


Non-Kinetic Targeting and the Law

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Meaning of 'non-kinetic'

- ◆ Kinetic – can be impact or effect
 - ◆ Is it the consequences that matter?
 - ◆ If so, non-kinetic = events that don't cause death, injury, damage or destruction?
 - ◆ So we focus on non-damaging, non-injurious targeting
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Full spectrum conflict

- ◆ = all elements of a party to a conflict devoted to securing victory
- ◆ BUT IHL focus on military violence
- ◆ SO
- ◆ what about...
- ◆ Rest of Spectrum? Psycho ops, info ops, key leader engagement, lawfare, criminal casework, detention, asset freezes and cyber ops

Where is IHL's CoG

- ◆ Attacks – e.g. articles 49(1), 50-57
- ◆ Non-kinetics can cause injury/damage (espionage, key leader engagement)
- ◆ Does targeting law cover non-kinetic ops with no violent consequences?
- ◆ Military operations – arts 48, 51(1) and 57(1)
- ◆ = Armed forces' movements/acts related to hostilities – API Commentary, 1875

IHL also covers e.g.

- ◆ Detention Ops (addressed by GCIII, GCIV, API, art 75, customary law)
- ◆ NLW often kinetic, so targeting law applies
- ◆ BUT
- ◆ Attack/military operations distinctions fuzzy and controversial

Targeting law does not address:

- ◆ Info ops, psychological ops against cohesion, attacking will, engaging key leader without damage etc
- ◆ Media ops without damage etc
- ◆ Espionage without damage etc
- ◆ Inconvenience/annoyance and similar effects based ops
- ◆ Lawfare
- ◆ Ops below art 48 threshold – e.g. some cyber


Consequence

- ◆ Ops below art 48 threshold against civilians are lawful.
- ◆ Warfare all about attacking will of whole of enemy
- ◆ Info, psych, anti-leader, media, espionage, inconvenience, annoyance, cyber and lawfare ops below the threshold that do this are lawful under IHL

Does other law apply?

- ◆ HRtsL – consider jurisdictional arrangements – consider Jaloud etc
- ◆ Perfidy -art 37(1) – includes capture
- ◆ Espionage – domestic law only
- ◆ Lawfare – the law being used/misused applies
- ◆ Cyber ops below threshold – domestic/HRtsL


...And with cyber?

- ◆ Cyber ops - when does data deletion/manipulation become damage
 - ◆ Another fuzzy area
 - ◆ ICRC notion of massive disruption – how massive
 - ◆ BUT – all focusing on attack notion
 - ◆ Deception arguably the future of cyber ops
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Cyber deception

- ◆ Corrupting enemy view of battlespace
- ◆ Interfering with enemy control of attack platforms/weapons
- ◆ Taking control of enemy weapon systems – when is hacker the attacker (back to attack again)
- ◆ Cyber = Vehicle for info, psyops, attacking will, social media ops, espionage, inconvenience ops etc


So what?

- ◆ Does it matter that ops aimed at winning the war by non-damaging, non-injurious means are not prohibited/restricted by IHL?
 - ◆ Would it be odd to limit such approaches?
 - ◆ Consider the underlying philosophy...
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So what? - 2

- ◆ In armed conflict, political/diplomatic differences settled by military means = indirect approach
- ◆ Law prohibits directly attacking public/political opinion = direct approach
- ◆ When no damage/injury and no harm, direct approach seems both lawful and rational

Contrast 'little green men'

- ◆ Put simplistically, they manipulate:
 - ◆ Classification of conflict
 - ◆ Status of participants
 - ◆ To seek to avoid attribution
 - ◆ To strengthen the rebels while masking intervention by nation of origin
 - ◆ i.e. Pretending things are not as they appear
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Differences

- ◆ Non-kinetic ops do not involve pretence as to conflict status
 - ◆ NKO's do not involve pretence as to status of participants or unlawful intervention in internal affairs
 - ◆ Most NKO's based on legal distinction – no manipulation of facts
 - ◆ But lawfare...?
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Common feature

- ◆ Both exploit legal distinctions
- ◆ Both seek thereby to gain advantage


South China Sea

- ◆ Classifying artificial island construction in hitherto accepted international waters to obtain sovereign rights
- ◆ Parallels with little green men...
- ◆ by dominant regional power...
- ◆ mil assets then assert sovereignty
- ◆ Nothing new – full spectrum/part of a comprehensive approach?

Nicaragua

- ◆ 1981-5, US support Contras against Sandinista government
- ◆ Economic, political, diplomatic and military activities
- ◆ E.g. blocking loans, minelaying in Nic waters by persons paid etc by US, US help in planning, direction and support of ops against oil facilities and a naval base, US entering Nic airspace and finance, training, equipping, arming and organising Contras


Nicaragua - 2

- ◆ Underhand aspect of US activities there – is that the 'hybrid' signature?
 - ◆ US was the regional power
 - ◆ Power being exercised to achieve US foreign policy goals
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Ambiguities

- ◆ Where situation sits on the spectrum of ops/conflict
- ◆ Who is undertaking 'enemy' NKO's
- ◆ Are their acts State acts?
- ◆ What is legitimate response action?
Are they DPHing if only NKO?
- ◆ Definitions of armed conflict, intervention, interference and military operation are imprecise

CoG of future ops

- ◆ Information – widely recognised – deception a development of this
 - ◆ ..but also...
 - ◆ Ambiguity of the thresholds
 - ◆ Irony – vaguely expressed distinctions there to be exploited,
 - ◆ BUT excessive precision yields wrinkles that can also be exploited
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Let's get real

- ◆ In war exploit every advantage
 - ◆ Find advantage where you can
 - ◆ May be technical, resource, manpower, or legal distinctions
 - ◆ Law that prohibits taking advantage liable to be ignored
 - ◆ Is advantage based on underhand action unacceptable?
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Questions?

