

## ESSAY

REGULATING THE IRREGULAR:  
INTERNATIONAL HUMANITARIAN LAW AND THE QUESTION OF  
CIVILIAN PARTICIPATION IN ARMED CONFLICTS*Emily Crawford\**

## ABSTRACT

*In the more than thirty years that have passed since the adoption of the Additional Protocols to the Geneva Conventions of 1949, the Geneva Conventions have not been revisited to evaluate whether they still effectively regulate their subject matter. Indeed, even if the Geneva Conventions were debated for revision, it seems highly unlikely that such revision would actually go forward. There are so many parties with a stake in the conduct of armed conflict that it is doubtful that any kind of consensus could be reached. A graphic example of the difficulties of achieving consensus could be seen when the Expert Process convened to discuss the concept of Direct Participation in Hostilities. Disagreements over the final text, known as the Interpretive Guidance on Direct Participation in Hostilities, resulted in almost one-third of the fifty experts involved withdrawing their names from the document.*

*This paper will review the history of international humanitarian law and regulation of irregular participation in armed conflict as a case study to demonstrate the increasingly difficult task of achieving international consensus on the rule of law during armed conflict. From the first provisions in the Hague Regulations regarding levée en masse, to the Geneva Conventions and the Additional Protocols, this paper will look at how non-conventional combatancy has been regulated, and examine the debates surrounding the expansion of the legal category of “combatant.” This paper will culminate in an analysis of the International Committee of the Red Cross (ICRC) Expert Process on Direct Participation in Hostilities, finding both the final Interpretive Guidance, and the controversy leading up to and surrounding its publication, are demonstrative of the obvious stumbling blocks facing any new treaties regarding participation in armed conflict.*

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## I. INTRODUCTION

August 2009 marked the sixtieth anniversary of the adoption of the Geneva Conventions.<sup>1</sup> News organizations around the world ran segments on the anniversary, invariably asking international lawyers whether they considered the Geneva Conventions to continue to be relevant in the twenty-

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<sup>1</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3314, 75 U.N.T.S. 31 [hereinafter Geneva Convention I or GCI]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II or GCII]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III, GCIII, or the POW Convention]; and Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV, GCIV, or the Civilians Convention].

first century.<sup>2</sup> The common refrain from journalists was that factors such as changes in weaponry, the rise of terrorist groups, the increasing use of corporations to help fight wars, and the emergence of so-called ‘asymmetric warfare’ were beyond the scope of the Geneva Conventions, and were in danger of rendering that instrument, if not obsolete, then certainly outmoded. The common response of most international lawyers and commentators was in the affirmative – the Geneva Conventions were still as relevant today as they were in 1949.<sup>3</sup>

However, less than twenty years after the adoption of the Geneva Conventions, it was already evident that the Conventions were failing to adequately address certain types of armed conflict.<sup>4</sup> This realization was one of the driving factors that lead to the drafting and adoption of the Additional

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<sup>2</sup> *The Geneva Conventions at 60: Unleashing the Laws of War*, THE ECONOMIST, Aug. 13, 2009, <http://www.economist.com/node/14213993>; Simon Hooper, *Geneva Conventions Still Relevant but Better Compliance Needed*, CNN, Aug. 12, 2009, [http://articles.cnn.com/2009-08-11/world/geneva.conventions.anniversary\\_1\\_fourth-convention-prisoners-icrc?\\_s=PM:WORLD](http://articles.cnn.com/2009-08-11/world/geneva.conventions.anniversary_1_fourth-convention-prisoners-icrc?_s=PM:WORLD); *ICRC Calls for Greater Compliance with Geneva Conventions*, VOICE OF AMERICA, Aug. 11, 2009, <http://www.voanews.com/english/news/a-13-2009-08-11-voa46-68806362.html>; Stephanie Nebhay, *Guantanamo Conditions Improve Under Scrutiny: ICRC*, REUTERS, Aug. 11, 2009, <http://www.reuters.com/article/2009/08/11/us-aid-cross-guantanamo-idUSTRE57A45Z20090811>; *Renewing the Conventions*, INDIAN EXPRESS, Aug. 13, 2009, <http://www.indianexpress.com/news/renewing-the-conventions/501507/>; *Reprieve mark Geneva Convention anniversary with call to defend human rights*, MORNING STAR UK, Aug. 10, 2009, <http://www.morningstaronline.co.uk/news/content/view/full/79131>; Andrew Wander, *Geneva Conventions Turn 60*, AL JAZEERA, Aug. 12, 2009, <http://english.aljazeera.net/news/europe/2009/08/200981212154828506.html>; Chris Laidlaw, *Sunday Morning: Ideas for 9 August 2009*, (Radio New Zealand National radio broadcast Aug. 9, 2009), <http://www.radionz.co.nz/national/programmes/sunday/20090809>.

<sup>3</sup> See generally Nicole Pope, *Geneva Conventions: More Needed Than Ever*, TODAY'S ZAMAN, Aug. 14, 2009, <http://www.todayszaman.com/columnist-183914-geneva-conventions-more-needed-than-ever.html>; Kenneth Roth, *Geneva Conventions Still Hold Up*, HUMAN RIGHTS WATCH, Dec. 30, 2009, <http://www.hrw.org/en/news/2009/12/30/geneva-conventions-still-hold-kenneth-roth>; Nick Young, *Don't Dismiss the Geneva Conventions*, THE GUARDIAN, Aug. 12, 2009, <http://www.guardian.co.uk/commentisfree/libertycentral/2009/aug/12/geneva-conventions-red-cross>; *The World Today* (ABC Radio Broadcast on Aug. 12, 2009), <http://www.abc.net.au/worldtoday/content/2009/s2653497.htm>.

<sup>4</sup> See David Burwell, *Civilian Protection in Modern Warfare: A Critical Analysis of the Geneva Civilian Convention of 1949*, 14 VA. J. INT'L L. 123, 129 (1973); Rahmatullah Khan, *Guerrilla Warfare and International Law*, 9(2) INT'L STUD. 101, 103 (1967); Claude Pilloud, *The Geneva Conventions – An Important Anniversary 1949-1969: Present Position and Prospects*, 9 INT'L REV. RED CROSS 399, 408-09 (1969); Alfred Rubin, *The Status of Rebels Under the Geneva Conventions of 1949*, 21 INT'L & COMP. L.Q. 472, 472 (1972); Delbert Smith, *The Geneva Prisoner of War Convention: An Appraisal*, 42 N.Y.U. L. REV. 880 (1967); see also GEOFFREY BEST, *WAR AND LAW SINCE 1945*, at 207-32 (1994) (critiquing the Conventions in the years following their adoption).

Protocol in 1977.<sup>5</sup> Since then, considerable advances have been made in a number of other international humanitarian law arenas, such as the creation of the International Criminal Court, as well as the *ad hoc* criminal tribunals and courts for Rwanda, the Former Yugoslavia, Lebanon, Cambodia, East Timor and Sierra Leone. Numerous weapons treaties have been adopted, and there is a growing awareness of the importance of international intervention in situations where grave human rights and humanitarian law abuses are taking place. The laws relating to the means of hostilities, as well as those relating to the mechanisms for enforcement and accountability, have kept pace with technological and geo-political developments. However, in the more than thirty years that have passed since the adoption of the Protocols, there has been no similar revisiting of the Geneva Conventions to see whether they still effectively regulate their subject-matter.

Indeed, even if the Geneva Conventions were debated for revision, it seems highly unlikely that such revision would go ahead. There are so many parties with a stake in the conduct of armed conflict that it is doubtful that any kind of consensus could be reached. A graphic example of the difficulties of achieving consensus could be seen when the Expert Process convened to discuss the concept of Direct Participation in Hostilities. Disagreements over the final text, known as the “Interpretive Guidance on Direct Participation in Hostilities”, resulted in almost one-third of the fifty experts involved withdrawing their names from the document.<sup>6</sup>

This disagreement merely reflects a noticeable trend when one looks at the ongoing attempts to expand the Geneva laws; while States have been relatively open to developing and updating Hague law on the means and methods of conflict, equivalent moves to update the laws relating to participants has routinely encountered reluctance, if not outright resistance.<sup>7</sup>

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<sup>5</sup> See INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at xix-xxxi, (Yves Sandoz et al. eds., 1987) [hereinafter AP COMMENTARY]; see also Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflict, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II].

