

**INTERNATIONAL HUMANITARIAN LAW
RESEARCH INITIATIVE**

**COMBATANTS, UNPRIVILEGED BELLIGERENTS
AND CONFLICTS IN THE 21ST CENTURY**

HPCR POLICY BRIEF

by
Colonel K. W. Watkin

JANUARY 2003



Background paper

**COMBATANTS, UNPRIVILEGED BELLIGERENTS AND CONFLICTS IN THE
21ST CENTURY**

By Colonel K.W. Watkin¹

1. Introduction

At the dawn of the 21st century international humanitarian law² is facing a number of significant challenges. The events since 11 September 2001 in particular have focused a bright spotlight on issues such as: the law governing conflict between states and non-state actors; the criteria to be applied for qualification as a combatant; the identification and targeting of the enemy; and the status and treatment to be afforded to captured “non-combatants” who participate in hostilities.

The campaign on terrorism is in many ways a reflection of a broader transformation of modern conflict. The conduct of asymmetric warfare, which has been defined as “acting, organizing and thinking differently than opponents in order to maximize one’s own advantages, exploit an opponent’s weaknesses, attain the initiative, or gain greater freedom of action”³ is challenging traditional notions of armed conflict.

¹ The author is currently a Visiting Fellow at the Human Rights Program, Harvard Law School. The opinions expressed in this article are those of the author and do not necessarily reflect the views of the Government of Canada, the Canadian Forces or the Office of the Judge Advocate General.

² While there is sometimes disagreement on the relative scope of the terms “international humanitarian law” and the “law of armed conflict”, I use them interchangeably as that body of law that governs the *jus in bello* conduct of hostilities and the protection of the victims of armed conflict that finds its genesis in the Hague and Geneva streams of law.

³ From S. Metz & D.V. Johnson II, *Asymmetry and U.S. Military Strategy: Definition, Background, and Strategic Concepts Strategic Studies Institute Report*, US Army War College, 5-6 (2001). For a general discussion of asymmetric warfare see Lieutenant-Colonel Don .A. La Carte, *Asymmetric Warfare and the*

The transnational reach of information warfare, the growth of global terrorism, the blending of domestic and international criminal acts and easier access to weapons of mass destruction have raised the stakes in terms of the types of threats posed to states and their citizens. The ability of both states and non-state actors to act asymmetrically has been enhanced by the technological leap into the information age and the so-called revolution in military affairs. The capacity of international humanitarian law to adequately address conflict in its modern form is being grappled with by government officials and legal practitioners, undergoing judicial review, carefully being analyzed by legal scholars and receiving close scrutiny by the media.

In meeting its goal of limiting the effects and suffering of armed conflict international humanitarian law shares many of the same principles and concepts as human rights. However, international humanitarian law differs from human rights law in its requirement to interface with “military necessity”. At the heart of military necessity is the goal of the submission of the enemy at the earliest possible moment with the least possible expenditure of personnel and resources. It justifies the application of force not prohibited by international law. The balancing of military necessity and humanity is often the most challenging aspect of finding agreement on the norms of international humanitarian law.⁴ In balancing these two concepts the requirement to *distinguish* between those who can participate in armed conflict and those who are to be protected from its dangers is perhaps its most fundamental tenet.⁵ A careful analysis shows that much of the discussion about the adequacy of international humanitarian law is centered on the principle of distinction.

2. Combatants and Civilians: Two Privileged Classes

International humanitarian law has primarily been constructed on the foundation of two privileged classes: combatants and civilians. Combatants have the “right” to participate directly in hostilities. They also have the unique status of being prisoners of war should they be captured. Simply put they are not treated as criminals, although they can be prosecuted for crimes committed both during and before the conflict. Civilians also benefit from protection associated with their status. International humanitarian law generally provides that they are to be protected from the dangers arising from military operations and are not to be the object of an attack. Even where civilians are not directly the object of an attack their proximity to a valid military objective may result in it not

Use of Special Operations Forces in North American Law Enforcement” Canadian Military Journal 24, 24-5 (Winter 2001-2002).

⁴ Some commentators indicate there is a tension between “humanity” and “military necessity”. I prefer to describe it as a “balancing” of factors since there are many aspects of “humanity” which are not only consistent with military necessity but also completely complimentary. For example the humane treatment of both POWs and civilians can assist in maintaining relations with opposing forces, avoid retaliation and assist in bring about peace.

⁵ The principle of distinction is reflected in 1977 Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) I art. 44. 3. (hereinafter Additional Protocol I). “In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack....”

being attacked if the civilian casualties would be excessive in relation to the military advantage to be gained. Civilians enjoy this protection until such time as they take a direct part in hostilities.⁶ Further, not unlike combatants, civilians in specific circumstances may be protected by a detailed international law framework should they find themselves under the authority of an enemy.⁷

A widely held view of international humanitarian law is that there is a bright line separation between combatants and civilians.⁸ Various international agreements have endeavoured to define combatants⁹ with everyone else being classified as a civilian. It has been suggested that this approach is preferable since it is all inclusive, with no-one being left out. Further, the rules are kept as simple and straightforward as possible. The goal of this approach is to enhance the likelihood that international humanitarian law would be complied with.¹⁰ Of course this approach is only as effective as the accuracy with which “combatants” as a group are defined and the degree that there is a common understanding of the cross over criteria for civilians losing the protection of their status. If the line between combatant and civilian is drawn in the wrong place or is more porous than the law on its face indicates then the ability of the law to regulate the conduct of hostilities can be adversely impacted.

Further, depending upon the application of the combatant/civilian distinction, personnel applying that violence will either be justified in killing or be subject to a domestic or international criminal accountability process. The ability of combatants to plan and conduct their operations and defend the state, as well as the capacity of a state or the international community to hold them accountable for failure, is significantly dependant upon the clarity and relevance of the distinction principle. What remains to be seen is whether the two distinct categories of participants, and the protections associated with those distinctions, provides an accurate, relevant and ultimately credible basis upon which to regulate modern armed conflict.

⁶ Additional Protocol I, art. 51.

⁷ Provisions for the protection of protected persons in the territory of a Party to the Conflict and in occupied territory are set out in Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949 (hereinafter Geneva Convention IV). Civilians who accompany the armed forces and other civilians are provided the status of prisoners of war in Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (hereinafter Geneva Convention III), arts. 4 (4) and (5).

