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Archaic Laws in Modern War

An examination of the failure of International Humanitarian Law to evolve alongside advances in modern warfare, in relation to the principle of distinction

Author: Nicholas Hughes

Supervisor: Dr. René Vark

Abstract

The law of armed conflict (or international humanitarian law) has evolved throughout history to respond to changes in the means and methods of warfare. However, the last multilateral treaty governing the regulation of hostilities was in 1977. War has evolved dramatically since this point, and the existing law is ill-equipped to deal with it. International humanitarian law must evolve once more to cover these new challenges, and therefore protect civilians in times of conflict. This thesis seeks to highlight the deficiencies in the current law, and propose reforms to bring humanitarian law in line with the realities of modern warfare. This thesis examines how warfare has changed from that imagined by the drafters of the previous conventions, and its impact upon civilians. Next, this thesis examines the development of the law in response to prior developments in the conduct of hostilities, and analyses the reasons why it has failed to respond to these latest developments. Next, the thesis considers the concept of direct participation in hostilities, an emerging concept which may serve as a foundation for future legal reform. An examination of the conflict in eastern Ukraine follows, concluding with the author's proposals for a new multilateral humanitarian law treaty.

Contents

Abstract.....	1
Contents.....	2
1. Introduction	4
2. The Evolution of Modern Warfare and its Impact on Civilians	6
2.1. The Evolving Nature of Warfare.....	7
2.2. The Civilianisation of Modern Conflict.....	10
2.3. Asymmetric/Irregular Warfare.....	13
2.4. Civilian Participation in Hostilities	15
3. The Principle of Distinction in Existing Law	16
3.1. The Development of IHL in Response to the Evolution of Conflict	17
3.1.1. Common Article 3 to the Geneva Conventions 1949.....	19
3.1.2. The Additional Protocols of 1977.....	23
3.2. The Principle of Distinction – Who is a Combatant?	30
3.2.1. Armed Conflicts of an International Character.....	31
3.2.2. Armed Conflicts Not of an International Character.....	36
3.2.3. A Response to the Realities of Warfare – the Tadić Decision.....	40
4. Direct Participation in Hostilities	45
4.1. The ICRC’s Interpretive Guidance	49
4.1.1. Defining civilians for the purposes of direct participation	49
4.1.2. The Concept of Direct Participation in Hostilities.....	53
4.1.2.1. Threshold of Harm	54
4.1.2.2. Direct Causation	55
4.1.2.3. Belligerent Nexus	58
4.1.3. “For such time” – The Revolving Door Dilemma.....	61
4.2. Building Upon the Interpretive Guidance	63
5. The Conflict in Ukraine: A Case Study.....	68
5.1. The Classification of the Conflict in Eastern Ukraine	69
5.1.1. Direct Intervention.....	70
5.1.2. Indirect Intervention	72

5.2. Violations of the Principle of Distinction in Ukraine	74
6. A New Protocol?	76
6.1. The Definition of Armed Conflict.....	76
6.2. The Classification of Combatants	79
6.2.1. ‘Combatants’ properly understood – legitimate targets in IACs	79
6.2.2. ‘Combatants’ by any other name – legitimate targets in NIACs	81
6.3. Direct Participation in Hostilities.....	81
6.3.1. The Revolving Door Dilemma.....	82
7. Conclusion.....	85
Bibliography	87
Table of Cases	99
Table of Treaties.....	101

1. Introduction

In 1977, the Additional Protocols to the Geneva Conventions entered into force.¹ These protocols are the most recent multilateral treaties governing the conduct of hostilities in both international and non-international armed conflicts. The Protocols were introduced to supplement the Geneva Conventions and laid down – for the first time – humanitarian principles that apply in ‘civil wars’.² They were created as a response to the evolution of the means and methods of modern warfare, as advances in military technology and strategy had meant that the reality of conflict imagined by the drafters of the 1949 Geneva Conventions was vastly different.

Core to the Additional Protocols is the principle of distinction. All parties to a conflict must distinguish between civilians and combatants, and no one may target civilians or civilian objects. The evolution of modern conflict has meant that it has become harder to apply the principle in all scenarios, with the increased involvement of civilians in hostilities and the advancement of military technology being amongst the factors further blurring the concept.

It is my position that there is a need for clarity in relation to the principle of distinction in modern conflict. The drafters of the Additional Protocols did not anticipate the radical shift in the conduct of warfare, and, as such, international humanitarian law (IHL) is massively out-dated. This is made worse by the fact that many states have not ratified the Additional Protocols, and therefore the law governing conflicts they are involved in is that created in 1949. It is my contention that it may be time for a new, Fourth, additional protocol.³

¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), 1125 UNTS 3, 1977; Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II), 1123 UNTS 609, 1977.

² ICRC, 'Protocols I and II additional to the Geneva Conventions' (01 January 2009), *available at* <https://www.icrc.org/eng/resources/documents/misc/additional-protocols-1977.htm>.

³ While it is commonly assumed that there are two Additional Protocols to the Geneva Conventions, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Additional Protocol III), 1125 UNTS 3, 2005 relates to the recognition of the adoption of the “red crystal” emblem of the ICRC.

There are many areas of IHL which have been affected by the evolution of warfare, but this thesis will focus on the principle of distinction. My assertion is that modern warfare has evolved beyond that which was imagined by the drafters of the Additional Protocols, and this has meant that, despite the intention of the drafters to reduce the suffering of civilians in conflict, civilians are the primary victims of modern conflict. IHL therefore needs to respond to the changing nature of armed conflict, as it did in 1977. It is time for a new additional protocol.

In section 2, I will examine the ways in which warfare has evolved, and its impact on the civilian population. Phenomena such as the civilianisation of modern militaries and asymmetric warfare have drastically altered the role of civilians in war, and have left them exposed to greater harm.

In section 3, I will examine the way in which IHL has evolved to adapt to changes in the conduct of hostilities. I do not seek to assert that IHL is static – it can evolve, as it has done throughout history. It is my argument that IHL must evolve once more to respond to the new realities of modern conflict.

In section 4, I will consider the proposals of the International Committee of the Red Cross (ICRC) on a very controversial area of IHL – direct participation in hostilities. This is an emerging trend in modern conflict which massively distorts the principle of distinction. The ICRC's Interpretive Guidance on the topic goes a considerable way to provide clarity in this field, but has been subject to heavy criticism.

In section 5, I turn to an analysis of the conflict in eastern Ukraine. It is my contention that we are in dire need of clarity in relation to the principle of distinction. The conflict in eastern Ukraine is a very interesting case study of what happens in a conflict where there is massive uncertainty. It is unclear what type of conflict is being fought in the region, and with differing rules relating to the principle of distinction applying to different types of conflict, violations of IHL are common.

Finally, in section 6, I lay out my proposals for a theoretical Additional Protocol IV to the Geneva Conventions, incorporating ideas and legal principles from case law, international conventions, state practice and legal scholars. International law requires

state support in order to come into force, and as such it will be important for me to balance my own beliefs with state interests in order for the proposals to be accepted.

2. The Evolution of Modern Warfare and its Impact on Civilians

The suffering of civilians in conflict is not a recent phenomenon. However, as the means and methods of warfare have evolved the impact on civilians has become more and more severe. The United Nation's Report regarding the "Impact of Armed Conflict on Children" noted that civilian fatalities in armed conflicts have risen from 5 per cent at the start of the 20th Century to over 90 per cent during the 1990's.⁴

During the Second World War, it is estimated that over 250,000 civilians were killed as a result of the deliberate saturation aerial bombardment strategies of the Allied forces.⁵ The dropping of 'Fat Man' and 'Little Boy' over the cities of Hiroshima and Nagasaki killed an estimated 150,000 and 75,000 civilians respectively.⁶ Of the twenty-five wars taking place in 1988, it was estimated that there were approximately three million casualties, of which four-fifths were civilians.⁷

This trend has continued into the 21st Century. As Emily Crawford highlights:

"[I]n WWI only 5 per cent of all victims were civilians, by the Korean war, the statistic rose to 60 per cent, with 70 per cent of all victims in the Vietnam war quantified as civilians or non-combatants. Most recently, the numbers of civilian deaths in the 2003 Iraq War has outnumbered combatant and insurgent deaths by a ratio of 20:1"⁸

⁴ Promotion and Protection of the Rights of Children: Impact of armed conflict on children (Note by the Secretary-General). United Nations. A/51/306. § 24 (26 August 1996).

⁵ Hays Parks, 'Air War and the Law of War', 32 *Air Force Law Review*, 1 (1990) at n.1.

⁶ [Children of the Atomic Bomb, 'Hiroshima and Nagasaki Death Toll' \(10 December 2007\), available at http://www.aasc.ucla.edu/cab/200708230009.html.](http://www.aasc.ucla.edu/cab/200708230009.html)

⁷ Judith Gail Gardam, *Non-combatant Immunity as a Norm of International Humanitarian Law* (Dordrecht: Martinus Nijhoff Publishers, 1993)

⁸ Emily Crawford, *The Treatment of Combatants and Insurgents Under the Law of Armed Conflict* 15 (New York: Oxford University Press, 2010)

Some researchers, such as Adam Roberts, have criticised the analysis of universal civilian-military casualty ratios as deeply “flawed” due to the unreliability of field statistics.⁹ Others have claimed that this dramatic rise in civilian fatalities is nothing more than an “urban myth.”¹⁰ It is true that we can only consider the casualty figures as pure estimates, with the chaos of warfare making it truly difficult to create accurate statistics. However, it is clear that in modern conflict, civilians are exposed to a far higher risk than in ‘conventional warfare’, and often pay the price. The means and methods of war fought today differ greatly from those imagined at the time of the drafting process of the Additional Protocols of 1977, the last multilateral treaty governing the regulation of armed conflicts. I will now turn to an examination of modern conflict since the Geneva Conventions were drafted.

2.1. The Evolving Nature of Warfare

The majority of modern conflicts do not easily fit into the current framework of IHL. When states came together to draft and sign the four Geneva Conventions in 1949, warfare was fundamentally different to what it is today. At the time the Geneva Conventions were drafted, the assumption was that the majority of the actors responsible for the implementation would be the military personnel of States Parties to the Convention, with the rest being insurgents who, by virtue of their citizenship of those States Parties, would be bound to the rules of IHL.¹¹

The reality which followed was very different to what the drafters of the Geneva Conventions imagined. A study by Kende showed that out of 97 wars between 1945-1969, only 15 were classified as being inter-state wars, with the other 82 being categorised as either internal anti-regime wars (67) or internal tribal wars (15).¹² It is

⁹ Adam Roberts, 'Lives and Statistics: Are 90% of War Victims Civilians?', 52 *Survival*, 3, 128 (2010)

¹⁰ Kristine Eck, 'The 'Urban Myth' About Civilian War Deaths', in *Human Security Report 2005, Part II* (2005), 75

¹¹ Michael H. Hoffman, 'Emerging Combatants, War Crimes and the Future of International Humanitarian Law', 34 *Crime, Law & Social Change*, 99 (2000)

¹² Istvan Kende, 'Twenty Five Years of Local Wars', 8 *Journal of Peace Research*, 5 (1971)

interesting to contrast these numbers with a study by Quincy Wright regarding the conflicts between 1900-1941, of which 79 per cent were inter-state wars, with only 5 being classified as 'civil wars'.¹³

The nature of conflict shifted from inter-state territorial conflicts, primarily frontier in nature, to armed struggles to achieve self-determination, resulting in a dynamic change in the types of conflict taking place.¹⁴ Intra-state, as opposed to inter-state conflicts have become the predominant form of warfare.¹⁵ Classic battlefields ceased to exist, with the transformation from two or three dimensional warfare into virtual and four dimensional conflict.¹⁶

This new form of conflict may be characterised by six broad trends, as laid out by Rupert Smith. Firstly, states go to war for fundamentally different ends than in 'traditional' conflicts. Rather than entering a conflict with the sole aim of the defeat of an adversary, states now seek to secure a political outcome, or to guarantee security following a conflict within its own borders.¹⁷ Secondly, conflicts are no longer fought on classic battlefields, instead taking place in harder to define battle-spaces amongst the civilian population.¹⁸ This dynamic has made it much harder for non-combatants to remove themselves from the combat zone, leaving civilians exposed to greater risk of harm.

'Traditional' conflicts took place in a linear form (i.e. with the intensity of the conflict increasing as the proximity between the two lines of opposing forces decreased), with engagements taking place across a forward edge of the battle area (FEBA). Modern conflicts very rarely take place across a FEBA, with engagements

¹³ Quincy Wright, *A Study of War* (Chicago: University of Chicago Press 2nd ed, 1971)

¹⁴ Gardam, *supra* note 7.

¹⁵ Monty G. Marshall & Benjamin R. Cole, *Global Report 2009: Conflict, Governance and State Fragility*, Jointly Published by the Center for Systematic Peace and Center for Global Policy, (George Mason University: December 2009) Available at: <http://www.systemicpeace.org/Global%20Report%202009.pdf>

¹⁶ Michael N. Schmitt, 'Direct Participation in Hostilities and 21st Century Armed Conflict', in H. Fischer et al ed., *Crisis Management and Humanitarian Protection: Festschrift fur Dieter Fleck* (Berlin: BWV 2004), 505-520

¹⁷ Rupert Smith, *The Utility of Force: The Art of War in the Modern World* 271 (New York: Penguin, 2006)

¹⁸ *Ibid.*, 280.

occurring on vast non-linear battle-spaces, rendering concepts such as ‘rear area’ and ‘frontline’ redundant.

Owing to technological advances and responses to asymmetric conflict, conflicts are fought along fluid spaces, with an emphasis on force mobility and long-range weaponry. If one considers Operation Iraqi Freedom¹⁹, for example, one would be hard-pressed to define any kind of ‘frontline’, as both ground and air forces were able to strike anywhere almost at will. The same can be said of Operations Desert Storm²⁰, Allied Force²¹, and Enduring Freedom.²²

Thirdly, Smith argues, western militaries are engaged in wars which “tend to be timeless, even unending”²³, with conflicts no longer being decided by clear decisive battlefield victories. Fourthly, related to this, western militaries “fight to preserve the force rather than risking all to gain the objective.”²⁴ This is an interesting claim, which merits some examination. Following the deaths of American and European soldiers in the Balkans and Eastern Africa in the 1990s whilst carrying out humanitarian missions²⁵, Western states sought to minimise military engagements in order to avoid casualties as far as possible, utilising the doctrine of force protection. Force protection has been defined as “[p]reventive measures taken to mitigate hostile action against Department of Defense personnel (to include family members), resources, facilities, and critical information. Force protection does not include actions to defeat the enemy...”²⁶

¹⁹ See Lt. Gen. T. Michael Moseley, 'Operation Iraqi Freedom - By the Numbers', United States Air Force (30 April 2003). Available at <http://www.afhso.af.mil/shared/media/document/AFD-130613-025.pdf>

²⁰ United States Central Command, *Operation Desert Shield/Desert Storm: Executive Summary*, (11 July 1991), available at <http://nsarchive.gwu.edu/NSAEBB/NSAEBB39/document6.pdf>.

²¹ See, North Atlantic Treaty Organization, *Operation Allied Force*, (updated 26 May 2006), available at <http://www.nato.int/kosovo/all-frce.htm>.

²² Global Security, *Operation Enduring Freedom - Afghanistan*, (updated 7 May 2011), available at <http://www.globalsecurity.org/military/ops/enduring-freedom-intro.htm>.

²³ Smith, *supra.*, note 17, 280

²⁴ *Ibid.*

²⁵ See, for example, Richard W. Stewart, 'The United States Army in Somalia 1992-1994', *Special Publications CMH Pub 70-81-1*, (2002), available at <http://www.history.army.mil/brochures/somalia/somalia.htm>;

²⁶ Department of Defense Joint Publication 1-02, *Department of Defense Dictionary of Military and Associated Terms* (Washington: GPO, 2001, amended through 17 October 2008) available at http://www.dtic.mil/doctrine/new_pubs/jp1_02.pdf.

A clear example of this is NATO's air intervention in Kosovo, utilising advanced technology to fight from over 10,000 feet away.²⁷

Whilst force protection may have been the predominant idea in the late 1990s, it has been recognised that it is not the only goal of military missions. Sarah Sewell notes: “[d]uring peace operations of the 1990s, force protection effectively became part of the mission, privileging the Soldier over the civilian. Because the civilian is fundamental to the COIN [counterinsurgency] mission, force protection must now give way”²⁸ to principles of IHL. This fourth principle therefore may not be as relevant as Smith argues. Fifth, Smith claims that western militaries are ill-equipped to fight these new forms of warfare, being organised around conventional conflicts.²⁹ Finally, modern conflicts are fought not between states, but instead between states and non-state armed groups (NSAGs).³⁰

Modern conflict poses many challenges to established IHL, most prominently to the principle of distinction. Civilians are now heavily involved in conflicts, either voluntarily or involuntarily. IHL seeks to achieve a balance between military necessity and humanity. Modern conflict has severely impacted upon this balance. William O'Brien, a leading just war scholar, argues that “a literal interpretation of the principle of discrimination is incompatible with the conduct of modern war at all levels. In nuclear war, conventional war, and revolutionary/counter-insurgency war it becomes necessary to use means that by any fair interpretation involve the direct intentional attacking of non-combatants and non-military targets.”³¹ Several factors can be highlighted to explain this, which I will now turn to.

2.2. The Civilianisation of Modern Conflict

²⁷ Trevor Keck, 'Not All Civilians are Created Equal: The Principle of Distinction, the Question of Direct Participation in Hostilities and the Evolving Restraints on the Use of Force in Warfare', 211 *Military Law Review*, 115 (2012).

²⁸ Sarah Sewell, 'Introduction to the University Press Edition: A Radical Field Manual', in *Counterinsurgency Field Manual* (Chicago: University of Chicago 2007), at xxix.

²⁹ Smith, *supra.*, note 17, 280

³⁰ *Ibid.*

³¹ William O'Brien, *The Conduct of Just and Limited War* (New York: Praeger Publications, 1981).

The role of civilians in combat situations has evolved dramatically in the last century. The U.S. Department of the Army has stated that:

Historically, civilians have played an important role in the conduct of U.S. military operations. More recently, Army civilians have established themselves as an integral and vital part of America's Army team. With distinction, they perform critical duties in virtually every functional facet of Combat Support and Combat Service Support, both at home and abroad serving beside their deployed uniformed compatriots they also provide the critical skills necessary to assure the availability of essential combat systems and weaponry; thereby maximizing the fighting capability of the combat soldier and success of the Army wartime and emergency missions.³²

Whilst the issue of civilians accompanying armed forces is not a recent one, what is new is the scale and scope of civilian involvement. Both the 1907 Hague Regulations and the 1949 Third Geneva Convention considered this issue, providing that civilians who accompany the armed forces of a state are afforded prisoner of war (POW) status if captured by the enemy.³³ Hersch Lauterpacht noted in 1944 that:

Modern war has raised, and, in some respects, left unresolved the problem of reconciling the fundamental distinction between combatants and noncombatants with the advent of new weapons and with the increase of the numbers of both combatants and noncombatants engaged in work of vital importance for the war effort.³⁴

Schmitt argues that three factors can explain this increased civilianisation in modern militaries.³⁵ The first of these three is purely economic. It has been noted that

³² US Department of the Army Pamphlet 690-47, Civilian Personnel, DA Civilian Employee Deployment Guide, Headquarters of the Army (1 November 1995).

³³ Regulations Respecting the Laws and Customs of War on Land, annex to Convention [No. IV] Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 13, 36 Stat. 2277, 1 Bevans 631; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N. T.S. 135, art. 4A(4).

³⁴ Hersch Lauterpacht, 'The Law of Nations and the Punishment of War Crimes', 21 *British Yearbook of International Law*, 58 (1944), 74-75.

³⁵ Schmitt, *supra.*, note 16, 512.

“the transfer of functions performed by military personnel to civil service personnel is one way to save costs while affecting force effectiveness minimally.”³⁶ Following the end of the Cold War and the decades’ long arms race, with both sides racing to build more, larger, more destructive weapons, states now seek to shrink their defence budgets.³⁷ The same approach is taken even by states who played no part in the Cold War, with “the demand ... to do more with less.”³⁸

A very easy way to reduce costs is to employ civilians to fulfil many essential, non-combat roles. Schmitt points to the argument that civilians do not need to have their leadership structure ‘grown’ in the same way that military personnel must (by repeatedly moving individuals to positions of greater and greater responsibility), and may fill roles dependent on pre-existing experience.³⁹ This means that less time and fewer resources are needed for the training and education of the civilian workforce. Furthermore, civilians do not require the complicated support structure that exists within military forces, such as medical facilities, dining halls and barracks, with civilians able to operate independently.

