

Canadian  
Forces  
College

Collège  
des  
Forces  
Canadiennes



## INTERNATIONAL HUMANITARIAN LAW: ANALYSTS AT THE GATE

Maj Joel Doucette

**JCSP 44**

***Exercise Solo Flight***

**Disclaimer**

Opinions expressed remain those of the author and do not represent Department of National Defence or Canadian Forces policy. This paper may not be used without written permission.

© Her Majesty the Queen in Right of Canada, as represented by the Minister of National Defence, 2018.

**PCEMI 44**

***Exercice Solo Flight***

**Avertissement**

Les opinions exprimées n'engagent que leurs auteurs et ne reflètent aucunement des politiques du Ministère de la Défense nationale ou des Forces canadiennes. Ce papier ne peut être reproduit sans autorisation écrite.

© Sa Majesté la Reine du Chef du Canada, représentée par le ministre de la Défense nationale, 2018.

CANADIAN FORCES COLLEGE – COLLÈGE DES FORCES CANADIENNES  
JCSP 44 – PCEMI 44  
2017 – 2018

EXERCISE *SOLO FLIGHT* – EXERCICE *SOLO FLIGHT*

**INTERNATIONAL HUMANITARIAN LAW: ANALYSTS AT THE GATE**

Maj Joel Doucette

*“This paper was written by a student attending the Canadian Forces College in fulfilment of one of the requirements of the Course of Studies. The paper is a scholastic document, and thus contains facts and opinions, which the author alone considered appropriate and correct for the subject. It does not necessarily reflect the policy or the opinion of any agency, including the Government of Canada and the Canadian Department of National Defence. This paper may not be released, quoted or copied, except with the express permission of the Canadian Department of National Defence.”*

Word Count: 4612

*“La présente étude a été rédigée par un stagiaire du Collège des Forces canadiennes pour satisfaire à l'une des exigences du cours. L'étude est un document qui se rapporte au cours et contient donc des faits et des opinions que seul l'auteur considère appropriés et convenables au sujet. Elle ne reflète pas nécessairement la politique ou l'opinion d'un organisme quelconque, y compris le gouvernement du Canada et le ministère de la Défense nationale du Canada. Il est défendu de diffuser, de citer ou de reproduire cette étude sans la permission expresse du ministère de la Défense nationale.”*

Compte de mots: 4612

## INTERNATIONAL HUMANITARIAN LAW: ANALYSTS AT THE GATE

The “ascendancy of organized society over the chaos of pre-Westphalian society” has resulted in the concentration of the authority to use force and the monopolization of violence by the state.<sup>1</sup> Consequently, governing authorities gained the legal right to wage war and to control individuals. Individuals fighting on behalf of a governing authority are viewed as legitimate extensions of that authority. Layers of international and national regulations have shaped many aspects of militaries with the continued development of nation-states and the rule of law; arguably, none more so than the sum total of international humanitarian law. Modern international humanitarian law is a combination of Geneva law, which is focused on the protection of victims of armed conflict and Hague Law, which is focused on the rules of combat and the legality of weapons. Both Geneva law and Hague law are geared towards the prevention of unnecessary human suffering and “have expanded to the point where their concerns overlap.”<sup>2</sup> Today, they are collectively known as ‘law of armed conflict’ (LOAC) amongst military personnel or ‘international humanitarian law’ (IHL) amongst academics and humanitarian practitioners.

The roots of IHL are found in the first Geneva Convention adopted in 1864 and in a draft international agreement concerning the laws and customs of war submitted by 15 European States during the Brussels Conference of 1874. Although it was not ratified, it was an important

---

<sup>1</sup>Kenneth Watkin, “Humans in the Cross-hairs: Targeting and Assassination in Contemporary Armed Conflict,” in *New Wars, New Laws? Applying the Laws of War in 21<sup>st</sup> Century Conflicts* (New York: Transnational Publishers, 2005), 142.

