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The Knight's Code, Not His Lance

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Inherent in the application of International Humanitarian Law (IHL) is finding the right balance between military necessity and humanitarian considerations. In doing so, the parties to the conflict will be called upon to interpret core principles and standards of IHL as they are applied in the conduct of military operations. At times, there might be disagreement as to the exact meaning and parameters of certain aspects of IHL. This paper argues against the suggestions by some commentators that in some situations, such interpretation of the law could be viewed as a form of "lawfare." It will also argue that a manipulation by belligerents of the law, for instance by hiding amongst the civilian population, is better described as a war crime than an act of lawfare.

I. INTRODUCTION

At the outbreak of armed conflicts, IHL, also known as the Laws of War, becomes the regulating legal framework for the parties to the conflict. This body of law includes the four Geneva Conventions of 1949 and Additional Protocols of 1977 and 2005, the Law of the Hague, and is also defined under customary international law. Because the laws of armed conflict call notably for a balancing act between military necessity and humanitarian considerations, there are at times differences in their interpretation, as with any other body of law, although the reach of most rules and principles are generally accepted. There is a wide agreement between States, military actors, humanitarians, academia, and other practitioners as to their meaning and how they should be applied in conflict. In fact, the Geneva Conventions

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are the only international treaties that have been universally ratified; all states have thus acquiesced to their principles and rules.

Yet, consensus on the understanding of certain principles, such as proportionality and precaution, is not always that easy to reach. Also, the evolving nature of armed conflicts regularly tests IHL and its interpretation, to the extent that "in today's asymmetric postcolonial wars, the terrain beneath a soldier's interpretations of what is and is not appropriate is constantly shifting."[1]

To the outsider, such terms as "acceptable" collateral damage must seem like an oxymoron. Yet this is the world of *jus in bello*, a world that recognizes that in armed conflict there will be loss of life and damage to property—incidents that have no place in times of peace. IHL attempts to limit the suffering caused by conflict and hostilities by inserting certain basics of humanity and minimum standards of behavior, whilst allowing the parties to the conflict to achieve their military objectives. IHL is about compromise, between the humanitarian and military necessity.[2]

In conflicts, there are situations where one of the belligerents, in defending and justifying its chosen military strategy as respecting IHL, will put forward a legal interpretation of the relevant principle that may seem at odds with that held by other interested parties, be they military or humanitarian. Thus, for instance, between military commanders and humanitarian workers, there might be a different understanding of that which constitutes acceptable collateral damage, simply because their respective interpretations of the principle of proportionality are taken from different standpoints. The former seek to accomplish their mission, which is to defeat the adversary, whereas the latter seek principally to prevent or limit civilian casualties and damage. Difference or even disagreement in the interpretation of IHL principles and standards is part of its very fabric, as is the case for any body of law. Yet, differences or disagreement over the interpretation of the law does not amount to an act of waging war, at least as is commonly understood.

Based on this premise, I argue against the application of the concept of "lawfare" to describe a process of interpretation, which is inherent to the application of any laws, including the laws of war. I also argue that an act of "lawfare" defined by some commentators as a manipulation by belligerents of the law, for instance by hiding amongst the civilian population and leading the other party to commit possible violations of IHL, is better described as a war crime than an act of lawfare.

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[1] DAVID KENNEDY, OF WAR AND LAW 133 (2006).

[2] *See* JEAN PICTET, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 xxxiv (Yves Sandoz, Christophe Swinarski, & Bruno Zimmerman eds., Martinus Nijhoff Publishers 1987) (stating that the Geneva Conventions aim to "spread an ideal of mutual aid and cooperation" to advance peace and the goodwill of men).

II. TO DEFINE IS TO LIMIT

A brief review of the ever expanding writings on and references to the term "lawfare" shows that there seems to be no generally agreed upon definition.[3] But, whilst the meaning of lawfare is a work in progress, as many of the speakers at this conference have indicated, this term is making its way into common parlance. Lawfare is being cited in myriad contexts to describe any number of actions by individuals or groups. Such usages are not being limited to armed conflicts.