Tied in to this first factor is Schmitt’s second: the demand for downsizing militaries. Whilst this can be explained with reference to the above, the reality of modern conflict means that smaller, mobile and more highly trained forces are able to act fluidly and with precision, able to adapt to the needs of conflict as it evolves.⁴⁰ As NSAGs have evolved new means of warfare to respond to asymmetric conflicts, so too have states evolved counter-insurgency tactics as a result. The effects of asymmetric warfare on the principle of distinction will be considered later.

Finally, Schmitt argues that the speed with which military technology is advancing has resulted in an increased reliance on civilian personnel to operate and maintain new weapon and command systems.⁴¹ As many weapons are developed by

³⁶ Rand Research Brief 7520, *Can Civilianization Save on Costs?*, (1998), available at <http://www.rand.org/publications/RB/RB7520/>.

³⁷ Schmitt, *supra.*, note 16, 512.

³⁸ *Ibid.*

³⁹ *Ibid.*, 513.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

civilians, they often come with ‘package deals’ with civilian operators, training and maintenance. The reliance on technology-driven C4ISR – command, control, computers, intelligence, surveillance, and reconnaissance – is highly dependent on civilian support in regards to design, manufacture, maintenance and operation. Schmitt notes “[t]he search for ever greater asymmetrical advantage over one’s opponents through technological superiority inescapably increases reliance on civilians.”⁴²

Not only are civilians increasingly taking essential roles within militaries worldwide, it can be very difficult to distinguish them from regular combat troops. The U.S. Department of the Army allows for civilians to dress in combat uniforms, Kevlar helmets, as well as even sidearms for personal protection.⁴³ Fundamental to the principle of distinction is for combatants to be easily distinguishable to civilians, and as such civilians are given special insignia to be worn on their battle dress uniforms. In the Air Force, this is an “olive green triangular patch with US in the center on their left shoulder.”⁴⁴ This would be very difficult to distinguish at a distance, raising serious questions as to whether this approach is in conformity with the principle of distinction.

2.3. Asymmetric/Irregular Warfare

As previously noted, the majority of modern conflicts are not fought between two states, but instead between a state and a NSAG. Clearly, the resources and technological capacities of the states will (normally) heavily outweigh the capabilities of the NSAG. As a result, NSAGs use non-conventional tactics to counter the advantages of their opponents. This is commonly known as ‘asymmetric warfare’. The U.S. Department of Defense’s Joint Publication (JP) 1-02 defines this form of warfare as such: “In military operations the application of dissimilar strategies, tactics, capabilities, and methods to circumvent or negate an opponent’s strengths while

⁴² *Ibid.*

⁴³ Department of the Army Pamphlet 690–47, *DA Civilian Employee Deployment Guide* (1 November 1995), paras. 1–13.

⁴⁴ Department of the Air Force Instruction 36–801, *Personnel Uniforms For Civilian Employees* (29 April 1994), para. 6.7.

exploiting his weaknesses.”⁴⁵ Examples of recent asymmetric conflicts include the first Gulf War, Kosovo, Afghanistan, and Iraq (again), in which the U.S. and other states attacked a far weaker state or NSAG.⁴⁶

In order to counter overwhelming force, NSAG’s employ tactics which challenge or violate principles of IHL, most notably that of the principle of distinction. Due to this asymmetry of power, NSAGs will often blend themselves in with the civilian population, rendering it almost impossible to distinguish fighters from civilians. Donald Snow notes that insurgents “fight in different manners, are organized differently, and often do not wear military uniforms to help identify friend and foe.”⁴⁷ The effect on the civilian population is drastic, as Eric Talbot Jensen highlights, “increased civilian casualties will inevitably result because of the inability to discern who is ‘targetable’ and who is not.”⁴⁸

This challenge of determining who is fighting and therefore who may be targeted is highlighted by the conflict in eastern Ukraine. Some groups or individuals fight without any discerning uniform⁴⁹ or with insignias covered so as to mask their origin.⁵⁰ Owing to the nature of the conflict, civilian and conflict areas are one and the same, and it can be very difficult to determine whether an individual is part of an organised armed group, or is simply trying to protect their home or neighbourhood, or

⁴⁵ Department of Defense, *supra.*, note 23, 18. It is interesting to note that this definition was not included until 2012, despite asymmetric conflicts having been fought throughout the world for decades prior.

⁴⁶ Ivan Arreguín-Toft, *How the Weak Win Wars: A Theory of Asymmetric Conflict* (New York: Cambridge University Press, 2005), 19.

⁴⁷ Donald Snow, *Uncivil Wars* (Boulder, CO: Lynne Rienner Publishers, 1996), 110.

⁴⁸ Eric Talbot Jensen, 'The ICJ’s ‘Uganda Wall’: A Barrier to the Principle of Distinction and an Entry Point for Lawfare', 35 *Denver Journal of International Law and Policy* 2, 243 (2008)

⁴⁹ Simon Shuster, 'Ukraine’s Battleground Blurs the Lines Between Civilian and Fighter', *Time*, 6 May 2014, available at <http://time.com/89747/ukraine-conflict-kramatorsk-donetsk-russia/>.

⁵⁰ Ewen MacAskill, 'Russian troops removing ID markings 'gross violation'', *The Guardian*, 6 March 2014, available at <http://www.theguardian.com/news/defence-and-security-blog/2014/mar/06/ukraine-gross-violation-russian-troops>; Maria Tsvetkova, 'Special Report: Russian soldiers quit over Ukraine', *Reuters*, 10 May 2015, available at <http://www.reuters.com/article/2015/05/10/us-ukraine-crisis-soldiers-specialreport-idUSKBN0NV06Q20150510>; Douglas Ernst, 'Russia Sends Tanks, Troops Without Insignia to Ukraine Border: Report', *The Washington Times*, 28 May 2015, available at <http://www.washingtontimes.com/news/2015/may/28/russia-sends-tanks-troops-without-insignia-ukraine/>.

are attempting to exploit the chaos of war for their own criminal gain, or whether they are fighting on behalf of Ukraine or Russia.⁵¹

Members of insurgent groups often do not benefit from the protection of IHL, nor do they gain any incentives from complying with it. As such, they regularly violate IHL in order to gain an upper-hand versus their opponents. Civilians are increasingly deliberately targeted and killed by insurgents in order to terrorise the civilian population and send a message that the ruling authorities cannot keep them safe. Sewall notes that insurgents “kill civilians to show that the government can’t protect its own citizens. Insurgents’ favorite tactic is to provoke overreaction from counterinsurgent forces, discrediting them before a vocal and increasingly international audience.”⁵²

2.4. Civilian Participation in Hostilities

Civilians are increasingly deliberately targeted in modern conflicts; however an emerging trend in late 20th and 21st century conflicts is the increasing participation of civilians in hostilities, raising serious challenges for conventional interpretations of IHL. As noted above, modern militaries rely heavily on civilian support. However, civilians are increasingly being used in situations without which advanced combat operations could not take place.

For example, if one considers government intelligence agencies, such as the CIA, DIA, NSA and National Reconnaissance Office, it is clear that they play an important role in the execution of military operations alongside the U.S. armed forces. Intelligence gathered by these agencies is vital to the success of drone strikes against enemy combatants in Pakistan or Yemen. Whilst it is true that military personnel are assigned to these agencies, they are primarily civilian organisations.⁵³ The technological prowess of the U.S. means that they are able to conduct military operations from thousands of miles away, and as Schmitt notes, “[i]n an era in which shooters no longer

⁵¹ Laurie R. Blank, *Ukraine’s Crisis Part 3: The Principle of Distinction and LOAC’s Key Goals*, Harvard Law School National Security Journal, 29 May 2014, available at <http://harvardnsj.org/2014/05/ukraines-crisis-part-3-the-principle-of-distinction-and-loacs-key-goals/>.

⁵² Sewall, *supra.*, note 28, at xxv.

⁵³ Schmitt, *supra.*, note 16.

need ‘eyes on target’ in order to strike their objective, the criticality of intelligence, particularly real-time intelligence, to the direct and immediate application of force against the enemy has grown immeasurably.”⁵⁴

Increasingly, conflicts are fought by groups who do not fit easily into the current paradigm of IHL. They may not be effectively organised into armed groups and so may not qualify as fighters or combatants under IHL. They may plant roadside bombs, wear suicide vests, or provide information to NSAGs operating in the area. They do not fit neatly into any category, and there is great debate as how best to deal with these individuals.

3. The Principle of Distinction in Existing Law

In order to understand how and why IHL has failed to evolve to respond to evolutions in modern warfare in relation to the principle of distinction, it is important to consider the origins of the principle, and analyse the reasons for its development over time. It is not my position that IHL is completely static, unable to respond to external changes in the means and methods of warfare. As I will seek to show, IHL has evolved alongside military development throughout history, and has made great leaps to ensure the minimisation of suffering in times of conflict. Law has responded to changes in conflict throughout the years, yet the last international multilateral treaty on the regulation of conflict was in 1977. Much has changed since then, and IHL needs to respond to this evolution.

The obligation to distinguish between combatants and civilians existed long before its codification in the 20th century treaties. Early examples can be seen in the writings on Sun Tzu⁵⁵ and in ancient Egyptian and Sumerian rules on warfare⁵⁶, yet

⁵⁴ *Ibid.*

⁵⁵ Sun Tzu, *The Art of War* (New York: Oxford University, 1963), 76. Tzu wrote: “treat the captives well and care for them ... generally in war the best policy is to take a state intact; to ruin it is inferior to this.”

⁵⁶ Jean Pictet, *Development and Principles of International Humanitarian Law* (Geneva: Martinus Nijhoff Publishers, 1985), 7-8.

these were generally driven from a pragmatic, utilitarian point of view.⁵⁷ Leon Friedman notes that armies spared civilian populations because they could “work for, pay tribute to, or be conscripted into, the victorious army.”⁵⁸ Early law of war theorist Francisco de Vitoria can be said to have first discussed the principle of distinction in humanitarian terms, arguing that “the deliberate slaughter of the innocent is never lawful in itself ... the basis of a just war is wrong done. But wrong is not done by an innocent person.”⁵⁹ Hugo Grotius noted that nations “must take care, so far as is possible, to prevent the death of innocent civilians, even by accident.”⁶⁰

Interestingly, it can be argued that the evolution of military technology and methods of warfare, such as explosive bullets, set about a desire for a codified set of norms in the form of multilateral treaties, as opposed to the bilateral treaties which existed prior.⁶¹ Developments in military technology, and means and methods of warfare have, throughout history, spurred states to develop rules to regulate the conduct of hostilities to reflect the realities of conflict. As I outlined earlier, it is my position that warfare has evolved significantly since the last major international treaty of IHL, and IHL needs to respond accordingly. I will discuss these historical evolutions below, and seek to answer the question of why IHL has not been able to evolve to regulate modern conflict.

3.1. The Development of IHL in Response to the Evolution of Conflict

As previously highlighted, modern conflicts are primarily non-international in character, being fought between states and NSAGs or between two NSAGs. Prior to the adoption of the Geneva Conventions in 1949, Non-International Armed Conflicts (NIACs) were virtually unregulated at the international level, being essentially an issue of domestic concern. As the ICRC noted in its Commentary for the Additional Protocols

⁵⁷ Jensen, *supra.*, note 48, 245.

⁵⁸ Leon Friedman (ed.), *The Law of War: A Documentary History* (New York: Random House, 1972), 4.

⁵⁹ Francisco de Vitoria, *On the Indies and the Law of War* (1532), in Friedman, *supra.*, note 58, 13.

⁶⁰ Hugo Grotius, *The Law of War and Peace* (1625) Book III Chapter XI Rule VIII, in Friedman, *supra.*, note 58, 87.

⁶¹ Keck, *supra.*, note 27.

to the Geneva Conventions of 1977, “[p]ositive law has very largely abstained from laying down rules governing [NIAC]. According to traditional doctrine, states were the only sovereign entities considered to be the subjects of international law; thus the laws of war which were conceived to govern international relations, were not applicable to internal conflicts.”⁶²

International law required that any hostilities conducted by parties involved in a conflict not of international character be recognised as belligerency before the laws of war could apply to it. This could mean that a state could refuse to recognise the existence of belligerency within its borders, and therefore would not need to apply any international standards whilst dealing with it. As Lindsay Moir notes,

An examination of some major internal conflicts of the nineteenth and early twentieth centuries shows that, in those cases where the laws of war were accepted and applied by opposing forces, some form of recognition of belligerency has invariably taken place. In contrast, where recognition of belligerency was not afforded by the government, the laws of war tended not to be applied, leading to barbaric conduct by both sides.⁶³

It is clear, that in instances where there are norms of IHL in place to regulate conduct, the treatment of civilians and combatants alike will be respected more so than in situations where no norms apply. It is essential therefore that, as argued previously, IHL can be applied to the majority of conflicts occurring worldwide. The Geneva Conventions of 1949 extended the coverage of IHL in order to guarantee protection for as many people in as many situations as possible. Of particular importance is Common Article 3 (CA3) to the Conventions, which extended the reach of IHL to “armed conflicts not of an international character”.

⁶² Claude Pilloud, Jean de Preux, Bruno Zimmerman, Phillipe Eberlin, Hans-Peter Gasser & Claude Wenger, *Commentary on the Additional Protocols of 8 June to the Geneva Conventions of 12 August 1949* (Geneva: Martinus Nijhoff Publishers, 1987), 1320

⁶³ Lindsay Moir, 'The Historical Development of the Application of Humanitarian Law in Non-International Armed Conflicts to 1949', 47 *International & Comparative Law Quarterly*, 345 (1998).

3.1.1. Common Article 3 to the Geneva Conventions 1949

CA3 provides that,

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

1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.⁶⁴

The Geneva Conventions were incredibly important in the development of IHL and the protection of civilians during conflict. I believe that the attitude of states regarding this Article during its drafting process will help to explain why IHL has been slow to respond to the challenges of modern conflict. IHL is made by states, and therefore reflect states interests. New IHL cannot be created without the support of the international community.

Key to state interests is the idea of sovereignty, one of the fundamental principles of IHL and international law. The potential encroachment upon sovereignty was an incredibly contentious issue during the drafting process of the Geneva Conventions. Draft Article 2 (elements of which would go on to form CA3) provided in its fourth paragraph that the Conventions would be applied “in all cases of armed conflict not of an international character”.⁶⁵ Many delegates were vocally critical of this provision. Albert Lamarle of the French delegation argued,

[t]he Conference at Stockholm had been mainly concerned with the protection of the rights of the individual; but it was also necessary not to lose sight of the

⁶⁴ Third Geneva Convention, Article 3

⁶⁵ Anthony Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* (New York: Cambridge University Press, 2010), 29.

rights of the States. It [is] impossible to carry the protection of individuals to the point of sacrificing the rights of States. In order to protect the rights of the State the French delegation would like to propose an amendment making it impossible for forms of disorder, anarchy or brigandage to claim protection under the Convention.⁶⁶

The French delegation was not alone in its disapproval of the perceived limitations upon state sovereignty.⁶⁷ However, following intense debates, the final text of the Conventions was agreed upon, and the four Geneva Conventions stand at the heart of the legal framework governing hostilities, both international and non-international in character. CA3 is incredibly important, but it is far from perfect. States parties often will not recognise the existence of an internal armed conflict, in order that the provisions of CA3 need not apply. As the UK Ministry of Defence highlights, “although [CA3] specifically provides that its application does not affect the legal status of the parties to a conflict, states have been, and always will be, reluctant to admit that a state of armed conflict exists.”⁶⁸ Professor Andrew Clapham summed up the dilemma effectively:

The designation of a situation as ‘armed conflict not of an international character’ so as to trigger the application of [CA3] is obviously an act of considerable political importance for all sides to the conflict. The insurgents will often welcome the designation of their attacks as constituting armed conflict as this confers a curious sort of international recognition on them; the applicability of [CA3] reinforces the special role of the ICRC. On the other hand the government may be less willing to acknowledge the situation as one of armed

⁶⁶ Final Record of the Diplomatic Conference of Geneva, vol II-B, Summary Records of the Joint Committee, 1st Meeting (26 April 1949). 10, available at http://www.loc.gov/rr/frd/Military_Law/pdf/Dipl-Conf-1949-Final_Vol-1.pdf

⁶⁷ For a detailed summary of the drafting process of CA3 to the Geneva Conventions, see Cullen, *supra.*, note 65, 27-49; Final Record, *supra.*, note 66.

⁶⁸ UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford: Oxford University Press, 2004), 384.

conflict, preferring instead to portray it as a fight against criminals and terrorists.⁶⁹

There are several reasons why a state might wish to avoid formally recognising the existence of a state of armed conflict within its territory. Doing so would highlight the state's own failure in controlling the situation within its territory. Recognition of armed conflict would also implicitly recognise that the situation within the state is so bad that people are not merely protesting or rioting, where domestic criminal actions would suffice, but instead has turned into a full-scale armed conflict. Secondly, this recognition may turn insurgents into legitimate combatants, and may provide weight to their cause. Thirdly, as the recognition of a state of armed conflict automatically sparks the application of IHL, the state will be limited in the methods it can take to suppress the rebellion.

States were reluctant to extend the principles of IAC to conflicts not of an international character, and there were many vocal critics of the inclusion of NIAC in the Geneva Conventions. The issue of state sovereignty was an incredibly important one, which goes some way to explain the reluctance of states to respond to changes in modern conflict. States were concerned about the shift from the rights of states to the rights of individuals (as exemplified by the French delegation above). With the increased civilianisation of modern militaries, the increased involvement of civilians in the conduct of hostilities, as well as emerging irregular combatants engaged in conflict, regulation of modern conflict requires a further shift away from the rights of states to the rights of individuals. Individuals are very much becoming a focal point in IHL, and states are understandably reluctant to deliberately place limits on the scope of their powers. The issue of state sovereignty may arguably be less important than it was during the drafting process of the Geneva Conventions, as these were the first major treaties regulating the conduct of states during hostilities, and there have been numerous treaties and conventions limiting the rights of states since then. However, the issue of state sovereignty, combined with the reluctance of states to legitimise NSAGs and

⁶⁹ Andrew Clapham, 'Human Rights Obligations of Non-State Actors in Conflict Situations', 88(863) *International Review of the Red Cross*, (2006), 112-113.

uprisings has meant that many states have been less than supportive of developing IHL at the same speed to which modern conflict has evolved.

The lack of precision in the formulation of CA3 has been the subject of much criticism. Colonel G.I.A.D. Draper argues that this leads to uncertainty in its application: “As is so often the case with humanitarian law instruments, this is the outcome of the desire for maximum width for the play of the humanitarian norms, overriding the desire for that element of certainty which legal norms demand if they are to be effective.”⁷⁰ IHL is often deliberately broad in order to be as inclusive as possible, so that the largest possible variety of situations are covered. However this often means that the terms are imprecise and confusing. The drafters of the Conventions did not want to create a narrow definition of ‘armed conflict’ in order to limit the applicability of its provisions, yet in doing so it had exactly this effect.⁷¹ As the UN Secretary General noted, “while [CA3] does not define ‘armed conflicts not of an international character’, in practice this wording has left room for Governments to contest its applicability to situations of internal violence inside their countries.”⁷²

This lack of a distinctive definition of armed conflict has been important for other, more positive reasons. If the drafters of the Conventions had included a definition of ‘armed conflict not of an international character’ as they understood it at the time, the definition would have been limited to that of civil war.⁷³ There is also evidence to suggest that it would have been based on the concept of belligerency.⁷⁴ This would have meant that the threshold for ‘armed conflict not of an international character’ would have been nothing short of full-scale civil war, an almost impossible standard that the majority of conflicts fought today would not fall under. The absence of a restrictive definition has allowed for IHL to develop the concept of NIAC since 1949. As Heike Spieker notes:

⁷⁰ G.I.A.D. Draper, 'Humanitarian Law and Armed Conflicts', 13 *Georgia Journal of International and Comparative Law*, 253 (1983), 264.

