

The past as prologue: the development of the ‘direct participation’ exception to civilian immunity

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Abstract

The ‘direct participation’ exception to the principle of distinction, found in Article 51(3) of Protocol I and Article 13(2) of Protocol II, embodies a long-recognized concept in the laws governing armed conflict. For centuries the broad notion that humanity demands the protection only of those citizens who are harmless has found expression in the rules and norms relating to war. This article traces the historical factors and trends which influenced the development of the ‘direct participation’ exception in its current form, revealing a tendency towards ‘humanizing’ the law in favour of civilians, notwithstanding their increased military value.



International humanitarian law¹ is predicated on a delicate equilibrium between the competing demands of military necessity and humanity.² In the development of any norm of international humanitarian law the challenge is, as stated in the 1868

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St Petersburg Declaration, to establish ‘the technical limits at which the necessities of war ought to yield to the requirements of humanity’.³ This subtle balancing act finds expression in Article 51(3) of Protocol I Additional to the Geneva Conventions of 1949,⁴ which provides that civilians are protected from attack ‘unless and for such time as they take a direct part in hostilities’. By permitting the targeting of civilians who participate directly in hostilities, Article 51(3) is a fulcrum balancing the humanitarian impulse to protect civilians with the dictates of military necessity, which permit attacks on civilians who are harmful to the military.

Civilians – that is, those who are not combatants under Article 4A of the Third Geneva Convention of 1949⁵ or Article 43 of Protocol I⁶ – have come to play roles of increased military significance in armed conflict. Developments in weapons technology,⁷ the asymmetric nature of many conflicts⁸ and increased outsourcing of war-related work to private (civilian) contractors⁹ have seen growing classes of civilians become potentially harmful to enemy forces. While military exigencies may mean that such people are viewed as valuable targets, military necessity is subject to the laws of war,¹⁰ including the general prohibition on attacking civilians. Determining the circumstances in which civilians lose immunity from attack for participating directly in hostilities becomes essential. Not only do civilians who participate directly in hostilities become legitimate targets,¹¹ they may also be prosecuted under national laws on the basis that they are not combatants who are entitled to so participate.¹²

- 1 The term ‘laws of war’ will be used interchangeably, particularly in reference to pre-twentieth century manifestations of the law.
- 2 See, e.g., Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict*, Cambridge University Press, Cambridge, 2004, pp. 16–17.
- 3 Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, opened for signature 29 November/11 December 1868 (no entry into force) (St Petersburg Declaration), preamble; see further Dinstein, above note 2, p. 17.
- 4 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, opened for signature 8 June 1977 (entered into force 7 December 1978) (Protocol I); see also Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, opened for signature 8 June 1977 (entered into force 7 Dec 1978) (Protocol II), Article 13(3), in similar terms; and Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Cambridge University Press, Cambridge, 2005, Rule 6.
- 5 Geneva Convention Relative to the Treatment of Prisoners of War, 75 UNTS 135, opened for signature 12 August 1949 (entered into force 21 October 1950) (Third Geneva Convention).
- 6 Protocol I, Article 50(1).
- 7 See Michael N. Schmitt, ‘War, technology and international humanitarian law’, Program on Humanitarian Policy and Conflict Research at Harvard University, No. 4, 2005, p. 5; Jean-François Quéguiner, ‘Direct participation in hostilities under international humanitarian law’, Program on Humanitarian Policy and Conflict Research at Harvard University, 2003 (working paper), pp. 5–6.
- 8 See Robin Geiss, ‘Asymmetric conflict structures’, *International Review of the Red Cross*, Vol. 88, No. 864 (2006); Schmitt, above note 7, pp. 35–41.
- 9 See generally Michael N. Schmitt, ‘Humanitarian law and direct participation in hostilities by private contractors or civilian employees’, *Chicago Journal of International Law*, Vol. 5, No. 2 (2004), p. 511.
- 10 See, e.g., Nuremberg Military Tribunals, *Hostage Case (USA v. List et al.)*, 11 NMT 1230, 1253 (1948).
- 11 As set out in Protocol I, Articles 48 and 51(1).
- 12 See Protocol I, Articles 43–45. See further Dieter Fleck, *The Handbook of Humanitarian Law in Armed Conflicts*, Clarendon Press, Oxford, 1995, p. 211, s. 501.

Although Article 51(3) is novel in its codification and phrasing of the ‘direct participation’ exception, the basic idea underpinning it – that humanity demands the protection of citizens, provided they are harmless – is not. The general concept that non-combatants who engage in hostile acts may be exposed to attack (and punishment) dates back several centuries. Against this historical backdrop, this paper will trace the factors and ‘mischief’ which influenced the formulation of Article 51(3) and which continue to affect its application.

Recognizing that Article 51(3) closes the conceptual gap between civilians entitled to protection from attack and combatants permitted to participate directly in hostilities, this inquiry commences by considering the development of these interlinked categories of persons. Starting with Grotius in the seventeenth century and proceeding to Rousseau in the eighteenth, it traces the limited right to participate in hostilities and the immunity of non-combatants. This paper illustrates that the development of the two categories has been heavily informed by the paradigms of war in which they have arisen, and also by notions of guilt and innocence, military necessity, chivalry and humanity. Having established these foundations, the second part of the paper considers the challenges posed by civilians participating in hostilities in the nineteenth and twentieth centuries and the international legal responses to such participation. While it is beyond the capacity of this paper to critique these activities or the responses to them in any detail, the hidden factors behind the laws, and how they fit within the dominant paradigm of conflict, are examined. The third part of this paper examines the legislative path to the introduction of Article 51(3) and the increased legal protection it provides for civilians. Such an examination is relevant not only for the current interpretation of the article,¹³ but also for an understanding of the factors underpinning it. Finally, drawing on these factors, this paper analyses some trends in the development of Article 51(3) and the compatibility of these trends with changes in the nature of contemporary armed conflict, particularly the shifting demands of military necessity.

The paper does not consider the specific challenges raised by modern warfare in depth; this has been done elsewhere.¹⁴ Rather, in recognition of the changing methods of warfare adopted over the last three decades, it considers the relevance of some of the major assumptions and biases which underpin Protocol I. In so doing, this paper provides a useful backdrop against which to view current debates about the circumstances in which civilians should forfeit their immunity as non-combatants for taking a direct part in hostilities under Article 51(3).

13 See Vienna Convention on the Law of Treaties, 1155 UNTS 331, opened for signature 23 May 1969 (entered into force 27 January 1980), Article 32, which allows recourse to be had to a treaty’s preparatory works if the meaning of the text is ambiguous or obscure. The ongoing discussions about the meaning of Article 51(3) suggest that this is the case.

14 See, e.g., Quéguiner, above note 7; Schmitt, above note 9; N. Melzer, *Targeted Killing in International Law*, Oxford University Press, Oxford, 2008.

Background: Grotius to Rousseau

This paper’s inquiry into the development of the ‘direct participation’ exception to civilian immunity begins with Grotius, since his work, along with that of Francisco de Vitoria, is acknowledged as the analytical basis of the contemporary law of land warfare.¹⁵ Grotius, writing in the midst of the Thirty Years War in 1625, recorded the state of the law of nations – the nascent international law – as he perceived it. By the seventeenth century, modern nation-states, although in an incipient form, had emerged as the only legitimate authorities in Europe that could make war on their neighbours and suppress rebellion within their own realms.¹⁶ Their status as such was cemented with the adoption, in 1648, of the Peace of Westphalia, which abolished private armies and conferred a legal monopoly on states for the maintenance of armies and for fighting wars.¹⁷ Developing on the ‘just war’ theories, ideas of military honour and chivalry required that wars be fought ‘publicly and openly’.¹⁸ Those who fought in wars without the authority of the state were considered marauders, brigands and freebooters outside the law of nations,¹⁹ and perfidy was repugnant to the fighting classes.²⁰ In accordance with the ideas of the medieval law of war (the *jus militare*), those who engaged in other than ‘open and public wars’ met short shrift at the hands of the fighting classes.²¹ It is against this background that the writings of Grotius are considered.

Grotius, the practice of nations and restraint in war

Grotius’ starting point was his conception of the effect of a declaration of war on a sovereign’s subjects. In his view, a public war (that is, a war waged between two or more sovereign authorities) was ‘declared at the same time ... upon all a sovereign’s subjects’.²² Accordingly, the ‘right to kill’ which arises in war²³ extended ‘not only to those who actually bear arms, or are subjects of him that stirs up the war, but in addition to all persons who are in the enemy’s territory’.²⁴ Indeed,

15 See, e.g., Richard Shelly Hartigan, *Lieber’s Code and the Law of War*, Precedent, Chicago, 1983, p. 3.

16 Michael Howard, ‘Constraints on warfare’, in Michael Howard, George J. Andreopoulos and Mark R Shulman (eds.), *The Laws of War: Constraints on Warfare in the Western World*, Yale University Press, New Haven, 1994, p. 9.

17 Peace Treaty between the Holy Roman Emperor and the King of France and their respective Allies (Treaty of Westphalia), 24 October 1648, available at The Avalon Project, Yale Law School, http://avalon.law.yale.edu/17th_century/westphal.asp (last visited 8 December 2008). Article 118 provided that ‘the Troops and Armys [sic] of all those who are making War in the Empire, shall be disbanded and discharg’d [sic]; only each Party shall send to and keep up as many Men in his own Dominion, as he shall judge necessary for his Security.’

18 G. I. A. D. Draper, ‘The status of combatants and the question of guerrilla warfare’, *British Yearbook of International Law*, Vol. 45 (1971), pp. 173–5.

19 *Ibid.*, pp. 174, 175.

20 *Ibid.*, p. 174.

21 See *ibid.*, p. 175.

22 Hugo Grotius, *The Law of War and Peace* (1625), reproduced in Leon Friedman (ed.), *The Law of War: A Documentary History*, Random House, Inc., New York, 1972, book III, ch. III, s. IX.

23 *Ibid.*, book III, ch. IV, s. V.

24 *Ibid.*, book III, ch. IV, s. VI.