<sup>2</sup>Nina Tannenwald, “Assessing the Effects and Effectiveness of the Geneva Conventions,” in *Do the Geneva Conventions Matter?* (New York: Oxford University Press, 2017), 4.

first step in the development of IHL and contributed to the Manual of the Laws and Customs of War at Oxford in 1880. These two documents formed the initial basis of the two Hague conventions on land warfare and many provisions can still easily be traced back to them.<sup>3</sup> Further developments in IHL have occurred with changes in the nature of war itself as well as the evolution of technology. For example, following World War I where mustard gas, machine guns, tanks and aerial warfare were used extensively, many revisions were made to the laws of war designed to limit the use of poison gas and improve the treatment of sick and wounded soldiers.<sup>4</sup> Similarly, the total war of World War II caused vast civilian casualties and resulted in a new Geneva Convention intended to protect civilians, as well as revisions to the first three Geneva Conventions with respect to the protection of wounded, sick, or shipwrecked members of armed forces.<sup>5</sup> However, the fourth Geneva Convention failed to adequately address many issues, such as indiscriminate attacks on civilian populations. The evolution of technology and the increase of internal armed conflicts prompted a conference convened by the International Committee of the Red Cross (ICRC) in 1974 which resulted in the two 1977 Additional Protocols elaborating on the applicable rules in international and non-international armed conflicts. After the Cold War, there was an increase in internal conflicts as well as an increase in hybrid warfare where combinations of State and non-State actors blurred the lines of distinction between combatants and civilians. There was also a rise in international terrorism, culminating in the September 11<sup>th</sup> attacks on the United States. Once, again the nature of war has changed and so has the technology that it employs. Non-State actors now possess “the ability and intent to wreak harm

---

<sup>3</sup>ICRC, “Project of an International Declaration concerning the Laws and Customs of War. Brussels, 27 August 1874,” last accessed 14 April 2018, <https://ihl-databases.icrc.org/ihl/INTRO/135>.

<sup>4</sup>David Wippman, “Introduction: Do new wars call for new laws?” *New Wars, New Laws? Applying the Laws of War in 21<sup>st</sup> Century Conflicts* (New York: Transnational Publishers, 2005), 2.

<sup>5</sup>*Ibid.*, 2.

on a scale previously reserved to States with organized military forces.”<sup>6</sup> As a result, questions have again been raised as to the adequacy of existing IHL.

Modern IHL predates modern technology and its applicability to the realities of the current nature of war has been criticized. The main argument stems from liberal democracies frequent use of “plausible legality” or “legal rationalism,” where legal justifications that are jurisdictionally layered and contextually complex create loopholes or gaps in the relatively elastic IHL principles.<sup>7</sup> It is argued these purported gaps make IHL vulnerable to manipulation and exploitation, as well as obscuring the distinction between legal compliance and non-compliance to secure immunity and legitimacy for military actions. The opposing argument posits that the current IHL is adequate as it stands if strictly interpreted as a whole, and in good faith, rather than loose, plausible readings. This argument is usually coupled with the contention that international human rights and criminal law should regulate a war on terrorism, rather than the laws of war, as it is not actually an armed conflict.<sup>8</sup> This paper supports the argument, that with the exception of a few minor inconsistencies in terminology, that the current IHL is adequate to address the current nature of war. This paper will examine this debate through a close textual analysis of two recurring interrelated key elements: the concept of combatant vs civilian and participation in hostilities. Through the discussion of these key elements, another element, the loss of protection against attack, will be discussed as it relates to both.

---

<sup>6</sup>Ibid., 3.

<sup>7</sup>Rebecca Sanders, “Human rights abuses at the limits of the law: Legal instabilities and vulnerabilities in the ‘Global War on Terror,’” *Review of International Studies* 44, no.1 (2017): 2-8.

<sup>8</sup>Wippman, “Introduction: Do new wars call for new laws?” . . . , 8.

## COMBATANT VS CIVILIAN

The discourse on this area revolves around the principle of distinction and definition of terms and concepts. Under IHL, during international armed conflict, “all persons who are neither members of the armed forces of a party to the conflict nor participants in a levee en mass are civilians and, therefore entitled to protection against direct attack unless and for such time as they take a direct part in hostilities.”<sup>9</sup> Similarly, in non-international armed conflict, the same is true for “all persons who are not members of State armed forces or organized armed groups of a party to the conflict ...”<sup>10</sup>

However, treaty IHL governing non-international armed conflict as well as that which governs international armed conflict predating Additional Protocol I does not expressly define many of these terms, arguably permitting an opening for loose legal interpretation.

