International Committee of the Red Cross Library’s classified acquisitions on international humanitarian law
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Introduction

The ICRC Library

The ICRC endeavors to prevent suffering by promoting and strengthening International Humanitarian Law (IHL) and universal humanitarian principles. The ICRC Library in Geneva contributes to this mission by keeping a strong collection of IHL documents to help ICRC colleagues in their work. While the library was primarily set up to support ICRC staff members, it also takes on its own share of dissemination towards the general public.

To this effect, the library holds a wide collection of specific IHL documents at public disposal: preparatory documents, reports, records, and final acts of the Diplomatic Conferences having led to the adoption of the main IHL treaties; records of the Red Cross and Red Crescent Movement Conferences during which numbers of questions related to IHL are discussed; every issue of International Red Cross Review from its creation until nowadays; all ICRC publications; rare documents published during the period between the creation of ICRC to the end of World War I and reflecting the effect of Dunant’s idea; a unique collection of national legislations and national case law implementing IHL at a domestic level.

The library also acquires as much as possible external IHL publications, at least in English and French. Every journals article, chapter, book, working paper, report... is catalogued separately in order to make the library’s online catalogue (http://www.cid.icrc.org/library/) one of the most exhaustive place to start researching IHL.

The library is open to the public from Monday to Thursday (9.00 to 17.00 non-stop) and Friday (9.00 to 13.00).

Origin and purpose of the IHL bibliography

At first, the bibliography was initiated at the request of field communication delegates in charge of encouraging universities to offer IHL courses and of giving assistance to professors who teach this subject. The delegates needed a tool they could give their interlocutors to help them develop or update their knowledge in IHL.

According to their needs, it was decided to classify the documents so readers could pick-up only what they needed, access the documents as easily as possible and have abstracts so they could decide whether or not to read a document in entirety.

As it quickly appeared, the bibliography was also helpful to any other researcher, student or legal professional working in the field of IHL. Therefore, the library decided to make the product public.

In sum, the bibliography can be useful to develop and strengthen IHL knowledge, help ICRC delegations, National Societies, schools, universities, research centres ... to feed their library in the field of IHL, keep eyes on IHL hot issues being dealt with by academic authors, help authors in the process of writing articles, books, thesis or legal professionals who work on IHL on a daily basis to see what has been written on a specific IHL subject.
How to use the IHL Bibliography

Part I: Multiple entries for readers who only need to check specific subjects
The first part is tailored for them: fifteen IHL-centred categories have been developed in collaboration with ICRC legal and communication advisors. An additional countries/region category has also been added for a regional approach. Each article, book or chapter is classified under every relevant category. This allows readers to identify as quickly as possible bibliographic references of interest without going through the whole bibliography. In order to avoid too long of a document, this first part only provides bibliographic reference and link to full text (when available). For the abstract, refer to the second part of the bibliography.

Part II: All entries with abstract for readers who need it all
Instead of going through the first part and having references repeating, readers can just skip to the second part where all documents are alphabetically listed (by title) with an abstract. When provided by the author or the publisher, the abstract is copied. When not provided, the abstract is elaborated by the IHL Reference Librarian in charge of the bibliography.

Access to document
Whenever an article is electronically available in full text, a link allows you to access the document directly. Some links only work from within ICRC HQ premises such as the library. All documents are available for loan at the ICRC Library. At the end of the bibliographic heading, “Cote xxx/xxx” refers to the ICRC library call number. In case your local library cannot provide you with some of the documents, requests for copies or scans (in a reasonable amount) can be sent to library@icrc.org

Chronology
This bibliography is based on the acquisitions made by the ICRC library during the past trimester. The ICRC library acquires relevant articles and books 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 writings related to IHL subjects: articles, monographs, chapters and reports or working papers.

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.

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

Subscription and feedback
If you wish to receive the each bibliography issue directly by mail, requests can be sent to library@icrc.org with the subject “IHL Bibliography subscription”.

Questions, Comments and feedback are also welcome at the same e-mail address.
I. General issues

(General catch-all category, Customary Law)

La contribution de l'Organisation des Nations Unies au d@veloppement du droit international humanitaire

Convergences entre droit international humanitaire et droit international des droits de l'homme : vers une assimilation des deux corps de r`gles ?
par G@erd Aivo. In: Revue trimestrielle des droits de l'homme 21ème année, no 82, avril 2010, p. 341-370. - Cote 345.2/888 (Br.)

Un droit dans la guerre ? : [cas, documents et supports d'enseignement relatifs ` la pratique contemporaine du droit international humanitaire]
Marco Sassoli, Antoine A. Bouvier et Anne Quintin ; avec la collab. de Juliane Garcia. - Genève : CICR, mars 2012. - 3 vol. (3030 p.) + 1 CD-ROM. - Cote 345.2/654

The fog of war reform : change and structure in the law of armed conflict after September 11
Peter Margulies. - [S.l.] : Roger Williams University School of Law, [2011]. - 47 p. - Cote 345.2/877 (Br.)
http://ssrn.com/abstract=1921446

Humanitarian access in situations of armed conflict : handbook on the normative framework
Federal Department of Foreign Affairs. - Bern : FDFA, 2011. - 63 p. - Cote 345.2/890 (Br.)

IHL supplement for use in courses in international criminal law
Beth Van Schaack. - [S.l.] : Santa Clara University School of Law, March 2012. - 52 p. - Cote 345.2/883 (Br.)
http://digitalcommons.law.scu.edu/facpubs/193

The just war tradition and its modern legacy : jus ad bellum and jus in bello
David Boucher. In: European journal of political theory Vol. 11, no. 2, 2011, p. 92-111. - Cote 345.2/889 (Br.)

"New rules for new wars" : international law and just war doctrine for irregular war
http://law.case.edu/journals/JIL/Documents/Lucas%202.pdf

A new twist on an old story : lawfare and the mixing of proportionalities
Laurie R. Blank. In: Case Western Reserve journal of international law Vol. 43, no. 3, 2011, p. 707-738. - Cote 345.2/879 (Br.)
http://law.case.edu/journals/JIL/Documents/Blank%202.pdf

Opting out of the law of war : comments on Withdrawing from international custom
David Luban. In: The Yale law journal online Vol. 120, 2010, p. 151-167. - Cote 345/602 (Br.)
Proceedings of the fourth international humanitarian law dialogs, August 30-31, 2010 at Chautauqua Institution

The strange pretensions of contemporary humanitarian law

War and the vanishing battlefield
Frédéric Mégret. In: Loyola University Chicago international law review Vol. 9, no. 1, Fall/Winter 2011, p. 131-155. - Cote 345.2/881 (Br.)

II. Types of conflicts
(Qualification of conflict, international and non-international armed conflict)

Armed violence in Manipur and human rights

At the fault-lines of armed conflict : the 2006 Israel-Hezbollah conflict and the framework of international humanitarian law
Andrew Yuile. In: Australian international law journal Vol. 16, issue 1, 2009, p. 189-218. - Cote 345.26/219 (Br.)

A critical appraisal of the air and missile warfare manual

Les cyber-opérations et le jus in bello = Cyber operations and jus in bello

Determining a legitimate target : the dilemma of the decision-maker

Drones and the boundaries of the battlefield

How to improve upon the faulty legal regime of internal armed conflicts

The law of operational targeting : viewing the LOAC through an operational lens
Law of war manuals and warfighting: a perspective
http://www.tilj.org/content/journal/47/num2/Dunlap265.pdf

Privileging asymmetric warfare (Part III)?: the intentional killing of civilians under international humanitarian law
Samuel Estreicher. In: Chicago journal of international law Vol. 12, Winter 2012, p. 589-603. - Cote 345.27/122 (Br.)

Sovereignty and neutrality in cyber conflict

Symposium: the 2009 air and missile warfare manual: a critical analysis
Claude Bruderlein (introd.) ; Charles J. Dunlap... [et al.]. In: Texas international law journal Vol. 47, no. 2, Spring 2012, p. 261-425. - Cote 341.226/55

Targeting the "terrorist enemy": the boundaries of an armed conflict against transnational terrorists
Full text: only from ICRC headquarters: http://tinyurl.com/7zscg5

Transformations of conflict status in Libya
Full text: only from ICRC headquarters: http://jcsl.oxfordjournals.org/content/17/1/81.full.pdf

III. Armed forces / Non-state armed groups
(Combatant status, compliance with IHL, etc.)

The applicability of international humanitarian law to organized armed groups

Applying a sovereign agency theory of the law of armed conflict

Bolstering the protection of civilians in armed conflict

Can the 1954 Hague Convention apply to non-state actors?: a study of Iraq and Libya
http://www.tilj.org/content/journal/47/num2/Howe.pdf
A collection of codes of conduct issued by armed groups
compiled by Olivier Bangerter ; assembled and introduced by Nelleke van Amstel.
In: International review of the Red Cross Vol. 93, no. 882, June 2011, p. 483-501

Educating for ethical behaviour ? : preparing military leaders for ethical challenges

Enemy status and military detention in the war against al-Qaeda
http://www.tilj.org/content/journal/47/num1/Chang1.pdf

Enemy status and military detention : neutrality law and non-international armed conflict, municipal neutrality statutes, the U.N. Charter, and hostile intent
http://www.tilj.org/content/journal/47/num2/Chang381.pdf

Engaging armed non-state actors to protect children from the effects of armed conflict : when the stick doesn't cut the mustard

How to improve upon the faulty legal regime of internal armed conflicts

International law : armed groups in a state-centric system

The law of neutrality does not apply to the conflict with Al-Qaeda, and it's a good thing, too : a response to Chang
Kevin Jon Heller. In: Texas international law journal Vol. 47, no. 1, Fall 2011, p. 115-141. - Cote 345.29/170 (Br.)
http://www.tilj.org/content/journal/47/num1/Heller115.pdf

The law that turned against its drafters : guerrilla-combatants and the First Additional Protocol to the Geneva Conventions

Lessons for the law of armed conflict from commitments of armed groups : identification of legitimate targets and prisoners of war
The move to substantive equality in international humanitarian law: a rejoinder to Marco Sassòli and Yuval Shany

Protecting civilians in armed conflict through rules of engagement

Reasons why armed groups choose to respect international humanitarian law or not

Should rebels be treated as criminals?: some modest proposals for rendering internal armed conflicts less inhumane

Should the obligations of states and armed groups under international humanitarian law really be equal?

Unregulated armed conflict: non-state armed groups, international humanitarian law, and violence in Western Sahara
Orla Marie Buckley. In: North Carolina journal of international law and commercial regulation Vol. 37, Spring 2012, p. 793-845. - Cote 345.29/168 (Br.)

Untangling belligerency from neutrality in the conflict with Al-Qaeda
Rebecca Ingber. In: Texas international law journal Vol. 47, no. 1, Fall 2011, p. 75-114. - Cote 345.29/171 (Br.)
http://www.tilj.org/content/journal/47/num1/Ingber75.pdf

Virtual battlegrounds: direct participation in cyber warfare
http://ssrn.com/abstract=2001794

IV. Multinational forces

All necessary means to protect civilians: what the intervention in Libya says about the relationship between the jus in bello and the jus ad bellum
V. Private actors

**Multilevel regulation of military and security contractors: the interplay between international, European and domestic norms**


Private military and security companies and the "civilianization of war"


Privatized military firms' impunity in cases of torture: a crime of humanity?


Full text: only from ICRC headquarters: [http://www.ingentaconnect.com/content/mnp/iclr/2012/00000014/00000002/art00003](http://www.ingentaconnect.com/content/mnp/iclr/2012/00000014/00000002/art00003)

Rethinking the regulation of private military and security companies under international humanitarian law


South african private security contractors active in armed conflicts: citizenship, prosecution and the right to work


VI. Protection of persons

All necessary means to protect civilians: what the intervention in Libya says about the relationship between the jus in bello and the jus ad bellum


Armed conflict in asylum law: the "war-flaw"


Full text: only from ICRC headquarters: [http://rsq.oxfordjournals.org/content/31/2/1.full.pdf](http://rsq.oxfordjournals.org/content/31/2/1.full.pdf)

Beyond occupation: protected persons and the expiration of obligations


Bolstering the protection of civilians in armed conflict


Civilians under the law: inequality, universalisms, and intersectionality as intervention

Discriminate warfare: the military necessity-humanity dialectic of international humanitarian law

Engaging armed non-state actors to protect children from the effects of armed conflict: when the stick doesn't cut the mustard

First do no harm: refugee law as a response to armed conflict

The first judgment of the International criminal court (Prosecutor v. Lubanga): a comprehensive analysis of the legal issues
Full text: only from ICRC headquarters: http://www.ingentaconnect.com/content/mnp/icla/2012/00000012/00000002/art00001

Good time for a change: recognizing individuals' rights under the rules of international humanitarian law on the conduct of hostilities

The proportionality principle in operation: methodological limitations of empirical research and the need for transparency
Aaron Fellmeth. In: Israel law review Vol. 45, no. 1, 2012, p. 125-150. - Cote 345.25/256 (Br.)
http://tinyurl.com/7rkjecu

Protecting civilians during violent conflict: theoretical and practical issues for the 21st century

Protecting civilians in armed conflict through rules of engagement

The protection of civilians during the Israeli-Hamas conflict: the Goldstone report

The protection of civilians from violence and the effects of attacks in international humanitarian law
Protection of military medical personnel in armed conflicts
Peter de Waard and John Tarrant. In: University of Western Australia law review Vol. 35, no. 1, September 2010, p. 157-183. - Cote 356/128 (Br.)

Surviving in war zone: the problem of civilian casualties in Afghanistan

The tools to combat the war on women's bodies: rape and sexual violence against women in armed conflict

Who is protected under international humanitarian law?: finding a definition for "direct participation in hostilities"

VII. Protection of objects
( Environment, cultural property, water, medical mission, emblem, etc.)

Can the 1954 Hague Convention apply to non-state actors?: a study of Iraq and Libya

Environmental protection in armed conflict
Full text: only from ICRC headquarters: https://ext.icrc.org/library/docs/ArticlesPDF/32851.pdf

Waging waterfare: Israel, Palestinians, and the need for a new hydro-logic to govern water rights under occupation
http://tinyurl.com/6o9e4qu

VIII. Detention, internment, treatment and judicial guarantees

Enemy status and military detention in the war against al-Qaeda
http://www.tilj.org/content/journal/47/num1/Changt.pdf
Enemy status and military detention: neutrality law and non-international armed conflict, municipal neutrality statutes, the U.N. Charter, and hostile intent

http://www.tilj.org/content/journal/47/num2/Chang381.pdf

Guarding the guards in the war on terrorism


International law issues raised by the transfer of detainees by Canadian forces in Afghanistan


The law of neutrality does not apply to the conflict with Al-Qaeda, and it's a good thing, too: a response to Chang

Kevin Jon Heller. In: Texas international law journal Vol. 47, no. 1, Fall 2011, p. 115-141. - Cote 345.29/170 (Br.)
http://www.tilj.org/content/journal/47/num1/Heller115.pdf

Mohammed Jawad and the military commissions of Guantánamo

http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1497&context=dlj

Privatized military firms' impunity in cases of torture: a crime of humanity?