⁸ In statement given at the 26th Roundtable in San Remo on current problems of international law on 5 September 2002 the President of the ICRC, Dr. Jakob Kellenberger indicated that a cornerstone of Additional Protocol I was the principle that required parties to an armed conflict to distinguish at all times between the civilian population and combatants and between civilian objects and military objectives. Dr Kellenberger went on to state that the “principle is crucial, as lawful attacks may only be directed at combatants and military objectives.” He did not address the issue of attacks on civilians who take a direct part in hostilities. See Dr. Jakob Kellenberger, International Humanitarian Law at the Beginning of the 21st Century, Statement at the 26th Round Table in San Remo on the Current Problems of International Humanitarian Law: “The Two Additional Protocols to the Geneva Conventions: 25 Years Later-Challenges and Prospects” (Sep. 5, 2002), at <http://www.icrc.org/eng>.

⁹ See the 1874 Brussels Declaration, arts. 9-11, the 1907 Hague Regulations Respecting the Laws and Customs of War, arts. 1-3, Geneva Convention III (POWs), art. 4 and Additional Protocol I, arts. 43-4.

¹⁰ A.P.V. Rogers, Law on the Battlefield 7-9, (Manchester University Press 1996).

The idea that there are only two distinct classes of participants in warfare faces a number of significant definitional challenges. Terms such as “belligerent”, “non-combatant”, “illegal combatant”, “enemy combatant”, “unprivileged belligerent” and “unlawful belligerent” are found throughout the legal literature. Their relevance is often impacted by changes in historical usage and reflects the difficulty that has arisen in attempting to categorize various persons found on the battlefield.

The definitional challenge is perhaps most clearly evident in the term “non-combatant”. In 1911 that term included non-military inhabitants of a country who take no part in hostilities (civilians) and members of the armed forces such as orderlies, clerks, bandsmen, etc. whose participation was seen as “ancillary to that of the fighting men (military non-combatants).”¹¹ The latter notion of a military “staff” non-combatant has since been eliminated.¹² A more modern use of the word appears to address non-combatants as persons who do not take part in hostilities; are not permitted to; or are incapable of doing so. For example, in the United States Annotated Supplement to The Commander’s Handbook on the Law of Naval Operations¹³ non-combatant has been interpreted to be “individuals who do not form a part of the armed forces and who otherwise refrain from the commission or direct support of hostile acts.”¹⁴ In that context non-combatants would generally include the civilian population. However, that term also includes a more diverse mix of persons such as medical officers, corpsmen, chaplains, contractors, civilian war correspondents and armed forces personnel who are unable to engage in combat because of wounds, sickness, shipwreck or capture (ie. POWs).¹⁵ Here “non-combatant” is used in the context of those persons, civilian and military, who should not be targeted and not in the sense of the combatant/civilian distinction.

For the purposes of this article I will substantially maintain the dual class concept of civilian and combatant. Combatants include all those persons who qualify under the provisions of the various conventions, protocols and customary international law for that status.¹⁶ Civilians will include all other persons. However, I have also chosen to identify a sub-set of civilians in using the term “unprivileged belligerent”.¹⁷ An unprivileged

¹¹ J.M. Spaight, *War Rights on Land* 58 (photo. reprint 1975) (1911)

¹² See Additional Protocol I, art. 44. 2. and Michael Bothe et al. *New Rules for Victims of Armed Conflicts* 240 (Martinus Nijhoff Publishers 1982). The only members of the armed forces under Additional Protocol I who would appear not to have combatant status are medical personnel and chaplains covered by Geneva Convention III, art. 33.

¹³ *Annotated Supplement to The Commander’s Handbook on the Law of Naval Operations*, 73 *International Law Studies* 1, 296-7 (A.R. Thomas & J.C. Duncan, ed. 1999).

¹⁴ *Id.* at 297.

¹⁵ *Id.* at 297 and 489.

¹⁶ This analysis does not require specific reference to medical personnel and chaplains. For the purposes of this paper I have also adopted the view expressed in Leslie C. Green, *The Contemporary Law of Armed Conflict* 111, n.44 105 (2nd ed. 1990) (1993) that POWs, the wounded sick and shipwrecked and others who are *hors de combat* are entitled to be treated as combatants, although no longer active.

¹⁷ The term “unprivileged belligerent” is taken from R.R. Baxter, *So-called ‘Unprivileged Belligerency’: Spies, Guerrilla, and Saboteurs* 28 *B.Y.I.L.* 323, 328 (1951) wherein he states:

A category of persons who are not entitled to treatment either as peaceful civilians or as prisoners of war by reason of the fact that they have engaged in hostile conduct without meeting the qualifications established by Article 4 of the Geneva Prisoners of War Convention of 1949 continues to exist....

belligerent is a civilian (ie. a person not having combatant status) who takes part in hostilities thereby committing a belligerent act and having neither the protection from attack associated with civilian status nor qualifying for the privilege of being a prisoner of war.

This question of whether a population should be neatly divided into two categories has been an ongoing area of controversy since the first attempt to create an international set of laws governing war at the end of the 19th century. It is in defining the status and treatment of civilians who participate in conflict where international humanitarian law has been particularly challenged. As was evidenced in the post 11 September period the lack of a common international understanding of “unprivileged belligerency” resulted in legal scholars and practitioners racing to legal texts, decades old cases¹⁸ and dated articles¹⁹ to determine the meaning of that categorization from a customary international law perspective.²⁰

The reality is that civilians always have been and will be involved in hostilities in one form or another. The nature of that participation can range from working in war related industry, to accompanying the armed forces as a contractor or even participating in combat without meeting the formal requirements of combatancy. A constant source of friction and debate has been the inability of the international community to come to terms with a fundamental question requiring the balancing of military necessity and humanity. To what degree is “war” a contest between every subject of the state, or is the conflict simply directed at privileged belligerents and objects related to military effectiveness? This question is relevant not only to the issue of combatancy and civilian status but also to the broader question of targeting.

Technological advances at the beginning of the 20th century led to longer range weapons systems (e.g. artillery and air power) and industrialization resulted in a greater incorporation of civilians into providing support to the war effort (e.g.. factory workers).²¹ This not only increased direct and indirect civilian involvement in hostilities, it also significantly widened the concept of the areas of military operations. While methods of warfare such as blockades and siege warfare already impacted directly on a

Professor Baxter’s thesis was that participation in hostilities by persons not having combatant status put those persons on the same legal footing as spies. In that respect their belligerency was not “unlawful” under international law, but rather “unprivileged”. The use of this term is not to suggest there should necessarily be a third category of person, only to identify there are civilians who commit belligerent acts inconsistent with that privileged status.