Grotius explicitly stated that the slaughter of infants, women, old men, hostages and ‘suppliants’ seeking to surrender was permissible in a public war.²⁵ He found ample evidence of the slaughter of non-combatants in the writings of ancient scholars and the ‘common practice of nations’.²⁶

Grotius explicitly distinguished, however, between actions which are ‘permissible’ according to the law of nations (such as those outlined above) and those which were ‘right’, ‘praiseworthy’ or ‘honourable’.²⁷ He wrote,

when I first set out to explain this part of the law of nations I bore witness that many things are said to be ‘lawful’ or ‘permissible’ for the reason that they are done with impunity, in part also because coercive tribunals lend to them their authority; things which, nevertheless, either deviate from the rule of right (whether this has its basis in law strictly so called, or in the admonitions of other virtues), or at any rate may be omitted on higher grounds and with greater praise among good men.²⁸

His treatment of legally permissible actions may thus be seen as a forced concession to past verdict and practice.²⁹

On the question of what is ‘right’ or ‘honourable’ in war (or the *lex ferenda*), Grotius stated as a basic principle, ‘One must take care, so far as is possible, to prevent the death of innocent persons, even by accident.’³⁰ While he did not expressly define ‘innocent persons’, he appears to have been referring to those who are unarmed³¹ and have not committed any serious crimes.³² Citing Livy and Josephus, Grotius observed,

By the law of war armed men and those who offer resistance are killed. ... [I]t is right that in war those who have taken up arms should pay the penalty, but that the guiltless should not be injured.³³

In Grotius’ view, children should always be spared, as should women, unless they ‘have committed a crime which ought to be punished in a special manner, or unless they take the place of men’.³⁴ Similarly, men ‘whose manner of

25 Ibid., book III, ch. IV, ss. VI–XIV.

26 See *ibid.*, book III, ch. I, s. II.

27 Ibid., book III, ch. I, s. II, and book III, ch. X, s. I. See further H. Lauterpacht, ‘The Grotian tradition in international law’, *British Yearbook of International Law*, Vol. 23 (1946), p. 5, and his criticism of Grotius’ research methodology.

28 Grotius, above note 22, book III, ch. X, s. I.

29 See Richard R. Baxter, ‘So-called “unprivileged belligerency”: spies, guerrillas and saboteurs’, *British Yearbook of International Law*, Vol. 28 (1951), pp. 324–5. See further Quincy Wright, *A Study of War*, University of Chicago Press, Chicago, 1942, p. 308.

30 See Grotius, above note 22, book III, ch. XI, s. VIII.

31 See Judith Gail Gardam, *Non-Combatant Immunity as a Norm of International Humanitarian Law*, Martinus Nijhoff Publishers, Dordrecht, 1993, p. 13.

32 Grotius, above note 22, book III, ch. XI, s. XVI.

33 Ibid., book III, ch. XI, s. X.

34 Ibid., book III, ch. XI, s. IX.

life is opposed to war’ – specifically those who perform religious duties or men of letters – should be spared.³⁵

In urging restraint in relation to these categories of civilians, unless they took up arms, Grotius trod a path well worn by earlier commentators such as Gentili, Suarez and Vitoria.³⁶ It was, however, Grotius’ reluctant view that the *lex lata*³⁷ permitted the slaughter of these categories of civilians as they were, according to Grotius’ conception, ‘enemies’ in a public war.

Rousseau’s maxim

From Grotius’ concept of the effect of a declaration of war, the significance of Rousseau’s commentary becomes apparent. In contrast with Grotius, Rousseau took the view that war is a relation between governments, involving the citizens of a state only ‘accidentally’. Writing in 1762, Rousseau said,

War, then, is not a relationship between man and man, but between State and State, in which private persons are only enemies accidentally, not as men, nor even as citizens, but simply as soldiers; not as members of their fatherland, but as its defenders ...³⁸

Rousseau’s maxim explicitly recognized that non-combatant citizens are not, in any real sense, the enemies of an opposing army and should not be made its object.³⁹ Prior to Rousseau’s contribution, the separate identity of the individual and his or her state was not recognized by the law of nations; the identification of one with the other was total.⁴⁰ Rousseau’s maxim is, accordingly, seen by many as forming the modern jurisprudential basis for the principle of non-combatant immunity,⁴¹ or as Best wryly put it, ‘the non-combatant’s supreme talisman’.⁴²

Rousseau’s statement appears to have reflected contemporary practice at the time he was writing.⁴³ Cassese has observed that during the period from 1648 to 1789, war became very much a game between professionals without a great

35 Ibid., book III, ch. XI, s. X.

36 See, e.g., Theodor Meron, ‘Shakespeare’s Henry the Fifth and the law of war’, *American Journal of International Law*, Vol. 86 (1992), pp. 24–5, citing Alberico Gentili, *De Jure Belli Libris Tres*, trans. J. C. Rolfe, ed. Carnegie Endowment for International Peace. Division of International Law, Clarendon Press, Oxford, and H. Milford, London, 1933, pp. 251–4, 427–8.

37 That is, the law as it exists.

38 Jean-Jacques Rousseau, *Du Contrat Social*, 1762, book I, ch. 4, reproduced in Geoffrey Best, *Humanity in Warfare*, Columbia University Press, New York, 1980, p. 56.

39 See Chris af Jochnick and Roger Normand, ‘The legitimation of violence: a critical history of the laws of war’, *Harvard International Law Journal*, Vol. 35 (1994), p. 62, n. 48.

40 Gardam, above note 31, p. 12.

41 Ibid., pp. 12–13; Best, above note 38, pp. 55–9 (although critical of the practical effects of Rousseau’s ‘well-meaning but practically useless maxim’); Draper, above note 18; H. Lauterpacht (ed), *Oppenheim’s International Law*, 7th edn, Longman, London (Vol. II), 1948–52, p. 205.

42 Geoffrey Best, *War and Law Since 1945*, Oxford University Press, Oxford, 1994, p. 32.

43 Percy Bordwell, *The Law of War Between Belligerents: A History and Commentary*, Callaghan & Co., Chicago, 1908, pp. 47–8; cf. Karma Nabulsi, *Traditions of War*, Oxford University Press, Oxford, 1999, pp. 36–7.

deal of involvement of the civilian population.⁴⁴ In contrast with the bloodiness of the Thirty Years War, during which Grotius wrote his treatise, wars in Rousseau's era were fought by professional armies, the expense of which kept conflicts small.⁴⁵ Moreover, military professionalism ensured that a soldier's focus was on mastering armed opponents, not on the civilian population.⁴⁶ Publicists such as Vattel were already cautiously moving towards a judicial statement of non-combatant immunity to match the practical immunity increasingly being achieved in conflict.⁴⁷ Rousseau's statement, however, was appealing for its 'surpassing simplicity'.⁴⁸ It set up an unbridgeable conceptual divide between combatants and non-combatants.⁴⁹

Over the years, many people have criticized aspects of Rousseau's maxim.⁵⁰ It is outside the scope of this paper to examine the merits of these criticisms in detail. Suffice it to note that, although the maxim was, and is, far from universally accepted,⁵¹ its influence is undeniable.⁵² The conceptual gulf it established, coupled with the idea (alluded to by Rousseau and codified in 1868 in the St Petersburg Declaration)⁵³ that the only legitimate object of war is to weaken the military forces of the enemy, brought Grotius' conception of the *lex ferenda* to life. In this way, the concept of innocence, on which Grotius and his contemporaries had focused, expanded and metamorphosed into notions of civilian status and the protection of civilians from attack.⁵⁴ Against the above backdrop, the second part of this paper

44 Gardam, above note 31, p. 12, citing Cassese, *International Law in a Divided World*, Clarendon Press, Oxford, 1986, p. 255. On the notion that war in the seventeenth and eighteenth centuries was a game, see further Gunther Rothenberg, 'The age of Napoleon', in Michael Howard, George J. Andreopoulos and Mark R. Shulman (eds.), *The Laws of War: Constraints on Warfare in the Western World*, Yale University Press, New Haven, 1994, p. 86; Wright, above note 29, p. 810; and the Treaty of Amity and Commerce between the United States and Prussia, 8 Stat. 84, 9 July and 10 September 1785, reproduced in Meron, above note 36, p. 25.

45 Howard, above note 16, p. 4; Wright, above note 29, p. 810.

46 Best, above note 42, p. 34; see further, Howard, above note 16, pp. 9–10 (observing that up to the late eighteenth century non-combatants had rarely taken any substantial part in hostilities, and the status of those who did was anomalous).

47 Best, above note 38, p. 56.

48 Ibid.

49 Best, above note 42, p. 258.

50 See, e.g., Best, above note 38, pp. 55–9 (calling the famous maxim 'pretentious and imprudent', 'defective and disadvantageous' and a 'well-meaning but practically useless maxim [which] merely encouraged self-deception among the French'); I. P. Trainin, 'Questions of guerrilla warfare in the law of war', *American Journal of International Law*, Vol. 40 (1946), pp. 537–8; J. Westlake, *International Law*, Cambridge University Press, Cambridge, 1894, p. 259, quoted in Gardam, above note 31, p. 14.

51 See, e.g., Baxter, above note 29, p. 324 (arguing that war is a conflict against populations, in which each national of one belligerent is pitted against each national of the other); *Griswold v. Waddington*, 16 Johns 438, 448 (1819) (in which Chancellor Kent held that '[a] war on the part of the government is a war on the part of all individuals of which that government is composed'); *The Rapid*, 8 Cranch, 155, 161, 3 L. Ed. 520 (1814) (finding that '[e]very individual of the one nation must acknowledge every individual of the other nation as his own enemy – because the enemy of his country'), both cited in Lester Nurick, 'The distinction between combatant and noncombatant in the law of war', *American Journal of International Law*, Vol. 39 (1945), p. 681.

52 See above note 41.

53 St Petersburg Declaration, preamble.

54 Meron, above note 36, p. 25.

considers some of the different ways in which non-combatants have participated in hostilities throughout history, and how the laws of war responded to them.

Law-making and the ‘wars of nations’

Beginning with the revolutionary wars of the late eighteenth century and early nineteenth century, war passed through a transition from the dynastic war of kings to the war of nations-at-arms, in which entire populations were mobilized to support the war effort.⁵⁵ An increasing range of activities involving peasants, such as providing food to partisans and passing on information about the occupying army, came to be regarded as political participation in conflict.⁵⁶ Armed resistance increased alongside political participation, and took many forms, including spontaneous armed resistance, organized acts of resistance in the form of guerrillas and *francs-tireurs*,⁵⁷ and the *levée en masse*.⁵⁸ Any currency Rousseau’s maxim once held was undermined.