It is not the aim of this presentation to advance a definition of lawfare, or to limit the meaning of a term that has yet to make its way into the Oxford Concise Dictionary. Indeed, there might even be multiple meanings attached to the term "lawfare," which have transmogrified over the past few years.

A thread common to most definitions appears to be that lawfare is more often than not associated with accusations that the law is being manipulated and exploited in an overtly negative manner, rather than simply as a "lawful" tool or means to achieve a desired result. For some commentators, lawfare is viewed as the violations of the rules of war in order to exploit the non-violating military's compliance,[4] in other words "lawfare can be used to goad American forces into violations of the Law of Armed Combat, which are then used against the United States in the court of world opinion."[5] For one school of thought, therefore, lawfare is a method of war, preferred by

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[3] This should come as no surprise given that the coining of the term appears to be fairly recent, dating back from 1999–2001. *See* QIAO LIANG & WANG XIANGSUI , UNRESTRICTED WARFARE (Beijing: PLA Literature and Arts Publishing House, Feb. 1999), *available at* http://redreform.com/unrestrictedwarfare.htm (discussing "other means and methods used to fight a non-military war" including psychological warfare, smuggling warfare, and media warfare among others); *see also* Charles J. Dunlap, Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts* (Carr Center for Human Rights, John F. Kennedy Sch. of Gov't, Harvard U., Working Paper, 2001), *available at* http://www.ksg.harvard.edu/cchrp/Web%20Working%20Papers/Use%20of%20Force/Dunlap2001.pdf (defining lawfare as "the use of law as a weapon of war").

[4] *See* Kenneth Anderson, *Battlefield Robots as a Technological Response to "Lawfare," and the Limits to Technological Counters to Bad Behavior*, OPINIO JURIS (May 22, 2008), http://opiniojuris.org/2008/05/22/battlefield-robots-as-a-technological-response-to-lawfare-and-the-limits-to-technological-counters-to-bad-behavior/ ("Indeed, one way to define 'lawfare' (at least on the battlefield, and leaving aside other uses of the term) is systematic behavioral violations of the rules of war; violations of law planned through advance study of the laws of war for the purpose of predicting how law-abiding military forces will behave; violations undertaken in order to exploit the non-violating military's compliance by forcing them to seek, to their own military disadvantage, to protect civilians put at risk by these behaviors; and intending such violations as a behavioral counter to superior military forces, including superior yet law-compliant, technology and weapons systems.").

[5] Council on Foreign Relations, *Lawfare: The Latest in Asymmetries*, CFR.ORG (Mar. 18, 2003), http://www.cfr.org/publication/5772/lawfare_the_latest_in_asymmetries.html?id=5772.

non-state actors and organized armed groups, seeking to create through the manipulation of the law situations casting a shadow over the actions of conventional armed forces, even if these actions comply fully with the laws of war.

As Dunlap argues, lawfare is the

> [E]xploitation of real, perceived, or even orchestrated incidents of law-of-war violations being employed as an unconventional means of confronting American military power. Make it appear that the United States is fighting in an illegal or immoral way, and the damage inflicted upon the public support the forces of a democracy need to wage war is as real as any caused by a traditional defeat.[6]

It has been opined that such goading, exploitation of situations and allegations of violations of IHL, would or could place strangleholds on the military engagements of the conventional fighting forces, undermining strategies, and making winning the hearts and minds of the local populations an insurmountable struggle.[7]

Lawfare, in the sense given by Dunlap and others, is not the same as interpreting *jus in bello*. The exploitation of an alleged violation of war, to discredit the goaded party, might be a powerful weapon, but as some speakers noted, it is more akin to a form of info ops, of mediatisation by one party to discredit another. That one party to an armed conflict hides behind civilian protection to launch military attacks is simply a potential violation of IHL. It is therefore important to distinguish between an attempt to misuse the law and the legal and operational process of interpretation of the law, which is at the heart of IHL.

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[6] *See, e.g.*, Maj. Gen. Charles J. Dunlap, Jr., *Lawfare Amid Warfare*, THE WASH. TIMES, Aug. 3, 2007, at A19, *available at* http://www.washingtontimes.com/news/2007/aug/03/lawfare-amid-warfare/?page=1.