¹⁸ Cases such as *Ex Parte Quirin*, 317 U.S. 1 (1942)., *Public Prosecutor v. Koi* [1968] A.C. 829, *Military Prosecutor v. Kassem* (1969) 42 I.L.R. 470, and *Mohammed Ali v. Public Prosecutor* [1969] A.C. 430.

¹⁹ Many legal articles and tests focus on “combatant status”. Articles and papers that concentrate on “unprivileged belligerency include Baxter, *supra*, note 17 and Y. Dinstein, *The Distinction Between Unlawful Combatants and War Criminal*, *International Law at a Time of Perplexity* (Dinstein and Tabory ed. 1989) 103.

²⁰ For a discussion of unprivileged belligerency and Geneva Convention IV see Baxter, *supra* note 17, at 328-29 and 333-38.

²¹ See W. Hayes Parks, *Air War and the Law of War*, 31 *Air Force Law Review* No. 1, 1, 5-7 (1990) and Major J.M. Meyer, *Targeting the Will of the Enemy and Air Force Doctrine* 51 *Air Force Law Review* 143, 156 (2001).

civilian population the advent of air warfare in particular exposed large segments of the population to the direct effects of hostilities. As significant as the starvation was that resulted from the World War I blockade of Germany it was the emotions raised by the violence of aerial bombing that caught the attention of 20th century theorists and legal scholars. Aerial bombardment “made it possible to bring the war into the backyards of many millions of civilians....”²² Today, information warfare, a result of the most recent wave of technological change, has already begun to challenge existing ideas of what constitutes an “armed attack” and could serve as a significant asymmetric threat for more powerful nations regardless of whether the attack is terrorist based or carried out by an economically or militarily weaker state. One of the most pressing problems facing international humanitarian law may not be how to deal with combatants or civilians who carry rifles on the frontlines, but rather in determining the status of and controls on civilians armed with CPUs and keyboards sitting at a desk a continent away.²³

3. A Brief History

The idea of a privileged class of belligerents has its roots in Roman and medieval times where the excesses of ancient warfare were restrained by the concept of chivalrous warriors fighting just wars while acting under official authority. With the rise of the nation state this privileged notion of participation in warfare was challenged by a patriotic and populist view that every citizen had a right to resist. The initial attempts to codify international humanitarian law were impacted by the conflicting visions of dominant military powers who wanted to restrict the class of privileged belligerents to their large and organized armies and those, most often states that might be occupied, who wanted recognition of the right to mobilize all citizens to defend their country. The motivation of the proponents for a more exclusive class of “belligerents” or “combatants” was in part humanitarian in that professional armed forces were seen as more likely to obey international humanitarian law due to state control and the existence of an internal disciplinary process. This approach also provided a clearer distinction between combatants and civilians thereby arguably providing enhanced protection to civilian populations. It might be argued, however, that this enhanced protection may be more

²² Lester. Nurick, *The Distinction Between Combatant and Noncombatant in the Law of War*, 39 A.J.I.L. 680, 689 (1945). This article presents an argument that belligerent practice during World War II had in effect “extended the definition of combatant to include almost all important elements of the enemy’s civilian population.”

²³ As is stated in Greg Rattray, *Strategic Warfare in Cyberspace 20* (The MIT Press, 2001):

Compared to other types of military force, digital warfare represents a type of microforce.... Chemical or biological weapons are referred to as weapons of mass destruction, not because of the amount of destructive energy released when they are deployed but because of the number of deaths they can cause. Large-scale conventional use of force...has caused massive damage. Despite the microforce nature of information attacks, disruption of the digital control systems of a nuclear plant could cause similarly large-scale effects.

For a discussion of some of the complexities of applying international humanitarian law in modern armed conflict see Michael Schmitt, *The Principle of Distinction in 21st Century Warfare*, 2 Yale Human Rights and Dev. L.J. 143 (1999) and Michael Schmitt, *Wired Warfare: Computer Network Attack and Jus in Bello* 84 I.R.R.C. 365 (2002).

notional than substantive if the state also takes the view that war is “total” in nature so that significant portions of the civilian population can be targeted like combatants because they provide support to the war effort.

The resulting criteria for combatancy, which continued on to form the basis for Prisoner of War status under the 1949 Geneva Conventions and is largely recognized as reflecting customary international law, was an attempt to satisfy both camps. Combatant status was primarily based on being a member of the regular armed forces, or a member of volunteer corps or militia who met the criteria of being commanded by a person responsible for his subordinates, having a fixed distinctive emblem recognizable at a distance, carrying arms openly and conducting operations in compliance with the laws and customs of war.

Significantly, there was also recognition of the *levee en masse* in which the inhabitants in unoccupied territory could spontaneously rise up to meet an invader so long as they carried arms openly and respected the law and customs of war. The view that combatants were a discrete privileged class separate from civilians on the battlefield was also challenged by the recognition that civilians accompanying the armed forces such as correspondents and contractors had the status of prisoners of war. Further, the codification attempts at the end of the 19th century were not necessarily viewed at that time as being exhaustive of the rights of civilians to come to the defence of their country.²⁴ An increasingly positivist view of international humanitarian law in the 20th century appears to have drawn significantly brighter lines between civilians and combatants than was originally contemplated. The outcome of these initial efforts to deal with “combatancy” could be generously termed as unfinished business.²⁵

The attempt to distinguish between combatants and civilians continued on throughout the 20th century driven primarily by the changing nature of armed conflict. The use of organized resistance movements by Allied Powers during World War II as a means of conducting warfare resulted in an acknowledgement of a new found legitimacy for guerrilla forces. The judgment of the Nuremberg Tribunal in the *Hostages* case equated a member of an organized guerrilla resistance movement to a spy who:

...may act lawfully for his country and at the same time be a war criminal to the enemy, so guerrillas may render great service to their country and, in the event of success, become heroes even, still they remain war criminals in the eyes of the enemy and may be treated as such.²⁶

²⁴ See Baxter, *supra* note 17, at 335-36 quoting de Martens the President of the 1899 Hague Conference and Spaight, *supra* note 11, at 6-9.

²⁵ The following commentary by J.M. Spaight, *supra* note 11, at 54-55 concerning the 1907 Hague Regulations provides an interesting assessment the success of the 19th century attempts to codify combatant status:

Instead of drafting a single Article which would satisfy the two conflicting interests, the delegates have almost shirked their task—a task of very great difficulty, it must be admitted—and have tried to satisfy both separately, in a way that will hardly, in practice, be found to please either.