<sup>6</sup> See Michael Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT’L. SEC. J. 5, 6 (2010).

<sup>7</sup> See, for instance, the response of States to the inclusion of non-international armed conflicts in the Geneva Conventions of 1949 (recounted in II-A FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, at 241-42, 429-30 (1950) [hereinafter GENEVA CONVENTIONS OFFICIAL RECORDS]) and to the inclusion of wars of national liberation as an international armed conflict in 1977 (recounted in the Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian

As more States have emerged and joined the international community, more States have asserted the right of State sovereignty and non-interference in internal affairs; achieving even a semblance of consensus has subsequently become exponentially difficult. The trend has thus been to either adopt generalized treaties that provide some basic rules (such as Protocol II) or else adopt a treaty so specific as to allow considerable “wobble room” for those States to circumvent the existing restrictions (such as the Cluster Munitions treaty).<sup>8</sup>

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

## II. THE HISTORY OF THE LEGAL REGULATION OF CIVILIAN PARTICIPATION IN HOSTILITIES

### A. *The Lieber Code, the Brussels Declaration, and the Beginnings of Laws relating to Civilian Participation in Armed Conflict*

The earliest modern laws of war with regards to civilian participation in armed conflict were largely shaped by the European experiences with land

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Law Applicable in Armed Conflicts, Geneva, III, CDDH/III/258 Add 1, CDDH/III/209, (1974-1977) [hereinafter Additional Protocols Official Records].

<sup>8</sup> For instance, in Article 2(2) of the Cluster Munitions Convention, certain cluster munitions are exempt from the prohibition on the use, development, acquisition, stockpiling and transfer of cluster munitions, namely:

munition that, in order to avoid indiscriminate area effects and the risks posed by unexploded submunitions, has all of the following characteristics: (i) Each munition contains fewer than ten explosive submunitions; (ii) Each explosive submunition weighs more than four kilograms; (iii) Each explosive submunition is designed to detect and engage a single target object; (iv) Each explosive submunition is equipped with an electronic self destruction mechanism; (v) Each explosive submunition is equipped with an electronic self-deactivating feature.

Convention on Cluster Munitions, 48 I.L.M. 357 (2009).

warfare during the nineteenth century. Resistance warfare carried out by civilians was considered illegal; partisan fighters were essentially bandits who were not entitled to any form of protection or recognition under the laws and customs of war at that time.<sup>9</sup> In his 1836 text, *Elements of International Law*, American jurist Henry Wheaton commented on the legal position of resistance warfare remaining mindful of State practice in Europe following Napoleon's advances on Russia and Spain:

The usage of nations has [legalized] such acts of hostility only as are committed by those who are authorised by the express or implied command of the State. Such as regularly commissioned naval and military forces of the nation and all others called in its defence, or spontaneously defending themselves in case of urgent necessity, without any express authority for that purpose . . . hence it is that in land wars, irregular bands of marauders are liable to be treated as lawless bandits, not entitled to the protection of the mitigated usages of war as practiced by civilised nations.<sup>10</sup>

When the first codified laws of war were drafted – the U.S. Lieber Code<sup>11</sup> – the accepted position on resistance warfare was reiterated: Articles 81-83 affirmed that only members of the regular army were legitimate combatants and were entitled to all protections of combatant status such as prisoner-of-war rights on capture. These articles also affirmed that POW rights did not extend to irregular fighters – persons not incorporated into the armed forces proper – and that scouts or individual soldiers caught wearing civilian clothing were subject to the death penalty if captured.

The core of these provisions was the enduring belief, repeated in later instruments, that civilians taking direct part in hostilities were fundamentally disruptive for all parties; these persons endangered both civilian and

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<sup>9</sup> See MORITZ BUSCH, *BISMARCK IN THE FRANCO-GERMAN WAR 1870-1871*, at 7 (Scribners ed., 1879) (detailing how during the Franco-Prussian War of 1870-1871, the German practice was to summarily execute any foreign volunteers serving in the French forces. When 13,000 riflemen in the Garibaldi corps were captured, Bismarck stated, “13,000 Franch-tireurs, who are not even Frenchmen, have been made prisoners - why on earth were they not shot?”). See generally Walter Laqueur, *The Origins of Guerrilla Doctrine*, 10 J. CONT. HIST. 341, 357-58 (1975). Franch-tireurs – translated as ‘free shooters’ – were unofficial groups of riflemen who operated throughout German occupied territory during the 1870 war.

<sup>10</sup> HENRY WHEATON, *ELEMENTS OF INTERNATIONAL LAW* 473 (Richard H. Dana, Jr. ed., 8th ed. 1866).

<sup>11</sup> *INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD* (Government Printing Office 1899) (1863), reprinted in *THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS, AND OTHER DOCUMENTS* 3-23 (Dietrich Schindler & Jiri Toman eds., 4th ed. 1988) [hereinafter *LIEBER CODE*].

combatant by blurring the distinction between the two. Belligerent forces would be unable to distinguish between civilian and combatant if the custom of wearing of uniforms and carrying arms openly was not respected. As argued by Fyodor Fyodorich von Martens, the Russian delegate at the Hague Conference of 1899<sup>12</sup> and “father” of the Martens Clause, civilian participation in armed conflict should not be sanctioned or encouraged:

It is not hard to stir the people up to oppose the enemy, but it is not easy to direct its aroused forces and to oblige it to subordinate itself to the orders of the government. In the majority of cases people's wars lead to complete anarchy, which is equally undesirable for the state which is attacked and the attacker.<sup>13</sup>

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

[T]he population of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had the time to organise themselves in accordance with Article 9, shall be regarded as belligerents if they respect the laws and customs of war.<sup>15</sup>

The Brussels rules reinforced the requirement that the *levée* may only be raised “on the approach” of the enemy – that is, in territory that is not yet occupied. Thus, international recognition and protection were still denied to civilians taking direct part in hostilities in the context of resistance warfare.

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<sup>12</sup> See Vladimir Pustogarov, *Fyodor Fyodorovich Martens (1845-1909): A Humanist of Modern Times*, 312 INT'L REV. RED CROSS 300, 307 (1996).

<sup>13</sup> FYODOR FYODOROVICH VON MARTENS, CONTEMPORARY INTERNATIONAL LAW 523 (1896).

<sup>14</sup> See LIEBER CODE, *supra* note 11, at 21.

<sup>15</sup> See Project of an International Declaration Concerning the Laws and Customs of War, art. 10, Aug. 27, 1874, available at <http://www.icrc.org/ihl.nsf/FULL/135?OpenDocument>. See also INST. OF INT'L LAW, THE OXFORD MANUAL OF THE LAWS OF WAR ON LAND (1880), <http://www.icrc.org/ihl.nsf/FULL/140?OpenDocument> (discussing a *levée en masse* in art. 2(4)).

In the end, not all governments at the Conference were willing to accept the declaration as a binding convention, and the Conference closed without adopting a binding instrument.<sup>16</sup> Despite this result, the Brussels Document was an important starting point for a number of processes that would eventually lead to the 1899 and 1907 Hague Regulations.<sup>17</sup>

### B. *The Hague Regulations of 1899 and 1907*

The Hague Regulations of 1899 and 1907 primarily deal with rules regarding the means and methods of armed conflict, although they also include some provisions regarding legitimate combatancy. During the 1899 Hague Peace Conference, rules regarding the conduct of hostilities on land were adopted.<sup>18</sup> Lawful combatant status was provided for the regular army as well as for militia and volunteer corps. These provisions were uncontroversial and reflected accepted State practice.

However, a diplomatic stalemate emerged at the Conference when the time came to discuss *levée en masse* and other forms of resistance warfare. The British delegate, General Sir John Ardagh, proposed adding a new provision into the Regulations:

Nothing in this chapter is to be considered as tending to modify or suppress the right which a population of an invaded country possesses of fulfilling its duty of offering the most energetic national resistance to the invaders by every means in its power.<sup>19</sup>

As with the Brussels Conference, delegates were divided over whether those who used force to resist an invading army could be considered as legitimate combatants or whether they were to be treated as criminals.<sup>20</sup> The larger military powers of Europe argued that such people were *francs-tireurs* and should be subject to summary execution.<sup>21</sup> The smaller European States argued that lawful combatant status should be granted to resistance

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<sup>16</sup> See generally JAMES MOLONY SPAIGHT & FRANCIS ACLAND, WAR RIGHTS ON LAND 51-53 (1911), <http://ia600308.us.archive.org/22/items/warrightsland00spai/warrightsland00spai.pdf> (describing such countries as Spain, Belgium, Holland and Switzerland as the main advocates for extending belligerent rights to irregular fighters, and that because they were without large standing armies and historically the subject of frequent incursions from neighboring European nations, they were reluctant to limit the scope of permissible civilian participation in armed conflict).