[7] *See id.* ("Establishing a paradigm of 'zero tolerance' for casualties may well come back to haunt us in yet another way. Specifically, it encourages the enemy to do exactly what we do not want them to do: surround themselves with innocent civilians so as to virtually immunize themselves from attack. It creates a sanctuary that the bad guys are not entitled to enjoy, and sends them exactly the wrong message. International law is the friend of civilized societies and the military forces they field. However, if we impose restraints as a matter of policy in a misguided attempt to 'improve' upon it, we play into the hands of those who would use it to wage lawfare against us."); *See also* Council on Foreign Relations, *supra* note 5 ("Armed combatants may conceal weaponry or themselves amongst civilians, encouraging attacks that can be used as propaganda against American forces. This can have a dramatic effect on the use of American air power, making commanders reticent to attack targets and dragging out the conflict. Too much concern over the legality of each and every decision can be harmful to soldiers involved in ground combat as well.").

III. A QUARREL ABOUT THE LAW IS NOT LAWFARE

As already mentioned, in times of armed conflict, states have agreed to be governed by the laws of war, which limit the means and methods of warfare and protect certain categories of persons and property. With the universal ratification of the Geneva Conventions, states have sent out the strong message that they intend to abide by their International Humanitarian Law obligations as they engage in hostilities. Non-state actors are also encouraged to bring into force IHL through special agreements.[8]

Respecting IHL and ensuring its respect is at the core of the Geneva Conventions.[9] States are to disseminate the text of the Conventions in times of peace and war as widely as possible, in particular in military programs,[10] and to adopt necessary legislation to effectively repress and suppress violations of IHL.[11] In addition to general requirements, Additional Protocol I also requires states to ensure that legal advisers are available when necessary to advise military commanders at the appropriate level on the application of the Geneva Conventions and Protocol and on the appropriate instruction to give to the armed forces.[12] Moreover, military commanders are to

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[8] *See* Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III] (stating that parties to a conflict should "endeavor to bring into force, by means of special agreements, all or part of the other provisions of the present Convention").

[9] *See id.* art. 1("The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances."); *see also* Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts art. 1(1), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Geneva Protocol I] ("The High Contracting Parties undertake to respect and to ensure respect for this Protocol in all circumstances.").

[10] *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 47, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31[hereinafter Geneva Convention I]; *see also* Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 48, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II] ; *see also* Geneva Convention III, *supra* note 8, art. 127; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 144, Aug. 12, 1949, 6 U.S.T. 3516, 73 U.N.T.S. 287 [hereinafter Geneva Convention IV]; Geneva Protocol I, *supra* note 9, art. 83 ("The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries.").

[11] *See* Geneva Convention I, *supra* note 10, art. 49; *see also* Geneva Convention II, *supra* note 10, art. 50; *see also* Geneva Convention III, *supra* note 8, art. 129; *see also* Geneva Convention IV, *supra* note 10, art. 146; *see also* Geneva Protocol I, *supra* note 9, art. 85 ("Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention.").

[12] *See* Geneva Protocol I, *supra* note 9, art. 82 ("The High Contracting Parties at all times, and the Parties to the conflict in time of armed conflict, shall ensure that legal advisors are available, when necessary, to advise military commanders at the appropriate level on the application of the Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject.").

ensure that armed forces under their command are aware of their IHL obligations.[13] Commanders are to prevent their subordinates from committing violations of IHL and to institute necessary disciplinary or penal actions, whichever is appropriate, against any violator.[14]

Through dissemination, training, presence of legal advisers, and underscoring responsibility on commanders, the Geneva Conventions and their Protocols have thus placed understanding of the law at the center of IHL. In so doing, the drafters of the Geneva Conventions aimed to generate the reflex among properly trained combatants to integrate IHL as part of their strategy and modalities of warfare. Before launching an attack or as they do so, choosing means and methods compliant with the laws of war should be an integral part of the thinking and action.