Full text: only from ICRC headquarters:
http://www.ingentaconnect.com/content/mnp/iclr/2012/00000014/00000002/art00003

Protection of terrorism suspects under international humanitarian law: a case study of Guantánamo Bay


A square peg in a round hole: stretching law of war detention too far

Laurie R. Blank. In: Rutgers Law Review Vol. 63, no. 4, Summer 2011, p. 1169-1193. - Cote 400.1/16 (Br.)

To transfer or not to transfer: identifying and protecting relevant human rights interests in non-refoulement

Vijay M. Padmanabhan. In: Fordham law review Vol. 80, no. 1, October 2011, p. 73-123. - Cote 345.1/369 (Br.)
http://fordhamlawreview.org/assets/pdfs/Vol_80/Padmanabhan_October.pdf

Transcending, but not abandoning the combatant-civilian distinction: a case study

Untangling belligerency from neutrality in the conflict with Al-Qaeda
Rebecca Ingber. In: Texas international law journal Vol. 47, no. 1, Fall 2011, p. 75-114. - Cote 345.29/171 (Br.)
http://www.tilj.org/content/journal/47/num1/Ingber75.pdf

IX. Law of occupation

Belligerent occupation : a plea for the establishment of an international supervisory mechanism

Beyond occupation : protected persons and the expiration of obligations
Full text : ICRC headquarters only:
http://heinonline.org/HOL/Page?handle=hein.journals/ilsaic17&collection=journals&index=journals/ilsaic&id=421

Human rights, positive obligations, and armed conflict : implementing the right to education in occupied territories
Full text : only from ICRC headquarters:
http://www.ingentaconnect.com/content/mnp/jhls/2010/00000001/00000002/art00004

The protection of civilians from violence and the effects of attacks in international humanitarian law

Targeted killings and international law : with special regards to human rights and international humanitarian law

Waging waterfare : Israel, Palestinians, and the need for a new hydro-logic to govern water rights under occupation
http://tinyurl.com/6oct4g4

X. Conduct of hostilities
(Distinction, proportionality, precautions, prohibited methods)

After "Top Gun" : how drone strikes impact the law of war

An assessment of the Gaza report's contribution to the development of international humanitarian law
Civilian vulnerability in asymmetric conflict: lessons from the second Lebanon and Gaza wars


A critical appraisal of the air and missile warfare manual

http://www.tijl.org/content/journal/47/num2/Paust277.pdf

Determining a legitimate target: the dilemma of the decision-maker

http://www.tijl.org/content/journal/47/num2/Guiora315.pdf

Did LOAC take the lead?: reassessing Israel’s targeted killing of Salah Shehadeh and the subsequent calls for criminal accountability

Full text: only from ICRC headquarters: http://jcsl.oxfordjournals.org/content/17/1/147.full.pdf

Discriminate warfare: the military necessity-humanity dialectic of international humanitarian law


Do soldiers’ lives matter?: a view from proportionality

Reuven (Ruvi) Ziegler and Shai Otzari. In: Israel law review Vol. 45, no. 1, 2012, p. 53-69. - Cote 345.25/251 (Br.)
http://tinyurl.com/6qk3qgif

Drones and the boundaries of the battlefield

http://www.tijl.org/content/journal/47/num2/Lewis293.pdf

A “fighting chance” or fighting dirty?: irregular warfare, Michael Gross and the Spartans

Cian O’Driscoll. In: European journal of political theory Vol. 11, no. 2, p. 112-130. - Cote 345.25/185 (Br.)

The Goldstone report: politicization of the law of armed conflict and those left behind

Joshua L. Kessler. In: Military law review Vol. 209, Fall 2011, p. 69-121

Good time for a change: recognizing individuals’ rights under the rules of international humanitarian law on the conduct of hostilities


Israeli soldiers’ perceptions of Palestinian civilians during the 2009 Gaza war

The law of operational targeting: viewing the LOAC through an operational lens

http://www.tilj.org/content/journal/47/num2/Corn337.pdf

Law of war manuals and warfighting: a perspective

http://www.tilj.org/content/journal/47/num2/Dunlap265.pdf

Legal ramifications of the war in Gaza


Measure twice, shoot once: higher care for CIA-targeted killing


Military operations, battlefield reality and the judgment's impact on effective implementation and enforcement of international humanitarian law

[Laurie R. Blank]. - [Atlanta]: International Humanitarian Law Clinic at Emory University School of Law, 2012. - 17 p. - Cote 345.25/243 (Br.)

Necessity, proportionality, and distinction in nontraditional conflicts: the unfortunate case study of the Goldstone report


The politics of civilian identity


The principle of proportionality: "force protection" as a military advantage

http://tinyurl.com/ctfxnz

The proportionality principle in operation: methodological limitations of empirical research and the need for transparency

Aaron Fellmeth. In: Israel law review Vol. 45, no. 1, 2012, p. 125-150. - Cote 345.25/256 (Br.)
http://tinyurl.com/7rkjecu

Proportionality under jus ad bellum and jus in bello: clarifying their relationship

http://tinyurl.com/ctwahs

The protection of civilians during the Israeli-Hamas conflict: the Goldstone report

The protection of civilians from violence and the effects of attacks in international humanitarian law


Regulating the irregular: international humanitarian law and the question of civilian participation in armed conflicts

Emily Crawford. In: University of California Davis journal of international law and policy Vol. 18, no. 1, 2011, p. 163-190. - Cote 345.25/257 (Br.)

Rethinking the regulation of private military and security companies under international humanitarian law


Section IX of the ICRC interpretive guidance on direct participation in hostilities: the end of jus in bello proportionality as we know it?


Symposium: the 2009 air and missile warfare manual: a critical analysis

Claude Bruderlein (introd.) ; Charles J. Dunlap... [et al.]. In: Texas international law journal Vol. 47, no. 2, Spring 2012, p. 261-425. - Cote 341.226/55

Targeted killing: the Israeli experience


Targeted killings and international law: with special regards to human rights and international humanitarian law


The use of unmanned aerial vehicles in contemporary conflict: a legal and ethical analysis

Sarah Kreps, John Kaag. In: Polity advance online publication 13 February 2012, 26 p. - Cote 345.25/258 (Br.)
http://ssrn.com/abstract=2023202

Virtual battlegrounds: direct participation in cyber warfare

http://ssrn.com/abstract=2001794

XI. Weapons

The chemical weapons convention and riot control agents: advantages of a "methods" approach to arms control

Discrimination and non-lethal weapons: issues for the future military

Measure twice, shoot once: higher care for CIA-targeted killing

Modern means of warfare: the need to rely upon international humanitarian law, disarmament, and non-proliferation law to achieve a decent regulation of weapons

White phosphorous munitions: international controversy in modern military conflict

XII. Implementation

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

The applicability of international humanitarian law to organized armed groups

Applying a sovereign agency theory of the law of armed conflict

Armed violence in Manipur and human rights

An assessment of the Gaza report’s contribution to the development of international humanitarian law

Can the 1954 Hague Convention apply to non-state actors?: a study of Iraq and Libya
http://www.tilj.org/content/journal/47/num2/Howe.pdf

La contribution de l’Organisation des Nations Unies au développement du droit international humanitaire
The domestic implementation of international humanitarian law: a manual

Educating for ethical behaviour?: preparing military leaders for ethical challenges

Engaging armed non-state actors to protect children from the effects of armed conflict: when the stick doesn't cut the mustard

The First Amendment's borders: the place of Holder v. Humanitarian Law Project in First Amendment doctrine
David Cole. In: Harvard law and policy review Vol. 6, no. 1, Winter 2012, p. 147-177. - Cote 303.6/204 (Br.)

The Goldstone report: politicization of the law of armed conflict and those left behind
Joshua L. Kessler. In: Military law review Vol. 209, Fall 2011, p. 69-121

How to improve upon the faulty legal regime of internal armed conflicts

Individual remedies for victims of armed conflicts in the context of mass claims settlements
Full text: only from ICRC headquarters: https://ext.icrc.org/library/docs/ArticlesPDF/33271.pdf

Israeli soldiers' perceptions of Palestinian civilians during the 2009 Gaza war

Necessity, proportionality, and distinction in nontraditional conflicts: the unfortunate case study of the Goldstone report

A new twist on an old story: lawfare and the mixing of proportionalities
Laurie R. Blank. In: Case western reserve journal of international law Vol. 43, no. 3, 2011, p. 707-738. - Cote 345.2/879 (Br.)
http://law.case.edu/journals/JIL/Documents/Blank%202.pdf

The politics of civilian identity
Protecting civilians in armed conflict through rules of engagement

Reasons why armed groups choose to respect international humanitarian law or not

Should rebels be treated as criminals?: some modest proposals for rendering internal armed conflicts less inhumane

Standards of proof in international humanitarian and human rights fact-finding and inquiry missions
by Stephen Wilkinson. - [S.l.]: [s.n.], [2011]. - 69 p. - Cote 345.22/199 (Br.)
http://www.adh-geneva.ch/docs/reports/Standards%20of%20proof%20report.pdf

Understanding when and how domestic courts apply IHL
http://law.case.edu/journals/JIL/Documents/20Blank%20_Darby.pdf

Universal jurisdiction: a means to end impunity or a threat to friendly international relations?

Unregulated armed conflict: non-state armed groups, international humanitarian law, and violence in Western Sahara
Orla Marie Buckley. In: North Carolina journal of international law and commercial regulation Vol. 37, Spring 2012, p. 793-845. - Cote 345.29/168 (Br.)

Les violations du droit humanitaire au Proche-Orient: le cas de l’opération "Plomb durci" à la lumière du rapport Goldstone
Full text: only from ICRC headquarters: https://ext.icrc.org/library/docs/ArticlesPDF/33260.pdf

XIII. International Human Rights Law
(Focus on situations of armed conflict and other situations of violence)

Armed conflict in asylum law: the "war-flaw"
Full text: only from ICRC headquarters: http://rsq.oxfordjournals.org/content/31/2/1.full.pdf

Confronting terrorism: human rights law, or the law of war?
La contribution de l'Organisation des Nations Unies au développement du droit international humanitaire

Convergences entre droit international humanitaire et droit international des droits de l'homme : vers une assimilation des deux corps de règles ?
par Gérard Aivo. In: Revue trimestrielle des droits de l'homme 21ème année, no 82, avril 2010, p. 341-370. - Cote 345.2/888 (Br.)

How to improve upon the faulty legal regime of internal armed conflicts

Human rights and the law of war : the Geneva Conventions of 1949
Full text : only from ICRC headquarters: https://ext.icrc.org/library/docs/ArticlesPDF/33381.pdf

Human rights, positive obligations, and armed conflict : implementing the right to education in occupied territories
Full text : only from ICRC headquarters: http://www.ingentaconnect.com/content/mnp/jhls/2010/00000001/00000002/art00004

Humanitarian law in action within Africa

The interaction between international humanitarian law and human rights law and the contribution of the ICJ
Full text : only from ICRC headquarters: https://ext.icrc.org/library/docs/ArticlesPDF/33837.pdf

Legal remedies for human rights violations in the armed conflict in Chechnya : the approach of the European Court of Human Rights in context
Full text : only from ICRC headquarters: http://www.ingentaconnect.com/content/mnp/jhls/2010/00000001/00000002/art00003

The rogue civil airliner and international human rights law : an argument for a proportionality of effects analysis within the right to life
Robin F. Holman. In: Canadian yearbook of international law = Annuaire canadien de droit international Vol. 48, 2010, p. 39-96. - Cote 345.1/374 (Br.)
Full text : only from ICRC headquarters: https://ext.icrc.org/library/docs/ArticlesPDF/33222.pdf

Targeted killings and international law : with special regards to human rights and international humanitarian law
To transfer or not to transfer: identifying and protecting relevant human rights interests in non-refoulement
Vijay M. Padmanabhan. In: Fordham law review Vol. 80, no. 1, October 2011, p. 73-123. - Cote 345:1/369 (Br.)
http://fordhamlawreview.org/assets/pdfs/Vol_80/Padmanabhan_October.pdf

XIV. International Criminal Law

The first judgment of the International criminal court (Prosecutor v. Lubanga): a comprehensive analysis of the legal issues
Full text: only from ICRC headquarters:
http://www.ingentaconnect.com/content/mnp/icla/2012/00000012/00000002/art00001

Formulating a new atrocity speech offense: incitement to commit war crimes

Good time for a change: recognizing individuals' rights under the rules of international humanitarian law on the conduct of hostilities

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The law of operational targeting : viewing the LOAC through an operational lens
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Military operations, battlefield reality and the judgment's impact on effective implementation and enforcement of international humanitarian law

[Laurie R. Blank]. - [Atlanta] : International Humanitarian Law Clinic at Emory University School of Law, 2012. - 17 p. - Cote 345.25/243 (Br.)

All with Abstracts

After "Top Gun": how drone strikes impact the law of war

The first section will address foundational questions regarding the application of the law of armed conflict to drones, including the legality of armed drones as a weapons system and their use in accordance with the key law of armed conflict requirements of distinction, proportionality, and precautions in attack. Although many argue that the "joystick mentality" of remotely piloted aircraft and weapons can lead to desensitization and a decreased likelihood of adherence to international norms, the examination below demonstrates that drones indeed offer extensive and enhanced opportunities for compliance with the law of armed conflict. In the second section, this article will explore how the burgeoning use of armed drones raises new questions for some traditional concepts and categories within the law of armed conflict, such as the status of persons and the geographical locus of attacks and hostilities, and potentially new challenges in the implementation of distinction and proportionality.


All necessary means to protect civilians: what the intervention in Libya says about the relationship between the jus in bello and the jus ad bellum

This article scrutinizes the phrase ‘all necessary means to protect civilians under threat of attack’, contained in the United Nations (UN) Security Council Resolution 1973 (2011) authorizing military force in the Libyan Arab Jamahiriya (Libya). It assesses both the meaning of this phrase and the legal regime pursuant to the resolution. That regime challenges the teleological separation but concurrent application of the law on the use of force (the jus ad bellum), and the law applicable in international and non-international armed conflict (the jus in bello or international humanitarian law (IHL)). Security Council Resolution 1973, and its understanding of the term ‘civilian’, should be read in accordance with other international law norms; prima facie conflict of the resolution with IHL on the issue of targeting can be resolved. The resolution was however ambiguous on when force can be used. It is suggested that Resolution 1973 required a demonstrable risk of indiscriminate attack to civilians, per se necessity and jus ad bellum proportionality, the latter exceeding IHL’s concept of proportionality because of the specificity of the resolution’s aim. In examining the concurrent application of the jus ad bellum and the jus in bello in the context of specific interventions in Libya, the criticism that some states contributing coalition forces overstretched their mandate is corroborated. A combination of the resolution’s ambiguity and political considerations lie at the heart of that overstretch. In developing international law for analogous situations, the intervention is likely to exacerbate existing quarrels over future council action to protect civilians.

