



ICRC

IHL Academic Articles - 4th trimester 2010 -

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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.

Case Law. The icon  highlights articles that comment on specific case law decisions.

Access to document. Whenever an article is available in full text, a link allows you to access the article directly. Some links only work from within ICRC premises such as the library.

Library reference number. At the end of the bibliographic reference, "Cote xxx/xxx" refers to the ICRC library referencing number.

Abstracts. When provided by the author or the publisher, the abstract is copied. When not provided, the abstract is elaborated by the legal librarian in charge of the bibliography.

Disclaimer. The classification is made by the library and does not necessarily reflect the opinions of the ICRC.

I. General issues

(General catch-all category, Customary Law)

The ICRC Study on customary international humanitarian law : characteristics, conclusions and practical relevance

Jean-Marie Henckaerts. - December 2009. - p. 225-273. In: Slovenian law review Vol. 6, no. 1-2. - Cote 345.2/820

The article highlights the most salient features of the ICRC Study on Customary International Humanitarian Law, noting the broad development treaty law in this field but asserting that customary law, once the basis of humanitarian law, still continues to exist in parallel with these treaties. It also continues to be relevant, all the more so because the fragmentation of treaty rules and their varied application in terms of contracting parties negatively affect the application of treaty law in practice. The article outlines the work of the study, starting with the mandate awarded, organisation of research and the methodology adopted, and then moves on to the conclusions adopted by the study, listing a number of provisions which should be recognised as part of customary international law. Finally, it reasserts its practical relevance in several areas where it can and has been applied when ascertaining the applicable legal framework, such as military operations, fact-finding, judicial procedures and others. Appended to the article is a list of rules that the study found to form part of customary international law.

Islam and international humanitarian law : a question of compatibility ?

by Robert P. Barnidge. - 2010. - p. 257-274. In: Israel yearbook on human rights Vol. 40.

This article provides a broad overview of scholarly perspectives on an Islamic law of war, perspectives that find broad similarities between Islam and international humanitarian law. It then juxtaposes these findings with the philosophy of militant Islam on the conduct of hostilities. Tying together these thoughts, it stresses the challenges that liberal scholars face in attempting to reconcile these competing narratives in light of militant Islam's philosophical resistance to moderation and uncompromising stance toward all things jahiliyya. These challenges are particularly acute given Islamist understandings of apostasy and militant Islam's rejection of the discursive value of international law itself.

Full text

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1680438

The law of armed conflict in Iraq

Neil Brown... [et al.]. - 2010. - p. 127-206. In: International law studies Vol. 86.

Contains : Legal considerations in relation to maritime operations against Iraq / N. Brown. - Come the revolution : a legal perspective on air operations in Iraq since 2003 / C. J. Dunlap. - The Iraq war : a commander's perspective / M. L. Oates. - The "fog of law" : the law of armed conflict in Operation Iraqi freedom / M. Warren

Full text

<http://www.usnwc.edu/Research---Gaming/International-Law/RightsideLinks/Studies-Series/documents/NavalWarCollegeVol-86.aspx>

Pragmatism and principle in international humanitarian law

Michael M. Lieberman. - 2009. - p. 150-167. In: Israel law review Vol. 42, no. 1. - Cote 345.2/825

As we seek to identify new norms to bridge the gaps between extant law and the challenges that new conflict modes pose today, we confront a threshold question as to which methodological ground we should stand upon in doing so. Based on a background assumption of positivism as the source of substantive norms, the issue for some observers comes down to a clash between pragmatism and formalism. To formalism's proponents, the concept of pragmatism—which sees

law as a functional instrument to be used in pursuit of pre-envisioned ends—has contributed to a dearth of moral obligation in international humanitarian law discourse. Such a view considers that the emphasis on empiricism found in pragmatism both legitimizes and shrouds the reality of effective power lurking behind the law. The alternative they prefer, championed most articulately by Professor Koskenniemi, is a “culture of formalism” that sees law as an object of universal obligation and as a form of critique that unmasks the pragmatic mode for what it is, namely, a rationalization of might. As this Article suggests, this understanding misapprehends the true nature of pragmatism, which is neither a smokescreen nor an apology. Rather, pragmatism’s focus on real-world effects and consequences holds far greater promise for advancing the actual humanitarianism of IHL. Formalism, moreover, is subsumed within the constellation of factors that pragmatic analysis demands. These ideas are explored on a theoretical level, and are then illustrated by a look at the Israel separation barrier cases decided by the International Court of Justice and the Israeli High Court of Justice.

Full text

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1488546

Symposium on complementing international humanitarian law : exploring the need for additional norms to govern contemporary conflict situations

David Kretzmer... [et al.]. - 2009. - 205 p.. In: Israel law review Vol. 42, no. 1. - Cote 345.2/825

Contains: Economic sanctions in IHL : suggested principles / A. Cohen. - The law applicable to non-occupied Gaza : a comment on Bassiouni v. the Prime Minister of Israel / Y. Shany. - Rethinking the application of IHL in non-international armed conflicts / D. Kretzmer. - Pragmatism and principle in international humanitarian law / M. M. Lieberman. - The internal legal order of the European Union as a complementary framework for its obligations under IHL / V. Falco

II. Types of conflicts

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

Application of international humanitarian law to contemporary peace operations : mapping the "grey areas"

Dominika Svarc. - 2010. - p. 529-553. In: Select proceedings of the European society of international law Vol. 2 (2008). - Cote 345.26/201 (Br.)