During the late eighteenth and nineteenth centuries, the practical response to non-uniformed fighters was usually ferocious.⁵⁹ Due to the ‘treacherous’ threat they posed, armed civilians, regardless of gender, were attacked with ‘a draconian severity’ by opposing armed forces.⁶⁰ Moreover, according to Nabulsi, there was no real legal or practical distinction between non-violent political behaviour and violent resistance.⁶¹ Peasants who, for instance, passed on information about the occupying army, hid escaped prisoners of war or fed illicit fighters, were deemed as criminal as those who physically killed soldiers from the occupying force.⁶² They were also exposed to risks, including being shot, for certain conduct, such as hiding their own crops.⁶³ Due to the relative paucity of historical records on political resistance in the nineteenth century,⁶⁴ it is difficult to determine whether political resisters were targeted directly or executed as a matter of law enforcement. From

55 See, e.g., the French ‘*Levée en masse*’ decree from 1793: ‘Young men shall go to battle; married men shall forge arms and transport provisions; women shall make tents and clothing and shall serve in the hospitals; children shall turn old linen into lint; the aged shall betake themselves to public places in order to arouse the courage of the warriors and preach hatred of kings and the unity of the Republic’, reproduced in Best, above note 38, p. 59. See further Rothenberg, above note 44, p. 86 (dating the development from 1792–1815).

56 Nabulsi, above note 43, p. 42.

57 The phrase ‘*francs-tireurs*’ was used, loosely speaking, to denote citizens who took up arms to resist invading forces. See Nabulsi, above note 43, p. 47. For Lieber’s definition of ‘*guerrilla parties*’, see below note 75.

58 The *levée en masse* referred to citizens who, on express or assumed orders of the government, took up arms for purely defensive purposes. Nabulsi, above note 43, p. 52.

59 See Jochnick and Normand, above note 39, p. 63. On the treatment of irregular troops in the revolutionary wars in the late eighteenth century, see Best, above note 38, pp. 118–19.

60 A. Brenet, *La France et l’Allemagne devant le droit international, pendant les opérations militaires de la guerre 1870–1871*, A. Rousseau, Paris, 1902, p. 29, quoted in Nabulsi, above note 43, p. 48.

61 Nabulsi, above note 43, p. 45.

62 *Ibid.*, p. 42.

63 *Ibid.*

64 *Ibid.*, p. 46.

the few records that do exist, however, it appears that, primarily, they were executed as a matter of law enforcement.⁶⁵

How the positive laws of war would deal with the various forms of civilian conduct was yet to be determined. The growing involvement of civilians in political life, including in armed conflict, compelled governments in the nineteenth century to discuss the question of ‘normalizing’ their involvement in war.⁶⁶ As discussed below, European countries which relied more heavily on the civilian population in armed conflict advocated their recognition as legitimate combatants. The debates around this issue were heavily influenced by the work of Dr Francis Lieber, a German émigré to America.

Lieber and his Code

It was not only in Europe that the participation of non-combatants in war demanded attention. Across the Atlantic, the methods used by the South in the American Civil War compelled the Union government to find ways of addressing the legal status of guerrilla warfare.⁶⁷ According to Hartigan, in the early years of the conflict the Union army tended to equate all irregular troops with ‘guerrillas’, who in turn were classified as criminals.⁶⁸ As in Europe during the revolutionary wars, this generalization applied not only to those who bore arms for the South, but also to non-combatant civilians who either actively or passively supported irregular troops.⁶⁹ The rebel authorities, on the other hand, claimed the right to engage in guerrilla warfare and be treated as combatants.⁷⁰ Writers on the laws of war had not dealt with the status of these troops in any comprehensive manner.⁷¹ In apparent recognition of the conundrum, Henry Wager Halleck, the general-in-chief of the Union armies, wrote to Lieber in 1862 requesting his assistance in defining guerrilla warfare.⁷² Lieber obliged, initially producing an essay on the topic⁷³ and later completing a more comprehensive field manual. Due to Lieber’s substantial influence on the subsequent codification of the laws of war, it is worthwhile examining his contribution in some detail.

65 But see Best, above note 38, p. 199 (discussing instances of German armed forces in 1870 shooting not only at civilians who shot at them, but also those ‘who were not so clearly doing so’).

66 Trainin, above note 50, p. 536.

67 See generally, Hartigan, above note 15, pp. 1–29.

68 *Ibid.*, p. 9.

69 *Ibid.*

70 *Ibid.*, p. 2.

71 See Francis Lieber, *Guerrilla Parties Considered with Reference to the Laws and Usages of War*, D. Van Nostrand, New York, 1862, reproduced in Hartigan, above note 15, p. 31. Hereafter all references to this work are to its reproduction in Hartigan.

72 Hartigan, above note 15, p. 2.

73 For the initial essay produced in response to Halleck’s request, see Lieber, above note 71, reproduced in Hartigan, above note 15, pp. 31–44. This was implemented by General Order No. 30: Official Orders Dealing with the Application of Lieber’s Essay on Guerrilla Warfare, approved 22 April 1863 (General Order No. 30).

Lieber’s essay on guerrilla warfare and the laws of war dealt comprehensively with the treatment of ‘armed parties loosely attached to the main body of the army, or altogether unconnected with it’.⁷⁴ Lieber observed that while several categories of armed bands (the freebooter, marauder, brigand, partisan, free corps, spy, war-rebel or conspirator, highway robber and *levée en masse* or ‘arming of the peasants’) were dealt with by the laws of war, ‘guerrilla parties’⁷⁵ were not.⁷⁶ Guerrillas, according to Lieber, are ‘peculiarly dangerous, because they easily evade pursuit, and by laying down their arms become insidious enemies; because they cannot otherwise subsist than by rapine, and almost always degenerate into simple robbers or brigands’.⁷⁷ In reflection of this ‘peculiar’ threat, Lieber argued that, when guerrilla parties aid the main army of the belligerent in ‘fair fight and open warfare’, they should be treated as regular partisans.⁷⁸ If, however, they resort to ‘occasional fighting and the occasional assuming of peaceful habits, and to brigandage’, they should not be protected by the laws of war.⁷⁹

Lieber’s treatment of ‘guerrilla parties’ may be contrasted with his treatment of the *levée en masse*. After noting that most constitutions enshrined the right of the people to possess and use arms, Lieber concluded that it was generally agreed that the rising of the people openly to repel invasion entitled them to the privileges of the laws of war.⁸⁰ The absence of a uniform was immaterial, provided such absence was not used for the purpose of concealment or disguise.⁸¹ Lieber thus gave emphasis to the idea of ‘openness’, a dominant indicator of a lawful war in medieval and post-Westphalian warfare.⁸²

Lieber subsequently completed his manual on the laws of war, which became ‘General Orders, no. 100: Instructions for the Armies of the United States in the Field’.⁸³ Lieber, whose political affiliations were with the anti-slavery North, felt that in order to preserve the Union and free the slaves, it was essential to bring discipline to the Union army and to define precisely the status of the enemy troops and greater population.⁸⁴ In the light of this attitude, it is, perhaps, unsurprising that his Code constituted ‘an admixture of military sternness with basic

74 Lieber, above note 71, p. 31.

75 By ‘guerrilla parties’ Lieber meant

self-constituted sets of armed men in times of war, who form no integrant part of the organized army, do not stand on the regular pay-roll of the army, or are not paid at all, take up arms and lay them down at intervals, and carry on petty war (*guerrilla*) chiefly by raids, extortion, destruction, and massacre, and who cannot encumber themselves with many prisoners, and will therefore generally give no quarter. (ibid., p. 41).

76 Ibid., p. 34.

77 Ibid., p. 41.

78 That is, a member of the regular army who operates separately from the main force: ibid., pp. 35, 42.

79 Ibid., p. 42.

80 Ibid., pp. 38–9.

81 Ibid., pp. 39–40.

82 On the importance of ‘openness’, see Draper, above note 18, p. 174.

83 General Orders, no. 100: Instructions for the Armies of the United States in the Field, approved 24 April 1863 (Lieber Code) (reproduced in Hartigan, above note 15, pp. 45–71).

84 Hartigan, above note 15, pp. 6–7.

humanitarianism'.⁸⁵ This delicate balance is evident in Article 15 of the Code, which codified the permissible destruction of life during war. It provided,

Military necessity⁸⁶ admits of all direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of the war ...

The Code defined the term 'enemy' to include citizens.⁸⁷ Article 15, therefore, emphasized the status of armed enemy citizens as legitimate targets. Other dangerous enemies or people of importance to the government could lawfully be captured.⁸⁸

Article 22 of the Code provided for the immunity of civilians. It stated, '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.'⁸⁹ The question of precisely how much 'the exigencies of war will admit' was not further developed in the Lieber Code. It was clear from Article 15 that all armed enemy citizens may be directly attacked.⁹⁰ However, the Code was less direct on the protection from attack provided to hostile, but unarmed, civilians.⁹¹ Some, such as spies and certain types of war traitors,⁹² were to be dealt with under severe rules of law enforcement, which included capture and execution.⁹³ Moreover, those who 'held intercourse' with the enemy were also treated as war traitors and faced 'severe' punishment.⁹⁴ According to General Order No. 30, those who harboured and fed the enemy were to 'suffer death' or such other punishment as ordered by a court martial.⁹⁵ This Order suggests that the 'military exigencies' referred to in Article 22 of the Lieber Code would, under the banner of law enforcement, have permitted the killing of certain unarmed hostile citizens for their participation in hostilities.

85 Frank Freidel, *Francis Lieber*, Louisiana State University Press, Baton Rouge, 1947, quoted in Hartigan, above note 15, p. 15; but see Jochnick and Normand, above note 39, pp. 65–6 (arguing that the Code condoned 'a barbarous system of warfare').

86 That is, 'the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war'. Lieber Code, Article 14.

87 Lieber Code, Article 21, provided that the citizen of a hostile country is an enemy and as such subjected to the hardships of war.

88 Lieber Code, Article 15.

89 The Code went on to observe that in modern European wars, the protection of the inoffensive citizen of the hostile country has become the rule, rather than the exception: Lieber Code, Article 25. See also Articles 23 and 25 (which protected the private relations of the 'inoffensive' individual).

90 Lieber Code, Article 15, read with Article 21.

91 The Lieber Code distinguished in Article 155 between loyal citizens and disloyal citizens, and further divided the disloyal citizens into those who sympathise with the rebellion without positively aiding it, and 'those who, without taking up arms, give positive aid and comfort to the rebellious enemy without being bodily forced thereto'. While loyal citizens were to be protected, disloyal citizens were to have 'the burden of the war' thrown upon them, subjecting them to a 'stricter police' than usual and requiring them to declare their fidelity to the government. Lieber Code, Article 156.

92 For instance, those who '[betray] to the enemy anything concerning the condition, safety, operations, or plans of the troops holding or occupying the place or district'. Lieber Code, Article 91.