²⁶ The Hostages Case, *Trials of War Criminals* (Washington: Government Printing Office 1950) at 1245. While the judgement refers to the employment of guerrilla forces as a “war crime” in the view of the

Notwithstanding this partial legitimization of the widespread use of “patriotically” driven guerrilla warfare by the Allied Powers, the international community chose to only extend the status of prisoner of war status to such guerrilla movements on the basis of the 19th century criteria applied to militia and volunteer corps. This has resulted in an almost universal acknowledgement that members of resistance movements could only obtain prisoner of war status under Geneva Convention III, article 4(2) in the most exceptional of circumstances.²⁷

A significant advance in the law regarding unprivileged belligerency was realized in Geneva Convention IV which established a detailed framework for the detention, treatment, trial and release of protected persons who are a threat to security (including irregulars and guerrilla movements) in the territory of Party to the Conflict or in occupied territory. However, that treatment would not apply to unprivileged belligerents who were not taken into custody for hostile conduct in a zone of operations outside of occupied territory.²⁸

The post World War II period created greater impetus to recognize members of guerrilla organizations as lawful combatants. This requirement resulted in part from the changing nature of conflict as the armed struggle for self-determination was conducted to a large extent as guerrilla warfare. Additional Protocol I marked a shift away from humanitarian protection being provided by retaining a more narrow class of privileged belligerents to one of encouraging participants in irregular warfare to adopt humanitarian norms by offering them combatant and therefore prisoner of war status. Persons who owing to the circumstances cannot distinguish themselves from civilians, but who carry arms openly during each military engagement and while they are visible to the adversary during the deployment preceding an attack are included as combatants.

While 160 countries are presently parties to Additional Protocol I countries such as India, Indonesia, the United States, Iran, Iraq, Israel, Japan and Pakistan have not

capturing party this has been interpreted to be more of a crime under domestic law rather than a crime under international law. See Baxter, *supra* note 17 at 336-8 and also Dinstein, *supra* note 19, at 111 where Professor Dinstein states ordinary civilians such as farmers killing a downed pilot would still be war criminals.

²⁷ As was stated by Howard Levie in *Prisoners of War in International Armed Conflict*, 59 International Law Studies 1, 42 “this attempted enlargement of the provisions of prior conventions accomplished little or nothing.” The unwillingness to extend combatant status to guerrilla movements impacts not only on the members of the guerrilla movement, but also to personnel of the Party to the Conflict supporting them if those personnel are participating without meeting the traditional criteria of combatancy. World War II examples might include the Special Operations Executive-SOE, the Office of Strategic Services-OSS and the Russian Central Staff of the Partisan Movement. See Robert B. Asprey, *War in the Shadows* (Doubleday and Co. Inc. 1975) No. I Chapters 31 to 51.

²⁸ While there are general protections for populations against certain consequences of war, the detailed provisions applicable to the treatment of detained persons are limited in terms of geography and nationality. For example, nationals of a neutral state who find themselves in the territory of a belligerent state, and nationals of co-belligerent states are not protected persons as long as their state has normal diplomatic relations with the state in whose hands they are. See Geneva Convention IV, art. 4. See Baxter, *supra* note 17, at 328-9.

ratified it. The United States, which has perhaps been the most open in terms of outlining its reasons in writing for not ratifying Additional Protocol I, has included concerns about whether it legitimizes terrorism, the definition of combatant status and issues related to the targeting provisions of the Protocol.²⁹ In addition, the existence of the large number of national reservations and understandings indicate that Additional Protocol I did not necessarily record a consensus on the meaning of many of its provisions.³⁰ The bottom line is that at the dawn of the 21st century the international community has still not been able to reach universal agreement on the very issue that has plagued the codification of international humanitarian law since its inception.

4. Challenges to the Dual Class Approach

What then of the future? The challenges to applying a clear combatant/civilian distinction appear numerous: establishing clear and comprehensive criteria for combatant status; interpreting the scope of the cross-over criteria by which a civilian is considered to take part in hostilities; applying the distinction principle across the whole spectrum of conflict; and accounting for the presence of civilians in the zone of operations or their participation in the war effort.

a) Criteria for Acquiring Combatant Status

One of the challenges of establishing combatant status, either under the Geneva Convention III criteria or under Additional Protocol I, has been interpreting what terms like “carrying arms openly” actually mean. Even in the period immediately after the adoption of the standard in the early 1900s there was no consensus that carrying a pistol met the criteria.³¹ Quite animated and interesting discussions can take place among legal scholars and military professionals as to what “having a fixed distinctive sign recognizable at a distance” actually means without even addressing the more controversial term of being “engaged in a military deployment preceding the launching of an attack....”³²

Further the criteria for acceptance as a combatant are both “group” based and individual. However, there appears to be no firm consensus as to which of the conditions are collective and which are individual.³³ Generally, the allegation of the commission of a

²⁹ Generally see H.P. Glasser, *Agora: The US Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims*, 81 A.J.I.L. 910 (1987), Abraham D. Sofaer, *Agora: The US Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims (Cont'd)* 82 A.J.I.L. 784 (1988), G.S. Prugh, *American Issues and Friendly Reservations Regarding Protocol I, Additional to the Geneva Conventions*, 31 *The Military Law and Law of War Review* 225 (1992) and Parks, *supra* note 21.

³⁰ For example Canada and a number of other nations have indicated that Additional Protocol, art. 44. 3. can only apply in occupied territories or in armed conflicts covered by art. 1. 4. Similarly, understandings regarding what is meant by a movement towards a place from which an attack is to be launched have also been submitted.

³¹ See Spaight, *supra* note 11, at 59.

³² See Levie, *supra* note 27, at 44-59 and W.T. Mallison & S.V. Mallison, *The Juridical Status of Irregular Combatants under International Humanitarian Law*, 9 *Case W. Res. J. Int'l L.* 39, 49-65 (1977).

³³ G.I.A.D. Draper, *The Status of Combatants and the Question of Guerrilla Warfare*, 45 *B.Y.I.L.* 73, 195-9 (1971). In Mallison, *supra* note 32, at 62 it is indicated that all six criteria (organization, association with a

war crime by an individual combatant will still result in that person being provided prisoner of war status.³⁴ While not without controversy it is open to a state to deny all the members of a group combatant status if that group does not “enforce compliance with the rules of international law applicable to armed conflict.”³⁵ The question remains as to what factors are applied to establish non-compliance.