There are important decisions to be made in the planning and the execution of an attack, in deciding whether the damage to civilian objects or injury to civilians would be excessive in relation to the concrete and direct military advantage anticipated.[15] Many of these decisions will turn on how respective armed forces interpret such terms as "feasible precautions," "necessary precaution," "excessive injury and damage," "effective advance warning," and "maximum extent feasible." Defining what constitutes a military objective or unnecessary suffering, has also invited lengthy debates and treatise, whether in academia, amongst practitioners, in judicial proceedings, or as part of lessons learnt cycles.[16]

The meaning of most IHL principles and standards at their core has in fact been agreed upon and, in most military operations, there is in reality little room to maneuver in how the laws of war are applied. Yet, of course, in the fog of modern day armed conflicts, situations arise every day where the answer for the planner or the Judge Advocate General in the field will be less clear-cut. A decision taken in the heat of a complex operation may sometimes be toeing the line between the lawful and unlawful under IHL. The military lawyer or commander might be called upon to defend the legality of the operation. This not to say, though, that the law is being used as a tool or a weapon of war.

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[13] *See id.* art. 83 (mandating High Contracting Parties to require a study of the Conventions in their programs of military instruction).

[14] *See id.* art. 87 (requiring military commanders "to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol").

[15] *See id.* art. 51(5) (discussing protection of the civilian population and types of attacks on civilian population that are to be considered as indiscriminate).

[16] For example, one discussion on what constitutes a military objective notes that "the API military objective definition/test contains various elements that require explanation . . . The words 'nature, location, purpose or use' allow wide discretion but are subject to qualifications stated in the definition/test." INT'L AND OPERATIONAL LAW DEP'T, OPERATIONAL LAW HANDBOOK 20 (Capt. Brian Bill & Maj. Jeremy Marsh eds., 2010).

The interpretation of some parts of IHL can certainly give rise to much legal debate, as demonstrated over the last few years with the process of clarifying the notion of "direct participation in hostilities." Under IHL, attacks may only be directed against combatants, and not against civilians,[17] therefore parties to a conflict must distinguish between civilians and combatants at all times. However, in today's so-called asymmetric conflicts, there has been not only an increased involvement of civilians in acts closely related to actual combat, but also a lessening distinction between civilians and belligerents, especially on the side of non-state actors involved in non-international armed conflicts. With this blurring of actors, determining who is and who is not a protected civilian, and who is therefore a lawful target, becomes that much more complex. This also obviously increases the risk of those civilians entitled to protection directly in harm's way during the hostilities. Under IHL, civilians can lose their protection from direct attack when and for such time as they take a direct part in hostilities.[18]

But, without a clear definition of what constitutes "direct participation in hostilities" under IHL, the waters were muddy when assessing under which circumstances a civilian lost his protection. To remedy this situation, in 2009, the International Committee of the Red Cross issued its "Interpretive Guidance on the notion of direct participation in hostilities under Inter-

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[17] Geneva Protocol I, *supra* note 9, art. 48, 51(1), 52(2); *see* Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts art. 13(2), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Geneva Protocol II] (prohibiting attack and spread of terror among civilian populations); *see also* JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT'L COMM. OF THE RED CROSS [ICRC], CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 8 (2005) ("Rule 2. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited."); *see also* INT'L AND OPERATIONAL LAW DEP'T, *supra* note 16, at 11 ("Sometimes referred to as the principle of *discrimination*, this principle requires that combatants be distinguished from civilians, and that military objectives be distinguished from protected property or protected places. In keeping with this 'grandfather' principle of the [Laws Of War], *parties to a conflict must direct their operations only against combatants and military objectives*.") (emphasis in original).

