

## Identifying the Enemy: Civil Participation in Armed Conflicts

Emily Crawford

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Emily Crawford's *Identifying the Enemy* introduces the reader to the legal difficulties with the 'basic rule'<sup>1</sup> of international humanitarian law ('IHL') – the principle of distinction. This principle seeks to distinguish combatants from civilians in terms of who may be targeted in armed conflicts. However, there is difficulty in classifying individuals who engage in hostile activities in some circumstances.<sup>2</sup> *Identifying the Enemy* seeks to address the four most problematic of these circumstances ('the four circumstances'). These are the most troubling because they each involve situations where individuals commit hostile acts, yet ostensibly retain their status as a 'civilian'. The four circumstances are: targeted killings, remote warfare (including the use of drones and cyber warfare), private military and security contractors, and organised criminal activities. In response to the four circumstances, Crawford argues that the principle of distinction, in its current form, is inadequate and that new soft law instruments must drive its development. This argument is divided into three Parts: firstly, an introduction to IHL generally; secondly, an explanation of why the four circumstances are problematic; and finally, a conclusion that specialised sui generis soft law instruments are the best method to develop the principle of distinction.

The strongest element of *Identifying the Enemy* is the presentation of the four circumstances. In Part Two, Crawford identifies these and presents them in separate chapters that are clear, comprehensive and balances the viewpoints of both Western and non-Western states. Complex matters of technological advancement, international relations and international law are reduced into concise summaries making *Identifying the Enemy* a useful collation of the modern challenges to the principle of distinction. This collation fills an important gap in IHL discourse. Other contemporary texts in this field have either sought to cover all of IHL comprehensively<sup>3</sup> or have applied the principle of distinction to niche areas such as refugees,<sup>4</sup>

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<sup>1</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) art 48 ('Protocol Additional to the Geneva Conventions').

<sup>2</sup> Emily Crawford, *Identifying the Enemy* (Oxford University Press, 2015) 11.

<sup>3</sup> See, eg, Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (Cambridge University Press, 2<sup>nd</sup> ed, 2016).

<sup>4</sup> See Mélanie Jacques, *Armed Conflict and Displacement: the Protection of Refugees and Displaced Persons under International Humanitarian Law* (Cambridge University Press, 2015).

targeted killings<sup>5</sup> or women in war.<sup>6</sup>

Crawford not only presents the four most challenging problems to the principle of distinction, but also includes important critical analysis of the current law in this area. In response to some topics, Crawford also critiques state practice and suggests how the law ought to regulate individuals who commit hostile acts, but remain ‘civilians’ in law. This direction was most impressive in the chapter devoted to remote warfare. Currently, the US classifies Central Intelligence Agency operatives who commit targeted killings as civilians.<sup>7</sup> Crawford argues that this position is untenable because these agents are directly participating in hostilities as any other combatant does.<sup>8</sup> Accordingly, a civilian agent tasked with targeting and killing individuals must be regulated by either domestic criminal law or international law, however it is unlikely that they would ever be prosecuted domestically.<sup>9</sup> Instead the principle of distinction must be developed further to regulate targeted killings by civilians.

Within the discussion of each circumstance in Part Two there are compelling critical analyses of how the relevant hard law instruments operate, but the critique of the laws themselves and of state practice could have been stronger in some chapters. An example of this inadequacy is found in the chapter concerning private military and security contractors. Crawford begins by explaining with clarity the logical and legal problems with employees of private military and security companies participating in hostilities while remaining ‘civilians’.<sup>10</sup> The reader is informed that such employees are commonly considered ‘mercenaries’ by academics.<sup>11</sup> This definition is appealing given the natural meaning of ‘mercenary’<sup>12</sup> and because it is naturally abhorrent for paid fighters to retain the status of ‘civilian’, however Crawford concludes that it is incorrect because the definition within international law requires that ‘mercenaries’ be incorporated into the state’s regular armed forces.<sup>13</sup> While this conclusion may be accurate, it is unsatisfying because it does not resolve how employees of private militaries should be classified. This chapter would have been strengthened by an argument concerning what the status of such individuals ought to be.

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<sup>5</sup> See Roland Otto, *Targeted Killings and International Law* (Springer, 2012).

<sup>6</sup> See Nour Mawloud Najeeb Fniish, *Protecting Women Under the International Humanitarian Law* (Vandeplas Publishing, 2013).

<sup>7</sup> Above n 2, 131–2.

<sup>8</sup> Ibid 137.

<sup>9</sup> Ibid 132.

<sup>10</sup> Ibid 164–5.

<sup>11</sup> Ibid 161.

<sup>12</sup> Catherine Soanes and Angus Stevenson (eds), *Concise Oxford English Dictionary* (Oxford University Press, 12<sup>th</sup> ed, 2008).

<sup>13</sup> Crawford, above n 2, 161–3.

Parts One and Three of *Identifying the Enemy* are also compelling reading. Part One is a well-researched introduction to the principle of distinction. The nature and development of IHL is explained with ample reference to relevant hard law instruments.<sup>14</sup> This explanation expands on the basic principles of IHL and concludes that warfare must be regulated to prevent the risk of states engaging in ‘total wars’ in which civilians are targeted without discrimination.<sup>15</sup> Further, in Part Three, Crawford’s conclusion that soft law instruments are the best method of development in this area is convincing. Firstly, the argument that hard law could continue to develop the principle of distinction is discredited on the basis that hard law expansions of the principle are very unlikely to be agreed upon again by states.<sup>16</sup> In contrast, there is a ‘growing influence of soft law’<sup>17</sup> indicating that soft law instruments are more likely to lead to development. Crawford argues that instruments such as the *Tallinn Manual on Cyberwarfare* which shaped international cyber law and the *Montreux Document* which has partially regulated private military and security companies have made some contribution to the development of IHL and that similar instruments will continue to shape it.<sup>18</sup> This argument is compelling because international law is defined as much by custom as it is by hard law, and the difficulties of crafting new hard law concerning civilian participation in armed conflicts would appear to be unrealistic.

*Identifying the Enemy* argues convincingly that soft law will define how this crucial area of international law will develop, but whether such development is realistic is yet to be determined. Unfortunately, Crawford’s argument is not as powerful as it might have been if a clear proposal for law reform had been included. Instead the reader is left guessing how civilians who commit acts of hostility should be classified, and how soft law ought to guide this. While proposing a resolution to the difficulties of classifying combatants and civilians would broaden the scope of the book, it would have given more weight to Crawford’s conclusion. *Identifying the Enemy* is nevertheless a formidable argument in favour of developing the principle of distinction with soft law instruments.

Ryan North\*

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<sup>14</sup> See, eg, *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); *Protocol Additional to the Geneva Conventions; Charter of the United Nations* 1945.

<sup>15</sup> Crawford, above n 2, 176.

<sup>16</sup> *Ibid* 210.

<sup>17</sup> *Ibid* 231.

<sup>18</sup> *Ibid* 228–30.

\* Fourth-year BA-LLB student at the University of Tasmania, and member of the Editorial Board of the University of Tasmania Law Review for 2016.