Full text: only from ICRC headquarters: http://jcsl.oxfordjournals.org/content/17/1/117.full.pdf

The applicability of international humanitarian law to organized armed groups

While it is generally accepted today that international humanitarian law (IHL) is binding on organized armed groups, it is less clear why that is so and how the binding force of IHL on organized armed groups is to be construed. A number of explanations for that binding force have been offered. The present contribution critically examines five such explanations, namely that organized armed groups are bound via the state on whose territory they operate; that organized armed groups are bound because their members are bound by IHL as individuals; that norms of IHL are binding on organized armed groups by virtue of the fact that they exercise de facto governmental functions; that customary IHL is applicable to organized armed groups because of the (limited) international legal personality that they possess; and that organized armed groups are bound by IHL because they have consented thereto.


Applying a sovereign agency theory of the law of armed conflict
The current bifurcated conflict classification paradigm for applying the Law of Armed Conflict (LOAC) has lost its usefulness. Regulation of state militaries was originally based on the principle that the armed forces of a state were acting as the sovereign agents of the state and were granted privileges and given duties based on that grant of agency. These privileges and duties became the bases for the formulation of the modern LOAC. During the twentieth century, the LOAC became bifurcated, with the complete LOAC applying only to armed conflicts between sovereigns and only few provisions of the law applying to armed conflicts that were not between sovereigns. This bifurcation has led to a lack of clarity for the sovereign's agents in LOAC application and given states the ability to manipulate which law applies to application of armed conflict. It analyses the origins of the prevailing "exceptionality approach", which regards such claims as unable to succeed unless they can make out a special case. It explains why its opposite, the "normalcy approach", equally does not resolve underlying problems. The "war-flaw" is seen to consist in the failure of international protection to analyse claims by persons fleeing armed conflict by reference to the correct international law framework. Whilst the development within refugee law of a human rights approach has been a major achievement, its inability to deal effectively with armed conflict-related claims located in its conspicuous failure, or unwillingness, to recognize that international law regards international humanitarian law as the lex specialis in situations of armed conflict. Curiously, despite the increasing acknowledgment of the complementarity of international human rights law and international humanitarian law by human rights bodies, the human rights paradigm remains stuck trying to analyse such situations exclusively in international human rights law terms. It is argued that this "war-flaw" afflicts not only contemporary refugee law but also current human rights jurisprudence dealing with problems of refoulement, and regional protection schemes such as subsidiary protection within the European Union. Tentative suggestions are made as to how the prevailing international human rights law paradigm can be revised to take account of international humanitarian law and as to how the two branches of international law can be applied in tandem.

Armed conflict in asylum law: the "war-flaw"

This article charts the difficulties refugee law – and more widely the legal regime governing international protection – has encountered from the outset in dealing with asylum-related claims by persons fleeing armed conflict. It analyses the origins of the prevailing "exceptionality approach", which regards such claims as unable to succeed unless they can make out a special case. It explains why its opposite, the "normalcy approach", equally does not resolve underlying problems. The "war-flaw" is seen to consist in the failure of international protection to analyse claims by persons fleeing armed conflict by reference to the correct international law framework. Whilst the development within refugee law of a human rights approach has been a major achievement, its inability to deal effectively with armed conflict-related claims is located in its conspicuous failure, or unwillingness, to recognize that international law regards international humanitarian law as the lex specialis in situations of armed conflict. Curiously, despite the increasing acknowledgment of the complementarity of international human rights law and international humanitarian law by human rights bodies, the human rights paradigm remains stuck trying to analyse such situations exclusively in international human rights law terms. It is argued that this "war-flaw" afflicts not only contemporary refugee law but also current human rights jurisprudence dealing with problems of refoulement, and regional protection schemes such as subsidiary protection within the European Union. Tentative suggestions are made as to how the prevailing international human rights law paradigm can be revised to take account of international humanitarian law and as to how the two branches of international law can be applied in tandem.

Armed violence in Manipur and human rights

The structural violence in Manipur has led to various forms of secondary violence. Gross human rights violations including torture, extra-judicial detention, rape and enforced disappearance have become endemic. The situation in Manipur is a clear case of an "internal disturbance" or non-international armed conflict requiring invocation of Article 355 of the Constitution (Chapter XVIII dealing with emergency powers) and not of a "public order" problem. In such situation both the parties to the conflict should at the minimum follow the common article 3 of the Geneva Conventions and strictly follow the rules of engagement under the relevant international humanitarian laws.

An assessment of the Gaza report's contribution to the development of international humanitarian law

Breau examines the criticisms of the UN Fact-Finding Mission and subsequent report that have dogged it since its inception, and finds that there is much to commend in the report. Considering the charges of bias against the mission, and despite the criticisms of Israel made by one of its members, she argues that the report was not biased against Israel. She concedes that improvements might have been made to the mission's methodology, particularly in allowing closed-session interviews of Palestinian witnesses, but argues that this does not introduce a fatal flaw into the report; rather, the mission's ability to produce findings was made far more difficult by Israel's refusal to cooperate. But, above all, and particularly in respect of humanitarian law regarding blockades, targeting and weaponry, Breau argues that the report helps to advance and clarify the laws applicable to armed conflict.
At the fault-lines of armed conflict: the 2006 Israel-Hezbollah conflict and the framework of international humanitarian law

Andrew Yuile. In: Australian international law journal Vol. 16, issue 1, 2009, p. 189-218. - Cote 345.26/219 (Br.)

The laws of armed conflict, or international humanitarian law (HL), divide armed conflict into two categories, international and non-international, with far fewer rules applicable to the latter. The conflicts of today, however, increasingly blur the lines between the two, often involving non-State parties with military capabilities on a par with States, and wreaking the same destruction as conflicts between States. One such example was the conflict in 2006 between Israel and Hezbollah. This article examines whether the conflict in Lebanon was international or non-international, and asks which laws applied to that conflict. The article argues that the 2006 conflict was non-international, and concludes that only the bare minimum treaty protection, as well as relevant customary laws, applied. In doing so, the article explores the legal problems created by modern conflicts with powerful non-State actors like Hezbollah. It argues for an expansion in the application of the laws applicable to international armed conflict in order to fill the lacuna, and calls for an independent international body to make determinations on the classification of conflicts until the gap between the rules of international and non-international armed conflict can be closed.

Belligerent occupation: a plea for the establishment of an international supervisory mechanism


Three main lessons can be drawn from some recent cases (the occupation of Gaza and that of Iraq): (i) an occupation is not an either/or situation - the decisive fact of "effective control" (potential and actual) rather than the tag "occupation" should determine the applicability of the law of occupation; (ii) the scope of the obligations of the foreign power which exercises effective control should derive from and relate to the scope of the control actually exercised; and (iii) an authoritative characterization of the situation by the Security Council - which took place in the case of Iraq but not in the case of Gaza - may often be required to delineate respective legal obligations and ensure no void in governance, including during transitional periods. It is undisputed that effective control by foreign military forces suspends, but does not transfer, sovereignty. The prohibition on annexation of an occupied territory is the normative consequence of this principle. Major shortcomings of the present legal regimes are: (i) the lack of a rule setting time limits on the duration of an occupation and the attendant failure to determine the illegality of an indefinite occupation and (ii) the lack of congruence between self-determination and transformative objectives pursued by the occupant. While it is neither feasible nor desirable to renegotiate the law of belligerent occupation in order to rectify its shortcomings, the sine qua non for enabling some advancement of this law is the establishment of an international supervisory mechanism equipped with the means to fulfil a number of tasks.

Beyond occupation: protected persons and the expiration of obligations


Under certain circumstances, stateless persons, for example, may find themselves in a situation akin to refugees, but due to occupation, have no (in any case not anymore) country of their own, and not being able to cross borders they would not qualify as persons fleeing their country of origin in terms of the 1951 Refugee Convention and its 1967 Protocol. On the other hand, being confined to an occupied territory and thus being prevented from moving, they would not fit the description of Internally Displaced Persons (IDPs) either. "Climate refugees" are a special sort of migrant, akin to IDPs when displaced within their own country due to catastrophic conditions. However, "climate refugees" often have to cross into another country in order to escape from life threatening conditions. Yet, once crossing an international border, they are not refugees under the Refugee Convention, as "climate" today is not a ground of persecution. Even where the Convention’s refugee definition applies, or where, for example, a legitimate claim to designation as protected persons under the Fourth Geneva Convention (Geneva IV) may be made, the rules governing the granting of the respective status, its duration, and the expiration of such obligations are at best blurry. This article has a main focus on state responsibility for convention refugees in times of-and beyond-occupation; juxtaposing their designation and states’ post-conflict obligations with the ones accorded to protected persons under Geneva IV as the two groups of “persons to be protected” perhaps the most directly affected by, and depending on, actions by foreign states.

Full text: ICRC headquarters only: http://heinonline.org/HOL/Page?handle=hein.journals/ilsaic17&collection=journals&index=journals/ilsaic&id=421
Bolstering the protection of civilians in armed conflict

In virtually all contemporary armed conflicts a staggering 90 per cent of all victims are civilians. A comprehensive and constructive clarification of international law relating to the protection of civilians in armed conflict requires that both academics and practitioners take a step back from an overly technical, political or positivist analysis of the law and look as the questions presenting themselves through the prism of general, well-established principles of law, most notably the principles of: (i) necessity; (ii) proportionality; (iii) precaution; and (iv) humanity, which underlie the entire normative framework governing the use of force. A major problem arises with regard to the lack of any incentive for rebels to comply with international humanitarian law. A viable alternative to the introduction of a full combatant privilege for non-state belligerents would require a two-pronged approach. In accordance with the respective logic of the jus in bello and the jus ad bellum, the conduct of hostilities and the exercise of power and authority over persons in compliance with international humanitarian law should be encouraged and legitimized (first objective), whereas the initiation of, or participation in, an armed conflict in contravention of domestic law should be discouraged (second objective).

Can the 1954 Hague Convention apply to non-state actors? : a study of Iraq and Libya

For the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention) to effectively protect cultural property, it must apply to non-state actors in non-international armed conflicts. To achieve this goal, the Hague Convention’s application to non-state actors must be strengthened and clarified. This Note examines the 1954 Hague Convention, focusing particularly on the application of the Convention to non-state actors. Part I outlines the development of laws protecting cultural property. Part II examines the important provisions of the 1954 Hague Convention and its Protocols, while Part III discusses the weaknesses of the Convention. The second half of the Note addresses the application of the Hague Convention to non-state actors, looking particularly at the looting of the Iraqi National Museum and the armed conflict in Libya. Part IV(A) examines whether the United States had a duty to prevent the looting of the National Museum of Iraq. Part IV(B) discusses the legal framework for applying the Hague Convention to non-state actors, and Part IV(C) uses an analysis of the armed conflict in Libya to further explore the implications of extending duties under the Hague Convention to non-state actors.

http://www.tilj.org/content/journal/47/num2/Howe.pdf

The chemical weapons convention and riot control agents : advantages of a "methods" approach to arms control

Analysis of how the CWC (Chemical Weapons Convention) affects how the U.S. may use RCAs (Riot Control Agents) in a war zone and compares the result to that from a more basic review guided by the principles of the Law of Armed Conflict (LOAC)—a review grounded in the methods, rather than the means of warfare. The most significant differences between the means-based CWC approach and the methods-based LOAC approach are in the weapons available for use against combatants, not the impact on civilians. Nevertheless, the author does not advocate withdrawal of the U.S. from the CWC regime because history suggests that using chemical NLW (Non-lethal Weapons) on the battlefield may make war no more humane than before. However, the example of RCAs within the means-based CWC regime demonstrates the limitations and the unintended consequences of an arms control regime focused on the “means” of warfare. A more basic LOAC approach that focuses on the methods of warfare, rather than the means, may better balance the humanitarian interests than flat weapons bans. Thus, the U.S. should consider pursuing (1) new treaties to focus and elaborate on the rules governing methods of warfare rather than the means and (2) stronger internal reviews of new weapons systems around the world. By using widely-accepted standards, the international humanitarian system may prove better able to adapt to ever-changing technological realities.

Civilian vulnerability in asymmetric conflict : lessons from the second Lebanon and Gaza wars
This chapter provides a critical study of two wars of military asymmetry in which the Israeli Defense Force fought engaged guerrilla fighters. In the Second Lebanon and Gaza Wars, guerrilla fighters were entwined in various sectors of civil society, seeking safe haven in civilian society, garnering support in the basic needs for survival, and drawing upon the social institutions - medical, legal, even financial. Some of this support is directly linked to military operations - providing arms, sanctuary, and even recruits for guerrilla forces. According to the author, when civilian participate directly in such support of guerrilla forces, civilians lose their right of immunity, based on international humanitarian law. The principle of noncombatant immunity does not protect civilians working for the institutions that sustain guerilla organization. Furthermore, in both wars guerrilla troops resorted to the draconian tactic of positioning noncombatants as human shields in the line of enemy fire. Under such conditions, the IDF cannot be required to withhold their fire against enemy forces; the author advocates the use of nonlethal weapons that disable, but not kill, the targeted individuals.

**Civilians under the law : inequality, universalisms, and intersectionality as intervention**


In this chapter the author explores the role of international law in protecting some civilians and failing to protect others. In so doing she addresses a central question taken up in the volume as a whole : how and why do international institutions contribute to lethal and non-lethal civilian devastation? Although it has not always been applied uniformly, IHL guides the protection of civilians through a body of customary law, treaties such as the Hague Conventions of 1899 and 1907, the Geneva Conventions of 1949, and the related Additional Protocols of 1977, which include the Principle of Distinction. More recently, developments in International Criminal Law (ICL) have also shaped the treatment of civilians through treaties, statutes, and case decisions. Most notable are those related to the ad hoc criminal tribunals following mass violence, specifically the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), as well as the International Criminal Court (ICC) established in 1998.

**A collection of codes of conduct issued by armed groups**

cmpiled by Olivier Bangerter ; assembled and introduced by Nelleke van Amstel. In: International review of the Red Cross Vol. 93, no. 882, June 2011, p. 483-501

Several authors in this edition of the Review discuss the importance of codes of conduct for understanding and engaging with armed groups. The Review has thus decided to include a collection of codes of conduct, or relevant extracts thereof. All materials in this collection are publicly available. They originate from various geographic areas and time periods – from China in 1947 to Libya in 2011 – and provide an insight into different armed groups’ views of and appreciation of humanitarian norms.


**Confronting terrorism : human rights law, or the law of war ?**


Today, most wars faced by states are with enemies who, like criminals, operate in small groups and in ways that are nebulous and covert. Such enemies engage in armed actions within the civilian population and, more frequently, against them. Human rights law and international humanitarian law are the legal tools society currently uses to face any criminal or otherwise hostile manifestation. By some accounts, however, terrorists and their actions do not fit within or deserve the legal guarantees established by HR treaties and conventions, while yet not always meeting the minimum requirements for the application of IHL that permit and expand the possibility of use of force by states and international organizations to prevent and contain extremely hostile actions.

**La contribution de l'Organisation des Nations Unies au d@veloppement du droit international humanitaire**


Depuis que l'Organisation des Nations Unies a inclus le droit international humanitaire dans sa sphère de compétence, ce corpus de droit a connu un développement sans précédent. Il est désormais acquis que les parties à un conflit armé doivent respecter les règles fondamentales du droit international des droits de l'homme indépendamment de la nature juridique des territoires qu'elles contrôlent. En se fondant sur les prérogatives que la Charte lui reconnaît dans le cadre du chapitre VII, le Conseil de sécurité s'est engagé à
recourir le cas échéant à des mesures coercitives pour assurer le respect du droit international humanitaire en vue de garantir la paix et la sécurité internationale. Ces prérogatives lui ont également permis de créer des tribunaux pénals internationaux ad hoc en vue de réprimer les violations du droit international humanitaire, les statuts et la jurisprudence de ces tribunaux ayant à leur tour favorisé la criminalisation des violations graves du droit international humanitaire commises lors de conflits armés non internationaux.