⁷¹ Cullen, *supra.*, note 65, 60.

⁷² UN Secretary General, *Minimum Humanitarian Standards: Analytical Report of the Secretary General Submitted pursuant to Commission on Human Rights Resolution 1997/21*, UN Doc. E/CN.4/1998/87, (1998) para. 74.

⁷³ Cullen, *supra.*, note 65, 60.

⁷⁴ *Ibid.*

[T]he positive effect of a lack of agreed distinctive criteria is the flexibility provided by such lacuna. Doors might be opened to apply international humanitarian law in situations which traditionally would not necessarily qualify as non-international armed conflicts. In theory, weaknesses in protecting civilian population and discretion in qualifying armed hostilities are balanced by an increased flexibility and an enhancement of the protection of the civilian population in non-international armed conflicts.⁷⁵

3.1.2. The Additional Protocols of 1977

The two protocols to the Geneva Conventions⁷⁶ were created as a response to developments of the means and methods of warfare following the Second World War. They are also the last multilateral documents governing the implementation of IHL as a whole⁷⁷ and therefore examining the reasons for their creation and the international reaction to their provisions will help to explain why there have been no further major developments in IHL, despite the evolution of warfare beyond that which was imagined at the time of its drafting. It can be argued that the two Additional Protocols both refine and complicate further issues relating to the existence of a state of armed conflict and the classification of combatants.⁷⁸ An examination of the deficiencies of the Additional Protocols will further support my argument that we are in need of a new international multilateral treaty to regulate IHL: not only has warfare evolved beyond that imagined at the time of the drafting of the Additional Protocols, but the existing documents have fail to strike the balance between humanity and military necessity, with many deficiencies which need addressing.

⁷⁵ Heike Spieker, 'Twenty-Fifth Anniversary of Additional Protocol II', 4 *Yearbook of International Humanitarian Law*, 129 (2001), 141.

⁷⁶ Additional Protocol I; Additional Protocol II.

⁷⁷ Subsequent treaties relate to the regulation of specific means or methods of warfare, such as the use of anti-personnel mines or blinding laser weapons.

⁷⁸ Cullen, *supra.*, note 65, 62.

Additional Protocol I (API) deals with IACs, a type of conflict less frequently seen in modern war, but contains an interesting provision that merits examination. Article 1 outlines the general principles and scope of application of the Protocol, but paragraph (4) is very interesting, as it is clearly an effort to respond to specific situations existing at the time of the drafting of the Protocols. Article 1(4) provides:

The situations referred to in the preceding paragraph include armed conflicts 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.⁷⁹

This is a massively dated provision, clearly aimed at individual states, for example Israel or South Africa. Whilst it was intended to solve a specific problem, states would clearly never wish to implement Article 1(4). Doing so would be accepting that they were one of the three categories of states listed. While states recognised the need for the protection of persons exercising the right to self-determination (a very prominent issue at the time of the drafting of the Protocols), the majority of experts considered that wars of national liberation would only ever be non-international in character.⁸⁰ This Article provided that they would be IACs, yet only in these very specific situations.

Part of the logic behind the inclusion of this Article was that IHL needed to respond to cover wars of national liberation, which the Geneva Conventions of 1949 were not equipped to deal with. This was a position put forward by delegates of African and East European countries at the Diplomatic Conference.⁸¹ Many other delegates supported this position, including those from Albania, Algeria, Burundi, Byelorussian SSR, China, Czechoslovakia, German Democratic Republic, India, Madagascar,

⁷⁹ Additional Protocol I, Article 1(4) [emphasis added].

⁸⁰ Cullen, *supra.*, note 65, 65.

⁸¹ *Ibid.*, 71.

Mongolia, Poland, Senegal, Sri Lanka, Uganda, Ukraine, USSR, Venezuela, Yugoslavia, and Zaire.⁸²

Article 48 of API reinforced the importance of the principle of distinction.⁸³ In terms of the classification of combatants, API took steps to modify the criteria set out in the Geneva Conventions in order to reflect the realities of guerrilla warfare. It was recognised that having a fixed distinctive sign recognisable at a distance would be tantamount to suicide in guerrilla warfare. Therefore, guerrilla fighters would be unlikely to comply with these provisions. As a result, they will be more likely to in turn violate other norms of IHL, as they no longer benefit from combatant privilege, and have no incentive to act in accordance with the laws of armed conflict. There is little to prevent non-privileged irregular combatants from committing indiscriminate violence; the difference for punishment of war crimes and belligerency is marginal, both may be death.⁸⁴

Article 44(3) API provides that combatants must distinguish themselves from the civilian population (as is the case under the Geneva Conventions), but allows that this is only necessary during an attack or in preparation of an attack. It also permits that if this is not possible owing to the nature of the situation, they must still carry arms openly during that period.⁸⁵ This distinction need not be a uniform, but must be some form of distinctive sign separating the combatants from civilians. As Yoram Dinstein notes, “[t]he issue is not whether combatants can be seen, but the lack of desire on their part to create the false impression that they are civilians.”⁸⁶

This Article raises issues regarding the open carrying of arms for guerrilla fighters. Again, this would be tantamount to suicide for irregular forces, but carrying arms openly is not the same as carrying arms *visibly*. Again, the Article reflects this reality, specifying that the fighter must carry his weapon openly “during such time as he

⁸² *Ibid.*, 72.

⁸³ Additional Protocol I, Article 48.

⁸⁴ Christopher Kutz, 'The Difference Uniforms Make: Collective Violence in Criminal Law and War', 33 *Philosophy & Public Affairs*, 148 (2005), 169.

⁸⁵ Additional Protocol I, Article 44(3).

⁸⁶ Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflicts* (New York: Cambridge University Press, 2004), 38.

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.”⁸⁷

Article 44 API was very contentious, as was the focus of much discussion during the drafting phase. For some, the inclusion of self-determination fighters was unacceptable, which led to some states failing to ratify API based on this article alone. For others, the changes to the Geneva Conventions made by Article 44 API contributed to a further confusion of the principle of distinction, as combatants are free to pose as civilians without losing protection.⁸⁸ The challenge facing international law at the time was to balance the needs of combatants of NSAGs and the protection of civilian lives. For some, API fell short.⁸⁹

The international community also recognised the need for a new instrument applicable to situations of NIAC. At the Diplomatic Conference, Daniele Bujard of the ICRC noted that “[w]hen put to the test ... the rules of protection in Article 3 common to the four Geneva Conventions of 1949 had been shown to require elaboration and completion.”⁹⁰ Roberts and Guelff argued that

experience demonstrated the inadequacy of the common article. While its provisions do extend certain fundamental humanitarian protections to non-combatants, they do not provide any definitive codification of the laws of war for non-international armed conflicts. Moreover, the provisions are so general and incomplete that they cannot be regarded as an adequate guide for the conduct of belligerents in such conflicts.⁹¹

The Appeals Chamber of the International Tribunal for the former Yugoslavia (ICTY) echoed the sentiments of the economic community, describing several reasons for the extension of IHL to insurgency and NIACs:

⁸⁷ Additional Protocol I, Article 44(3).

⁸⁸ Guy B. Roberts, 'The New Rules for Waging War: The Case Against the Ratification of Additional Protocol I', 26 *Virginia Journal of International Law*, 129 (1985-86)

⁸⁹ Dinstein, *supra.*, note 86, 47.

⁹⁰ *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, CDDH/I/SR.22, 201, (Geneva, 1974-77) vol. VIII.

⁹¹ Adam Roberts & Richard Guelff, *Documents on the Laws of War* (Oxford: Oxford University Press 3rd ed, 2000), 482.

First, civil wars have become more frequent, not only because technological progress has made it easier for groups of individuals to have access to weaponry but also on account of increasing tension ... as a consequence the international community can no longer turn a blind eye to the legal regime of such wars. Secondly, internal armed conflicts have become more and more cruel and protracted ... Thirdly, the large-scale nature of civil strife ... [requires] that international law ... [must] prevent, as much as possible, adverse spill-over effects. Fourthly, the impetuous development and propagation ... of human rights doctrines ... has brought about significant changes in international law ... A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach. Gradually the maxim of Roman law *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well.⁹²

During the drafting process, some delegates called for a uniform body of law applicable in all situations of armed conflict, whatever the political or legal classification of the conflict.⁹³ The delegate from the Syrian Arab Republic claimed that “[i]t was unfortunate that there were two draft Protocols, providing for two kinds of treatment. But surely humanitarian law was concerned with man; why then should there be two sets of rules? There was no excuse for such a differentiation.”⁹⁴ However, this approach had been discussed at the Diplomatic Conference for the Geneva Conventions, and concerns over state sovereignty had halted it. The majority of delegates at the Conference for the Additional Protocols did not see the law governing NIAC to be equivalent to that for IAC.⁹⁵

The final text agreed upon included a similar provision to Article 48 API, but in relation to NIACs. Article 13(2) APII states that “[t]he civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence

⁹² *Prosecutor v. Tadić (Appeal Chamber)*, IT-94-1-A, ICTY, 2 October 1995, para. 97.

⁹³ Official Records, *supra.*, note 90, vol. V, CDDH/SR.10, 91.

⁹⁴ *Ibid.*, 193.

⁹⁵ Cullen, *supra.*, note 65, 90.

the primary purpose of which is to spread terror among the civilian population are prohibited.”⁹⁶

Major criticisms of APII revolve around how broad and imprecise its provisions are. Roberts and Guelff note “the provisions are so general and incomplete that they cannot be regarded as an adequate guide for the conduct of belligerents.”⁹⁷ The most contentious article in APII is its first, notably paragraph (1). It provides:

This protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all conflicts which are not covered by Article 1 of the Protocol, and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.⁹⁸

This is a much higher threshold for the existence of a NIAC than under CA3. Controlling sufficient territory is a very difficult standard for a revolutionary group to attain. Roberts and Guelff have noted that conflicts such as those in Colombia, El Salvador and Rwanda “have raised questions regarding the extent to which 1977 Geneva Protocol II may be effective in practice.”⁹⁹

Article 1(2) attempts to explain this threshold by explaining which situations are not covered. It provides that “This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflict.”¹⁰⁰ Without an independent body to determine the application of APII, governments will be reluctant to recognise that an internal revolution is so serious as to constitute a NIAC. L. C. Green notes that “[t]he governmental authorities against which the rebellious forces are engaged, even though

⁹⁶ Additional Protocol II, Article 13(2).

⁹⁷ Roberts and Guelff, *supra.*, note 83, 481.

⁹⁸ Additional Protocol II, Article 1(1).

⁹⁹ Roberts and Guelff, *supra.*, note 83, 482.

¹⁰⁰ Additional Protocol II, Article 1(2).

these forces may claim to be engaged in efforts to achieve self-determination, describe such opponents as ‘terrorists’ and refuse to acknowledge that they possess any rights under the law of armed conflict.”¹⁰¹

In practice, the high threshold of APII has meant that it has rarely been used in regard to NIACs.¹⁰² Eve La Heye notes that “[p]ractice since 1977 shows that in the instances where Protocol II could be deemed to apply, legitimate governments had had a tendency not to recognise its applicability.”¹⁰³ Medard Rwelamira noted that “[i]ndividual states are [...] left with a *carte blanche* to decide when the Protocol [...] should be invoked.”¹⁰⁴

Whilst both API and APII have their own weaknesses, and there are concerns over the relevance of APII owing to its lack of applicability, they mark an important moment in the development of IHL. War had changed from that which was fought at the time of the 1949 Geneva Conventions. New methods of warfare such as guerrilla tactics and insurgencies, as well as an increase in rebellions fought for self-determination (a focus for the UN at the time) provided the environment necessary for a multilateral IHL document to deal with these emerging trends. It has been almost forty years since the Additional Protocols were created, and modern conflict has evolved far beyond anything imagined at the time of its creation. Is it time for a new Additional Protocol? States are reluctant to afford combatant status to NSAGs for fear of legitimising their cause and incentivising uprisings. It is clear that if a new Protocol were to be drafted, it would have to carefully balance the incorporation of the realities of modern conflict, but still reflect state interests. International Law is created by states, and without state support any new convention or protocol would be worthless.

¹⁰¹ L. C. Green, 'Grave Breaches' or Crimes Against Humanity?', 8 *Journal of Legal Studies*, 19 (1997-1998), 20.

¹⁰² Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (New York: Cambridge University Press, 2010), 131.

¹⁰³ Eve La Heye, *War Crimes in Internal Armed Conflicts* (Cambridge: Cambridge University Press, 2008), 46.

¹⁰⁴ Medard Rwelamira, 'The Significance and Contribution of the Protocols Additional to the Geneva Conventions of August 1949', in Christophe Swinarski ed., *Études et essais sur le droit international humanitaire et sur les principes de la Croix-Rouge, en honneur de Jean Pictet* (The Netherlands: Martinus Nijhoff Publishers 1984), 236.

3.2. The Principle of Distinction – Who is a Combatant?

Before we can examine a new approach to the principle of distinction in IHL, we must first understand the existing law. Article 48 of API provides that “The Parties to the conflict shall at all times distinguish between the civilian population and combatants.”¹⁰⁵ Article 51(2) reaffirms this, by stating that “[t]he civilian population as such, as well as individual civilians, shall not be the object of attacks.”¹⁰⁶ Who then is a civilian? While it may seem prudent to define exactly who is a civilian in order to guarantee their protection, IHL defines civilians in negative terms, defined in reference to what it is not. Simply put, a civilian is a person who is not a combatant. Article 50(1) API states that: “A civilian is any person who does not belong to one of the categories referred to in Article 4(a)(1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered a civilian.”¹⁰⁷ The logic behind defining civilians in the negative is to make the category as inclusive as possible. A narrow, specific definition would be more open to interpretation, leading to civilians being excluded from protection.

While the principle of distinction applies to all situations of armed conflict, the concept of who is a combatant varies depending on whether the conflict is international or non-international in character. Therefore, we must determine what type of conflict is being fought before we can consider the status of the participants. As L.C. Green notes, “in view of the fact that an international conflict is subject to the law of war, while this is not so with a non-international conflict, the issue of classification becomes of major significance, particularly in so far as the law concerning ‘atrocities’ and other ‘breaches’ is concerned.”¹⁰⁸

¹⁰⁵ Additional Protocol I, Article 48.

¹⁰⁶ Additional Protocol I, Article 51(2).

¹⁰⁷ Additional Protocol I, Article 50(1).

¹⁰⁸ L. C. Green, *The Contemporary Law of Armed Conflict* (Manchester: Juris Manchester University Press 2nd ed, 2000), 65-6.

3.2.1. Armed Conflicts of an International Character

For IACs, the starting point is Common Article 2 (CA2) to the Geneva Conventions 1949. This Article states “...the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.”¹⁰⁹ We are unlikely to see a situation of a declaration of war today. The last time a formal declaration was issued was on August 8, 1945, when Russia declared war on Japan. There is no guide to what constitutes ‘armed conflict’ in the context of CA2, however the ICRC explained the position in its Commentary:

Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Common Article 2, even if one of the parties denies the existence of a state of war. It makes no difference how long the conflict lasts, how much slaughter takes place, or how numerous are the participating forces; it suffices for the armed forces of one Power to have captured adversaries falling within the scope of Article 4 of the Third Geneva Convention. Even if there has been no fighting, the fact that persons covered by the Convention are detained is sufficient for its application.¹¹⁰

The existence of a state of IAC is purely a factual assessment therefore. No formal declaration of war or recognition of the situation as an IAC is required for IHL to apply. A situation of IAC may exist even if one belligerent party does not recognise the government of the other: “[i]t is irrelevant to the validity of international humanitarian law whether the States and Government involved in the conflict recognize each other as States.”¹¹¹

¹⁰⁹ Third Geneva Convention, Article 2

¹¹⁰ Jean Pictet, *Commentary to the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Geneva: ICRC, 1952), 32.

¹¹¹ *Joint Services Regulations (ZDv) 15/2*, in Dieter Fleck, *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford: Oxford University Press, 1995)45.

If we are dealing with a situation of IAC, we can look to the Third Geneva Convention to determine who is a combatant and who is not. Article 4(a) details who qualifies as prisoners of war (POWs). As only combatants may be considered POWs, this list therefore details the criteria for combatant status under IAC. As Dinstein notes, “[e]ntitlement to the status of a prisoner of war – on being captured by the enemy – is vouchsafed to every combatant, subject to the *conditio sine qua non* that he is a lawful combatant.”¹¹²

Art. 4. A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

- (1) Members 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.
- (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
 - 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.
- (3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

[...]

- (6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had

¹¹² Dinstein, *supra.*, note 86, 29.

time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.¹¹³

Members of the armed forces of a state party to the conflict are combatants. This is the most straightforward categorisation. According to the wording of the Convention, members of regular armed forces do not need to satisfy the four criteria listed in paragraph (2), as these are criteria for militia or volunteer corps. However, there have been cases which have run counter to the exact wording of the Convention, which confuses the situation somewhat.

The case of *Bin Haji Mohamed Ali*¹¹⁴ concerned two members of the armed forces of Indonesia, who planted explosives in a non-military building in Singapore, resulting in the deaths of three people. The soldiers were arrested without any identification, dressed in civilian clothing, and were charged with the murder of the three civilians. The question arose whether members of the armed forces needed to satisfy the four criteria in paragraph (2) of Article 4(a) of the Third Geneva Convention. The Privy Council held that members of the armed forces who committed sabotage in civilian clothes were not entitled to be treated as prisoners of war, thereby losing their combatant privileges.

*Ex Parte Quirin*¹¹⁵ was a similar case from the U.S., in which members of the German armed forces during World War II were on a mission in the US to engage in acts of sabotage. Before they committed these acts, they removed their uniforms. It was held here that the four conditions of Article 4(a)(2) needed to be satisfied, even where regular armed forces are concerned. It is important to remember that these cases do not reflect the position in customary international law, and are to be regarded as curiosities rather than state practice.

As previously noted, the view amongst certain members of the international community was that the conditions in the Third Geneva Convention were too strict,

¹¹³ Third Geneva Convention, Article 4(a).

¹¹⁴ *Bin Haji Mohamed Ali and Another v. Public Prosecutor*, Judicial Committee of the Privy Council (U.K.), 29 July 1968.

¹¹⁵ *Ex Parte Quirin*, 317 U.S. 1 (1942)

particularly with the example of guerrilla warfare. The Additional Protocols of 1977 go some way to expand upon the criteria listed in the Geneva Conventions. The first of the four conditions for militia and volunteer corps remains the same, that in an IAC, the group must have a leader who is responsible for their conduct. There need not be a hierarchical “chain of command” as is such for military units¹¹⁶; however this is often the case. This condition is intended to prevent individuals acting of their own volition in a “private war”.

The second and third criteria are modified by API, as noted above. The conditions are relaxed, to an extent, to allow for the exigencies of guerrilla warfare. Article 44(3) API is an express recognition of the realities of war, and is a prominent example of the evolution of IHL to respond to changes in the conduct of warfare. It is important at this moment to reaffirm my thesis: I do not seek to argue that IHL has never adapted in response to evolutions of warfare. I argue instead that IHL has done so on numerous occasions, yet has ground to a halt following the Additional Protocols of 1977. The means and methods of warfare have evolved dramatically since the Additional Protocols were drafted, and IHL has failed to respond to these changes.

Some commentators have argued that there are three further requirements for members of militias and volunteer corps to retain their combatant status in situations of IAC. It is important to remember that these criteria are not found in international treaties, but have instead been inferred from state practice and certain case law. It is important to remember that the ICRC study of customary law has reaffirmed the number of preconditions, stating that “members of militias and volunteer corps are required to comply with *four* conditions...”¹¹⁷

The first suggested precondition requires that “[l]awful combatants must act within a hierarchic framework, embedded in discipline, and subject to supervision by upper echelons of what is being done by subordinate units in the field.”¹¹⁸ This is based around the ideas of preventing bands of fighters from operating at will, requiring them

¹¹⁶ *Prosecutor v. Musema*, ICTR-95-13-T (27 January 2000), para. 257.

¹¹⁷ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law: Book I* (Cambridge: ICRC, 2006), Rule 106, at 385 (emphasis added).