This paper identifies and explores some of the "grey areas" in the application of international humanitarian law to peace operations. In order to set the background for the analysis, the first part of the paper looks at some of the factual developments that characterise contemporary peace operations, most relevant for the debate about the applicability of international humanitarian law. The second part the proceed to re-examine the relationship between peace operations and international humanitarian law, focusing on some of the most contested issues, such as : the applicability of IHL to peace operations *rationae materiae*; the determination of applicable (international or non-international) legal regime; the applicability of the law of occupation; and the legal status of peace forces in terms of IHL.

Computer network attacks in the grey areas of jus ad bellum and jus in bello

Erki Kodar. - 2009. - p. 133-155. In: Baltic yearbook of international law Vol. 9. - Cote 345.26/181 (Br.)

Both qualitatively and quantitatively the attacks perpetrated on Estonia's critical IT-systems in April and May 2007 were the largest of any known cyber attacks that have taken place in the world recently. Computer network attack (CNA) demands that military operations planners and high-ranking government officials take into account the following questions of jus ad bellum

and jus in bello. For example, does a cyber attack constitute an armed attack under the UN Charter? Does there have to be physical damage to property or loss of life before a state can exercise the right of self-defense? Is the cyber attack a violation of criminal or international law? In what cases is there state responsibility for acts of individuals acting from its own territory? What could be the future perspectives for the regulation of CNA? The purpose of this article is to provide a general assessment of the legal consequences of CNA according to jus ad bellum and jus in bello, mapping the problems encountered in both spheres of law upon the application of international law on CNA, and to suggest possible future perspectives for the regulation of CNA.

The international humanitarian law classification of armed conflicts in Iraq since 2003

by David Turns. - 2010. - p. 39-66. In: Israel yearbook on human rights Vol. 40.

This article considers the characterisation of the armed conflict in Iraq under IHL in each of four stages through which the conflict has gone. While the characterisation of the conflict as an international armed conflict (IAC) in its early stages (invasion through occupation) was clear enough, after the end of occupation it could not have been an IAC on a plain reading of the scope of application provisions of the Geneva Conventions, but nor could it have been a non-international armed conflict by the same terms or by any application of logic.

Rethinking the application of IHL in non-international armed conflicts

David Kretzmer. - 2009. - p. 8-45. In: Israel law review Vol. 42, no. 1. - Cote 345.2/825

The first step in application by treaty of IHL norms to non-international armed conflicts, adoption of Common Article 3 of the Geneva Conventions, 1949, was taken before the dramatic development of international human rights law (IHRL). The assumption was that unless international humanitarian law (IHL) norms were applied to such conflicts, the way States acted would be unrestrained by international law. With the development of IHRL this assumption is no longer valid. Application of IHL in such conflicts should therefore be re-examined. The Article argues that moving away from IHL in non-international armed conflicts should be based on the following principles: 1. In cases other than international armed conflicts, the presumption should be that the prevailing international legal regime is the human rights regime, based as it is on a law-enforcement model of law, rather than an armed conflict model. 2. The only justification for departure from that regime and for action under the armed conflict model, should be that the level and scope of organized armed violence are such that the State cannot reasonably be expected to act in accordance with the law-enforcement model. The rule of thumb in deciding whether this test has been met could be the definition of non-international armed conflicts adopted in APII. 3. There should be a return to the notion of minimum humanitarian standards or fundamental standards of humanity, which apply to all parties in all situations, whether armed conflict, internal violence, disturbances, tensions and public emergencies. 4. A State should not be allowed to employ the armed conflict model, without at least some of the norms of protection that this model affords parties in international armed conflicts. The ideal solution would be to demand that a State, which employs the armed conflict model has to draw the legal consequences and recognize as combatants those members of dissident forces who meet the substantive conditions of combatants under Article 4, paragraph 2 of Third Geneva Convention.

Full text

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1408011

III. Armed forces / Non-state armed groups

(Combatant status, compliance with IHL, etc.)

Civilians in cyberwarfare : casualties

Susan W. Brenner and Leo L. Clarke. - Summer 2010. - p. 249-282. In: SMU science and technology law review Vol. 13, no. 3. - Cote 345.29/5 (Br.)

This article is a sequel to *Civilians in Cyberwarfare: Conscripts*, to be published by the Vanderbilt Journal of Transnational Law. *Conscripts* addresses the essential role of civilians as participants in cyberwarfare. Here, we explore the potential losses cyberwarfare might cause to civilian entities, including multi-national corporations, utilities, universities and local governments. We explain why cyberwarfare presents unique risks and requires unique executive responses. We also analyze how civilians should manage specific legal liability, political and reputational risks. Finally, we consider whether civilians can expect compensation if the federal government imposes new regulations, appropriates intellectual property, or even conscripts entire businesses in connection with cyberwarfare.

Civilians in cyberwarfare : conscripts

Susan W. Brenner with Leo L. Clarke. - 2010. - p. 1011-1076. In: Vanderbilt journal of transnational law Vol. 43, no. 4. - Cote 345.29/1 (Br.)