Although, the philosophical rationale of IHL is relatively straightforward and the distinction between ‘civilians’ and ‘combatants’ (whether they be lawful or unlawful in their conduct) is clear, the ‘Global War on Terror’ raised concerns that some of the parties to the conflict are not state-based, are networks rather than militias, and do not conduct themselves in accordance with IHL.<sup>11</sup> This has resulted in controversial and arguably incorrect interpretations of IHL. For example, several memos and orders have been cited to include such language as “individuals subject to this order,” “detainees,” “Taliban fighters,” “unlawful combatants,” and “enemy

---

<sup>9</sup>ICRC, *Interpretive Guidance on the Notion of Direct Participation under International Humanitarian Law* (Geneva: ICRC, 2009), 26, last accessed 2 April 2018, <https://www.icrc.org/en/publication/0990-interpretive-guidance-notion-direct-participation-hostilities-under-international>. ‘Levee en mass’ refers to inhabitants of a non-occupied territory who, on approach of the enemy, spontaneously take up arms to resist the invading forces without forming into regular armed units, provided they carry arms openly and respect the laws and customs of war.

<sup>10</sup>Ibid., 36.

<sup>11</sup>Barbara J. Falk, “The Global War on Terror and the Detention Debate: The Applicability of Geneva Convention III,” *Journal of International Law and International Relations* 3, no.1 (2007): 35-36.

belligerents.”<sup>12</sup> An even better illustration is the detailed memorandum written in January 2002 by Jay S. Bybee, Assistant Attorney-General for Alberto R. Gonzalez (White House Counsel) and William J. Haynes II (General Counsel for the Department of Defense). In that memo, Bybee legally rationalized that by invoking his presidential powers of treaty interpretation to “override international customary law,” President Bush could legally determine that the Taliban do not fit any of the categories articulated in the Geneva Conventions; furthermore, that since status determination by a competent tribunal under article 5 is only required in ‘cases of doubt,’ they are not required when there is no doubt.<sup>13</sup> Consequently, President Bush, pursuant to his authority, confirmed that none of the provisions of Geneva apply to the conflict with al Qaeda in Afghanistan, made the blanket determination that al Qaeda and Taliban detainees were ‘unlawful combatants’ and not eligible for prisoner-of-war (POW) status, and denied the applicability of Common Article 3 relating to non-international armed conflict.<sup>14</sup> Consequently, this is one example which contributes to the idea that the current IHL has limited applicability to the current nature of war.

However, the terminology used in the Hague Regulations and the four Geneva Conventions, and Additional Protocols establish that the concepts of civilian, armed forces, organized armed group, and levee en mass are mutually exclusive and that every individual affected by or taking part in the conduct of hostilities belongs to one of these categories.<sup>15</sup> Furthermore, there is sufficient clarity in these terms without expressly defining them, and therefore must be “interpreted in good faith in accordance with the ordinary meaning to be given

---

<sup>12</sup>Ibid., 36-43.

<sup>13</sup>U.S. Department of Justice, *Memorandum Regarding Application of Treaties and Laws to al Qaeda and Taliban Detainees* (Washington, Office of the Assistant Attorney General, 22 January 2002), 30-37, last accessed 14 April 2018, <http://hrlibrary.umn.edu/OathBetrayed/Bybee%201-22-2002.pdf>.

<sup>14</sup>Falk, “The Global War on Terror. . .,” 41.

<sup>15</sup>ICRC, *Interpretive Guidance. . .*, 21, 28.

to [them] in their context and in the light of [the] object and purpose” of IHL.<sup>16</sup> For example, the four requirements under IHL to be considered a member of a militia or volunteer corps other than a regular armed force are: responsible command; fixed distinctive sign recognizable at a distance; carrying arms openly; and, operating in accordance with the laws and customs of war. For regular armed forces, the relationship between the armed group and the party to the conflict is relatively easy to distinguish compared to irregular armed forces. However, a person belonging to an irregular force is not necessarily excluded from this category and would otherwise be regarded as a civilian for the purposes of the conduct of hostilities.<sup>17</sup> Consequently, such a person may be entitled to combatant privilege and POW status. One issue is that of determining membership to an irregular force.