<sup>17</sup> See REPORT TO THE HAGUE CONFERENCES OF 1899 AND 1907, at 137 (James Scott ed., 1917) (showing that The Brussels Declaration was used as the reference paper from which discussions originated during the 1899 Diplomatic Conference).

<sup>18</sup> Hague Convention with Respect to the Laws and Customs of War on Land (Hague II), July 29, 1899, 32 Stat. 1803 (entered into force Sept. 4, 1900).

<sup>19</sup> REPORT TO THE HAGUE CONFERENCES, *supra* note 17, at 54.

<sup>20</sup> See *id.* at 139-42.

<sup>21</sup> *Id.* at 142.



fighters.<sup>22</sup> The impasse was overcome when the Conference agreed to essentially “split” the issue.<sup>23</sup> Persons participating in a *levée en masse* could be considered legitimate only if the *levée* took place within strict parameters:

Art. 2. The population of a territory which has not been occupied who, on the enemy's approach, spontaneously take up arms to resist the invading troops without having time to organize themselves in accordance with Article 1, shall be regarded as belligerent, if they respect the laws and customs of war.<sup>24</sup>

Persons participating in ongoing partisan or resistance war in occupied territory were *not* to be granted combatant status, but were, instead, to be treated according to “certain minimum fundamental standards of behaviour, as understood by considerations of ‘humanity’ and ‘public conscience.’”<sup>25</sup>

When the Hague Conference reconvened in 1907, *levée en masse* was again included in the revised Hague Regulations. However, in this iteration, Article 2 of Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, added the additional requirement that:

The inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with Article 1, shall be regarded as belligerents *if they carry arms openly* and if they respect the laws and customs of war.<sup>26</sup>

This new requirement of the open carrying of arms was a further and final narrowing of the criteria for a *levée en masse*.<sup>27</sup> However, as in 1899, resistance and partisan war was not included in the categories of lawful combatant.

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<sup>22</sup> *Id.* at 141.

<sup>23</sup> *Id.*

<sup>24</sup> SCHINDLER & TOMAN, *supra* note 11, at 66.

<sup>25</sup> See Paolo Benvenuti, *La Clausola Martens e la Tradizione Classica del Diritto Naturale nella Codificazione del Diritto dei Conflitti Armati*, in SCRITTI DEGLI ALLIEVI IN ONORE DI GIUSEPPE BARILE (Cedam, Padova, 1995); Antonio Cassese, *The Martens Clause: Half a Loaf or Simply Pie in the Sky?*, 11 EUR. J. INT'L L. 187 (2000); Theodor Meron, *The Martens Clause, Principles of Humanity, and the Dictates of Public Conscience*, 94 AM. J. INT'L L. 78 (2000); Rupert Ticehurst, *The Martens Clause and the Laws of Armed Conflict*, 317 INT'L REV. RED CROSS 125 (1997).

<sup>26</sup> Hague Convention IV Respecting the Laws and Customs of War on Land 1907, 205 C.T.S. 227 (emphasis added); see also 1 THE PROCEEDINGS OF THE HAGUE PEACE CONFERENCE: THE CONFERENCE OF 1907, at 623 (James Scott ed., 1920).

<sup>27</sup> See REPORT TO THE HAGUE CONFERENCES, *supra* note 17, at 522, 528-29.

### C. *The Geneva Conventions of 1949*

Following the Second World War, the laws of armed conflict were revisited and reassessed.<sup>28</sup> Again, debate centred on questions of who may legitimately participate in armed conflict; namely, questions of when civilians were allowed to legitimately participate in armed conflict. There was little controversy over including *levée en masse* in the category of legitimate combatant. Reaffirming the Hague Regulations, and utilizing the formula laid down in the 1907 Regulations, the Geneva Conventions included *levée en masse* in Article 13(6) of Convention I, Article 13(6) of Convention II, and Article 4(A)(6) of Convention III.<sup>29</sup>

However, the experience and treatment of partisan and resistance fighters in Occupied Europe again put the issue on the agenda for the 1949 Diplomatic Conference.<sup>30</sup> During the War, captured partisans and resistance fighters operating in Nazi-held Europe were routinely denied any sort of legal protection or recognition, both internationally and domestically. They were either summarily executed or shipped to concentration camps.<sup>31</sup> State practice from Allied States demonstrated similar attitudes. When Winston

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<sup>28</sup> Convention Relative to the Treatment of Prisoners of War, June 19, 1931, 118 L.N.T.S. 343 (describing how *levée en masse* was affirmed in the 1929 Geneva Convention on Prisoners of War by way of reference to the Hague Regulations (The 1929 Convention was replaced by the 1949 Conventions)).

<sup>29</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135; *see also* COMMENTARY TO THE THIRD GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR, 67-68 (Jean Pictet ed., 1960) [hereinafter GCIII COMMENTARY].

<sup>30</sup> *See* GCIII COMMENTARY, *supra* note 29, at 49-50, 52-64 (regarding the protracted debates which took place during the preparatory work and the Diplomatic Conference itself, regarding recognition of partisan and resistance fighters. The ICRC, on August 17, 1944, addressed a memorandum to all States involved in the Second World War, urging them to grant POW status to captured partisans, provided they complied with the basic rules of organized command; the wearing of a fixed, distinctive emblem; and the open carriage of arms. Indeed, during the Second World War, the Netherlands Forces of the Interior were granted, under the Dutch Royal Emergency Decree of 1944, the status of being part of the Dutch Army. The German occupying force did not recognize the Forces of the Interior as legitimate combatants; however, the status of the Forces was affirmed as such during the war crimes trials of the post-war period); *see also* INT'L COMM. OF THE RED CROSS, REPORT OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS ON ITS ACTIVITIES DURING THE SECOND WORLD WAR (1948). *See generally* Thomas Mallison & Sally Mallison, *The Juridical Status of Irregular Combatants Under the International Humanitarian Law of Armed Conflict*, 9 CASE W. RES. J. INT'L L. 39, 52-54 (1977).

<sup>31</sup> *See* Francois Bugnion, *THE ICRC AND THE PROTECTION OF WAR VICTIMS 192-94* (2006).

Churchill announced the unconditional surrender on May 8, 1945, he stated that:

Hostilities will end officially at one minute after midnight tonight. . . [t]he Germans are still in places resisting the Russian troops, but should they continue to do so after midnight they will of course deprive themselves of the protection of the laws of war and will be attacked from all quarters by the allied troops.<sup>32</sup>

Indeed, during the post-war war crimes trials, it was explicitly confirmed that partisan fighters had no protected status under international law.<sup>33</sup> However, only a few years later at the 1949 Geneva Diplomatic Conference, States that had been subject to occupation by the Nazis argued that partisans and resistance fighters deserved equivalent treatment to other combatants, which included full POW recognition and protection if captured. They also argued that less restrictive conditions for fulfillment of combatant status for partisans should be introduced.<sup>34</sup>

Debate at the conference was “most lively”<sup>35</sup> and protracted, but eventually, all parties came to agree that partisans and resistance fighters could enjoy international protections and rights, provided they fulfilled the criteria outlined in Article 1 of the 1907 Hague Regulations. Thus, the Geneva Conventions, under Article 4(A)(2) of Convention III, recognize partisan and organized resistance movements and provide treatment as POWs for organized groups even if they operate in already occupied territory. Resistance fighters are obliged to comply with the Hague Regulation requirements in that they must be under responsible command,<sup>36</sup> wear a fixed distinctive sign recognizable at a distance,<sup>37</sup> carry their arms openly,<sup>38</sup> and conduct their operations in accordance with the laws and customs of war.<sup>39</sup>

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<sup>32</sup> *Text of Churchill’s Speech on the Surrender*, N.Y. TIMES, May 9, 1945, at L8.