Exclusion of a group from combatant status is perhaps most easily applied in respect of terrorist organizations that by definition do not respect the fundamental distinction between combatants and civilians in their actions and sometimes overtly reject any requirement to do so.³⁶ An argument that terrorists as a group should not be excluded from gaining combatant status ultimately would have to assess the purpose for requiring that armed forces “enforce compliance with the rules of international law applicable in armed conflict.” This requirement appears to be clearly directed towards the goal of having all participants in the group act lawfully rather than simply rely on potentially punishing individual offenders.

A decision to exclude a group from combatant and therefore POW status should not be based on an assessment of the “justness” of that group’s cause. The application of “just war” thinking to combatant status is fraught with difficulty. Under that approach the state lawfully using force claims a right to combatant and ultimately have POW status, while the party acting unlawfully “would be subject to the obligations, but could not benefit from the rights conferred by the law of war, including the Geneva Conventions of 1949.”³⁷ It is a fundamental principle of international humanitarian law that the treatment of captured personnel is based on their meeting appropriate objective criteria and not the “justness” of the cause they serve.

party to the conflict and military command, distinctive sign, open arms and adhering to the laws and customs of war) are group based, with the last three criteria having to be met by both the group and individuals.

³⁴ However, see the Commentary to Additional Protocol I, para. 1689 footnote 19, www.icrc.org/ which notes that a number of countries have made reservations wherein they are not bound to extend the application of Geneva Convention III to prisoners of war who are convicted of war crimes or crimes against humanity.

³⁵ The ICRC Commentaries to Art. 44, para. 1688, www.icrc.org indicates that several representatives at the diplomatic discussions felt this was an issue that should be expressly addressed in the Protocol while others felt there was no need and that persons could be punished for criminal offences. Ultimately the Commentary concludes:

However, this in no way detracts from the fact that armed forces as such must submit to the rules of international law applicable in armed conflict, this being a constitutive condition for the recognition of such force, within the meaning of Article 43.

A group ban is supported by Leslie C. Green, *supra* note 16, at 111, n.44 where there is consistent disregard on the part of the armed force. See also Levie, *supra* note 27, at 52-3. However, in Bothe, *supra* note 12, at 238-9 the view is expressed that the negotiating history, the structure of the paragraph and the provisions of AP I, art. 44(2) “strongly militate against any construction that this provision constitutes one of the conditions for qualification as an armed force”. In Mallison, *supra* note 32, at 58-63 the requirement to comply with the laws and customs of war is analyzed from the relative ability of regular versus irregular armed forces to fulfill all the requirements of international humanitarian law.

³⁶ For example a 1998 Fatwa issued by Osama Bin Laden indicated there was a duty to kill “the Americans and their Allies, civilians and military...” R.G. Gunaratna, *Inside Al Qaeda* 45-46 (Columbia University Press 2002).

³⁷ R.R. Baxter, *Introduction to 9 Case W. Res. J. Int’l L.* 7 (1977).

It has been noted that the decision to exclude a group from attaining combatant status should not be taken lightly.³⁸ Such a determination may undermine the inherent incentive for the denied group to comply with international humanitarian law and might be perceived to be inconsistent with the humanitarian purpose of international humanitarian law.³⁹ There is also a very real danger it could result in a reciprocal denial of POW status to captured personnel.⁴⁰ Concerns over the effect which denying POW status to opponents might have on the treatment of a state's own forces will receive if captured has provided a powerful incentive to provide POW status even where law might not technically require it.⁴¹

The result of a group exclusion is that opposing forces which could range from organized military units to operatives hiding within a civilian population but organized along military lines have the status of "civilians" under international law, if not the protection from attack.⁴² Such a denial of combatant status highlights one of the challenges of maintaining a distinction principle based solely on the dual class construct of combatants and civilians. At a minimum it appears awkward to use the term "civilian" to describe the legal status of a warrior group that does not qualify for combatant status.

b) The Nature of the Participation in Hostilities

An area where there appears is a considerable lack of clarity is the determination of when civilians participate in hostilities. As has been noted the Additional Protocol I test is that they are protected *unless and until such time as they take a direct part in hostilities*.⁴³ This test is not only found throughout Additional Protocol I, but is also set out in Additional Protocol II⁴⁴ and in the 1998 Rome Statute for the International

³⁸ Mallison, *supra* note 32, at 63.

³⁹ *Id.*, at 61-63 that indicates the central legal policy objective to adhering to the laws and customs of war is "that this is designed to promote maximum lawfulness in the conduct of hostilities."

⁴⁰ An example of where a military forces reacted to the treatment of their own personnel by the opposing party is the execution of 80 members of the German army by the French Forces of the Interior (FFI) following the killing of the same number of FFI personnel by the German forces on the basis that they were unprivileged combatants. The ICRC subsequently received verbal assurances that FFI prisoners would be properly treated. Levie, *supra* note 27, at 41 n.156. Reprisals against POWs are prohibited under Geneva Convention III, art. 13. Issues of reciprocity of treatment in a modern context are discussed in Major G.S. Corn & Major M.L. Smidt, *To Be or Not to Be, That is the Question, Contemporary Military Operations and the Status of Captured Personnel*, The Army Lawyer, DA PAM 27-50-319 1, 1-2 (June 1999).

⁴¹ The example often given is the decision of the United States government to extend POW protection to captured Viet Cong as well as captured regular force North Vietnamese Army personnel. Classification as POWs was not provided if the personnel were involved in terrorism, sabotage or spying. See *Annex A of Directive Number 381-46 of December 27, 1967*, 62 A.J.I.L. 763-768 (1967). See also Mallison, *supra* note 32, at 72-74.

⁴² For a discussion of the military organization of terrorist forces see G. Davidson Smith, *Combating Terrorist Forces* 17-20 (Routledge, Chapman and Hall Ltd 1990) and W. Hayes Parks, *Memorandum of Law: Executive Order 12333 and Assassination* The Army Lawyer 4, 7 (1989).

⁴³ Additional Protocol I, art. 51.

⁴⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II). (referred to as Additional Protocol II).