Membership in irregularly constituted groups has no basis in domestic law and is not consistently expressed through uniforms, identification cards or insignia. Therefore, in IHL, the concept of membership in these groups is determined in a functional sense. Membership depends on whether “the continuous function assumed by an individual corresponds to [the conduct of hostilities] collectively exercised by the group as a whole” as part of or on behalf of a non-State party to the conflict.<sup>18</sup> This is known as ‘continuous combat function’ and does not necessarily grant combat privilege; rather, it distinguishes members of non-State fighting forces from civilians who directly participate in hostilities on a spontaneous, sporadic or unorganized basis. Continuous combat function involves “preparation, execution or command of acts or operations

---

<sup>16</sup>United Nations, *Vienna Convention on the Law of Treaties* (Vienna, UN, 1969), last accessed 14 April 2018, <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf>, Article 31. As of January 2018, 116 states have ratified this convention, while those who have not, such as the United States, recognize parts of it as a restatement of customary law and binding upon them as such.

<sup>17</sup>See Article 1 of Hague Regulation IV, Article 13 (1), (2), (3) and (6) of Geneva Convention I and Geneva Convention II, and Article 4 A (1), (2), (3) and (6) of Geneva Convention III.

<sup>18</sup>ICRC, *Interpretive Guidance*. . . , 34



amounting to direct participation in hostilities.”<sup>19</sup> This includes “individuals recruited, trained and equipped by such a group to continuously and directly participate in hostilities on its behalf” even before he or she carries out a hostile act.<sup>20</sup> Continuous combat function can also be identified on the basis of “conclusive behavior whereby a person has repeatedly directly participated in hostilities in support of an armed group,” thereby indicating the conduct establishes a continuous function rather than a spontaneous, sporadic, or a temporary role.<sup>21</sup> This addresses the concern over the ‘revolving door’ concept. Combatants cannot demobilize at will in order to return to status as civilians and then take up arms once again to become combatants. This would create a significant imbalance where, for example, members of organized armed groups that belong to a non-State party to a conflict could operate as fighters at night and civilians by day. Serious consequences would likely result through the undermining of IHL during the conduct of hostilities from excessively loose interpretations of the law to outright disrespect for it.

However, the ‘revolving door’ concept as it relates to civilians is “an integral part, not a malfunction, of IHL” as it protects civilians who do not represent a military threat at the time, in contrast to members of organized armed groups who demonstrate continuous combat function.<sup>22</sup> This is necessary to protect the civilian population from erroneous or arbitrary attack, as long as such civilian participation occurs on a merely spontaneous, sporadic and unorganized basis. Furthermore, a civilian who directly participates in hostilities loses their protection but not their status, and may be the target of direct attack during this time and/or, if captured, tried under domestic law for criminal actions.

---

<sup>19</sup>Ibid.

<sup>20</sup>Ibid.

<sup>21</sup>Ibid., 35

<sup>22</sup>ICRC, Interpretive Guidance. . . , 70

Continuous combat function is also distinguishable with respect to persons who are comparable to reservists, who after a period of active membership leave the group and re-integrate into civilian life. Another important distinction is other individuals who continuously accompany or support such a group, but whose function does not involve direct participation in hostilities. These individuals are considered civilians similar to private contractors and civilian employees who accompany State armed forces. Finally, with the exception of *levee en masse*, “all other persons who directly participate in hostilities on a merely spontaneous, sporadic or unorganized basis must be regarded as civilians.”<sup>23</sup> Consequently, under IHL, even when dealing with non-State actors, there effectively remain only two categories of persons: combatants and civilians. Each category is bestowed certain rights and/or protections and there are consequences should a person in either category act unlawfully. The case of the Global War on Terror and the US conflict in Afghanistan and Iraq demonstrates an attempt by the Bush administration to circumvent or change the rules due to significant public pressure for justice. However, IHL is an attempt at balance, where it is not possible for one side of a conflict to have all the rights and protections while the other side has none. This was demonstrated in 2006 when the US Supreme Court determined that the US was not free to set aside the Geneva Conventions and that the basic humanitarian provisions of Common Article 3, at a minimum, were applicable to non-State actors.<sup>24</sup>

---

<sup>23</sup>Ibid., 25.

<sup>24</sup>Salim Ahmed Hamdan, Petitioner v. Donald H. Rumsfeld, Secretary of Defense, et al., 548 U.S. 4 (2006), last accessed 19 April 2018, <https://supreme.justia.com/cases/federal/us/548/557/>.