¹¹⁸ Dinstein, *supra.*, note 86, 39.

to have an established command structure. However, *Prosecutor v. Musema*¹¹⁹ has said the exact opposite position, and most authoritative texts do not cite this as a precondition for POW status.¹²⁰

The second, carrying similar intentions, is that irregular fighters must belong to a party to the conflict. This is not a new condition. In a CA2 conflict, groups of fighters may not independently fight for their own cause or goals. Rogue citizens and armed groups have always been excluded from attaining combatant privilege. This condition is supported by the *Kassem* case, which the Israeli Military Court stated: "...irregular forces must belong to a belligerent party. If they do not belong to the Government or State for which they fight, then it seems to us that, from the outset, under current International Law they do not possess the right to enjoy the status of prisoners of war upon capture."¹²¹

The third requirement that has been asserted is that POWs cannot be nationals of the detaining power. Again, it must be noted that this is not featured in any international treaty, yet can be seen in case law. It is well highlighted by the case of *Oie Hee Koi*¹²². During the IAC between Indonesia and Malaysia, twelve members of the Indonesian Air Force infiltrated in Malaysia and were arrested, convicted and sentenced to death under Malaysian law. All twelve were Malaysian Chinese, all born in or settled in Malaysia. The question arose as to whether the twelve could be considered POW under the Geneva Conventions. The Judicial Committee held that the Geneva Convention "does not extend the protection given to prisoners of war to nationals of the detaining power" and to "persons who, though not nationals of, owe a duty of allegiance to the detaining power."¹²³

Of particular interest for our purposes is the definition of combatant in Article 43(2) of API: "Members of the armed forces of a Party to a conflict (other than medical

¹¹⁹ *Prosecutor v. Musema*, ICTR-95-13-T (27 January 2000), para. 257.

¹²⁰ Solis, *supra.*, note 99, 197.

¹²¹ Israel Military Court sitting in Ramallah, *Military Prosecutor v. Omar Mahmud Kassem and Others*, 13 April 1969, 42 INTERNATIONAL LAW REPORTS (1971), para. 11.

¹²² *Public Prosecutor v. Oie Hee Koi and connected appeals*, Judicial Committee of the Privy Council (U.K.), 4 December 1967 [1968], A. C. 829.

¹²³ *Ibid.*, 6.

personnel and chaplains...) are combatants, that is to say, they have the right to participate directly in hostilities.”¹²⁴ While this appears to be very similar to the definition in the Third Geneva Convention, what is important to consider is the phrase “right to participate directly in hostilities.” There are many members of the armed forces who may have very little to do with actually firing weapons, such as cooks, administrative personnel, musicians etc. This does not mean that they are not combatants, as being a combatant affords you the *right* to fight.¹²⁵ As Dieter Fleck highlights, “the combatant is a person who is authorized by international law to fight in accordance with international law applicable in international armed conflict.”¹²⁶ The status of combatant is therefore not conduct-based, but *membership*-based. This will be very important when we turn to consider the ICRC’s Interpretative Guidance on Direct Participation in Hostilities.

3.2.2. *Armed Conflicts Not of an International Character*

The situation in NIAC is far more complex. The concept of “combatant” does not exist, as members of NSAGs do not qualify as POWs. Neither CA3 nor APII mention the term “combatant”. Whilst there is a reference to the “members of the armed forces”, it is only in relation to being *hors de combat*, that is, fighters who are unable to fight (literally meaning “outside the fight”), and are granted special immunity from attack. Instead, a term commonly used is that of “fighter”.

This absence of the term “combatant” causes problems when we are determining who is a civilian. Civilian status is defined in the negative as anyone who is not a combatant, but where we do not have a definition of combatant, who therefore is a civilian? CA3 makes no reference to “civilian” or “civilian population”. Instead, it protects “persons taking no active part in the hostilities”, and goes on to provide a non-exhaustive list of examples.

¹²⁴ Additional Protocol I, 1977, Article 43(2).

¹²⁵ Pilloud et. al., *supra.*, note 62, 515.

¹²⁶ Fleck, *supra.*, note 111, para. 301, at 67.

How then are we to determine who is a combatant, and therefore who is a civilian, under NIAC? One answer may be to look to the development of customary international law relating to NIAC. In the *Nicaragua* case, the International Court of Justice (ICJ) held that the principles of CA3 were a part of customary international law.¹²⁷ The ICTY in *Prosecutor v. Tadić* went further, holding that it could apply norms of IAC to that of NIAC, on the basis of Article 3 of its founding Statute:

The Trial Chamber concludes that article 3 of the Statute provides a non-exhaustive list of acts which fit within the rubric of “laws or customs of war”. The offences it may consider are not limited to those contained in the Hague Convention and may arise during an armed conflict *regardless of whether it is international or internal*.¹²⁸

This was confirmed by the Appeals chamber:

Since the 1930s, ... the ... distinction [between international and internal conflicts] has gradually become more and more blurred and international legal rules have increasingly emerged or have been agreed upon to regulate internal armed conflict. ... If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight.¹²⁹

This is an interesting position. Customary international law is very important to the development of IHL, especially so as many States have not ratified the Additional Protocols. However, can we directly apply the definition of combatant from IACs into a NIAC? Doing so would run counter to the intentions of States in the creation of the Geneva Conventions and the Additional Protocols. States are loathed to give the legitimacy that combatant privilege provides to insurgents, and therefore it cannot be a correct interpretation of the *Tadić* decision that this is the result.

¹²⁷ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits Judgement, I.C.J. REPORTS (1986), 113 et seq (paras. 218 et seq. of the Judgement).

¹²⁸ *Prosecutor v. Tadić (Trial Chamber)*, IT-94-1-T, ICTY, 10 August 1995, para. 64 (emphasis added).

¹²⁹ *Prosecutor v. Tadić (Appeal Chamber)*, IT-94-1-A, ICTY, 2 October 1995, para. 97.

Additional Protocol II was created to ‘flesh out’ the bare bones of CA3, and bring the law of NIAC more in line with that of IAC.¹³⁰ As a result, the draft version of APII did use the word “combatant”, mirroring the provisions of API.¹³¹ It is important to remember that APII exists alongside to CA3. It has a narrower field of application as its threshold for armed conflict is much higher.¹³² As a result, if the threshold is not met, only CA3 applies. If the threshold is met, then APII and CA3 exist concurrently.¹³³ This is often the case at the beginning of a NIAC, where the intensity of the conflict increases over time.

Owing to the fears of the impact of state sovereignty and worries about legitimising internal uprisals, a more ‘simplified’ version of the Protocol was created. The final version therefore avoids terms such as “parties to the conflict” in order to avoid creating a level of equality of status between governmental and non-governmental forces.¹³⁴ This also meant that the term “combatant” was removed from the original draft version. The terms “civilian population” and “civilian” were retained, however, and the Protocol provides that civilians lose their protection if “they take a direct part in hostilities”.¹³⁵ This therefore infers that there are two categories of persons whose treatment differs under IHL, as is the case under IAC. The understanding is that if there are civilians who may not be the subject of deliberate attacks, there must therefore be ‘non-civilians’ who may be targeted (as well as civilians who lose their protection through directly participating in hostilities).

The answer to who is (to use the preferred term) a ‘fighter’ in a situation of NIAC is found in Article 1(1) APII. Although this Article has received a lot of criticism for its definition of “armed conflict”, the provision is useful for the understanding of

¹³⁰ See Pilloud et. al., *supra.*, note 62.

¹³¹ Michael Bothe, *Direct Participation in Hostilities in Non-International Armed Conflict*, expert paper submitted to the Second Expert Meeting on the Notion of Direct Participation in Hostilities, ICRC, (The Hague: 25/26 October 2004), 7, 8.

¹³² Michael Bothe, Karl Josef Partsch & Waldemar A. Solf, *New Rules for Victims of Armed Conflicts* 604 (The Hague: Martinus Nijhoff Publishers, 1982)

¹³³ Jan Römer, *Killing in a Gray Area between Humanitarian Law and Human Rights: How Can the National Police of Colombia Overcome the Uncertainty of Which Branch of International Law to Apply?* (2010) (European University Viadrina Frankfurt).

¹³⁴ Pilloud et. al., *supra.*, note 62, 8.

¹³⁵ Additional Protocol II, Article 13.

who is a ‘fighter’ and who is a ‘civilian’ for the purposes of the principle of distinction. The article describes the possible parties to the conflict (whilst at the same time avoiding referring to them as parties) as being the “armed forces” of the High Contracting Party, and “dissident armed forces or other organized armed groups”.¹³⁶ In terms of “armed forces”, we may infer from *Tadić* that we can consult API, which states: “The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates...”¹³⁷ This was discussed during the Diplomatic Conference.

In terms of the NSAG, “dissident armed forces or other organized armed groups” have to satisfy certain criteria. Article 1(1) provides that they must be “under responsible command”, and must exercise sufficient control over part of the territory of the High Contracting Party “as to enable them to carry out sustained and concerted military operations and to implement this Protocol”.¹³⁸ Fighters must therefore be sufficiently organised, as highlighted by the ICRC during the negotiation process of Working Group B of Committee I:

The expression does not mean any armed band acting under a leader. Such armed groups must be structured and possess organs, and must therefore have a system for allocating authority and responsibility; they must also be subject to rules of internal discipline. Consequently, the expression “organized armed groups” does not imply any appreciable difference in degree of organisation from that of regular armed forces.¹³⁹

The armed group must also have control over a part of a territory. The wording of APII does not explain to what degree control must be exercised, nor how much territory is needed. What can be inferred through Article 1(1) is that the control over the territory must be sufficient in order to carry out military operations from the territory, and they must also be able to apply the Protocol, for example by caring for the wounded and sick, and by detaining prisoners and treating them according to the standards of

¹³⁶ Additional Protocol II, Article 1(1).

¹³⁷ Additional Protocol I, Article 43(1).

¹³⁸ Additional Protocol II, Article 1(1).

¹³⁹ Boothe et. al., *supra.*, note 131, 626.

IHL.¹⁴⁰ These military operations must also be “sustained” and “concerted”, meaning that they must be continuous, and planned and executed according to that plan.¹⁴¹

A ‘fighter’, therefore, is someone who belongs to an organisation which constitutes the ‘armed forces’ or another ‘organised armed group’. This therefore means that a lawful target under NIAC is determined through membership, rather than conduct, which will be of importance when we turn to direct participation in hostilities, below. It is important to clarify, that membership of an organised armed group will usually require some level of conduct, requiring both the will of the individual and the armed group. This act can be, for example, the signing of a contract, establishing membership with the OAG and thereby creating the status of a fighter. Membership is not ended by leaving the conflict area, or withdrawing from the fighting. If a fighter is a farmer by day and a soldier by night, he remains a lawful target while working the fields in his civilian clothes.

3.2.3. *A Response to the Realities of Warfare – the Tadić Decision*

As previously stated, there are many States who are not parties to APII, and many further conflicts which do not fall under the strict threshold of armed conflict. As such, its usefulness is limited. Therefore, we may turn to case law. The case of *Prosecutor v. Tadić*¹⁴² is of vital importance to the development of the concept of NIAC and of the parties to the conflict. The Appeals Chamber explained the threshold requirement for situations of NIAC thusly: “an armed conflict exists whenever there is *a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.*”¹⁴³

¹⁴⁰ Pilloud et. al., *supra.*, note 62.

¹⁴¹ Römer, *supra.*, note 133, 24.

¹⁴² *Prosecutor v. Tadić*, IT-94-1-T, ICTY, 7 May 1997.

¹⁴³ *Prosecutor v. Tadić*, IT-94-1-A (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), ICTY, 2 October 1995, para. 70 (emphasis added).

This decision is important for a number of reasons. “Armed conflict” is never defined in the Geneva Conventions, and the Appeals Chamber neatly laid out a practical and easy to follow definition. Arguably, even more of note is the fact that the definition included the possibility for the extension of IHL to situations of “protracted armed violence” between two NSAGs, a situation not imagined by the drafters of the Geneva Conventions or the Additional Protocols. This clearly demonstrates an understanding of the realities of modern conflicts, and the response IHL needed to make in order to react. As Sonja Boerlaert-Suominen noted:

The definition of armed conflict suggested by the Appeals Chamber covers not only the classic examples of (a) an armed conflict between two or more states and (b) a civil war between a state on the one hand, and a non-state entity on the other. It clearly encompasses a third situation, (c) an armed conflict in which no government party is involved, because two or more non-state entities are fighting each other.¹⁴⁴

This definition was incorporated into Article 8(2)(f) of the Rome Statute of the ICC¹⁴⁵, inferring that idea that a state of armed conflict can exist without the involvement of any state forces has been accepted by the international community.¹⁴⁶ This has meant that CA3 is now applicable to situations of conflict between two NSAGs, with no governmental forces. This would have been impossible pre-*Tadić*, with state intentions necessitating the involvement of *de jure* state authorities.

Also of great importance is that the threshold in *Tadić* is much lower than that required by Article 1(1) APII, whilst still retaining a higher threshold than in situations of IAC, which reflects the intentions of States. An IAC requires only that there be some force, as the ICRC notes in its commentary of CA2 to the Geneva Conventions: “It makes no difference how long the conflict lasts, how much slaughter takes place, or

¹⁴⁴ Sonja Boerlaert-Suominen, 'The Yugoslave Tribunal and the Common Core of Humanitarian Law Applicable to All Armed Conflicts', 13 *Leiden Journal of International Law*, 619 (2000), 632-3.

¹⁴⁵ UN General Assembly, *Rome Statute of the International Criminal Court*, 17 July 1998, ISBN No. 92-9227-227-6, Article 8(2)(f).

¹⁴⁶ Andreas Zimmerman, 'War Crimes Committed in an Armed Conflict not of an International Character', in Otto Triffterer ed., *Commentary on Statute of the International Criminal Court* (Baden-Baden: Verlagsgesellschaft 1999), 233, 286.

how numerous are the participating forces...” For a NIAC, there must be “protracted armed violence”.

What therefore is “protracted armed violence”? The Trial Chamber of *Tadić* interpreted this definition as a test, focusing “on two aspects of a conflict; the intensity of the conflict and the organisation of the parties to the conflict.”¹⁴⁷ In a similar manner to APII, through determining whether a state of armed conflict exists, we can determine who qualifies as a ‘fighter’ and who is a civilian. The Trial Chamber in the *Delalic* case reaffirmed this, stating “in order to distinguish from cases of civil unrest or terrorist activities, the emphasis is on the protracted extent of the armed violence and the extent of the organisation of the parties involved.”¹⁴⁸

Protracted armed violence is therefore above internal disturbances and tensions, but below sustained and concerted military operations.¹⁴⁹ What is important is that there is a time element, yet this should be interpreted flexibly.¹⁵⁰ It does not require that hostilities be sustained, as for APII. It is a factual assessment, more than isolated or sporadic clashes, but still low enough to reflect the realities of guerrilla warfare and insurgency. As Thahzib-lie and Goldman note: “the protracted requirement is met when the hostilities are extended over time and include events attributable to the conflict. Whether or not hostilities are ‘protracted’ is assessed by reference to the entire period from the initiation of the hostilities to the cessation of hostilities.”¹⁵¹

The second criteria, that of the organisation of the armed groups, is not defined by the *Tadić* court, but can be seen through subsequent case law and through ICRC Commentaries. The ICRC noted that “[t]he general consensus of expert opinion is that armed groups opposing a government must have a minimum degree of organization and discipline – enough to enable them to respect international humanitarian law – in order

¹⁴⁷ *Prosecutor v. Tadić (Trial Judgement)*, IT-94-1-T, ICTY, 7 May 1997, para. 562.

¹⁴⁸ *Prosecutor v. Delalić et al. (Trial Judgement)*, IT-96-21-T, 16 November 1998, para. 184.

¹⁴⁹ Cullen, *supra.*, note 65, 127.

¹⁵⁰ Boelaert-Suominen, *supra.*, note 144, 634.

¹⁵¹ Bahia Thahzib-lie and Olivia Swaak-Goldman, 'Determining the Threshold', in Liesbeth Lijnzaad, Johanna Van Sambeek & Bahia Thahzib-lie eds., *Making the Voice of Humanity Heard* (Leiden/Boston: Martinus Nijhoff Publishers 2004), 239-53

to be recognized as a party to the conflict.”¹⁵² The Trial Chamber in the *Limaj* trial assessed the level of organisation of the Kosovo Liberation Army to determine whether they qualified as “an organised armed group”. Several criteria were assessed, which do provide an exhaustive list of identifiers, but serve as a guide for future factual assessments of armed groups.¹⁵³

Some identifiers which may help in this assessment include whether the group has a command structure; is able to access funding and resources; in situations where they occupy territory whether they have some sort of administration in process; can demonstrate they are enforcing IHL; whether they have a disciplinary system in place; and whether they are able to demonstrate they have specific goals and objectives.

The definition and test in *Tadić* laid down by the Appeals Chamber and Trial Chamber respectively marks a very important development in IHL. As discussed earlier, combats fought between states have decreased almost to vanishing point, with the majority of conflicts fought either between states and NSAGs, or between two or more NSAGs. Neither the Geneva Conventions nor the Additional Protocols reflected this reality. The concept of armed conflict was poorly defined, with thresholds unrealistically high for the majority of NIAC to be defined as such. Many states are not a party to APII, meaning that there were many conflicts fought throughout the world that were simply not covered by IHL.

In a situation where IHL does not come into play, there are no incentives for those involved in the conflict to abide by the principles of IHL, such as distinction or proportionality. NSAGs who rebel against a government face criminal punishment if they are unsuccessful in their uprising. In many states, this can mean death. As such, the only incentive for NSAGs in conflicts not covered by IHL is to win, at any cost. The potential for war crimes and crimes against humanity as a result is vast, and so it is vital

¹⁵² ICRC, *Armed Conflicts Linked to the Disintegration of State Structures: Preparatory Document Drafted by the International Committee of the Red Cross for the First Periodical Meeting on International Humanitarian Law, Geneva, 19-23 January 1998*, (Geneva: 23 January 1998)(23 January 1998), available at www.icrc.org/web/eng/siteeng0.nsf/html/57JPLQ.

¹⁵³ *Prosecutor v. Limaj et al. (Trial Judgement)*, IT-03-66-T, ICTY, 30 November 2005, para. 90.

that IHL may be applied to as many situations as possible in order to minimise the human suffering in the wake of armed conflict.

The acceptance by the international community of the *Tadić* definition and test can be seen not only in the case law of the ICTY,¹⁵⁴ but also in the reports of independent experts,¹⁵⁵ international commissions of enquiry,¹⁵⁶ state manuals of IHL,¹⁵⁷ as well as case law of the International Criminal Tribunal for Rwanda (ICTR),¹⁵⁸ the ICJ,¹⁵⁹ the International Criminal Court (ICC),¹⁶⁰ and the Special Court for Sierra Leone.¹⁶¹ The multitude of references to the *Tadić* definition and test, combined with the incorporation of the definition into the Rome Statute of the ICC, suggest heavily that it has found its way into customary international law. This is incredibly important, broadening further the application of the test to conflicts which would otherwise have been left uncovered by IHL.

CA3, as previously discussed, makes no reference to the concept of fighters or combatants. IHL has responded accordingly, with the Additional Protocols and case law going a considerable way to clarify who may be a legitimate target in conflicts not of an

¹⁵⁴ See, for example, *Prosecutor v. Furundzija (Trial Judgment)*, IT-96-21-T, ICTY, 10 December 1998, para. 59; *Prosecutor v. Kordic and Cerkez (Trial Judgment)*, IT-95-14/2-T, ICTY, 26 February 2001, para. 24; *Prosecutor v. Kunarac, Kovac and Vukovic (Appeal Judgment)*, IT-96-23, ICTY, 12 June 2002, para. 56.

¹⁵⁵ See, for example, Sima Samar, *Report of the Special Rapporteur on the Human Rights Situation in the Sudan*, UN Doc. E/CN.4/2006/111, (11 January 2006)

¹⁵⁶ See, for example, *Report of the Commission on Inquiry on Lebanon pursuant to Human Rights Council Resolution S-2/1*, UN Doc. A/HRC/3/2, (23 November 2006); *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General pursuant to Security Council Resolution 1564 of 18 September 2004*, (25 January 2005)

¹⁵⁷ See, for example UK Ministry of Defence, *supra.*, note 68, 29; Canadian Department of National Defence, *Prisoner of War Handling Detainees and Interrogation and Tactical Questioning in International Operations* (Ottawa: Department of Defence, 2004), section 1-7, fn. 21; International Institute of Humanitarian law, *The Manual on the Law of Non-International Armed Conflict with Commentary* (San Remo: International Institute of Humanitarian Law, 2006), 2.