**Convergences entre droit international humanitaire et droit international des droits de l’homme : vers une assimilation des deux corps de règles ?**

par Gérard Aivo. In: Revue trimestrielle des droits de l’homme 21ème année, no 82, avril 2010, p. 341-370. - Cote 345.2/888 (Br.)

L’existence de convergences entre droit international humanitaire et droit international des droits de l’homme, tant au niveau des droits intangibles que sur le plan de la protection juridique de catégories spécifiques telles que les femmes et les enfants, ne fait aujourd’hui aucun doute. Le rapprochement de ces deux branches du droit international, apparaît encore plus pertinent dans les cas confus et de plus en plus fréquents de conflits armé-terrorisme et d’occupation militaire d’un Etat tiers. Mais ces convergences réelles et souhaitables, qui se concrétisent dans la jurisprudence de nombreuses juridictions, permettent-elles d’envisager une assimilation globale des deux corps de règles ? Celle-ci est-elle nécessaire ?

**A critical appraisal of the air and missile warfare manual**


This article offers a critical appraisal of the Manual on International Law Applicable to Air and Missile Warfare (AMW Manual). Although the AMW Manual was adopted by consensus after “extensive consultations” among a notable group of experts over a six-year period and allegedly “restates current applicable law,” there are a number of provisions that do not reflect current international law (especially the laws of war), are highly problematic and, if actually implemented, could result in war crime responsibility. Additionally, there are a number of provisions that are too limiting in their reach or focus or too inattentive to developments in the laws of war.

[http://www.till.org/content/journal/47/num2/Paust277.pdf](http://www.till.org/content/journal/47/num2/Paust277.pdf)

**Les cyber-opérations et le jus in bello = Cyber operations and jus in bello**

Nils Melzer. In: Forum du désarmement = Disarmament forum 4, 2011, p. 3-18, 3-17

This article analyzes the applicability of International humanitarian law (IHL) to cyber operations. The author argues that the phenomenon of cyberwarfare does not exist in a legal vacuum but is subject to well-established rules and principles of international. However, transposing these rules and principles to the new domain of cyberspace encounters certain difficulties and raises a number of important questions. Some of these questions can be resolved through classic treaty interpretation and common sense; others will require a unanimous policy decision by the international community of states.


**Cyber sanctions : exploring a blind spot in the current legal debate**


This article aims to bring to attention the prospective use of a novel category of coercive methods, cyber sanctions. Whilst acknowledging their untapped potential as a means available to international institutions, in particular the United Nations Security Council (UNSC), for targeting and pressurizing (non-)state actors, we maintain that there are several legal concerns surrounding their utilization that deserve closer attention. As regards the UN Charter, we discuss the growing acknowledgment that cyberspace is an area of conflict warranting UNSC action, the appropriate legal basis for executing measures travelling through cyberspace, as well as the competences of regional organizations in this regard. Furthermore, we contemplate to what extent UNSC is bound by other norms if it chooses to utilize these digital methods. More precisely, we look into some possible normative constraints emanating from human rights law and international humanitarian law. Having addressed these various juridical aspects we conclude that whereas the law as it stands today appears able to partially accommodate cyber sanctions, as is often the case, new technology stretches old law, sometimes to the breaking point.

Cyber war inc. : the law of war implications of the private sector's role in cyber conflict

Part I, briefly characterizes how scholars have mapped the law of war onto cyber conflict generally, considering both jus ad bellum and jus in bello regimes. This analysis is key to understanding how the ambiguities plaguing the application of the law of war to cyber conflict are further complicated when the private sector plays a role. Part II, considers the Obama administration’s proposal to foster public-private partnerships as a means of combating cyber attacks, as well as a few current models proposed by legal scholars to address this dilemma. The article points out law of war blind spots in these political and scholarly proposals and argue that how these issues are resolved will have important implications for the development of customary international law in cyber conflicts. The primary concerns in this regard are the erosion of the state’s monopoly on the use of force and the eroding standard for imputation of non-state actor conduct to states. The last section offers a brief conclusion.

Determining a legitimate target : the dilemma of the decision-maker

Discussion regarding the Manual on International Law Applicable to Air and Missile Warfare (AMW Manual) is particularly relevant to the legitimate target dilemma. Any analysis of air and missile warfare must include discussion regarding defining a legitimate target and then, subsequently, determining when the individual defined as a legitimate target is, indeed, a legitimate target. In that context, the link between the definition of a legitimate target and the AMW Manual is inexorable. With the primary focus on who is a legitimate target and when the target is legitimate, this Article is organized as follows: Section I offers a “word of caution” in an age of uncertainty; Section II discusses operational counterterrorism; Section III offers a survey of how the term legitimate target has been defined historically and applied in the battlefield; Section IV focuses on the non-state actor and international law; Section V discusses defining the legitimate target; Section VI focuses on the practical application of the legitimate target definition from the commander’s perspective; and the conclusion proposes a road map for both the definition of legitimate target and its application.

Did LOAC take the lead ? : reassessing Israel's targeted killing of Salah Shehadeh and the subsequent calls for criminal accountability

The recent report of an Israeli Inquiry Committee that examined the 2002 targeted killing of Salah Shehadeh, the commander of Palestinian armed group Hamas, provides a valuable opportunity to reassess the legality of this highly controversial incident. The attack on Shehadeh by Israeli forces caused the death of 13 innocent civilians and the injury of dozens of others. While Israel refused to open a criminal investigation following the attack, several attempts in Israel and elsewhere were made in order to initiate criminal proceedings and to hold those involved accountable. It seems however that the allegations of ‘an Israeli war crime’ neglected the normative framework which governs the incident. This article analyses the lawfulness of the Israeli operation under the law of armed conflict (LOAC) by discussing the legitimacy of the selected target and the issues of proportionality and precautions in attack. It also considers the relationship between LOAC and human rights law. As the calls for criminal measures may be resumed in light of the Inquiry Committee’s findings, the article recalls the supremacy of LOAC when assessing behaviour in the context of high-intensity hostilities. In the absence of a LOAC violation which triggers individual criminal responsibility, human rights law may play a role in relation to a post-incident remedy, namely, a review of the attack and, in some cases, compensation for victims. Yet, allegations of war crimes cannot be based on human rights law when there is no case to answer under LOAC.

Discriminate warfare : the military necessity-humanity dialectic of international humanitarian law
Schmitt is concerned with issues surrounding the protection of civilians when military operations are under way. He argues that no principle is more central to the content and understanding of international humanitarian law (IHL) than military necessity; it has informed the law since its modern inception in the nineteenth century. Yet the principle has also been the subject of misinterpretation and abuse. Schmitt’s contribution examines the relation of the principle of military necessity to the countervailing principle of humanity. Their coexistence serves to balance humanitarian law in a way that best protects individuals and property while allowing states sufficient leeway to conduct military operations effectively. He further examines how the principles are being applied by courts, non-governmental organizations and others involved in the legal assessment of armed conflict, and offers thoughts on whether the trend is positive or negative.

Discrimination and non-lethal weapons: issues for the future military

Stephen Coleman observes that there are many situations where it would be extremely useful for military personnel to have access to non-lethal weapons (NLWs), especially in humanitarian, peacekeeping and counterinsurgency operations, and in other situations where the distinction between combatants and non-combatants tends to be blurred. There are, however, also some obvious problems with the use of such weapons, including the fact that some NLWs might violate existing conventions on chemical or biological weapons and that there might be a temptation for personnel equipped with such weapons to use them inappropriately.

Do soldiers' lives matter?: a view from proportionality
Reuven (Ruvi) Ziegler and Shai Otzari. In: Israel law review Vol. 45, no. 1, 2012, p. 53-69. - Cote 345.25/251 (Br.)

A military operation is about to take place during an ongoing international armed conflict; it can be carried out either by aerial attack, which is expected to cause the deaths of enemy civilians, or by using ground troops, which is expected to cause the deaths of fewer enemy civilians but is expected to result in more deaths of compatriot soldiers. Does the principle of proportionality in international humanitarian law impose a duty on an attacker to expose its soldiers to life-threatening risks in order to minimise or avert risks of incidental damage to enemy civilians? If such a duty exists, is it absolute or qualified? And if it is a qualified duty, what considerations may be taken into account in determining its character and scope? This article presents an analytic framework under the current international humanitarian law (IHL) legal structure, following a proportionality analysis. The proposed framework identifies five main positions for addressing the above queries. The five positions are arranged along two ‘axes’: a value ‘axis’, which identifies the value assigned to the lives of compatriot soldiers in relation to lives of enemy civilians; and a justification ‘axis’, which outlines the justificatory bases for assigning certain values to lives of compatriot soldiers and enemy civilians: intrinsic, instrumental or a combination thereof. The article critically assesses these positions, and favours a position which attributes a value to compatriot soldiers’ lives, premised on a justificatory basis which marries intrinsic considerations with circumscribed instrumental considerations, avoiding the indeterminacy and normative questionability entailed by more expansive instrumental considerations.

http://tinyurl.com/6qk39jf

The domestic implementation of international humanitarian law: a manual

This manual is a practical tool to assist policy-makers, legislators and other stakeholders worldwide in ratifying international humanitarian law (IHL) instruments. Drawing on the ICRC Advisory Service’s 15 years of experience, the manual offers guidelines to help States implement IHL and meet all their obligations under IHL, particularly the repression of serious violations of it.


Un droit dans la guerre?: [cas, documents et supports d’enseignement relatifs à la pratique contemporaine du droit international humanitaire]
Marco Sass, [iii], Antoine A. Bouvier et Anne Quintin ; avec la collab. de Julieane Garcia. - Genève: CICR, mars 2012. - 3 vol. (3030 p.) + 1 CD-ROM. - Cote 345.2/654

Outil de référence sur la pratique du droit international humanitaire, cet ouvrage est destiné aux professeurs et aux étudiants en droit international ou en sciences politiques, ainsi qu’aux juristes en
exercice. Son objectif principal est de démontrer la pertinence du droit international humanitaire dans les conflits contemporains et de présenter les réponses qu’il apporte aux problèmes humanitaires que ces conflits provoquent.

**Drones and the boundaries of the battlefield**  

While drones have been criticized for causing a disproportionate number of civilian casualties or for merely sending the wrong message about American power, the most serious legal challenges to the use of drones in the modern combat environment involve questions of where such unmanned aircraft may be legally utilized. It is contended that drone strikes in places like Yemen and Pakistan violate international law because there is currently no armed conflict occurring in these nations. Although theoretically the limitations imposed by this view of the boundaries of the battlefield are not specifically directed at the use of drones and apply with equal force to any use of the tools of armed conflict. This Article briefly discusses drone use in the combat environment and explains why the debate about the boundaries of the battlefield is of particular importance to the employment and development of drones. It will then describe the geographically limited scope of International Humanitarian Law (IHL) proposed by commentators critical of drone use in areas like Pakistan and Yemen. This view of the boundaries of the battlefield will be compared with the historical understanding of where the laws of armed conflict apply in international armed conflicts and the role that geography has traditionally played in restricting IHL’s scope. It concludes by arguing that the more traditional view of IHL’s scope of application should apply with even more force to transnational armed conflicts because any other interpretation threatens to undermine the basic theoretical underpinnings upon which IHL is constructed.

[http://www.tilj.org/content/journal/47/num2/Lewis293.pdf](http://www.tilj.org/content/journal/47/num2/Lewis293.pdf)

**Educating for ethical behaviour ? : preparing military leaders for ethical challenges**  

At a fundamental level, Rules of Engagement (ROE) must be applied and - just as crucially - understood by soldiers. David Lovell examines the ways in which we educate officers for the challenges of ethical combat. Because Lovell believes that a philosophical approach to ethics alone is insufficient, he advocates a broad education in history and literature in order that officers might have some sense of what is like on the battlefield; and because the battlefield itself, as others report it, is chaotic, frightening, exhilarating and exhausting, the intellectual appreciation of it alone might not be enough. Lovell argues that combatants making ethically appropriate decisions in the theatre of war is important both for their own sense of proper purpose and for the ultimate resolution of a war, which is more than simply military, especially where the conflict is an insurgency. Drawing on the experience of recent conflicts, his chapter examines the preparedness of Australian officers for the ethical dilemmas of combat.

**Enemy status and military detention in the war against al-Qaeda**  

This article presents "enemy" as a concept for defining the legal limits on military detention in the United States' campaign against al-Qaeda. Existing frameworks have sought to define the government’s military detention authority in terms of "combatant", a concept drawn from jus in bello-international law governing how enemies fight one another. Although helpful for informing who may be detained under the government’s war powers, “combatant” is not the correct legal concept for defining the limits of that authority. Instead, the correct legal concept is “enemy,” a concept that has been defined in the international law of neutrality—a species of jus ad bellum. Unlike jus in bello, which specifies the relations between opposing belligerents, neutrality law specifies the relations between belligerents and neutrals—those outside the conflict. Neutrality law explains when non-hostile persons, organizations, and states forfeit their neutral immunity and acquire enemy status. Neutrality law’s role in defining who belligerents may treat as enemies in war is important not only as a matter of international law, but also domestic law. Interpreting the war powers conferred by Congress to be informed by the framework of duties and immunities in neutrality law balances, on the one hand, giving the President the full range of authority necessary to wage war successfully and, on the other, ensuring that the President uses the powers Congress grants only for the war that Congress has authorized. Lastly, this Article uses neutrality law’s framework of duties and immunities to describe who may be detained as an enemy in the ongoing war against al-Qaeda.