## PARTICIPATION IN HOSTILITIES

As detailed, a combatant is fairly well defined. A civilian is negatively defined by contradistinction relative to the definition of combatant, effectively as any individual who does not belong to one of the specified categories of combatant. As much of the IHL was written with respect to the protection of civilians, a literal reading of the plain text in Protocol I Article 50 makes it clear that a civilian is anyone who is not a combatant. However, there has been much debate regarding the phrase, “civilians shall enjoy the protection afforded in this Section, unless and for such time as they take a direct part in hostilities.” It has been argued that here in lies a gap, because a person who takes part in hostilities is therefore not a civilian but at the same time not entitled to the protections afforded to combatants.<sup>25</sup> This is complicated by the fact that IHL is also not clear in terms that relate to participating in hostilities. Both Additional Protocols use varied terms such as “any person who has taken part in hostilities,” “acts harmful to the enemy,” “abstains from any hostile act,” “any act of hostility,” and persons “who have ceased to take part in hostilities.”<sup>26</sup> Common Article 3 of the 1949 Geneva Convention also includes language that lacks consistency. This lack of consistency in terminology within and between different IHLs creates uncertainty about when people are protected and when they are legitimate targets for direct attack. There is no limit from directly targeting combatants during an armed conflict, even when they are not actively conducting operations. Similarly, it is not just the fighters with weapons in their hands that pose a threat, it is also the commanders and planners who are considered to be directly participating as a result of these activities. At the same time, civilians will not automatically lose their protected status simply by carrying weapons if they are not

---

<sup>25</sup>Michael Newton, “Unlawful Belligerency after September 11: History Revisited and Law Revised,” in *New Wars, New Laws? Applying the Laws of War in 21<sup>st</sup> Century Conflicts* (New York: Transnational Publishers, 2005), 106.

<sup>26</sup>These excerpts were taken, in sequential order, from Additional Protocol I Article 45(3), Article 65, Article 41(2), Article (8), and Additional Protocol II Article 4.

directly participating in hostilities. However, now that violent non-State actors pose threats similar to those of members of armed forces, who have the privilege of combatant status under IHL, the concept of direct participation in hostilities becomes that more important. Whether the target is a lone actor with a weapon of mass destruction or a well-resourced, organized group with global reach, clarity in the guidance of IHL is paramount.

This debate is not new. The legal targeting of combatants “has long been complicated by the existence of indirect warfare involving ... irregular forces operating behind enemy lines,” and civilians have always been subject to collateral effects of war in accordance with the principles of military necessity and proportionality.<sup>27</sup> As stated, the ‘revolving door’ concept is not permissible for combatants; however, the qualifying phrase “...for such time...” as it relates to civilian participation in hostilities suggests they might be treated differently. Since the nature of participation in hostilities is the same for both combatants and civilians, and non-State actors are not bestowed combatant status, this temporal wording represents another potential gap. Consequently, clarification is required with respect to the direct participation of civilians in armed conflict.

The ICRC states that “direct participation in hostilities remains a legal concept of limited elasticity that must be interpreted in a theoretically sound and coherent manner reflecting the fundamental principles of IHL.”<sup>28</sup> Since IHL does not clearly define the concept it must also be interpreted in good faith in the context and in the light of the object and purpose of IHL. However, if the authentic French documents are considered, the consistent use of “paricipant directment” provide the missing clarity of consistency in terminology from the English text with

---

<sup>27</sup>Michael Newton, “Unlawful Belligerency after September 11. . .,” 149.

<sup>28</sup>ICRC, Interpretive Guidance. . . , 42.

respect to the quality and degree of individual participation in hostilities.<sup>29</sup> What is also clear is that IHL is linked to situations of international or non-international conflict and refers only to conduct occurring within these situations. Even during an armed conflict, not all conduct constitutes part of the hostilities, such as internal disturbances, riots, and isolated acts of violence. The “notion of direct participation in hostilities refers to specific acts carried out by individuals” as part of the conduct of hostilities against parties to an armed conflict.<sup>30</sup> Consequently, three cumulative criteria were developed to determine whether and, if so, for how long a particular conduct amounts to direct participation in hostilities.