[18] *See* Geneva Protocol I, *supra* note 9, art. 51(3); *see also* Geneva Protocol II, *supra* note 17, art. 13(3) ("Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities."); *see also* JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *supra* note 17, at 19 ("Rule 6. Civilians are protected against attack unless and for such time as they take a direct part in hostilities."). The immunity from direct attack to which civilians are entitled is one of the lynchpins of IHL. Civilians do not lose immunity for mere contribution to the general war effort carried out far from the battlefield. *See also* JEAN PICTET, *supra* note 2, at 618, ¶ 3 ("The immunity afforded individual civilians is subject to an overriding condition, namely, on their abstaining from all hostile acts. Hostile acts should be understood to be acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces.").

national Humanitarian Law."[19] The Guidance represented the outcome of an expert process conducted from 2003 to 2008, during which several meetings were held to bring together nearly fifty legal experts.[20] The debate between experts has continued in subsequent publications,[21] with some commentators suggesting that the debates between the various lawyers was a form of lawfare.[22]

If such clarification processes on the interpretation and clarification of IHL can come under the broad umbrella of lawfare, one could argue that just about any proceeding, judicial, academic, or operational where the exact meaning of IHL terms is at issue could be viewed as lawfare. To entertain such a position would imply that all forms of legal debate addressing possible lacunae and clarifying areas of law are from now on to be viewed as "method of war." Practitioners, military and humanitarian, would be ac-

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[19] *See generally* NILS MELZER, INT'L COMM. OF THE RED CROSS [ICRC], INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2009).

[20] *See id.* at 9–10 (discussing the many sources from which the Interpretive Guidance drew in formulating its recommendations). While the experts came from academic, military, governmental and non-governmental circles, all attended in personal capacities. The Guidance is influenced by expert discussions, but does not necessarily reflect a majority opinion of the participating experts. As the various expert meeting reports show, the experts expressed many diverse views regarding this delicate and complex aspect of IHL.

[21] *See* Ryan Goodman & Derek Jinks, *The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law: An Introduction to the Forum*, 42 N.Y.U. J. INT'L L. & POL. 637, 638–640 (2009) (listing "four partially-overlapping, partially-conflicting critical perspectives applied to any concrete interpretation of DPH—or any other central concept in IHL"); *see also* Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance*, 42 N.Y.U. J. INT'L L. & POL. 641, 643 (2009) (criticizing the way in which the Interpretive Guidance handles the issue of "organized armed groups"); *see also* Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, 42 N.Y.U. J. INT'L L. & POL. 697, 698 (2009) (stating that "key features of the [Interpretive] Guidance have proven highly controversial"); *see also* Bill Boothby, *"And for Such Times As": The Time Dimension to Direct Participation in Hostilities*, 42 N.Y.U. J. INT'L L. & POL. 741, 743 (2009) ("There are three main grounds on which the ICRC's analysis in the Interpretive Guidance can be criticized."); *see also* W. Hays Parks, *Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. J. INT'L L. & POL. 769, 784 (2009) (criticizing Section IX of the Interpretive Guidance); *see also* Nils Melzer, *Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC'S Interpretive Guidance on the Notion of Direct Participation in Hostilities*, 42 N.Y.U. J. INT'L L. & POL. 831, 834 (2009) (responding to four critiques of the ICRC's Interpretive Guidance presented by other scholars).

[22] *See* Jack Goldsmith, *Thoughts on "Lawfare"*, LAWFAREBLOG, (Sept. 8, 2010, 9:24 PM), http://www.lawfareblog.com/2010/09/thoughts-on-lawfare/ (describing lawfare as "a war in which battles take place across the ocean; between proponents and opponents of the Goldstone Report; between the ICRC and government lawyers about the meaning and applicability of 'direct participation of hostilities'; and among lawyers representing alleged terrorists, government lawyers, and judges in the D.C. circuit").

cused of lawfare whenever there were exchanges or disagreement on the definition of one concept or principle. This would certainly be taking the idea of lawfare too far, and we should caution against any creep in this direction.

IV. CONCLUSION

In conclusion, it should be underscored that although there might be disagreement as to the exact meaning and reach of a particular IHL principle, there is nothing untoward in this. *Jus in bello* is the code by which all fighters must abide; it is not a complement or alternative to the lance. This distinction is important, and should not be ignored. Although one party's reading of the law might sit uncomfortably with other interested parties, this is simply the reality of war, and the nature of the laws of war, to find the right balance between military necessity and humanity.