¹⁵⁸ *Prosecutor v. Akayesu (Trial Judgment)*, ICTR-96-4, ICTR, 2 September 1998; *Prosecutor v. Rutaganda (Trial Judgment)*, ICTR-96-3-T, ICTR, 6 December 1999.

¹⁵⁹ *Democratic Republic of the Congo v. Uganda*, ICJ, Case Concerning Armed Activities on the Territory of the Congo, Separate Opinion of Judge Simma, 19 December 2005, para. 23. Available at www.icj-cij.org/icjwww/idocket/ico/ico_judgments/ico_judgment_opinions_simma_20051219.pdf.

¹⁶⁰ *Prosecutor v. Lubanga* (Case No. ICC-01/04-01/06), Decision on the confirmation of charges, 29 January 2007, para. 233.

¹⁶¹ *Prosecutor v. Fofana et al.*, Decision on Appeal against 'Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence', 16 May 2005, Appeals Chamber Decision of the Special Court for Sierra Leone. Separate Opinion of Justice Robertson, para. 32.

international character. However, CA3 makes reference to “persons taking no active part in the hostilities” as being protected categories of individuals. By this categorisation, there must therefore be persons who actively participate in hostilities, who are unprotected by IHL. This area of law is one of the most complicated and contested issues in regards to modern conflict, and it is to an examination of these issues that I turn to next.

4. Direct Participation in Hostilities

As combat involves, civilians are not only increasingly victims of wars, but also increasingly become participants. As previously noted, civilians are increasingly utilised in the design, manufacture, maintenance and operation of vital weapon and military intelligence systems, tasks which, in the context of armed conflict, blur the principle of distinction. The traditional conception of IHL is that its participants and the actors responsible for its implementation are either the military forces of High Contracting Parties (States), or insurgents/rebels who are bound by these rules as a result of their citizenship to the contracting states.¹⁶² This is not an accurate reflection of modern conflict today.

Taking the definition of a civilian in IHL, anyone who is not a (lawful) combatant is a civilian. Therefore, anyone who cannot be categorised as a combatant under the Geneva Conventions or Additional Protocols is a civilian, who may not be targeted, and may not participate in armed conflict. What then is the situation regarding terrorist groups? What of the civilian who plants an IED by the roadside? What of the individual who assists in the manufacture of weaponry used by armed groups against government forces? How do we define the status of the farmer by day, guerrilla fighter by night?

Transnational terror groups such as Al Qaeda do not meet the requirements of APII to be regarded as “fighters”, in that they often do not have responsible command, do not exercise control over territory, cannot be said to carry out “sustained and

¹⁶² Hoffman, *supra.*, note 11, 99.

concerted military operations”, and, through the deliberate targeting of civilians, do not abide by the obligations under the protocol. One may be able to contend that transnational terrorist groups have a form of military command structure, but the lack of a structured hierarchy and the reliance upon secrecy means, as Marco Sassóli contends, “many operational decisions (e.g., means and methods to achieve a goal) may be left to those fighting in the field rather than to ‘commanders’.”¹⁶³

Yet can it be said that they are therefore civilians? To do so would be to take a contentious and problematic position, that would seem to run contrary to the principles of IHL. As the ICRC highlights, “this approach would seriously undermine the conceptual integrity of the categories of persons underling the principle of distinction, most notably because it would create parties to [NIACs] whose entire armed forces remain part of the civilian population.”¹⁶⁴ Members of transnational terrorist groups would be able to enjoy civilian immunity outside of hostilities, which would severely limit the means and methods of counter-terrorist operations. States have already rejected the phenomenon of “soldier by night and peaceful citizen by day”.¹⁶⁵ Finally, granting civilian immunity to groups or individuals who regularly participate in hostilities would only result in incentivising violations of IHL in order to secure greater protection than that afforded to regular combatants. This clearly runs counter to the very ideas behind IHL.

Combatants in conflicts such as Afghanistan are identified through prior participation in hostilities or by their connections with other known insurgents,¹⁶⁶ through an analysis of “pattern of life” in order to identify legitimate targets.¹⁶⁷ As previously noted, combatant status is traditionally formulated on a membership basis,

¹⁶³ Marco Sassóli, 'Transnational Armed Groups and International Humanitarian Law', Program of Humanitarian Policy and Conflict Research Occasional Paper Series 6 (Harvard University, Winter 2006)

¹⁶⁴ Nils Melzer, *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (Geneva: ICRC, 2009), available at <http://www.icrc.org/eng/resources/documents/feature/direct-participation-ihl-feature-020609.htm>.

¹⁶⁵ Pilloud et al., *supra.*, note 62, 515.

¹⁶⁶ Jane Meyer, 'The Predator War', *The New Yorker*, October 29, 2009, available at http://www.newyorker.com/reporting/2009/10/26/091026fa_fact_mayer?printable=true Available at http://www.newyorker.com/reporting/2009/10/26/091026fa_fact_mayer?printable=true.

¹⁶⁷ United Nations, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Addendum: Study on Targeted Killings*, UN Doc. A/HRC/14/24/Add. 6, (2010), §20.

yet it is rarely possible for state forces to successfully distinguish between lawful combatants and civilians based on membership criteria. The function-based approach is a response by militaries to the evolution of the organisation of armed groups in modern conflicts.¹⁶⁸

The Geneva Conventions establishes that “persons taking no active part in the hostilities” are protected categories of individuals.¹⁶⁹ The Additional Protocols provide that civilians may not be directly targeted “unless and for such time as they take a direct part in hostilities.”¹⁷⁰ Determining exactly what constitutes direct participation in hostilities is therefore essential to the development of IHL and the protection of civilians in situations of armed conflict. As Wenger and Mason argue, a clear and precise definition of “‘direct participation in hostilities’ is a necessary part of the process of adapting to the changing nature of armed conflict.”¹⁷¹

The addition of a temporal dimension to the notion of direct participation in hostilities in the Additional Protocols is an important element, yet it is as unclear as the Geneva Conventions as to what exactly this requires. The ICRC’s Commentary on the Additional Protocols provides some guidance here, yet there is still ambiguity. As the ICRC themselves contend, “a clear and uniform definition of direct participation in hostilities has not been developed in state practice.”¹⁷² In terms of the conduct of the individual, the ICRC argues that “‘direct’ participation means acts of war by which their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces. It is only during such participation that a civilian loses his immunity and becomes a legitimate target.”¹⁷³ As such, in order for a civilian to directly participate in hostilities, his actions must actually cause harm or be likely to do so.

With regards to the temporal quality of direct participation, the ICRC notes that “[o]nce he ceases to participate, the civilian regains his right to protection ... and he

¹⁶⁸ Keck, *supra.*, note 27, 15.

¹⁶⁹ Third Geneva Convention, Article 3.

¹⁷⁰ Additional Protocol I, Article 51(3); Additional Protocol II, Article 13(3).

¹⁷¹ Andreas Wenger and Simon J. A. Mason, 'The Civilianization of Armed Conflict: Trends and Implications', 90 *International Review of the Red Cross*, 850 (2008), 851.

¹⁷² Henckaerts & Doswald-Beck, eds., *supra.*, note 117, 23.

¹⁷³ Pilloud et. al., *supra.*, note 62, 619.

may no longer be attacked.”¹⁷⁴ A civilian therefore regains immunity from attack once he ceases directly participating in hostilities, and may only be targeted whilst he is doing so. The actions of the individual must also be directly related to the conduct of hostilities, not merely actions that support the war effort. The ICRC argues that “[t]here should be a clear distinction between direct participation in hostilities and participation in the war effort ... Without such a distinction the efforts made to reaffirm and develop international humanitarian law could become meaningless.”¹⁷⁵

Whilst the Commentary to the Additional Protocols goes a considerable way to explain the principle of direct participation, the criteria have been subject to heavy debate and criticism. Some, such as Antonio Cassese have called for a narrow interpretation in order to enhance civilian protection from arbitrary attacks.¹⁷⁶ This position is echoed by the Israeli Supreme Court in the *Targeted Killings* decision, where it said that the “desire to protect innocent civilians leads, in the hard cases, to a narrow interpretation of the term ‘direct’ part in hostilities.”¹⁷⁷

Others have called for a more liberal approach, based around the idea that broadening the classification would incentivise civilians from participating in hostilities, thereby saving lives.¹⁷⁸ Schmitt, one of the advocates for this position, argues that this approach creates “an incentive for civilians to remain as distant from the conflict as possible – in doing so they can better avoid being charged with participation in the conflict and are less liable to being directly targeted.”¹⁷⁹

This debate between two contrasting ideas is a reflection of the dichotomy of IHL: that of the balance between military necessity and humanity.¹⁸⁰ Any definition of direct participation would need to strike this balance effectively, should reflect the Geneva Conventions and Additional Protocols, as well as the practices of states, and the

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid.*

¹⁷⁶ Antonio Cassese, *International Law* (Oxford: Oxford University Press, 2005), 421.

¹⁷⁷ *The Public Committee against Torture in Israel v. Israel*, HCJ 769/02, Judgement (2005), para. 34.

¹⁷⁸ Schmitt, *supra.*, note 16, 509.

¹⁷⁹ Michael N. Schmitt, 'Deconstructing Direct Participation in Hostilities: The Constitutive Elements', 42 *N.Y.U. Journal of International Law and Politics*, 697 (2010)

¹⁸⁰ Christopher Greenwood, 'Historical Developments and Legal Basis', in Dieter Fleck ed., *The Handbook of Humanitarian Law in Armed Conflicts* (New York: Oxford University Press 1999), 32.

principle of reciprocity. I will seek to analyse these polarising perceptions of direct participation, but first I will examine the ICRC's Interpretive Guidance (IG) on direct participation in hostilities.

4.1. The ICRC's Interpretive Guidance

The ICRC published its Interpretive Guidance in 2009 with the intention of clarifying the meaning of direct participation in hostilities.¹⁸¹ Legal definitions alone are not enough to guarantee the protection of civilians – guidance on the interpretation and implementation of those principles are essential. It must be remembered that the Interpretive Guidance is simply that – guidance, and nothing more. It is a non-binding, yet authoritative document that states can choose to consider or not. Its value stems from its potential to shape state practice, which may in turn form customary international law, and may influence an international treaty on the issue of direct participation.

The IG was created out of a desire to address several worrying trends in modern conflict, such as the shift in the conduct of hostilities from battlefields to being fought within civilian population areas, resulting in the intermingling of civilians and combatants or fighters. The civilianisation of the modern military has meant that previously traditional military roles are being performed by civilian personnel, making the task of distinguishing between those who are legitimate targets of attack and those who are protected more complex and difficult. Those individuals who do directly participate in hostilities are increasingly failing to distinguish themselves from the civilian population.

4.1.1. Defining civilians for the purposes of direct participation

The IG makes a distinction between situations of IAC and NIAC for determining who is a civilian. In IACs, members of irregular groups that belong to the State, but who do not satisfy the four criteria in Article 4(a)(2) of the Third Geneva

¹⁸¹ Melzer, *supra.*, note 164.

Convention to qualify for POW status, will be regarded as members of the armed forces and therefore not civilians for the purposes of direct participation in hostilities. The logic behind this position is that it would run counter to the logic of the principle of distinction to afford irregular armed forces the protection of civilian status merely because they fail to satisfy the four criteria.¹⁸² This demonstrates sound reasoning. Irregular armed groups are therefore incentivised to comply with the four criteria (most importantly, compliance with the laws and customs of war) in order to gain POW status, as they will not be able to gain civilian protection.

The ICRC also makes it clear that, in an IAC, OAGs must belong to a party to the conflict in order to qualify as armed forces. There must be at least a *de facto* relationship between the OAG and a party to the conflict. This may be demonstrated through whether control of the OAG is attributable to the party to the conflict, although the IG notes that the level of control required is not “settled” in IHL.¹⁸³ The logic here appears sound, as an IAC is fought between the armed forces of the parties to conflict, and if it were any different, it may fall under the law of NIAC, provided the threshold be met. The principle of distinction is clear: one must be able to distinguish between the armed forces of the parties to the conflict and the civilian population. Blurring this distinction by including OAGs not belonging to the armed forces of the parties to conflict would make enforcing the principle of distinction far more difficult to implement effectively.

Yet this idea in turn creates problems. If the OAG does not belong to a party to the conflict, then its members are civilians. This seems at odds with the flexible approach adopted regarding the four criteria. Regardless of whether or not members of the OAG are wearing uniforms, bearing weapons openly, and performing a combat function, they are to be regarded as civilians for the purposes of the IAC. Despite being intended to create clarity in regard to the principle of distinction and direct participation in hostilities, the IG goes on to say that “[w]hether the individuals are civilians or members of the armed forces of a party to the conflict would then have to be determined

¹⁸² Melzer, *supra.*, note 164, 22.

¹⁸³ *Ibid.*, 23.

under IHL governing non-international armed conflicts.”¹⁸⁴ Therefore, members of OAGs could be civilians during IACs and members of the armed forces under NIAC simultaneously. This only serves to further confuse the principle of distinction, and more clarity is required on this subject.

There is an interesting difference between regular armed forces and irregular armed forces which merits examination. In the case of regular armed forces, because “membership is generally regulated by domestic law and expressed through formal integration into permanent units distinguishable by uniforms, insignia, and equipment,”¹⁸⁵ individuals belonging to those forces “are not civilians, regardless of their individual conduct or the function they assume within armed forces.”¹⁸⁶ This seems to take the membership approach, echoing the Additional Protocols. However, the IG goes on to say that membership in irregular armed forces “generally is not regulated by domestic law and can only be reliably determined on the basis of functional criteria, such as those applying to organized armed groups in non-international armed conflict.”¹⁸⁷ Regular armed forces are determined through a membership approach, with irregular forces in a functional approach.

This approach also differs from the ICRC’s own study of Customary International Law of 2005. Rule 4 of the study states: “The armed forces of a party to the conflict consist of all organized armed forces, groups, and units which are under a command responsible to that party for the conduct of its subordinates.”¹⁸⁸ It goes on to say that “[t]he definition contained in Additional Protocol I does not distinguish between the regular armed groups or units, but defines all armed forces, groups and units ... as armed forces of that party ... all persons who fight in the name of a party to a conflict ... are combatants.”¹⁸⁹

¹⁸⁴ *Ibid.*, 24.

¹⁸⁵ *Ibid.*, 25.

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.*

¹⁸⁸ Henckaerts & Doswald-Beck, eds., *supra.*, note 117, 14.

¹⁸⁹ *Ibid.*, 15.

In a NIAC, the basic principle of distinction remains the same: all those who are not members of State armed forces or OAGs of a party to the conflict are civilians, and are therefore protected against direct attack “unless and for such time as they take a direct part in hostilities.”¹⁹⁰ The difference lies in the fact that, in order to qualify as a member of the armed forces of a non-State party, members of OAGs must have a “continuous combat function”.¹⁹¹

The ICRC reasons that, whilst NSAGs cannot be regarded as regular armed forces, they cannot be assumed to therefore be civilians who are continuously directly participating in hostilities. This would severely undermine and devalue the concept of a civilian, as this approach would create parties to NIACs whose entire armed forces would be regarded as civilians. This is an important consideration, one which addresses the issue of transnational terrorist groups discussed above.

Membership of an OAG depends on the continuous combat function of individuals which corresponds to that exercised by the non-State party to the conflict. Therefore, individual membership in an OAG is determined by whether a person assumes a continuous function of direct participation in hostilities. It is this function which distinguishes the fighting forces of a non-State party from civilians who may directly participate on a spontaneous or sporadic basis, or who have essentially non-combat functions.¹⁹² This concept is not found in treaty law, and was created as a result of discussions by the expert group in the drafting of the IG. It is interesting to note that IG does not purport to change the law, but instead provide an interpretation of the existing legal framework.¹⁹³ Yet the creation of this continuous combat function seems to run counter to this proposition.

The IG notes that the combat function may be “openly expressed through the carrying of uniforms, distinctive signs or certain weapons”¹⁹⁴, yet makes no reference as to whether this is reflective of integration into membership of the OAG, as is the case

¹⁹⁰ Melzer, *supra.*, note 164, 27.

¹⁹¹ *Ibid.*

¹⁹² *Ibid.*, 34.

¹⁹³ *Ibid.*, 6.

¹⁹⁴ *Ibid.*, 35.

for regular armed forces. This is important, as it states that “[c]ontinuous combat function requires lasting integration into an organized armed group”.¹⁹⁵

The IG regards that while some individuals may contribute to the general war effort, this is not equated with the continuous combat function, and are therefore civilians. Examples include recruiters, trainers, financiers, and propagandists. This position is reasonable; however some have raised issue with the inclusion of individuals who are involved in the purchase, smuggling, manufacturing and maintenance of “weapons and other equipment outside specific military operations or to the collection of intelligence other than of a tactical nature”¹⁹⁶ as amongst those who are classified as civilians. Watkin raises the issue of Improvised Explosive Devices (IEDs) here, the use of which, he argues, “represents one of the greatest threats to both civilians and security forces in contemporary conflicts such as Afghanistan and Iraq.”¹⁹⁷ Those who manufacture or smuggle IEDs do not fall under the continuous combat function criteria, and Watkin argues that this means that “[t]he initiative is therefore surrendered to the enemy force”¹⁹⁸, as it will only be when the IED is used that direct action may be taken.

4.1.2. The Concept of Direct Participation in Hostilities

The Geneva Conventions and the Additional Protocols of 1977 both make reference to the idea of direct participation, but neither provides any form of explanation of what this means. Hostilities are directly linked with the idea of conflict, and therefore direct participation in hostilities cannot take place in situations that do not qualify as IACs or NIACs, such as riots or other internal disturbances. Further, the notion of direct participation in hostilities is in reference to the individual’s participation in specific acts.¹⁹⁹ The ICRC stresses that it is only in relation to these specific acts, and not the

¹⁹⁵ *Ibid.*, 34.

¹⁹⁶ *Ibid.*, 35.

¹⁹⁷ Kenneth Watkin, 'Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance', 42 *International Law and Politics*, 641 (2010), 658.

¹⁹⁸ *Ibid.*

¹⁹⁹ Melzer, *supra.*, note 164, 44.

individual's intention to carry out other acts in the future. This is to guarantee the distinction between “*temporary, activity-based loss of protection* (due to direct participation in hostilities), and *continuous, status or function-based loss of protection* (due to combatant status or continuous combat function).”²⁰⁰

The ICRC argues that to allow for future acts to be considered, and therefore for individuals who directly participate in hostilities to be targeted even after they have participated, would blur this distinction, and would add to the operational difficulties of distinguishing between civilians and members of organised armed groups. It would be almost impossible to determine whether civilians have a sufficient level of intent to commit further acts or not and therefore would be legitimate targets, and would result in erroneous or arbitrary attacks on the civilian population, clearly running counter to the intention and purpose of IHL and the principle of distinction.

The IG establishes that for a specific act to qualify as direct participation in hostilities, it must satisfy three (cumulative) criteria: (1) it “must be likely to adversely affect the military operations or ... capacity of a party to an armed conflict or ... inflict death, injury or destruction...”; (2) there must be a direct causal link between the specific act and the expected harm; and (3) there must be a belligerent nexus between the specific act and the threshold of harm.²⁰¹

4.1.2.1. Threshold of Harm

This first element goes beyond that which was discussed in the ICRC's Commentary to API, which seemingly interpreted the notion of direct participation overly narrowly. In the IG, acts need not cause any actual harm, it may be sufficient if they are *likely* to adversely affect the military operations of the party to the conflict, or to cause death or injury or destruction. This broader interpretation more accurately reflects the realities of battlefield decision making – an individual who directly

²⁰⁰ *Ibid.*, 44 – 45.

²⁰¹ *Ibid.*, 16, para. V.

participates in hostilities still loses his civilian protection during such time as he is directly participating, even if he is unsuccessful with his attempt.

The threshold can also be reached without the act resulting in any concrete losses. Acts which “adversely affect the military operations or military capacity of a party to an armed conflict” including “sabotage and other armed or unarmed activities restricting or disturbing deployments, logistics and communications”²⁰² will be sufficient to constitute direct participation. This takes into account the wide usage of civilians in modern conflicts in roles which are not overtly “combat-oriented”. As discussed above, the civilianisation of many modern militaries has resulted in a wide variety of non-combat functions being filled by civilians. Their role, whilst not having obvious, concrete consequences, such as the killing or wounding of enemy military personnel, is often vital to the continuation of the war effort and in the defeat of the enemy.