[http://www.tilj.org/content/journal/47/num1/Chang1.pdf](http://www.tilj.org/content/journal/47/num1/Chang1.pdf)
Enemy status and military detention: neutrality law and non-international armed conflict, municipal neutrality statutes, the U.N. Charter, and hostile intent


In “Enemy Status and Military Detention in the War Against Al-Qaeda,” the author proposed that the concept of “enemy” and the standards for construing “enemy” that have been developed in the law of neutrality provide the appropriate legal framework for construing the limits of detention authority in U.S. military operations against al-Qaeda. The author proposed the concept of “enemy” as a legal theory that would bridge domestic and international law. This theory could provide principles to address the hard cases and define the edges of the authority that the U.S. government may exercise to prosecute its war against al-Qaeda. And, unlike attempts to craft law anew, this theory draws from the rich principles and practice that states have developed in the law of neutrality. In this vein, Rebecca Ingber and Kevin Jon Heller have written responses to “Enemy Status and Military Detention,” which accompanied it in the first issue of the forty-seventh volume of the Texas International Law Journal. Ingber and Heller have raised some important issues to which the author would like to reply. Below, he discusses: (1) the law of neutrality and non-international armed conflict; (2) using municipal neutrality statutes to interpret international law; (3) the effect of the U.N. Charter on the law of neutrality; and (4) using hostile intent to distinguish between violations of neutral duties and conversion of a neutral to an enemy.

http://www.tijl.org/content/journal/47/num2/Chang381.pdf

Engaging armed non-state actors to protect children from the effects of armed conflict: when the stick doesn’t cut the mustard


This policy and practice note describes the methodology of the non-governmental organization (NGO) Geneva Call to engage armed non-state actors (ANSAs) in protecting children from the effects of armed conflict. ANSAs cannot take part in the development of, or become party to, international treaties, so Geneva Call has developed an innovative mechanism, the ‘Deed of Commitment’, by which ANSAs subscribe to specific norms. Efforts to engage ANSAs on protection of children built on Geneva Call’s earlier experience and the trust built up with ANSAs in developing and implementing a Deed of Commitment banning the use of anti-personnel (AP) mines. The Deed of Commitment on children and armed conflict, however, is more complex, having to take account of the agency of children, a more convoluted legal framework, and the existing United Nations (UN) Monitoring and Reporting Mechanism on children and armed conflict (MRM). The Deed of Commitment on children and armed conflict – similar to its predecessor banning AP mines – includes provisions on implementation and verification by both external monitoring and self-monitoring. Challenges to monitoring and verification include those posed by states which deny or obstruct access to ANSAs or territories where they operate. Complex problems such as protecting children from the effects of armed conflict require a range of responses. While the MRM – a political and process-driven mechanism based on an essentially punitive approach – will continue to be a key mechanism, it is important to have complementary approaches to engage ANSAs in committing to and complying with norms for child protection in armed conflict. The text of the Deed of Commitment is included as an appendix.

Environmental protection in armed conflict


In the past 30 years since the adoption of the Protocols, States have continuously added to their humanitarian law commitments in negotiating limitations or prohibitions on certain weapons and in creating an International Criminal Court to oversee compliance and prosecute breaches. Furthermore, the Customary Humanitarian Law Study by Henckaerts and Doswald-Beck (2005) may work to garner even wider support and acceptance of core humanitarian law norms, including those designed to protect the environment during armed conflict. Environmental protections in war are undoubtedly predicated on a balance between the demands of military necessity to attack a particular environmental component and the principle of humanity in ensuring a viable environment for civilians- both during and beyond the period of conflict. International humanitarian law clearly demonstrates a strong acceptance by States of wartime obligations of environmental protection, but 30 years after adoption, the threshold at which that protection applies remains vague and rather meaningless. The Study is a valuable tool in provoking State comment and scholarly dialogue, and may have a norm-crystallizing effect. However, as possibly the most important comment on the environmental provisions since their inception, the Study falls short in a number of ways. Most importantly, while there is no objection to the application to the environment of the
foundational humanitarian principles, in abstracting customary norms (Rule 43), the Study serves to confuse and misquote existing provisions. The authors of the Study go even further in Rule 44 by recognizing as applicable in war a principle of environmental law origin without adequate evidence in either area of law as to its acceptance by States. Leaving the Study to one side, developments in humanitarian law have also been witnessed for certain environmentally destructive weapons. Many governments are taking positive steps to eradicate the more controversial models of cluster weapons from their arsenals, and are abandoning or choosing alternatives to depleted uranium weapons. Finally, looking to the future, while humanitarian laws ensure a degree of protection to environmental resources during armed conflict, it is lamentable that it is the scarcity of such environmental resource that is often at the heart of many conflicts. Lamentably more so is the fact that most of these resource conflicts will be extremely localized or possibly civil wars, which are regulated by the least sophisticated body of law.

Full text: only from ICRC headquarters: https://ext.icrc.org/library/docs/ArticlesPDF/33551.pdf

A "fighting chance" or fighting dirty? : irregular warfare, Michael Gross and the Spartans
Cian O'Driscoll. In: European journal of political theory Vol. 11, no. 2, p. 112-130. - Cote 345.25/185 (Br.)

Among the most vexed moral issues in contemporary conflict is the matter of whether irregular forces waging wars of national liberation should be expected to abide by the same jus in bello rules as state actors, even though these rules may prejudice their cause. Is it, in other words, reasonable to demand that irregular forces, including guerrilla groups and national liberation movements, should comport themselves like state armies, even in cases where this would stymie their capacity to effectively pursue their military goals? This article examines Michael Gross's recent provocative response to this question. Taking Article 44 of the 1977 Additional Protocol I to the Geneva Conventions as his point of departure, Gross contends that the laws governing battlefield conduct should be revised to allow irregular forces waging an otherwise just war greater leeway to pursue their cause. Controversially, he extends this concession to the use of qualified terrorist tactics. Focusing on Gross's use of the notion of a "right to a fighting chance" as a normative grounding for this far-reaching proposition, this article draws on specific historical cases that arose in the context of Ancient Greek warfare to challenge Gross's position. On a broader note, this article concludes with some remarks to the effect that this foray into the world of Ancient Greek warfare is demonstrative of the critical potential of a historical approach to the ethics of war.

The First Amendment's borders: the place of Holder v. Humanitarian Law Project in First Amendment doctrine
David Cole. In: Harvard law and policy review Vol. 6, no. 1, Winter 2012, p. 147-177. - Cote 303.6/204 (Br.)

In Holder v. Humanitarian Law Project, decided in 2010, the Supreme Court addressed the constitutionality of punishing speech and association on the ground that they might further violence. The particular speech in question in Humanitarian Law Project (HLP) advocated only nonviolent, lawful ends; the plaintiffs principally sought to advocate for human rights and peace to and with the Kurdistan Workers' Party, a Kurdish organization in Turkey that the Secretary of State had designated as a "foreign terrorist organization." They did not intend to further the organization's illegal ends; indeed, they sought to dissuade it from violence, and to urge it to pursue lawful ends through peaceful means. Yet the Court held, by a vote of 6-3, that the First Amendment permitted criminal prosecution of such speech. The HLP decision has potentially grave repercussions. Most immediately, nongovernmental organizations working to resolve conflict or to provide humanitarian assistance may well be unable to operate where designated "terrorist organizations" are involved, because any advice or assistance they provide could be criminally prohibited. Still more troubling, however, are the decision's potential consequences for First Amendment doctrine more generally. Part I summarizes the case and its treatment by the Supreme Court. Part II details the grave consequences for First Amendment doctrine that the Court's analysis portends if it applies generally. Part III asks whether HLP can be limited in ways that would preserve First Amendment protection for other speech and association disputes involving national security in the future.


First do no harm: refugee law as a response to armed conflict

The problem of refugees has become an extremely important one in recent times, especially as conflicts increase the numbers fleeing for their safety and as places that might be considered safe havens - Australia and Europe, for example - suffer an internal political backlash against the arrival of large numbers of
refugees. Against this background, Penelope Mathew argues that the cardinal principle of non-refoulement or non-return is arguably the first line of defence for people fleeing armed conflict. As many internal armed conflicts reflect racial, ethnic and religious cleavages, the definition of a refugee contained in the 1951 Convention Relating to the Status of Refugees is capable of responding to the needs of many persons displaced by armed conflict. Some persons, however, will be determined not to be refugees as they have fled "generalized violence". It is possible to meet the compelling protection needs of such war refugees through expanded refugee definitions (as in the African and American regions) or the notion of "complementary protection" (as in Europe). Using examples from recent and ongoing conflicts, Mathew explores the argument in favour of surrogate protection for these war refugees, the relevance of international humanitarian law to the allocation of protection responsibilities and the uncomfortable division of labour in human rights protection that is imposed by the state system in which all remain formally sovereign despite huge substantive inequalities.

The first judgment of the International criminal court (Prosecutor v. Lubanga) : a comprehensive analysis of the legal issues


On 14 March 2012, Trial Chamber I (hereinafter 'the Chamber') of the International Criminal Court ('ICC' or 'the Court') delivered the long awaited first judgment of the Court ('the judgment'). This comment focuses exclusively on the legal issues dealt with in the judgment but pretends to do this comprehensively. It critically analyses the following five subject matters with the respective legal issues: definition and participation of victims; presentation and evaluation of evidence; nature of the armed conflict; war crime of recruitment and use of children under fifteen years (Article 8(2)(e)(vii) ICC Statute); and, last but not least, co-perpetration as the relevant mode of responsibility, including the mental element (Articles 25, 30). While this article follows the order of the judgment for the reader's convenience and to better represent the judgment's argumentative sequence, the length and depth of the inquiry into each subject matter and the respective issues depend on their importance for the future case law of the Court and the persuasiveness of the Chamber's own treatment of the issue. The article concludes with some general remarks on aspects of drafting, presentation and referencing.

The fog of war reform : change and structure in the law of armed conflict after September 11

Peter Margulies. - [S.l.] : Roger Williams University School of Law, [2011]. - 47 p. - Cote 345.2/877 (Br.)

Since the attacks of September 11, 2001, the law of armed conflict (LOAC) has been locked in a bitter conflict between utilitarians, who generally defer to state power, and protective theorists, who seek to shield civilians by curbing official discretion. However, protective theorists’ scrutiny of states is burdened by hindsight bias. Failing to recognize the challenges faced by states, protective theorists have ignored the risk to civilians posed by violent non-state actors such as terrorist networks. Because of this blind spot, protective theorists have embraced changes such as the ICRC’s Guidance on Direct Participation in Hostilities that exacerbate LOAC’s asymmetries, creating a “revolving door” that shields terrorist bomb makers while permitting continuous targeting of state forces. Holistic signalling requires the United States to support the law of armed conflict, even when adversaries such as Al Qaeda reject that framework. Applying the structural test, a state can use a sliding scale of imminence and necessity to justify targeting Al Qaeda-affiliated terrorists in states unwilling or unable to apprehend those operatives. However, the material support charges against Hamdan signal a troubling turn to victors’ justice that will ultimately harm counterterrorism efforts. Stressing a linear time horizon and holistic signalling defuses rhetoric and sharpens deliberation about post-9/11 LOAC changes.

Formulating a new atrocity speech offense : incitement to commit war crimes

Gregory S. Gordon. In: Loyola University Chicago law journal Vol. 43, no. 2, Winter 2012, p. 281-316. - Cote 344/260 (Br.)

Since the time of the Pharaohs, certain military commanders have sought to demonize the enemy in speeches given to troops before sending them into battle. Depending on the words used by the commanding officer in these situations, such speech would not necessarily amount to “orders” given to the troops. In a genocidal context, the officer’s words alone might be actionable as “incitement to genocide.” But curiously, under the current state of international humanitarian law, the speech itself would not permit an incitement prosecution of the commander. This Article proposes filling the speech gap in international humanitarian law by creating a new inchoate offense—direct incitement to commit war crimes. The Article
proceeds in five parts. Part II chronicles instances where both military commanders and prominent civilians have exhorted soldiers and militia to commit atrocities but the civilians’ use of such facilitating language was not punished as a violation of the law of war. Part III examines the existing law related to speech crimes in the mass atrocity context and its extremely limited scope in the current laws and customs of war and applicable treaties, including the Geneva and Hague Conventions. Part IV suggests ways in which incitement could be incorporated into the existing framework of both international humanitarian law and international criminal law. Finally, Part V will demonstrate that while the new offense may raise free-expression and operational concerns, it will not run afool of military individual liberty norms or institutional prerogatives.

The Goldstone report: politicization of the law of armed conflict and those left behind

Joshua L. Kessler. In: Military law review Vol. 209, Fall 2011, p. 69-121

This article addresses the legal issues specifically pertaining to Operation Cast Lead in Gaza, and the United Nations Human Rights Council fact-finding mission’s troubling analysis thereof. Ultimately, the article concludes that the Mission’s one-sided analysis of Operation Cast Lead overshadows the very real and pressing effects of war on the civilian populations of both Israel and Gaza. By superimposing a capabilities based paradigm on international humanitarian law—holding the attacker to a higher legal standard than the defender in an armed conflict—the Mission creates an environment that encourages non-state actors to circumvent the law, while rendering adherence to the law for nation-states nearly impossible. First, a historical context of the conflict and the applicable law is reviewed, providing a backdrop for the military operation and its causes. This background is followed by a discussion of the legal standards that apply to Operation Cast Lead under IHL. The article then addresses the Goldstone Report’s strengths and weaknesses, to include a critique of select findings of the Mission as they relate to the IHL. Finally, this article concludes with a discussion of the value of the Goldstone Report as a whole, rejecting the politicization of asymmetric warfare (epitomized in the Goldstone Report) as counter-productive to achieving the intent of the IHL: to respect a nation-state’s military necessities while at the same time protecting non-combatants caught between adversaries on the field of battle.

Good time for a change: recognizing individuals’ rights under the rules of international humanitarian law on the conduct of hostilities


Given the current state of international law and international relations, in the near future it would be impossible, though highly desirable, to improve the situation of all civilians adversely affected by the outbreak of an armed conflict. It is, however, both necessary and realistic to address the condition of at least those individuals who suffer damage as a result of violations of the rules of jus in bello on the conduct of hostilities (the so-called "Hague law"). A belligerent violating international humanitarian law (IHL) bears the responsibility for the breach of such rules and is liable to make reparation for the consequences thereof. Arguably, the time is ripe for recognizing that the rules of the Hague law also protect individuals’ rights, and that injured individuals are therefore entitled to remedy and reparation for the wrong suffered. The shift from the traditional paradigm of inter-state responsibility to responsibility of the state vis-à-vis individuals could be achieved through the creation of ad hoc international mechanisms (such as claims commissions) for the processing of individual complaints. In addition, the task of making a major breakthrough would fall to domestic courts and human rights supervisory bodies, which have ample potential for affirming the existence of individuals’ rights under the rules of IHL regulating means and methods of warfare.

La “gravité” dans la jurisprudence de la cour pénale internationale à propos des crimes de guerre


Le Statut de Rome qui définit les fonctions et les pouvoirs de la Cour pénale internationale constitue la « règle du jeu » dont la portée est censée être dévoilée par la jurisprudence de la Cour. Dans ce cadre, les éléments constitutifs des crimes de guerre se développent au-delà des approches classiques à travers l’activité jurisprudentielle de la Cour pénale internationale. La présente analyse s’efforce de dégager un certain nombre de particularités quant au rôle de la gravité dans la poursuite des crimes de guerre sur le plan international.
Guarding the guards in the war on terrorism

A debate on the propriety of any counterterrorism strategy should arguably address not only the substantive merits of specific acts pursued under the existing policy - that is, whether the targeted killing of dangerous terrorists, or the torture of terrorists under "ticking bomb scenarios" can ever be justified - but also the policy's institutional or second-order implications. Part I will identify three principal institutional settings in which key decisions on the war on terror are reviewed and discussed; it is claimed that in all of those settings the executive branch is subject to insufficient oversight and that, as a result, given the executive's structural incentives, an improper application of counterterrorism norms can be expected to occur. Part II describes some of the political dynamics that cause the executive to perform inadequate right balancing, and which limit the ability of other branches of government to correct such decisions and actions. Part III then discusses the possibility of remedying the inadequate oversight procedures which are currently in place by way of strengthening international supervision over counterterrorism policies, clarifying the law governing counterterrorism policies - in particular, norms governing the invocation of the "armed conflict paradigm".