<sup>33</sup> 3 LAW REPORTS OF TRIALS OF WAR CRIMINALS 57 (1949); see *United States of America v. von Leeb*, 12 L.R.T.W.C. 1 (1948) (holding that partisan fighters operating in south-eastern Europe could not be considered legitimate combatants under the Hague Regulations of 1907, as “captured members of these unlawful groups were not entitled to be treated as prisoners of war. No crime can be properly charged against the defendants for the killing of such captured members of the resistance forces, they being franc-tireurs.”).

<sup>34</sup> See GCIII COMMENTARY, *supra* note 29, at 52-55.

<sup>35</sup> *Id.* at 53.

<sup>36</sup> GCIII, *supra* note 1, art. 4(A)(2)(a).

<sup>37</sup> GCIII, *supra* note 1, art. 4(A)(2)(b).

<sup>38</sup> GCIII, *supra* note 1, art. 4(A)(2)(c).

<sup>39</sup> GCIII, *supra* note 1, art. 4(A)(2)(d).

## III. THE POST-WORLD WAR II ERA

Following the adoption of the Geneva Conventions, a number of significant changes were experienced both in the international community and in the conduct of armed conflict. It is not possible in an article of this scope to detail the events of the period with any degree of fullness; however, certain key elements bear acknowledgment. Firstly, the post-World War II era saw a significant rise in the frequency of non-international armed conflicts. Where once international armed conflicts were the norm, they now became a rarity eclipsed by internal conflicts. A 2002 study conducted by the Department of Peace and Conflict Research at Uppsala University<sup>40</sup> categorized and analyzed all armed conflicts that had occurred following World War II. Of the 225 armed conflicts which had taken place between 1946 and 2001, 163 were internal armed conflicts. Only 42 were qualified as inter-state or international armed conflicts. The remaining 21 were categorized as “extra-state”, defined as a conflict involving a State and a non-state group, the non-state group acting from the territory of a third State.<sup>41</sup>

Secondly, during the 1960s and 1970s, the United Nations General Assembly adopted a number of resolutions regarding the increasingly frequent colonial wars taking place in Africa and Southeast Asia. Wars of national liberation, as these conflicts were being termed, were becoming so pervasive that the UN General Assembly adopted a number of declarations regarding self-determination and national liberation wars.<sup>42</sup> The upshot of

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<sup>40</sup> UPPSALA UNIV.: DEP'T OF PEACE & CONFLICT RES., REPORT NO. 63, STATES IN ARMED CONFLICT 2001 (Mikael Eriksson ed., 2002) (describing the study conducted in conjunction with the Conditions of War and Peace Program at the International Peace Research Institute in Oslo).

<sup>41</sup> See Peter Gleditsch et al., *Armed Conflict 1946-2001: A New Dataset*, 39 J. P. RES. 615 (2002).

<sup>42</sup> The UN had adopted a number of resolutions and declarations regarding self-determination and national liberation movements. See, e.g., G.A. Res. 3103 (XXVIII), U.N. GAOR, 28th Sess., Supp. No. 30, U.N. Doc. A/9030, (Dec. 12, 1973); G.A. Res. 2787 (XXVI), U.N. GAOR, 26th Sess., Supp. No. 29, U.N. Doc. A/8429 (Dec. 6, 1971); Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028 (Oct. 24, 1970) [hereinafter Friendly Relations Declaration]; G.A. Res. 2548 (XXIV), U.N. GAOR, 24th Sess., Supp. No. 30, U.N. Doc. A/7630 (Dec. 11, 1969); G.A. Res. 2465 (XXIII), U.N. GAOR, 23d Sess., Supp. No. 18, U.N. Doc. A/7218 (Dec. 20, 1968); G.A. Res. 2326 (XXII), U.N. GAOR, 22d Sess., Supp. No. 16, U.N. Doc. A/6716 (Dec. 16, 1967); G.A. Res. 2189 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 13, 1966); G.A. Res. 2105 (XX), U.N. GAOR, 20th Sess., Supp. No. 14, U.N. Doc. A/6104 (Dec. 20, 1965); G.A. Res. 1514 (XV), U.N. GAOR, 15th Sess., Supp. No. 16, U.N. Doc. A/4684 (Dec. 14, 1960); G.A. Res. 637 (VII), U.N. GAOR, 7th Sess., Supp. No. 20, U.N. Doc. A/2361 (Feb. 5, 1952); see also Stephen M. Schwebel, *Wars*

these resolutions was the elevation of “wars of national liberation” from a non-international armed conflict to the stratum of an international armed conflict.<sup>43</sup> As such, it was argued that the Geneva Conventions should be reaffirmed and expanded on to incorporate this new type of international armed conflict. This advocacy directly contributed to the adoption of the Additional Protocols.

*A. The Additional Protocols of 1977*

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

Armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.<sup>44</sup>

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

Protocol I also recognized the methods by which such wars were usually waged; that is, through guerrilla tactics. Guerrilla fighters are granted combatant status in much the same way as partisans and resistance fighters had been in the Conventions. These guerrilla fighters are now afforded “full” Geneva protection rather than simply being covered under Common Article 3.<sup>45</sup> Guerrillas are to be considered combatants, rather than

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*of Liberation – as Fought in UN Organs, in LAW AND CIVIL WAR IN THE MODERN WORLD* 648 (Norton Moore ed. 1974).

<sup>43</sup> Anthony Cullen, *Key Developments Affecting the Scope of Internal Armed Conflict in International Humanitarian Law*, 183 MIL. L. REV. 66, 89 (2005).

<sup>44</sup> Protocol I, *supra* note 5, art. 1(4).

<sup>45</sup> As they would be if wars of national liberation had not been considered fundamentally international in character, even if they were internal in reality.

“marauders or bandits,”<sup>46</sup> and are to be granted full combatants rights, responsibilities, and concomitant POW rights if captured. Article 44(3) also recognizes that “there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself,”<sup>47</sup> and provides that such a combatant will not lose his combatant status so long as he “carries his arms openly (a) during each military engagement, and (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.”<sup>48</sup>

In granting recognition to fighters in national liberation wars, Protocol I significantly extended the ambit of international armed conflicts to include what would have previously been considered internal armed conflicts. Thus, more “civilians” were being authorized under international law to take part in armed conflict; civilian participation in armed conflict was being further standardized.

However, the Diplomatic Conferences who debated and adopted the Protocols declined to extend the category of legitimate combatant to persons taking part in non-international armed conflicts under Protocol II. These persons would remain officially “civilians who take direct part in hostilities,” liable for targeting when they took direct part, but regaining their civilian immunity once they ceased taking direct part.<sup>49</sup> Indeed, this concept was included in Protocol I as well as in Part IV, Section I, on “General Protection Against the Effects of Hostilities”. Specifically, Article 51(3) stated, “[c]ivilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.” The Diplomatic Conferences did not explain in any great detail what was meant by the phrase “direct part in hostilities.”<sup>50</sup> However, the term is quite complex and includes a number of distinct elements. For instance, what

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<sup>46</sup> LESLIE C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 108 (2d ed. 2000); see also George H. Aldrich, *Civilian Immunity and the Principle of Distinction: Guerrilla Combatants and Prisoner of War Status*, 31 AM. U. L. REV. 871 (1982).

<sup>47</sup> Protocol I, *supra* note 5, art. 44(3).

<sup>48</sup> Protocol I, *supra* note 5, art. 44(3) (However, this article does not extend to regular armies the right to engage in guerrilla tactics. Article 44(7) specifies that the article is “not intended to change the generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict.” *Id.* at art. 44(7)); see also AP COMMENTARY, *supra* note 6, at 524.

<sup>49</sup> Protocol II, *supra* note 5, art. 13(3) (stating that civilians are immune from direct attack “unless and for such time as they take a direct part in hostilities”).

<sup>50</sup> See Additional Protocols Official Records XV, *supra* note 7, at 330, CDDH/III/224; see also MICHAEL BOTHE ET AL., *RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949*, at 301-04, ¶ 2.4 - 2.4.2.2 (1982) [hereinafter *NEW RULES*]; AP COMMENTARY, *supra* note 6, at 618-19.

constitutes “hostilities”? Is there a specific threshold? Equally, how would one define “direct part” or “unless and for such time”?