The first constitutive element that must be satisfied in order for an act to qualify as direct participation in hostilities is regarding the threshold of harm likely to result from the act. The threshold of harm is achieved, regardless of the gravity of the act, if it “adversely affects the military operations or military capacity of a party to the conflict” and/or the act simply inflicts death, injury or destruction upon persons or objects that are protected against direct attack.<sup>31</sup> This also includes acts such as sabotage or unarmed activities that: restrict or disturb deployments, logistics, and communications; deny the military use of certain objects, equipment or territory; clearance of mines placed by a party to the conflict; and, electronic interference of military computer networks. Two key distinctions are relevant in this discourse. The first, although activities described above are viewed as adversely affecting military operations or capacity, the refusal of a civilian to collaborate with a party to conflict cannot be interpreted as adversely affecting military operations because it fails to positively affect them. An example is a civilian refusing to act in the capacity of a scout or informant for a party to the conflict. The second, that direct attacks against persons or objects bestowed protection under IHL, such as innocent

---

<sup>29</sup>Ibid., 43

<sup>30</sup>Ibid..

<sup>31</sup>Ibid., 47-49.

civilians and/or civilian villages or residential areas qualify as direct participation in hostilities regardless of any harm to a party to the conflict. In any case, the act which satisfies the criteria of threshold of harm can only amount to direct participation in hostilities if it also satisfies the second constitutive element, which is direct causation.

In order to satisfy the criteria of direct causation, there must be a “direct causal link between a specific act and the harm likely to result from that act, or from a coordinated operation of which that act constitutes an integral part.”<sup>32</sup> The specific use of the word ‘direct’ implies that there could also be indirect participation on the part of civilians. Consequently, the conclusion reached by the ICRC is that if a civilian’s direct participation results in the loss of protection provided by IHL against direct attack, then it stands to reason that indirect participation does not lead to such loss of protection. This corresponds to other activities that are part of the general war effort or war-sustaining activities. The former could be characterized as all activities that objectively contribute to the defeat of opposing forces, such as: the design, production and shipment of military equipment, or the means and infrastructure involved in logistical supply chains. Meanwhile, war-sustaining activities would include more distant contributing activities such as political propaganda, economic undertakings, and production of agriculture or industrial goods. Both activities maintain or increase the capacity to cause harm, but unlike the actual conduct of activities, are not causing harm independently by design. Consequently, a direct and indirect participation in hostilities corresponds to a direct and indirect causation of harm. Therefore, direct participation in hostilities implies a “direct causal relationship between the

---

<sup>32</sup>Ibid., 51.

activity engaged in and the harm done to the enemy at the time and the place where the activity takes place.”<sup>33</sup>

However, the degree of causal proximity should not be constrained merely on the basis of temporal or geographic proximity. For example, remote piloted UAVs (geographically remote) or time-controlled IEDs (temporally remote) are methods commonly employed in the current nature of war. There is a direct causal link between the use of these activities and the harm to a party of conflict regardless of their proximity in time and space. Similarly, from the opposite perspective, the delivery and preparation of food for combatants occurs in the same time and place as the conduct of hostilities, however, the link between these supporting activities and the potential harm to opposing combatants remains indirect. This concept does not necessarily limit the targeting of military objectives. The principles of military necessity and proportionality come into play and pose more of an ethical/legal challenge in this situation as civilians remain subject to collateral effects of a valid attack. Additional Protocol I, Article 52 permits the targeting of objects “which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.” Therefore, by the virtue of a civilian’s presence near legitimate military objectives, voluntary or otherwise, there is an increased risk of suffering, incidental death or injury incurred during valid attacks against those objectives. However, acts which satisfy the criteria of direct causation and threshold of harm can only amount to direct participation in hostilities if they also satisfy the third constitutive element, which is labeled by the ICRC as ‘belligerent nexus.’

---

<sup>33</sup>Ibid., 52.

The concept of ‘belligerent nexus’ refers to the element of an act that meets the first two criteria and where its purpose is “specifically designed to [inflict harm] in support of one party to an armed conflict and to the detriment of another.”<sup>34</sup> Armed violence that does not satisfy this criteria does not amount to participation in hostilities, unless it gives rise to a separate armed conflict, and must be addressed through criminal law enforcement. It is possible that activities during an armed conflict lack a belligerent nexus. For example, the stealing of military supplies or equipment for personal use may cause a threshold of harm, but is not supporting a party to the conflict by harming another. The use of necessary and proportionate force in situations of individual self-defense is another example. Furthermore, civil unrest and inter-civilian violence as a result of a breakdown of law and order that is not specifically designed to support a party to an armed conflict against another does not constitute direct participation in hostilities. In addition, the use of armed force by legitimate authorities to exercise power or authority over persons or territory in support of administrative, judicial or disciplinary actions on behalf of a party to conflict (outside the conduct of hostilities) is not considered direct participation, even when such acts might be perpetrating war crimes under IHL. However, such prohibited conduct might then constitute a domestic or international crime that permits the lawful use of armed force against the perpetrators.

