



ICRC

IHL Academic Articles - 2nd trimester 2011 -

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Preliminary remarks

Chronology. This bibliography is based on the acquisitions made by the ICRC library during the 1stth trimester of 2010. The ICRC library acquires articles as soon as they are available. However publication date might not coincide with the bibliography period due to various editorial delays.

Contents. The bibliography contains English and French articles related to IHL subjects. Monographs will be included in later versions of the bibliography.

Sources. The ICRC library monitors a large panel of sources including all 120 journals to which the library subscribes, bibliographical databases, legal databases, legal publishers catalogues, legal research centres, NGOs, etc. It also receives various propositions from the ICRC legal advisers.

Multiples entries. Each article is classified under all relevant categories. This allows to consult single subjects of interest without going through the whole bibliography.

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I. General issues

(General catch-all category, Customary Law)

Before the abyss : reshaping international humanitarian law to suit the ends of power

Eitan Diamond. In: Israel law review Vol. 43, no. 2, 2010, p. 414-456. - Cote 345.2/451 (Br.)

In the increasingly legalized landscape in which armed conflicts are now waged, international humanitarian law (IHL) has become an integral and ever more central part of military strategy. States can and do use it to gain advantage over their adversaries, but must also contend with challenges that arise when it is wielded against them. In their efforts to respond to these challenges official and unofficial advocates of State powers have advanced modes of argumentation which question the fundamental structure of IHL. This article takes issue with one such argument that mobilizes the theologico-political principle of the "lesser-evil" to conclude that acts which are absolutely prohibited under IHL should nevertheless be deemed legally permissible when their foreseen consequences are less harmful than lawful alternatives. The article demonstrates that this argument threatens to blur IHL's sharp boundaries and expand its zone's of elasticity thereby undermining its structural principles. More specifically, the article maintains that the argument in question rests on exaggerated faith in the judgment of belligerent parties, that it fails on its own utilitarian logic and that it ignores deontological reasoning fundamental to IHL. The article contends that accepting this argument would severely compromise IHL's capacity to limit violence and preserve human dignity and therefore advocates that it be rejected.

Full text

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1801475

The constitution and the laws of war during the civil war

Andrew Kent. In: Notre Dame law review Vol. 85, no. 5, 2010, p. 1839-1930. - Cote 345.27/55 (Br.)

In the courts and legal academy, interest in the Civil War has increased greatly in the last decade, and it is not hard to understand why. The 9/11 attacks were by far the most spectacular and deadly military attacks on the mainland United States since the Civil War. Both the conflict against al Qaeda and the Civil War were untraditional; in both, it was contested whether they amounted to "war" in the sense used in the Constitution and public international law, and what effect that had on government powers and individual rights. Lines between combatants and non combatants were blurry in both conflicts, often intentionally so. This article attempts to recover important but forgotten legal rules and theories about the relationship between the Constitution and the laws of war. The Supreme Court today, while claiming fidelity to the doctrines of the Civil War era, holds that military enemies of the United States—and noncitizens outside the United States, at that—have judicially enforceable rights under the Constitution, the laws of Congress and the international laws of war. That repudiates core legal doctrines of the Civil War. The author tries to recover and accurately describe the law of the Civil War as it was understood by contemporaries. It turns out that those doctrines are vastly different than what the Supreme Court and many contemporary academic commentators have led to believe.

Full text

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1758807

Controlling the recourse to war by modifying jus in bello

Ryan Goodman. In: Yearbook of international humanitarian law Vol. 12, 2009, p.53-84

According to a bedrock principle of international law, the rules regulating the recourse to war and the rules regulating conduct during war must be kept conceptually and legally distinct. The purported independence of the two domains – the 'separation principle' – remains unstable despite its historic pedigree. This essay explores recent developments that threaten to erode the separation. The author analyzes, in particular, doctrinal innovations that result in the regulation of the recourse to war through alterations of jus in bello. International and national institutions have incentivized states to pursue particular paths to war by tailoring the rules that regulate conduct in armed conflict. Some warpaths are accordingly rewarded, and others are penalized. The article then explores potential consequences, first, on state behavior involving the use of force and, second, on state behavior involving the conduct of warfare. One significant conclusion is that these recent developments channel state behavior and justifications for using force toward security-based and strategic rationales. These efforts – whether intended or not – risk suppressing 'desirable wars' and inspiring 'undesirable wars.' These recent developments also undercut humanitarian protections by undermining the mechanisms for compliance with legal norms on the battlefield.

Full text : ICRC access

<http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=7918818&fulltextType=RA&fileId=S1389135909000038>

Defining the battlefield in contemporary conflict and counterterrorism : understanding the parameters of the zone of combat

Laurie R. Blank. In: Georgia journal of international and comparative law Vol. 39, no. 1, 2010, p. 1-38. - Cote 345.26/205 (Br.)

The nature of today's conflicts has led many practitioners and scholars to suggest that the traditional battlefield – once populated by tank battles and infantry – has been replaced by a more complex environment – sometimes called the zone of combat. When many argue that the United States is engaged in a global war against Al Qaeda and other terrorist groups, one natural question is where is the battlefield, or zone of combat, in this global struggle against terrorist groups and how do we identify it. This article will focus on two hitherto ignored aspects in the discussions about the modern battlefield or zone of combat – when and for how long is an area part of the zone of combat and how far does this designation extend geographically. These questions are critical for understanding how to apply the law to questions of targeting, detention, interrogation, direct participation in hostilities, and trials, among others. Because the applicability of the law of armed conflict is naturally limited by – and triggered by – the existence of an armed conflict, it therefore provides a paradigm for understanding the temporal and geographic parameters of the zone of combat that other generally applicable legal frameworks cannot necessarily offer. This article demonstrates that traditional conceptions of belligerency and neutrality are not designed to address the complex spatial and temporal nature of terrorist attacks and states responses. Nor can human rights law or domestic criminal law, which are both legal regimes of general applicability, offer a useful means for defining where a state can conduct military operations against terrorist groups. LOAC, in contrast, provides a framework not only for when it applies, but where and for how long. By using this framework and analogizing relevant factors and considerations to the conflict with al Qaeda, we can identify factors that can help define the zone of combat, including the nature of the hostilities, the government response to the threat and the territorial connections of the terrorist or non-state armed group.

Full text

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1677965

On a differential law of war

Gabriella Blum. In: Harvard international law journal Vol. 52, no. 1, Winter 2011, p. 164-218. - Cote 345.2/48 (Br.)

Should the United States, as the strongest military power in the world, be bound by stricter humanitarian constraints than its weaker adversaries? Would holding the U.S. to higher standards than the Taliban, Iraqi insurgents, or the North Korean army yield an overall greater humanitarian welfare or be otherwise justified on the basis of international justice theories? Or would it instead be an unjustifiable attempt to curb American power, a form of dangerous "lawfare"? The paper offers an analytical framework through which to examine these questions. It draws on the design of international trade and climate agreements, where obligations have been linked to capabilities through the principle of Common-but-Differentiated Responsibilities (CDRs), and inquires whether the justifications that have been offered for CDRs in these other regimes are transposable to the laws of war. More broadly, the framework tests the extent to which war can and should be equated to other phenomena of international relations or whether it is a unique context that resists foreign analogies. Rather than offering a definitive answer, the inquiry illuminates the types of judgments and predictions that one must hold in order to have a position on the desirability of CDRs in international humanitarian law, most notably, the degree to which weaker adversaries will be prone to abusing further constraints on stronger enemies, the expected effects of CDRs on the propensity to go to war, who on the enemy's side is the "enemy," and what are the duties that are owed to one's enemies.

Full text

http://www.harvardilj.org/2011/02/issue_52-1_blum/

Mistreatment of the wounded, sick and shipwrecked by the ICRC study on customary international humanitarian law

James P. Benoit. In: Yearbook of international humanitarian law Vol. 11, 2008, p.175-219

In 2005, the International Committee of the Red Cross (ICRC) completed a ten-year study on customary international humanitarian law, based on an assessment of the State practice of over 150 nations over the

preceding thirty years. Somewhat surprisingly, but perhaps owing to the sheer size of the ICRC Study, only two states have officially responded to the ICRC: the United States and Israel. Although an analysis of the US response is beyond the scope of this paper, it generally criticizes the ICRC Study's unorthodox methodology, including both the State practice it considered, and its lack of proof of *opinio juris*. The ICRC is a venerable organization, traditionally viewed as the guardian of international humanitarian law. Its study is a monumental work compiling a surfeit of State practice. Nevertheless, the ICRC Study articulates 'rules' that are not sustainable under the traditional theory of customary international law formation, as may be seen by the examination in Section 3 of the three seemingly uncontroversial rules proposed for handling the wounded, sick and shipwrecked.

Full text : ICRC access

<http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=7193288&fulltextType=RA&fileId=S138913590800175X>

Re-envisaging the international law of internal armed conflict

Sandesh Sivakumaran ; [a reply by Gabriella Blum]. In: European journal of international law = Journal européen de droit international Vol. 22, no 1, February 2011, p. 219-275

The regulation of internal armed conflict by international law has come a long way in a very short space of time. Until the early 1990s, there were a minimum of international law rules applicable to internal armed conflict. Today, the situation has changed almost beyond recognition with a healthy body of international law applicable to internal armed conflict. This change has taken place in three principal ways – through analogy to the law of international armed conflict, through resort to international human rights law, and through the use of international criminal law. Each of these approaches stressed its similarity to internal armed conflict or to international humanitarian law. They proved immensely important, filling in what was a more or less blank canvas. However, there are limits to how far they can take us. Today, the canvas is no longer blank and a step back is needed in order to assess the existing state of affairs. Focusing not on the similarities between international and internal armed conflicts or between the various bodies of international law, but on their differences, will allow us to ascertain what further work is in order. It will allow us to identify gaps in regulation and refine relevant rules. It will also force us to re-think our approach to particular issues. Only in this way will we be able to develop the international law of internal armed conflict further.

Full text : ICRC access

<http://ejil.oxfordjournals.org/content/22/1/219.full.pdf>

Re-focusing on protecting civilians' basic safety and why we need to know why people kill : on the latest reports of the Secretary-General on the protection of civilians in armed conflict

Evelyne Schmid. In: Journal of international peacekeeping Vol. 13, no. 3-4, September 2009, p. 356-382. - Cote 345.2/527 (Br.)

The concept of protection of civilians in armed conflict and the respective roles of peace operations and other actors have not been conclusively defined. This article considers the Secretary General's latest reports on protection, in particular the two most recent ones (29 May 2009 and 28 October 2007). The author argues that the understanding of effective protection strategies should be informed by a diagnosis of the warring parties' motivations to use deliberate violence against civilians. Analyzing why humanitarian law, human rights law and refugee law are disregarded in many conflicts can help to improve protection strategies. An analysis of the warring parties' motivations may also caution against the belief that there is a system out there that can always protect people in ongoing conflict if only humanitarian actors would improve their *modus operandi*. Consequently, this article suggests that the notion of protection should remain in close touch with the idea of immediate basic safety. The author recommends that the Secretary General should insist in future statements and reports that a sound approach to protection requires a diagnosis of why fighting parties choose to attack and threaten civilians. If the diagnosis shows that the armed parties have incentives to disregard basic legal norms and morals; the SC needs to demonstrate real political will to give the concept of protection the meaning it has in conventional language or in the alternative, honestly avoid using it.

The role of the United States Supreme Court in interpreting and developing humanitarian law

David Weissbrodt and Nathaniel H. Nesbitt. In: Minnesota law review Vol. 95, no. 4, 2011, p. 1339-1423. - Cote 345.2/33 (Br.)

In the absence of a single authoritative mechanism to interpret humanitarian law, a number of treaty bodies, national courts, regional human rights courts/commissions, international tribunals, and thematic mechanisms have been called upon to address humanitarian law issues. Prime among these institutions is the U.S. Supreme Court. Though only in a small number of cases, the Court has relied on humanitarian law principles and treaties from the early days of the Republic to the “war on terrorism.” In what ways does the Court invoke this body of law and how thorough is its analysis? Is the Court institutionally equipped to play a meaningful role in the development of humanitarian law? The Article assesses the historical, current, and potential role of the Court in interpreting and developing humanitarian law. Through a comprehensive examination of the Court’s humanitarian law jurisprudence, it argues that while the Court has offered useful and precedential interpretations of humanitarian law, its analysis suffers from a relatively superficial engagement with the Hague and Geneva Conventions. In short, the Court is reluctant to probe too deeply into this complex body of law and its reliance on humanitarian law is often minimal and sometimes haphazard. Despite these shortcomings, the Court has an important role to play. Throughout its history, but most notably in the years after September 11, 2001, the Court has unearthed various substantive propositions of humanitarian law and offered a novel interpretation of at least one of them, specifically Common Article 3 of the 1949 Geneva Conventions pertaining to transnational armed conflicts involving terrorists. As national and international courts grapple with the implications of international terrorism, the Court will remain an important voice.

Full text

<http://www.minnesotalawreview.org/articles/the-role-of-the-united-states-supreme-court-in-interpreting-and-developing-humanitarian-law/>

II. Types of conflicts

(Qualification of conflict, international and non-international armed conflict)

Administrative detention in armed conflict

Ashley S. Deeks. In: *Case Western Reserve journal of international law* Vol. 40, no. 3, 2009, p. 403-436. - Cote 323.2/273 (Br.)

Treaties long have recognized that a state may detain without trial not only opposing armed forces, but also civilians and others who pose threats to its security. While the procedural rules for administrative detention in international armed conflict are reasonably robust, only a very limited set of treaty rules apply to administrative detention in noninternational armed conflicts. This article examines the treaty rules governing detention procedures in international and non-international conflicts. It then analyzes realworld examples of administrative detention by multi-national forces and individual states. The article concludes that states should, as a matter of policy, apply several key principles drawn from treaties governing international armed conflict to all administrative detentions. These rules impose a high standard for a state to initially detain a person, require the state to immediately review that detention, permit the detainee to appeal the detention decision, require the state to review the detention periodically, and obligate the state to release the detainee when the reasons for his detention have ceased. A state also should inform a detainee why it has detained him. The article argues that these core procedures, drawn from the Fourth Geneva Convention and Article 75 of Additional Protocol I, are battle-tested and that adopting such baseline rules as matter of clearlystated policy would: ensure that all states strike the proper balance between national security and personal liberty; let states avoid answering hard questions about the type of armed conflicts they are fighting; and might facilitate multi-national operations among allies with different detainee policies.

Full text

http://www.case.edu/orgs/jil/security_detention_deeks.html

Characterizing US operations in Pakistan : is the United States engaged in an armed conflict ?