Given the definitional ambiguities, it is unsurprising that in the ICRC Study on the Customary Status of International Humanitarian Law, it was stated that “a precise definition of the term ‘direct participation in hostilities’ does not exist.”<sup>51</sup> It was with this fact in mind that the ICRC instigated a study into the concept of “direct participation in hostilities.”<sup>52</sup> The project, conducted over five years in cooperation with the TMC Asser Institute, included questionnaires, reports, background papers, and five expert meetings. The final result of this study was the production of the Interpretive Guidance on Direct Participation in Hostilities in 2009, marking the latest stage of attempts to define the role of civilians in armed conflict.<sup>53</sup>

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

The Interpretive Guidance<sup>54</sup> issued by the ICRC focused on three questions: (1) who is a civilian for the purposes of the principle of distinction; (2) what conduct amounts to direct participation in hostilities; and (3) which modalities govern the loss of protection against direct attack.<sup>55</sup> The Guidance defines civilians as “all persons who are neither members of the armed forces of a party to the conflict nor participants in a *levée en masse*.” Such persons are “entitled to protection against direct attack unless and for such time as they take a direct part in hostilities.”<sup>56</sup> This definition is essentially straightforward in relation to civilians in international armed conflicts.

It becomes more complicated when one looks at how to define a civilian in a non-international armed conflict. The instruments that deal with non-international armed conflict – Common Article 3 and Protocol II – acknowledge, but do not authorize, participation in armed conflict. Thus,

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<sup>51</sup> 1 JEAN MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT’L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 22 (2005) [hereinafter referred to as ICRC CIHL STUDY].

<sup>52</sup> NILS MELZER, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 8 (2009).

<sup>53</sup> However, this process and the final document were controversial; the process failed to achieve consensus, a number of experts requested their names be removed from the final document, and the ICRC ended up releasing the document as its “own work,” rather than as a result of the expert meetings. See discussion *infra* Part III.

<sup>54</sup> ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, Adopted by the Assembly of the International Committee of the Red Cross on 26 February 2009*, 90(872) INT’L REV. RED CROSS 991 (2008).

<sup>55</sup> *Id.* at 994.

<sup>56</sup> *Id.* at 997.

there is no clear combatant/civilian divide amongst non-State persons engaged in a non-international armed conflict. The Interpretive Guidance on participation in non-international armed conflict is accordingly more complex than that for international armed conflict:

All persons who are not members of State armed forces or organised armed groups of a party to the conflict are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. In non-international armed conflict, armed groups constitute the armed forces of a non-State party to the conflict and consist only of individuals whose continuous function is to take a direct part in hostilities ('continuous combat function').<sup>57</sup>

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

A specific act must meet the following cumulative criteria: (1) the act must be likely to adversely affect the military operations of military capacity of a party to an armed conflict or alternatively to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm); (2) there must be a direct causal link between the act and the harm likely to result from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation); and (3) the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).<sup>58</sup>

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

Finally, the remaining part of the overall test is that of “modalities governing loss of protection.”<sup>59</sup> The Guidance states that civilians directing participating will lose their protected status for the duration of each act of

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<sup>57</sup> *Id.* at 1002.

<sup>58</sup> *Id.* at 1016.

<sup>59</sup> *Id.* at 1034.



direct participation. However, higher-level members of organized groups do not have this “revolving door” of protection or loss of protection. As long as such persons are deemed to be assuming a continuous combat function, they will remain targets.<sup>60</sup> This loss of protection for individual acts includes a temporal element where “measures preparatory to the execution of a specific act of direct participation in hostilities, as well as the deployment to and the return from the location of its execution, constitute an integral part of that act.”<sup>61</sup> Travel to, and return from, an act of direct participation is therefore included in the window for loss of protection.

What is striking about these cumulative criteria and definitions is the incongruity of the aims of the study into direct participation and the outcomes. That is to say, the intention behind the study into direct participation was to clarify when a civilian could be considered as taking direct part in hostilities *for the purposes of whether they could be targeted*.<sup>62</sup> A party to the conflict, often an individual participant, making targeting decisions would have to assess whether the person or persons in question were legitimate targets due to their direct participation.

However, the outcome – a long, detailed and quite complex cumulative test – presents a series of questions that can only be successfully answered *ex post facto* with regard to the targeting decision. It may well be that such a complex test would prove useful when a targeting decision is being made prior to any active engagement against a target that is offering no immediate threat – the targeted killing of Osama Bin Laden is an obvious example.<sup>63</sup> However, one must question the utility of this Guidance in active hostilities. It seems exceptionally unlikely that an individual soldier could make such an assessment in a combat situation, under fire, with little time to weigh up whether the person or persons they are confronted with in battle are meeting the requisite threshold of harm, causation criteria, and belligerent nexus.

#### IV. FROM *LEVÉE EN MASSE* TO DIRECT PARTICIPATION: WHAT DOES THIS MEAN FOR THE FUTURE OF GENEVA LAW?

The process that produced the Interpretive Guidance was noteworthy for the controversies and disagreements that marked the experience. Consensus was hard to achieve, and dispute arose over the inclusion of

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<sup>60</sup> *Id.* at 1034-35.

<sup>61</sup> *Id.* at 1031.

<sup>62</sup> *Id.* at 993 (noting that “the Interpretive Guidance examines the concept of direct participation in hostilities . . . for the purposes of the conduct of hostilities.”).

<sup>63</sup> See Jordan Paust, *Permissible Self-Defence Targeting and the Death of Bin Laden*, 39 DENV. J. INT’L L. & POL’Y 569, 578 (2011); Anthony Rogers & Dominick McGoldrick, *Assassination and Targeted Killing—The Killing of Osama Bin Laden*, 60 INT’L & COMP. L.Q. 778, 783 (2011).

Section IX in the final document<sup>64</sup> as well as the definition of membership in armed groups.<sup>65</sup> A considerable number of participating experts requested their names be removed from the final document.<sup>66</sup> The ICRC, in response, “took back” the Interpretive Guidance, and issued it under its own auspices. The problematic process that marked the drafting and publication of the Interpretive Guidance is indicative of one of the problems facing the future of Geneva law – the difficulties of achieving consensus. The complexity of the Guidance also demonstrates additional hurdles for any future revision of Geneva law; namely, that modern armed conflict has become a considerably more complex and chaotic endeavor in the sixty years since the adoption of the Geneva Conventions. It is these two distinct facets that will be explored in this final section.

#### A. *Difficulties of Consensus*

Generally speaking, achieving consensus among a number of disparate parties is often difficult, even when these parties share similar goals. This is just the mechanics of the international legal system in the twenty-first century.<sup>67</sup> The increasing difficulty in adopting new treaties is partially due to the increasing number of players on the international stage. To illustrate, one needs only to look at the statistics with regards to the Geneva Conventions and their Additional Protocols. The Geneva Conventions of 1949 were debated and drafted by 59 delegations, comprising almost 300 plenipotentiaries and delegates mainly drawn from Europe and the Americas.<sup>68</sup> The average delegation comprised five members.

Over the period of four months, these States debated and adopted four conventions comprising nearly 400 articles. Asia, Africa, and the Middle East were virtually unrepresented at the Geneva conference – only two African States,<sup>69</sup> six Middle Eastern States,<sup>70</sup> and four Asian States were at

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<sup>64</sup> See W. Hays Parks, *Part IX of the ICRC “Direct Participation in Hostilities” Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. J. INT’L L. & POL. 769, 783-85 (2010) (noting that the ICRC’s inclusion of Section IX “General Restraints on the Use of Force in Attack” was neither expected nor debated by the participating experts for inclusion in the draft of the interpretive guidance and that nearly a third of the experts requested removal of their names from the final version).

<sup>65</sup> See Kenneth Watkin, *Opportunity Lost: Organised Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guidance*, 42 N.Y.U. J. INT’L L. & POL. 641, 643-44 (2010).

<sup>66</sup> See Schmitt, *supra* note 6, at 6.

<sup>67</sup> See, e.g., Courtney B. Smith, *The Politics of Global Consensus Building: A Comparative Analysis*, 5 GLOBAL GOVERNANCE 173 (1999) (exploring theories of consensus building in United Nations General Assembly).

<sup>68</sup> *Geneva Conventions Official Records*, Vol. I, *supra* note 7, at 158-78.

<sup>69</sup> *Id.* at 162 (Egypt and Ethiopia).