Thus, the application of the three cumulative criteria of threshold of harm, direct causation and belligerent nexus provides a framework for the determination between activities that constitute direct participation in hostilities and activities that occur within the time and space of an armed conflict but are not part of the conduct of hostilities. Furthermore, even when a

---

<sup>34</sup>Ibid., 58.



specific act satisfies the three criteria, the kind and degree of force used must comply with the rules and principles of IHL and other applicable international laws.

## **CONCLUSION**

Some have argued that, with the current nature of war, States and conventional militaries are disadvantaged if they adhere to rules and principles of IHL. After all, modern IHL was designed during times where States and their professional standing armies were the principle parties to conflicts. Since, ‘terrorist’ acts often concentrate on or have little regard for civilians, it is clear they have little or no incentive to abide by human rights or humanitarian laws. In addition to moral duty, obligation and appropriate behavior norms, the fear of reprisal acts as a motivator for States to overcome what might be in their self-interest. However, this does not generally hold sway with violent non-State actors, whom often act from countries with ineffective legal systems or in remote areas beyond the reach of host nation central authorities. There is also a significant discrepancy in IHL between setting the standards of behavior and enforcing them. Each State is effectively responsible for ensuring its own compliance; therefore, IHL depends largely on national action for implementation. Non-State actors, such as the ICRC or other NGOs have no powers of enforcement; however, they can serve as a means for monitoring armed conflicts and assessing the implementation of IHL. Combined with today’s 24-hour news cycle and social media, significant pressure for compliance is possible from an informed public, as well as the international community.

Modern IHL is little more than “a web of interlocking protections and specific legal obligations held together by a thread of respect for humankind and a reciprocal expectation that

the other participants in armed conflict are bound by the same normative constraints.”<sup>35</sup>

Unfortunately, this is not the reality in the current nature of war. IHL bestows the right to wage war on specific groups of individuals, in accordance with established legal constraints, and restricts upon whom violence may be applied. Even then, the right to commit violence on the enemy is not without limits. Lawful combatants become war criminals if their conduct crosses the established legal boundaries of IHL just as civilians who commit warlike acts do not enjoy the combatant immunity bestowed by IHL and are therefore subject to criminal prosecution. However, when organized armed groups belonging to violent non-State actors do not distinguish themselves or ignore other tenets of IHL, it creates the conceptual notion of exception to IHL. This then fosters the idea that military necessity can suspend the law or legally rationalize through loose interpretation of the law to create loopholes through which nations and their militaries can act, leading to non-compliant outcomes. This was seen in the events following the September 11<sup>th</sup> attacks. While American global influence and hegemony may be in decline, the United States remains one of the world’s leading liberal democracies and possesses the capability to influence the behavior of other States. When liberal democracies engage in legal and definitional acrobatics to pursue a strategy of plausible legality to maximize military freedom of action, it not only undermines the institutional regime of IHL, it also invites other States to follow suit. In the absence of consistent practice, this will lead to the erosion of international norms and inevitably impact the effectiveness of IHL. This remains very applicable today, in the continuing global war on terror, particularly since the current President of the United States made several striking comments during his election campaign where he pledged to kill the families of terrorists and would sanction waterboarding “in a heartbeat” and “a hell of a

---

<sup>35</sup>Michael Newton, “Unlawful Belligerency after September 11. . .,” 77.

lot worse than waterboarding [because] only a stupid person would say it doesn't work."<sup>36</sup> In the years following the September 11<sup>th</sup> attacks, and the resulting Global War on Terror, there have been calls to fix instabilities and vulnerabilities with IHL. This prompted the independent and expert review of IHL by the ICRC from 2003-2008. However, the resulting guidance document is only that and is not a legally binding text. However, it should serve as an unbiased legal reading of IHL to reduce non-compliance from States and facilitate external or international pressure on public officials who might be tempted to create legal rationalizations for non-compliant actions.