93 Lieber Code, s. V (esp. Articles 88–101).

94 Lieber Code, Articles 90 and 91.

95 General Order No. 30, pp. 92–97, 96.

Brussels to The Hague

Lieber’s authority as to the laws of war was held by his contemporaries in high regard,⁹⁶ and his Code was widely adopted in Europe.⁹⁷ The Lieber Code formed the basis of the draft text for the Brussels Conference in 1874, which was convened at the behest of Emperor Alexander of Russia.⁹⁸ The Conference gave rise to a Protocol and a Declaration on the laws of war.⁹⁹ The Declaration was not ratified due to the unwillingness of the ‘great powers’, who, according to Jochnick and Normand, considered it too ‘humanitarian’.¹⁰⁰ Many of its rules were, nonetheless, reproduced in military manuals.¹⁰¹

The Brussels Protocol adopted, in slightly looser terms, the principle of restraint laid down six years earlier in the St Petersburg Declaration,¹⁰² stating that the only legitimate object of war is to weaken the enemy without inflicting unnecessary suffering.¹⁰³ The Brussels Declaration went on to specify, in Articles 9 to 11, the classes of people who should be recognized as ‘belligerents’ under the laws of war. Under Article 9, the laws of war applied to armies, and militia and volunteer corps who were commanded by a responsible person, had a fixed distinctive emblem recognisable at a distance, carried arms openly, and conducted their operations in accordance with the laws of war. Like the Lieber Code, this definition of ‘belligerent’ focused on the requirement of ‘openness’ of warfare and reflected an aversion for perfidious methods. According to Risley, writing at the close of the nineteenth century, Article 9 accurately expressed the generally accepted laws of war.¹⁰⁴ Article 10 conferred belligerent status on the members of a *levée en masse*, while Article 11 granted prisoner of war status to non-combatant members of the armed forces.

On the controversial issue of those outside the armed forces or the *levée en masse* who resisted invasion or occupation, the Brussels Declaration said nothing. This omission was not for want of trying. The Russian draft text, for instance, proposed that individuals not qualifying as combatants, but who ‘at one time take

96 Sir Edward Creasy, *First Platform of International Law*, 1876, cited in L. Oppenheim, ‘On war treason’, *Law Quarterly Review*, Vol. 33 (1917), p. 278; Best, above note 42, p. 43 (observing that the Code was ‘universally admired’); but see Gardam, above note 31, p. 17 (stating that it is not clear to what extent the Code represented customary law).

97 Lord Russell of Killowen, ‘International law: the annual address before the American Bar Association’, *Albany Law Journal*, Vol. 54 (1896–7), p. 122 (observing that the manual had been adopted by England, France and Germany).

98 Dietrich Schindler and Jiri Toman (eds.), *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents*, 3rd edn, Martinus Nijhoff Publishers, Dordrecht, 1988, p. 25.

99 Final Protocol of the Brussels Conference, opened for signature 27 August 1874, 4 *Martens Nouveau Recueil* (ser. 2) 219 (Brussels Protocol), and Project of an International Declaration Concerning the Laws and Customs of War, not opened for signature, 1874 (Brussels Declaration), both reproduced in *ibid.*, pp. 25–34.

100 Jochnick and Normand, above note 39, p. 67.

101 John Shuckburgh Risley, *The Law of War*, A. D. Innes and Co., London, 1897, pp. 109–10.

102 St Petersburg Declaration, preamble (stating that ‘the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy’).

103 Brussels Protocol.

104 Risley, above note 101, p. 111.

part independently in the operations of war, and at another return to their pacific occupations ..., do not enjoy the rights of belligerents, and are amenable, in case of capture, to military justice'.¹⁰⁵ The draft article was, however, withdrawn as a consequence of the opposition of the smaller powers, many of whom viewed the Brussels Conference as an attempt by the military powers to prevent resistance being offered by the civilian population against an invader.¹⁰⁶ The Brussels Declaration did not, therefore, explicitly forbid guerrilla warfare and other forms of civilian participation in hostilities falling outside Article 9.¹⁰⁷ Rather, it merely enumerated conditions (in Articles 9 and 10) under which combatants were to be regarded as lawful.¹⁰⁸ Thus, in the absence of rules protecting civilians, individuals who participated in hostilities in any way continued to do so at their own risk.¹⁰⁹

The Brussels Declaration, while not ratified, provided an important basis for the work of the jurists of the Institute of International Law, who produced the 'Oxford Manual' in 1880.¹¹⁰ The Oxford Manual, which purported to codify 'the accepted ideas of our age so far as this has appeared allowable and practicable',¹¹¹ provided in Article 1,

The state of war does not admit of acts of violence, save between the armed forces of belligerent States. Persons not forming part of a belligerent armed force should abstain from such acts.¹¹²

The armed forces of a state were defined in Article 2 and included bodies other than the regular army which, among other things, wore a uniform or 'fixed distinctive emblem' and carried arms openly.¹¹³ The manual went on to forbid the 'maltreatment' of 'inoffensive populations', on the basis that 'The contest (is) carried on by "armed forces" only'.¹¹⁴ Like the Brussels Declaration, however, the Manual did not give further consideration to the question of people who fell in the gap between the 'armed force' and 'inoffensive population', such as civilians who engaged in hostile acts, whether bearing arms or not. The exception to this rule was

105 Reproduced in L. Nurick and R. W. Barrett, 'Legality of guerrilla forces under the laws of war', *American Journal of International Law*, Vol. 40 (1946), p. 565. Cf. Trainin, above note 50, p. 542. See further Nabulsi, above note 43, p. 16.

106 See, e.g., Risley, above note 101, p. 109; Trainin, above note 50, p. 542; Nurick and Barrett, above note 106, p. 565; Nabulsi, above note 43, p. 17.

107 Trainin, above note 50, p. 543; Nurick and Barrett, above note 106, p. 565. This is consistent with the previously prevalent view that international law governs only relations between states: see L. Oppenheim, *International Law*, 6th edn, ed. H. Lauterpacht, Longman, Green, London and New York, 1940, s. 254, cited in Nurick and Barrett, above note 105, pp. 568–9.

108 Nurick and Barrett, above note 106, p. 565.

109 See Best, above note 38, p. 199; Best, above note 42, p. 43.

110 *The Laws of War on Land*, adopted by Institute of International Law on 9 September 1880 (Oxford Manual). See further Nabulsi, above note 43, pp. 8–9.

111 Oxford Manual, preamble.

112 *Ibid.*, Article 1.

113 *Ibid.*, Article 2. The definition of armed forces also included the inhabitants of non-occupied territory who take up arms spontaneously to resist invading enemy troops.

114 *Ibid.*, Article 7.

the treatment of individuals as spies, who could not demand treatment as prisoners of war.¹¹⁵

Although the Manual was ignored by most countries and derided by its contemporaries,¹¹⁶ it formed, along with the Brussels Declaration, the basis of the Hague Conventions on the conduct of land warfare which were adopted in 1899 and 1907.¹¹⁷ These Conventions were, according to their preambles, ‘inspired by the desire to diminish the evils of war, as far as military requirements permit’.¹¹⁸ Both Conventions adopted a set of Regulations Respecting the Laws and Customs of War on Land which were in most material respects identical. As Best has observed, the Hague Regulations have provided the basis for the laws of land warfare ever since.¹¹⁹

In contrast with the Oxford Manual and, to a lesser extent, the Brussels Protocol,¹²⁰ the Hague Conventions did not refer specifically to the immunity of civilians from direct attack.¹²¹ The definition of ‘belligerent’ used in the Brussels Declaration was, however, reproduced in the Hague Regulations without change.¹²² Participants in the *levée en masse* who carried arms openly and respected the laws of war were likewise considered belligerents entitled to the rights and subject to the duties of the laws of war.¹²³ The continued focus on openness was also apparent in the definition of spies. A spy was a person who, acting clandestinely or on false pretences, attempted to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party.¹²⁴ Soldiers not wearing a disguise who managed to penetrate the zone of operations of the hostile army to obtain information were not considered spies. Nor were civilians who ‘openly’ carried out their mission to deliver despatches.¹²⁵

The Regulations did not expressly address the fate of other civilians who, falling short of the definition of belligerent, took up arms against an invading or

115 Ibid., Article 23.

116 Nabulsi, above note 43, pp. 8–9.

117 Hague Convention (II) with respect to the Laws and Customs of War on Land, 32 Stat. 1803, opened for signature 29 July 1899 (entered into force 4 September 1900) (1899 Hague Convention) and its Annex, Regulations Respecting the Laws and Customs of War on Land (1899 Hague Regulations); Hague Convention (IV) Respecting the Laws and Customs of War on Land, 1910 UKTS 9, opened for signature 18 October 1907 (entered into force 26 January 1910) (1907 Hague Convention), and its Annex, Regulations Respecting the Laws and Customs of War on Land (1907 Hague Regulations). These documents are reproduced in Schindler and Toman, above note 98, pp. 63–98. On the influence of the Brussels Declaration and Oxford Manual, see Schindler and Toman, above note 98, p. 25.

118 1907 Hague Convention, preamble. The preamble to the 1899 Hague Convention adopts similar wording.

119 Best, above note 42, p. 41.

120 See Oxford Manual, above note 114, Article 7; and, Brussels Protocol, above note 103 and accompanying text.

121 See Gardam, above note 31, p. 19.

122 See 1899 Hague Regulations, Article 1; cf. Brussels Declaration, Article 9. See Knut Ipsen, ‘Combatants and non-combatants’ in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law in Armed Conflicts*, Oxford University Press, Oxford, 1995, s. 308, p. 76.

123 1899 and 1907 Hague Regulations, Article 2.

124 Ibid., Article 29.

125 Ibid.

occupying power, or resisted in other ways. This issue therefore remained the province of customary international law.¹²⁶ The 1866 edition of Wheaton's classic text, *Elements of International Law*, stated the law as follows:

[N]o use of force against an enemy is lawful, unless it is necessary to accomplish the purposes of war. The custom of civilized nations, founded upon this principle, has therefore exempted ... all ... public or private individuals engaged in the ordinary civil pursuits of life, from the direct effect of military operations, unless actually taken in arms, or guilty of some misconduct in violation of the usages of war, by which they forfeit their immunity.¹²⁷

The editor's accompanying note elaborated that non-combatants who 'make forcible resistance, or violate the mild rules of modern warfare, give military information to their friends, or obstruct the forces in possession ... are liable to be treated as combatants'.¹²⁸ Thus, hostile but unarmed civilians could lawfully be targeted for their participation in conflict.