Laurie R. Blank and Benjamin R. Farley. In: *Fordham international law journal* Vol. 34, issue 2, 2011, p. 151-189. - Cote 345.27/16 (Br.)

This article first analyzes the extent and nature of the hostilities between Pakistan and Tehrik-e-Taliban, the main insurgent group in opposition to the Pakistani government. Both the intensity of the hostilities and the level of the TTP’s organizational structure demonstrate that Pakistan and the TTP are engaged in a non-international armed conflict, along with other relevant non-state armed groups in Pakistan. The intensity of the hostilities between the U.S. and the TTP – which has steadily increased over the past two years, both in frequency and in scope – suggests that the U.S. and the TTP are also engaged in an armed conflict. Once identified as an armed conflict rather than isolated acts of violence, the hostilities between

the U.S. and the TTP can be characterized as an intervention into the existing non-international armed conflict, which remains a non-international armed conflict because the U.S. is intervening on the side of the state actor. Alternatively, the conflict between the U.S. and the TTP can be characterized a separate parallel conflict, either a Common Article 3 conflict, using the broad standard established in Hamdan, or, at a minimum, a transnational armed conflict triggering the application of fundamental principles of the law of war that govern the conduct of any military operations.

Full text

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1670930

The conflict in Colombia and the relationship between humanitarian law and human rights law in practice : analysis of the new operational law of the Colombian armed forces

Constantin von der Groeben. In: Journal of conflict and security law Vol. 16, no. 1, Spring 2011, p. 141-164

When dealing with non-State actors such as terrorists or guerilla groups, States often have to act in a grey area between International Humanitarian Law (IHL) and International Human Rights Law (IHRL). The constant question is which of these two legal regimes is applicable and what their relationship is. Colombia, a veteran in dealing with non-State actors and internal conflicts, has recently set out to answer that question by applying a new approach of combining IHL and IHRL in a hybrid model. The legal basis for this approach is the new operational law for the Colombian armed forces, which offers guidance to the acting soldiers in the field. The Colombian approach is novel and unique and has to be scrutinized and analysed against the broader background of States' struggles with non-State armed groups.

Full text : ICRC access

<http://jcsf.oxfordjournals.org/content/16/1/141.full.pdf>

Defining the battlefield in contemporary conflict and counterterrorism : understanding the parameters of the zone of combat

Laurie R. Blank. In: Georgia journal of international and comparative law Vol. 39, no. 1, 2010, p. 1-38. - Cote 345.26/205 (Br.)

The nature of today's conflicts has led many practitioners and scholars to suggest that the traditional battlefield – once populated by tank battles and infantry – has been replaced by a more complex environment – sometimes called the zone of combat. When many argue that the United States is engaged in a global war against Al Qaeda and other terrorist groups, one natural question is where is the battlefield, or zone of combat, in this global struggle against terrorist groups and how do we identify it. This article will focus on two hitherto ignored aspects in the discussions about the modern battlefield or zone of combat – when and for how long is an area part of the zone of combat and how far does this designation extend geographically. These questions are critical for understanding how to apply the law to questions of targeting, detention, interrogation, direct participation in hostilities, and trials, among others. Because the applicability of the law of armed conflict is naturally limited by – and triggered by – the existence of an armed conflict, it therefore provides a paradigm for understanding the temporal and geographic parameters of the zone of combat that other generally applicable legal frameworks cannot necessarily offer. This article demonstrates that traditional conceptions of belligerency and neutrality are not designed to address the complex spatial and temporal nature of terrorist attacks and states responses. Nor can human rights law or domestic criminal law, which are both legal regimes of general applicability, offer a useful means for defining where a state can conduct military operations against terrorist groups. LOAC, in contrast, provides a framework not only for when it applies, but where and for how long. By using this framework and analogizing relevant factors and considerations to the conflict with al Qaeda, we can identify factors that can help define the zone of combat, including the nature of the hostilities, the government response to the threat and the territorial connections of the terrorist or non-state armed group.

Full text

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1677965

Intervention and consent : consensual forcible interventions in internal armed conflicts as international agreements

Eliav Lieblich. In: Boston university international law journal Vol. 29, issue 2, Summer 2011, p. 337-382. - Cote 345/582 (Br.)

This article addresses the issue of consensual forcible intervention in internal armed conflict—meaning, intervention undertaken with the consent of a party to an internal conflict—and seeks to clarify the place of such interventions within the framework of the law of international agreements in conjunction with the law on the use of force. It analyzes the question of consent strictly in the context of relations between a consenting party and an external intervener (“procedural consent”), as opposed to questions regarding the internal legitimacy or capacity of a party to express consent (“substantive consent”)—which are not dealt with in this article. The article attempts to demonstrate that consensual forcible interventions, in their “procedural” sense, are regulated by firm and accepted norms of international law. These are found in the Vienna Convention on the Law of Treaties (VCLT), found in customary international law, found in the law on the use of force, and augmented by the law of state responsibility. The article seeks to systematically elaborate on these frameworks and to clarify them. It demonstrates the general dynamics of consensual interventions, as they occurred in the different stages of the conflict in the Democratic Republic of Congo; it then addresses the regulation of consensual interventions under the VCLT and customary international law; discusses the question of withdrawal of consent and aggression; analyzes the dilemma of forward-looking consent in the context of regional defense treaties; surveys the role of consent in relation to U.N. Chapter VII interventions; and briefly touches upon the question of consent and non-state actors, exemplifying this issue through the analysis of the development of the legal status of the Palestine Liberation Organization.

Full text

<http://www.bu.edu/law/central/jd/organizations/journals/international/volume29n2/documents/Lieblich-finalpdf.pdf>

The Mexican drug war : the case for a non-international armed conflict classification

Carina Bergal. In: Fordham international law journal Vol. 34, issue 3, 2011, p. 1042-1088. - Cote 345.27/56 (Br.)

Since Felipe Calderon’s ascension to the Mexican presidency in 2006, approximately 30,000 people have died as a result of the protracted and gruesome drug wars that have plagued the country for years. Both the Mexican military and police at all levels have been dispatched to quell the violence, and various institutional reforms have been put into place to facilitate an end to the drug war. This Note argues that the Mexican drug war should not be considered a mere domestic insurgency and should instead be classified as a non-international armed conflict (“NIAC”), subject to the properly affiliated laws of war that govern such classification. Through a comprehensive review of the various international legal standards, decisions and authoritative guidelines applicable to the current conflict in Mexico, the case for a NIAC classification is laid out.

Full text

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1846066

Mexico's "war on drugs" : real or rhetorical armed conflict ?

Patrick Gallahue. In: Humanitäres Völkerrecht : Informationsschriften = Journal of international law of peace and armed conflict Vol. 24, 1/2011, p. 39-45

The author considers Mexico’s “drug war” to determine if the ongoing violence between authorities and drug cartels can be classified as an armed conflict, which would make the situation subject to International Humanitarian Law (IHL). Looking at several influential decisions that determined the existence of an armed conflict as well as a consideration of modern, so-called “anarchic” conflicts, the current crisis seems well suited for such a categorisation. However, classifying Mexico’s situation as an armed conflict would be inappropriate. Though sophisticated in some respects, these groups lack the organisation requirement and the violence unique to this crisis make this “drug war” a rhetorical war rather than a real armed conflict.

Privileging asymmetric warfare ? Part I : defender duties under international humanitarian law

Samuel Estreicher. In: Chicago journal of international law Vol. 11, no. 2, Winter 2011, p. 425-437. - Cote 345.25/53 (Br.)

This article is part of a three-part series addressing the question whether the law of armed conflict privileges a form of guerrilla warfare by nonstate actors that is often conducted in violation of these laws and in the process endangers civilians, in pursuit of a strategy of inviting a response from their opponents that helps them enlist additional recruits and international support. The strategy, rational from the standpoint of the guerrilla forces, derogates significantly from the law’s overall objective of minimizing harm to civilian populations. The articles in this series approach this question of asymmetry by considering

whether IHL in fact need or should be interpreted to privilege the guerrilla strategy. Most discussions of the laws of war focus on the limitations placed on attackers to avoid risks to civilians. The purpose of this article is to look at the issue from the standpoint of the duties of defenders to avoid such risks. Dangers to civilians during armed conflict are a joint product of both attackers and defenders, and minimization of such harm--presumably the overriding mission of IHL--requires establishing the right incentives for both attackers and defenders.

The qualification framework of international humanitarian law : too rigid to accommodate contemporary conflicts ?

Elizabeth Holland. In: *Suffolk transnational law review* Vol. 34, no. 1, Winter 2011, [37] p.. - Cote 345.2/457 (Br.)

This note examines the traditional binary qualification framework in the context of contemporary conflicts marked by everchanging degrees of cross-border activity, third-state involvement, and non-state actor participation. First, this note lays out the material scope of international and non-international armed conflicts. Next, it examines three cases in which the International Court of Justice (ICJ), the International Criminal Tribunal for the former Yugoslavia (ICTY), and the U.S. Supreme Court addressed questions of qualification. The note then questions whether the binary framework is incongruous with contemporary conflicts due to the difficulty in qualifying many situations. The note concludes by suggesting that rather than develop new law to address current challenges, a broader and more flexible application of protections found in existing law, less restricted by the traditional dichotomy, may provide a constructive and practical basis from which to proceed when determining application of international or non-international armed conflict rules to specific contexts.

Full text

http://www.law.suffolk.edu/highlights/stuorgs/transnat/documents/Holland_final.pdf

Re-envisaging the international law of internal armed conflict

Sandesh Sivakumaran ; [a reply by Gabriella Blum]. In: *European journal of international law = Journal européen de droit international* Vol. 22, no 1, February 2011, p. 219-275

The regulation of internal armed conflict by international law has come a long way in a very short space of time. Until the early 1990s, there were a minimum of international law rules applicable to internal armed conflict. Today, the situation has changed almost beyond recognition with a healthy body of international law applicable to internal armed conflict. This change has taken place in three principal ways – through analogy to the law of international armed conflict, through resort to international human rights law, and through the use of international criminal law. Each of these approaches stressed its similarity to internal armed conflict or to international humanitarian law. They proved immensely important, filling in what was a more or less blank canvas. However, there are limits to how far they can take us. Today, the canvas is no longer blank and a step back is needed in order to assess the existing state of affairs. Focusing not on the similarities between international and internal armed conflicts or between the various bodies of international law, but on their differences, will allow us to ascertain what further work is in order. It will allow us to identify gaps in regulation and refine relevant rules. It will also force us to re-think our approach to particular issues. Only in this way will we be able to develop the international law of internal armed conflict further.

Full text : ICRC access

<http://ejil.oxfordjournals.org/content/22/1/219.full.pdf>

Territory, boundaries and the law of armed conflict

Louise Arimatsu. In: *Yearbook of international humanitarian law* Vol. 12, 2009, p. 157-192

Israel's military operation in the Gaza Strip from 27 December 2008 until 18 January 2009 raised a host of legal questions on status and the conduct of hostilities, many of which have been subjected to intense scrutiny. But perhaps the two most troubling questions that remain unresolved concern the appropriate legal regime that governed the conflict and the geographical reach of the law. Was this an international armed conflict? If so, who were the 'contracting parties' and what was the territorial scope of the conflict? Alternatively, was the armed conflict one between a state, Israel, and a non-state actor, Hamas, and thus subject to the rules that apply in non-international armed conflict? This latter position jars with our intuition not least because the codified law assumes non-international armed conflict takes place within the territory of a contracting state. The disquiet is apparent in the Israeli Supreme Court judgment of 2009, *Physicians for Human Rights v. Prime Minister*, in which the Court had to determine the legal regime governing the armed conflict between Israel and 'the Hamas organization'. Describing the

normative 'arrangements' as 'complex', it noted that 'the classification of the armed conflict between the state of Israel and the Hamas organization as an international conflict raises several difficulties'

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<http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=7918824&fulltextType=RA&fileId=S1389135909000063>

III. Armed forces / Non-state armed groups

(Combatant status, compliance with IHL, etc.)

The conflict in Colombia and the relationship between humanitarian law and human rights law in practice : analysis of the new operational law of the Colombian armed forces

Constantin von der Groeben. In: Journal of conflict and security law Vol. 16, no. 1, Spring 2011, p. 141-164

When dealing with non-State actors such as terrorists or guerilla groups, States often have to act in a grey area between International Humanitarian Law (IHL) and International Human Rights Law (IHRL). The constant question is which of these two legal regimes is applicable and what their relationship is. Colombia, a veteran in dealing with non-State actors and internal conflicts, has recently set out to answer that question by applying a new approach of combining IHL and IHRL in a hybrid model. The legal basis for this approach is the new operational law for the Colombian armed forces, which offers guidance to the acting soldiers in the field. The Colombian approach is novel and unique and has to be scrutinized and analysed against the broader background of States' struggles with non-State armed groups.

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<http://jcsj.oxfordjournals.org/content/16/1/141.full.pdf>

Defining aggression : an opportunity to curtail the criminal activities of non-state actors

Steve Beytenbrod. In: Brooklyn journal of international law Vol. 36, issue 2, 2011, p. 647-693. - Cote 344/56 (Br.)

Part I of this Note provides a background of the international laws governing conflicts, particularly those relating to Non-State Actors (NSAs). Part II criticizes the current international framework for conflict resolution. Specifically, Part II discusses why international law is too outdated to properly handle modern conflicts and how developments in international criminal law make it the best avenue for enforcing laws against NSAs. Part III focuses on the Rome Statute and particularly the 2010 review. Given that this review amended the Rome Statute to define the crime of aggression, this Note discusses the implications and shortcomings of this amendment. Lastly, Part IV argues that by passing a state-focused definition of aggression, the international community missed a critical opportunity to reign in the illegal activities of NSAs.

Defining the battlefield in contemporary conflict and counterterrorism : understanding the parameters of the zone of combat

Laurie R. Blank. In: Georgia journal of international and comparative law Vol. 39, no. 1, 2010, p. 1-38. - Cote 345.26/205 (Br.)

The nature of today's conflicts has led many practitioners and scholars to suggest that the traditional battlefield – once populated by tank battles and infantry – has been replaced by a more complex environment – sometimes called the zone of combat. When many argue that the United States is engaged in a global war against Al Qaeda and other terrorist groups, one natural question is where is the battlefield, or zone of combat, in this global struggle against terrorist groups and how do we identify it. This article will focus on two hitherto ignored aspects in the discussions about the modern battlefield or zone of combat – when and for how long is an area part of the zone of combat and how far does this designation extend geographically. These questions are critical for understanding how to apply the law to questions of targeting, detention, interrogation, direct participation in hostilities, and trials, among others. Because the applicability of the law of armed conflict is naturally limited by – and triggered by – the existence of an armed conflict, it therefore provides a paradigm for understanding the temporal and geographic parameters of the zone of combat that other generally applicable legal frameworks cannot necessarily offer.