Civilian-owned and -operated entities will almost certainly be a target in cyberwarfare because cyberattackers are likely to be more focused on undermining the viability of the targeted state than on invading its territory. Cyberattackers will probably target military computer systems, at least to some extent, but in a departure from traditional warfare, they will also target companies that operate aspects of the victim nation's infrastructure. Cyberwarfare, in other words, will penetrate the territorial borders of the attacked state and target high-value civilian businesses. Nation-states will therefore need to integrate the civilian employees of these (and perhaps other) companies into their cyberwarfare response structures if a state is to be able to respond effectively to cyberattacks. While many companies may voluntarily elect to participate in such an effort, others may decline to do so, which creates a need, in effect, to conscript companies for this purpose. This Article explores how the U.S. government can go about compelling civilian cooperation in cyberwarfare without violating constitutional guarantees and limitations on the power of the Legislature and the Executive.

Full text

<http://law.vanderbilt.edu/publications/journal-of-transnational-law/archives/vol-43-number-4/download.aspx?id=6226>

Some reflections on the international legal framework governing transnational armed conflicts

Claus Kress. - Summer 2010. - p. 245-274. In: Journal of conflict and security law Vol. 15, no. 2.

Transnational non-State armed violence calls for a reconsideration of the existing concepts of the *ius contra bellum*, the *ius in bello* and international human rights law, and international criminal law in order to see whether new concepts such as the category of 'transnational armed conflict law' are needed. This article suggests that current international law can adequately deal with transnational armed conflicts without having to devise fundamentally new legal categories. Instead, it is possible, though intellectually demanding, to adjust and to fine tune the existing legal concepts including, in particular, the right to self-defence and the law of non-international armed conflict, and to construe on that basis an overall legal framework that provides for both a coherent and a reasonably balanced answer to the challenges posed.

Full text: ICRC access

<http://jcsf.oxfordjournals.org/content/15/2/245.full.pdf>

IV. Multinational forces

Application of international humanitarian law to contemporary peace operations : mapping the "grey areas"

Dominika Svarc. - 2010. - p. 529-553. In: Select proceedings of the European society of international law Vol. 2 (2008). - Cote 345.26/201 (Br.)

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Gas smells awful : U.N. forces, riot-control agents, and the chemical weapons convention

James D. Fry. - Spring 2010. - p. 475-558 : tabl.. In: Michigan journal of international law Vol. 31, no. 3. - Cote 341.67/154 (Br.)

This article takes a comprehensive look at the use of riot-control agents (RCAs) by U.N. forces and the legal issues that arise as a result. The thesis of this article is that RCA use by U.N. forces is potentially illegal and certainly bad policy. The CWC clearly allows RCAs for domestic law-enforcement purposes and is unclear, at best, for many other situations. The article explains how the CWC prohibits RCAs and explores whether this prohibition applies directly to U.N. forces. This article is particularly timely, given that some key states, such as the United States, recently have shown a willingness to reconsider their interpretation of disabling chemicals under the Chemical Weapons Convention and support the ICRC's efforts in this realm.

Full text

<http://students.law.umich.edu/mjil/article-pdfs/v31n3-fry.pdf>

The internal legal order of the European Union as a complementary framework for its obligations under IHL

Valentina Falco. - 2009. - p. 168-205. In: Israel law review Vol. 42, no. 1. - Cote 345.2/825

When exploring the sources of International Humanitarian Law (IHL) obligations of multinational peacekeeping forces, legal scholars have thus far focused mainly on the UN (and, to a lesser extent, NATO), whilst other organizations have remained largely in the shadows. Whereas the UN Secretary-General's Bulletin on the Observance by UN Forces of International Humanitarian Law has been widely debated and extensively investigated, little or no attention has been paid to self-regulatory solutions adopted by other international and regional organizations. This Article focuses on the European Union (EU), holding that this regional organization—by virtue of its sui generis nature and of its increasing engagement in the field of crisis management—can be regarded as one of the most interesting newcomers to the realm of jus in bello. More specifically, it looks at the EU's internal legal order with a view to verifying whether and to what extent it may complement customary IHL in regulating the conduct of the EU as a military actor. The Article surveys the primary and secondary sources of EU legislation which may prima facie spell out obligations for the EU-led troops engaged in European Security and Defence Policy military operations. Finally, the Article seeks to draw some broader conclusions on the nature of the relationship between EU law and IHL, as well as on the complementarity and inherent normative value of their sources.

Full text

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1488874

V. Private actors

Civilians in cyberwarfare : casualties

Susan W. Brenner and Leo L. Clarke. - Summer 2010. - p. 249-282. In: SMU science and technology law review Vol. 13, no. 3. - Cote 345.29/5 (Br.)

This article is a sequel to *Civilians in Cyberwarfare: Conscripts*, to be published by the *Vanderbilt Journal of Transnational Law*. *Conscripts* addresses the essential role of civilians as participants in cyberwarfare. Here, we explore the potential losses cyberwarfare might cause to civilian entities, including multi-national corporations, utilities, universities and local governments. We explain why cyberwarfare presents unique risks and requires unique executive responses. We also analyze how civilians should manage specific legal liability, political and reputational risks. Finally, we consider whether civilians can expect compensation if the federal government imposes new regulations, appropriates intellectual property, or even conscripts entire businesses in connection with cyberwarfare.