Risley, writing in the closing years of the nineteenth century, appears, at first blush, to have interpreted the law more restrictively in favour of civilians. In language reminiscent of Common Article 3 of the four Geneva Conventions of 1949,¹²⁹ he argued that subjects of a belligerent 'are not liable to be killed or taken as prisoners of war so long as they do not *actively* engage in hostilities'.¹³⁰ Further examination of Risley's argument, however, suggests that participation in hostilities need not in fact have been 'active' for a non-combatant to lose immunity. Risley contended that the immunity of non-combatants was granted on the implicit understanding that the distinction between the classes of combatant and non-combatant be maintained in good faith.¹³¹ Accordingly, immunity was 'forfeited by a non-combatant who commits any hostile act'.¹³² He stated,

Combatants must be open enemies, known and knowable, and non-combatants must be harmless. As soon as an individual ceases to be harmless, he ceases to be a non-combatant, and must be reckoned a combatant; and unless he bears the distinguishing marks of an open combatant, he puts himself

126 See especially, 'Martens clause', 1899 Hague Convention, preamble, and 1907 Hague Convention, preamble, which expressly required states parties to respect customary international law 'and the dictates of public conscience'.

127 Henry Wheaton, *Elements of International Law*, literal reproduction of the edition of 1866 by Richard Henry Dana, Jr, ed. with notes by George Grafton Wilson, Clarendon Press, Oxford, and H. Milford, London, 1936, s. 345, p. 362.

128 *Ibid.*, s. 345, p. 362, note 168, citing H. Halleck, *International Law, or, Rules Regulating the Intercourse of States in Peace and War*, San Francisco, 1861, pp. 427, 428. See further L. C. Green, *The Contemporary Law of Armed Conflict*, Manchester University Press, Manchester, 1993, p. 101.

129 Hereafter Common Article 3.

130 Risley, above note 101, p. 107 (emphasis added). According to Gardam, the military manuals of the United States and the United Kingdom provide evidence of Risley's approach in practice. Gardam, above note 31, p. 15.

131 Risley, above note 101, p. 107.

132 *Ibid.*

outside the laws of war, and is, if captured, liable to be shot as a bandit instead of detained as a prisoner of war.¹³³

In accordance with Risley’s analysis, civilians who ‘actively engaged in hostilities’, ‘ceased to be harmless’, or ‘[committed] any hostile acts’ would have become subject to attack.

The breadth of, and lack of precision in, these phrases would have provided cold comfort to civilians in conflict zones at the turn of the twentieth century. Regrettably, significant gaps in the positive law, such as the lack of a definition of ‘civilian’ and the failure of the world’s powers to agree on the status of individuals who took up arms or otherwise participated in hostilities without meeting the requirements of belligerent status,¹³⁴ persisted for some time. These deficiencies opened the door for arguments in the early part of the twentieth century that all non-combatants whose destruction would be of military value should lose their immunity from attack.

The challenges of ‘total war’

The twentieth century saw a blurring of the distinction between combatants and civilians in armed conflict.¹³⁵ With no positive law protecting (or, indeed, defining) civilians, their immunity from attack was precarious¹³⁶ and vulnerable to arguments that military necessity permitted them to be targeted. Wright observed in his authoritative *A Study of War* in 1942,

As the proportion of the population contributing directly or indirectly to the making of the policy and the military of the enemy have increased, economic and propaganda measures have gained in relative importance. Attacks upon civilians ... have increased under the plea that traditional rules must be applied in the light of ‘military necessity’ as developed under changing technical conditions.¹³⁷

As discussed below, by the Second World War arguments of military necessity were used to justify widespread bombing of civilian and industrial targets. The notion that humanity required the protection of ‘harmless’ civilians, which had come to be the norm at the turn of the twentieth century,¹³⁸ proved largely ineffective in sparing civilian populations from attack.

133 Ibid., p. 108.

134 The status of spies is an exception.

135 See, e.g., Nurick, above note 51, p. 692 (identifying six factors contributing to the near obsolescence of the distinction); Joyce Gutteridge, ‘The Geneva Conventions of 1949’, *British Yearbook of International Law*, Vol. 26 (1949), p. 319.

136 See, e.g., Gardam, above note 31, pp. 23, 113.

137 Wright, above note 29, p. 151.

138 See above note 133.

Quasi-combatants

With increasingly sophisticated methods of warfare, the civilian population became more involved in the war-making machine, including in supplying arms and ammunitions.¹³⁹ One of the great debates during the two world wars revolved around the status of armament and munitions workers. Such persons did not fall within the definitions of ‘combatant’ or ‘non-combatant members of the armed forces’ under the Hague Regulations.¹⁴⁰ In the absence of a positive definition of ‘civilian’, it was also logically problematic to regard them as such, given that their workplaces constituted legitimate military targets under customary international law.¹⁴¹ The need to clarify the status of such workers, whose contribution to the war effort was arguably on a par with that of soldiers,¹⁴² was compounded by the advent of aerial warfare. Aerial warfare enabled belligerents to attack military objectives – such as munitions factories – on a larger and less discriminate scale than previously.¹⁴³ The status of those inside the factories became crucial.

Accordingly, as early as 1916 arguments were made that armament workers should be treated as a category of quasi-combatants who lost their immunity as non-combatants and should be treated as combatants while they were engaged in activities harmful to the enemy. In an article in the *Revue de Droit International* Rolland wrote that armament workers

... occupy a position intermediate between the combatants proper and the non-combatants who are still employed on their peacetime trades and professions. The reasons for sparing them are losing force. Fundamentally they are almost in exactly the same position as the men of the auxiliary services of the armies, and the latter are certainly legitimate objects of attack.¹⁴⁴

This argument was taken up with great vigour by some scholars over the next thirty years.¹⁴⁵ In 1938 Spaight famously urged international law to ‘move with the times’ by accepting that ‘the old clear-cut division of enemy individuals into combatants and non-combatants is no longer tenable without some qualification’.¹⁴⁶ This

139 See, e.g., Gardam, above note 31, p. 23; Gutteridge, above note 135, p. 319.

140 As set out in 1899 and 1907 Hague Regulations, above note 117, Article 3.

141 See, e.g., Hague Rules on Air Warfare, December 1922–February 1923 (not opened for signature), Article 24(2). Although they never became binding, the Hague Rules were considered an authoritative to attempt to clarify and formulate rules of law governing aircraft in war. Schindler and Toman, above note 98, p. 207.

142 See, e.g., J. M. Spaight, ‘Non-combatants and air attack’, *Air Law Review*, Vol. 9 (1938), p. 374.

143 See, e.g., *ibid.*, p. 375.

144 L. Rolland, ‘Les pratiques de la guerre aérienne dans le conflit de 1914 et le droit des gens’, *Revue de Droit International* (1916), p. 559, cited in J. M. Spaight, ‘Legitimate objectives in air warfare’, *British Yearbook of International Law*, Vol. 21 (1944), p. 162. Rolland’s view was influential: see, e.g., James W. Garner, ‘Proposed rules for the regulation of aerial warfare’, *American Journal of International Law*, Vol. 18 (1924), p. 68.

145 E.g., Spaight, above note 143; c.f. H. Lauterpacht (ed), above note 41, p. 525; cf. Garner, above note 144, pp. 66–67.

146 Spaight, above note 142, pp. 374–5; see also J. M. Spaight, ‘Air bombardment’, *British Yearbook of International Law*, Vol. 4 (1923–4), pp. 31–2, which sets out a similar argument.

argument was, moreover, extended by some to civilian workers who directly supported the war effort, such as those who transported munitions.¹⁴⁷

The Draft Convention for the Protection of Civilian Populations Against New Engines of War, approved in principle by the International Law Association in 1938,¹⁴⁸ reflected Spaight’s argument that munitions factory workers should be, while at work, legitimate objects of war. It protected the ‘civilian population’ from ‘[forming] the object of an act of war’. ‘Civilian population’ was defined as ‘all those not enlisted in any branch of the combatant services nor for the time being employed or occupied in any belligerent establishment’. ‘Belligerent establishments’ were defined to include ‘military, naval or air establishment, or barracks, arsenal, munition stores or factories, aerodromes or aeroplane workshops or ships of war, naval dockyards, forts, or fortifications for defensive or offensive purposes, or entrenchments’.¹⁴⁹ Thus emerged a precursor to Article 51(3) in the form of the quasi-combatant; that is, a person ‘for the time being employed or occupied in a belligerent establishment’, such as a munitions store or factory. On its face, it appears that once such people ceased employment within belligerent establishments or, arguably, returned to their homes, they would once again receive the protection offered to the civilian population. The Draft Convention, however, was neither signed nor adopted due to the onset of the Second World War.¹⁵⁰ Accordingly, the question of whether, and to what extent, munitions workers constituted a legitimate target remained a topic of dispute for the duration of the Second World War¹⁵¹ and, indeed, well beyond.¹⁵²

Contribution to the war effort

Armament and munitions workers were not the only civilians in danger of attack, particularly from the air, during the two world wars. By the dawn of the Second World War, war had come to be viewed as a totalitarian affair to which all a nation’s citizens contributed through industry and morale.¹⁵³ While states initially sought to avoid the direct targeting of civilians, as the conflict progressed the

147 See, e.g., Spaight, above note 144, p. 162. For similar arguments in the context of Article 51(3), see W. Hays Parks, ‘Air war and the law of war’, *Air Force Law Review*, Vol. 32 (1990); cf. Michael E. Guillory, ‘Civilianizing the force: is the United States crossing the Rubicon?’, *Air Force Law Review*, Vol. 51 (2001), pp. 115–16.

148 *Draft Convention for the Protection of Civilian Populations Against New Engines of War*, adopted by the International Law Association, 29 August–2 September 1938 (not opened for signature) (ILA Draft Convention), reproduced in Schindler and Toman, above note 98, pp. 223–9.

149 ILA Draft Convention, Article 2.

150 Gregory P. Noone, ‘The history and evolution of the law of war prior to World War II’, *Naval Law Review*, Vol. 47 (2000), p. 204.

151 Nurick, above note 51, p. 692.

152 See, e.g., Parks, above note 147; cf. A. P. V. Rogers, *Law on the Battlefield*, Manchester University Press, Manchester, 1996, p. 9. See further Nils Melzer, ‘Third expert meeting on the notion of direct participation in hostilities: summary report’, International Committee of the Red Cross and the TMC Asser Institute, 2005, pp. 21, 23, 32–33.