This article demonstrates that traditional conceptions of belligerency and neutrality are not designed to address the complex spatial and temporal nature of terrorist attacks and states responses. Nor can human rights law or domestic criminal law, which are both legal regimes of general applicability, offer a useful means for defining where a state can conduct military operations against terrorist groups. LOAC, in contrast, provides a framework not only for when it applies, but where and for how long. By using this framework and analogizing relevant factors and considerations to the conflict with al Qaeda, we can identify factors that can help define the zone of combat, including the nature of the hostilities, the government response to the threat and the territorial connections of the terrorist or non-state armed group.

Full text
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1677965

Enhancing compliance with international law by armed non-state actors

Annyssa Bellal and Stuart Casey-Maslen. In: Goettingen journal of international law Vol. 3, no. 1, 2011, p. 175-197. - Cote 345.22/174 (Br.)

Enhancing compliance with international norms by armed non-state actors is central to efforts to improve the protection of civilians in armed conflict. Limited engagement with such actors, as well as lack of clarity as to the precise nature and extent of the international legal regimes that are applicable to them, constitute significant barriers to achieving better compliance. In this article the authors argue for international human rights law to be more widely seen as imposing direct obligations upon armed nonstate actors and for counter-terrorism legislation not to be interpreted so as to preclude engagement on positive respect for humanitarian norms. What is needed is greater engagement with armed non-State actors, not less.

Full text
<http://gojil.uni-goettingen.de/ojs/index.php/gojil/article/view/175/pdfGoJIL%203%20%282011%29%201%2C%20Bellal-Maslen>

Privileging asymmetric warfare ? Part I : defender duties under international humanitarian law

Samuel Estreicher. In: Chicago journal of international law Vol. 11, no. 2, Winter 2011, p. 425-437. - Cote 345.25/53 (Br.)

This article is part of a three-part series addressing the question whether the law of armed conflict privileges a form of guerrilla warfare by nonstate actors that is often conducted in violation of these laws and in the process endangers civilians, in pursuit of a strategy of inviting a response from their opponents that helps them enlist additional recruits and international support. The strategy, rational from the standpoint of the guerrilla forces, derogates significantly from the law's overall objective of minimizing harm to civilian populations. The articles in this series approach this question of asymmetry by considering whether IHL in fact need or should be interpreted to privilege the guerrilla strategy. Most discussions of the laws of war focus on the limitations placed on attackers to avoid risks to civilians. The purpose of this article is to look at the issue from the standpoint of the duties of defenders to avoid such risks. Dangers to civilians during armed conflict are a joint product of both attackers and defenders, and minimization of such harm--presumably the overriding mission of IHL--requires establishing the right incentives for both attackers and defenders.

Re-envisaging the international law of internal armed conflict

Sandesh Sivakumaran ; [a reply by Gabriella Blum]. In: European journal of international law = Journal européen de droit international Vol. 22, no 1, February 2011, p. 219-275

The regulation of internal armed conflict by international law has come a long way in a very short space of time. Until the early 1990s, there were a minimum of international law rules applicable to internal armed conflict. Today, the situation has changed almost beyond recognition with a healthy body of international law applicable to internal armed conflict. This change has taken place in three principal ways – through analogy to the law of international armed conflict, through resort to international human rights law, and through the use of international criminal law. Each of these approaches stressed its similarity to internal armed conflict or to international humanitarian law. They proved immensely important, filling in what was a more or less blank canvas. However, there are limits to how far they can take us. Today, the canvas is no longer blank and a step back is needed in order to assess the existing state of affairs. Focusing not on the similarities between international and internal armed conflicts or between the various bodies of international law, but on their differences, will allow us to ascertain what further work is in order. It will allow us to identify gaps in regulation and refine relevant rules. It will also force us to re-think our

approach to particular issues. Only in this way will we be able to develop the international law of internal armed conflict further.

Full text : ICRC access

<http://ejil.oxfordjournals.org/content/22/1/219.full.pdf>

IV. Multinational forces

Controlling the recourse to war by modifying jus in bello

Ryan Goodman. In: Yearbook of international humanitarian law Vol. 12, 2009, p.53-84

According to a bedrock principle of international law, the rules regulating the recourse to war and the rules regulating conduct during war must be kept conceptually and legally distinct. The purported independence of the two domains – the ‘separation principle’ – remains unstable despite its historic pedigree. This essay explores recent developments that threaten to erode the separation. The author analyzes, in particular, doctrinal innovations that result in the regulation of the recourse to war through alterations of jus in bello. International and national institutions have incentivized states to pursue particular paths to war by tailoring the rules that regulate conduct in armed conflict. Some warpaths are accordingly rewarded, and others are penalized. The article then explores potential consequences, first, on state behavior involving the use of force and, second, on state behavior involving the conduct of warfare. One significant conclusion is that these recent developments channel state behavior and justifications for using force toward security-based and strategic rationales. These efforts – whether intended or not – risk suppressing ‘desirable wars’ and inspiring ‘undesirable wars.’ These recent developments also undercut humanitarian protections by undermining the mechanisms for compliance with legal norms on the battlefield.

Full text : ICRC access

<http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=7918818&fulltextType=RA&fileId=S1389135909000038>

Intervention and consent : consensual forcible interventions in internal armed conflicts as international agreements

Eliav Lieblich. In: Boston university international law journal Vol. 29, issue 2, Summer 2011, p. 337-382. - Cote 345/582 (Br.)

This article addresses the issue of consensual forcible intervention in internal armed conflict—meaning, intervention undertaken with the consent of a party to an internal conflict—and seeks to clarify the place of such interventions within the framework of the law of international agreements in conjunction with the law on the use of force. It analyzes the question of consent strictly in the context of relations between a consenting party and an external intervener (“procedural consent”), as opposed to questions regarding the internal legitimacy or capacity of a party to express consent (“substantive consent”)—which are not dealt with in this article. The article attempts to demonstrate that consensual forcible interventions, in their “procedural” sense, are regulated by firm and accepted norms of international law. These are found in the Vienna Convention on the Law of Treaties (VCLT), found in customary international law, found in the law on the use of force, and augmented by the law of state responsibility. The article seeks to systematically elaborate on these frameworks and to clarify them. It demonstrates the general dynamics of consensual interventions, as they occurred in the different stages of the conflict in the Democratic Republic of Congo; it then addresses the regulation of consensual interventions under the VCLT and customary international law; discusses the question of withdrawal of consent and aggression; analyzes the dilemma of forward-looking consent in the context of regional defense treaties; surveys the role of consent in relation to U.N. Chapter VII interventions; and briefly touches upon the question of consent and non-state actors, exemplifying this issue through the analysis of the development of the legal status of the Palestine Liberation Organization.

Full text

<http://www.bu.edu/law/central/jd/organizations/journals/international/volume29n2/documents/Lieblich-finalpdf.pdf>

Yesterday's mistakes still today's news : the persisting cloud of humanitarian violations over United Nations peace-keeping : a new agenda for accountability

Jackson Nyamuya Maogoto. In: African yearbook of international law = Annuaire africain de droit international Vol. 16, 2008, p. 269-298

This study revisits and argues for the more radical solution that holding the UN accountable for international humanitarian law violations by troops serving under its command can be more readily achieved by the UN directly possessing rights and duties under international humanitarian law. After canvassing the weaknesses and shortcomings of extant accountability mechanisms it asserts that there is wherewithal for the paradigm this author reasserts and fleshes out.

V. Private actors

International code of conduct for private security service providers

introductory note by David A. Wallace. In: International legal materials Vol. 50, no. 1, 2011, p. 89-104

On November 9, 2010, fifty-eight major private security providers gathered in Geneva to sign the international code of conduct for private security service providers with the objective of strengthening respect for human rights and humanitarian law within their operations.

Full text

<http://www.news.admin.ch/NSBSubscriber/message/attachments/21143.pdf>

Lawyers, guns, and money : the governance of business activities in conflict zones

Simon Chesterman. In: Chicago journal of international law Vol. 11, no. 2, Winter 2011, p. 321-341. - Cote 345.29/14 (Br.)

There is a proliferation of literature discussing human rights and business, but far less that looks at the issue of businesses operating in conflict zones and the applicability of international humanitarian law. This is understandable in terms of the prominence and dynamism of human rights as a sub-discipline, contrasted with the conservatism of international humanitarian law. But from a doctrinal perspective it is somewhat odd, as the direct applicability of human rights norms to business is far less clear than the applicability of international humanitarian law. Section II of this paper describes the normative regime that is set up by human rights and international humanitarian law, before Section III turns to the specific situation of conflict zones and efforts to regulate some of the newer entities on the scene, in particular private military and security companies. Section IV then sketches out a regime that focuses not on toothless regulation, but on a model of governance that combines limited sanctions with a wider structuring of incentives. These three parts are referred to in shorthand as "lawyers," "guns," and "money."

Regulation of private military companies

Alexander Kees. In: Goettingen journal of international law Vol. 3, no. 1, 2011, p. 199-216. - Cote 345.29/157 (Br.)

The increasing use of private military companies by states in armed conflict raises questions regarding the regulation of those non-state actors. However, even though the privatization of core state functions might be an emerging phenomenon with respect to its extent and quality, there is no legal vacuum for the activities of private military contractors. According to international humanitarian law, states must ensure respect for the *ius in bello* and enforce applicable international law also with respect to private contractor personnel if they are charged with functions governed by international law. Against this background, the challenge for future regulation is on the national and administrative level. States must intensify their efforts to implement existing standards.

Full text

<http://gojil.uni-goettingen.de/ojs/index.php/gojil/article/view/186/pdfGoJIL%203%20%282011%29%201%2C%20Kees>

Some comments and observations on the Montreux document

Marie-Louise Tougas. In: Yearbook of international humanitarian law Vol. 12, 2009, p. 321-345

Growing concerns that PMSCs were operating in a legal vacuum led to increasing calls for further clarification on the role of such entities in conflict zones and to mounting pressure to develop a regulative framework under international law. In September 2008, 17 States endorsed the Montreux Document, an initiative sponsored by the Swiss government and the ICRC. The Montreux Document is a non-binding

document aimed at identifying and reasserting the most relevant international legal obligations that govern the conduct of PMSCs during armed conflicts. It also provides for a set of guidelines on 'good practices' for States in regard to the operation of PMSCs in armed conflicts. Although it does not create any legal obligations, and only recalls existing ones, it is the first intergovernmental document to address international obligations in respect to the activities of PMSCs. It can thus be seen as a first step toward the establishment of a better regulative framework of PMSCs' activities in conflict zones. This article provides an overview of the process that led to the endorsement of this document and an analysis of its content. It also addresses some of the questions left unanswered by the Montreux Document.

Full text : ICRC access

<http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=7918836&fulltextType=RA&fileId=S1389135909000129>

VI. Protection of persons

Child soldiers and the duty of nations to protect children from participation in armed conflict

Luz E. Nagle. In: *Cardozo journal of international and comparative law* Vol. 19, no. 1, Winter 2011, p. 1-58. - Cote 362.7/19 (Br.)

This article examines the plight of child soldiers and the collective duties of nations in their commitments under international law to protect the fundamental human rights of children subjected to conflict. The first part of this article will determine how children become soldiers in international and internal armed conflict. The article will then look at the international law intended to protect children in conflict zones and what tests or standards should be applied in determining how child soldiers should be treated, either as war criminals or as victims of conflict. Next, the article will look at the responsibility nations have to protect children from becoming combatants or being re-recruited into emerging armed conflicts; to prosecute those who use children as combatants; to help children in the process of rehabilitation and reintegration; and to educate the citizens about the plight of child soldiers and the factors that place children at risk of becoming child soldiers. The article will conclude with a discussion of what should be the goals and strategies from this point forward in the international effort to stop children from becoming child combatants.

The civilian in modern war

Adam Roberts. In: *Yearbook of international humanitarian law* Vol. 12, 2009, p. 13-51

There is a widespread view that civilians are worse off in today's wars than ever before. Civilians are often deliberately targeted by belligerents or are victims of 'collateral damage'. They form the majority of victims of landmines. They are used as human shields. They are displaced from their homes, even from their country. They are affected, often more than soldiers, by the pestilence, famine and displacement that wars bring in their wake. They are often particularly vulnerable in the types of war that are most prevalent in the world today – including civil wars and asymmetric conflicts. Children are forced to become soldiers. How can it be that the lot of civilians in war remains so dire, when so much attention has been paid to the protection of civilians in war – not just in international treaties, but in the work of international organizations and also that of numerous humanitarian bodies?

Full text : ICRC access

<http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=7918816&fulltextType=RA&fileId=S1389135909000026>

Engendering protection : an analysis of the 2009 Kampala convention and its provisions for internally displaced women

Lauren Groth. In: *International journal of refugee law* Vol. 23, no. 2, July 2011, p. 221-251. - Cote 362.8/147 (Br.)

On 23 October 2009, the African Union officially adopted the Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention). The product of over two years of deliberation and consultation with AU member states and partners, the Kampala Convention represents an important step in the development of legally binding instruments of protection for internally displaced persons (IDPs). Such an accomplishment, while commendable, comes at a time of increasing insecurity and violence for IDPs, especially internally displaced women, who are disproportionately represented within this population. This article considers the legal protections encompassed within the Kampala

Convention from a gendered perspective, analyzing the extent to which the Convention adequately acknowledges and addresses the unique vulnerabilities of internally displaced women. Specifically, the article considers the ways in which the Kampala Convention includes women in the drafting process, expands conceptions of gender-based violence, encourages protections of economic, social, and cultural rights, and extends obligations to non-state actors. In sum, the article argues that, while the progressive legal developments of the African Union deserve much praise, there remain continued limitations in conferring adequate protection to the most prevalent victims of internal conflict: internally displaced women.

The interplay between international humanitarian law and refugee law

Pablo Antonio Fernández-Sánchez. In: Journal of international humanitarian legal studies Vol. 1, issue 2, 2010, p. 329-381

International humanitarian law (IHL) is not the sole body of international law that applies in armed conflicts. Among the different legal bodies that may be subject to the simultaneous application during armed conflicts is refugee law. The questions considered in this article are the protection of refugees under IHL, including the right of non-refoulement during armed conflicts. The cumulative application of IHL and refugee law is another focus of analysis. This article deals with inter alia the reinforced extension of alien rights to refugees during armed conflict, the possibility to grant refugee status to new actors which appear during armed conflict, the obligation to disarm and separate armed elements, the forced transfer of refugees for military or humanitarian reasons, and the right of ex-combatants to be treated as civilian refugees once they have disarmed and their legal status can be determined.