VI. Protection of persons

The Red Cross and the Geneva Conventions : 60 years on

New Zealand Red Cross. - 2010. - p. 113-121. In: *Victoria university of Wellington law review* Vol. 41, issue 2. - Cote 345.2/830

Introductory remarks of the New Zealand Red Cross stressing the basic principles underlying the Geneva Conventions: the notion of respect for the life and dignity of the individual and the duty for all parties to a conflict to ensure that those who suffer in conflict be aided and cared for without distinction. Noble as they may be, these principles continue to be tested in contemporary conflicts of an international or non-international character. For example, the protection of health workers and the actual delivery of health care to the victims of armed conflicts remain a priority for the ICRC and national Red Cross and Red Crescent societies, but the support and commitment of governments, armed forces and non-State armed groups required for their success are not always forthcoming.

VII. Protection of objects

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

N/A

VIII. Detention, internment, treatment and judicial guarantees

Detention operations in Iraq : a view from the ground

by Brian J. Bill. - 2010. - p. 67-115. In: *Israel yearbook on human rights* Vol. 40.

This paper attempts to shed some light on detention operations conducted by the Coalition Forces, focusing on those aspects associated with the legal authorities to detain and release detainees. Part I discusses the legal background against which detention of persons are authorized during conflicts and other operations. Part II describes in some detail the command structure of the operation, the applicable regulatory guidance, and the explains the various review processes, during the 2007-2008 period, by which detainees were initially interned and then eventually released.

The role of the International Committee of the Red Cross in stability operations in Iraq

by Laurent Colassis. - 2010. - p. 183-202. In: *Israel yearbook on human rights* Vol. 40.

In order to examine the role of the International Committee of the Red Cross (ICRC) in stability operations in Iraq, this article examines the ICRC's mandate, its main activities in Iraq, and the major legal challenges it faces as it conducts its activities.

IX. Law of occupation

Complementing occupation law ? : selective judicial treatment of the suitability of human rights norms

Ralph Wilde. - 2009. - p. 80-100. In: Israel law review Vol. 42, no. 1. - Cote 345.2/825

This Article offers a critical evaluation of the treatment of the suitability of applying human rights law to occupation situations offered by the English House of Lords in the Al-Skeini judgment of 2007. Al-Skeini concerned the application of the European Convention on Human Rights (ECHR) to the United Kingdom in Iraq. In the decision, the majority asserted that the application of human rights law would amount to a form of “imperialism” in requiring an occupying State to impose culturally inappropriate norms in occupied territory. They also found that its application would undermine the status quo norm contained in occupation law, by obliging an occupying State to transform the legal system in occupied territory in order to bring it in line with the human rights standards in play. This Article argues that these two assertions are based on a mistaken understanding of the substantive meaning of human rights obligations in occupation situations, and the effect on this meaning of the interface with other areas of international law. It is suggested that the fear of “human rights imperialism” is, as articulated here, misconceived; that applying human rights law to occupation situations may not actually involve breaching the law of occupation; and that in any case a more sophisticated approach to the question of clashes in normative regimes needs to be adopted.

Full text

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1488819

An enduring occupation : the status of the Gaza Strip from the perspective of international humanitarian law

Shane Darcy and John Reynolds. - Summer 2010. - p. 211-243. In: Journal of conflict and security law Vol. 15, no. 2.

The status of the Gaza Strip as occupied territory has been the subject of renewed policy, judicial and academic debate following a series of noteworthy developments in the territory since 2005. This article considers the present status of Gaza from the perspective of international humanitarian law in light of these events, which include Israel’s ‘disengagement’ from the Gaza Strip in 2005, its declaration of Gaza as a ‘hostile territory’ in 2007, and the military action labelled ‘Operation Cast Lead’ which commenced in late 2008. It addresses the concept of occupation and the application of the laws of belligerent occupation, making recourse to the travaux préparatoires of relevant treaties, and international and national jurisprudence. In focusing on the situation in the Gaza Strip, the article assesses the various criteria identified in customary international law for determining the existence of a situation of occupation.

Full text: ICRC access

<http://jcsf.oxfordjournals.org/content/15/2/211.full.pdf>

The law applicable to non-occupied Gaza : a comment on Bassiouni v. the Prime Minister of Israel

Yuval Shany. - 2009. - p. 101-116. In: Israel law review Vol. 42, no. 1. - Cote 345.2/825

Although Israel no longer effectively controls Gaza, Israel’s of overwhelming physical dominance over Gaza, coupled with the historical links of dependence, were likely central to the balancing formula applied by the High Court of Justice in Bassiouni v. The Prime Minister. The proposed solution—Israel assumes obligations that go beyond the requirements of International Humanitarian Law (IHL) in situations of siege but that fall short of the requirements applicable in situations of occupation—is the “basic humanitarian needs” standard. The main weakness of the Court’s decision is not the final outcome it prescribes but the underdeveloped legal analysis of the alternative grounds for imposing obligations on the Israel. This unnecessarily complicates attempts to grasp the full implications of the decision and to identify its precedential value. However, the judgment should be viewed as endorsing the need to step outside IHL and look for

additional legal norms governing humanitarian interests which may reflect our moral sensibilities and contemporary needs in a more appropriate manner than the traditional rules of IHL.

Full text

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1350307

Moving the law of occupation into the twenty-first century

Breven C. Parsons. - 2009. - p. 1-48. In: Naval law review Vol. 57.