How to improve upon the faulty legal regime of internal armed conflicts

There is a growing view that human rights law (HRL) offers greater protection to the individual and should therefore replace international humanitarian law (IHL) in the regulation of internal armed conflict, at least when the violence is below the threshold of Protocol II. However, the consequences of a shift from regulation through IHL to regulation through HRL have not been fully explored. For example, one would need to turn attention to whether, and in what circumstances, armed groups have human rights obligations. There would also need to be a forum before which these obligations could be enforced. Another problem is the methodological approach by which the international law of internal armed conflict has developed. The development has taken place primarily by analogy to the law of international armed conflict. Yet there are important differences between internal armed conflicts and their international counterparts, principal among which are the actors that take part in each of them. A study needs to be undertaken to determine whether all rules now applicable in internal armed conflicts are within the capacity of armed groups. To improve upon the current condition greater regard should be had to the ad hoc regulation of internal armed conflict through unilateral declarations, bilateral agreements.

Human rights and the law of war : the Geneva Conventions of 1949

Do the Geneva Conventions of 1949-the cornerstone of international humanitarian law-belong in the history of human rights? It seems not: most surveys of human rights history neglect the Conventions entirely. Historians rarely place Geneva alongside other founding documents of the "human rights revolution" of the 1940s. To be sure, historians of human rights will argue that the Geneva Conventions do not figure prominently in their work because the Conventions form part of the laws of war. Yet this defense-that Geneva does not belong in the human rights "story"-has of late been fatally undermined. Powerful forces have combined to bring Geneva to the forefront of human rights debates. Scholars of international humanitarian law have recently noted that during the post-1945 period, the laws of war and human rights converged. Today, legal scholars-if not historians-generally consider the Geneva Conventions as one of a series of international treaties that form part of the human rights regime, and that compel states to recognize and respect the inalienable right of individuals to exist in freedom, security, and dignity.

Human rights, positive obligations, and armed conflict : implementing the right to education in occupied territories

In three cases, the International Court of Justice (ICJ) has held that States must apply their human rights treaty obligations extraterritorially during times of occupation. International human rights law and international humanitarian law (IHL), under which occupation law exists, were not constructed in formal consultation with one another. But their ability to co-exist is logical enough, with human rights law emerging from, and IHL expanding after, World War II with the similar aim of committing governments to protect the most basic notions of humanity. Tensions between the two regimes do, however, exist.
Occupation law largely works to restrict Occupying Powers from tampering with the laws and institutions of the occupied territory, whereas significant portions of human rights law press States to amend or change laws and develop infrastructure to accommodate the welfare of the population under their control. With a focus on the positive human rights obligations contained within the right to education, this article looks at the compatibility of these two regimes, points out tensions, and proposes ways for easing their co-existence.

Full text: only from ICRC headquarters:
http://www.ingentaconnect.com/content/mnp/jhls/2010/00000001/00000002/art00004

Humanitarian law in action within Africa

In Humanitarian law in action within Africa, Jennifer Moore studies the role and application of humanitarian law by focusing on African countries that are emerging from civil wars. Moore offers an overview of international law, and describes four particular subfields relevant to the resolution of armed conflict: international humanitarian law, international human rights law, international criminal law, and international refugee law. Building on this legal foundation, Moore considers practical mechanisms to implement international humanitarian law, focusing specifically on the experience of Uganda, Sierra Leone, and Burundi. Through the case studies of these countries, Moore identifies three fundamental components of transitional justice: criminal, social, and historical. Although the African continent has gone through some of the world's greatest humanitarian emergencies, issues such as violence against women, child soldiers, and genocide are not unique to Africa, and as such, the study of humanitarian law by examining Africa's experience is important to conflict resolution and reconstruction throughout the world.

IHL supplement for use in courses in international criminal law
Beth Van Schaack. - [S.l.]: Santa Clara University School of Law, March 2012. - 52 p. - Cote 345.2/883 (Br.)

This is a teaching supplement on the interface of international humanitarian law (IHL) and international criminal law (ICL). It is designed for use primarily in a course on ICL, but could also be assigned in an IHL course as well. It is part of a series being generated by the Emory International Humanitarian Law Clinic and the International Committee of the Red Cross to enable the teaching of the law of armed conflict in other substantive courses.

Individual remedies for victims of armed conflicts in the context of mass claims settlements

The emerging law on the peaceful resolution of armed conflicts has to address, among other issues, the resolution of claims of individual victims of violations of the law during the conflict. The question is whether and, if so, how international law should limit the discretion of parties to the conflict when they negotiate a comprehensive settlement of all the outstanding claims. This essay sets out to explore this question. The essay envisages negotiations towards a comprehensive settlement of all outstanding issues. This settlement will ultimately be part of a peace treaty in a case of an international armed conflict, or part
of an internal agreement following an internal armed conflict, or both. The questions are similar: to what extent should the discretion of these parties be constrained by international law? Does the law at present empower individual victims to seek reparations in courts for violations of international humanitarian law?

Full text: only from ICRC headquarters: https://ext.icrc.org/library/docs/ArticlesPDF/33271.pdf

The interaction between international humanitarian law and human rights law and the contribution of the ICJ


Writers hold that the Court's contribution to the relationship between the two branches of International Humanitarian Law (IHL) and Human Rights Law (HRL) can be expressed in a single term, namely the principle as an integral part of a strong lex specialis regime or self-contained regime. The question of the interrelation between IHL and HRL owes its credibility to the recognition given in the Corfu Channel Judgment to the principle of 'elementary considerations of humanity' around which rules of HRL and IHL as branches of the law, revolve.

Full text: only from ICRC headquarters: https://ext.icrc.org/library/docs/ArticlesPDF/33837.pdf

International law: armed groups in a state-centric system


What is the position of non-state armed groups in public international law, a system conceived for and by states? This article considers the question, mainly in the light of jus ad bellum and jus in bello. It shows that, while armed groups essentially trigger the application of jus ad bellum and jus in bello, they are not themselves endowed with a right to peace. Jus in bello confers rights and obligations on armed groups, but in the context of an unequal relationship with the state. This inequality before the law is strikingly illustrated by the regulation of detention practised by armed groups in non-international armed conflicts. Despite the significant role that they play in modern-day conflicts, armed groups constitute an 'anomaly' in a legal system that continues to be state-centric.


International law issues raised by the transfer of detainees by Canadian forces in Afghanistan


The transfer of Afghan detainees to Afghan authorities by Canadian forces raised concerns in public opinion, in Parliament, and was the object of court proceedings and other enquiries in Canada. This article aims to explore the rules of international law applicable to such transfers. The most relevant rule of international humanitarian law (IHL) applies to prisoners of war in international armed conflicts. However, the conflict in Afghanistan, it is argued, is not of an international character. The relevant provision could nevertheless apply based upon agreements between Canada and Afghanistan and upon unilateral declarations by Canada. In addition, international human rights law (IHRL) and the very extensive jurisprudence of its mechanisms of implementation on the obligations of a state transferring a person to the custody of another state where that person is likely to be tortured or treated inhumanely will be discussed, including the standard of care to be applied when there is an alleged risk of torture. While IHL contains the rules specifically designed for armed conflicts, IHRL may in this respect also clarify as lex specialis the interpretation of concepts of IHL. Finally, the conduct of Canadian leaders and members of the Canadian forces is governed by international criminal law (ICL). This article thus demonstrates how IHL, IHRL, and ICL are intimately interrelated in contemporary armed conflicts and how the jurisprudence of human rights bodies and of international criminal tribunals informs the understanding of IHL rules.


Israeli soldiers' perceptions of Palestinian civilians during the 2009 Gaza war

While the suffering of Palestinian civilians in the 2009 Gaza War can be explained in part by the type of war it was and the ambiguity of civilian identity and relationship with the combatants, such suffering also finds its source in a shared mind set among Israeli soldiers about the identity of civilians, what are their relations to enemy combatants, and how they should be treated in times of war. And the ambiguities of the written set of rules that govern the relationship between soldiers and civilians may in some cases result in the indiscriminate use of violence and provide justification to kill civilian non-combatants. The chapter thus focuses on Israeli Rules of Engagement adopted during the 2009 Gaza War and highlights some challenges regarding the practicality of these rules and their interpretation by soldiers in the field that may explain why, despite a strong pro-civilian focus of the International Humanitarian law, civilians continue to suffer and die in far greater numbers than combatants in today’s conflicts.

The just war tradition and its modern legacy: jus ad bellum and jus in bello
David Boucher. In: European journal of political theory Vol. 11, no. 2, 2011, p. 92-111. - Cote 345.2/889 (Br.)

The relationship between jus ad bellum and jus in bello has been characterized differently throughout European history. There have been three main positions exemplified by Hugo Grotius, Samuel von Pufendorf and Emer de Vattel. They are, first, both the cause and the conduct of warfare must be just; second, the cause must be just, but the conduct of the war is unconstrained in order to achieve the goal of peace; and, third, we must assume justice on both sides, and concentrate on ensuring just conduct in armed conflict. Each attempted to distil customary practices, which they saw in some relation to Natural Law, the ultimate source of moral obligation. Customary international law now serves the function of Natural Law in that even if treaties in which it is articulated lapse the customary constraining precepts remain, and are equally obligatory. It is contended that the relationship between just war and just conduct in war during the 20th and 21st centuries has mirrored the three classic positions, and since 9/11, with the advent of new dimensions to warfare in the war against terror, the relationship is in flux. Since 9/11 there has been a growing emphasis on jus ad bellum and a relative silence on the principles of jus in bello. Implicitly, there is an informal acceptance of something like Pufendorf's position in which outlaw combatants are deemed to place themselves outside of the protection of customary law.

The law of neutrality does not apply to the conflict with Al-Qaeda, and it’s a good thing, too: a response to Chang
Kevin Jon Heller. In: Texas international law journal Vol. 47, no. 1, Fall 2011, p. 115-141. - Cote 345.29/170 (Br.)

In his Article “Enemy Status and Military Detention in the War Against Al-Qaeda,” Karl Chang addresses the critical problems of the scope of a state’s detention authority in non-international armed conflict (NIAC). He rejects the idea that the scope of detention in NIAC is determined by the distinction between “combatants” and “civilians”. Instead, he argues that “the legal limit on military detention is ‘enemy,’ a concept that has been defined in the law of neutrality.” This article is a response divided into three sections. Part I criticizes Chang’s assertion that the law of neutrality applies to the conflict between the United States and al-Qaeda, explaining why neutrality law would apply only if the United States or third states recognized al-Qaeda as a legitimate belligerent, a status that the United States would desperately want to avoid. Part II demonstrates that the power to detain is far more limited under the law of neutrality than Chang believes and that permitting states to declare neutrality would undermine the United States’ counterterrorism efforts. Finally, Part III explains why, contrary to Chang’s claim, the law of neutrality no longer determines the limits of the jus ad bellum, its rules having been effectively supplanted by the U.N. Charter’s prohibition on the use of force.

http://www.tilj.org/content/journal/47/num1/Heller115.pdf

The law of operational targeting: viewing the LOAC through an operational lens

Understanding how air and missile warfare is planned, executed, and regulated requires more than just an understanding of relevant LOAC provisions. In U.S. practice (and that of many other countries), air and missile warfare is one piece of a broader operational mosaic of law and military doctrine related to the joint targeting process. How operational commanders select, attack, and assess potential targets and how the LOAC reflects the logic of military doctrine related to this process is therefore the objective of this Article. To achieve this objective, the authors focus on a recent decision by the International Criminal Tribunal for the Former Yugoslavia (ICTY), Prosecutor v. Gotovina. Although the military operation at the center of this case involved only limited use of air and missile warfare, the ICTY’s extensive focus on the use of artillery and rocket attacks provides a useful and highly relevant illustration of why understanding the interrelationship between law and military doctrine is essential for the logical and credible development of the law. The authors therefore seek to “exploit” this case as an opportunity to expose the reader to this
interrelationship, an interrelationship equally essential to the effective evolution of the law of air and missile warfare.

http://www.tilj.org/content/journal/47/num2/Corn337.pdf

Law of war manuals and warfighting: a perspective

This short essay is intended to provide some perspectives on the role the Air and Missile Warfare Manual can play in the future. It aims to provide special emphasis on the practical issues associated with air and missile operations. It assesses the potential of the manual to turn the norms it promotes into accepted practice among nations, if not into customary international law.

http://www.tilj.org/content/journal/47/num2/Dunlap265.pdf

The law that turned against its drafters: guerrilla-combatants and the First Additional Protocol to the Geneva Conventions

This chapter explores the effect of the First Additional Protocol’s provisions on customary international law, both with regards to the question of entitlement to prisoner-of-war status and with regard to the application of the principle of distinction in the conduct of warfare. At the heart of the argument lies the proposition that state practice may have a destructive effect on customary norms that exceeds its constitutive effect. This is precisely what has happened with the Protocol. While the Protocol’s provisions regarding guerrilla insurgency failed to acquire a status of customary norms, they nonetheless undermined the customary status of preexisting rules. The implications of this are twofold and - from the perspective of the Protocol’s drafters, who intended to give additional protections to groups fighting against state adversaries in irregular conflicts - sadly ironic. First, the Protocol failed to expand the category of guerrillas entitled to POW status under customary law. Second the Protocol eroded much of the protection against attack previously afforded to guerrillas under the customary law principle of distinction. Hence, from the perspective of guerrilla fighters, the Protocol had only adverse consequences in terms of its influence on the state of customary international law.

Legal ramifications of the war in Gaza

The purpose of this Article is to highlight the major rules of international (humanitarian) law that have been implicated by the war in Gaza. The first section of this Article is devoted to the international status of Gaza. Although Israel in 2005 officially withdrew from the Gaza Strip, there are compelling grounds for maintaining that Gaza is de facto still subject to Israeli occupation. If that is found to be the case, resistance to Israeli occupation would qualify as a war of liberation, which in terms of Protocol I to the Geneva Conventions of 12 August 1949 is subject to the rules of international humanitarian law applying to international armed conflicts. That is the focus of the second part of this Article. The legality and legitimacy of a war of liberation do not afford a right to freedom fighters to conduct hostilities by all conceivable means, and especially do not exonerate the belligerents from attacking civilians or civilian targets. Hamas conducted its militant operations from within a civilian environment. The consequences of doing that is analyzed in the fourth section of this essay. The possibility of this amounting to using civilians as a human shield is discussed at some lengths. In the fifth section, focus shifts to Israel. It is there argued that Israel had every right to defend itself against the armed attack orchestrated by Hamas. However, the ways and means of doing that are again not without far-reaching limitations. Section six again turns attention to Hamas. The law relating to the inherent right of individual or collective self-defense does not apply to Hamas, since the hardships suffered by Gaza residents in consequence of Israeli control measures did not amount to an armed attack as required by Article 51 of the U.N. Charter.