Left out by the pied piper : the U.N. response to children in localized conflict settings

Mukul Saxena Vimug. In: Northwestern university journal of international human rights Vol. 9, no. 1, Fall 2010, p. 59-81. - Cote 362.7/20 (Br.)

This paper addresses whether the U.N.'s recent efforts to enforce strict codes of conduct regarding child participation in conflicts have left behind the majority of children in localized conflicts. Part I of the paper examines the difficulty of defining and understanding child participation in democratic states with localized conflicts. Part II discusses the increased international scrutiny applied to an affected state that hesitates to recognize a localized armed conflict. Part III examines various international organizations' approaches to addressing child participation in armed conflicts, and the results of imposing those approaches to child participation in secessionist movements. Continued advocacy is necessary to raise international awareness of the need to follow the approaches used to address child participation in armed conflicts to child participation in internalized conflicts. Affected states must enact domestic legislation and executive measures that encompass and protect child participants.

Full text

<http://www.law.northwestern.edu/journals/jihr/v9/n1/3/Saxena.pdf>

Managing forced displacement by law in Africa : the role of the new African Union IDPs convention

Won Kidane. In: Vanderbilt journal of transnational law Vol. 44, no. 1, January 2011, p. 1-85. - Cote 325.3/109 (Br.)

This article provides a critical appraisal of the newly adopted African IDPs Convention. In particular, it offers a detailed analysis of the Convention's transformation of the UN Guiding Principles into legally binding rules for the management of the phenomenon of internal displacement in Africa. By definition, internally displaced persons (IDPs) are persons who have not crossed international frontiers and are citizens of the state within which they find themselves. Although their conditions may be similar to refugees, who are necessarily aliens to the host community, their legal status is not analogous. At the most basic level, there is no doctrinal agreement on whether "IDP" is a legal status at all. This has created a fundamental doctrinal dilemma. The Article analyzes the merits of the arguments for and against according IDPs a distinctive legal status analogous to refugees. It also provides a detailed discussion of the important provisions that define the rights and responsibilities of IDPs and the various state and non-state actors during the three most important phases – before displacement, during displacement, and after return.

Full text

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1757271

Mistreatment of the wounded, sick and shipwrecked by the ICRC study on customary international humanitarian law

James P. Benoit. In: Yearbook of international humanitarian law Vol. 11, 2008, p.175-219

In 2005, the International Committee of the Red Cross (ICRC) completed a ten-year study on customary international humanitarian law, based on an assessment of the State practice of over 150 nations over the preceding thirty years. Somewhat surprisingly, but perhaps owing to the sheer size of the ICRC Study, only two states have officially responded to the ICRC: the United States and Israel. Although an analysis of the US response is beyond the scope of this paper, it generally criticizes the ICRC Study's unorthodox methodology, including both the State practice it considered, and its lack of proof of *opinio juris*. The ICRC is a venerable organization, traditionally viewed as the guardian of international humanitarian law. Its study is a monumental work compiling a surfeit of State practice. Nevertheless, the ICRC Study articulates 'rules' that are not sustainable under the traditional theory of customary international law formation, as may be seen by the examination in Section 3 of the three seemingly uncontroversial rules proposed for handling the wounded, sick and shipwrecked.

Full text : ICRC access

<http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=7193288&fulltextType=RA&fileId=S138913590800175X>

Protection of civilians during armed conflicts

Stylianos Politis. In: Revue hellénique de droit international 63e année, 2/2010, p. 1011-1018. - Cote 345.2/544 (Br.)

The higher cost during a war is always paid by fighters, as thousands of them die and even more get injured. They die having in mind the completion of an aim. When the aim is their country's defence then it is sacred and the sacrifice is the ultimate duty. However, the death of civilians who lose their lives during war conflicts motivated by fanaticism and hate, or by weapons which nowadays become more and more destructive causing 'collateral damages' without any distinction, cannot be considered as such. Based on the rules and regulations of modern international law, efforts are made to cut down and if possible to eliminate war consequences to civilians.

The rights and duties of physicians in armed conflict

Sigrid Mehring. In: Militair rechtelijk tijdschrift Vol. 103, no. 5, 2010, p. 205-221. - Cote 356/7 (Br.)

Recently, questions resurfaced concerning the duties of physicians in armed conflicts : namely the role of physicians in reporting violations of international humanitarian law, especially torture, and their own involvement in such practices. Through scrutinizing the protection of the wounded and sick, both combatant and civilian, on the one hand, and the protection of medical personnel on the other, this article sheds light on the parameters of medical treatment in armed conflict. The conclusion must be that although international humanitarian law provides a workable, intricate, and detailed basis for the work of physicians in armed conflict, the ethical boundaries of medical care and the associated possibility of "medical" grave breaches deserve further study and attention

The Supreme court of Canada's declining of its jurisdiction in not ordering the repatriation of a Canadian Guantanamo detainee : implications of the case for our understanding of international humanitarian law

Sonja Grover. In: The international journal of human rights Vol. 15, no. 3, March 2011, p. 481-508. - Cote 345.2/449 (Br.)

The Supreme Court of Canada (SCC) declined its jurisdiction in its 2010 ruling in *Canada (Prime Minister) v. Khadr* by not ordering the repatriation of Canadian Guantanamo detainee Omar Ahmed Khadr. Despite finding that Khadr's deprivation of liberty at Guantanamo was not in accord with the principles of fundamental justice, and that Canada was complicit in his ongoing detention, the Court left the remedy to the Canadian federal government's discretion. This based on a theory of 'royal prerogative' inapplicable on the facts of the case, and an erroneous claim of an inconclusive record relating to alleged relevant foreign relations matters.

Who is a child ? : the legal conundrum of child soldiers

David M. Rosen. In: Connecticut journal of international law Vol. 25, no. 1, Fall 2009, p. 81-118. - Cote 362.7/338 (Br.)

This article examines the issues surrounding the initial recruitment of child soldiers and the potential war crime liability those children may face. The analysis will focus on the importance of the age at which a young person is considered to be a child. Section I describes the conflict between sovereign states and the humanitarian and human rights organizations that challenge them, regarding the lawful age of recruitment and the criminal liability of child soldiers. Section II reviews current patterns in the recruitment of child soldiers and shows that non-state actors, such as insurgent groups and terrorist organizations, are now the primary users of children in armed conflict. Section III outlines the way the issue of age came to be incorporated into the laws of war. Section IV examines attempts by human rights and humanitarian groups to incorporate a universal definition of childhood into the laws of war. Section V looks at the ways international trial courts, specifically the Special Court for Sierra Leone and the International Criminal Court, have applied new statutory definitions of child soldiers in war crimes trials. Section VI describes the failure of international law to properly address the problem of child soldiers' culpability for war crimes.

VII. Protection of objects

(Environment, cultural property, water, medical mission, emblem, etc.)

The criminalization of offences against cultural heritage in times of armed conflict : the quest for consistency

Micaela Frulli. In: European journal of international law = Journal européen de droit international Vol. 22, no. 1, February 2011, p. 203-217

This article undertakes a comparative analysis of the two main international legal instruments providing for offences against cultural property and cultural heritage in times of armed conflict in order to assess existing gaps and lacunas, and to make suggestions on how better to advance the protection of cultural property through international criminal law. The International Criminal Court Statute takes a very retrograde attitude to this kind of crime – which the author calls the civilian-use approach – whereas the Second Protocol to the 1954 Hague Convention on the Protection of Cultural Property in Times of Armed Conflict seems far more innovative, preferring a cultural-value oriented approach. The author concludes that the latter approach is more appropriate and that, at present, the most effective tool for pursuing war crimes against cultural property is Protocol II to the 1954 Hague Convention. It is thus crucial to promote ratification by a large number of states and to encourage states to adopt implementing legislation that may allow domestic judges to prosecute the most serious crimes against cultural heritage on the basis of jurisdictional criteria provided for in Protocol II to the 1954 Hague Convention.

Full text : ICRC access
<http://ejil.oxfordjournals.org/content/22/1/203.full.pdf>

Protection de l'environnement et armes de combat : étude de droit international pénal

par Rodolphe Mésa. In: Revue trimestrielle des droits de l'homme No 85, Janvier 2011, p. 43-57. - Cote 363.7/98 (Br.)

Malgré sa valeur grandissante, l'environnement est un élément particulièrement vulnérable en période de conflit armé. Aussi ses atteintes illicites doivent-elles être appréhendées par le droit pénal international. L'étude des qualifications de crime contre l'humanité et de crime de guerre montre que la protection de l'environnement issue du droit pénal international est limitée, d'une part, en raison d'une absence d'automatisme d'incrimination de la violation du droit international humanitaire, d'autre part, à cause du caractère indirect de la protection pénale. En plus d'être limitée, cette protection de l'environnement est inefficace, pour deux raisons principales qui tiennent à la politique et à la structure des juridictions pénales internationales.

VIII. Detention, internment, treatment and judicial guarantees

Administrative detention in armed conflict

Ashley S. Deeks. In: *Case Western Reserve journal of international law* Vol. 40, no. 3, 2009, p. 403-436. - Cote 323.2/273 (Br.)

Treaties long have recognized that a state may detain without trial not only opposing armed forces, but also civilians and others who pose threats to its security. While the procedural rules for administrative detention in international armed conflict are reasonably robust, only a very limited set of treaty rules apply to administrative detention in noninternational armed conflicts. This article examines the treaty rules governing detention procedures in international and non-international conflicts. It then analyzes realworld examples of administrative detention by multi-national forces and individual states. The article concludes that states should, as a matter of policy, apply several key principles drawn from treaties governing international armed conflict to all administrative detentions. These rules impose a high standard for a state to initially detain a person, require the state to immediately review that detention, permit the detainee to appeal the detention decision, require the state to review the detention periodically, and obligate the state to release the detainee when the reasons for his detention have ceased. A state also should inform a detainee why it has detained him. The article argues that these core procedures, drawn from the Fourth Geneva Convention and Article 75 of Additional Protocol I, are battle-tested and that adopting such baseline rules as matter of clearly stated policy would: ensure that all states strike the proper balance between national security and personal liberty; let states avoid answering hard questions about the type of armed conflicts they are fighting; and might facilitate multi-national operations among allies with different detainee policies.

Full text

http://www.case.edu/orgs/jil/security_detention_deeks.html

Detention operations in contemporary conflicts : four challenges for the Geneva Conventions and other existing law

by John B. Bellinger and Vijay M. Padmanabhan. In: *American journal of international law* Vol. 105, no. 2, April 2011, p. 201-243

Since the 9/11 attacks, States have been scrambling to find answers to difficult questions surrounding the detention of members of non-State groups. Four legal questions in particular have proven vexing to States: (1) who is subject to detention; (2) what process must the State provide to those detained; (3) when does the right of the State to detain terminate; and (4) what legal obligations do States have in connection with repatriating detainees at the end of the conflict? Nearly nine years since 9/11 two factors have prevented development of the law on these questions. First, some States, international organizations, and NGOs continue to insist that existing law adequately answers these questions. Second, where there is agreement that new law is needed, disagreement about how to develop the law has limited progress. This Article, by two former State Department lawyers, crystallizes the existing state of law to create the foundation for development of new law on these important questions. The first objective is to demonstrate that existing law inadequately answers the questions posed. The Article begins by demonstrating why the law of non-international armed conflict, the generally applicable legal regime for armed conflicts between States and non-State groups, does not provide clear answers to these questions. The Article then explains why other legal regimes — international humanitarian law for international armed conflict, municipal law and international human rights law — also fail to provide adequate answers at present. The Article's second objective is to identify areas of convergence on these four questions that may form the basis for future legal development. The resistance of many to admitting further legal development is necessary is the legitimate fear that States will abuse legal uncertainty to engage in policies inconsistent with the spirit of international law. Immediate work on development of new law may ameliorate these fears. While a new treaty regime may be the ideal vehicle for development of new law, the Article recognizes that agreement on a new treaty is unlikely, and proposes an agreement on common principles by like-minded States as an interim step.

Full text

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1734922

Indefinite detention under the laws of war

Chris Jenks and Eric Talbot Jensen. - [S.l.] : [S.n], 2010. - 54 p.. - Cote 323.2/143 (Br.)

The Obama Administration has made it clear that some detainees will be held indefinitely "under the laws of war" but has provided no clear guidance as to what that detention would look like. Historical practice has generally involved detention for much shorter periods of time than many at Guantanamo have already been detained. There are some notable exceptions, however, where fighters were detained for extended periods of time, including more than twenty years in the case of Morocco. Surprisingly, considering the number of armed conflicts that have involved detention, there is no common international practice concerning long-term or indefinite detention upon which states may rely. The question then becomes, assuming that long-term and potentially indefinite detention of unlawful enemy combatants (or unprivileged enemy belligerents) will occur as justified by the law of war, what should that detention look like? This article argues that the basic provisions and safeguards currently extant in the law of armed conflict are sufficient to satisfy an indefinite detention paradigm. Though many of these provisions are under-utilized or ineffective in the current detention framework, the current structure could be adapted to provide a LOAC detention model that accounts for a contemporary view of individual rights, protections, and privileges. Such an adapted paradigm would be completely appropriate for the indefinite detention of the 48 detainees designated by the U.S. Government to be held at Guantanamo Bay, and would provide all the safeguards and ensure the overall security necessary for that detention until the conflict is over or until the detainees no longer pose a risk.

Full text

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1729221

La doctrine du "combattant ennemi illégal"

par Julien Cantegreil. In: Revue de science criminelle et de droit pénal comparé No 1, janvier - mars 2010, p. 81-106. - Cote 323.2/255 (Br.)

Si les caractères de la War on terror menée par l'administration Bush se laissent résumer d'un seul concept, nul doute qu'il s'agirait de celui de "combattant ennemi illégal". En qualifiant ainsi une personne, comme le sceau de sa prétendue suprême "dangerosité", l'exécutif d'alors s'autorisait à la détenir, à l'interroger et à la juger de façon dérogatoire aux droits pénal et international. Ce concept n'est pas neuf, même en droit américain. Il signe pourtant mieux qu'aucun autre ce que la war on terror a d'excessif car il constitue la porte d'entrée technique et doctrinale à ses dérogations les plus fortes. Mais alors qu'une année a passé depuis la prise de fonction du président Obama et qu'une profusion de rapports et de déclassifications ont précisé les violations issues du régime de "l'ennemi combattant illégal", comment ne pas constater l'incapacité de répudier dans les faits certaines des pratiques de l'Administration précédente qui avaient été dénoncées avec le plus de force ? Etranger hier à l'esprit du droit pénal, il en interdit aujourd'hui le retour. L'article tente de cerner la nature de cet effet cliquet.

