INTERNATIONAL HUMANITARIAN LAW AND
THE CHALLENGE OF COMBATANT STATUS

-Jonathan Crowe*

International humanitarian law faces a range of ongoing challenges. These include the challenges posed by new and emerging types of weapons, the changing face of armed conflict and the political dynamics of the international community. Armed conflicts continue to arise, defying the aspirations of the United Nations Charter. Civil conflicts, in particular, continue to proliferate. Conflicts involving non-state armed groups have always posed a challenge for international humanitarian law. Many contemporary civil conflicts involve a number of different state and non-state parties, some of which may be loosely affiliated or have overlapping command structures. These conflicts may occur wholly within the territory of a single state or spill over national boundaries.

The respect shown for international humanitarian norms in these conflicts is highly variable. Organisations such as the International Committee of the Red Cross and the United Nations continue to work to disseminate humanitarian principles. However, the informal recruitment policies and loose command structures that characterise many contemporary conflicts makes it difficult to disseminate and enforce humanitarian standards. Reprisals against captured combatants and civilian populations, including campaigns of torture and rape, are widespread. The problem is exacerbated in some conflicts by the use of independent contractors outside the military hierarchy.

This article focuses on the challenges these kinds of conflicts can pose for one of the most fundamental principles of international humanitarian law: namely, the principle of distinction. International humanitarian law encourages a clear and reliable division between combatants and non-combatants. The principle of distinction requires combatants to distinguish at all times between military targets and civilian objects and stipulates that only military targets may be the object of attack. This is arguably the most important principle of the whole law of armed conflict. The principle is undermined if attacking forces cannot readily distinguish combatants from other parties.

I. THE SIGNIFICANCE OF COMBATANT STATUS

The classic definition of combatant status under international humanitarian law is found in Article 4 of Geneva Convention III. That provision sets out the categories of people who are entitled to prisoner of war status. The first category comprises members of the regular armed forces of a party to the conflict. The second category covers members of other armed groups, such as militias and volunteer corps, who are under responsible command; bear a fixed, distinctive sign recognisable at a distance; carry arms openly; and respect the requirements of international humanitarian law.

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broadly similar definition, albeit with some differences, is found in Articles 43 and 44 of Additional Protocol I.

The importance of the distinction between combatants and non-combatants is reflected in Article 43(2) of Additional Protocol I, which provides that ‘[m]embers of the armed forces of a Party to a conflict […] are combatants, that is to say, they have the right to participate directly in hostilities.’ This provision makes it clear that international humanitarian law regards combatants as the primary agents of warfare. Beyond that, however, the provision is open to two different interpretations. The pivotal question here is what Article 43(2) means when it says that combatants ‘have the right to participate directly in hostilities’. One way of interpreting this provision would be to infer that only combatants have the right to participate in hostilities. This would make it a violation of international humanitarian law for a noncombatant to engage directly in armed conflict.

The better view, however, is that Article 43(2) of Additional Protocol I does not prohibit noncombatants from directly participating in hostilities. It bears noting that there is no provision in the Geneva Conventions or Additional Protocols expressly stating such a prohibition. Article 43(2) is as close as we get. Other provisions that deal expressly with civilians engaging in hostilities, such as Article 51(3) of Additional Protocol I, merely say they lose their immunity from attack while doing so. It would be dangerous to imply such a strong prohibition from the ambiguous words of Article 43(2) when it does not appear anywhere else in the relevant international treaties.

What, then, is the point of Article 43(2)? I would contend that the provision serves two purposes. The first is to reinforce the importance of the distinction between combatants and non-combatants, by designating combatants as the primary (although not necessarily sole) agents of warfare. The second is to emphasise that combatants may not be tried or punished merely for taking part in hostilities. On this interpretation, the provision states that combatants ‘have the right to participate directly in hostilities’, not to imply that noncombatants lack that right, but to emphasise that captured combatants cannot be executed or otherwise penalised merely for being on the wrong side of the conflict. Article 43(2) therefore reinforces the prohibition on reprisals against prisoners of war.