The article uses historical examples to illustrate the state practice of avoiding the law of occupation. These historical examples highlight the tension between the existing law and state practice and underscore the necessity to update the law of occupation. It discusses some of the proposed theories for changing the law of occupation and argues for an international treaty built upon the current law, with four major components. Those components include: 1) creating a mechanism for multilateral international oversight of the occupant's activities, 2) requiring U.N. approval or other multilateral agreement for the system of administration of the occupation, 3) incorporating by reference certain human rights to solidify the application of those rights within the *lex specialis* of the law of occupation, and 4) allowing for departure from the conservationist principle in limited cases with legitimate transformative objectives.

Full text

<http://www.jag.navy.mil/documents/navylawreview/NLRVolume57.pdf>

X. Conduct of hostilities

(Distinction, proportionality, precautions, prohibited methods)

The great oxymoron : jus in bello violations as legitimate non-forcible measures of self-defense : the post-disengagement Israeli measures towards Gaza as a case study

Solon Solomon. - 2010. - p. 501-536. In: Chinese journal of international law Vol. 9, issue 3. - Cote 345.26/199 (Br.)

Modern warfare and the war on terror against mainly non-State actors have obliged States to resort to innovative measures which blur the limits between *jus in bello* and *jus ad bellum* and create a legal oxymoron where the same measures constitute international law violations should they be perceived under *jus in bello* and legitimate means of self-defense should they be seen under the lens of self-defense and *jus ad bellum*. In order to demonstrate the particular axiom the note will use the Israeli–Palestinian conflict as a factual and normative framework and will put under its kaleidoscope the post-disengagement Israeli measures towards Gaza.

Military necessity : a fundamental "principle" fallen into oblivion

Robin Geiss. - 2010. - p. 554-568. In: Select proceedings of the European society of international law Vol. 2 (2008). - Cote 345.25/47 (Br.)

This contribution seeks to reassess military necessity's contemporary scope and role. It aims to demonstrate that our understanding of military necessity has a far-ranging impact on such timely issues as IHL's interrelation with human rights law, the permissibility of targeted killings and the operation of IHL in asymmetric conflict scenarios. To this end, the analysis pursues two basic questions. Firstly, does contemporary IHL leave room for recourse to military necessity's restrictive aspects in order to close potential loopholes in the legal framework? IHL, for example, makes no provision with regard to the degree of force permissible against unprotected persons, combatants and civilians directly participating in hostilities. Secondly, the question is raised whether military necessity is reconcilable with today's increasingly soft continuum of war and peace. These two questions touch upon the two distinctive components of military necessity: the necessity component, which naturally begs the question "necessary for what", and the "military component", which answers this question, because it encapsulates those aims that may legitimately be pursued in the conduct of hostilities.

Rethinking the application of IHL in non-international armed conflicts

David Kretzmer. - 2009. - p. 8-45. In: Israel law review Vol. 42, no. 1. - Cote 345.2/825

The first step in application by treaty of IHL norms to non-international armed conflicts, adoption of Common Article 3 of the Geneva Conventions, 1949, was taken before the dramatic development of international human rights law (IHRL). The assumption was that unless international humanitarian law (IHL) norms were applied to such conflicts, the way States acted would be unrestrained by international law. With the development of IHRL this assumption is no longer valid. Application of IHL in such conflicts should therefore be re-examined. The Article argues that moving away from IHL in non-international armed conflicts should be based on the following principles: 1. In cases other than international armed conflicts, the presumption should be that the prevailing international legal regime is the human rights regime, based as it is on a law-enforcement model of law, rather than an armed conflict model. 2. The only justification for departure from that regime and for action under the armed conflict model, should be that the level and scope of organized armed violence are such that the State cannot reasonably be expected to act in accordance with the law-enforcement model. The rule of thumb in deciding whether this test has been met could be the definition of non-international armed conflicts adopted in APII. 3. There should be a return to the notion of minimum humanitarian standards or fundamental standards of humanity, which apply to all parties in all situations, whether armed conflict, internal violence, disturbances, tensions and public emergencies. 4. A State should not be allowed to employ the armed conflict model, without at least some of the norms of protection that this model affords parties in international armed conflicts. The ideal solution would be to demand that a State, which employs the armed conflict model has to draw the legal consequences and recognize as combatants those members of dissident forces who meet the substantive conditions of combatants under Article 4, paragraph 2 of Third Geneva Convention.

Full text

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1408011

Shelling, sniping and starvation : the law of armed conflict and the lessons of the siege of Sarajevo

K. J. Riordan. - 2010. - p. 149-178. In: Victoria university of Wellington law review Vol. 41, issue 2. - Cote 345.2/830

This article looks at the siege of Sarajevo conducted from April 1992 to February 1996, which resulted in the loss of thousands of lives and great suffering to the civilian population of the city. It also resulted in criminal convictions for Bosnian Serb commanders Stanislav Galic and Dragomir Milosevic. This article examines the traditional methods of warfare associated with the successful prosecution of a siege and contrasts them with the detailed and onerous provisions of the law of armed conflict. It ponders the question of what a modern commander must do to conduct a siege which is both lawful and successful.

So-called targeted killings in volatile occupied territories : critical appraisal through the concept of direct participation in hostilities and the principle of proportionality

Yutaka Arai-Takahashi. - 2009. - [p. 1-47]. In: Kokusaiho gaiko zasshi = Revue mensuelle de droit international et diplomatique = Journal of international law and diplomacy Vol. 108, no. 4. - Cote 345.25/43 (Br.)