The rights and duties of physicians in armed conflict

Sigrid Mehring. In: Militair rechtelijk tijdschrift Vol. 103, no. 5, 2010, p. 205-221. - Cote 356/7 (Br.)

Recently, questions resurfaced concerning the duties of physicians in armed conflicts : namely the role of physicians in reporting violations of international humanitarian law, especially torture, and their own involvement in such practices. Through scrutinizing the protection of the wounded and sick, both combatant and civilian, on the one hand, and the protection of medical personnel on the other, this article sheds light on the parameters of medical treatment in armed conflict. The conclusion must be that although international humanitarian law provides a workable, intricate, and detailed basis for the work of physicians in armed conflict, the ethical boundaries of medical care and the associated possibility of "medical" grave breaches deserve further study and attention

The Supreme court of Canada's declining of its jurisdiction in not ordering the repatriation of a Canadian Guantanamo detainee : implications of the case for our understanding of international humanitarian law

Sonja Grover. In: The international journal of human rights Vol. 15, no. 3, March 2011, p. 481-508. - Cote 345.2/449 (Br.)

The Supreme Court of Canada (SCC) declined its jurisdiction in its 2010 ruling in *Canada (Prime Minister) v. Khadr* by not ordering the repatriation of Canadian Guantanamo detainee Omar Ahmed Khadr. Despite

finding that Khadr's deprivation of liberty at Guantanamo was not in accord with the principles of fundamental justice, and that Canada was complicit in his ongoing detention, the Court left the remedy to the Canadian federal government's discretion. This based on a theory of 'royal prerogative' inapplicable on the facts of the case, and an erroneous claim of an inconclusive record relating to alleged relevant foreign relations matters.

IX. Law of occupation

Au coeur de l'occupation : le Sahara occidental, les droits de l'homme et le droit international humanitaire = In the heart of the occupation : Western Sahara, human rights and international humanitarian law

Eric Goldstein... [et al.]. In: Revue belge de droit international = Belgian review of international law = Belgisch tijdschrift voor internationaal recht Vol. 43, 2010-1, p. 15-74

Contient notamment : Human rights in Western Sahara and in the Tindouf refugee camps : the report of Human Rights Watch (excerpts). - Human rights in Western Sahara and in the Tindouf refugee camps : a commentary / E. Goldstein. - L'exercice de la compétence universelle en Belgique dans le cas du Sahara occidental / E. David

Changing the landscape : Israel's gross violations of international law in the occupied Syrian Golan

Ray Murphy and Declan Gannon. In: Yearbook of international humanitarian law Vol. 11, 2008, p. 139-174

Successive Israeli governments have adopted a number of policies to control and contain the Syrian population since Israel began its occupation. Numerous villages have been destroyed, thousands driven from their homes, private and public property expropriated, the remaining Arab villages have been prevented from expanding and the free movement of people curtailed. In 1981, Israel enacted legislation that purported to annex the territory. This move was widely condemned by the international community and from the perspective of international law, the Syrian Golan remains an occupied territory to which the laws of occupation apply. The northern hemisphere summer of 2008 marked the 41st anniversary of Israel's occupation. This report outlines the background to the occupation and the consequences for the local population. It then examines the action of the Israeli authorities and argues that certain practices by the Israeli Defence Forces constitute war crimes, which in some cases may also amount to grave breaches of the Fourth Geneva Convention governing the protection of civilians.

Full text : ICRC access

<http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=7193280&fulltextType=RA&fileId=S1389135908001396>

Occupied or not : the question of Gaza's legal status after the Israeli disengagement

Solon Solomon. In: Cardozo journal of international and comparative law Vol. 19, no. 1, Winter 2011, p. 59-89. - Cote 345.28/74 (Br.)

In September 2005, after thirty-eight years of occupation, Israel withdrew its army from the Gaza Strip ("Gaza" or "the Strip") and evacuated all of its settlements, retaining control over the Strip's naval and aerial space as well as its crossings. While Israel did contend that its occupation of the area had come to an end, Israeli control over the Strip's naval and aerial space sparked a debate among Israelis and Palestinians, as well as international legal scholars, as to whether Israeli occupation of the Strip had truly ended. The following article will present the various arguments and take the position that post-disengagement Gaza should be seen as a legal hybrid, due to the factual complexities that modern international humanitarian law has to face. While not occupied by Israel, Gaza cannot be considered "non-occupied" because of Israel's exertion of a certain degree of control over the area, as well as for reasons pertaining to protection of the local population's rights. This article will argue that due to the sui generis status of post-disengagement Gaza, a positivist branch of international law, such as international humanitarian law or human rights law, does not apply in globo and thus any Israeli obligations in the Gaza Strip should be perceived as based on natural law.

X. Conduct of hostilities

(Distinction, proportionality, precautions, prohibited methods)

The application of IHL in the Goldstone report : a critical commentary

Laurie Blank. In: Yearbook of international humanitarian law Vol. 12, 2009, p. 347-402

Operation Cast Lead, the Israeli military operation in Gaza that began on December 27, 2008, demonstrated anew the challenges international humanitarian law faces in contemporary conflict. The Goldstone Report presented an opportunity to examine critically how the law applies in complicated modern warfare and how the law might be used to solve difficult problems such conflict poses. This article analyzes the Goldstone Report's application of the law to the conduct of both parties in the conflict to examine how it applies and interprets the legal standards within the framework of the Gaza conflict. In particular, the article focuses on two main shortcomings in the Goldstone Report's application of IHL: areas in which the report could have benefitted from a greater sensitivity to the complexities of modern warfare, and areas in which its approach is questionable as a matter of law. First, the article highlights the report's flawed examination of the challenges posed by contemporary conflicts in two fundamental areas of IHL: distinction and military objectives. Both require that military commanders and soldiers understand who is a civilian and who is a fighter or combatant, and which targets are military targets and which are civilian objects. Without a thorough and sophisticated understanding of how to make these determinations, military commanders, soldiers and policy makers will face grave difficulty in planning and carrying out military operations within the bounds of the law. The challenges presented in Operation Cast Lead are emblematic of some of the most difficult dilemmas modern warfare poses. Second, the article highlights several areas in which the Goldstone Report's application of IHL is questionable, either because it uses the incorrect legal standard or because it applies the wrong law when more than one body of law applies. The report errs twice in its treatment of the principle of proportionality, first by approaching *jus in bello* proportionality retrospectively rather than prospectively, and second by conflating *jus ad bellum* proportionality with *jus in bello* proportionality. Additional problems arise in its analysis of the law governing precautions in attack and the treatment of prisoners of war, and its assessment of responsibility for specific crimes, including attacks on civilians, destruction of property and hostage taking.

Full text : ICRC access

<http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=7918838&fulltextType=RA&fileId=S1389135909000130>

Credible fact-finding and allegations of international humanitarian law violations : challenges in theory and practice

Théo Boutruche. In: Journal of conflict and security law Vol. 16, no. 1, Spring 2011, p. 105-140

The increasing resort to fact-finding missions from various international actors to address alleged human rights and international humanitarian law violations raises various issues ranging from one of an agreed common methodology to ascertain credibly such allegations to practical questions pertaining for example to the protection of witnesses and victims. This article intends to review some of the challenges arising from conducting fact-finding about international humanitarian law violations. While this contribution suggests that there are common features to fact-finding activities under international humanitarian law and human rights law, it also focuses on specific challenges related to the situation of armed conflict and to the structure of certain international humanitarian law norms that render fact-finding missions complicated. It also aims at presenting both legal and practical challenges with the view to help relevant actors planning more effectively on fact-finding missions on alleged international humanitarian law violations.

Full text : ICRC access

<http://jcsf.oxfordjournals.org/content/16/1/105.full.pdf>

The dilemma of direct participation in hostilities

Eric Christensen. In: Journal of transnational law and policy Vol. 19, no. 2, Spring 2010, p. 281-309. - Cote 345.25/52 (Br.)

A universal and comprehensive definition of direct participation in hostilities (DPH) does not exist. Furthermore, modern warfare's tendency to blur the distinction between combatant and civilian necessitates a new interpretation of DPH. However, States have incentives to pursue narrow or broad interpretations of DPH, or even both. These contradictory strategies create a dilemma for policymakers

who seek to reinterpret the concept of DPH. Any revision is likely to put some group of individuals at risk; there is not a simple answer to the question of how to best revise DPH. Instead, a dramatic revision of DPH is needed. This Essay will briefly examine the law of armed conflict before exploring the merits of the interpretations of DPH adopted by the United States, Israel, and the International Committee of the Red Cross. Lastly, this essay will recommend a potential solution to the dilemma of DPH interpretation: a limited membership-based approach.

ICRC guidance on direct participation in hostilities

William J. Fenrick. In: Yearbook of international humanitarian law Vol. 12, 2009, p. 287-300

The ICRC, following extended discussions with a large group of experts, has adopted and issued a non-legally binding document entitled 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law' consisting of ten recommendations and about fifty pages of related commentary. The discussion process which preceded production of the Interpretive Guidance was contentious and no consensus was reached on the issue of Direct Participation in Hostilities. As the result, the ICRC, as it was entitled to do, issued its own interpretation of the applicable law. The author of this article, who was involved in all of the expert meetings, reviews and comments on the Interpretive Guidance and attempts to make an assessment of its general viability and of its acceptability to the wider IHL community.

Full text : ICRC access

<http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=7918832&fulltextType=RA&fileId=S1389135909000105>

Moral ambiguities underlying the laws of armed conflict : a perspective from military ethics

Th. A. van Baarda. In: Yearbook of international humanitarian law Vol. 11, 2008, p. 3-49

The law of armed conflict suffers from an internal ambiguity. The Declaration of St Petersburg (1868) made the ambiguity explicit when it stated that 'the necessities of war ought to yield to the requirements of humanity'. The Lieber Code (1863) was less explicit, though it suffered from the same ambiguity. The Code received a lengthy critique from the Confederate Secretary of War who stated bluntly: 'A military commander under this code may pursue a line of conduct in accordance with the principles of justice, faith and honour, or he may justify conduct correspondent with warfare of the barbarous hordes who overran the Roman Empire, or who, in the Middle Ages, devastated the continent of and menaced the civilisation of Europe'. Which of the two considerations, the Confederate Secretary demanded to know, should prevail: humanity or necessity?

Full text : ICRC access

<http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=7193256&fulltextType=RA&fileId=S1389135908000032>

Naval chamaleons ? : re-evaluating the legality of deceptive lighting under international humanitarian law

Mike Madden. In: Canadian naval review Vol. 6, no. 4, Winter 2011, p. 4-9. - Cote 347.799/133 (Br.)

Discussion on perfidy in IHL, particularly as the concept is applied to deceptive lighting of warships at sea. An analysis of conventional and customary IHL will demonstrate that many ambiguities and grey areas exist in the laws that purport to distinguish between permissible ruses of war and illegal acts of perfidy. An investigation into the practice of deceptively lighting naval vessels during armed conflicts will reveal that some more careful analysis of the practice might be necessary for Canadian naval commanders if they wish to avoid violating perfidy prohibitions.

Full text

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1773099

Operation "Cast Lead" : jus in bello proportionality

by Michael Wells-Greco. In: Netherlands international law review Vol. 57, 2010, p. 397-422. - Cote 345.25/51 (Br.)

This article attempts to: (a) provide an analysis of the legal discourse presented on jus in bello proportionality in the Goldstone Report, the Amnesty International report, Israel's response to the Goldstone Report and the Human Rights Watch report; (b) consider what proportionality means and add to the critique by arguing that the ambiguities inherent in key aspects of the proportionality doctrine of armed conflict may contribute to neither the proper realisation of IHL goals nor the attaining of military strategy; (c) submit that, despite the lack of consensus on a clear definition of proportionality, it would be beneficial to debate the contours more clearly to establish parameters so that the principle serves its purpose of protecting civilians.

Self-defense targeting of non-state actors and permissibility of U.S. use of drones in Pakistan

Jordan J. Paust. In: *Journal of transnational law and policy* Vol. 19, no. 2, Spring 2010, p. 237-280. - Cote 341.67/680 (Br.)

The United States has used unmanned aerial vehicles (UAVs) or drones over portions of Pakistani territory for reconnaissance and the targeting of members of al Qaeda and the Taliban who have in various ways taken a direct and active part in extensive and ongoing armed attacks against U.S. military personnel and other U.S. nationals in Afghanistan. Some have argued that the U.S. use of drones in Pakistan appears to have violated international law. Is the use of drones within Pakistan merely to target non-state actors under such circumstances violative of international law? Must the United States obtain the express consent of Pakistan before targeting non-state actors who engage in ongoing armed attacks against United States military personnel? Does such a use of armed force against non-state actors necessarily require a conclusion that the United States is at war with either the state from which non-state actor armed attacks are emanating or the non-state actor? Does the selective use of force in self-defense violate the human right to life of human targets who take an active part in the armed attacks? Does use of drones necessarily constitute indiscriminate targeting in violation of the general principle of proportionality? Before addressing these questions, one should consider relevant international legal norms concerning the permissibility of selective self-defense in response to armed attacks by non-state actors emanating from another state.

Targeting narcoinsurgents in Afghanistan : the limits of international humanitarian law

Michael N. Schmitt. In: *Yearbook of international humanitarian law* Vol. 12, 2009, p. 301-320

In October 2008, upon the request of the Afghan government, NATO Defence Ministers meeting in Budapest agreed that 'ISAF [International Security Assistance Force] can act in concert with the Afghans against facilities and facilitators supporting the insurgency, in the context of counternarcotics, subject to the authorization of respective nations'. In explaining the scope of the contemplated actions, NATO officials noted that drug producers and traffickers who aided the ongoing insurgency could now be attacked. NATO's Supreme Allied Commander Europe (SACEUR), US General Bantz Craddock, justified the policy on the ground that the Taliban reaped over \$100 million annually from the drug trade. US Secretary of Defence Robert Gates likewise defended the decision as sound strategy. It soon became clear that other key figures were less enamoured with the new approach, or the subsequent guidance issued to effectuate it. On 5 January 2009, Craddock instructed General Egon Ramms, the German Commander of Allied Joint Force Command Brunssum, which oversees NATO operations in Afghanistan, 'to attack directly drug producers and facilities throughout Afghanistan'. The threshold for engagement seemed to require little connection to the insurgency. According to SACEUR's guidance, it was 'no longer necessary to produce intelligence or other evidence that each particular drug trafficker or narcotics facility in Afghanistan meets the criteria of being a military objective' because the alliance 'has decided that (drug traffickers and narcotics facilities) are inextricably linked to the Opposing Military Forces, and thus may be attacked'.