Geneva.<sup>71</sup> Less than thirty years later, 134 delegations and over 1,400 delegates met over a period of three years at the Geneva Conferences that debated and adopted the Additional Protocols, with average delegations comprising eleven plenipotentiaries and delegates.<sup>72</sup> These delegations debated and eventually adopted two conventions comprising 130 articles. This time, Africa, Asia, and the Middle East were far better represented, frequently outnumbering the European and American delegations.

Though a somewhat rudimentary statistical analysis, it is clear that as the number of delegates and delegations rose, the number of adopted provisions fell considerably. This was evident during the debate surrounding Additional Protocol II with regards to non-international armed conflict. The original, more expansive draft Protocol, comprising forty-nine articles, was considered unacceptable by a number of delegates. It was only when the head of the Pakistani delegation negotiated a much reduced twenty-four article Protocol II that the instrument was adopted at all.<sup>73</sup>

The number of UN Member States currently stands at 193.<sup>74</sup> One can only surmise the difficulty in achieving consensus amongst that many States. Consensus is especially unlikely when one casts an even cursory look at the history of the law of armed conflict with regards to irregular participants. Advances have been made, and the category of lawful combatant expanded; however, even these expansions have been met with varying degrees of resistance.<sup>75</sup> The one area where there has been an almost unwavering refusal to accept expansion of the law has been with regards to irregular civilian participation in non-international armed conflict.<sup>76</sup>

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<sup>70</sup> *Id.* at 158, 163-4, 166, 168 (Afghanistan, Iran, Israel, Lebanon, Pakistan and Syria).

<sup>71</sup> *Id.* at 160, 163, 168 (Burma, China, India and Thailand).

<sup>72</sup> Additional Protocols Official Records, Vol. II, *supra* note 7, at 29-408.

<sup>73</sup> The Pakistani revised draft was included in the official records as a series of amendments to each article of Protocol II. *See* Pakistan, Statement at the CDDH, Additional Protocols Official Records, *supra* note 7, at 3-121; *see also* AP COMMENTARY, *supra* note 5, at 1331-36.

<sup>74</sup> Press Release, Dep't of Public Info., United Nations Member States, U.N. Press Release ORG/1469 (July 3, 2006), <https://www.un.org/News/Press/docs/2006/org1469.doc.htm>. *See generally* C.I.A., THE WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/index.html> (showing that although this figure is sometimes disputed, the number of sovereign states who are UN members is 193; two States have observer status (Vatican City and Kosovo); nine other states have disputed status, having claimed statehood (or independence) without widespread acceptance, including Somaliland, South Ossetia, Taiwan, Abkhazia, Nagorno-Karabakh, Northern Cyprus, Palestine, Transnistria, Sahrawi Arab Democratic Republic).

<sup>75</sup> *See* discussion *supra*, Introduction; *see also* Bothe, *supra* note 48, at 244-46, 248.

<sup>76</sup> II-B Geneva Conventions Official Records, *supra* note 7, at 10-16, 325-39 (indicating what was then draft common Article 2).

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

The difficulties of achieving consensus is not the only, nor perhaps the most insuperable, obstruction in the way of further development of the laws of armed conflict regarding participants. International humanitarian law is based on certain fundamental dichotomies – and the principle of distinction is one of the most significant.<sup>77</sup> The principle of distinction provides that all persons involved in an armed conflict must distinguish between persons who take direct part in hostilities – combatants – and persons who may not be attacked or do not take direct part in hostilities – civilians.<sup>78</sup> The concept of distinction comprises two elements: combatants must distinguish themselves from the civilian population, and civilians are not to be made the object of attack.

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

That the progress of civilization should have the effect of alleviating as much as possible the calamities of war; [t]hat the only legitimate object which States should endeavour to accomplish during war is to weaken the *military forces* of the enemy.<sup>79</sup>

The philosophical underpinning of the principle of distinction can be traced to the writings of writers like Jean-Jacques Rousseau, who theorized that wars must be considered as conflict between States and not as conflict between the men who fight on behalf of the State:

Men, from the mere fact that, while they are living in their primitive independence, they have no mutual relations stable enough to constitute either the state of peace or the state of war, cannot be naturally enemies. War is constituted by a relation between things, and not between persons; and, as the state of war cannot arise out of simple personal relations, but only out of real relations, private war, or war of man with man, can exist neither in the state of nature, where there is no constant property,

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<sup>77</sup> 2 MARCO SASSÒLI ET AL., HOW DOES LAW PROTECT IN WAR? Case No. 143 (3d ed. 2011).

<sup>78</sup> See Esbjörn Rosenblad, International Humanitarian Law of Armed Conflict: Some Aspect of the Principle of Distinction and Related Problems, 63-68 (1977) (unpublished thesis, on file with Collège Universitaire Henry Dunant, Geneva.); see also ICRC CIHL STUDY, *supra* note 49, Rules 1-2, 5-6, & 7-10.

<sup>79</sup> SCHINDLER & TOMAN, *supra* note 11, at 92 (emphasis added).

nor in the social state, where everything is under the authority of the laws.

...

War then is a relation, not between man and man, but between State and State, and individuals are enemies only accidentally, not as men, nor even as citizens, but as soldiers; not as members of their country, but as its defenders. Finally, each State can have for enemies only other States, and not men; for between things disparate in nature there can be no real relation.

...

The object of the war being the destruction of the hostile State, the other side has a right to kill its defenders, while they are bearing arms; but as soon as they lay them down and surrender, they cease to be enemies or instruments of the enemy, and become once more merely men, whose life no one has any right to take. Sometimes it is possible to kill the State without killing a single one of its members; and war gives no right which is not necessary to the gaining of its object. These principles are not those of Grotius: they are not based on the authority of poets, but derived from the nature of reality and based on reason.<sup>80</sup>

Civilians were not the enemies of the State against which their own state fought; they were to thusly be spared, as far as possible, from the deleterious effects of the conflict.<sup>81</sup>

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

In contrast, the laws of armed conflict are premised on essentially clear divisions. Combatants wear uniforms and carry weapons; civilians do neither. Combatants may be intentionally targeted; civilians may not be intentionally targeted. Irregular and civilian participants intentionally

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<sup>80</sup> JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT, OR PRINCIPLES OF POLITICAL RIGHT* 4 (G.D. H. Cole trans., London and Toronto: J.M. Dent and Sons, 1923) (1762).

<sup>81</sup> See LIEBER CODE *supra* note 11, art. 22 (“Nevertheless, as civilisation has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property and honour as much as the exigencies of war will admit.”).

subvert these distinctions to their own advantage, but also to the detriment of those who must make targeting decisions that follow the law. As the new types of participant in armed conflict have grown more complex and irregular in character, so too have the laws that attempt to regulate such irregular participation.

The “original” definitional criterion for participant in armed conflict was essentially quite straightforward – a combatant is a member of a State’s armed forces. However, as demonstrated above, as that definition was expanded to address practical changes in conflict participation, the definition became increasingly layered and complex. Compare the simplicity of “members of the armed forces of a Party to the conflict” (the definition of combatant in Article 4A of Convention III) with the multi-stage “test” in Protocol I – a person is considered a combatant if they:

1. are fighting in[:]

... armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations;<sup>82</sup>

2. are part of[:]

... organised armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognised by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict;<sup>83</sup>

[and]

3.

... distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognising, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed conflict cannot so distinguish

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<sup>82</sup> Protocol I, *supra* note 5, art. 4.

<sup>83</sup> Protocol I, *supra* note 5, art. 43.

himself, he shall retain his status as a combatant provided that, in such situations, he carries his arms openly (a) during each military engagement, and (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.<sup>84</sup>

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

### C. *The Arab Spring and Civil War in Libya*

In addition, political and practical realities make the process of identifying direct participation in hostilities a bit more complicated. Indeed, these complexities are illustrated by recent events in the Middle East and Africa - the so-called “Arab Spring.” The Arab Spring is acknowledged to have started with a single event – the self-immolation of Tunisian street vendor Mohamed Bouazizi.<sup>85</sup> Bouazizi had reputedly suffered humiliating and degrading treatment at the hands of Tunisian authorities for years,<sup>86</sup> culminating in a final confrontation in December 2010, upon which Bouazizi set himself alight.<sup>87</sup> By the time of his death in January 2011, Bouazizi’s plight had been taken up in Tunisia at large, eventually leading to the ousting of President Zine El Abidine Ben Ali after twenty-three years of autocratic rule. In the months that followed, numerous other countries

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<sup>84</sup> Protocol I, *supra* note 5, art. 44.