---

<sup>36</sup>Jenna Johnson, "Trump says 'torture works,' backs waterboarding and 'much worse,' *The Washington Post*, 17 February 2016, last accessed 24 April 2018, [https://www.washingtonpost.com/politics/trump-says-torture-works-backs-waterboarding-and-much-worse/2016/02/17/4c9277be-d59c-11e5-b195-2e29a4e13425\\_story.html?utm\\_term=.7fe38003a038](https://www.washingtonpost.com/politics/trump-says-torture-works-backs-waterboarding-and-much-worse/2016/02/17/4c9277be-d59c-11e5-b195-2e29a4e13425_story.html?utm_term=.7fe38003a038); Nick Gass, "Trump: We have to take out ISIL members' families," *Politico*, 2 December 2015, last accessed 24 April 2018, <https://www.politico.com/story/2015/12/trump-kill-isil-families-216343>.

## BIBLIOGRAPHY

- Evangelista, Matthew. "How the Geneva Conventions Matter." In *Do the Geneva Conventions Matter?* 323-348. New York: Oxford University Press, 2017.
- Falk, Barbara J. "The Global War on Terror and the Detention Debate: The Applicability of Geneva Convention III." *Journal of International Law and International Relations* 3, no.1 (2007): 31-60.
- International Committee of the Red Cross (ICRC). *Interpretive Guidance on the Notion of Direct Participation under International Humanitarian Law*. Geneva: ICRC, 2009. Last accessed 2 April 2018. <https://www.icrc.org/en/publication/0990-interpretive-guidance-notion-direct-participation-hostilities-under-international>.
- International Committee of the Red Cross (ICRC). "Project of an International Declaration concerning the Laws and Customs of War. Brussels, 27 August 1874." Last accessed 14 April 2018. <https://ihl-databases.icrc.org/ihl/INTRO/135>.
- Newton, Michael. "Unlawful Belligerency after September 11: History Revisited and Law Revised." In *New Wars, New Laws? Applying the Laws of War in 21<sup>st</sup> Century Conflicts*, 75-111. New York: Transnational Publishers, 2005.
- Sanders, Rebecca. "Human rights abuses at the limits of the law: Legal instabilities and vulnerabilities in the 'Global War on Terror.'" *Review of International Studies* 44, no.1 (2017): 2-23.
- Salim Ahmed Hamdan, Petitioner v. Donald H. Rumsfeld, Secretary of Defense, et al., 548 U.S. 4 (2006). Last accessed 19 April 2018. <https://supreme.justia.com/cases/federal/us/548/557/>.
- Sowers, Jeannie L., Erika Weinthal, Neda Zawahri. "Targeting environmental infrastructures, international law, and civilians in the new Middle Eastern Wars." *Security Dialogue* 48(5) (2017): 410-430.
- Sutherland, Iain, Konstatinos Xynos, Andrew Jones and Andrew Blyth. "The Geneva Conventions and Cyber-Warfare." *The RUSI Journal* 160, no. 4 (2015): 30-39.
- Tannenwald, Nina. "Assessing the Effects and Effectiveness of the Geneva Conventions." In *Do the Geneva Conventions Matter?* 1-34. New York: Oxford University Press, 2017.
- United Nations. *Vienna Convention on the Law of Treaties*. Vienna, UN, 1969. Last accessed 14 April 2018, <https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf>.

United States Department of Justice. *Memorandum Regarding Application of Treaties and Laws to al Qaeda and Taliban Detainees*. Washington, Office of the Assistant Attorney General, 22 January 2002. Last accessed 14 April 2018, <http://hrlibrary.umn.edu/OathBetrayed/Bybee%201-22-2002.pdf>.

Watkin, Kenneth. "Humans in the Cross-hairs: Targeting and Assassination in Contemporary Armed Conflict." In *New Wars, New Laws? Applying the Laws of War in 21<sup>st</sup> Century Conflicts*, 137-179. New York: Transnational Publishers, 2005.

Wippman, David. "Introduction: Do new wars call for new laws?" In *New Wars, New Laws? Applying the Laws of War in 21<sup>st</sup> Century Conflicts*, 1-28. New York: Transnational Publishers, 2005.