153 Spaight, above note 143, p. 372; Wright, above note 29, p. 73.

perceived demands of military necessity eroded this standard.¹⁵⁴ Consequently, the area and extent of aerial bombardment continually expanded during the Second World War.¹⁵⁵ As Nurick stated,

At first, the bombing was confined to military objectives in the actual theater of operations. Then bombing was extended to military objectives, such as factories, communications, and the like in the rear of the enemy's lines, with some regard for the civilian population. Finally, it was extended in many instances to the bombing of cities in order to affect the morale of the civilians.¹⁵⁶

Best aptly observed that plausible economic reasons for injuring civilians had multiplied, and 'their own apparently willing participation in the decisions to make or to continue war seductively suggested that they deserved to be damaged'.¹⁵⁷ The widespread practice of saturation bombing of civilian targets made it difficult to assert that the direct targeting of civilians remained contrary to international law.¹⁵⁸ Scholarly consensus existed, however, on one point: the illegality of targeting the civilian population for the mere purpose of terrorizing the population.¹⁵⁹

The practice of bombing civilians to negate their general contribution to the war effort or to terrorize them into submitting had a significant effect on the development of Protocol I; terror bombing was clearly prohibited by Article 51(2). Further, as will be discussed in the following section of this paper, the requirement in Article 51(3) that participation in hostilities be direct appears to have been formulated largely to ensure that general contribution to the war effort not be sufficient to expose civilians to attack.¹⁶⁰

The Geneva Conventions of 1949

Enemy attacks by belligerents, whether directly aimed or incidental, were, according to Best, one of the principal causes of civilian suffering in 1939–45.¹⁶¹ Thus, when the International Committee of the Red Cross¹⁶² took up its longstanding project to improve the protection of civilians following the Second World War, the issue was in dire need of attention.¹⁶³ As a result of political circumstances,

154 See Gardam, above note 31, p. 24. On the effectiveness of morale bombing, see Parks, above note 147, p. 21.

155 See Nurick, above note 51, p. 691.

156 Ibid. See further H. Lauterpacht, 'The problem of the revision of the law of war', *British Yearbook of International Law*, Vol. 29 (1952), p. 365 (noting that by 1944 Britain had come to view the civilian population as a legitimate target of aerial bombardment).

157 Best, above note 38, pp. 223–4.

158 See Gardam, above note 31, p. 24; Nurick, above note 51, p. 696.

159 Gardam, above note 31, p. 24; Lauterpacht, above note 156, p. 368; but see Jeanne M. Meyer, 'Tearing down the facade: a critical look at the current law on targeting the will of the enemy and air force doctrine', *The Air Force Law Review*, Vol. 51, 2001, pp. 156–7 (arguing that the concept of morale as a legitimate target was universally accepted as one of the advantages provided by air power).

160 See below note 210 and accompanying text.

161 Best, above note 42, p. 115.

162 Here after ICRC.

163 See above, Best, note 42, p. 115

however, the issue of enemy attacks on civilians was not taken up.¹⁶⁴ Rather, the 1949 Diplomatic Conference was tasked only with updating the ‘Geneva law’¹⁶⁵ and not the Hague Regulations governing the conduct of military operations.¹⁶⁶ The ICRC observed in its Commentary to the Fourth Geneva Convention¹⁶⁷ that any provisions in the Convention’s draft text designed to protect the civilian population from the dangers of military operations were systematically removed.¹⁶⁸ Accordingly, the Fourth Geneva Convention only protects those who ‘find themselves ... in the hands of a party to the conflict of which they are not nationals’¹⁶⁹ from arbitrary actions by the enemy. It does not protect civilians against the ‘whole series of dangers which threaten them in warfare’.¹⁷⁰

There is, nonetheless, one provision of the four Geneva Conventions of 1949 which deserves mention in the present context: Common Article 3. This Article sets out minimum guarantees applicable in non-international armed conflict and protects ‘persons taking no active part in the hostilities’ against ‘violence to life and person, in particular murder of all kinds’.¹⁷¹ Although one could argue that Common Article 3 sets out the principle of distinction later codified in the Additional Protocols, this was probably not the intention behind the provision, given the Conference’s focus on the Geneva law.¹⁷² Common Article 3 is, however, significant for its use of the language ‘taking no active part in the hostilities’, a precursor to the phrase later adopted in Article 51(3) of Protocol I and Article 13(3) of Protocol II.¹⁷³

The road to Article 51(3)

Gathering momentum: the work of the ICRC

The failure to update the Hague Regulations following the Second World War left a significant void in the codified laws of war. In the light of this, in 1956 the ICRC

164 *Ibid.*, pp. 115–16 (arguing that ‘[t]he most conspicuous sufferers from bombing, Germany and Japan, were unable to put their case, while the bombing specialists, the USA and the UK, had every reason for preventing the case being put’).

165 That is, the laws designed to protect those who have ceased to fight or have fallen into the power of the adversary.

166 See ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, 1987 (ICRC Commentary on Additional Protocols), [1829].

167 *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 75 UNTS 287, opened for signature 12 August 1949 (entered into force 21 October 1950) (Fourth Geneva Convention).

168 ICRC, *Commentary on the Geneva Conventions of 12 August 1949*, Vol. IV, 1952 (ICRC Commentary on the Geneva Conventions), p. 10; Gardam, above note 31, p. 25.

169 Fourth Geneva Convention, Article 4; cf. Article 5 (allowing derogation from the Convention where a protected person is engaged in hostile activities).

170 ICRC Commentary on the Geneva Conventions (IV), above note 168, p. 10; see also Gardam, above note 31, p. 25.

171 Common Article 3(1).

172 Gardam, above note 31, p. 26.

173 See, e.g., Quéguiner, above note 7, p. 1.

moved beyond its traditional focus on ‘Geneva law’, promulgating the Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in Time of War.¹⁷⁴ The 1956 Draft Rules reaffirmed some principles of customary law and offered concrete solutions to resolve problems resulting from changes and developments in weaponry.¹⁷⁵ They were directed primarily towards protecting ‘civilian populations efficiently from the dangers of atomic, chemical and bacteriological warfare’.¹⁷⁶ Ultimately the 1956 Draft Rules made no headway with the governments intended to implement them.¹⁷⁷ Nonetheless, they remained an important document in the push for an authoritative revision of the laws of war given the ‘ever more distressing varieties of war and war techniques’.¹⁷⁸

The 1956 Draft Rules sought to require parties to ‘confine their operations to the destruction of ... military resources, and leave the civilian population outside the sphere of armed attacks’.¹⁷⁹ ‘Civilian population’ was negatively (and somewhat awkwardly) defined as all persons who were not

- (a) Members of the armed forces, or of their auxiliary or complementary organizations; and
- (b) Persons who do not belong to the forces referred to above, but nevertheless take part in the fighting.¹⁸⁰

Under this definition, individuals who took part in the fighting were not considered civilians, even if their usual activities were primarily peaceful. The range of people protected by civilian immunity under the 1956 Draft Rules was, accordingly, considerably narrower than those later protected under Article 51(3). As discussed later in this paper, one of the reasons for broadening the protection afforded to civilians under Article 51(3) was the increased use of citizens engaged in guerrilla warfare in the years preceding 1977.

The ICRC’s next, and more subdued, attempt to revise the law of armed conflict was manifested in a draft resolution, which was ultimately adopted by the Twentieth International Red Cross Conference in 1965 in Vienna.¹⁸¹ The resolution

174 *Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in Time of War*, approved by the International Conference of the Red Cross, 1956 (no entry into force) (1956 Draft Rules), reproduced in Schindler and Toman, above note 98, pp. 251–7. See ICRC Commentary on Additional Protocols, above note 166, [1830].

175 ICRC Commentary on Additional Protocols, above note 166, [1831].

176 ICRC, *Introduction to the Draft Rules*, available at www.icrc.org/ihl.nsf/INTRO/420?OpenDocument (last visited 4 December 2008).

177 ICRC Commentary on Additional Protocols, above note 166, [1832]; See Howard S. Levie, ‘Book review: *An International Law of Guerrilla Warfare: the Global Politics of Law-making*’, *MD Journal of International Law and Trade*, Vol. 9 (1985), p. 251.

178 ICRC Commentary on Additional Protocols, above note 166, [1832]; Best, above note 42, pp. 254–5.

179 1956 Draft Rules, Article 1.

180 *Ibid.*, Article 4.

181 *Protection of Civilian Populations Against the Dangers of Indiscriminate Warfare*, Res. XXVIII, adopted by the XXth International Conference of the Red Cross, Vienna (1965), reproduced in Schindler and Toman, above note 98, pp. 29–30.

on the ‘protection of civilian populations against the dangers of indiscriminate warfare’ relevantly provided that

distinction must be made at all times between persons taking part in hostilities and members of the civilian population to the effect that the latter be spared as much as possible.¹⁸²

Like the 1956 Draft Rules, the resolution, on its face, provided no protection for civilians who intermittently took part in hostilities. According to Pictet’s 1966 analysis of the resolution, the principle it espoused was one of the ‘general principles of customary law which now regulate the question’.¹⁸³ The resolution was, Pictet observed, ‘the only pronouncement of the kind made by an assembly in which governments are represented since the Second World War’.¹⁸⁴ However, no further moves were made to convert the resolution into a binding agreement.¹⁸⁵

It was not until the 1968 Teheran United Nations International Conference on Human Rights¹⁸⁶ that the need to clarify the rules protecting the civilian population gained the necessary traction within the international community.¹⁸⁷ One of the dominant themes at the conference was the law relating to guerrilla warfare.¹⁸⁸ Thanks largely to the behind-the-scenes work of the International Commission of Jurists, the conference resulted in the adoption of Resolution 2444, ‘Respect for Human Rights in Armed Conflicts’.¹⁸⁹ Resolution 2444 affirmed the principle of distinction exactly as drafted in the 1965 Red Cross resolution. Moreover, the resolution from Teheran provided the impetus needed for the International Conference of the Red Cross to request, in 1969, the ICRC to ‘[propose], as soon as possible, concrete rules which could supplement the existing humanitarian law’.¹⁹⁰

182 Ibid.

183 Jean Pictet, ‘The XXth International Conference of the Red Cross: results in the legal field’, *Journal of the International Commission of Jurists*, 1996, p. 14, quoted in Keith Suter, *An International Law of Guerrilla Warfare: The Global Politics of Law-Making*, Francis Pinter, London, 1984, p. 98.

184 Suter, above note 183, p. 98.

185 See *ibid.*, p. 99.

186 *Human Rights in Armed Conflicts*, UN Res. XXIII, International Conference on Human Rights, UN Doc. A/Conf. 32/41 (Sales No. 68.XIV.2) (1968), reproduced in Schindler and Toman, above note 98, pp. 261–2.

187 Suter, above note 183, pp. 21, 93.

188 *Ibid.*, pp. 106–15.

189 *Respect for Human Rights in Armed Conflicts*, GA Res. 2444, UN GAOR, 23rd session, Supp. No. 18 (A/7218) (1968), [1(c)]. The resolution affirmed resolution XXVIII of the XXth International Conference of the Red Cross, above note 181. On the work of the International Commission of Jurists, see Suter, above note 183, pp. 21–5. See also *The Distinction between Military Objectives and Non-Military Objectives in General and Particularly the Problems Associated with Weapons of Mass Destruction*, resolution of the Institute of International Law, Edinburgh sess., Vol. 53 II (1969), p. 375, [1] (which protects those who do not participate in hostilities), reproduced in Schindler and Toman, above note 98, pp. 265–6; *Basic Principles for the Protection of Civilian Populations in Armed Conflicts*, GA Res. 2675, UN GAOR, 25th sess., supp. no. 28 (A/8028) (1970), [2], which affirms the principle that ‘a distinction must be made at all times between persons taking part in the hostilities and civilian populations’, reproduced in Schindler and Toman, above note 98, pp. 267–8.