<sup>85</sup> Robert F. Worth, *How a Single Match Can Ignite a Revolution*, N.Y. TIMES, Jan. 21, 2011, <http://www.nytimes.com/2011/01/23/weekinreview/23worth.html>.

<sup>86</sup> Peter Beaumont, *Mohammed Bouazizi: The Dutiful Son Whose Death Changed Tunisia's Fate*, GUARDIAN, Jan. 20, 2011, <http://www.guardian.co.uk/world/2011/jan/20/tunisian-fruit-seller-mohammed-bouazizi>; Yazmine Ryan, *The Tragic Life of a Street Vendor*, AL JAZEERA, Jan. 20, 2011, <http://english.aljazeera.net/indepth/features/2011/01/201111684242518839.html>.

<sup>87</sup> Kareem Fahim, *Slap to a Man's Pride Set Off Tumult in Tunisia*, N.Y. TIMES, Jan. 21, 2011, <http://www.nytimes.com/2011/01/22/world/africa/22sidi.html>.

experienced uprisings and protests, including Egypt,<sup>88</sup> Bahrain,<sup>89</sup> Syria,<sup>90</sup> Yemen,<sup>91</sup> and Libya.<sup>92</sup> In Libya, the protests reached a full-scale civil war, resulting in United Nations sanctioned intervention<sup>93</sup> and a referral to the International Criminal Court.<sup>94</sup>

The Libyan Civil War is particularly pertinent regarding the issues of direct participation. The conflict started in February 2011, after news reports that government forces had fired upon anti-government protestors in the city of Benghazi.<sup>95</sup> Over several days, numerous protestors were killed; in retaliation, the anti-government forces rallied, escalated their attacks, and occupied nearly all of Benghazi.<sup>96</sup> Libyan President Muammar Gaddafi recruited over 300 mercenaries to combat the protestors.<sup>97</sup> As fighting continued, anti-government sentiment spread to the cities of Misrata and Tripoli. News reports noted widespread defections from the army as well as the defection of notable government public servants from prominent positions.<sup>98</sup>

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<sup>88</sup> Scott Peterson, *Egypt's Revolution Redefines what's Possible in the Arab World*, CHRISTIAN SCIENCE MONITOR, Feb. 11, 2001, <http://www.csmonitor.com/World/Middle-East/2011/0211/Egypt-s-revolution-redefines-what-s-possible-in-the-Arab-world>.

<sup>89</sup> Jesse McLean, *Death Turns "Harmless Man" into Bahrain Uprising's Martyr*, THE STAR.COM, Feb. 16, 2011, <http://www.thestar.com/news/world/article/939631--death-turns-harmless-man-into-bahrain-uprising-s-martyr>.

<sup>90</sup> Susanne Koelbl, *Syrian Uprising Continues Despite Crackdown*, DER SPIEGEL, Mar. 28, 2011, <http://www.spiegel.de/international/world/0,1518,753517,00.html>.

<sup>91</sup> Nada Bakri, *Thousands in Yemen Protest Against the Government*, N.Y. TIMES, Jan. 27, 2011, <http://www.nytimes.com/2011/01/28/world/middleeast/28yemen.html>.

<sup>92</sup> Matthew Weaver, *Muammar Gaddafi Condemns Tunisia Uprising*, THE GUARDIAN, Jan. 16, 2011, <http://www.guardian.co.uk/world/2011/jan/16/muammar-gaddafi-condemns-tunisia-uprising>.

<sup>93</sup> S.C. Res. 1970, U.N. DOC. S/RES/1970 (Feb. 26 2011); S.C. Res 1973, U.N. DOC. S/RES/1973 (Mar. 17, 2011).

<sup>94</sup> S.C. Res. 1970, *supra* note 93; see also Edward Wyatt, *Security Council Calls for War Crimes Inquiry in Libya*, N.Y. TIMES, Feb. 26, 2011, <http://www.nytimes.com/2011/02/27/world/africa/27nations.html>.

<sup>95</sup> *See Libyan Police Stations Torched*, AL JAZEERA, Feb. 16, 2011, <http://www.aljazeera.com/news/africa/2011/02/20112167051422444.html>.

<sup>96</sup> Paul Schemm, *Battle at Army Base Broke Gadhafi Hold in Benghazi*, WASH. POST, Feb. 25, 2011, <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/25/AR2011022505021.html>.

<sup>97</sup> Martin Vogl, *Tauregs "join Gaddafi's mercenaries"*, BBC NEWS, Mar. 4, 2011, <http://www.bbc.co.uk/news/world-12647115>.

<sup>98</sup> *Gaddafi Defiant as State Teeters*, Feb. 23, 2011, <http://www.aljazeera.com/news/africa/2011/02/20112235434767487.html>; *Muammar Gaddafi Ordered Lockerbie Bombing, Says Libyan Minister*, NEWS.COM.AU, Feb. 24, 2011, <http://www.news.com.au/breaking-news/muammar-gaddafi-ordered-lockerbie-bombing-says-libyan-minister/story-e6frfku0-1226011070628>.



In response to international condemnation of the events in Libya<sup>99</sup> and amid calls for international intervention, including a request for a no-fly zone from the Arab League,<sup>100</sup> the UN Security Council passed Resolution 1973 on March 17th, demanding an immediate cease-fire and the imposition of a no-fly zone in Libya for the protection of the Libyan population.<sup>101</sup> The resolution authorised all means necessary to impose the cease-fire, short of a foreign occupation force. However, despite Libyan government promises to abide by the Resolution,<sup>102</sup> the fighting continued for some months,<sup>103</sup> resulting in the ousting of Gaddafi by September 2011 and the recognition of the National Transitional Council as the legitimate government of Libya.<sup>104</sup>

For those persons participating in the anti-government movement, the journey from protestors to fighters to legitimate government over the course of seven months demonstrates the complexities inherent in attempting to identify civilians deemed to be taking direct part in hostilities. At the beginning of the protests, these civilians were not, by any definition, taking direct part in hostilities; there is no indication that in the initial stages, any of the protestors were armed or involved in any acts of violence against government personnel or property.<sup>105</sup> However, this fact was ignored by the Libyan government, who directly targeted the protestors.<sup>106</sup>

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<sup>99</sup> *Clinton to Libya, End "Unacceptable Bloodshed"*, CNN, Feb. 22, 2011, <http://edition.cnn.com/2011/POLITICS/02/21/libya.us.reaction/?hpt=T2> (quoting Secretary of State Hilary Clinton); *Hague Condemns Violence in Libya, Bahrain and Yemen*, BBC NEWS, Feb. 19, 2011, <http://www.bbc.co.uk/news/uk-12514696> (quoting Foreign Secretary William Hague).

<sup>100</sup> *Arab States Seek No-Fly Zone*, AL JAZEERA, Mar. 12, 2011, <http://english.aljazeera.net/news/africa/2011/03/201131218852687848.html>; Adam Gartrell, *Rudd Ramps Up Call for Libya No-Fly Zone*, THE AGE, Mar. 1, 2011, <http://news.theage.com.au/breaking-news-national/rudd-ramps-up-call-for-libya-nofly-zone-20110301-1bccl.html> (quoting Australian Foreign Minister Kevin Rudd).

<sup>101</sup> S.C. Res. 1973, *supra* note 84; S.C. Res. 2022, ¶ 1-2, U.N. DOC. S/RES/2022 (Dec. 2, 2011).

<sup>102</sup> Samira Shackle, *Libya Declares Ceasefire*, NEW STATESMAN, Mar. 18, 2011, <http://www.newstatesman.com/blogs/the-staggers/2011/03/fly-zone-ceasefire-libya>.

<sup>103</sup> *Gaddafi Forces Move East, Bombard Rebels with Rockets*, REUTERS, Mar. 30, 2011, <http://af.reuters.com/article/libyaNews/idAFWEA164620110330>; *Libya: Gaddafi Troops Push Rebels Back from Bin Jawad*, BBC NEWS, Mar. 29, 2011, <http://www.bbc.co.uk/news/world-africa-12892798>.

