

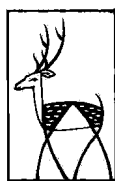
# International Humanitarian Law and Terrorism

Andrea Bianchi  
and Yasmin Naqvi

STUDIES IN INTERNATIONAL LAW

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## *Preface*

At least at first sight, one might think that international humanitarian law (IHL) and terrorism are strictly related to each other. In the layman's view, situations of extreme, ruthless violence such as terrorist attacks against innocent civilians ought to be regarded as war-like acts to be considered under the looking glass of the laws of war. After all, international humanitarian law is built upon the principle that the life, dignity and property of civilians must be protected; that there must be a clear distinction between military and civilian objectives and that unnecessary suffering should never be inflicted on human beings, not even in the circumstances of a war. In addition to that, some of the instruments of international humanitarian law could prove useful to effectively fight against terrorism. Persons posing a threat to the security of a state in time of armed conflict can be detained as long as the threat lasts, individuals participating directly in the hostilities may be legitimately targeted; acts of terrorism are prohibited in all kinds of conflict and specific mechanisms of enforcement of these rules have been put in place to repress proscribed conduct. Yet, terrorism in and of itself is not inherently related to armed conflict, and only comes under the regulation of IHL in certain particular circumstances. This book aims to shed light on the issue of when IHL applies and how it deals with acts of terrorism.

While the book was conceived and designed in the contingencies of the post 9/11 terrorist attacks against the United States and the ensuing 'global war on terror', an effort has been made not to focus exclusively on the peculiarities of such a historically contingent debate. It is undeniable, however, that the challenges posed by the 'war on terror' to traditional categories of IHL has been a cause for rethinking afresh the suitability of certain rules for facing particular phenomena, including but not limited, to terrorism, or, more generally, for calling into question the scope of application of IHL. This exercise has been carried out at various levels.

On the one hand, a panoply of scholarly writings has been produced. Many of these have proposed a radical review of traditional categories of IHL, the legal basis for which often remains obscure. Other commentators have intervened to restate the fundamental tenets of IHL, often with very little sense of reflexivity about the state of the law and its interpretation. More than anything else, however, the debate has been characterised by the clashes of various legal cultures and mindsets of both scholars and practitioners coming from different experiences and areas of expertise. The long-established insularism of IHL and its experts and the

relatively low profile role that IHL has had until recently, for its being the law regulating the pathology of international relations, ie situations of conflict, have been dramatically called into question. The challenges posed by the fight against international terrorism as well as the great interest and practical relevance of IHL to the jurisprudence of international criminal tribunals, have revived interest in IHL and exposed the discipline to unprecedented challenges.

Rather than remaining entrapped in sterile doctrinal quarrels we have as far as possible looked at the practice of social agents, primarily, although not exclusively, states. Indeed, the somewhat theoretical debate about the content and scope of application of IHL rules often overlooks the attitude of the actors and their expectations about the interpretation and the implementation of the law. As a matter of fact, at the inter-state level claims have been advanced to the effect of challenging either the applicability of particular regimes of IHL or the interpretation of some of its rules. While some of these claims have been flatly rejected, others have triggered a debate on the desirability of some IHL rules to change or to be interpreted differently.

Be that as it may, the field is characterised by a certain tension between the unwillingness to review the fundamental tenets of IHL and the uneasiness about the outdated or no longer suitable content of some of its rules. The patrimony of consensus represented by the universal ratification of the four 1949 Geneva Conventions is too precious to be dispersed and yet not all of its provisions are perceived to be adequate to meet the challenges of contemporary armed conflict. This leaves one with the problem of alleged 'grey areas' of IHL and of the controversial interpretation of some of its rules that invariably arise in diplomatic exchanges and scholarly writings. Such characterisations hardly hide the breaking up of societal consensus over the interpretation of the law and may entail a certain degree of uncertainty, which is detrimental to the efficacy and the credibility of IHL.

Therefore, it should not be surprising that occasionally the book acknowledges the lack of consensus in certain particular areas rather than stating what the law is or what the law should be. Indeed, this is one of the main methodological hurdles we had to overcome. When faced with an issue of uncertainty about the state of the law, we have decided to highlight it and to undertake a policy analysis of the legal interpretive options that are available. While this may cause some formalistic lawyers to frown, we believe it to be the most intellectually honest approach one could have to the problem and a sound way to guide the action of decision-makers and practitioners.

Another noticeable feature of this book is that it tries not to look at IHL in complete isolation, as if it were a self-contained, specialised branch of international law, impermeable to its surroundings. In an academic world

ruled by expertise, we thought that to reach out to the necessary inter-connectedness of principles and rules among different legal regimes was indispensable to satisfactorily account for contemporary IHL. We are aware that those who believe that all the answers to questions related to IHL can be found within the narrow boundaries of the same specialisation might resist this attempt. Arguably, however, an approach to IHL that is considerate to the developments occurring in related areas and to the changing demands of the societal body seemed to us preferable to a view of the law in which rules are immutable and unresponsive to context. The reader will notice that in taking such an approach we have adhered to the structure of traditional categories of IHL. The purpose is not to radically innovate IHL against the will of social agents who are still very supportive of its fundamental tenets. It is just a matter of no longer looking at it as a set of still and unalterable rules but as a mix of rules and processes that must ensure a certain degree of adjustment to the changing demands of contemporary armed conflict.

Andrea Bianchi & Yasmin Naqvi\*  
Geneva and The Hague, June 2010

\* Yasmin Naqvi's disclaimer: The views expressed herein are those of the authors alone and do not necessarily reflect the views of the International Tribunal for the former Yugoslavia or the United Nations in general.

## Acknowledgments

This book brings to completion a pattern of collaboration initiated in 2003 in the framework of the course on international law and terrorism that we started teaching at the Graduate Institute in Geneva. At almost the same time, we worked together on the book *Enforcing International Law Norms against Terrorism*, published by Hart in 2004. When the occasion arose to carry out a research project on international humanitarian law and terrorism, the challenge intrigued both of us. We decided then to put together our respective skills and to venture into the difficult task of co-authoring a book. Even when the paths of our respective professional lives departed from each other, we managed to continue working on this project. Whilst it would be hypocritical to say that it was easy, we both agree that it has been worth the effort. After all, co-authoring a book is very much like playing a sonata for piano for four hands. It may very well be that piano four-hands playing has a unique appeal, for it allows full advantage to be taken of all the keyboard registers. However, to weave the two players' personalities into the performance is never an easy task. Yet, this is precisely what we attempted to do.

Inevitably, at the end of this intellectual journey, there are debts of gratitude that we owe and that need be honoured. This book is the output of a research project, funded by the Swiss National Fund for Research (FNS, *Fonds national Suisse de la recherche scientifique*). The FNS generously provided a research grant over two years. The FNS officer in charge of the project, Rudolf Bolzern, is to be thanked for his professional support. He closely followed the whole process, providing technical expertise and showing human understanding towards the administrative slips occasionally committed by the grant beneficiaries.

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