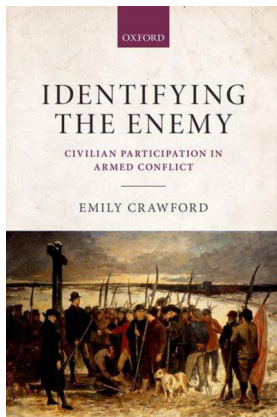


BOOK REVIEW



Identifying the Enemy: Civilian Participation in Armed Conflict

Emily Crawford*

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Emily Crawford's 2015 book, *Identifying the Enemy: Civilian Participation in Armed Conflict*, is an examination of civilian involvement in armed conflict, with a focus on the development of international humanitarian law (IHL) relating to civilians' direct participation in conflict. It puts the evolution of the law in the broader historical context from the birth of modern IHL to drone targeting and cyber-warfare.

Dr Emily Crawford, of University of Sydney Law School, wrote her doctoral thesis on the disparate treatment of participants in armed conflict.¹ *Identifying the Enemy* grew out of a post-doctoral fellowship at the University of Sydney aimed at exploring the way in which civilian participation in twenty-first-century armed conflict has created challenges for the traditional conceptualization of civilians and belligerents.² From the level of technical detail and the historical depth of the volume, it is clear that its intended audience are scholars who are interested in tracing major developments in the distinction between civilians and belligerents under international law, with a view to clarifying what constitutes "direct participation in hostilities" (DPH) by civilians.

Identifying the Enemy is successful in its meticulously researched framing of the modern concept of DPH within its historical evolution, making a valuable

* Published by Oxford University Press, Oxford, 2015.

contribution to the literature concerning civilian participation in hostilities (direct or otherwise) and examining how civilians taking part in the fight are perceived and identified by armed actors. Crawford's field of view in this discussion expands on the traditional understanding of civilians who engage in DPH to discuss how the international community has dealt with civilians who participate in hostilities, who she terms "irregular combatants" or "irregulars". She aims to contextualize the contemporary understanding of which conduct results in a loss of civilians' legal protection from attack by framing the question in light of legal developments over the course of modern history, reaching back to the 1800s and following the law's evolution up to today.

The book is divided into three main parts, entitled "The Development of the Law relating to Civilians and Armed Conflicts", "Current Challenges to the Law on Civilians and Armed Conflict" and "Civilian Participation in Armed Conflict and the Law in the Twenty-First Century". Although it is sometimes easy to lose sight of the DPH "forest" through the trees of Crawford's in-depth analysis and rich historical references, overall the reader will find the book is structured in an accessible way.

In outlining the development of the law, Crawford begins with the principle of distinction, a touchstone she comes back to time and again to remind the reader of its importance in regulating warfare.³ Also threaded throughout the book are the historical sources Crawford cites, such as the 1868 St Petersburg declaration,⁴ Grotius's seminal 1625 work *The Law of War and Peace*,⁵ and Rousseau's *The Social Contract*.⁶ Crawford is not unique in turning to historical and contemporary examples in examining the issue of civilian participation in hostilities,⁷ but the breadth of her research is impressive. Putting the discussion in historical context gives an important sense of the evolution of thinking around civilians participating in conflict, and grounds Crawford's analysis solidly in the wealth of scholarly thought that has taken place on this topic.

Crawford's first chapters use this deep historical analysis to examine how perceptions of civilian immunity from attack have evolved over time, finding patterns in an individual's ability to cause harm triggering their susceptibility to lawful attack and looking at the types of individuals that are protected from attack under different religious traditions.⁸ She traces the international community's legislative responses to civilian participation in hostilities, as most

1 Emily Crawford, *The Treatment of Combatants and Insurgents under the Law of Armed Conflict*, Oxford University Press, Oxford, 2010.

2 See Sydney Law School, "Meet Our Expert – Dr Emily Crawford", available at: http://sydney.edu.au/law/research/our_experts/emily_crawford.shtml (all internet references were accessed in December 2015).

3 *Identifying the Enemy*, p. 12.

4 *Ibid.*, p. 13.

5 *Ibid.*, p. 20.

6 *Ibid.*, pp. 21–22.

7 See, e.g., Hugo Slim, *Killing Civilians: Method, Madness and Morality in War*, C. Hurst & Co., London, 2007; Nicolette Boehland, *The People's Perspectives: Civilian Involvement in Armed Conflict*, Report, Center for Civilians in Conflict, Washington, DC, 2015, available at: http://civiliansinconflict.org/uploads/files/Peoples_Perspectives_WebFinal.pdf.

8 *Identifying the Enemy*, pp. 21–22.