This paper aims to analyse the so-called targeted killings undertaken in volatile occupied territories riddled with (occasional or frequent) eruptions of armed violence. It seeks to examine the extent to which the interlocking relationship between international humanitarian law (IHL) and international human rights law (IHRL) can operate to address the conditions under which an occupying power in such turbulent context of occupation can resort to lethal measures against individual persons which it considers to pose an imminent and serious danger. In so doing, the paper will focus on two key areas that are of special relevance to the assessment of targeted killings: (i) the elements (Tatbestand) of the concept of direct participation in hostilities; and (ii) the role of the IHL-based principle of proportionality, as influenced by the

IHL-derived test of proportionality, in constraining lethal pinpoint measures taken in the course of conduct of hostilities.

XI. Weapons

Gas smells awful : U.N. forces, riot-control agents, and the chemical weapons convention

James D. Fry. - Spring 2010. - p. 475-558 : tabl.. In: Michigan journal of international law Vol. 31, no. 3. - Cote 341.67/154 (Br.)

This article takes a comprehensive look at the use of riot-control agents (RCAs) by U.N. forces and the legal issues that arise as a result. The thesis of this article is that RCA use by U.N. forces is potentially illegal and certainly bad policy. The CWC clearly allows RCAs for domestic law-enforcement purposes and is unclear, at best, for many other situations. The article explains how the CWC prohibits RCAs and explores whether this prohibition applies directly to U.N. forces. This article is particularly timely, given that some key states, such as the United States, recently have shown a willingness to reconsider their interpretation of disabling chemicals under the Chemical Weapons Convention and support the ICRC's efforts in this realm.

Full text

<http://students.law.umich.edu/mjil/article-pdfs/v31n3-fry.pdf>

XII. Implementation

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

Regional approaches to international humanitarian law

Richard Burchill. - 2010. - p. 205-233. In: Victoria university of Wellington law review Vol. 41, issue 2. - Cote 345.2/830

Violations of international humanitarian law (IHL) are a global concern. The enforcement of IHL has traditionally focused on the State level. As States have shown an unwillingness or inability to address violations, attention has moved to the international level primarily through universal approaches such as the International Criminal Court. However, experience has demonstrated that universal approaches also have their limitations. This article argues that regional arrangements offer the possibility of strengthening the enforcement of IHL. As regional arrangements occupy a distinct space between particular local conditions and the universalising tendencies of the global system, they are well placed to handle the various concerns and considerations surrounding the enforcement of IHL.

La restriction de la compétence universelle des juridictions nationales : les exemples belge et espagnol

par Jacobo Riós Rodríguez. - 2010. - p. 563-595. In: Revue générale de droit international public T. 114, no 3.

La Belgique, jusqu'en 2003, et l'Espagne, jusqu'en 2009, avaient deux lois particulièrement avancées dans le domaine de la compétence universelle de leurs tribunaux, permettant de la qualifier d'"absolue". Face au recul de ces deux Etats par la modification restrictive de leurs instruments législatifs, il convient d'analyser dans une perspective comparative, dans la palette de solutions possibles offertes par le droit international aux Etats, quand, pourquoi et comment cette limitation a eu lieu. Si, dans les deux cas, un certain nombre de similitudes de fond émerge parmi les divergences de forme, des incertitudes en ce qui concernent leur application devront encore être résolues.

The universality of IHL : surmounting the last bastion of the Pacific

Kelisiana Thynne. - 2010. - p. 135-147. In: Victoria university of Wellington law review Vol.41, issue 2. - Cote 345.2/830

There are other major international humanitarian law (IHL) instruments developed in the last 60 years which are yet to achieve universal ratification. In the Pacific, in particular, it is often difficult to demonstrate how IHL is relevant. This article addresses the challenges that the Pacific region poses in terms of IHL ratification and discusses how IHL instruments are indeed pertinent to the Pacific context, focusing on the three Additional Protocols to the Geneva Conventions, the Convention on the Prohibition of Anti-Personnel Mines and the Rome Statute of the International Criminal Court. It concludes that in the Pacific these challenges should be seen as opportunities to address historical and current problems associated with war and that, by the next major anniversary, the Pacific might be, if not leading the way, at least not lagging behind.

XIII. International Human Rights Law

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

Complementing occupation law ? : selective judicial treatment of the suitability of human rights norms

Ralph Wilde. - 2009. - p. 80-100. In: Israel law review Vol. 42, no. 1. - Cote 345.2/825

This Article offers a critical evaluation of the treatment of the suitability of applying human rights law to occupation situations offered by the English House of Lords in the *Al-Skeini* judgment of 2007. *Al-Skeini* concerned the application of the European Convention on Human Rights (ECHR) to the United Kingdom in Iraq. In the decision, the majority asserted that the application of human rights law would amount to a form of "imperialism" in requiring an occupying State to impose culturally inappropriate norms in occupied territory. They also found that its application would undermine the status quo norm contained in occupation law, by obliging an occupying State to transform the legal system in occupied territory in order to bring it in line with the human rights standards in play. This Article argues that these two assertions are based on a mistaken understanding of the substantive meaning of human rights obligations in occupation situations, and the effect on this meaning of the interface with other areas of international law. It is suggested that the fear of "human rights imperialism" is, as articulated here, misconceived; that applying human rights law to occupation situations may not actually involve breaching the law of occupation; and that in any case a more sophisticated approach to the question of clashes in normative regimes needs to be adopted.