Legal remedies for human rights violations in the armed conflict in Chechnya: the approach of the European Court of Human Rights in context

The article discusses the efficacy of the remedies offered to successful applicants by the European Court of Human Rights in the cases coming from the armed conflict in the Chechen Republic of the Russian Federation. It submits, firstly, that proper establishment of facts constitutes a remedy in itself for victims
of human rights violations in an armed conflict. It then analyses the establishment of facts by the Court in the Chechen cases and argues that the assessment of evidence under the Court's burden of proof 'beyond reasonable doubt' was applied unevenly in different cases. The paper suggests that the Court obtains evidence proprio motu, which it has never done in the Chechen cases. Secondly, this paper evaluates the European Court's practice to limit the just satisfaction by monetary awards and to consistently deny the applicants' requests for non-monetary awards. It then discusses the developments in the international law on reparations for human rights violations under the ECHR and in the Inter-American and UN systems, and argues for a need to enhance the European Court's awards of just satisfaction. Finally, the paper assesses the supervision of the execution of judgments in the Chechen cases, finds it ineffective, and suggests that more actions are required from the Court in order to deal effectively with alleged human rights violations arising from armed conflicts.

Full text : only from ICRC headquarters:
http://www.ingentaconnect.com/content/mnp/jhls/2010/00000001/00000002/art00003

Lessons for the law of armed conflict from commitments of armed groups : identification of legitimate targets and prisoners of war

Armed groups frequently issue ad hoc commitments that contain a law of armed conflict component. These commitments detail the obligation of the relevant armed group to abide by international humanitarian law, the Geneva Conventions, or particular rules set out in the commitment. They commit the group to abide by international standards, sometimes exceed international standards, or in certain respects violate international standards. Although these commitments are often overlooked, they offer certain lessons for the law of armed conflict. This article considers the commitments of armed groups with respect to two specific areas of the law that are either of contested interpretation or seemingly inapplicable to noninternational armed conflicts, namely the identification of legitimate targets and the prisoners of war regime.


Living in the "new normal" : modern war, non-state actors, and the future of law

In many regards, the advent of modern irregular conflict - especially in its specifically counterterrorist (CT) incarnation - has indeed led to some growth in the power in the Executive Branch. But this has not occurred willy-nilly, or without attendant dynamics of bargained adjustment. Indeed, rather than being a process that could be likened to the swing of a pendulum back and forth between extremes, the intra-governmental dynamics of CT war and legality in the United States have looked more like a process of punctuated evolution. Expedient single-branch executive responses to crisis have been to some extent adjusted as the courts and Congress have stepped in - and as successive presidents have taken office - but there has been much more ratification than retrenchments in these respects, and more continuity than change in CT policy since the first phase of the U.S. response after 9/11.

Measure twice, shoot once : higher care for CIA-targeted killing

To rein in the killer drones, this Article looks to foundational IHL principles to develop limits on the CIA's campaign in Pakistan and on the possible extension of that campaign to other countries outside the United States. In particular, this Article argues that IHL's requirements of distinction and military necessity generally require the CIA to achieve a very high level of certainty that a targeted person is a legitimate object of attack before carrying out a drone strike. To capture this level of certainty, one might borrow the "beyond reasonable doubt" standard from the criminal law, the "clear and convincing" standard from civil law, or create some new phrase. Also, to honor the principle of precaution, the CIA's Inspector General must review every CIA drone strike, including the agency's compliance with a checklist of standards and procedures for the drone program. The results of these reviews should be made as public as consonant with national security. These controls are, in the language of IHL, "feasible precautions" for the remote-control weapons of the new century.

Military operations, battlefield reality and the judgment's impact on effective implementation and enforcement of international humanitarian law

[Laurie R. Blank]. - [Atlanta] : International Humanitarian Law Clinic at Emory University School of Law, 2012. - 17 p. ; 30 cm. - Cote 345.25/243 (Br.)

On November 4, 2011, the International Humanitarian Law Clinic at Emory Law School convened a group of military operational law experts to analyze the broader legal issues in and implications of the recent judgment of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the case of Prosecutor v. Gotovina, which focused on Operation Storm, the Croatian operation to re-take the Krajina region in the summer of 1995. The report sets forth the experts’ consensus views and concerns regarding the application of the law in the judgment, highlighting four key areas: the imposition of what amounts to a strict liability standard imposed on commanders who attack lawful military objectives in populated areas; the flawed application of the principle of proportionality; the failure to consider or apply Article 58(b) of Additional Protocol I and its obligations for defending parties to take precautions; and the failure to properly recognize and rest the legal analysis on the operational complexity inherent in the targeting process. The report also emphasizes a range of institutional concerns and second order effects resulting from the judgment: the effect on future military operations; the consequences for the respect for and development of international law; and specific overarching concerns regarding the role of the commander and the role of legal advisers during military operations.


Modern means of warfare: the need to rely upon international humanitarian law, disarmament, and non-proliferation law to achieve a decent regulation of weapons


The problem with traditional criteria for restricting the use of certain weapons is that they are unclear and thus unable to set a prohibition, or that they are obsolete, since they regulate weapons no more in use or of no specific military value. At present disarmament and international humanitarian law (IHL) employ two different techniques for regulating weapons. While disarmament prohibits the build-up and stock-piling of weapons, IHL regulates their use. A topical issue is that of the use of drones. They should be operated in conformity with rules of IHL and kept under control. With regard to possible future changes, it must be said that IHL is not the only way to achieve decent regulations of weapons. Arms control, non-proliferation, and disarmament instruments should be used to achieve a more suitable result. The choice of instruments available is also important. The indeterminacy and lacunae of customary international law makes it ill-suited for disarmament. Treaties are necessary for IHL, that is, for prohibiting the use of specific weapons. However, one should also rely on soft law for managing non-proliferation regimes and even arms control.

Mohammed Jawad and the military commissions of Guantánamo


The military commission of U.S. v. Mohammed Jawad, (in which the author served as lead defense counsel) perhaps more clearly than any other case demonstrated that the government was relying on its ability to use coerced evidence to earn convictions, even for invented war crimes. In this notorious case, which the New York Times called “emblematic of everything that is wrong with Guantanamo Bay” the prosecution repeatedly took extreme and unsupportable positions in litigation before the commission in an effort to preserve its ability to use coerced evidence and to convict detainees for non-existent war crimes. Even with all the advantages afforded to the government by the MCA and MMC, the prosecution was unable to make its case against Mr. Jawad and was ultimately forced to dismiss the charges and release him when a federal judge granted his petition for a writ of habeas corpus. Through the story of Mohammed Jawad and the disintegration of the case against him we can see the larger narrative of the abject failure of the military commissions of the Bush Administration.

http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1497&context=dlj

The move to substantive equality in international humanitarian law: a rejoinder to Marco Sass, li and Yuval Shany

For this first debate, the Review asked two members of its Editorial Board, Professor Marco Sassòli and Professor Yuval Shany, to debate on the topic of equality of states and armed groups under international humanitarian law. Professor René Provost comments on this debate, adding a third dimension to the discussion. The crucial question is whether it is realistic to apply the current legal regime to non-state armed groups. How can armed groups, with sometimes very limited means and low levels of organization, meet the same obligations as states? What are the incentives for armed groups to respect rules that their opponents have enacted? Why should they respect any rules when the very fact of taking arms against the state already makes them ‘outlaws’? - Contient : Introducing a sliding-scale of obligations to address the fundamental inequality between armed groups and states? / M. Sassòli. - A rebuttal to Marco Sassòli / Y. Shany.


Multilevel regulation of military and security contractors : the interplay between international, European and domestic norms

The outsourcing of military and security services is the object of intense legal debate. States employ private military and security companies (PMSCs) to perform functions previously exercised by regular armed forces, and increasingly international organisations, NGOs and business corporations do the same to provide security, particularly in crisis situations. Much of the public attention on PMSCs has been in response to incidents in which PMSC employees have been accused of violating international humanitarian law. Therefore initiatives have been launched to introduce uniform international standards amidst what is currently very uneven national regulation. This book analyses and discusses the interplay between international, European, and domestic regulatory measures in the field of PMSCs. It presents a comprehensive assessment of the existing domestic legislation in EU Member States and relevant Third States, and identifies implications for future international regulation. The book also addresses the crucial questions whether and how the EU can potentially play a more active future role in the regulation of PMSCs to ensure compliance with human rights and international humanitarian law.

Necessity, proportionality, and distinction in nontraditional conflicts : the unfortunate case study of the Goldstone report

This chapter highlights the challenges of applying the international humanitarian law principles of military necessity, proportionality, and distinction to nontraditional armed conflicts, exploring these issues through an examination of the Report of the United Nations Fact-Finding Mission on the Gaza Conflict, also known as the "Goldstone Report".

The new cyber face of battle : developing a legal approach to accomodate emerging trends in warfare

This Note addresses an emerging form of cyberspace operations, and adapts existing threshold approaches to this new type of warfare first executed during the Russian-Georgian War of 2008 : the use of non-kinetic cyberattacks to facilitate kinetic effects and the use of non-kinetic effects as a substitute for conventional operations. This Note is divided into four parts. The first part provides a basic introduction to the terminology used in this note and a brief discussion of the legal paradigms that may apply to cyberspace operations. Part II continues with a proposal to consider cyberspace operations as an armed attack when non-kinetic cyberattacks are used in connection with other conventional weapons to achieve kinetic effects or to supplant the need for kinetic effects. This proposal is significant because it will impact the legal response a state can take in an armed conflict. Part II also introduces two case studies in which cyberspace operations were used in connection with conventional military attacks. The first is the 2007 Israeli raid on the suspected Syrian nuclear reactor; the second is the Russian-Georgian War of 2008. Part III discusses the different tests that have been proposed to determine when a cyberspace operation meets the threshold to be declared an armed attack. After reviewing existing literature, a proposal is made to adopt a modified effects-based approach to better address the unique nature of cyberattacks and their interaction with conventional arms to achieve kinetic outcomes. Part IV provides concluding thoughts and discusses what future steps should be taken with regards to developing a legal framework that is better-suited to the distinct challenges of cyberattacks.
"New rules for new wars" : international law and just war doctrine for irregular war

This article traces the increasing pressures exerted upon international law and international institutions from two sources: the humanitarian military interventions (and failures to intervene) in the aftermath of the Cold War during the decade of the 1990s; and the “global war on terror” and wars of counterinsurgency and regime change fought during the first decade of the 21st century. Proposals for legal and institutional reform in response to these challenges emerge from two distinct and largely independent sources: a “publicist” or theoretical discussion among scholars in philosophy, law, and international relations; and a formal or procedural discussion among diplomats and statesmen, both focusing upon what the latter group defines as a “responsibility to protect”. This study concludes with recommendations for reform of international humanitarian law (or Law of Armed Conflict), and for reformulations of professional ethics and professional military education in allied militaries, both of which will be required to fully address the new challenges of “irregular” or hybrid war.

A new twist on an old story : lawfare and the mixing of proportionalties
Laurie R. Blank. In: Case western reserve journal of international law Vol. 43, no. 3, 2011, p. 707-738. - Cote 345.2/879 (Br.)

The claim that a just cause erases any wrongs committed in war is an old story, just like the opposite claim that an unjust cause renders all acts unlawful. International law has traditionally reinforced a strict separation between jus ad bellum - the law governing the resort to force - and jus in bello - the law governing the conduct of hostilities and protection of persons during conflict. Nonetheless, we see today a new twist on this old story that threatens the separation between jus ad bellum and jus in bello from the opposite perspective. In essence, there is an ever-louder claim that excessive civilian deaths under jus in bello proportionality render an entire military operation unjust under jus ad bellum. Protection of civilians is a central purpose of international humanitarian law (IHL) and media coverage of conflict and civilian deaths is critical to efforts to minimize human suffering during war. However, insurgent groups and terrorists exploit this greater focus on civilian casualties to their own advantage through tactics often termed "lawfare," such as human shields, perfidy, and other unlawful tactics. Not only do they seek greater protection for their fighters, but they also use the resulting civilian casualties as a tool of war. This article analyzes the growing use of alleged violations of jus in bello proportionality to make claims of disproportionate force under jus ad bellum. In doing so, it highlights the strategic and operational ramifications for combat operations and the impact on investigations and analyses of IHL compliance and accountability. Ultimately, this new twist on an old story has significant consequences for the application of IHL, for decisions to use force, and for the implementation of strategic, operational, and tactical goals during conflict. Most of all, it places civilians in increasing danger because it encourages tactics and strategies that directly harm them.

Obeying restraints : applying the plea of superior orders to military defendants before the International Criminal Court
Christopher K. Penny. In: Canadian yearbook of international law = Annuaire canadien de droit international Vol. 48, 2010, p. 3-38. - Cote 344/574 (Br.)

This article addresses the content and ramifications of the unique plea of superior orders, illustrating the complexities of absolving wartime behaviour on this basis as well as the legitimate rationale for doing so in certain cases. The article discusses the general legal obligations for soldiers to obey commands ; outlines the historical development and legal content of the corresponding plea of superior orders ; and assesses the potential future application by the International Criminal Court of this specialized "mistake of law" doctrine. The author argues that in light of its moral and practical ramifications it should be considered by the court as both a full defence and a factor in mitigation of sentence, in a manner conceptually distinct from duress. However, the author cautions that the ICC must be careful to encourage, rather than discourage, individual moral autonomy, to the extent possible. A full defence should remain open to soldiers only when they have acted under a reasonable albeit mistaken belief in the legality of their orders. Especially on the modern battlefield, soldiers must continue to act and be judged as "reasoning agents" and not as mere automatons.

Full text : only from ICRC headquarters: https://ext.icrc.org/library/docs/ArticlesPDF/33221.pdf
Opting out of the law of war: comments on Withdrawing from international custom

David Luban. In: The Yale law journal online Vol. 120, 2010, p. 151-167. - Cote 345/602 (Br.)

This paper is a response to Curtis A. Bradley & Mitu Gulati, Withdrawing from International Custom, Yale Law Journal, Vol. 120 p. 202 (2010), which argues against the Mandatory View (according to which states are bound by customary international law with no possibility of opting out), and in favor of a Default View, which permits states to opt out of international custom unilaterally. The response offers the following arguments: (1) Currently, the most significant contested issue about customary international law in U.S. discourse concerns the laws of war - a topic that Bradley and Gulati treat only briefly and incidentally. Their proposal would make it possible for the United States to withdraw unilaterally from customary law-of-war limitations. (2) Part of Bradley and Gulati's case for the Default View is that it actually represents the historical norm until the twentieth century. Luban argues that their main source, Vattel, thought that states can opt out only of a customary rule that is indifferent in itself - a category that excludes the jus in bello rules of the law of war. He discusses other sources as well. (3) Bradley and Gulati believe that the Mandatory View was a colonialist invention to lock new nations into old rules, but the history they cite does not support this diagnosis. (4) Turning from history to policy, permitting states to opt out of the law of war would likely have immediate dangerous effects on the ground as the U.S. military rewrites its manuals and retrains officers and troops to respond to changes in law. The result of a U.S. opt-out is more likely to be an unravelling of the law of war than a helpful revision leading to better rules.


The politics of civilian identity


In the arena of IHL civilian noncombatants are treated as war's innocents, and thus situated outside of the realm of military objectives. Yet, the principle of proportionality is so shallow in meaning that it fosters a dizzying array of incompatible interpretations and applications by field commanders. Because of its lack of clarity, excessive vagueness, and conceptual impoverishment regarding the meaning of proportionate killing, the principle allows for highly arbitrary judgments by military leaders, many of which prioritize the military mission, strategy, and tactics at the expense of humanitarian protections of civilians. Commanders often "fill in" the principle's content with their own, possibly idiosyncratic, understanding of proportionality that is linked to their sense of balance of competing moral commitments.