190 See *Reaffirmation and Development of the Laws and Customs Applicable in Armed Conflicts*, ICRC, Res. 13, 21st International Conference of the Red Cross, Istanbul (1969), 98, [1], reproduced in Suter, above note 183, p. 102.

The negotiation of Article 51(3)

Beginning in 1971, the ICRC held a series of Conferences of Government Experts on the Reaffirmation and Development of International Humanitarian Principles in Armed Conflicts.¹⁹¹ The conferences set an essentially conservative path for the future codification of the laws of war by agreeing not to revise or ‘overhaul’ the Geneva Conventions of 1949, but rather to reaffirm them.¹⁹² Moreover, the government experts rejected the proposal of the ICRC to deal with guerrilla warfare *sui generis* via a specific protocol, preferring for it to be addressed in the context of all the other forms of warfare.¹⁹³ Consequently, in 1973 the ICRC distributed drafts of two protocols which built on the Geneva Conventions and addressed the question of guerrilla warfare alongside the other forms of warfare.¹⁹⁴

The Draft Protocols formed the basis for Protocols I and II. A number of the provisions now found in Protocol I relating to the protection of the civilian population underwent only minor amendment during the negotiation process. For example, Draft Protocol I (on international armed conflict) set out the expansive, and much needed,¹⁹⁵ definition of ‘civilian’ now found in Article 50.¹⁹⁶ ‘Civilian’ was, and remains, defined as any person who is not a combatant within the meaning of Article 43 of Protocol I or Article 4A of the Third Geneva Convention.¹⁹⁷ Further, Draft Protocol I expressly prohibited making the civilian population or individual civilians the object of attack, a rule which is now found in Article 51(2).¹⁹⁸ This rule has, of course, been made subject to the exception now set

191 Draper, above note 18, p. 175.

192 ICRC, *Report on the Work of the Conference of Government Experts*, 1971, p. 18, quoted in Suter, above note 183, pp. 64, 110. On the negative effect of this conservatism see Suter, above note 183, pp. 180–1.

193 Suter, above note 183, p. 114.

194 ICRC, First Draft Additional Protocol to the Geneva Conventions of 12 August 1949, 1973 (Draft Protocol I), reproduced in Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Official Records); ICRC, Second Draft Additional Protocol to the Geneva Conventions of 12 August 1949, 1973 (Draft Protocol II) (on internal armed conflict), reproduced in Official Records, Vol. 1–2. On the context surrounding the Draft Protocols, see ICRC, *Commentary on Draft Additional Protocols to the Geneva Conventions of 12 August 1949*, 1973 (ICRC Commentary on Draft Protocols).

195 See statement of the ICRC delegate at the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, *Report on the Work of the Conference*, 1971, Vol. III, p. 17 (‘the absence of any specific norm on this question has already had a too harmful effect on the civilian population during the course of the events which have occurred during this century’), reproduced in Gardam, above note 31, p. 113.

196 Draft Protocol I, Article 45. On the breadth of the definition of ‘civilian’ see Best, above note 42, p. 255.

197 Michael N. Schmitt, ‘Fault lines in the law of attack’, in Susan Breau and Agnieszka Jachec-Neale (eds.), *Testing the Boundaries of International Humanitarian Law*, BIICL, London, 2006, pp. 277, 287, summarizes the category of combatants as including

members of the armed forces, militia, volunteer corps, or members of an organized resistance commanded by a person responsible for subordinates and who wear a distinctive sign or uniform, carry weapons openly, and are subject to a disciplinary system capable of enforcing (the law of international armed conflict); and members of a *levée en masse*.

198 Draft Protocol I, Article 46(1).

out in Article 51(3) of Protocol I involving civilians who participate directly in hostilities.

Draft Article 46(2), the predecessor to Article 51(3), provided that ‘[c]ivilians shall enjoy the protection afforded by this Article unless and for such time as they take a direct part in hostilities.’¹⁹⁹ In contrast with the principle as set out in earlier resolutions, draft Article 46(2) made it clear that civilians lost their immunity only for the period during which they took part in hostilities.²⁰⁰ Once they returned to peaceful activities they would once again be protected by their civilian status. In so providing, draft Article 46(2) shifted the law’s balance between military necessity and humanity further towards the latter than previous formulations of the norm. This progression was consistent with the purpose of draft Article 46 as expressed in the provision’s heading, ‘Protection of the civilian population’.²⁰¹

True to the observation by Suter that the law tends to be concerned with the last war,²⁰² discussions during negotiations seem to have focused on civilians in two historical contexts. On the one hand, a number of states referred to the need to increase the protection afforded to the civilian population in the light of the experience of the Second World War.²⁰³ Other delegations focused attention on the protection of civilians and guerrilla fighters in the context of wars of national liberation. The Chinese representative, for example, argued that

People’s militia and guerrilla fighters in wars of national liberation should be protected, since they were basically civilians who had been forced to take up arms in self-defence against imperialist repression in order to win independence and safeguard their right to survival. When not participating directly in military operations, members of people’s militia or guerrilla movements should have civilian status and benefit from the protection granted to civilians.²⁰⁴

199 See also Draft Protocol II, Article 26(2).

200 The idea behind draft Article 46(2) was, according to the ICRC, ‘that civilians taking a direct part in hostilities would during that time lose the protection afforded by the article’. ICRC statement, Official Records, Meeting of Committee III, CDDH/III/SR.5 (1974). This was interpreted by states to include preparations for combat and return from combat. See Report of Committee III, Official Records, CDDH/215/Rev.1 (1975), 272, [53].

201 This is identical to the title of Article 51. See further the statements made following the provision’s adoption by the Third Committee: Statements of Byelorussian Soviet Socialist Republic, Colombia, German Democratic Republic, Mexico, Romania, Sweden, Ukrainian Soviet Socialist Republic, Official Records, Plenary Meeting, CDDH/SR.41, Annex, 168–173 (1977).

202 Suter, above note 183, p. 93.

203 See, e.g., Statements of Poland, Byelorussian Soviet Socialist Republic, Colombia, German Democratic Republic, Mexico, Romania, Sweden, Ukrainian Soviet Socialist Republic, Official Records, Plenary Meeting, CDDH/SR.41, ANNEX, 166–173 (1977). See also, Swedish Statement, Official Records, Meeting of Committee III, CDDH/III/SR.8, [7], 137 (1974) (noting that the history and literature of air warfare since the First World War presented evidence that terror raids and area bombardment had limited military value).

204 Chinese Statement, Official Records, Meeting of Committee III, CDDH/III/SR.7, 135–136, [54] (1974).

Similar sentiments advocating the broad protection of civilian populations fighting wars of national liberation were expressed by other states.²⁰⁵ It appears that both sets of concerns were allayed by draft Article 46(2), as it underwent only minor change during the negotiation process²⁰⁶ and was adopted by consensus in the Third Committee.²⁰⁷

The general acceptance of Article 46(2) may have been partially due to the malleability of the phrase, 'direct participation in hostilities'.²⁰⁸ The ICRC Commentary on Draft Protocol I stated,

What should be understood by *direct part in hostilities*? The expression covers acts of war intended by their nature or purpose to strike at the personnel and matériel of enemy armed forces.²⁰⁹

The meaning was not, however, so broad as to include a civilian's participation in the 'war effort'. The commentary to the draft expressly distinguished the 'direct part which civilians might take in hostilities' from the 'part in the *war effort* which they are called upon to carry out at highly different levels'.²¹⁰ The latter should not expose a civilian to attack, because 'in modern warfare, all the nation's activities contribute in some way or other, to the pursuit of hostilities, and even the people's morale plays its part in this context'.²¹¹ One might surmise from this discussion that the adjective 'direct' was included for the primary purpose of ensuring that general contribution to the war effort was excluded as a ground for the loss of civilian immunity.

The malleability of the phrase 'direct participation in hostilities' is apparent from discussions surrounding an alternative proposal advanced during negotiations about draft Article 46(2). Brazil, Canada, the German Democratic Republic (GDR) (East Germany) and Nicaragua suggested rewording draft Article 46(2) to read, 'Civilians shall enjoy the protection afforded by this Section except when they commit hostile acts or take a direct part in military operations.'²¹² This proposal appears to have been considered by some delegations as being synonymous with draft Article 46(2). The Danish representative, for example, interpreted

205 Albania, for instance, reiterated his delegation's view that 'the main objective of the Conference was to provide effective protection for the civilian population and for freedom fighters in unjust colonial wars'. Albanian Statement, Official Records, Meeting of Committee III, CDDH/III/SR.8, 144, [85] (1974). India was concerned to ensure that civilians lost protection only when they took a direct part in hostilities. Indian Statement, Official Records, Meeting of Committee III, CDDH/III/SR.8, 68, [74] (1974).

206 The word 'Article' was replaced with the wider 'Section'. A comma was also added after the word 'Section', but this did not materially affect the meaning of the Article.

207 ICRC Report, Official Records, Committee III, CDDH/215/Rev.1, 275 (1975).

208 Cf. UK Statement, Official Records, Meeting of Committee III, CDDH/III/SR.8, [47], 140 (1974) (noting that the representatives from the United Kingdom and Ghana expressed 'doubts concerning the word 'hostilities', for which a more precise substitute might be found.').

209 ICRC Commentary on Draft Protocols, above note 194, p. 58 (emphasis in original).

210 *Ibid.*, p. 58.

211 *Ibid.*, p. 58 (suggesting that if participation in the war effort were included in the scope of draft Article 46(2), civilians would effectively be denied the protection of international humanitarian law).

212 Proposed amendment CDDH/III/27.

the proposed amendment as having the same meaning as draft Article 46(2).²¹³ Similarly, the Australian representative considered the proposal superfluous, ‘since a civilian committing a hostile act, even an isolated one, would be taking a direct part in hostilities’.²¹⁴ According to Fleck, the GDR representative, the proposed amendment was intended to make draft Article 46 ‘clear and applicable for the serving soldier’.²¹⁵ The proposal was, however, rejected by other states,²¹⁶ and ultimately the ICRC draft was preferred.