4.1.2.2. Direct Causation

The second criteria for an act to be considered direct participation is that there must be “a direct causal link between a specific act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part.”²⁰³ The ICRC goes on to state that “[f]or a specific act to qualify as ‘direct’ rather than ‘indirect’ participation in hostilities there must be a sufficiently close causal relation between the act and the resulting harm.”²⁰⁴ In order for there to be direct participation, there must be direct causation.

As the threshold of harm requirement includes such things as damage to logistics and communications, the causation requirement may be satisfied by gathering intelligence, relaying targeting information, as well as monitoring or interfering with enemy electronic or computer networks. While this may seem broad, the criteria is narrowed through the exclusion of acts which may simply contribute to the capacity of

²⁰² *Ibid.*, 48.

²⁰³ *Ibid.*, 51.

²⁰⁴ *Ibid.*, 52.

the party to the conflict to inflict harm, such as weapons or food production and propaganda. These are acts which merely sustain the war effort, and are not sufficiently direct as to cause (or be likely to cause) harm to the enemy.

The logic here seems sound. An overextension of the criteria for direct participation to include individuals responsible for food production or propaganda would be erring too far on the side of military necessity. Yet many critics have argued that this narrow interpretation of causation does not accurately reflect the realities of modern conflict, and is under-inclusive to the point that it puts lives at risk. A common example raised is that of IEDs, discussed briefly earlier.

An individual who plants and detonates an IED would clearly satisfy these requirements (the issue of belligerent nexus will be discussed below, but this would also be satisfied here). Whether or not the IED kills or injures anyone is irrelevant, as the act is likely to do so. The causation element is satisfied through the concept of “one causal step”.²⁰⁵ There is a clear causal link between the planting and detonation of the IED and any harm that is caused by it. However, if we consider the production of the IED, the situation is different. There is a clear, uninterrupted causal chain of events from the creation of the explosive device and the explosion resulting from its detonation. Yet an uninterrupted causal chain is insufficient. The IG in fact specifically states that “the assembly and storing of an improvised explosive device (IED) in a workshop, or the purchase or smuggling of its components, may be connected with the resulting harm ... but, unlike the planting and detonation of that device, do not cause that harm directly.”²⁰⁶

This limits the action that counter-insurgent forces may take drastically. Rather than being able to target the manufacture of lethal weapons that are used frequently as a tactic in asymmetric warfare²⁰⁷, armed forces are limited to a very small window of time where the IEDs are actually placed or detonated. Owing to the nature of IEDs as being hidden along roadsides, this can be almost impossible. This places the initiative in the

²⁰⁵ *Ibid.*, 53.

²⁰⁶ *Ibid.*, 54.

²⁰⁷ Watkin, *supra.*, note 197, 658.

hands of the insurgents, with the counter-insurgent forces only able to act in a reactionary role. This can hardly be said to be reflective of the realities of modern warfare, and may in turn incentivise NSAGs to more frequently use such tactics.²⁰⁸ Schmitt suggests that “given the clandestine nature by which such devices are emplaced, an immediate attack may be the only option for foiling a later operation employing the device.”²⁰⁹

Using the example of IEDs to emphasise his point, Schmitt argues that actions which cause harm to the enemy as well as those which benefit a party should be included within the scope of direct participation in hostilities.²¹⁰ He notes that “the development, production, training for use, and fielding of IED’s necessitated costly investment in counter-technologies, hurt the moral of Coalition forces, and negatively affected perceptions as to the benefits of the conflict at home.”²¹¹ This argument has merit from a military standpoint, yet fails for two major reasons.

Firstly, in terms of the element of harm, the ICRC’s Commentary to API states that “hostile acts should be understood to be acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces.”²¹² Costly investment in counter-technologies or the perception of the conflict at home cannot be said to be *actual harm*. The IG includes the likelihood of harm in its threshold, and should not be made any broader without being inconsistent with its earlier Commentary.

Secondly, in terms of direct causation, as I have described above there is an uninterrupted causal link between the production and the detonation of IEDs, and a narrow interpretation places counter-insurgency forces at a severe disadvantage. However, it would set a dangerous precedent if we were to allow the targeting of an individual for the mere development or production of a weapon. This would shift the threshold away from *direct* causation to *indirect* causation. Munitions workers and

²⁰⁸ Keck, *supra.*, note 27, 36.

²⁰⁹ Schmitt, *supra.*, note 179, 731.

²¹⁰ *Ibid.*, 720.

²¹¹ *Ibid.*, 719.

²¹² Pilloud et al., *supra.*, note 62, 618.

weapons trainers are protected from direct attacks by the IG, a position supported by the Commentary to API, which states that there is “a clear distinction between direct participation in hostilities and participation in the war effort.”²¹³

This does raise an interesting dilemma. It should not be our intention to widen the category of individuals who may be targeted so as to include all munitions workers, however the production of IED’s represents a real challenge in modern conflict. Schmitt notes that, during the ICRC’s expert discussions on the subject of direct participation in hostilities, all the experts with “military experience or who serve governments involved in combat supported the characterization of IED assembly as direct participation.”²¹⁴ State practice also seems to follow this military necessity route. The ISAF Command in Afghanistan included the targeting of “bomb-making personnel and materials” in their attempts to counter the use of IEDs.²¹⁵ Schmitt argues that “few states would hesitate, on the basis that the action is not ‘direct enough,’ to attack those in the process of assembling IEDs.”²¹⁶

A distinction could be made between those who create IEDs (and a linked clandestine weapon – suicide bombs) from those who work in a factory creating conventional weapons. Those who make IEDs and suicide bombs are often linked in some way to the NSAG²¹⁷, and may also play a significant role in the planning or execution of operations involving such weaponry.²¹⁸ What may therefore be a better position is to say that those involved in the production of IEDs and suicide bombs are fulfilling a specific combat function (as opposed to merely supporting the war effort as contested by the ICRC), and may therefore be legitimate targets of attack.

4.1.2.3. Belligerent Nexus

²¹³ *Ibid.*

²¹⁴ Schmitt, *supra.*, note 179, 731.

²¹⁵ Matthew Millham, 'Attacking IED Networks', International Security Assistance Force (ISAF) (31 December 2010), available at <http://www.rs.nato.int/article/focus/attacking-ied-networks.html>.

²¹⁶ Schmitt, *supra.*, note 179, 731.

²¹⁷ Michael Flynn (Director of Intelligence), *State of the Insurgency: Trends, Intentions and Objectives*, International Security Assistance Force, (Afghanistan: December 2009)

²¹⁸ Scott Swanson, 'Viral Targeting of the IED Social Network System', 8 *Small Wars Journal*, (2007), 4 – 7.

The belligerent nexus criteria requires that the individual has knowledge that his actions are in support of a party to the conflict, therefore amounting to the direct participation in hostilities. The IG states that the individual's act must "be specifically designed to cause the required threshold of harm in support of a party to the conflict and to the detriment of another."²¹⁹ This belligerent nexus "should be distinguished from concepts such as subjective intent and hostile intent."²²⁰ What is meant by this is that it is irrelevant what the individual's intent is; the reasons for participation do not matter. What is important is that the person has knowledge that he is participating in hostilities.

For example, an individual who is driving a truck who is unaware that he is transporting a bomb would not satisfy the belligerent nexus requirement. This is an obvious example, yet the importance of the belligerent nexus criteria is to separate acts which are directly participating in hostilities from those which can be described as criminal enterprise or vigilantism. An individual acting alone out of vengeance for perceived wrongs by one party to the conflict cannot be said to possess the belligerent nexus. Similarly, acts of self-defence cannot be said to be directly participating. If we were to include self-defence into the concept of direct participation, and therefore make those acting in self-defence legitimate targets of attack, this would set an undesirable precedent, as the ICRC notes: "this would have the absurd consequence of legitimizing a previously unlawful attack."²²¹

The ICRC notes that the violence does not have to be directed against the armed forces of a party to the conflict. It may be targeted against civilians, but it must be distinguishable from mere criminal activity. The belligerent nexus will only be satisfied if the "violence is motivated by the same political disputes or ethnic hatred that underlie the surrounding armed conflict and where it causes harm of a specific military nature."²²² Therefore, acts of terror such as suicide bombings which are targeted against civilians, but perpetrated not by members of a NSAG party to the conflict, may qualify as direct participation in hostilities if the above can be satisfied. This is an important

²¹⁹ Melzer, *supra.*, note 164, 58.

²²⁰ *Ibid.*

²²¹ *Ibid.*, 61.

²²² *Ibid.*, 63.

qualification – vigilantism is regarded as criminal conduct and therefore should be dealt with under law enforcement mechanisms. Acts of violence against the civilian population within the contexts of political or ethnic hatred which underlie the armed conflict taking place would count as direct participation, and therefore those who perpetrate such attacks would be legitimate targets of attack under IHL.

How would one be able to determine whether the actions perpetrated against the civilian population were motivated by political disputes or ethnic hatred? This becomes even more difficult in the heat of the moment, understanding the rationale behind a person's actions in the midst of a conflict situation would be next to impossible. The situation is further complicated by the potential for criminal groups to capitalise on the chaos of war, committing violence in pursuit of their own aims. The acts may be identical, but the individual only becomes a legitimate target if it can be said that he has knowledge that his actions are contributing to one side to the conflict to the detriment of another. The ICRC has recognised this difficulty, and has stated that the question in this scenario “should be whether the conduct of a civilian, in conjunction with the circumstance prevailing at the relevant time and place, can reasonably be perceived as an act designed to support one party to the conflict by directly causing the required threshold of harm to another party.”²²³

This is an important example of the ICRC taking into account the realities of war and adapting IHL to reflect this. Article 50(1) of API states that in cases of doubt as to the status of an individual they should be regarded as a civilian and therefore be protected from direct attack.²²⁴ A direct incorporation of this standard of doubt would not work in connection with the belligerent nexus requirement, and the ICRC has broadened the test in this instance from one of any doubt as per API to one of reasonableness in order to reflect the realities of modern conflict.

²²³ *Ibid.*, 64.

²²⁴ Additional Protocol I, Article 50(1).

4.1.3. “For such time” – The Revolving Door Dilemma

According to both treaty law and customary IHL, a civilian loses his/her immunity from attack only “for such time”²²⁵ as he or she is directly participating in hostilities. The principle is based on the idea that civilians may participate in hostilities but then may return to a normal life, and no longer pose any threat to military forces. Outside of the direct participation, the civilian retains his or her immunity. This represents the principle that direct participation does transform the status of the individual into a lawful combatant, but strips the civilian of his or her immunity for such time as he or she is directly participating in hostilities. This reinforces the idea that direct participation is function-based rather than membership-based. A membership-based analysis would mean that the individual, by directly participating in hostilities, loses his civilian protection unless he can become *hors de combat*, by removing himself from hostilities through declared withdrawal or through being incapacitated.

At first glance, this might seem like a very narrow window in which civilians who directly participate in hostilities may be targeted, particularly when one considers the clandestine nature of insurgencies. An overly narrow interpretation of ‘for such time’ could mean that the individual is only targetable during the exact moment of the execution of specific act. However, the ICRC makes it clear that ‘for such time’ should include “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.”²²⁶ The ICRC reaffirms the distinction raised earlier in the context of the manufacture of IEDs, by stating that “preparatory measures *aiming to carry out a specific hostile act* qualify as direct participation in hostilities, whereas preparatory measures *aiming to establish the general capacity to carry out unspecified hostile acts do not.*”²²⁷

²²⁵ Additional Protocol I, Article 51(3); Additional Protocol II, Article 13(3); Henckaerts and Doswald-Beck, eds., *supra.*, note 117, Rule 6.

²²⁶ Melzer, *supra.*, note 164, 65.

²²⁷ *Ibid.*, 66 (emphasis original).

The temporal dimension of direct participation has been subjected to a large amount of criticism, mainly due to the fact that the individual may lose and regain his immunity from direct attack on numerous occasions. If an individual participates in hostilities, he loses his immunity, and then regains it upon termination of his direct participation. If he then participates again, he loses his immunity for such time as he is participating, and then regains immunity once more upon its completion. This is the ‘revolving door’ dilemma, and it is unclear how many times an individual may go through the revolving door and still retain immunity.

The revolving door idea finds support in the Commentary to API, which states that “[i]t is only during such participation that a civilian loses his immunity and becomes a legitimate target. Once he ceases to participate, the civilian regains his right to the protection ... and he may no longer be attacked.”²²⁸ The position is echoed by the Israeli Supreme Court in its *Targeted Killings* decision:

Article 51(3) of *The First Protocol* states that civilians enjoy protection from the dangers stemming from military acts, and that they are not targets for attack, unless “and for such time” as they are taking a direct part in hostilities. The provisions of Article 51(3) of *The First Protocol* present a time requirement. A civilian taking part in hostilities loses the protection from attack “for such time” as he is taking part in those hostilities. If “such time” has passed – the protection granted to the civilian returns.”²²⁹

The ICRC’s position in the IG clearly has support from treaty law and case law, yet it has received much criticism. If an individual constantly travels through the revolving door, it may be argued that he has a continuous combat function, and ceases to be a civilian directly participating in hostilities, and instead becomes a fighter or combatant. Yet the extent to which an individual can enter and withdraw from hostilities is unclear. The ICRC only goes as far to say that “where individuals go beyond spontaneous, sporadic, or unorganized direct participation in hostilities and become members of an organized armed group belonging to a party to the conflict, IHL

²²⁸ Pilloud et al., *supra.*, note 62, 619.

²²⁹ *The Public Committee against Torture in Israel v. Israel*, HCJ 769/02, Judgement (2005), para. 38.

deprives them of protection against direct attack for as long as they remain members of that group.”²³⁰

I will now turn to an examination of some of the major criticisms of the IG, and will weigh the merits of each. The development of the concept of direct participation in hostilities is an incredibly vital principle in IHL, and it is essential that it is as clear as possible in order for it to be fully implemented. If it is the case that we require a new international treaty or additional protocol to the Geneva Conventions, then a precise definition of direct participation in hostilities is essential, and it must be one which strikes the necessary balance between humanity and military necessity.

4.2. Building Upon the Interpretive Guidance

The ICRC acknowledged that the concept of direct participation in hostilities was imprecise in its Commentary to API: “Undoubtedly there is room here for some margin of judgment: to restrict this concept to combat and active military operations would be too narrow, while extending it to the entire war effort would be too broad, as in modern warfare the whole population participates in the war effort to some extent, albeit indirectly.”²³¹ The IG was attempt to clarify this somewhat, but the principle remains unclear in key areas.

One proposal to attempt to solve the revolving door dilemma is to introduce a membership-based approach to direct participation in hostilities, similar to the approach taken by the Additional Protocols and Geneva Conventions. The idea behind this approach is that an individual who directly participates is likely to do so again, and again, and to afford that individual protection outside of the moment of participation puts lives at risk. The individual who directly participates should lose his protection during the entire conflict, not only during the specific acts, as he is a permanent threat.²³²

²³⁰ Melzer, *supra.*, note 164, 72.

²³¹ Pilloud et al., *supra.*, note 62, 516.

²³² Anicée Van Engeland, *Civilian or Combatant? A Challenge for the 21st Century* (New York: Oxford University Press, 2011)

Individuals who directly participate in hostilities may often do so clandestinely, and so the moment in which they are targetable may be very brief, leading to challenges for armed forces and counter-insurgency forces. A membership-based approach would mean that the individual would be targetable outside of the moment of direct participation. The core of direct participation would remain the same, and it would be the act of directly participating that establishes membership.

Kenneth Watkin argues that recurring participation can devalue the protection afforded by civilian status, thereby placing civilian lives at risk.²³³ This is an interesting argument. There is confusion as to where persistently recurring participation fits alongside the continuous combatant function, and – during the fog of war – effectively making this judgement can be very difficult. Those who tread this line may be seen as exploiting the protection of civilian status, which is an undesirable result. Michael Schmitt argues that combatants who are victimised by civilians who exploit this immunity will lose their respect for IHL, and will therefore expose the wider civilian population to greater danger.²³⁴ Schmitt contends that grey areas of law should be interpreted “in light of the underlying purposes of the law.”²³⁵ As the purpose of IHL is to balance humanity with military necessity, the best approach is one that protects civilian lives and is practical in combat situations.

Schmitt and Watkin seem to have good reasons for their argument, but their logic is flawed in several key areas. The balance of humanity with military necessity does not mean that combatants should be protected at the expense of civilians. The idea that engaging with civilians who directly participate in hostilities on a persistently recurring basis will inspire combatants to violate other areas of IHL is a leap in logic that seems to place the blame for violations of IHL by combatants on civilians. Schmitt also contends that a liberal, membership-based approach to direct participation would incentivise civilians to distance themselves from the conflict, thereby being less likely to be targeted and saving more civilian lives.²³⁶ Yet, as Schmitt himself acknowledges,

²³³ Watkin, *supra.*, note 197, 688.

²³⁴ Schmitt, *supra.*, note 16, 510.

²³⁵ *Ibid.*

²³⁶ *Ibid.*, 509.

in modern conflict the combat zone is fluid, with clashes often taking place in civilian areas.²³⁷ It is increasingly difficult for civilians to distance themselves from hostilities, and so this is an insufficient basis for such a position.

Watkin laments the inequality of applying membership criteria to conventional armed forces and then applying a continuous combat function test to irregular armed forces.²³⁸ Members of armed forces who do not fulfil a continuous combat function – such as cooks or administrative personnel – may be targeted even when they are not directly participating in hostilities, whereas members of OAGs fulfilling the same function may not.²³⁹ He argues that “the law, and interpretations of that law, should not incorporate elements which inappropriately prejudice one party to a conflict.”²⁴⁰ Watkin contends that authors who suggest that “the combatant trades his right to life for the right to kill”²⁴¹ objectifies combatants and devalues their lives.²⁴² This is a solid point, yet the application of the membership criteria to OAGs in NIACs does not remedy this.

This is exemplified by consideration of the Palestinian Qassam Brigades, the military wing of Hamas. All members of the Qassam Brigades – be they teachers, doctors or any others who join the insurgency for any time, regardless of the frequency or scope of their participation – would be a legitimate target for the entirety of the conflict. This can also be extended to all those who support Hamas in whatever fashion.²⁴³ They would be legitimate targets whilst teaching, or eating dinner with their families. The issue of whether or not to directly attack these individuals whilst at home would be based on the principle of proportionality, not distinction. This clearly is not a favourable situation. Some authors have suggested that if we were to accept this

²³⁷ *Ibid.*, 510-511.

²³⁸ Watkin, *supra.*, note 197, 644.

²³⁹ *Ibid.*

²⁴⁰ *Ibid.*, 647.

²⁴¹ William Abresch, 'A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya', 16 *European Journal of International Law*, 740 (2005), 757.

²⁴² Watkin, *supra.*, note 197, 647.

²⁴³ Van Engeland, *supra.*, note 232, 109.

position, then the principle of equal application in IHL would mean that Israeli reservists may also be legitimate targets at all times.²⁴⁴

Schmitt has called for “gray areas” in direct participation to be “interpreted liberally” to find direct participation in hostilities in areas of doubt.²⁴⁵ He argues that this would prevent insurgents from using IHL as a weapon against state forces. Schmitt also calls for individuals who have opted into hostilities to remain valid targets until they have “unambiguously” opted out:

Once an individual has opted into the hostilities, he or she remains a valid military objective until ambiguously opting out. This may occur through extended non-participation or an affirmative act of withdrawal. Further, since the individual who directly participated did not enjoy any privilege to engage in hostilities, it reasonable that he or she assume the risk that the other side is unaware of such withdrawal.²⁴⁶

A classic example used when discussing direct participation is that of a truck driver delivering ammunition. A factory producing ammunition for use by a party to the conflict would be a legitimate target, but the delivery of the ammunition is unclear. The ICRC contends that delivery of ammunition to the front lines would constitute “an integral part of on-going combat operations and would therefore constitute direct participation in hostilities”²⁴⁷; yet a driver delivering ammunition to a port far away from the conflict zone would not be a legitimate target. What of an individual who drives the ammunition to a supply depot, where the OAG then picks up and uses at the front lines? This is a grey area, and if we were to follow Schmitt, we would interpret this as direct participation. This individual would, according to the membership approach, be a legitimate target for the entire duration of the conflict. He may be

²⁴⁴ Valentina Azarov, 'Who is a civilian in Gaza? The dangers of adopting a membership approach to "direct participation in hostilities"', *International Law Observer* (03 March 2009), *available at* <http://www.internationallawobserver.eu/2009/03/03/who-is-a-civilian-in-gaza-the-dangers-of-adopting-a-membership-approach-to-direct-participation-in-hostilities/>.