Full text : ICRC access

<http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=7918834&fulltextType=RA&fileId=S1389135909000117>

Targeting operations with drone technology : humanitarian law implications

Human rights institute, Columbia law school. - [S.I.] : [S.n.], March 2011. - 38 p. ; 30 cm. - Cote 345.25/54 (Br.)

Background note for the American Society of International Law Annual Meeting panel on "Targeting with drone technology". Part I explores the nature and scope of the armed conflict referenced by the [U.S.] Administration in recent statements, describing debates among scholars about the government's possible theories. Part II discusses scholarly debates about who may be targeted, focusing on standards related to the principle of distinction, and identify basic questions about the government's approach. Part III briefly describes reports of targeting conducted by the CIA and considers implications arising from humanitarian law standards. Conclusion evaluates whether and how drone technology affects calls for government clarity.

Full text

http://www.law.columbia.edu/ipimages/Human_Rights_Institute/BackgroundNoteASILColumbia.pdf

XI. Weapons

Self-defense targeting of non-state actors and permissibility of U.S. use of drones in Pakistan

Jordan J. Paust. In: Journal of transnational law and policy Vol. 19, no. 2, Spring 2010, p. 237-280. - Cote 341.67/680 (Br.)

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Full text

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XII. Implementation

(ICRC, protecting powers, fact finding commission, other means of preventing violations and controlling respect for IHL, state responsibility)

Credible fact-finding and allegations of international humanitarian law violations : challenges in theory and practice

Théo Boutruche. In: Journal of conflict and security law Vol. 16, no. 1, Spring 2011, p. 105-140

The increasing resort to fact-finding missions from various international actors to address alleged human rights and international humanitarian law violations raises various issues ranging from one of an agreed common methodology to ascertain credibly such allegations to practical questions pertaining for example to the protection of witnesses and victims. This article intends to review some of the challenges arising from conducting fact-finding about international humanitarian law violations. While this contribution suggests that there are common features to fact-finding activities under international humanitarian law and human rights law, it also focuses on specific challenges related to the situation of armed conflict and to the structure of certain international humanitarian law norms that render fact-finding missions complicated. It also aims at presenting both legal and practical challenges with the view to help relevant actors planning more effectively on fact-finding missions on alleged international humanitarian law violations.

Full text : ICRC access
<http://jcsf.oxfordjournals.org/content/16/1/105.full.pdf>

Enhancing compliance with international law by armed non-state actors

Annyssa Bellal and Stuart Casey-Maslen. In: Goettingen journal of international law Vol. 3, no. 1, 2011, p. 175-197. - Cote 345.22/174 (Br.)

Enhancing compliance with international norms by armed non-state actors is central to efforts to improve the protection of civilians in armed conflict. Limited engagement with such actors, as well as lack of clarity as to the precise nature and extent of the international legal regimes that are applicable to them, constitute significant barriers to achieving better compliance. In this article the authors argue for international human rights law to be more widely seen as imposing direct obligations upon armed nonstate actors and for counter-terrorism legislation not to be interpreted so as to preclude engagement on positive respect for humanitarian norms. What is needed is greater engagement with armed non-State actors, not less.

Full text
<http://gojil.uni-goettingen.de/ojs/index.php/gojil/article/view/175/pdfGoJIL%203%20%282011%29%201%2C%20Bellal-Maslen>

Exceptional engagement : Protocol I and a world united against terrorism

Michael A. Newton. In: Texas international law journal Vol. 45, no. 2, Winter 2009, p. 323-375. - Cote 303.6/14 (Br.)

This article challenges the prevailing view that U.S. "exceptionalism" provides the strongest narrative for the U.S. rejection of Additional Protocol I to the 1949 Geneva Conventions. The United States chose not to adopt the Protocol in the face of intensive international criticism because of its policy conclusions that the text contained overly expansive provisions resulting from politicized pressure to accord protection to terrorists who elected to conduct hostile military operations outside the established legal framework. In effect, the U.S. concluded that key provisions of Protocol I actually undermine the core values that spawned the entire corpus of humanitarian law. More than two decades after the debates regarding Protocol I, the U.S. position provided the normative benchmark for the subsequent rejection of efforts by some states to shield terrorists from criminal accountability mechanisms required by multilateral terrorism treaties. This article demonstrates that the U.S. policy stance regarding Protocol I helped to prevent the commingling of the laws and customs of war in the context of the multilateral framework for responding to transnational terrorist acts in the aftermath of September 11. In hindsight, the "exceptional" U.S. position was emulated by other nations as they reacted to reservations designed to blur the distinctions between terrorists and privileged combatants. U.S. "exceptionalism" in actuality paved the way for sustained engagement that substantially shaped the international response to terrorist acts. This article suggests that reservations provide an important mechanism for states to engage in second-order dialogue over the true meaning and import of treaties, which in turn fosters the clarity and enforceability of the text.

Full text

<http://www.tilj.org/journal/45/newton/Newton%2045%20TexIntlJ%20323.pdf>

The International Court of Justice and applied forms of reparation for international human rights and humanitarian law violations

Gentian Zyberi. In: Utrecht law review Vol. 7, issue 1, January 2011, p. 204-215. - Cote 345.22/172 (Br.)

This article examines the case law of the International Court of Justice (ICJ or the Court) which is relevant to the issue of reparations that are due to individuals or states for violations of international human rights and humanitarian law. This article will focus on the ICJ decisions that address not only state reparations, but also reparations owed to natural and legal persons. The most recent case which hinges on the issue of whether jurisdictional state immunity can serve as a barrier to individual claims for reparation concerning international humanitarian law violations highlights the legal complexity and the increasing occurrence of requests combining state reparations and individual reparations. The article is divided according to the four types of reparations applied in those decisions, notably restitution, compensation, satisfaction and guarantees of non-repetition. While, as mentioned above, those decisions provide a limited discussion on the implementation mechanism or modalities of reparations, the emphasis on the obligation to make full reparations for injuries, whether material or moral, caused by the internationally wrongful acts of a state is present in each of them.

Full text

<http://www.utrechtlawreview.org/index.php/ulr/article/view/155>

Re-focusing on protecting civilians' basic safety and why we need to know why people kill : on the latest reports of the Secretary-General on the protection of civilians in armed conflict

Evelyne Schmid. In: Journal of international peacekeeping Vol. 13, no. 3-4, September 2009, p. 356-382. - Cote 345.2/527 (Br.)

The concept of protection of civilians in armed conflict and the respective roles of peace operations and other actors have not been conclusively defined. This article considers the Secretary General's latest reports on protection, in particular the two most recent ones (29 May 2009 and 28 October 2007). The author argues that the understanding of effective protection strategies should be informed by a diagnosis of the warring parties' motivations to use deliberate violence against civilians. Analyzing why humanitarian law, human rights law and refugee law are disregarded in many conflicts can help to improve protection strategies. An analysis of the warring parties' motivations may also caution against the belief that there is a system out there that can always protect people in ongoing conflict if only humanitarian actors would improve their modus operandi. Consequently, this article suggests that the notion of protection should remain in close touch with the idea of immediate basic safety. The author recommends that the Secretary General should insist in future statements and reports that a sound approach to protection requires a diagnosis of why fighting parties choose to attack and threaten civilians. If the diagnosis shows that the armed parties have incentives to disregard basic legal norms and morals; the SC needs to demonstrate real political will to give the concept of protection the meaning it has in conventional language or in the alternative, honestly avoid using it.

The United Nations Security Council and the enforcement of international humanitarian law

Marco Roscini. In: Israel law review Vol. 43, no. 2, 2010, p. 330-359. - Cote 345.22/173 (Br.)

This article discusses the competences and powers of the UN Security Council in securing compliance with international humanitarian law, in particular through the adoption of the measures provided in Chapter VII of the Charter. The competence of the Council in this field can be founded on several legal grounds: on a broad interpretation of the notion of "threat to the peace" (Article 39 of the Charter), on Article 94(2) with regard to the International Court of Justice's judgments establishing violations of the jus in bello and also on the customary duty to ensure respect for international humanitarian law as reflected in Article 1 Common to the 1949 Geneva Conventions on the Protection of the Victims of War. In particular, such customary provision empowers the Security Council to react to any violation of international humanitarian law regardless of a nexus with concerns of international stability. Although the Council has adopted a variety of measures in relation to violations of the laws of war, the most incisive ones are those provided in Articles 41 and 42 of Chapter VII, which however are not without problems. The role the Security Council has played in the enforcement of international humanitarian law has been criticized because of its selective

and opportunistic approach, which is due to the political nature of the organ. Also, in several instances the Council, far from securing compliance with the jus in bello, has instead interfered with its application. However selective and imperfect the Council's approach might be, though, its power to adopt decisions binding on UN members and its competence to take or authorize coercive measures involving the use of force make it potentially a formidable instrument against serious violations of international humanitarian law, partly remedying the lack of enforcing mechanisms in the treaties on the laws of war.

Full text

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1767983

Yesterday's mistakes still today's news : the persisting cloud of humanitarian violations over United Nations peace-keeping : a new agenda for accountability

Jackson Nyamuya Maogoto. In: African yearbook of international law = Annuaire africain de droit international Vol. 16, 2008, p. 269-298

This study revisits and argues for the more radical solution that holding the UN accountable for international humanitarian law violations by troops serving under its command can be more readily achieved by the UN directly possessing rights and duties under international humanitarian law. After canvassing the weaknesses and shortcomings of extant accountability mechanisms it asserts that there is wherewithal for the paradigm this author reasserts and fleshes out.

XIII. International Human Rights Law

(Focus on situations of armed conflict and other situations of violence)

The conflict in Colombia and the relationship between humanitarian law and human rights law in practice : analysis of the new operational law of the Colombian armed forces

Constantin von der Groeben. In: Journal of conflict and security law Vol. 16, no. 1, Spring 2011, p. 141-164

When dealing with non-State actors such as terrorists or guerilla groups, States often have to act in a grey area between International Humanitarian Law (IHL) and International Human Rights Law (IHRL). The constant question is which of these two legal regimes is applicable and what their relationship is. Colombia, a veteran in dealing with non-State actors and internal conflicts, has recently set out to answer that question by applying a new approach of combining IHL and IHRL in a hybrid model. The legal basis for this approach is the new operational law for the Colombian armed forces, which offers guidance to the acting soldiers in the field. The Colombian approach is novel and unique and has to be scrutinized and analysed against the broader background of States' struggles with non-State armed groups.

Full text : ICRC access

<http://jcsf.oxfordjournals.org/content/16/1/141.full.pdf>

Detention operations in contemporary conflicts : four challenges for the Geneva Conventions and other existing law

by John B. Bellinger and Vijay M. Padmanabhan. In: American journal of international law Vol. 105, no. 2, April 2011, p. 201-243

Since the 9/11 attacks, States have been scrambling to find answers to difficult questions surrounding the detention of members of non-State groups. Four legal questions in particular have proven vexing to States: (1) who is subject to detention; (2) what process must the State provide to those detained; (3) when does the right of the State to detain terminate; and (4) what legal obligations do States have in connection with repatriating detainees at the end of the conflict? Nearly nine years since 9/11 two factors have prevented development of the law on these questions. First, some States, international organizations, and NGOs continue to insist that existing law adequately answers these questions. Second, where there is agreement that new law is needed, disagreement about how to develop the law has limited progress. This Article, by two former State Department lawyers, crystallizes the existing state of law to create the foundation for development of new law on these important questions. The first objective is to demonstrate that existing law inadequately answers the questions posed. The Article begins by demonstrating why the law of non-international armed conflict, the generally applicable legal regime for armed conflicts between States and

non-State groups, does not provide clear answers to these questions. The Article then explains why other legal regimes — international humanitarian law for international armed conflict, municipal law and international human rights law — also fail to provide adequate answers at present. The Article's second objective is to identify areas of convergence on these four questions that may form the basis for future legal development. The resistance of many to admitting further legal development is necessary is the legitimate fear that States will abuse legal uncertainty to engage in policies inconsistent with the spirit of international law. Immediate work on development of new law may ameliorate these fears. While a new treaty regime may be the ideal vehicle for development of new law, the Article recognizes that agreement on a new treaty is unlikely, and proposes an agreement on common principles by like-minded States as an interim step.

Full text

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1734922

The European Convention on human rights and international humanitarian law : conference report

Cordula Droege and Louise Arimatsu. In: Yearbook of international humanitarian law Vol. 12, 2009, p. 435-449

On 24–25 September 2009, the Faculty of Laws, University College London and the International Humanitarian Law Project, London School of Economics held a conference in cooperation with the International Committee of the Red Cross entitled 'The European Convention on Human Rights and International Humanitarian Law'. Armed conflict situations (including belligerent occupations) have increasingly become the subject of litigation before national courts and the European Court of Human Rights (ECtHR). As a result, there is now a substantial body of case-law on the application of the European Convention on Human Rights (ECHR) in armed conflict situations. The ECtHR has had to engage with questions involving situations of armed conflict and occupation since the Turkish intervention in Northern Cyprus in the 1970s. The increasing resort to the ECHR by claimants whose rights have allegedly been violated in contemporary armed conflicts and occupations, raise new and complex questions of law. To what extent does the ECHR, as a human rights legal regime, apply in such situations, especially when alleged violations have been perpetrated abroad? How does the ECHR interact with international humanitarian law (IHL)?

Full text : ICRC access

<http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=7918842&fulltextType=RA&fileId=S1389135909000154>

The extraterritorial reach and applicability in armed conflict of the international covenant on civil and political rights : a rejoinder to Dennis and Surena

Nigel Rodley. In: European human rights law review Issue 5, 2009, p. 628-636. - Cote 345.1/74 (Br.)

Response to an article by Michael J. Dennis and Andre M. Surena in the same Review. The central issue is the extra-territorial application of the International Covenant on Civil and Political Rights and its applicability in armed conflict. The author discusses recent developments in the jurisprudence of the Human Rights Committee and the International Court of Justice in order to highlight his criticisms of Dennis' and Surena's arguments and methodology. At the heart of the discussion is an analysis of appropriate canons of treaty interpretation as applicable in particular to the Covenant.

The relationship between international humanitarian law and human rights

Constantine Antonopoulos. In: Revue hellénique de droit international 63e année, 2/2010, p. 599-634. - Cote 345.1/34 (Br.)