Non-combatants who take up arms are bound by the same legal rules as any other fighter. They cannot directly attack civilians or their property; they cannot mount their attacks in a disproportionate way; they cannot mistreat civilians or captured combatants; they cannot use prohibited weapons or tactics. Like recognised combatants, they can lawfully be targeted by opposing forces. They may also be

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liable to prosecution under the law of the detaining power for their hostile actions, since they do not benefit from the combatant immunity recognised in Article 43(2). However, provided that non-combatants abide by the ordinary laws of war, they are not prohibited under international law from engaging in hostilities. There is no firm basis in the conventions for such a prohibition.

II. Protections For Unprivileged Belligerents

The definitions of combatant status in both Geneva Convention III and Additional Protocol I are framed primarily as prerequisites for prisoner of war status. The benefits of prisoner of war status are extensive and detailed. The fact that unprivileged belligerents do not qualify for prisoner of war status if captured therefore provides a real disincentive for noncombatants to take up arms. Nonetheless, it would be wrong to think that unprivileged belligerents are entirely unprotected by international humanitarian law. In fact, under international humanitarian law, nobody goes entirely unprotected. Those who are not entitled to prisoner of war status benefit from other safeguards.

There are at least two additional layers of protection available to captured belligerents who do not benefit from prisoner of war status under Geneva Convention III. The first is the ‘protected persons’ regime in Part III of Geneva Convention IV, which extends detailed protections to people who fall into the hands of a party to a conflict of which they are not nationals. However, the ‘protected persons’ regime will not extend to unprivileged belligerents who find themselves in the hands of their own state or its allies. It is also possible to override some of the protections on security grounds.

The second additional layer of protection is contained in Article 75 of Additional Protocol I, which lists the ‘fundamental guarantees’ that protect all persons who fall into the hands of a party to an armed conflict. Additional Protocol I, like Geneva Convention IV, only applies in international armed conflicts. The equivalent level of protection in non-international conflicts is expressed in Articles 4-5 of Additional Protocol II, which are less detailed than Article 75, but cover many of the same basic issues. These articles, in turn, elaborate on the guarantees set out in Common Article 3 of the Geneva Conventions. Together, these provisions represent the minimum level of protection to which everyone is entitled in times of armed conflict, even unprivileged fighters.

It has been suggested by some commentators that these basic tenets of international humanitarian law do not apply to people who provide support for terrorism. However, there is no basis for this in the applicable treaties. The closest we get is

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2 See CROWE AND WESTON-SCHEUBER, supra note 1, at 80–84.
3 See, e.g., John C. Yoo, Terrorists Have No Geneva Rights, WALL STREET JOURNAL, 26 May 2004, at A16.
the security based exceptions contained in Geneva Convention IV, but even those provisions are subject to express guarantees of humane treatment and procedural justice. Nor is there any scope to argue that the conventions did not anticipate the use of terrorism in warfare. Terrorism in wartime is hardly a recent phenomenon. Indeed, it is explicitly mentioned and condemned in Geneva Convention IV, as well as both Additional Protocols. A strong case can be made that terrorists, like other people caught up in warfare, should be afforded at least the basic level of protection set out in the provisions mentioned above.

III. Combatant Status in Non-International Conflicts

It is sometimes said that there is no such thing as combatant status in non-international armed conflicts. The reasoning behind this claim runs as follows. First, the definition of combatant status is found in Article 4 of Geneva Convention III and Article 43 of Additional Protocol I. Neither of those provisions applies to non-international conflicts. Second, the main benefits associated with being a combatant are entitlement to prisoner of war status if captured and immunity from trial and punishment for taking part in hostilities. Neither of those protections is enjoyed by fighters in non-international conflicts. They are not covered by the protections afforded to prisoners of war under Geneva Convention III and can potentially be prosecuted under domestic law for their hostile actions.

There are, however, some obvious dangers to denying the existence of combatant status in internal conflicts. The most troubling consequence of this claim is perhaps that it risks undermining respect for the principle of distinction. There can be no doubt that the principle of distinction applies in non-international conflicts. Article 13(2) of Additional Protocol II prohibits attacks against individual civilians or the civilian population. This prohibition is recognised as a principle of customary international law applying in conflicts of all kinds. The prohibition implies that a distinction can meaningfully be drawn between combatants and civilians for the purposes of planning military attacks.

