Contemporary Challenges to International Humanitarian Law

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Contemporary Challenges to IHL

- 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.

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Global war on terrorism – another oxymoron.
Applicability of IHL to terrorist acts against civilians and civilian objects.
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)

- 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.
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

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

- *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

- 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.
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)

- 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.

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Multinational Forces

- 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)

- 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.

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Issues Concerning Occupation (2)

- 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.

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Privatization of Armed Conflict

- 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?
Automatization of War and Cyber Warfare

- 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

- 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?

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Concluding Remarks

- 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 automatisation of armed conflict
  - Cyberwarfare
  - **Failure to address root causes in a systematic manner.**
Relevant Literature

- 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](http://www.icrc.org/eng/resources/international-review/review-878-urban-violence/review-878-all.pdf)