IHL scholars do, back to the 1874 Lieber Code,⁹ also discussing the 1874 Brussels Declaration¹⁰ and the 1880 response by the Institute of International Law in the form of the *Oxford Manual on the Laws of War on Land*,¹¹ and the 1899 and 1907 Hague Regulations,¹² before reaching the 1949 Geneva Conventions and their Additional Protocols.¹³ She looks at historical developments in treaty law, scholarly literature, State practice (via military manuals, codes of conduct, domestic laws and regulations etc.), the practice of international organizations and international tribunals, and soft-law instruments. Crawford's book does not include mention of the 2015 US *Law of War Manual*, which was published in the same year.¹⁴

Since 2009, the ICRC's *Interpretive Guidance on the Notion of Direct Participation in Hostilities* (Interpretive Guidance) has been the principal text referenced in scholarly discussions of civilian participation in hostilities.¹⁵ Crawford has included much discussion of this text in her book, but does not rely solely upon it, also looking to other sources such as State practice, international and national jurisprudence, and other interpretations of the law. She includes the most well-known criticisms of the Interpretive Guidance, notably the criticisms of Section IX on "Restraints on the Use of Force in Direct Attack", as well as her own critical analysis of the text. She sees the Interpretive Guidance as "the 'outer marker' of a more narrow and restrictive approach to targeting persons directly participating in hostilities".¹⁶

In determining whether a consensus on the definition of DPH can be found after examining these historical and modern-day interpretations of the concept, Crawford reaches a definition to be evaluated on a case-by-case basis:

[I]f in light of circumstances ruling at the time, a person appears to be taking a direct part in hostilities, and that their actions are more than indirect (i.e., political support, provision of basic sustenance such as food or water) but are likely to cause actual harm to an enemy, one could feasibly maintain a charge of DPH.¹⁷

Having established consensus only on this vague and exceedingly broad definition of the conduct that makes a civilian subject to lawful attack, in the second part of the book Crawford discusses how this lack of clarity plays out in light of several features of modern armed conflict: targeted killing, remote warfare (drones and cyberwarfare), private military and security contractors, and criminal activities in

9 *Ibid.*, pp. 27 ff.

10 *Ibid.*, pp. 30 ff.

11 *Ibid.*, pp. 31 ff.

12 *Ibid.*, pp. 32 ff.

13 *Ibid.*, pp. 35 ff.

14 US Department of Defense, *Law of War Manual*, Office of General Counsel, Washington, DC, 12 June 2015, available at: www.dod.mil/dodgc/images/law_war_manual15.pdf.

15 Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, 2009.

16 *Identifying the Enemy*, p. 88.

17 *Ibid.*, p. 91.

armed conflict. A substantive critique that can be made here is that while these topics may be “sexy” at the moment, it is important to note that such “new” phenomena can be analyzed within the existing IHL framework to create consistency and predictability in the law. For example, targeted killing is not a new phenomenon, regardless of the relatively recent debate on drones as a weapons platform.

The third and final part of the book argues that the way forward in dealing with increased civilian participation in armed conflict is through the development of soft-law instruments.¹⁸ Crawford defines “soft law” broadly, as “any non-binding instrument or set of instructions designed to either restate, affirm, develop, and/or clarify the binding norms that regulate conduct in a particular area”.¹⁹ She cites numerous benefits of soft-law instruments in armed conflict, especially in non-international armed conflict.²⁰

Crawford points out that it is unclear whether soft law truly affects the behaviour of belligerents without more details and concrete data in this area.²¹ She also acknowledges some of the drawbacks of soft law. She uses the ICRC’s Interpretive Guidance as an example here, stating that it is “a document issued by a well-respected and undoubted leader in IHL affairs, but one that came out of a process which was marked by dissent and disavowal by some of the participants”.²² Tainted, in Crawford’s view, by disagreements among experts during the consultation process, the Interpretive Guidance suffers from the fact that “any potential norm-influencing power that international law instruments may have will be limited by the degree to which the instruments are accepted by States, and incorporated into State practice”.²³ One potential danger behind the author’s call for further regulation of DPH through new soft-law instruments is the risk of opening up the protection offered to the civilian population to erosion by those who would seek to expand the interpretation of DPH.

According to Crawford, “the question of DPH might be best addressed through unconventional means, such as soft law instruments”.²⁴ Given the dearth of new binding legal instruments at the international level, soft law certainly does seem an attractive option. However, the controversy that greeted the 2009 Interpretive Guidance, a key example of such soft law, shows that this solution may have its flaws. Crawford interestingly points to the possibility that such soft law could be “a number of smaller, shorter, more specific documents on specific areas”, rather than addressing DPH as a whole in the vein of the ICRC’s Interpretive Guidance.²⁵ This may solve some of the controversies, although the

18 *Ibid.*, p. 206.

19 *Ibid.*, p. 212, citation omitted.

20 *Ibid.*, pp. 212–216.

21 *Ibid.*, pp. 217–225.

22 *Ibid.*, pp. 226–227, citations omitted.

23 *Ibid.*, pp. 227–228.

24 *Ibid.*, p. 7.

25 *Ibid.*, p. 229.

specific areas where States are likely to agree to such soft-law instruments may be those that are already accepted as norms.

Crawford presents a strong case that it is worth considering how to better regulate the varied forms of civilian participation in hostilities under international law. In light of the deep and informative historical examination that underlies her analysis, this book presents a valuable perspective and is an interesting contribution to the literature on the topic. Given that the consequences for civilians who are directly participating or who are perceived as directly participating in hostilities can be lethal, one can only hope that there will be continued discussion leading to more consensus on when civilians lose their protection from direct attack.