Criminal Tribunal.⁴⁵ Criticism of this test has been made on both temporal and functional grounds. A concern has been expressed that it might raise a “revolving door” zone of immunity for civilian participants who could participate in hostilities, drop their weapon and claim they were are privileged civilians.⁴⁶ Further, there is the question of whether taking a direct part in hostilities accurately addresses the scope and nature of civilian involvement in conflict.⁴⁷ A significant part of the debate centers on the meaning of taking a *direct* part in hostilities. The ICRC Commentaries states it means “acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces” with such participation including hostile acts without a weapon.⁴⁸

Both Additional Protocols also contain other wording relating to participation in hostilities which appears to be more general in nature: “*a person who has taken part in hostilities*”, “*acts harmful to the enemy*”⁴⁹ and “*persons who ...have ceased to take part*”.⁵⁰ Common Article 3 of the Geneva Conventions provides protection for persons who “*take no active part*” in hostilities in respect of conflicts not of an international character. In addition the phrase “*aids, abets, or participates in fighting*”⁵¹ has been used to describe the nature of participation in hostilities.

A “revolving door” interpretation of taking a direct part in hostilities could lead to allegations of perfidy and the misuse of civilian status. At the other end of the spectrum is the view that there is a loss of privileged status as long as the person is a “member” of the group engaged in hostilities. To the extent that the opposing force involved may have been denied combatant status solely as a result of a group characteristic a strong argument may be made that a “combatant like” approach to whether they may be targeted would be appropriate. While criminal law generally does not embrace the notion of culpability on the basis of membership in a group alone combatancy is itself “membership” based. That does not mean in respect of non-state actors that all supporters or even members of such an entity may be involved in the planning for or application of violence as the entity may include military and political components depending on its level of sophistication and its governance structure⁵²

⁴⁵ See Additional Protocol I, arts 43. 2 and 67 1. (e), Additional Protocol II arts 4 and 13. 3. and the 1998 Rome Statute for the International Criminal Court, s. 8(2)(b)(i) and 8(2)(e)(i).

⁴⁶ Parks, *supra* note 21, at 118-120.

⁴⁷ *Id.* at 120-135. The argument has been made that such participation should be more fulsomely categorized as participation in the war effort (war production, etc.), military effort (combat support) and military operations (participation in deployments and fighting). Similar categories of civilians were raised during the Additional Protocol I negotiations in the 1970s, but were ultimately dropped in favour of the two category combatant/civilian distinction. Bothe, *supra* note 12, at 294-5.

⁴⁸ ICRC AP I Commentary Art. 51, para. 1944, www.icrc.org/.

⁴⁹ AP I, arts. 45 3., 65. and 67. 1.(e), GC I, art. 21, GC II, art. 34 and GC IV, art. 19.

⁵⁰ AP I, art. 4.

⁵¹ See The Hostages Case, *supra* note 26, at 1246. See also Schmitt, *The Principle of Distinction in 21st Century Warfare*, *supra* note 23, at 149 for additional examples of the general terminology used in the Additional Protocols largely related to targeting.

⁵² For a general discussion of the nature of insurgent movements see Davidson Smith, *supra* note 42 at wherein he discusses their military and political structures and how they might mature over time.

c) Combatancy Across the Spectrum of Conflict

i) International Armed Conflict

Traditionally the status of combatant was most readily identified with service in the armed forces of a state in the context of an armed conflict between states. Since World War II there has been a steady expansion of what is considered to be an international armed conflict. The linkage between states, non-state actors and the international humanitarian legal standards for attaining combatant status has been at the heart of that migration away from exclusively state on state conflict. As a result the potential for groups other than the regular armed forces of a state to be recognized as combatants has increased.

For example, in the immediate post World War II period Geneva Convention III was enacted with provisions where prisoners of war may be members of regular armed forces who profess allegiance to an “authority” not recognized by the Detaining Power.⁵³ As has been noted there was a recognition that members of militias and members of other volunteer corps, including organized resistance movements, “belonging to” a Party to the conflict could attain prisoner of war, and by analogy combatant, status.⁵⁴ However, the nature of the type of association to a state in respect of organized resistance movements was unclear given the differing degrees of connection many World War II resistance movements had to the Allied Powers sponsoring them.⁵⁵

The 1970s response to increasing guerrilla warfare in the Post World War II period resulted in Additional Protocol I recognition that some guerrilla organizations should be capable of having combatant status. Although only applicable in limited circumstances non-state actors were offered what was previously a state associated status. Perhaps most significantly non-state actors could attain combatant status without “belonging to” a state Party to the conflict.

More recently in the Tadic case⁵⁶ the Appeal Chamber for the International Tribunal for the Former Yugoslavia assessed the international humanitarian law criteria of “belonging to a Party to the conflict” associated with combatancy under Geneva Convention III in determining that the conflict in the former Yugoslavia between the armed forces of Bosnia and Herzegovina and the Bosnian Serb Army was an international armed conflict.

The idea that international armed conflict only occurs between states has been further eroded in the face of the post-11 September campaign against terrorism. The international nature of this conflict is recognized in regional action invoking the right to

⁵³ Geneva Convention III, art. 4 A. (3)

⁵⁴ Geneva Convention III, art. 4 A. (2).

⁵⁵ See Levie, *supra* note 27, at 40-43 and Mallison, *supra* note 32, at 50-58 for a discussion of “belonging to” a Party to the Conflict.

⁵⁶ Prosecutor v. Tadic, IT-94-1-A 30-75 (15 July 1999), available at <http://www.un.org/icty/tadic/appeal/judgement/index.htm>.

self-defence,⁵⁷ United Nations Security Council Resolutions⁵⁸ and in recent United States court decisions.⁵⁹

ii) Non-International Armed Conflicts

It has been noted that a “striking feature of the law of non-international armed conflicts is that it foresees no combatant status, does not define combatants and does not prescribe specific obligations for them....”⁶⁰ This is seen as a consequence of the non-state actor not having a right to participate in non-international armed conflicts.⁶¹ Neither common Article 3 of the Geneva Conventions, nor Additional Protocol II refers to combatants. Common article 3 neutrally uses the term “persons” while the Additional Protocol specifically refer to civilians.

However, the lack of a reference to combatants does not change two important factors. First, when persons or civilians actively participate or take a direct part in

⁵⁷ For example, see 2001 Statement by the North Atlantic Council wherein the Council agrees “if it is determined that this attack was directed from abroad against the United States, it shall be regarded as an action covered by Article 5 of the Washington Treaty, which states that an armed attack against one or more of the Allies in Europe or North America shall be considered an attack against them all.” It was confirmed on 2 October 2001 by the NATO Secretary-General Lord Robertson that the attacks were from abroad and that article 5 had been invoked. See NATO press release *available at* <http://www.nato.int/docu/update/2001/1001/e1002a.htm>. Similarly, the Australian Government in consultation with the United States invoked Article IV of the ANZUS Treaty in recognition that the terrorist attacks constituted an armed attack from outside the United States. See Media Release *available at* http://www.pm.gov.au/news/media_releases/2001/media_release1241.htm.