²⁴⁵ Schmitt, *supra.*, note 16, 509.

²⁴⁶ *Ibid.*, 510.

²⁴⁷ ICRC, 'Direct Participation in Hostilities: Questions and Answers' (June 2009), *available at* <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/direct-participation-ihl-faq-020609>.

targeted at home with his family, with the issue of proportionality rather than distinction determining whether he may be fired upon. How would he be able to opt out? Would he have to display a white flag outside of his house? To what extent would an individual have to stop participating to qualify as having withdrawn from hostilities? How can this be an interpretation “in light of the underlying purposes of the law” as Schmitt claims?

The evolution of modern conflict has complicated this dilemma further. The combination of technological advancement and the civilianisation of the modern military means that, for example, an individual who is providing real-time targeting intelligence in the U.S. to a field commander in Iraq for a precision strike is arguably participating far more directly in hostilities than the ammunition truck driver. The technological asymmetry between many advanced state militaries and the rest of the world has led to dynamic differences in the perception of direct participation in hostilities. If a civilian is involved in the maintenance or launch of an aircraft in hostile combat situations, it would not be difficult to argue that he or she is directly participating in hostilities. Yet if the aircraft is launched from thousands of miles away, the civilian may have little understanding of the actual conflict being fought. The civilian here is no less a direct participant in hostilities as the one in the midst of the combat zone, yet the perception is that the two cases are not equal. Due to this asymmetry of technological advantage, the civilian in the U.S. is unlikely to be targeted at home, and as McDonald notes: “the consequences that its widespread and growing civilianisation of the military has for the concept of direct participation have not yet become fully manifest: the chickens have not yet come home to roost.”²⁴⁸

As the execution of modern warfare comes more and more to rely upon the use of civilians, the division between those who are perceived to be simply supporting the war effort and those who are directly participating in hostilities becomes narrower and narrower.²⁴⁹ It may very well be the case that the individual is not aware of his direct participation in the hostilities, and is unaware that he may be lawfully targeted. This

²⁴⁸ Avril McDonald, *The Challenges to International Humanitarian Law and the Principles of Distinction and Protection from the Increased Participation of Civilians in Hostilities*, SPOTLIGHT ON ISSUES OF CONTEMPORARY CONCERN IN INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL CRIMINAL LAW, (The Hague: The Asser Institut, April 2004).

²⁴⁹ *Ibid.*, 23.

means that Schmitt's call for the individual to 'unambiguously withdraw' is unworkable. This reinforces the importance of the belligerent nexus requirement.

It is clear that a balance is required between the narrow approach, which places emphasis on the humanitarian side of IHL, and the liberal approach, which emphasises the military aspect. The foundations of the ICRC's IG are solid, but it is important to remember that the document is only guidance. What is needed is an international multilateral treaty that can incorporate elements of the IG, yet is appealing to states who did not ratify the Additional Protocols of 1977. Without state support, international law is worthless. The importance of clarity in regard to the principle of distinction can be seen when examining the conflict in eastern Ukraine. One may argue that the conflict exists in a kind of legal 'black hole', where it is unclear who the participants are or even what kind of conflict is taking place.

5. The Conflict in Ukraine: A Case Study

The on-going conflict in eastern Ukraine is an excellent example of what happens when there is uncertainty as to what law, if any, applies to a situation of armed conflict. It is my argument that it is essential that we are able to apply the laws of armed conflict to as many situations of violence as possible in order to protect lives. As previously stated, unprivileged belligerents have little incentive to comply with IHL, and therefore will do whatever it takes to secure victory. This often involves violations of IHL, notably the principle of distinction (as discussed earlier, it is in their interests to blend in with the civilian population in order to survive against technologically superior opponents).

We can see this in the conflict in eastern Ukraine. There is confusion over who exactly are the participants in the conflict, are they independent rebels or Russian proxies? Is the conflict between Ukraine and Russia or between Ukrainian government forces and rebel groups? Is this a civil war or an IAC? Whether the conflict is international or non-international in character will massively affect the status of the participants in the conflict, with differing standards to qualify as combatants or fighters.

The question of who is a legitimate target and who is a civilian becomes much harder to answer if we are not able to say with certainty what type of conflict is being fought.

5.1. The Classification of the Conflict in Eastern Ukraine

On 23 July 2014 the ICRC issued a statement declaring that the conflict in eastern Ukraine was non-international in character.²⁵⁰ Yet it may well be the case that the conflict is an IAC, or even that a situation of IAC and NIAC exists simultaneously. Determining whether the conflict has turned from a NIAC to an IAC depends upon whether it can be established that Russia is a party to the conflict, either directly through the presence of Russian armed forces in Ukrainian territory and their direct participation in hostilities, or indirectly through whether the armed opposition groups are controlled by Russia. This situation is less than clear, and there are numerous conflicting reports of the extent of Russian involvement in the conflict. Russia has repeatedly denied any involvement in Ukraine²⁵¹, whereas numerous reports and articles indicate regular participation of Russian forces in eastern Ukraine.²⁵²

²⁵⁰ ICRC, *Ukraine: ICRC Calls on all Sides to Respect International Humanitarian Law*, (Geneva/Kiev: ICRC, 23 July 2014), available at <https://www.icrc.org/eng/resources/documents/news-release/2014/07-23-ukraine-kiev-call-respect-ihl-repatriate-bodies-malaysian-airlines.htm> (archived, last accessed 30/06/2015).

²⁵¹ See, for example, Gabriela Baczynska, 'Russia says no proof it sent troops, arms to east Ukraine', *Reuters*, 21 January 2015, available at <http://www.reuters.com/article/2015/01/21/us-ukraine-crisis-lavrov-idUSKBN0KU12Y20150121>; Lisa Schlein, 'Evidence Grows of Russian Military Involvement in Ukraine', *Voice of America*, 1 June 2015, available at <http://www.voanews.com/content/growing-evidence-of-russian-military-involvement-in-ukraine/2803192.html>; Guardian Staff, 'Russia denies military vehicles entered Ukraine', *The Guardian*, 15 August 2014, available at <http://www.theguardian.com/world/2014/aug/15/russia-denies-ukraine-vehicles-military>; Karoun Demirjian, 'Putin denies Russian troops are in Ukraine, decrees certain deaths secret', *The Washington Post*, 28 May 2015, available at http://www.washingtonpost.com/world/putin-denies-russian-troops-are-in-ukraine-decrees-certain-deaths-secret/2015/05/28/9bb15092-0543-11e5-93f4-f24d4af7f97d_story.html.

²⁵² See, for example, Times of India Staff, 'Russian military sources say soldiers crossed Ukraine border 'by accident'', *The Times of India*, 26 August 2014, available at <http://timesofindia.indiatimes.com/World/Europe/Russian-military-sources-say-soldiers-crossed-Ukraine-border-by-accident/articleshow/40912541.cms>; Andrew Kramer & Michael Gordon, 'Ukraine Reports Russian Invasion on a New Front', *The New York Times*, 27 August 2014, available at http://www.nytimes.com/2014/08/28/world/europe/ukraine-russia-novoazovsk-crimea.html?_r=3; Adam Swain, 'Further claims of Russian troop deployments follow capture of soldiers in Donetsk', *The*

The Geneva Conventions have a very low threshold for a situation of IAC to be determined – the mere occurrence of *de facto* hostilities will be sufficient, there is no requirement for an IAC to have reached a certain intensity. As the ICRC Commentary to the Geneva Conventions highlights: “[i]t makes no difference how long the conflict lasts, or how much slaughter takes place. The respect due to the human person as such is not measured by the number of victims.”²⁵³ Therefore, the presence of Russian forces in Ukrainian territory²⁵⁴, or the capture of Russian personnel²⁵⁵, or Russian helicopters firing at Ukrainian border guards²⁵⁶ would be enough to be able to establish a state of IAC in eastern Ukraine, and therefore trigger the application of the Geneva Conventions and Additional Protocol I (the latter of which both Russia and the Ukraine are State Parties to).²⁵⁷

If, as Russia has asserted, the above claims are false, it may be the case that a NIAC may become internationalised if, as the Appeals Chamber in the *Tadić* case stated: “(i) another State intervenes in that conflict through its troops, or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other State.”²⁵⁸ Intervention may therefore be direct or indirect.

5.1.1. Direct Intervention

According to the judgement in *Prosecutor v. Naletilic and Martinovic*, establishing direct intervention in a NIAC requires determining (1) the actual presence of state forces in the conflict zone and (2) whether the foreign state’s armed forces are

Conversation, 27 August 2014, available at <https://theconversation.com/further-claims-of-russian-troop-deployments-follow-capture-of-soldiers-in-donetsk-30945>

²⁵³ Pictet, *supra.*, note 110, 20-21.

²⁵⁴ Kharviv Human Rights Protection Group, 'Nemtsov Report Says More Than 200 Russian Soldiers Killed in Ukraine War' (13 May 2015), available at <http://khp.org/en/index.php?id=1431480815>.

²⁵⁵ Carl Schreck, 'Video raises concerns over Ukraine's treatment of Russian prisoners', *The Guardian*, 20 May 2015, available at <http://www.theguardian.com/world/2015/may/20/ukraine-russia-pow-video-war-crimes>.

²⁵⁶ Swain, *supra.*, note 252.

²⁵⁷ ICRC, 'Treaties and States Parties to Such Treaties: Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977', available at https://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=470.

²⁵⁸ *Prosecutor v. Tadić*, IT-94-1-A, ICTY, 2 October 1995 para. 84.

in command of the NSAG.²⁵⁹ Establishing the presence of Russian forces raises some interesting issues in IHL. Allegations have been made that Russian forces entered Ukraine with their insignias and other identification removed,²⁶⁰ with some disguising themselves as members of the Donetsk People's Republic (DPR) (the pro-Russian separatist rebel group in Ukraine).²⁶¹ Russia has countered these claims by arguing that those individuals are either volunteers or active-duty soldiers on leave.²⁶² This is a very dubious argument, and it is important to note that a similar argument was raised in *Naletilic and Martinovic* and was rejected by the Trial Chamber, where it was said: "it is the Republic of Croatia that did in fact organise the sending of the vast majority of them, while attempting to conceal their presence by asking them, for example to replace their uniforms and insignia for those of the [armed opposition group]."²⁶³

Efforts to prove the existence of Russian forces in Ukraine by the Ukrainian government has raised an interesting paradox of IHL. On 16 May 2015 two Russian soldiers were captured by Ukrainian forces and were transported to Kiev.²⁶⁴ Footage of one of the servicemen lying in a hospital bed and talking to the camera was posted on the Facebook page of Ukrainian MP Anton Gerashchenko²⁶⁵ and later made its way to many media outlets.²⁶⁶ Criticism instantly emerged, with claims that Ukraine had violated the Geneva Conventions' ban on exposing POWs to public curiosity.²⁶⁷ However, this prohibition only comes into play if the conflict is international in character. In a NIAC, public curiosity on its own does not amount to a war crime – there must also be evidence of "outrages upon personal dignity" and "humiliating and

²⁵⁹ *Prosecutor v. Naletilic and Martinovic*, IT-98-34-T, 31 March 2003 para. 189.

²⁶⁰ See, for example, MacAskill, *supra.*, note 47; Damien Sharkov, 'Observers spot Russian army insignia in eastern Ukraine as tension rises', *Newsweek*, 04 June 2015, available at <http://europe.newsweek.com/observers-spot-russian-army-insignia-eastern-ukraine-tension-rises-328255>.

²⁶¹ Organization for Security and Co-operation in Europe (OSCE), *Statement by the Delegation of Ukraine at the 770th FSC plenary meeting*, FSC.DEL/194/14, (Hofburg: OSCE, 12 November 2014)

²⁶² Tsvetkova, *supra.*, note 50.

²⁶³ *Prosecutor v. Naletilic and Martinovic*, IT-98-34-T, 31 March 2003, para. 195.

²⁶⁴ Associated Press in Kiev, 'Two Russian soldiers captured near rebel-controlled Luhansk, says Ukraine', *The Guardian*, 18 May 2015, available at <http://www.theguardian.com/world/2015/may/18/two-russian-soldiers-captured-near-rebel-controlled-luhansk-says-ukraine>.

²⁶⁵ Anton Gerashchenko, 'Facebook Post of 18 May 2015' (18 May 2015), available at <https://www.facebook.com/anton.gerashchenko.7>.

²⁶⁶ Schreck, *supra.*, note 255.

²⁶⁷ *Ibid.*

degrading treatment.”²⁶⁸ If the footage has the desired effect of establishing that Ukraine is at war with Russia, then the Geneva Conventions would automatically be invoked and the posting of the video on Facebook would constitute a war crime.

In terms of the second criteria in *Naletilic and Martinovic*, one needs to establish that the Russian armed forces are in command of the DPR. This will be very difficult to determine. No parties have raised this claim, and evidence exists to suggest the opposite is in fact true, with the leadership of the DPR, whilst being pro-Russian, instead being Ukrainian members of the DPR, and in many cases replaced Russians.²⁶⁹ It is almost impossible therefore show that there is an IAC in Ukraine as a result of direct Russian intervention.

5.1.2. Indirect Intervention

The test here is one of ‘overall control’, as stated in the *Tadić* decision:

[C]ontrol by a State over subordinate armed forces or militias or paramilitary units may be of an overall character (and must comprise more than the mere provision of financial assistance or military equipment or training). ... The control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the Party to the conflict) has a role in organising, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group. Acts performed by the group or members thereof may be regarded as acts of de facto State organs regardless of any specific instruction by the controlling State concerning the commission of each of those acts.²⁷⁰

²⁶⁸ Third Geneva Convention, Article 3(1)(c).

²⁶⁹ Neil MacFarquhar & Michael Gordon, 'Ukraine Leader Says 'Huge Loads of Arms' Pour in From Russia', *The New York Times*, 28 August 2014, available at <http://www.nytimes.com/2014/08/29/world/europe/ukraine-conflict.html>; Tom Balmforth, 'A Guide to the Separatists of Eastern Ukraine', *Radio Free Europe/Radio Liberty*, 03 June 2014, available at <http://www.rferl.org/content/ukraine-separatists-whos-who/25408875.html>.

²⁷⁰ *Prosecutor v. Tadić (Trial Chamber)*, IT-94-1-T, ICTY, 10 August 1995, para. 137.

The application of this test is made more complicated by the fact that it must be shown that the State has not only “provided financial and training assistance, military equipment and operation support” but also “participated in the organisation, co-ordination or planning of military operations.”²⁷¹ Few contest whether Russia satisfies this first criterion, many weapons and supplies have been supplied by Russia to DPR forces²⁷², but establishing the latter criteria will be much more difficult.

The ICTY has, throughout its case law, developed several non-exhaustive indicators which may help determine whether a foreign state is ‘organising, co-ordinating or planning’ the military actions of the NSAG. The foreign state and the NSAG may share personnel²⁷³, may pay the wages of the NSAG²⁷⁴, and it may be that the military structure and rank system are similar, if not identical²⁷⁵ (although NSAGs may model their military structure on state military models with which they have no connection). Decisions may be coordinated by the foreign state²⁷⁶ or orders may be passed by the state to the NSAG directly.²⁷⁷ There may be shared interests or intent, such as the pursuit of the same goal²⁷⁸ or the foreign state may have ambitions as to the territory in which the armed conflict is being fought.²⁷⁹ Russia annexed Crimea in March 2014, and there are clear common interests shared by Russia and the pro-Russian DPR. The Nemtsov Report alleges that Russia has spent 53 billion roubles (1 billion USD) hiring mercenaries to support the ranks of separatists and providing and maintaining military hardware to the DPR.²⁸⁰

In terms of the other indicators, there is too much conflicting evidence to be able to determine whether Russia is exercising control over the DPR. The list of indicators developed by the ICTY are non-exhaustive, and not all must be found to prove control.

²⁷¹ *Prosecutor v. Naletilic and Martinovic*, IT-98-34-T, 31 March 2003, para. 198.

²⁷² Kharviv Human Rights Protection Group, *supra.*, note 254.

²⁷³ *Prosecutor v. Blaskic*, IT-95-14-T, ICTY, 3 March 2000, paras. 114-117.

²⁷⁴ *Prosecutor v. Blaskic*, IT-95-14-T, ICTY, 3 March 2000, para. 101.

²⁷⁵ *Prosecutor v. Tadić (Trial Judgement)*, IT-94-1-T, ICTY, 7 May 1997, para. 151.

²⁷⁶ *Prosecutor v. Blaskic*, IT-95-14-T, ICTY, 3 March 2000, para. 118.

²⁷⁷ *Prosecutor v. Tadić (Trial Judgement)*, IT-94-1-T, ICTY, 7 May 1997, para. 151; *Prosecutor v. Naletilic and Martinovic*, IT-98-34-T, 31 March 2003, para. 201.

²⁷⁸ *Prosecutor v. Naletilic and Martinovic*, IT-98-34-T, 31 March 2003, para. 200; *Prosecutor v. Blaskic*, IT-95-14-T, ICTY, 3 March 2000, paras. 108-110.

²⁷⁹ *Prosecutor v. Blaskic*, IT-95-14-T, ICTY, 3 March 2000, paras. 103-106.

²⁸⁰ Kharviv Human Rights Protection Group, *supra.*, note 254.

However, financial support and common interests cannot be enough on its own to establish control. The U.K. has provided training and support to the Ukrainian government armed forces²⁸¹ and shares similar interests (preventing Russia from gaining any more territory in Eastern Europe). Yet we cannot say that the U.K. is at war with Russia. We need more than just financial support and common interests. It may very well be that the other indicators are present, and that is exactly my point: it is almost impossible to say either way definitively whether Russia is a party to the conflict in eastern Ukraine.

5.2. Violations of the Principle of Distinction in Ukraine

If we cannot establish whether there is an IAC or NIAC taking place, determining who is a legitimate target becomes next to impossible. This is even more difficult in the fog of war, and as a result, we have seen numerous violations of the principle of distinction during the conflict in eastern Ukraine. Unguided Grad rockets are being launched by both sides into primarily civilian areas. The weapons are notoriously imprecise, and many civilians have been killed as a result of the use of these indiscriminate weapons.²⁸² Cluster Munitions have been used by both sides repeatedly, with at least 13 civilians killed in January and February 2015.²⁸³ After these munitions are fired, the container opens up, dispersing dozens or hundreds of submunitions, which explode indiscriminately over a large area. Those which do not explode become embedded in the ground, and may become *de facto* landmines.

Ukrainian soldiers were paraded through the streets of Donetsk by pro-Russian separatists in front of a large crowd who hurled insults and garbage alike at the captured

²⁸¹ Julian Borger & Richard Norton-Taylor, 'UK Military Training in Ukraine: Symbolic Move That Risks Russian Ire', *The Guardian*, 24 February 2015, available at <http://www.theguardian.com/politics/2015/feb/24/uk-military-training-in-ukraine-symbolic-move-that-risks-russian-ire>

²⁸² Human Rights Watch, 'Ukraine: Unguided Rockets Killing Civilians' (24 July 2014), available at <http://www.hrw.org/news/2014/07/24/ukraine-unguided-rockets-killing-civilians>.

²⁸³ Human Rights Watch, 'Ukraine: More Civilians Killed in Cluster Munition Attacks' (19 March 2015), available at <http://www.hrw.org/news/2015/03/19/ukraine-more-civilians-killed-cluster-munition-attacks>.

soldiers.²⁸⁴ Whether or not this amounts to a war crime is dependent on whether the conflict is categorised as an IAC or an NIAC.²⁸⁵ The shooting down of Malaysia Airlines Flight MH17 by a surface to air missile is clearly a war crime, being the targeting of a civilian aircraft resulting in the death of 298 civilians.²⁸⁶ Despite evidence to the contrary²⁸⁷, Russia and the pro-Russian separatists have denied any involvement²⁸⁸, and with no conclusive proof either way, it is impossible to hold anyone accountable. There is mounting evidence that anti-personnel landmines are being used by both sides to the conflict.²⁸⁹ Ukraine is a party to the 1997 Mine Ban Treaty²⁹⁰, whereas Russia is not. Again, the lack of clarity as to the nature of the conflict and the participants involved is putting civilian lives at risk.