Full text

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1488819

XIV. International Criminal Law

The complicity and limits of international law in armed conflict rape

John D. Haskell. - Winter 2009. - p. 35-84. In: Boston college third world law journal Vol. 29, issue 1. - Cote 344/52 (Br.)

The inauguration of the International Criminal Court and the proliferation of criminal tribunals over the last twenty years are often presented as historic and progressive moments in the trajectory of international law's response to victims of rape in armed conflicts. However, these moments may signal not only inclusion, but also repression. They signal not just progress, but also a renewed rhetorical and institutional legitimization of colonialism. Historicizing the advent of the International Criminal Tribunal for Rwanda, the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Court, this Article examines some ways that international law obfuscates its complicity in armed conflict rape, looking particularly at calls within the profession for greater efficiency, nation state security, and reparations for victims. In doing so, this Article grapples with questions concerning the limits and alternatives to our current legal imagination towards rape in armed conflict.

Full text

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1700344

Criminal responsibility of German soldiers in Afghanistan : the case of colonel Klein

by Constantin von der Groeben. - 2010. - p. 469-492. In: German law journal Vol. 11, no. 5. - Cote 344/514 (Br.)

On 4 September 2009 an officer of the German Bundeswehr (German Army) in Afghanistan, Colonel Georg Klein, ordered an airstrike against two gas tanker trucks hijacked by the Taliban. In this airstrike, carried out by U.S. Air Force pilots, up to 140 people were killed, among them not only members of the Taliban but also many civilians. This raises the question of criminal responsibility of German soldiers who operate in Afghanistan. The Generalbundesanwalt (General Public Prosecutor) investigated the case and recently decided to terminate the investigations against Colonel Klein. Despite this decision not all questions are answered. I will present a more comprehensive analysis of the case, not only commenting on the decision of the Generalbundesanwalt, but also applying different factual hypotheses leading to a different legal assessment of the case. At the outset I will look back at the line of cases known as the "Road Block Cases," and seek to explain how the criminal responsibility of German soldiers has been dealt with in the past.

Full text

http://www.germanlawjournal.com/pdfs/Vol11-No5/PDF_Vol_11_No_05_469-492_Articles_von%20der%20Groeben%20FINAL.pdf

A prosecution too far ? : reflections on the accountability of heads of states under international criminal law

Steven Freeland. - 2010. - p. 179-204. In: Victoria university of Wellington law review Vol. 41, issue 2. - Cote 345.2/830

The recent issue by the International Criminal Court (ICC) of an arrest warrant against Omar Al Bashir, the President of Sudan, for alleged war crimes and crimes against humanity, represents the first time that the ICC has acted in such a way against an incumbent Head of State. It has renewed the debate about the potential international criminal responsibility of Heads of State and has led to strong opinions both for and against such actions. Yet, the prosecution of Heads of State is by no means a new phenomenon, and its continued use represents an important element in the internationalisation of justice that has gained renewed emphasis over the past two decades. This article offers some thoughts and reflections on several key issues associated with this debate, focusing particularly on the political, legal and historical dimensions that have combined to allow for the prosecution under international criminal law of any person, irrespective of their official capacity. It also examines the important role in this regard for the ICC, the world's first permanent international criminal tribunal, as well as the increasing range of prosecutions now taking place within national jurisdictions, as the period of impunity in relation to the commission of international crimes that had existed for several decades up to the 1990s has come to an end.

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par Jacobo Riós Rodríguez. - 2010. - p. 563-595. In: Revue générale de droit international public T. 114, no 3.

La Belgique, jusqu'en 2003, et l'Espagne, jusqu'en 2009, avaient deux lois particulièrement avancées dans le domaine de la compétence universelle de leurs tribunaux, permettant de la qualifier d'"absolue". Face au recul de ces deux Etats par la modification restrictive de leurs instruments législatifs, il convient d'analyser dans une perspective comparative, dans la palette de solutions possibles offertes par le droit international aux Etats, quand, pourquoi et comment cette limitation a eu lieu. Si, dans les deux cas, un certain nombre de similitudes de fond émerge parmi les divergences de forme, des incertitudes en ce qui concernent leur application devront encore être résolues.

XV. Contemporary challenges

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

Civilians in cyberwarfare : conscripts

Susan W. Brenner with Leo L. Clarke. - 2010. - p. 1011-1076. In: Vanderbilt journal of transnational law Vol. 43, no. 4. - Cote 345.29/1 (Br.)

Civilian-owned and -operated entities will almost certainly be a target in cyberwarfare because cyberattackers are likely to be more focused on undermining the viability of the targeted state than on invading its territory. Cyberattackers will probably target military computer systems, at least to some extent, but in a departure from traditional warfare, they will also target companies that operate aspects of the victim nation's infrastructure. Cyberwarfare, in other words, will penetrate the territorial borders of the attacked state and target high-value civilian businesses. Nation-states will therefore need to integrate the civilian employees of these (and perhaps other) companies into their cyberwarfare response structures if a state is to be able to respond effectively to cyberattacks. While many companies may voluntarily elect to participate in such an effort, others may decline to do so, which creates a need, in effect, to conscript companies for this purpose. This Article explores how the U.S. government can go about compelling civilian cooperation in cyberwarfare without violating constitutional guarantees and limitations on the power of the Legislature and the Executive.