⁵⁸ For example see S/Res/1368 (2001) which in response to the attacks on 11 September, 2001 The United Nations Security Council recognized “the inherent right of individual or collective self-defence in accordance with the Charter” and “regards such acts, like any act of terrorism, as a threat to international peace and security”.

⁵⁹ As was stated in *Padilla v. Bush*, No. 02 Civ 4445 (MBM), slip op. at 53 (Order and Opinion) *available at* <http://news.findlaw.com/hdocs/docs/terrorism/padillabush120402opn.pdf>: “The laws of war themselves, which the President has invoked as to Padilla, apply regardless of whether or not a war has been declared.... The question of when the conflict with Al Qaeda may end is one that need not be addressed.” See also *Hamdi v. Rumsfeld*, 02-7338, (4th Cir Ct of Appeals 08 Jan 2003) *available at* <http://laws.findlaw.com/4th/027338p.html> wherein it is stated:

“These interests do not carry less weight because the conflict in which Hamdi was captured is waged less against nation-states than against scattered and unpatriated forces. We have emphasized that the “unconventional aspects of the present struggle do not make its stakes any less grave.” *Hamdi II*, 296 F.3d at 283. Nor does the nature of the present conflict render respect for the judgments of the political branches any less appropriate. We have noted that the “political branches are best positioned to comprehend this global war in its full context,” *id.*, and neither the absence of set-piece battles nor the intervals of calm between terrorist assaults suffice to nullify the warmaking authority entrusted to the executive and legislative branches.

⁶⁰ Marco Sassoli & Antoine Bouvier, *How Does Law Protect in War?* 208 (International Committee of the Red Cross 1999).

⁶¹ *Id.*

hostilities they are distinguished from civilians who must be protected.⁶² Secondly, whether by virtue of the scale of conflict or common practice, specific agreements as provided for in Geneva Convention art. 3 may use the term “combatant”. For example, the Bosnia and Herzegovina, Agreement No. 1 of May 22, 1992 stated, “captured combatants shall enjoy the treatment provided for the Third Geneva Convention”.⁶³

iii) United Nations Operations

The status of United Nations personnel using armed force also challenges traditional notions of combatancy. The 1994 Convention on the Safety of United Nations and Associated Personnel (the Safety Convention) provides protection from attack for military and police personnel on a UN operation.⁶⁴ The Safety Convention does not apply to “an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies.”⁶⁵ In such cases combatant status for United Nations personnel would be based on international humanitarian law criteria including the association of the armed forces with the state that provides the forces.

The United Nations has identified a requirement to have international humanitarian law principles apply to all UN operations including peacekeeping and Chapter VII operations that fall within the provisions of the Safety Convention. In August 1999 the Secretary General issued a bulletin which states the “fundamental principles and rules of international humanitarian law set out in the present bulletin are applicable to United Nations forces when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement.”⁶⁶ These rules apply in enforcement actions and “in peacekeeping operations when the use of force is permitted in self-defence.”⁶⁷ This provision introduces a temporal aspect to combatant status for armed forces that can raise the “revolving door” concerns already commented on in respect of civilians taking a direct part in hostilities. It also seems to equate any use of armed force, including acting in self-defence, as being an act of “combat”. This concept appears to introduce a *de facto* notion of combatancy that may not be the same as the traditional idea of participation in armed conflict by armed forces “belonging” a party to the conflict.

d) Civilian Involvement in the Conduct of War

⁶² For example, Additional Protocol II, art. 13.

⁶³ Sassoli & Bouvier, *supra* note 60, at 1115.

⁶⁴ Protection is also provided to UN civilian components, officials and experts on mission and Associated Personnel. See Convention on the Safety of United Nations and Associated Personnel, arts 1 and 7. (hereinafter the Safety Convention).

⁶⁵ The Safety Convention, art. 2.

⁶⁶ Secretary-General’s Bulletin, Observance by United Nations forces of International Humanitarian Law, 12 August 1999, art 1.1.

⁶⁷ *Id.*

The final challenge arises from the fact that civilians are integrally involved in the conduct of war. The following are some categories of civilians who do not on their face fit neatly into the combatant/civilian distinction and in some cases are provided “combatant like” prisoner of war status under international humanitarian law if captured:

i) Persons Integrated into or Supporting the Military Structure:

The presence of civilians on the battlefield has been recognized since the initial codification of international humanitarian law. It could be argued that the provision of prisoner of war status in the Hague Regulations, article 13 and Geneva Convention III, article 4(5) and (5) is itself recognition of the near combatant type functions performed by these civilians. This presence has increased significantly since the 19th century in part due to technological advancement. In modern armed forces civilians perform integral support functions such as maintenance, logistics and intelligence. The advent of information warfare may further expand the traditional notions of when and how civilians “accompany” the armed forces. The degree to which civilians are now an integral part of even frontline military operations has prompted some legal scholars to indicate 21st century armed forces may be in danger of employing civilians in combat roles.⁶⁸

ii) Civilian Leaders Directing Operations:

The involvement of civilian political leaders such as government ministers in making decisions related to the conduct of hostilities inevitably raises the question of when such involvement constitutes taking part in hostilities. To the extent that in many countries the head of the government is directly in the chain of command the question of the involvement of the political leadership is simplified. Where civilian leaders do not exercise a formal constitutional or command responsibility the nature of their involvement and their status may not always be as clear. However the fact they may be held accountable for the commission of war crimes committed by subordinates and under customary international law civilian leaders associated with the war effort were often given prisoner of war status is an acknowledgement in part of their connection to hostilities.⁶⁹ This issue is not limited to states and can also be addressed in the context of the leadership structure of non-state actors involved in armed conflict.

iii) Civilians Participating in the War Effort:

⁶⁸ See Maj. L.L. Turner & Maj. L.G. Norton, *Civilians at the Tip of the Spear*, 51 Air Force Law Review 1, 29-33 (2001) and Maj. M.E. Guillory, *Civilianizing the Force: Is the United States Crossing the Rubicon*, 51 Air Force Law Review 111,136 (2001).