The view that Article 51(3) encompasses the carrying out of ‘hostile acts’ nevertheless made its way into the final ICRC commentary on the provision.²¹⁷ The commentary unhelpfully conflated the notion of ‘direct participation in hostilities’ with engaging in ‘hostile acts’.²¹⁸ Thus, while Protocol I on its face narrowed the exception to the norm of non-combatant immunity, the discussions surrounding Article 51(3) demonstrate that there remained considerable latitude in the interpretation of ‘direct participation in hostilities’.

On the whole, the adoption of Protocol I substantially strengthened the protection afforded to civilians in comparison with previous manifestations of the norm of civilian immunity. First, Protocol I adopted a broad definition of ‘civilian’ which includes all those who do not qualify as a ‘combatant’.²¹⁹ Second, it provided that only civilians who take a *direct* part in hostilities lose their protection from attack; *indirect* participation in hostilities is not sufficient to cause the forfeiture of civilian immunity.²²⁰ Arguments that would see civilian populations lose their immunity due to their ‘war sustaining’ activities²²¹ are therefore beyond the legal pale of Article 51(3).²²² Finally, Protocol I expressly recognized that immunity is lost only for such time as civilians participate directly in hostilities.

In the light of these important differences between Article 51(3) and previous formulations of the norm, one might well have doubts about the view expressed by the UK representative during negotiations that Article 51(3) simply reaffirmed existing rules of international law designed to protect civilians.²²³ Rather,

213 Danish Statement, Official Records, Meeting of Committee III, CDDH/III/SR.7, 131, [32] (1974).

214 Australian Statement, Official Records, Meeting of Committee III, CDDH/III/SR.8, 138, [25] (1974).

215 German Statement, Official Records, Meeting of Committee III, CDDH/III/SR.7, 31, [2] (1974).

216 E.g., USSR Statement, Official Records, Meeting of Committee III, CDDH/III/SR.7, 134, [44] (1974); Polish Statement, Official Records, Meeting of Committee III, CDDH/III/SR.8, 138, [15] (1974); Finnish Statement, Official Records, Meeting of Committee III, CDDH/III/SR.8, 142, [61] (1974) (observing that the deletion of the words ‘and for such time’ could be taken to mean that a person who had once taken a direct part in hostilities would lose civilian status for the duration of such hostilities).

217 ICRC Commentary on Additional Protocols, above note 166, [1942].

218 *Ibid.*, [1942], [1944].

219 Protocol I, Articles 50(1), 43; Third Geneva Convention, Article 4A.

220 See ICRC Commentary on Additional Protocols, above note 166, [1678] (stating that ‘[d]irect participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and place where the activity takes place’.)

221 See, e.g., Emanuel Gross, ‘Use of civilians as human shields: what legal and moral restrictions pertain to a war waged by a democratic state against terrorism?’, *Emory International Law Review*, Vol. 16 (2002), p. 544.

222 ICRC Commentary on Draft Protocols, above note 194, p. 58; above note 210. See further Melzer (2005), above note 152, p. 21.

223 UK, Statement at the CDDH, Official Records, CDDH/SR.41, 1977, p. 164, [119].

Article 51(3) has involved a fairly substantial shift in the balance between military necessity and humanity, with a weighting in favour of protecting civilians. The precise scope of Article 51(3), however, remains unclear. With these factors in mind, the final part of this paper analyses the relationship between the evolving requirements of military necessity on the one hand, and the increasingly protective framework of international humanitarian law²²⁴ (and, in particular, Article 51(3)), on the other.

Challenges facing Article 51(3)

At the centre of international humanitarian law is – and always has been – a tug of war between the competing principles of military necessity and humanity. Military necessity admits of such force as is necessary to subdue the enemy.²²⁵ In accordance with the dictates of military necessity, the immunity afforded to civilians has, historically, been predicated on their remaining unarmed and harmless. For Grotius and his contemporaries, notions of honour and righteousness required that only the ‘innocent’ – that is, those who were unarmed and not guilty of serious crime – be protected from attack.²²⁶ Throughout the nineteenth century the requirement of harmlessness prevailed. The influential Lieber Code, for instance, required the sparing of the ‘unarmed citizen ... as much as the exigencies of war [would] admit’.²²⁷ If military necessity required the targeting of harmful civilians, the Lieber Code, with its allowance for the exigencies of war, was sufficiently flexible to accommodate their being put to death, at least as a matter of law enforcement. Subsequent nineteenth-century instruments did nothing to displace this approach or disavow the paramountcy of ‘the exigencies of war’; thus, while civilians were generally protected, their protection remained subject to military demands.²²⁸ By the end of the nineteenth century, therefore, it was established that in order to enjoy immunity from attack, ‘non-combatants must be harmless. As soon as an individual ceases to be harmless, he ceases to be a non-combatant.’²²⁹ This approach, which effectively deprived those who were harmful ‘[took] part in the fighting’²³⁰ from the protection afforded to civilians (thus roughly reflecting Grotius’ conception of the *lex ferenda*), continued until Protocol I.

224 See generally Luc Reydams, ‘A la guerre comme à la guerre: patterns of armed conflict, humanitarian law responses and new challenges’, *International Review of the Red Cross*, Vol. 88, No. 864 (2006).

225 *Hostage Case (USA v. List et al.)*, above note 10, p. 1253.

226 See above note 30 and accompanying text.

227 Lieber Code, Article 22.

228 See, e.g., Brussels Protocol; 1899 Hague Convention, preamble, and 1907 Hague Convention, preamble (both noting the desire to diminish the evils of war as far as military necessities permit); cf. Oxford Manual, Article 1 (providing that the state of war does not admit of acts of violence, save between the armed forces of belligerent states, and that persons not forming part of the armed forces should abstain from such acts).

229 Risley, above note 101, pp. 107–108.

230 E.g., 1956 Draft Rules, Article 4, above note 180.

Protocol I went against the tide of history by expressly conferring civilian status on all those who were not combatants properly so called, regardless of whether or not they were harmless.²³¹ The inclusive definition of ‘civilian’ in Article 50 of Protocol I meant that classes of people not fitting the traditional civilian mould were nonetheless entitled to immunity against attack. This definition may be contrasted with the ICRC’s 1956 Draft Rules, which, on their face, would have deprived those who took part in the fighting of civilian status altogether.²³² As a result of Protocol I’s undifferentiating conception of civilians, international humanitarian law found itself, in the words of Best, ‘teetering on the edge of a credibility gap’, with the law bestowing on all classes of non-combatants the same protection.²³³

Since the adoption of Protocol I in 1977, ways for civilians to harm the enemy have developed and diversified, such that the conduct of a civilian may be as integral to military operations as that of the soldier.²³⁴ We are now far removed from the post-Westphalian paradigm of war as a conflict which takes place on a battlefield between the armed forces of states or state-like entities.²³⁵ As seen in Operation Iraqi Freedom, for instance, military functions are being outsourced to private contractors to an unprecedented degree.²³⁶ Recent years have also seen the rapid development of weapons technology that enables attacks (for example, against computer networks) to be waged with great precision from remote locations by either civilian or military personnel.²³⁷ Advanced weapons technology is, however, far from universally available, and the technological capabilities of the parties to several contemporary international conflicts have been significantly disparate.²³⁸ This military asymmetry appears to have created incentives for the weaker party to resort to more covert or perfidious methods of war which frequently involve civilian participants, such as those seen in the latest conflicts involving international forces in Afghanistan and Iraq.²³⁹ The support of the civilian population becomes, to paraphrase Mao Zedong, as essential to the combatant as water to the fish.²⁴⁰ Increased reliance on civilian populations by the parties to armed conflicts, together with an often pronounced divergence in their ideological and structural make-up and motivations,²⁴¹ blurs conventional understanding about who is and is not a civilian.

231 Protocol I, Article 50(1).

232 1956 Draft Rules, Article 4; see above note 180.

233 Best, above note 42, p. 260.

234 See, e.g., Schmitt, above note 7; Reydams, above note 224; Geiss, above note 8.

235 See, e.g., Reydams, above note 224, pp. 745–6 (likening the present state of global conflict, particularly in weak states, to a pre-Westphalian paradigm of ‘ragged armies and warlords’), 750–2 (on the borderless nature of the belligerent in the ‘war on terror’).

236 See generally Schmitt, above note 9.

237 Schmitt, above note 7, p. 5; Quéguiner, above note 7, pp. 5–6.

238 See, e.g., Geiss, above note 8, pp. 757–60.

239 See *ibid.*, p. 758; Schmitt, above note 7, pp. 35–41.

240 Roger Trinquier, *La Guerre Moderne: Une vision française de la contre-insurrection*, 1961 (English translation with an introduction by Bernard Fall), cited in Reydams, above note 224, p. 742.

241 See, e.g., Geiss, above note 8, p. 758 (referring in particular to the 2006 conflict between Israel and Hezbollah in Lebanon).

The increasing military value of civilians may create doubt as to whether the 'direct participation' exception in Article 51(3) strikes an appropriate balance between the competing considerations of military necessity and humanity. For example, some argue that civilians in 'societies with malevolent propensities' should, as a matter of military necessity, be exposed to attack.²⁴² That such arguments continue to arise despite rules prohibiting terror bombing²⁴³ and attacks against civilians for indirect participation in hostilities²⁴⁴ is testimony to the tension (around which international humanitarian law revolves) between fluctuating perceptions of military necessity and considerations of humanity.

Notions of military necessity suggest that civilians whose actions are harmful to the enemy should lose their immunity from attack. In contrast with previous manifestations of the exception to civilian immunity, however, Article 51(3) does not permit the targeting of all civilians whose attack is necessary from a military perspective. Rather, only those who are participating directly in hostilities may be subject to attack. People whose conduct is indirectly harmful to the enemy are, under Article 51(3), protected from attack. In this respect, Article 51(3) gives rise to complex questions about how to distinguish between direct and indirect participation in hostilities. To this end, it is hoped that the guidelines being published in this issue of the *Review*, a culmination of the international expert process which took place under the auspices of the ICRC and the TMC Asser Institute, will provide much needed interpretative guidance. With the increased role of civilians in armed conflict since 1977, the importance of the 'direct participation' exception has grown. It now requires clarification and re-interpretation if it is to remain workable in the context of modern hostilities. Whether or not this aspect of the law can be interpreted and applied to accommodate the competing dictates of humanitarian protection and military necessity remains to be seen.

242 See C. J. Dunlap, Jr, 'The end of innocence: rethinking noncombatancy in the post-Kosovo era', *Strategic Review* Vol. 28 (2000), p. 14, discussed in Michael N. Schmitt, 'Targeting and humanitarian law: current issues', *Israel Yearbook on Human Rights*, Vol. 34 (2004), pp. 71–2.

243 Protocol I, Article 51(2).

244 *Ibid.*, Article 51(3).