Non-Kinetic Targeting and the Law

by

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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
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
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…
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
Differences

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

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

- Where situation sits on the spectrum of ops/conflict
- Who is undertaking ‘enemy’ NKOs
- 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
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?
Questions?