As a matter of normative objective, both branches of the law share an interest in the protection of individuals; in the case of human rights law this accounts for the entirety of its object and purpose, whereas in the case of IHL it extends to part of its object, albeit a fundamental one. The practice of states, the case-law of international tribunals and the writings of publicists support a convergence and complementarity in the application of human rights law and IHL.

The rights and duties of physicians in armed conflict

Sigrid Mehring. In: Militair rechtelijk tijdschrift Vol. 103, no. 5, 2010, p. 205-221. - Cote 356/7 (Br.)

Recently, questions resurfaced concerning the duties of physicians in armed conflicts : namely the role of physicians in reporting violations of international humanitarian law, especially torture, and their own involvement in such practices. Through scrutinizing the protection of the wounded and sick, both combatant and civilian, on the one hand, and the protection of medical personnel on the other, this article sheds light on the parameters of medical treatment in armed conflict. The conclusion must be that although international humanitarian law provides a workable, intricate, and detailed basis for the work of physicians in armed conflict, the ethical boundaries of medical care and the associated possibility of "medical" grave breaches deserve further study and attention.

XIV. International Criminal Law

Defining aggression : an opportunity to curtail the criminal activities of non-state actors

Steve Beytenbrod. In: Brooklyn journal of international law Vol. 36, issue 2, 2011, p. 647-693. - Cote 344/56 (Br.)

Part I of this Note provides a background of the international laws governing conflicts, particularly those relating to Non-State Actors (NSAs). Part II criticizes the current international framework for conflict resolution. Specifically, Part II discusses why international law is too outdated to properly handle modern conflicts and how developments in international criminal law make it the best avenue for enforcing laws against NSAs. Part III focuses on the Rome Statute and particularly the 2010 review. Given that this review amended the Rome Statute to define the crime of aggression, this Note discusses the implications and shortcomings of this amendment. Lastly, Part IV argues that by passing a state-focused definition of aggression, the international community missed a critical opportunity to reign in the illegal activities of NSAs.

Is the Rome statute binding on individuals ? (and why we should care)

Marko Milanovic. In: Journal of international criminal justice Vol. 9, no. 1, March 2011, p. 25-52

This article examines whether the Rome Statute is binding on individuals, i.e. whether its provisions which define international crimes are substantive or jurisdictional in nature. This question cannot be resolved by the text of the Statute alone. It is both vexing and fundamental, and has significant conceptual and practical consequences. If the Statute is only jurisdictional in nature, then the source of substantive norms of criminal law binding on individuals must be elsewhere, primarily in customary law. If this is so, then the Statute could never go beyond customary law, even though it arguably attempts to do so in several instances, and any individual accused before the Court should be able to mount a challenge as to whether the charges against him have a basis in customary law. If, on the other hand, the Statute is seen as being substantive in nature, then the Statute — a treaty — must be binding on individuals who have never consented to be bound by it, nor could have done so. Then it may well go beyond customary law, but it would potentially run afoul of the *nullum crimen sine lege* principle in two cases — when a particular situation has been referred to the Court by the UN Security Council or by a non-state party — since the supposedly substantive Statute could not have been binding on the individuals concerned at the time that they allegedly committed their offence. These issues have been already raised (in Lubanga, its first case), and will be raised before the Court, as with the declaration lodged by Palestine whereby it accepted the Court's jurisdiction for Gaza, or with regard to the situation in Darfur. The article argues that the best approach in such situations is for the Court to 'read down' the Statute so as to conform to customary law that was binding on the individuals in question at the relevant time. This, however, is not the only solution open to the Court, and the article examines others. In doing so, it also deals with broader issues of when and how treaties can directly bind individuals in international law.

Full text: ICRC access
<http://jicj.oxfordjournals.org/content/9/1/25.full.pdf>

Poursuivre le génocide, les crimes contre l'humanité et les crimes de guerre au Canada : une analyse des éléments des crimes à la lumière de l'affaire Munyaneza

Fannie Lafontaine. In: The Canadian yearbook of international law = Annuaire canadien de droit international Vol. 47, 2009, p. 261-297. - Cote 344/53 (Br.)

La décision Munyaneza constitue la première analyse judiciaire de la "Loi sur les crimes contre l'humanité et les crimes de guerre" et des définitions qu'elle propose des infractions de droit international maintenant criminalisées dans le système juridique canadien. Il s'agit d'un régime juridique nouveau, original et complexe, qui fait s'entrecroiser le droit international et le droit canadien, et qui constitue un pilier important de l'entreprise globale de lutte contre l'impunité pour les crimes internationaux les plus graves. L'auteure propose une analyse critique du jugement Munyaneza en ce qui concerne les éléments constitutifs du crime de génocide, des crimes contre l'humanité et des crimes de guerre. Elle offre une discussion de certains des aspects les plus difficiles des définitions de ces crimes et vise à contribuer à ce que la jurisprudence future soit cohérente avec l'esprit et la lettre de la loi et avec le droit international. Le régime des peines applicables en vertu de la loi est aussi brièvement analysé.

Protection de l'environnement et armes de combat : étude de droit international pénal

par Rodolphe Mésa. In: Revue trimestrielle des droits de l'homme No 85, Janvier 2011, p. 43-57. - Cote 363.7/98 (Br.)

Malgré sa valeur grandissante, l'environnement est un élément particulièrement vulnérable en période de conflit armé. Aussi ses atteintes illicites doivent-elles être appréhendées par le droit pénal international. L'étude des qualifications de crime contre l'humanité et de crime de guerre montre que la protection de l'environnement issue du droit pénal international est limitée, d'une part, en raison d'une absence d'automatisme d'incrimination de la violation du droit international humanitaire, d'autre part, à cause du caractère indirect de la protection pénale. En plus d'être limitée, cette protection de l'environnement est inefficace, pour deux raisons principales qui tiennent à la politique et à la structure des juridictions pénales internationales.

Unravelling the confusion concerning successor superior responsibility in the ICTY jurisprudence

Barrie Sander. In: Leiden journal of international law Vol. 23, issue 1, 2010, p. 105-135. - Cote 344/49 (Br.)

The recent jurisprudence of the ICTY concerning the proper interpretation of the doctrine of superior responsibility under Article 7(3) of the ICTY Statute has been stifled by division and uncertainty. In particular, the question of the responsibility of successor superiors for crimes committed by their subordinates prior to taking command has led to a number of 3–2 majority decisions. This paper seeks to reconcile the divergent judicial opinions by moving away from a narrow analysis of successor superior responsibility, instead focusing on the determination of the underlying nature of the doctrine of superior responsibility. While a polarity of opinions also exists in relation to the nature of the doctrine of superior responsibility, this paper argues that the opinions can be reconciled by adopting a more principled approach to customary international law, an approach justified by the international criminal law context. Such an approach involves two elements: first, ensuring that a clear distinction is drawn between international humanitarian and international criminal legal concepts; and, second, the invocation of the principle of individual culpability as a standard against which the weight to be attributed to authorities evidencing custom ought to be assessed. A principled approach would enable the identification of the nature of the doctrine of superior responsibility while ensuring that the doctrine reinforces international criminal law principles rather than acts as an exception to them; in addition, by determining the nature of the doctrine of superior responsibility, the principled approach would unravel the confusion concerning successor superior responsibility in the ICTY jurisprudence.

XV. Contemporary challenges

(Terrorism, DPH, cyber warfare, asymmetric war, etc.)

Defining the battlefield in contemporary conflict and counterterrorism : understanding the parameters of the zone of combat

Laurie R. Blank. In: Georgia journal of international and comparative law Vol. 39, no. 1, 2010, p. 1-38. - Cote 345.26/205 (Br.)

The nature of today's conflicts has led many practitioners and scholars to suggest that the traditional battlefield – once populated by tank battles and infantry – has been replaced by a more complex environment – sometimes called the zone of combat. When many argue that the United States is engaged in a global war against Al Qaeda and other terrorist groups, one natural question is where is the battlefield, or zone of combat, in this global struggle against terrorist groups and how do we identify it. This article will focus on two hitherto ignored aspects in the discussions about the modern battlefield or zone of combat – when and for how long is an area part of the zone of combat and how far does this designation extend geographically. These questions are critical for understanding how to apply the law to questions of targeting, detention, interrogation, direct participation in hostilities, and trials, among others. Because the applicability of the law of armed conflict is naturally limited by – and triggered by – the existence of an armed conflict, it therefore provides a paradigm for understanding the temporal and geographic parameters of the zone of combat that other generally applicable legal frameworks cannot necessarily offer. This article demonstrates that traditional conceptions of belligerency and neutrality are not designed to address the complex spatial and temporal nature of terrorist attacks and states responses. Nor can human rights law or domestic criminal law, which are both legal regimes of general applicability, offer a useful means for defining where a state can conduct military operations against terrorist groups. LOAC, in contrast, provides a framework not only for when it applies, but where and for how long. By using this framework and analogizing relevant factors and considerations to the conflict with al Qaeda, we can identify factors that can help define the zone of combat, including the nature of the hostilities, the government response to the threat and the territorial connections of the terrorist or non-state armed group.

Full text
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1677965

Detention operations in contemporary conflicts : four challenges for the Geneva Conventions and other existing law

by John B. Bellinger and Vijay M. Padmanabhan. In: American journal of international law Vol. 105, no. 2, April 2011, p. 201-243

Since the 9/11 attacks, States have been scrambling to find answers to difficult questions surrounding the detention of members of non-State groups. Four legal questions in particular have proven vexing to States: (1) who is subject to detention; (2) what process must the State provide to those detained; (3) when does the right of the State to detain terminate; and (4) what legal obligations do States have in connection with repatriating detainees at the end of the conflict? Nearly nine years since 9/11 two factors have prevented development of the law on these questions. First, some States, international organizations, and NGOs continue to insist that existing law adequately answers these questions. Second, where there is agreement that new law is needed, disagreement about how to develop the law has limited progress. This Article, by two former State Department lawyers, crystallizes the existing state of law to create the foundation for development of new law on these important questions. The first objective is to demonstrate that existing law inadequately answers the questions posed. The Article begins by demonstrating why the law of non-international armed conflict, the generally applicable legal regime for armed conflicts between States and non-State groups, does not provide clear answers to these questions. The Article then explains why other legal regimes – international humanitarian law for international armed conflict, municipal law and international human rights law – also fail to provide adequate answers at present. The Article's second objective is to identify areas of convergence on these four questions that may form the basis for future legal development. The resistance of many to admitting further legal development is necessary is the legitimate fear that States will abuse legal uncertainty to engage in policies inconsistent with the spirit of international law. Immediate work on development of new law may ameliorate these fears. While a new treaty regime may be the ideal vehicle for development of new law, the Article recognizes that agreement on a new treaty is unlikely, and proposes an agreement on common principles by like-minded States as an interim step.

Full text
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1734922

La doctrine du "combattant ennemi illégal"

par Julien Cantegreil. In: Revue de science criminelle et de droit pénal comparé No 1, janvier - mars 2010, p. 81-106. - Cote 323.2/255 (Br.)

Si les caractères de la War on terror menée par l'administration Bush se laissent résumer d'un seul concept, nul doute qu'il s'agirait de celui de "combattant ennemi illégal". En qualifiant ainsi une personne, comme le sceau de sa prétendue suprême "dangerosité", l'exécutif d'alors s'autorisait à la détenir, à l'interroger et à la juger de façon dérogatoire aux droits pénal et international. Ce concept n'est pas neuf, même en droit américain. Il signe pourtant mieux qu'aucun autre ce que la war on terror a d'excessif car il constitue la porte d'entrée technique et doctrinale à ses dérogations les plus fortes. Mais alors qu'une année a passé depuis la prise de fonction du président Obama et qu'une profusion de rapports et de déclassifications ont précisé les violations issues du régime de "l'ennemi combattant illégal", comment ne pas constater l'incapacité de répudier dans les faits certaines des pratiques de l'Administration précédente qui avaient été dénoncées avec le plus de force ? Etranger hier à l'esprit du droit pénal, il en interdit aujourd'hui le retour. L'article tente de cerner la nature de cet effet cliquet.

Exceptional engagement : Protocol I and a world united against terrorism

Michael A. Newton. In: Texas international law journal Vol. 45, no. 2, Winter 2009, p. 323-375. - Cote 303.6/14 (Br.)

This article challenges the prevailing view that U.S. "exceptionalism" provides the strongest narrative for the U.S. rejection of Additional Protocol I to the 1949 Geneva Conventions. The United States chose not to adopt the Protocol in the face of intensive international criticism because of its policy conclusions that the text contained overly expansive provisions resulting from politicized pressure to accord protection to terrorists who elected to conduct hostile military operations outside the established legal framework. In effect, the U.S. concluded that key provisions of Protocol I actually undermine the core values that spawned the entire corpus of humanitarian law. More than two decades after the debates regarding Protocol I, the U.S. position provided the normative benchmark for the subsequent rejection of efforts by some states to shield terrorists from criminal accountability mechanisms required by multilateral terrorism treaties. This article demonstrates that the U.S. policy stance regarding Protocol I helped to prevent the commingling of the laws and customs of war in the context of the multilateral framework for responding to transnational terrorist acts in the aftermath of September 11. In hindsight, the "exceptional" U.S. position was emulated by other nations as they reacted to reservations designed to blur the distinctions between terrorists and privileged combatants. U.S. "exceptionalism" in actuality paved the way for sustained engagement that substantially shaped the international response to terrorist acts. This article suggests that reservations provide an important mechanism for states to engage in second-order dialogue over the true meaning and import of treaties, which in turn fosters the clarity and enforceability of the text.

Full text

<http://www.tilj.org/journal/45/newton/Newton%2045%20TexIntILJ%20323.pdf>

ICRC guidance on direct participation in hostilities

William J. Fenrick. In: Yearbook of international humanitarian law Vol. 12, 2009, p. 287-300

The ICRC, following extended discussions with a large group of experts, has adopted and issued a non-legally binding document entitled 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law' consisting of ten recommendations and about fifty pages of related commentary. The discussion process which preceded production of the Interpretive Guidance was contentious and no consensus was reached on the issue of Direct Participation in Hostilities. As the result, the ICRC, as it was entitled to do, issued its own interpretation of the applicable law. The author of this article, who was involved in all of the expert meetings, reviews and comments on the Interpretive Guidance and attempts to make an assessment of its general viability and of its acceptability to the wider IHL community.

Full text : ICRC access

<http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=7918832&fulltextType=RA&fileId=S1389135909000105>

Indefinite detention under the laws of war

Chris Jenks and Eric Talbot Jensen. - [S.I.] : [S.n], 2010. - 54 p.. - Cote 323.2/143 (Br.)