⁶⁹ “High civil functionaries, whether accompanying an army or not, are also liable to be made prisoners of war; to capture a war minister, for instance, or a sovereign, or a Lord Chancellor would be justifiable as tending to disorganize the administration of the enemy state and to weaken indirectly its fighting efficiency.” Spaight, *supra* note 11, at 305. See also Hingorani, *Prisoners of War 60-61* (Oceana Publications, 1982). In Levie, *supra* note 27, at 83 it is indicated a sovereign, president, their family and chief minister would as a result of Geneva Convention IV now “only be placed in assigned residence or interned.” That analysis does not address the fact that the basis for detaining such political leaders would still be for “imperative reasons of security” as set out in Geneva Convention IV, art. 78. In other words the threat they pose to the detaining power.

This issue is related to the concept of “total war” and whether conflict truly is between a privileged class of belligerents or involves all or a significant portion of the opposing population. Even here, however, there would appear to be functional distinctions in that targeting the will of the enemy to fight may be seen as different than attacking the war industry and other segments of the economy directed to the war effort.⁷⁰ The traditional analysis of attacking factory workers inevitably can lead to a discussion as to whether it is necessary to attack the individuals or simply the factory (ie. what it is they do) with the resulting civilian casualties being incidental to the attack. The question to be asked is whether the attack is on a military object or on civilians individually who are performing a “combatant like” function that is inconsistent with their civilian status.

iv) Armed Individuals or Groups Present on the Battlefield

A fundamental element of combatancy has been that there is a connection to a state or group that is a Party to the Conflict. To be armed and present on a battlefield without such a connection has traditionally meant that the individual was a “marauder” and subject to sanction as an “unprivileged belligerent”. However, conflict in failed states may lead to situations where individuals and even groups such as local police forces act in self-defence while not engaged in a *levee en masse*.⁷¹

v) Integration of Law Enforcement Personnel and Para-military Agencies

International humanitarian law contemplates the integration of law enforcement and para-military agencies into its armed forces. That in turn would provide them with the right to “participate directly in hostilities.”⁷² In modern armed conflict where the opposing force may be a state sponsored or non-state terrorist group accused of committing international or domestic criminal acts, civilian law enforcement agencies may be involved both in the zones of operation in other countries or domestically in tasks such as collecting evidence or countering threats such as the use of weapons of mass destruction. Similarly, depending upon the constitutional and legal framework of the country the armed forces may be deployed domestically to counter “criminal” activity perpetrated by the same non-state actors.⁷³ This blending of law enforcement and military

⁷⁰ There has been considerable debate about the status of the Serb RTS in central Belgrade in the 1999 Kosovo air campaign as a valid military objective and whether the targeting of the civilian population or civilian morale is a valid military objective. See William J. Fenrick, *The Law Applicable to Targeting and Proportionality After Operation Allied Force: A View From the Outside*, 3 Y. I. H.L. 53, 70-74 (2000).

⁷¹ See excerpts from the decision Prosecutor v. Tadic ICTY Case No. IT-94-I-T, Judgement, 7 May 1997 cited in Sassoli & Bouvier, *supra* note 57, at 1213-4 wherein reference was made by the court to a Commission of Experts conclusion that civilians might be armed simply in self-defence. Similarly in The Prosecutor v. Tihomir Blaskic, ICTY Case No. IT-95-14-T, Judgement, 3 March 2000 at paras. 402-10 the trial court held that the presence of a territorial defence force being set up as a form of civil defence in the Ahmici area did not make the village a “military objective”.

⁷² Additional Protocol I, art. 43. 3.

⁷³ La Carte, *supra* note 3, at 24-5.

operations brought on by the application of asymmetric warfare may serve to blur the distinction between combatants and civilians.⁷⁴

Even if the provisions of Additional Protocol I had universal agreement regarding their application issues regarding the status and treatment of unprivileged belligerency would have to be addressed. While that Protocol provides a certain level of due process for detainees⁷⁵ it does not equate to the protection that would be available under Geneva Convention IV if the unprivileged belligerent were detained in occupied territory and was a protected person under that Convention. At present, Additional Protocol I, while an improvement, continues the uneven and piecemeal approach that has been the history of unprivileged belligerency. Movement towards a GC IV standard for the handling of detained “unprivileged belligerents” might provide a more consistent approach for both the capturing party and the detainee. It would also be mean that the standard of treatment would be based solely on status and not on the location of capture or nationality of the detained person.⁷⁶ By not fully addressing unprivileged belligerency the issue remains largely governed by customary international law where unprivileged belligerents are grouped with spies and military personnel operating behind enemy lines in civilian clothes.⁷⁷ These persons make strange bedfellows.

5. The Future?

In the past analysis of the combatant/civilian distinction has led to consideration and rejection of a “quasi-combatant” category of participants in conflict.⁷⁸ Ultimately the question may not be if there is a third category, but rather whether international humanitarian law has fully and realistically accounted for the civilian who does take a part in hostilities.

At the outset of this paper it was indicated that warfare is undergoing a fundamental transformation. It may be that rules crafted even 25 years ago do not reflect the reality of modern conflict even without considering whether those rules fully addressed the combatancy conundrum that has plagued the codification of international humanitarian law since its inception. Perhaps the following two quotes from writers dealing with this issue some 50 years ago places the required balancing of military necessity and humanitarian values in context:

...no purpose would be served if the next Convention on the Rules of Warfare adopts a set of rules which in practice would be meaningless. Any international

⁷⁴ For a discussion of the application of the law of armed conflict to anti-terrorist operations see Adam Roberts, *Counter-terrorism, Armed Force and the Laws of War*, Survival Vol. 44, No. 1, 7, 11-15 (Spring 2002).

⁷⁵ See Additional Protocol I, arts. 44 3., 45. 3 and 75.

⁷⁶ The principles of Geneva Convention IV and its procedures regarding the treatment and holding of detainees are increasingly being applied to situations that do not fall entirely with the technical jurisdiction of that Convention. See B.M. Oswald, *The INTERFET Detainee Management Unit in East Timor*, 3 Y.I.H.L. 347 (2000).

⁷⁷ See Baxter, *supra* note 17.

⁷⁸ See Mallison, *supra* note 32, at 47.

agreement designed to prevent or regulate future wars must take into account the ways in which future wars may be fought. The very notion of regulating war is an anomaly to some extent, and it is doubtful that completely satisfactory rules for the conduct of war can ever be worked out.⁷⁹

In respect of “unprivileged belligerents”:

...it is possible to envisage a day when the law will be so-retailored as to place all belligerents, however garbed, in a protected status.⁸⁰

The question remains whether the wisdom of 21st century thinkers can solve a problem that has challenged international humanitarian law since its 19th century codification.

⁷⁹ Nurick, *supra* note 22, at p. 696-97.

⁸⁰ Baxter, *supra* note 17, at 343.