The view that combatant status does not exist in non-international conflicts also risks giving the impression that captured fighters in such conflicts are entirely at the mercy of the enemy. This is far from the case, even though Geneva Convention III

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4 Geneva Convention IV, art. 5, 43.
5 Geneva Convention IV, art. 33; Additional Protocol I, art. 51(2); Additional Protocol II, art. 4(2)(d).
6 For further discussion, see Jan Klabbers, Rebel with a Cause? Terrorists and Humanitarian Law, 14 EUROPEAN JOURNAL OF INTERNATIONAL LAW 299 (2003).
7 Gary Solis calls this the ‘traditional view’. See GARY SOLIS, THE LAW OF ARMED CONFLICT 191 (2010).
8 Geneva Convention III, art. 2.
and Additional Protocol I do not apply. Captured fighters in internal conflicts are afforded a range of protections under international law, including those in Common Article 3 to the Geneva Conventions and Articles 4, 5 and 6 of Additional Protocol II. It therefore seems best to say that the distinction between combatants and non-combatants applies in all forms of warfare, although its precise significance may differ from context to context.10

The circumstances of some internal armed conflicts may of course make it difficult to consistently tell combatants and civilians apart. This is not a problem unique to internal conflicts, but it does pose a challenge for the implementation and enforcement of international humanitarian law. It is hard not to react to world events, such as the recent use of chemical weapons in Syria, by feeling sceptical about the prospects for international law to make a real difference in warfare. Attempts to gauge compliance with international humanitarian law are themselves beset by problems, due to difficulties in gaining access to areas where hostilities are occurring. There is, nonetheless, real cause for optimism.

In many respects, support for humanitarian principles within the international community appears stronger than ever before. The Geneva Conventions of 1949 have now been accepted by every recognised state, while the two Additional Protocols of 1977 have been ratified by the vast bulk of the international community. Leading human rights instruments, such as the two International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights are also widely recognised, while treaties on specific forms of prohibited weapons, such as the Ottawa Landmines Convention of 1997, have gained significant international support in a relatively short time.

It is true that international humanitarian law lacks the centralised enforcement mechanisms that characterise domestic legal systems. However, it gains support from other sources. The main methods by which international humanitarian law is enforced are not international courts and tribunals, but rather internal systems of military discipline and the diplomatic pressure exerted on states and non-state groups by organisations like the Red Cross movement and the United Nations. These methods may seem at first to lack bite, but they have been surprisingly successful in ensuring that the fundamental rules of international humanitarian law are generally respected.11

IV. Conclusion

This article has examined some of the current challenges facing international humanitarian law in relation to the issue of combatant status. The central place of the principle of distinction within the international law of armed conflict makes combatant status crucial. However, debates continue to arise concerning the legal significance

10 See CROWE AND WESTON-SCHEUBER, supra note 1, at 49–50.
11 See CROWE AND WESTON-SCHEUBER, supra note 1, at 154–159.
of combatant status, the position of unprivileged belligerents and the relevance of combatant status in noninternational armed conflicts. This article has sought to clarify the legal position in each of these areas. I have emphasised that there is no general prohibition on non-combatants taking up arms and even unprivileged belligerents enjoy robust protections under international humanitarian law. Furthermore, I have suggested that there is good reason to recognise a form of combatant status even in non-international conflicts.

International humanitarian law emphasises the basic values that unite human societies. Its continued effectiveness therefore depends not so much upon the formal status of the applicable legal documents, as on the continuation of the international spirit of cooperation that those documents reflect. Should states consistently decide to bypass international institutions in favour of unilateral responses to perceived threats or humanitarian crises – as was narrowly averted in relation to Syria – the cooperation necessary to maintain respect for humanitarian standards could become increasingly tenuous. On the other hand, the universal recognition afforded to the Geneva Conventions shows that the aspirations reflected in this body of law are still very much alive. A robust and consistent interpretation of the principles of international humanitarian law is needed in order to uphold its central goal of placing stable and dependable restrictions on all forms of warfare.