

Contemporary Challenges to International Humanitarian Law



GENTIAN ZYBERI
NORWEGIAN CENTRE FOR HUMAN RIGHTS
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Contemporary Challenges to IHL

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- Terrorism;
- Direct participation in hostilities (DPH);
- Security detention;
- Multinational forces;
- Occupation;
- The privatization of war;
- Automatization of war and cyber warfare;
- Ensuring respect for IHL.

IHL and Terrorism

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- Global war on terrorism – another oxymoron.
- Applicability of IHL to terrorist acts against civilians and civilian objects.
- ‘Unlawful combatants’ and their treatment.
- Additional Protocol I unequivocally prohibits acts of terrorism, such as attacks against civilians or civilian objects.
- Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are also prohibited.
- It is important to determine the applicable legal framework to specific acts – and that is not always IHL!

Direct Participation in Hostilities (DPH)

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- Direct participation of civilians in armed conflict:
- Blurring of distinction between combatants and civilians – urban warfare;
- Problems with targeting – the continuous combat function – modalities of loss of protection;
- Potential increase of harm to civilians and civilian objects;
- Problems with security detention.
- 2009 ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law.

Concept of Direct Participation in Hostilities

- **ICRC, Interpretive Guidance, 2009, p. 45:**
- Direct Participation in Hostilities (DPH) refers to specific, hostile acts carried out by individuals as part of conduct of hostilities between parties to an armed conflict.
- Interpreted synonymously in IAC and NIAC.
- Treaty terms of ‘direct’ and ‘active’ indicate the same quality and degree of individual participation in hostilities.

Elements of Direct Participation in Hostilities

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- 1. Act must be likely to *adversely affect* the *military operations* or *military capacity* of a party to an AC, or alternatively to *inflict death, injury* or *destruction* on persons or objects protected against direct attack (*threshold of harm*).
- 2. A *direct causal link* between the *act* and the *expected harm* (*direct causation*).
- 3. Act specifically designed to directly cause the required threshold of harm in support to a party to the conflict, to the detriment of another (*belligerent nexus*).

Threshold of Harm

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- *Interpretive Guidance*, p.47:
- Direct Participant reaches threshold either by causing *harm of specifically military nature* **or** by inflicting *death, injury, or destruction on persons or objects protected against direct attack*.
- Harm does not need to materialize; what's important is the *objective likelihood that act will result in such harm*.
- Acts of sabotage; cyber warfare; passing information to the adversary (targeting information) would also qualify.

Direct Causation

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- Must be a *direct causal link* between *specific act* and *harm likely to result from it*, or from a coordinated military operation of which that act constitutes an integral part. *Interpretive Guidance*, p. 51.
- ‘The harm in question must be brought about in one causal step.’ *Interpretive Guidance*, p. 53.

Belligerent Nexus

- “Direct Participation in Hostilities” is restricted to *specific acts that* are so closely related to the hostilities conducted between parties to AC that they *constitute an integral part of conflict*. *Interpretive Guidance*, p. 58.
- Act *must be designed to* **directly** *cause the required threshold of harm in support of a party to the conflict and to the detriment of another*. *Interpretive Guidance*, p. 58.
- Objective purpose of the act – distinct from subjective intent or hostile intent, *Interpretive Guidance*, p. 59.

Security Detention Issues (1)

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- Those who are deprived of liberty are at a particular risk of physical or mental abuse, disappearance, and whose immediate needs such as food, water and medical care are often not adequately met.
- General rules concerning detention/administrative detention
- Guantanamo Bay issue (status and treatment) and the Abu Ghraib violations.
- Due process and fair trial guarantees.

Security Detention Issues (2)

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- Rules on the treatment of detainees (physical and mental integrity and well-being)
- Rules on material conditions of detention (physical and psychological needs)
- Fair trial rights (art. 75(4) of Additional Protocol I)
- Procedural safeguards in internment.

Multinational Forces

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- Applicability of IHL to multinational, integrated multidimensional missions (conflict prevention, peace-keeping, peace-making, peace-enforcement and peace-building)
- Occupation law
- Detention activities
- Dissemination of IHL
- Protection of peacekeepers
- Neutral independent humanitarian action approach.

Issues Concerning Occupation (1)

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- General principles re occupation (1907 HagReg, arts. 42-56; and arts. 27-34 and 47-78 of the 1949 GV IV)
- What are the proper limits to an occupying power's freedom to effect changes in an occupied territory (be they legal, political and institutional)?
- Private property
- Public property
- Beginning and end of an occupation?
- Situation of people deprived of their liberty during and after occupation?
- Monitoring compliance with obligations arising for Occupying Powers under the law of occupation.

Issues Concerning Occupation (2)

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- ICRC project on occupation and other forms of administration of foreign territory (2012 [Report](#)):
 - 1) the beginning and end of occupation;
 - 2) the delimitation of the rights and duties of an occupying power/the relevance of occupation law for United Nations administration of territory;
 - 3) the use of force in occupied territory.

Privatization of Armed Conflict

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- Outsourcing of military activities
- Implementing IHL
- Distinction between civilians and combatants
- Duty to respect and ensure respect for IHL
- Command responsibility?
- Who is responsible for violations? PMSCs or contracting States?
- The Montreux Document on Private Military and Security Companies of 2009.

Automatization of War and Cyber Warfare

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- Use of drones and other high-tech weapons
- Who is responsible in case of IHL violations?
- Use of drones in Afghanistan and Pakistan
- Cyber warfare (armed conflict in another dimension)
- [Tallinn Manual of Cyber Warfare](#) of 2012

Ensuring Respect for IHL

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- The challenge of ensuring respect for IHL:
- Both States and non-State actors guilty of violations of IHL;
- Sanctions;
- State responsibility and individual criminal responsibility;
- Dissemination and awareness raising;
- Engaging with armed groups?
- Other options?

Concluding Remarks

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- Many challenges to applying and ensuring respect for IHL (conceptual, normative, procedural, and institutional):
- **Changing nature of conflicts:**
- Nature of armed conflict
- Fluctuation/fluidity of the situation/s
- Different interests and approaches by the parties to the armed conflict
- **Technological challenges and others:**
- Privatization and automatisisation of armed conflict
- Cyberwarfare
- **Failure to address root causes in a systematic manner.**

Relevant Literature

- ICRC website: www.icrc.org/eng/war-and-law/contemporary-challenges-for-ihl/index.jsp
- 2011 ICRC Report: www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf
- ICRC President Statement on the 60th anniversary of the Geneva Conventions: www.icrc.org/eng/resources/documents/statement/geneva-convention-statement-091109.htm
- International Review of the Red Cross, 2010, No. 878 – Urban Violence: www.icrc.org/eng/resources/international-review/review-878-urban-violence/review-878-all.pdf
- Direct participation in hostilities: questions & answers: www.icrc.org/eng/resources/documents/faq/direct-participation-ihl-faq-020609.htm