These are just some examples of the violations of the principle of distinction in Ukraine. There are many others, and many other violations of other principles of IHL. It is not my contention that developing the law of armed conflict would make it easier to determine whether or not an IAC is taking place in eastern Ukraine. The issue here is not of the definition of the two forms of conflict, but of ambiguity in the factual evidence of state participation. What is important is that IHL is as clear as possible and may be applicable in as many situations as possible, so that even in cases where it is uncertain what type of conflict is being fought the principle of distinction is clear and easily applicable, and is therefore complied with, so that civilians are protected in times of war.

²⁸⁴ RFE/RL, 'Rebels Parade POWs as Kyiv Marks Independence Day', *Radio Free Europe/Radio Liberty*, 24 August 2014, available at <http://www.rferl.org/content/ukraine-donetsk-pows-parade-independence-day/26547822.html>

²⁸⁵ Carl Schreck, 'Donetsk POW March: When Is A Parade A War Crime?', see id. at, 25 August 2014, available at <http://www.rferl.org/content/ukraine-pow-march-war-crime/26548667.html>

²⁸⁶ BBC News, 'MH17 Malaysia plane crash in Ukraine: What we know' (9 September 2014), available at <http://www.bbc.co.uk/news/world-europe-28357880>.

²⁸⁷ Doug Stanglin, 'Ukraine: Intercepted calls pin MH17 shootdown on rebels', *USA Today*, 18 July 2014, available at <http://www.usatoday.com/story/news/world/2014/07/18/ukraine-malaysia-airline-security-service-intercepted-tapes-russian-rebels/12826269/>

²⁸⁸ Shaun Walker, 'MH17 crash: Russia and separatists deny mounting evidence of involvement', *The Guardian*, 9 July 2015, available at <http://www.theguardian.com/world/2015/jul/09/mh17-crash-one-year-on-blame-game-continues-over-who-shot-down-plane>

²⁸⁹ Human Rights Watch, 'Landmines in Ukraine: Technical Briefing Note' (6 April 2015), available at <http://www.hrw.org/news/2015/04/06/landmines-ukraine-technical-briefing-note>.

²⁹⁰ Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 2056 UNTS 241; 36 ILM 1507 (1997).

6. A New Protocol?

The principle of distinction in the law of armed conflict has developed from being a tactic of war to ensure stability following conquest²⁹¹ to one of the fundamental principles in a codified set of humanitarian ideals governing conduct in armed conflict. IHL has responded to and evolved alongside radical changes in the means and methods of warfare, such as advances in technology and guerrilla warfare, as demonstrated by the advancements made by the Additional Protocols of 1977. Yet while there have been treaties governing the use of certain weapons since, there have been no new multilateral treaties designed to regulate or react to the emergence of new types of combatants or conflicts fought today. The principle of distinction in IHL has been stuck in the version of reality understood by the drafters of the Additional Protocols in 1977. Several states (many of which have been regularly involved in major conflicts in the 20th and 21st centuries) have not ratified the Additional Protocols, and so the iteration of the principle of distinction in such conflicts is the one which was understood in 1949. Clearly, the drafters of the Geneva Conventions could not have anticipated the dramatic civilianisation of modern militaries, or autonomous weapons or digital warfare.

IHL should be applicable in every armed conflict fought worldwide. As such, any new multilateral treaty would need not only to be broad and flexible, but also must appeal to state interests. A balance must be struck between military necessity and humanity, in order that those states who did not ratify the Additional Protocols might consider ratifying this document, but without sacrificing the humanitarian core of the new additional protocol. This is a monumental task, and I will not be attempting to draft the full text of such a protocol. Instead, I will explain my proposals of what would need to be included in any multilateral treaty dealing with the principle of distinction in the context of modern conflict.

6.1. The Definition of Armed Conflict

²⁹¹ Tzu, *supra.*, note 55.

It is important to reaffirm the distinction between the definitions of armed conflict in IACs and NIACs. Placing the threshold for armed conflict in NIAC as higher than in IAC will appeal to states who wish to deal with minor uprisings as a domestic issue, and thus will not be limited in the methods they can use to suppress or control internal disturbances, and will also not legitimise the plight of rebel groups. The considerably lower threshold for IACs found in Common Article 2 to the Geneva Conventions therefore does not need altering. This provision contains a very broad notion of armed conflict, which was deliberately designed to as many situations of interstate conflict as possible, as if the conflict were to fall outside of the Geneva Conventions in 1949 it would be unregulated as there was no developed human rights law at the time. Whilst human rights law has developed considerably since that point, there is no reason for us to narrow and limit the scope of IACs.

Common Article 2 should be supported by the explanation of the threshold for armed conflict in IACs found in the ICRC's Commentary to the Additional Protocols.²⁹² Whilst the text for the definition of IACs virtually mirrors that of the Geneva Conventions and API, Article 1(4) of API should not be included. This is a massively dated provision aimed at very particular situations, and is one states will never willingly invoke. The intention was to broaden the applicability of IHL to wars of self-determination, but this will be best served by the strengthening of the law of NIAC instead of including a very particular form of a conflict not of an international character in the laws governing IACs.

In terms of NIACs, as I have previously argued, CA3 is overly imprecise and provides too much room for states to contend that a situation of armed conflict is not taking place within their territory. Whilst the ambiguity in the Article allowed for a more flexible idea of NIAC to emerge (as it was not limited to civil war as understood by the drafters of the Geneva Conventions)²⁹³ it is underused and, rather than being interpreted widely as the drafters intended, it is interpreted narrowly by states. Additional Protocol II also fails to provide a suitable alternative. The threshold is much

²⁹² Pictet, *supra.*, note 110, 20-21.

²⁹³ Cullen, *supra.*, note 65, 60.

higher in Article 1(1), and the conditions of responsible command, control over territory, sustained and concerted military operations, and the ability to implement the Protocol provide too much leeway for states to contend the non-applicability of the Protocol. Furthermore, these conditions are unrealistic standards for NSAGs in modern conflicts to attain, and result in many conflicts being uncovered by the Protocol.

Many states have not ratified APII, and modelling a new definition of armed conflict in NIAC on the Protocol is therefore undesirable, not least for its limited applicability but for its unpopularity with states. Therefore, a more effective model to use would be one which lowers the impossible threshold set by APII but is at the same time popular with states. The definition in *Tadić*²⁹⁴ meets both of these requirements. The definition is widely supported, as shown by its usage in the reports of independent experts, international commissions of enquiry, state manuals of IHL, as well as case law of the ICTR, the ICJ, the ICC, and the Special Court for Sierra Leone, and may have even found its way into customary international law following its incorporation into the Rome Statute of the ICC.²⁹⁵

Article 1 of our draft Additional Protocol would therefore read:

Article 1(1): This protocol applies to all situations of armed conflict of an international character arising between two or more High Contracting Parties, even if the state of war is not recognised by one of them, and to all situations of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties between governmental authorities and organised armed groups or between such groups within a State.

Article 1(2): An armed conflict exists whenever there is any resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State.

²⁹⁴ *Prosecutor v. Tadić*, IT-94-1-A (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), ICTY, 2 October 1995, para. 70

²⁹⁵ See *supra.*, notes 154 – 161.

Article 1(2)(a): “Protracted armed violence” refers to the intensity of the conflict and the organisation of the parties to the conflict.

This Article therefore avoids the issues of clarity in CA3, provides that an IAC may only be fought between two or more states, and that a NIAC may be fought between a state and a NSAG or between two or more NSAGs, in order to be as broad, concise and applicable in as many situations as possible. By using the definition and test for a situation of armed conflict in NIAC established by the widely supported *Tadić* decision and avoiding the contentious APII threshold, we appeal to States whilst at the same time making it far more difficult for states to deny the existence of NIACs. The four criteria have been removed, as they are unrealistic in modern conflict. This has been replaced by the test in *Tadić*, that of the intensity of the conflict and organisation of the parties. These two have not been developed in order to prevent a narrow interpretation of the criteria, and therefore preventing armed groups from deliberately organising themselves in a different manner from the criteria to gain civilian immunity. ‘Intensity’ and ‘organisation’ should be interpreted broadly so as to find armed conflicts in as many hostilities as possible.

6.2. The Classification of Combatants

Establishing a clear definition of combatants in the law of armed conflict is essential to guarantee the principle of distinction. Civilians will remain defined in the negative, that is, all those who are not lawful participants in hostilities will be immune from direct attack. The distinction between lawful participants in IACs and NIACs will also remain, and so ‘combatants’ properly named will only be found in IACs. Affording NSAGs the status of combatants in NIACs will legitimise internal disturbances and uprisings, and states will never support a protocol which takes this step. However, reform is needed in the definition of combatant and fighter in IACs and NIACs alike.

6.2.1. ‘Combatants’ properly understood – legitimate targets in IACs

Irregular armed groups in IACs who do not comply with the four criteria laid down in Article 4(a)(2) of the Third Geneva Convention will not gain civilian immunity. It would be a paradox to afford greater protection for those who fail to adhere to the laws of armed conflict than to those who comply with IHL at all times.²⁹⁶ This will therefore disincentivise deliberate violations of IHL to gain civilian protection, and will incentivise irregular armed groups in IACs to comply with the four criteria to gain POW status if they are captured.

Irregular armed groups in IACs must also belong to a party to the conflict. This was a controversial inclusion in the ICRC's IG on direct participation in hostilities, but the logic behind the principle was sound – it was the execution of the principle that was flawed. There must be at least a *de facto* relationship between the OAG and a party to the conflict in order for the irregular armed group to qualify as 'armed forces' in an IAC. This prevents vigilantism and independent irregular armed groups from participating without direction from the state parties to the conflict in an IAC. Including these groups in IACs would blur the principle of distinction and disincentivises civilians from rising up and participating in hostilities, therefore reducing civilian casualties in IACs. Criticisms of the IG revolved around the fact that regardless of whether or not members of the OAG are wearing uniforms, bearing weapons openly, and performing a combat function, they are to be regarded as civilians for the purposes of the IAC.

Anyone who is not a combatant is a civilian, and therefore if an armed group not belonging to a party to the conflict cannot be considered combatants, then under the law of IAC they would be considered civilians. This is not to say that they gain civilian immunity, however. If an organised group not under the control of a state engages in protracted armed violence against a state or another armed group, then a situation of NIAC emerges. The IG attempted to use principles of NIACs in IAC, yet this was an unnecessary over complication. Two separate conflicts, one international in character, the other non-international in character, may take place simultaneously.

²⁹⁶ Melzer, *supra.*, note 164, 22.

6.2.2. 'Combatants' by any other name – legitimate targets in NIACs

Members of NSAGs cannot be regarded as civilians who are directly participating in hostilities. This would severely undermine and devalue the concept of a civilian, as this approach would create parties to NIACs whose entire armed forces would be regarded as civilians. However, we cannot afford them the status of combatants proper – they will not be afforded the protection of POW status upon capture, and they will be liable for prosecution by the state in which the conflict took place upon cessation of hostilities.

Members of OAGs will be legitimate targets in NIACs provided they satisfy the continuous combat function detailed in the ICRC's IG on direct participation in hostilities. Whilst this appears to be a functional approach to the question of legitimate targets, in the same way that membership of the armed forces in IACs requires some form of act (such as conscription or signing a contract), so too does actively joining the fighting wing of an OAG bring with it membership. This therefore means that any individual who has a continuous combat function within an OAG will continue to be a legitimate target of attack regardless of whether he or she is actively participating in a combat operation at the time.

The OAG must be sufficiently organised as per the *Tadić* test, but must also comply with IHL as a whole in order to qualify as an OAG. The strict requirements of APII are unrealistic, and so will not be used. In order to determine whether or not a group is sufficiently organised, a non-exhaustive list of indicators will be included, akin to those found in the *Limaj* decision²⁹⁷, but it must be stressed that this is not finite and not all indicators need be present to determine organisation, in order to be flexible as to new emerging combatants.

6.3. Direct Participation in Hostilities

²⁹⁷ *Prosecutor v. Limaj et al. (Trial Judgement)*, IT-03-66-T, ICTY, 30 November 2005, para. 90.

The ICRC's IG on direct participation in hostilities is a very important document, but it is not without flaws. It is also non-binding, and so it is essential that any new Protocol incorporate the best elements of the IG and improve upon the areas which were unsatisfactory.

Civilians will be protected from direct attack at all times during armed conflict, unless and for such time as they directly participate in hostilities. The three cumulative criteria laid down by the ICRC will be retained for a specific act to constitute direct participation in hostilities: (1) it "must be likely to adversely affect the military operations or ... capacity of a party to an armed conflict or ... inflict death, injury or destruction..."; (2) there must be a direct causal link between the specific act and the expected harm; and (3) there must be a belligerent nexus between the specific act and the threshold of harm.²⁹⁸

The criteria remain relatively unchanged from the IG, but the direct causation criterion merits some alteration. War-sustaining acts such as food production or propaganda will not be sufficiently direct as to constitute direct participation in hostilities. The issue of IED's is a major criticism of the direct causation requirement²⁹⁹, but to go so far as to make "bomb-making personnel and materials" legitimate targets would set a dangerous precedent for all civilians who manufacture weapons and armaments. However, a large portion of states consider those who create IEDs as directly participating in hostilities.³⁰⁰ What will be understood according to this new protocol is that weapons manufacture is not direct participation in hostilities, but those individuals who manufacture IEDs and other clandestine weapons (such as suicide jackets) who assist in the planning or execution of operations involving such weapons (as is often the case)³⁰¹ will be fulfilling a continuous combat function and therefore would be legitimate targets of attack.

6.3.1. The Revolving Door Dilemma

²⁹⁸ Melzer, *supra.*, note 164, 16, para. V.

²⁹⁹ See Schmitt, *supra.*, note 179, 731; Watkin, *supra.*, note 197, 658.

³⁰⁰ Schmitt, *supra.*, note 179, 731.

³⁰¹ Flynn, *supra.*, note 217; Swanson, *supra.*, note 218, 4-7.

The temporal nature of direct participation in hostilities is an area which needs refining. This element of the IG is incredibly contentious among academics, and a lot of the concerns need to be addressed in order to get state support for the additional protocol. “For such time” refers to both preparatory measures and the deployment to and the return from the location of the execution of the act.³⁰²

The individual who participates in hostilities and then returns to his normal life regains his protection from direct attack until he directly participates in hostilities once more. As the Israeli Supreme Court stated: “A civilian taking part in hostilities loses the protection from attack ‘for such time’ as he is taking part in those hostilities. If ‘such time’ has passed – the protection granted to the civilian returns.”³⁰³ However, the individual cannot pass through the revolving door indefinitely. Regular direct participation will equate to a continuous combatant function, and the individual will be regarded as a member of the OAG to which the specific act is intended be in the name of.

The open-ended nature of this determination has been subject to criticism, with many calling for a membership-approach similar to that used to determine members of the regular armed forces. But we cannot argue that civilians who directly participate in hostilities become members of the armed forces of the State or of armed groups, this is clearly absurd. Nor are they members of a *levee en masse*. There will be no magic number of times an individual can travel through the revolving doors, as this number would be arbitrary. The principle needs to retain a level of flexibility in order to respond to potential future evolutions in the conduct of warfare.

It may well be the case that the intervals between the individual’s participatory acts are in reality preparation for the next act of direct participation in hostilities. If this is the case, then the individual has a continuous combat function, and will remain a legitimate target for the duration of the hostilities. When the individual ceases participation, there is no longer any military necessity or advantage gained from directly

³⁰² Melzer, *supra.*, note 164, 65.

³⁰³ *The Public Committee against Torture in Israel v. Israel*, HCJ 769/02, Judgement (2005), para. 38.

targeting the civilian. This can be very hard to establish in a military context, particularly during the fog of war. A balance is therefore required.

A lot of criticism and analysis of the IG focuses on the number of times an individual can go through the revolving door. It is my assertion that this is the wrong thing to be focusing upon, and will not yield a satisfactory answer. Instead, the focus should be placed on determining exactly when the participation stops. If it can be shown that there has been a sufficient act of disengagement, or that there has been a sufficient amount of time since the individual last participated and is therefore not in the middle of continuously participating, then the individual regains his civilian immunity. From a practical standpoint, there is no visible difference between the gaps between an individual's repeated participation in hostilities and the end of another individual's one-time participation. The difference only becomes apparent after the fact, when the individual either does or does not participate again. For the purposes of criminal punishment, retroactive examination may be appropriate, but for the purposes of determining whether an individual may be targeted during the fog of war, we cannot 'wait and see' what happens next.

It is important to strike the balance between military necessity and humanity, and appeal to state interests whilst retaining the core principles of IHL. Earlier I rejected Schmitt's suggestion that an individual who directly participates in hostilities be obliged to actively withdraw from the conflict in order to regain his civilian immunity, either from a direct notification of his intent to withdraw or through extended non-participation.³⁰⁴ While I personally disagree with this idea, I feel that a version of this may work to achieve this balance between military necessity and humanity. Compromises must be made if states are to accept any proposals for reform. An individual who participates in hostilities cannot rely on the ambiguity of his future intent as to repeat participation. An approach which disincentivises direct participation is one that would be favourable to states, and would protect civilian lives by distancing them from the conflict (not by proximity, but through participation).

³⁰⁴ Schmitt, *supra.*, note 16, 510.

A civilian therefore is protected from attack unless and for such time he or she directly participates in hostilities. Once the individual ceases participation, he or she recovers their civilian immunity. However, in order to distinguish between actual cessation of participation and mere gaps between future acts, the individual must actively withdraw from the conflict, or there must be an extended period of non-participation. Reasonable steps must be taken to show that the individual is no longer participating in hostilities, thereby incentivising non-participation. At the same time, reasonable steps must be taken by the attacker to determine whether the individual is a lawful target. While it may not always be clear whether an individual is in the process of non-participating or is preparing for another act, if the attacking party has taken reasonable steps to ascertain whether the individual is a lawful target or not, an attack on the individual may be wrongful, but not criminal. I believe that this approach retains the flexibility necessary to adapt to the ever evolving nature of modern conflict, but allows a careful balance of military necessity and humanity.

7. Conclusion

Throughout this thesis, I have demonstrated the need for IHL's evolution. The increased civilianisation of the military, technological advances, asymmetric warfare and an increase in civilian participation in hostilities have placed civilians in the line of fire, with civilians being the main victims of armed conflict. IHL has responded to shifts in the conduct of hostilities throughout history, yet has not done so for the development of warfare since 1977.

I believe that my proposals for reform strike a decent balance between military necessity and humanity, between my own humanitarian ideals and the interests of states. Clarity in the application of IHL is essential. The vast majority of conflicts fought today are non-international in character; therefore we need to have a clear definition of what constitutes an NIAC that is flexible enough to include these new types of wars. Laws governing the conduct of hostilities are useless if they cannot be applied to the majority of conflicts fought today.

Convincing states to get on board with a new additional protocol will be a huge challenge, particularly with those who did not ratify API or APII. For countries such as the U.S.A., who did not ratify the Additional Protocols, clarity in the area of direct participation in hostilities is essential, particularly when one considers the vast civilianisation of their military. The U.S.A. is able to fire at a target from thousands of miles away with relative impunity, and therefore the issue of whether a civilian who provides targeting information essential for a drone strike is directly participating in hostilities is unimportant, as there is very little likelihood that they could be targeted anyway. However, this situation will undoubtedly change, and therefore the U.S.A. will be very much affected by the provisions in this proposed additional protocol.

The participants in modern conflict are also vastly different to those imagined by the drafters of the Additional Protocols, ranging from transnational terrorist groups, mercenaries, and even civilians providing intelligence for remote drone strikes thousands of miles away. In order for the principle of distinction to be upheld, it is essential that we are able to define who is a legitimate target and who is not. The concepts of civilian and combatant have become more blurred as warfare evolves, and therefore the desired approach is not to blur it further by introducing a third category of combatants, but instead to clarify the concepts of civilians who directly participate in hostilities and the role of OAGs in NIACs. I believe that my proposals go some way to help in this regard.

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