<sup>104</sup> Dapo Akande, *Recognition of Libyan National Transitional Council as Government of Libya*, EUR. J. INT'L L. BLOG (Jul. 23, 2011), <http://www.ejiltalk.org/recognition-of-libyan-national-transitional-council-as-government-of-libya/>.

<sup>105</sup> *Libyans Protest over Delayed Subsidized Housing Units*, EGYPT INDEP., Jan. 16, 2011, <http://www.egyptindependent.com/node/297407>.

<sup>106</sup> *Anti-Government Protesters Killed in Libya Clash*, USA TODAY, Feb. 17, 2011, [http://www.usatoday.com/news/world/2011-02-17-libya-protests\\_N.htm](http://www.usatoday.com/news/world/2011-02-17-libya-protests_N.htm).

Neither the Geneva Conventions nor their Additional Protocols were applicable to the early stages of the Libyan civil unrest and conflict, as this situation fell outside the scope of both Common Article 3 and Protocol II.<sup>107</sup> However, once the protestors organized themselves into a force able to hold and control territory and conduct their operations in compliance with the laws of armed conflict, the conflict in Libya fulfilled and even surpassed the criteria for a Common Article 3 conflict, and was at the threshold for a Protocol II conflict – even though such recognition was not forthcoming.<sup>108</sup> The involvement of the United Nations and NATO added an additional element. The international support of the Libyan people, while not an outright endorsement of the rebel movement, nonetheless had the effect of “internationalizing” the conflict.<sup>109</sup> Looking at this timeline of events, one can see the complexities in determining the status of participants in the civil war. As civil unrest continues in countries such as Syria and Bahrain,<sup>110</sup> these complexities will remain a challenging part of the process of developing consensus regarding an appropriate international response.

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<sup>107</sup> Article 1(2) of Protocol II specifically determines that the 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 conflicts.” Protocol II, *supra* note 5, art. 1, ¶ 2. Libya is a party to Protocol II and to the Geneva Conventions.

<sup>108</sup> Reports from the NGO Lawyers for Justice in Libya (LJIL) indicate that the rebel fighters in Libya actively sought independent legal assistance in order to instruct rebel fighters in the laws of armed conflict; an ability to implement the laws of armed conflict is one of the threshold requirements for applicability of Protocol II. See *All Libyans urged to adhere to international human rights and international humanitarian law*, LAWYERS FOR JUSTICE IN LIBYA (Aug. 16, 2011), <http://www.libyanjustice.org/news/news/post/13-all-libyans-urged-to-adhere-to-international-human-rights-and-international-humanitarian-law/>; see also Christine Seisun, *Operationalizing the Laws of Armed Conflict for Libyan Opposition Forces*, YALE J. INT’L AFF. (Aug. 17, 2011), <http://yalejournal.org/2011/08/operationalizing-the-laws-of-armed-conflict-for-libyan-opposition-forces/>; *Building Respect for Humanitarian Action and IHL among “Other” Weapon Bearers*, ICRC (Oct. 29, 2010), <http://www.icrc.org/eng/what-we-do/building-respect-ihl/dialogue-weapon-bearers/other-weapons-bearers/overview-icrc-other-weapon-bearers.htm>; *Libyan Prisoners Get Red Cross Visits*, SWISS INFO.CH, (Aug. 29, 2011), [http://www.swissinfo.ch/eng/politics/Libyan\\_prisoners\\_get\\_Red\\_Cross\\_visits\\_.html?cid=31015718](http://www.swissinfo.ch/eng/politics/Libyan_prisoners_get_Red_Cross_visits_.html?cid=31015718); Gentian Zyberi, *What Law Is Applicable to the Situation in Libya?*, INT’L L. OBSERVER (Mar. 28, 2011), <http://internationallawobserver.eu/2011/03/28/situation-in-libya/> (commenting on relevant law applicable to conflict).

<sup>109</sup> “Internationalizing” is used in this context generically, to denote international involvement in domestic affairs, rather than in the strictly legal sense of how a conflict might be internationalized through State intervention, as outlined in the cases of *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, 181 (June 27), and *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment (Int’l Crim. Trib. for the Former Yugoslavia, Jul. 15, 1999).

<sup>110</sup> Frank Gardner, *Protest on Anniversary of Bahrain Unrest*, BBC NEWS, Feb. 14, 2012, <http://www.bbc.co.uk/news/world-middle-east-17027867>; Neil MacFarquhar, *Frustrated Protesters Fill the Streets in Syria’s Capital*, N.Y. TIMES, Feb. 18, 2011, <http://www.nytimes.com/2012/02/19/world/middleeast/syrian-protesters-fill-streets-of-damascus.html>.

## V. CONCLUSION

This paper began with reference to the 60<sup>th</sup> anniversary of the Geneva Conventions in 2009. Another 2009 event – one less affirming of the Conventions – was the U.S. case, *Al-Bihani v. Obama*,<sup>111</sup> the first *habeas* challenge in relation to Guantánamo Bay detentions heard in U.S. courts since *Boumediene v. Bush*.<sup>112</sup> In this case, Judge Brown commented on the changing nature of modern armed conflict, and the need for the law to keep pace with developments: “war is a challenge to law, and the law must adjust. It must recognize that the old wineskins of international law, domestic criminal procedure, or other prior frameworks are ill-suited to the bitter wine of this new warfare.”<sup>113</sup>

It is indeed incumbent on all law to adapt and evolve in line with the situations it seeks to regulate. However, it may be that, for now, the Geneva Conventions and Protocols have come to a proverbial crossroads. The 1949 Conventions and the 1977 Protocols were adopted at times when profound shifts in the international community were taking place – including the aftermath of a cataclysmic world war in 1949 and the tail-end of numerous devastating colonial wars in 1977. The wars of the post-9/11 era have been protracted, intense engagements. However, unlike the post-World War II and post-colonial period, what we have witnessed has been an attempt by more powerful States to attempt to downplay or even outright avoid their international legal obligations rather than reaffirm and develop those laws.

Following the Second World War and the flagrant violations of IHL that occurred during that conflict, the international community was spurred to join together as the United Nations and to adopt treaties and declarations prohibiting genocide, affirming fundamental human rights, and developing and expanding the laws of armed conflict. Following the 9/11 attacks and the wars in Iraq and Afghanistan, the governments in power during these conflagrations have repeatedly attempted to avoid or downplay their international obligations, resulting in the dehumanizing environments of Abu Ghraib and Guantánamo and the spurious legality and contrivance behind the U.S. definition of the “unlawful combatant.”<sup>114</sup>

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<sup>111</sup> *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1814 (2011).

<sup>112</sup> *Boumediene v. Bush*, 553 U.S. 723 (2008).

<sup>113</sup> *Al-Bihani*, 590 F.3d at 882.

<sup>114</sup> For critiques of the concept of “unlawful combatant” in the context of the Guantánamo and Abu Ghraib detention facilities, see generally Sylvia Borelli, *Casting Light on the Legal Black Hole: International Law and Detentions Abroad in the “War on Terror”*, 87 INT’L REV. RED CROSS 39 (2005); Knut Dörmann, *The Legal Situation of “Unlawful/Unprivileged Combatants”*, 85 INT’L REV. RED CROSS 45, 48-49 (2003); Manooher Mofidi & Amy E. Eckert, “Unlawful Combatants” or “Prisoners of War”: *The Law and Politics of Labels*, 36 CORNELL INT’L L. J. 59 (2003); Jordan Paust, *War and Enemy Status After 9/11: Attacks on*

In some respects, the difficulties facing Geneva Law are those which confront all international law – that of the difficulty in bringing so many disparate opinions in line in order to adopt a document of utility and significance. Given the current political environment, where the word “terrorist” still lacks an accepted legal definition, and yet is thrown around with regularity at any group or organization that threatens the status quo, it may well be that the international community has taken Geneva Law as far as they feel they can go in this area. The mixed successes of “after the fact” mechanisms – enforcement and accountability mechanisms such as the International Criminal Court, the ICTY, ICTR, and the various other post-conflict tribunals and courts – is perhaps demonstrative of some practical way forward for the laws of armed conflict, one that balances both preventative and remedial measures.

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*the Laws of War*, 28 YALE J. INT’L L. 325 (2003); Marco Sassòli, *The Status of Persons Held in Guantánamo under International Humanitarian Law*, 2 J. INT’L CRIM. JUST. 96 (2004).