The Obama Administration has made it clear that some detainees will be held indefinitely "under the laws of war" but has provided no clear guidance as to what that detention would look like. Historical practice has generally involved detention for much shorter periods of time than many at Guantanamo have already been detained. There are some notable exceptions, however, where fighters were detained for extended periods of time, including more than twenty years in the case of Morocco. Surprisingly, considering the number of armed conflicts that have involved detention, there is no common international practice concerning long-term or indefinite detention upon which states may rely. The question then becomes, assuming that long-term and potentially indefinite detention of unlawful enemy combatants (or unprivileged enemy belligerents) will occur as justified by the law of war, what should that detention look like? This article argues that the basic provisions and safeguards currently extant in the law of armed conflict are sufficient to satisfy an indefinite detention paradigm. Though many of these provisions are under-utilized or ineffective in the current detention framework, the current structure could be adapted to provide a LOAC detention model that accounts for a contemporary view of individual rights, protections, and privileges. Such an adapted paradigm would be completely appropriate for the indefinite detention of the 48 detainees designated by the U.S. Government to be held at Guantanamo Bay, and would provide all the safeguards and ensure the overall security necessary for that detention until the conflict is over or until the detainees no longer pose a risk.

Full text

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1729221

Information warfare and civilian populations : how the law of war addresses a fear of the unknown

Lucian Dervan. In: Goettingen journal of international law Vol. 3, no. 1, 2011, p. 373-396. - Cote 345.26/206 (Br.)

Imagine a civilian communications system is being temporarily relied upon by an opposing military force for vital operations. If one launches a computer network attack against the communications system, the operation may disable the opposing force's ability to function adequately and, as a result, prompt their surrender. The alternative course of action is to launch a traditional kinetic weapons attack in the hopes of inflicting enough casualties on the troops to induce surrender. Given these options, the law of war would encourage the utilization of the computer network attack because it would result in less unnecessary suffering. But is the same true if we are unsure of the collateral consequences of the computer network attack on a large civilian population that also relies on this communications system? For instance, because civilians use the same communications system to gather critical information, disabling the system might result in rioting, civil disorder, serious injuries, and deaths. Further, civilians may be unable to call for help, seek out medical assistance, or locate emergency response centers. Given these unknown yet potentially severe collateral consequences to civilians, it becomes less clear that a proportionality analysis under the law of war would favor the computer network attack over the traditional kinetic operation. In this article, Professor Lucian E. Dervan examines the application of the law of war to information operations and analyses the role of the Geneva Convention's utilitarian goals in determining the validity of computer network attacks against dual-use civilian objectives.

Full text

<http://gojil.uni-goettingen.de/ojs/index.php/gojil/article/view/189/pdfGoJIL%203%20%282011%29%201%2C%20Dervan>

Mexico's "war on drugs" : real or rhetorical armed conflict ?

Patrick Gallahue. In: Humanitäres Völkerrecht : Informationsschriften = Journal of international law of peace and armed conflict Vol. 24, 1/2011, p. 39-45

The author considers Mexico's "drug war" to determine if the ongoing violence between authorities and drug cartels can be classified as an armed conflict, which would make the situation subject to International Humanitarian Law (IHL). Looking at several influential decisions that determined the existence of an armed conflict as well as a consideration of modern, so-called "anarchic" conflicts, the current crisis seems well suited for such a categorisation. However, classifying Mexico's situation as an armed conflict would be inappropriate. Though sophisticated in some respects, these groups lack the organisation requirement and the violence unique to this crisis make this "drug war" a rhetorical war rather than a real armed conflict.

The qualification framework of international humanitarian law : too rigid to accommodate contemporary conflicts ?

Elizabeth Holland. In: Suffolk transnational law review Vol. 34, no. 1, Winter 2011, [37] p.. - Cote 345.2/457 (Br.)

This note examines the traditional binary qualification framework in the context of contemporary conflicts marked by everchanging degrees of cross-border activity, third-state involvement, and non-state actor participation. First, this note lays out the material scope of international and non-international armed conflicts. Next, it examines three cases in which the International Court of Justice (ICJ), the International Criminal Tribunal for the former Yugoslavia (ICTY), and the U.S. Supreme Court addressed questions of qualification. The note then questions whether the binary framework is incongruous with contemporary conflicts due to the difficulty in qualifying many situations. The note concludes by suggesting that rather than develop new law to address current challenges, a broader and more flexible application of protections found in existing law, less restricted by the traditional dichotomy, may provide a constructive and practical basis from which to proceed when determining application of international or non-international armed conflict rules to specific contexts.

Full text

http://www.law.suffolk.edu/highlights/stuorgs/transnat/documents/Holland_final.pdf

Regulation of private military companies

Alexander Kees. In: Goettingen journal of international law Vol. 3, no. 1, 2011, p. 199-216. - Cote 345.29/157 (Br.)

The increasing use of private military companies by states in armed conflict raises questions regarding the regulation of those non-state actors. However, even though the privatization of core state functions might be an emerging phenomenon with respect to its extent and quality, there is no legal vacuum for the activities of private military contractors. According to international humanitarian law, states must ensure respect for the *ius in bello* and enforce applicable international law also with respect to private contractor personnel if they are charged with functions governed by international law. Against this background, the challenge for future regulation is on the national and administrative level. States must intensify their efforts to implement existing standards.

Full text

<http://gojil.uni-goettingen.de/ojs/index.php/gojil/article/view/186/pdfGoJIL%203%20%282011%29%201%2C%20Kees>

The role of the United States Supreme Court in interpreting and developing humanitarian law

David Weissbrodt and Nathaniel H. Nesbitt. In: Minnesota law review Vol. 95, no. 4, 2011, p. 1339-1423. - Cote 345.2/33 (Br.)

In the absence of a single authoritative mechanism to interpret humanitarian law, a number of treaty bodies, national courts, regional human rights courts/commissions, international tribunals, and thematic mechanisms have been called upon to address humanitarian law issues. Prime among these institutions is the U.S. Supreme Court. Though only in a small number of cases, the Court has relied on humanitarian law principles and treaties from the early days of the Republic to the "war on terrorism." In what ways does the Court invoke this body of law and how thorough is its analysis? Is the Court institutionally equipped to play a meaningful role in the development of humanitarian law? The Article assesses the historical, current, and potential role of the Court in interpreting and developing humanitarian law. Through a comprehensive examination of the Court's humanitarian law jurisprudence, it argues that while the Court has offered useful and precedential interpretations of humanitarian law, its analysis suffers from a relatively superficial engagement with the Hague and Geneva Conventions. In short, the Court is reluctant to probe too deeply into this complex body of law and its reliance on humanitarian law is often minimal and sometimes haphazard. Despite these shortcomings, the Court has an important role to play. Throughout its history, but most notably in the years after September 11, 2001, the Court has unearthed various substantive propositions of humanitarian law and offered a novel interpretation of at least one of them, specifically Common Article 3 of the 1949 Geneva Conventions pertaining to transnational armed conflicts involving terrorists. As national and international courts grapple with the implications of international terrorism, the Court will remain an important voice.

Full text

<http://www.minnesotalawreview.org/articles/the-role-of-the-united-states-supreme-court-in-interpreting-and-developing-humanitarian-law/>

Self-defense targeting of non-state actors and permissibility of U.S. use of drones in Pakistan

Jordan J. Paust. In: *Journal of transnational law and policy* Vol. 19, no. 2, Spring 2010, p. 237-280. - Cote 341.67/680 (Br.)

The United States has used unmanned aerial vehicles (UAVs) or drones over portions of Pakistani territory for reconnaissance and the targeting of members of al Qaeda and the Taliban who have in various ways taken a direct and active part in extensive and ongoing armed attacks against U.S. military personnel and other U.S. nationals in Afghanistan. Some have argued that the U.S. use of drones in Pakistan appears to have violated international law. Is the use of drones within Pakistan merely to target non-state actors under such circumstances violative of international law? Must the United States obtain the express consent of Pakistan before targeting non-state actors who engage in ongoing armed attacks against United States military personnel? Does such a use of armed force against non-state actors necessarily require a conclusion that the United States is at war with either the state from which non-state actor armed attacks are emanating or the non-state actor? Does the selective use of force in self-defense violate the human right to life of human targets who take an active part in the armed attacks? Does use of drones necessarily constitute indiscriminate targeting in violation of the general principle of proportionality? Before addressing these questions, one should consider relevant international legal norms concerning the permissibility of selective self-defense in response to armed attacks by non-state actors emanating from another state.

The Supreme court of Canada's declining of its jurisdiction in not ordering the repatriation of a Canadian Guantanamo detainee : implications of the case for our understanding of international humanitarian law

Sonja Grover. In: *The international journal of human rights* Vol. 15, no. 3, March 2011, p. 481-508. - Cote 345.2/449 (Br.)

The Supreme Court of Canada (SCC) declined its jurisdiction in its 2010 ruling in *Canada (Prime Minister) v. Khadr* by not ordering the repatriation of Canadian Guantanamo detainee Omar Ahmed Khadr. Despite finding that Khadr's deprivation of liberty at Guantanamo was not in accord with the principles of fundamental justice, and that Canada was complicit in his ongoing detention, the Court left the remedy to the Canadian federal government's discretion. This based on a theory of 'royal prerogative' inapplicable on the facts of the case, and an erroneous claim of an inconclusive record relating to alleged relevant foreign relations matters.

Targeting narcoinsurgents in Afghanistan : the limits of international humanitarian law

Michael N. Schmitt. In: *Yearbook of international humanitarian law* Vol. 12, 2009, p. 301-320

In October 2008, upon the request of the Afghan government, NATO Defence Ministers meeting in Budapest agreed that 'ISAF [International Security Assistance Force] can act in concert with the Afghans against facilities and facilitators supporting the insurgency, in the context of counternarcotics, subject to the authorization of respective nations'. In explaining the scope of the contemplated actions, NATO officials noted that drug producers and traffickers who aided the ongoing insurgency could now be attacked. NATO's Supreme Allied Commander Europe (SACEUR), US General Bantz Craddock, justified the policy on the ground that the Taliban reaped over \$100 million annually from the drug trade. US Secretary of Defence Robert Gates likewise defended the decision as sound strategy. It soon became clear that other key figures were less enamoured with the new approach, or the subsequent guidance issued to effectuate it. On 5 January 2009, Craddock instructed General Egon Ramms, the German Commander of Allied Joint Force Command Brunssum, which oversees NATO operations in Afghanistan, 'to attack directly drug producers and facilities throughout Afghanistan'. The threshold for engagement seemed to require little connection to the insurgency. According to SACEUR's guidance, it was 'no longer necessary to produce intelligence or other evidence that each particular drug trafficker or narcotics facility in Afghanistan meets the criteria of being a military objective' because the alliance 'has decided that (drug traffickers and narcotics facilities) are inextricably linked to the Opposing Military Forces, and thus may be attacked'.

Full text : ICRC access

<http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=7918834&fulltextType=RA&fileId=S1389135909000117>

Targeting operations with drone technology : humanitarian law implications

Human rights institute, Columbia law school. - [S.l.] : [S.n.], March 2011. - 38 p. ; 30 cm. - Cote 345.25/54 (Br.)

Background note for the American Society of International Law Annual Meeting panel on "Targeting with drone technology". Part I explores the nature and scope of the armed conflict referenced by the [U.S.] Administration in recent statements, describing debates among scholars about the government's possible theories. Part II discusses scholarly debates about who may be targeted, focusing on standards related to the principle of distinction, and identify basic questions about the government's approach. Part III briefly describes reports of targeting conducted by the CIA and considers implications arising from humanitarian law standards. Conclusion evaluates whether and how drone technology affects calls for government clarity.

Full text

http://www.law.columbia.edu/ipimages/Human_Rights_Institute/BackgroundNoteASILColumbia.pdf

Typology of conflict : terrorism and the ambiguation of the laws of war

Jackson Nyamuya Maogoto and Gywnn MacCarrick. In: GNLU law review Vol. 2, no. 1, 2010, 31 p.. - Cote 303.6/13 (Br.)

One of the reasons that terrorism is unconventional and viewed as beyond the pale is because it adopts an arbitrary stance. War is the predictable and directed waging of armed conflict against an enemy, where as terrorism can not be anticipated or calculated because it's ominous and malevolent actions do not discriminate between the enemy and civilians. In deed the greater the number of civilian casualties the greater the prominence they bring to their political cause. The distinction here is that we can seek to place limits on war because both sides agree to the terms under which they fight and both stand to gain from the benefits of limitation. But acts of terror rely upon the absence of limitation (including the absence distinction, proportionality, military necessity) for psychological impact such that there is no mutual benefit of placing constraints or confines on actions taken. Thus terrorism has passed over the parameters of warfare and into the realm of criminal conduct or alternatively it is employing the methods of warfare with a criminal intent. It seems therefore that terrorists should either be thought of as criminal behavior, in which case they might be accused of violating criminal law, or they should be thought of as acting within the scope of war and peace, in which case they might be accused of violating either the law of war or the law of peace. However, they do not seem to fall clearly in either scenario thus despite being law violators, they have situated themselves in an impossible place, located somewhere outside of the law.

Full text

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Where precision is the aim : locating the targeted killing policies of the United States and Israel within international humanitarian law

Michael Elliot. In: The Canadian yearbook of international law = Annuaire canadien de droit international Vol. 47, 2009, p. 99-158. - Cote 345.26/207 (Br.)

If state practice is any indication, targeted killing is increasingly becoming regarded as a viable and effective response to the threat posed by terrorist organizations. Its growing role in armed conflict makes it particularly important that international humanitarian law (IHL) prove capable of providing an effective framework within which this practice may be governed. As it is currently conceived, however, IHL has shown itself ill-suited to the particular nature of armed conflicts between states and terrorist organizations on a broad level and, more specifically, to the practice of targeted killing. This article examines the decision of the Israeli Supreme Court in *Public Committee against Torture in Israel v. the Government of Israel* as an example of an attempt to fit targeted killing in the context of state-terrorist conflicts within IHL. In particular, it will consider two aspects of the court's judgment : (1) its categorization of terrorists; and (2) its imposition of the "least harmful means" requirement. It will argue that the former exposes the problems that accompany recognizing targeted killing as lawful by interpreting the prevailing legal rules in such a way as to tailor them to the context. It will further argue that the latter, in resorting to an underlying principle of IHL and adapting its articulation to the particular circumstances in which targeted killing occurs, presents the preferable means by which to recognize targeted killing as lawful in state-terrorist conflicts.