Full text

<http://law.vanderbilt.edu/publications/journal-of-transnational-law/archives/vol-43-number-4/download.aspx?id=6226>

Computer network attacks in the grey areas of jus ad bellum and jus in bello

Erki Kodar. - 2009. - p. 133-155. In: Baltic yearbook of international law Vol. 9. - Cote 345.26/181 (Br.)

Both qualitatively and quantitatively the attacks perpetrated on Estonia's critical IT-systems in April and May 2007 were the largest of any known cyber attacks that have taken place in the world recently. Computer network attack (CNA) demands that military operations planners and high-ranking government officials take into account the following questions of jus ad bellum and jus in bello. For example, does a cyber attack constitute an armed attack under the UN Charter? Does there have to be physical damage to property or loss of life before a state can exercise the right of self-defense? Is the cyber attack a violation of criminal or international law? In what cases is there state responsibility for acts of individuals acting from its own territory? What could be the future perspectives for the regulation of CNA? The purpose of this article is to provide a general assessment of the legal consequences of CNA according to jus ad bellum and jus in bello, mapping the problems encountered in both spheres of law upon the application of international law on CNA, and to suggest possible future perspectives for the regulation of CNA.

Cyber threats and the law of war

David E. Graham. - 2010. - p. 87-102. In: Journal of national security law and policy Vol. 4, no. 1. - Cote 345.26/189 (Br.)

Succinct and brief explanation of how the existing law of war (LOW) might be applied to cyber threats. The question of how the current LOW apply to cyber warfare can be addressed only after it is first determined that a state might legally use "force" in responding to what it perceives to be "cyber attacks".

Military necessity : a fundamental "principle" fallen into oblivion

Robin Geiss. - 2010. - p. 554-568. In: Select proceedings of the European society of international law Vol. 2 (2008). - Cote 345.25/47 (Br.)

This contribution seeks to reassess military necessity's contemporary scope and role. It aims to demonstrate that our understanding of military necessity has a far-ranging impact on such timely issues as IHL's interrelation with human rights law, the permissibility of targeted killings and the operation of IHL in asymmetric conflict scenarios. To this end, the analysis pursues two basic questions. Firstly, does contemporary IHL leave room for recourse to military necessity's restrictive aspects in order to close potential loopholes in the legal framework? IHL, for example, makes no provision with regard to the degree of force permissible against unprotected persons, combatants and civilians directly participating in hostilities. Secondly, the question is raised whether military necessity is reconcilable with today's increasingly soft continuum of war and peace. These two questions touch upon the two distinctive components of military necessity: the necessity component, which naturally begs the question "necessary for what", and the "military component", which answers this question, because it encapsulates those aims that may legitimately be pursued in the conduct of hostilities.

Some reflections on the international legal framework governing transnational armed conflicts

Claus Kress. - Summer 2010. - p. 245-274. In: Journal of conflict and security law Vol. 15, no. 2. - Cote 345.2/825

Transnational non-State armed violence calls for a reconsideration of the existing concepts of the *ius contra bellum*, the *ius in bello* and international human rights law, and international criminal law in order to see whether new concepts such as the category of 'transnational armed conflict law' are needed. This article suggests that current international law can adequately deal with transnational armed conflicts without having to devise fundamentally new legal categories. Instead, it is possible, though intellectually demanding, to adjust and to fine tune the existing legal concepts including, in particular, the right to self-defence and the law of non-international armed conflict, and to construe on that basis an overall legal framework that provides for both a coherent and a reasonably balanced answer to the challenges posed.

Full text: ICRC access

<http://jcsf.oxfordjournals.org/content/15/2/245.full.pdf>

Transnational armed conflict : a "principled" approach to the regulation of counter-terror combat operations

Geoffrey S. Corn and Eric Talbot Jensen. - 2009. - p. 46-79. In: Israel law review Vol. 42, no. 1. - Cote 345.2/825

Transnational armed conflicts have become a reality. The increasing sophistication of terrorist organizations, their increasingly transnational nature, and their development of military strike capabilities, push and will continue to push States to resort to combat power as a means to defend against this threat. Relying on the factual fiction that the acts of such terrorists must be attributable to the States from which they launch their operations, or on the legal fiction that the use of military combat power to respond to such threats is in reality just extraterritorial law enforcement, fails to acknowledge the essential nature of such operations. Because these operations invoke the authority of the LOAC, they should and must be treated as armed conflicts. LOAC principles must be identified and must be broad enough to provide the authority necessary to bring the transnational enemy to submission while ensuring that that authority does not override fundamental humanitarian protections for victims of war. This Article proposes three essential pillars of this regulatory foundation: military necessity, targeting (object/distinction and proportionality), and humane treatment. These principles provide the balance between authority and obligation that is so essential for the effective and disciplined application of combat power. Like the treatment of internal armed conflict, these pillars can form a foundation for a more comprehensive treatment of regulatory analysis, encompassing other issues such as command responsibility, criminal liability, access to judicial review, perfidy and treachery, and medical obligations.

Full text

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1256380