The principle of proportionality: "force protection" as a military advantage


"Force protection" is a primary concern of every military commander. Undoubtedly, it is an important and legitimate factor in the planning of every attack. However, when it comes to the humanitarian proportionality principle there is considerable controversy over the question to what extent "force protection" can be factored into the humanitarian proportionality calculus as a relevant military advantage to be weighed against expected civilian casualties, injuries and damage. This question is pursued in this article.

http://tinyurl.com/ctfxnxz

Private military and security companies and the "civilianization of war"


Andrew Alexandra's chapter begins from the observation that Private Military and Security Companies (PMSCs) have come to play an increasingly important role in the military activities of states, especially of the United States. The functions of PMSCs cover the range of combat operations, training programs and logistical support, but while in the latter two roles they might formally be considered non-combatants (given their separation from the military chain of command) their activities in recent conflicts have created problems for the viability of the distinction between combatants and non-combatants. Alexandra explores the issues surrounding this "civilianization" of warfare, focusing on the congruence (or otherwise) of interests between PMSCs and the states that employ them, a relationship in which the interests of the states are sometimes put at risk. Alexandra urges that, given the unlikelyhood of the role of PMSCs being curtailed, their position in conflict zones should be regularized by falling under the military chain of command, and becoming unequivocally lawful combatants.
Privatized military firms' impunity in cases of torture: a crime of humanity?

Over the past few years privatized military firms (PMFs) have allegedly committed all kind of war crimes, including torture. Prisoners' abuses at Abu Ghrabi or indiscriminate firing against civilian vehicles to the rhythm of Elvis Presley's “Runaway Train” are but a couple of examples of the excesses revealed by the public media. Nonetheless, members of PMFs have hardly been held accountable. “Lawlessness” and “weak laws” have been blamed for these striking cases of impunity. Emphasizing the crime of torture, this article explores the legal framework applicable to PMFs, both from a domestic and an international perspective, and sheds light on ways in which these alleged crimes could be investigated, prosecuted, and tried. The Article concludes by questioning the reasons behind the impunity of members of a PMF, even in cases in which their military counterparts were tried and condemned.

Privileging asymmetric warfare (Part III)?: the intentional killing of civilians under international humanitarian law
Samuel Estreicher. In: Chicago journal of international law Vol. 12, Winter 2012, p. 589-603. - Cote 345.27/122 (Br.)

The overarching objective of the law of armed conflict is the minimization of harm to civilians during such conflicts. Yet, at least in some circles, there is a reluctance to make evaluative judgments about non-state groups who, in a variety of contexts, intentionally target civilians as a tactic in pursuing their political or military objectives. The focus of this paper is on Common Article 3 of the Geneva Conventions of 1949 - the strongest, least debatable basis for applying certain IHL principles to those who kill noncombatants during internal armed conflict. It seeks to demonstrate that Common Article 3 binds both the state and those seeking its violent overthrow. The binding force of Common Article 3 flows both from the positive premise that states can legislate on behalf of all those within its territory, even its armed opponents, and from the fact that Common Article 3 reflects customary international law.

The proportionality principle in operation: methodological limitations of empirical research and the need for transparency
Aaron Fellmeth. In: Israel law review Vol. 45, no. 1, 2012, p. 125-150. - Cote 345.25/256 (Br.)

The principle of proportionality, notoriously obscure in application and subjective in interpretation, has been enforced so rarely as to call into question its potency as a meaningful international legal standard. Nonetheless, international criminal tribunals, academics, and the ICRC's monumental study on customary international humanitarian law all confidently proclaim the principle as embedded in the customary international law applicable to both international and non-international armed conflicts. To assess whether these claims are accurate, and to flesh out how states interpret the principle in practice, the author and a colleague have undertaken a long-term, multinational empirical study of state practice in interpreting and enforcing the proportionality principle. This article discusses the methodological options available and explains the one chosen for the proportionality study. The limitations of the study, in spite of its deliberate methodology, suggest that the debilities of the proportionality principle may not be conceptual as much as a byproduct of unnecessary military secrecy. This article concludes that greater transparency in state compliance with the rule of discrimination and the principle of proportionality would, at least, facilitate an understanding of how the hitherto obscure principle operates in practice and, at best, could create systemic effects that would decrease the dangers to civilians in armed conflicts.
Proportionality under jus ad bellum and jus in bello: clarifying their relationship

Proportionality is a condition provided under both jus ad bellum and jus in bello. Based on a particular interpretation of state practice and international case law, recent legal literature argues that the two notions of proportionality are interrelated in that proportionality under jus in bello is included in the assessment of proportionality under jus ad bellum. This article seeks to refute such a position and, more generally, to clarify the relationship between the two notions of proportionality. The main argument of the article is in line with the traditional position regarding the relationship between jus ad bellum and jus in bello. It is argued that, although sharing common features and being somewhat interconnected, the notions of proportionality provided under these two separate branches of international law remain independent of each other, mainly because of what is referred to in this article as the "general versus particular" dichotomy, which characterises their relations. Proportionality under jus ad bellum is to be measured against the military operation as a whole, whereas proportionality under jus in bello is to be assessed against individual military attacks launched in the framework of this operations. This article nonetheless emphasises the risk of overlap between the assessments of the two notions of proportionality when the use of force involves only one or a few military operations. Indeed, in such situations, the "general versus particular" dichotomy, which normally enables one to make a distinct assessment between the two notions of proportionality, is no longer applicable since it becomes impossible to distinguish between the military operation as a whole and the individual military attacks undertaken during this operation.

http://tinyurl.com/ctywahs

Protecting civilians during violent conflict: theoretical and practical issues for the 21st century

There is almost unanimous agreement that civilians should be protected from the direct effects of violent conflict, and that the distinction between combatant and non-combatant should be respected. But what are the fundamental ethical questions about civilian immunity? Are new styles of conflict making this distinction redundant? Elocuently combining theory and practice, leading scholars from the fields of political science, law and philosophy have been brought together to provide an essential overview of some of the major ethical, legal and political issues with regard to protecting civilians caught up in modern inter- and intra-state conflicts. In doing so, they examine what is being done, and what can be done, to make soldiers more aware of their responsibilities in this area under international law and the ethics of war, and more able to respond appropriately to the challenges that will confront them in the field. 'Protecting Civilians During Violent Conflict' presents a clear-eyed look at the dilemmas facing regular combatants as they confront enemies in the modern battlespace, and especially the complications arising from the new styles of conflict where enemy and civilian populations merge.

Protecting civilians in armed conflict through rules of engagement

The presumption of protecting civilians is basic to the rules of engagement (ROE) under which regular armed forces operate. Rob McLaughlin, formerly a senior Australian military officer charged with the oversight of the ROE, demonstrates that there are some inherent limitations and that ROE need to be understood in the round to appreciate what they can and cannot achieve. Using the International Institute of Humanitarian Law’s Rules of Engagement Handbook as a framework, McLaughlin examines the means by which protection of civilians in armed conflict - through the application of both the applicable law and the policy aims of the state or coalition of states engaged in a particular operation - can be built into rules of engagement.

The protection of civilians during the Israeli-Hamas conflict: the Goldstone report
Arising from the UN Fact-Finding Mission on the armed conflict between Israel and Hamas fought in Gaza strip in December 2008 and January 2009, the Goldstone report examined allegations of human rights and international humanitarian law (IHL) violations during the conflict. Rosen, as a critic of the report, sees it as a missed opportunity to reflect on the IHL implications for the dynamic of contemporary asymmetrical warfare in which some combatants - particularly members of insurgent and terrorist organizations - discard any attempt to distinguish themselves from civilians and conduct combat operations from civilian population centres. For him, the Gaza conflict is emblematic of this dynamic, with Hamas using live civilians to shield or screen operations and dead civilians as props in an information war to portray adversaries as indiscriminate and “heavy-handed” in their use of force. Thus the report delivers an anti-Israeli polemic without dealing with the issues central to the Hamas strategy of placing civilians in danger.

The protection of civilians from violence and the effects of attacks in international humanitarian law

There is a substantial body of law - international humanitarian law (IHL) - dedicated to protecting civilians during violent conflict. There are three groups of such laws: a) rules for the protection of civilians in the conduct of military operations; b) rules for the protection of civilians under the control of the adversary against violence or arbitrary acts; and c) rules for the protection of civilians from the effects of military operations. Hitoshi Nasu explores the last two. Nasu first provides a useful overview of the different types of armed conflict - international armed conflict, military occupation and non-international armed conflict - and the rules of IHL that apply to each. The Fourth Geneva Convention, and its additional protocols, prescribes that warring parties not simply refrain from doing violence against civilians, but that they also protect civilians from the effects of attacks. Yet Nasu observes that there are uncertainties about the scope of this precautionary obligation.

Protection of military medical personnel in armed conflicts
Peter de Waard and John Tarrant. In: University of Western Australia law review Vol. 35, no. 1, September 2010, p. 157-183. - Cote 356/128 (Br.)

Medical personnel are entitled to protection in armed conflicts under international law. However, that protection will be lost unless such personnel strictly comply with the requirements set out in the relevant conventions. The authors examine the protection regime available to medical personnel including the regime applicable to hospital ships and medical aircraft. The authors argue that any permanent military medical personnel who engage in hostile acts without being correctly re-assigned permanently from their medical role could be liable for their conduct under the criminal law because they do not possess combatant immunity. The difficulty in re-assigning personnel from medical to non-medical roles and vice versa is examined against the background of the concept of civilians directly participating in hostilities. The authors examine the interpretive guidance issued by the International Committee of the Red Cross and the significant criticism of that guidance.

Protection of terrorism suspects under international humanitarian law: a case study of Guantanamo Bay

This study focuses on the protection of terrorism suspects under International Humanitarian Law. This study makes Guantanamo Bay in Cuba a case study. The central themes of this study is the question on whether Guantanamo bay detainees are entitled for prisoners of war status or and also this study deals with the legal position for detainees suspected of terrorism acts during peacetime. These are main issues the field study has attempted to address. The study has revealed that every component of the war on terrorism, every situation in which persons held in Guantánamo were involved and every individual detained there has to be qualified separately. Many persons held in Guantánamo are not at all covered by international humanitarian law (IHL). Others benefit from the fundamental guarantees of International Humanitarian Law of non-international armed conflicts, which do not offer a legal basis for their detention an issue dealt with by domestic law. The study has also shown that those persons who were arrested in Afghanistan are protected by International Humanitarian Law of international armed conflicts.
Reasons why armed groups choose to respect international humanitarian law or not

The decision to respect the law – or not – is far from automatic, regardless of whether it is taken by an armed group or a state. Respect for international humanitarian law (IHL) can only be encouraged, and hence improved, if the reasons used by armed groups to justify respect or lack of it are understood and if the arguments in favour of respect take those reasons into account. Among the reasons for respecting the law, two considerations weigh particularly heavily for armed groups: their self-image and the military advantage. Among the reasons for non-respect, three are uppermost: the group’s objective, the military advantage, and what IHL represents according to the group.


Regulating the irregular: international humanitarian law and the question of civilian participation in armed conflicts
Emily Crawford. In: University of California Davis journal of international law and policy Vol. 18, no. 1, 2011, p. 163-190. - Cote 345.25/257 (Br.)

This paper will review the history of international humanitarian law and regulation of irregular participation in armed conflict as a case study to demonstrate the increasingly difficult task of achieving international consensus on the rule of law during armed conflict. From the first provisions in the Hague Regulations regarding levée en masse, to the Geneva Conventions and the Additional Protocols, this paper will look at how nonconventional combatancy has been regulated, and examine the debates surrounding the expansion of the legal category of “combatant.” This paper will culminate in an analysis of the International Committee of the Red Cross (ICRC) Expert Process on Direct Participation in Hostilities, finding both the final Interpretive Guidance, and the controversy leading up to and surrounding its publication, are demonstrative of the obvious stumbling blocks facing any new treaties regarding participation in armed conflict.


Rethinking the regulation of private military and security companies under international humanitarian law

Presumptively treating the vast majority of Private Military and Security Companies (PMSC) personnel as civilians, although consistent with a general IHL presumption in favor of civilian status, is overinclusive and leads to legal and practical difficulties: it fails to recognize the truly military-like operations of some PMSCs (indeed, some are contracted to perform direct military operations); the indeterminacy of the nature and temporal scope of direct participation may prove unworkable in practice; and personnel taking an active part in the hostilities are chargeable with unprivileged belligerency for duties they may have been hired to perform. PMSC personnel contracted to engage specifically in the type of activity that constitutes direct participation in hostilities should be categorically presumed to be members of organized armed forces and should be required to abide by the requirements of Article 4(A)(2) of the Third Geneva Convention. If contracting States hired PMSCs to engage in contractor combatant activities, a proposed treaty provision would presume the PMSC personnel to be combatants and contracting States would be required to ensure that such contractors abided by the requirements of Article 4(A)(2).

The rogue civil airliner and international human rights law: an argument for a proportionality of effects analysis within the right to life
Robin F. Holman. In: Canadian yearbook of international law = Annuaire canadien de droit international Vol. 48, 2010, p. 39-96. - Cote 345.1/374 (Br.)

Existing theoretical approaches to international human rights law governing the state’s duty to respect and ensure the right not to be arbitrarily deprived of life fail to provide a satisfactory analytical framework within which to consider the problem of a rogue civil airliner - a passenger-carrying civil aircraft under the effective control of one or more individuals who intend to use the aircraft itself as a weapon against persons or property on the surface. A more satisfactory approach is provided by the addition of a norm of proportionality of effects that is analogous to those that have been developed within the frameworks of international humanitarian law, moral philosophy, and modern constitutional rights law. This additional norm would apply only where there is an irreconcilable conflict between the state’s duties in respect of the
right to life such that all of the courses of action available will result in innocent persons being deprived of life.

Full text: only from ICRC headquarters: https://ext.icrc.org/library/docs/ArticlesPDF/33222.pdf

Section IX of the ICRC interpretive guidance on direct participation in hostilities: the end of jus in bello proportionality as we know it?


Section IX of the ICRC Interpretive Guidance on Direct Participation in Hostilities asserts: ‘In addition to the restraints imposed by international humanitarian law on specific means and methods of warfare, and without prejudice to further restrictions that may arise under other applicable branches of international law, the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances’. The present article scrutinises arguments that have been, or can be, advanced in favour of and against a ‘least harmful means’ requirement for the use of force in situations of armed conflict as suggested in Section IX. The principal aim of the article is to examine the question whether such an additional proportionality requirement forms part of the applicable international lex lata.

Should rebels be treated as criminals?: some modest proposals for rendering internal armed conflicts less inhumane


Governments against whom rebels fight regard them as persons engaging in seditious action hence as criminals deserving to be punished. As a result rebels, knowing that in any case upon capture they will be punished not only for any war crime they may have committed but also for the simple fact of taking up arms against the government, have no incentive to comply with humanitarian law rules, in spite of recent trends to the contrary and the imperative stemmings for the whole body of international humanitarian law (IHL). No international customary rule exists suppressing or curtailing the freedom of every state to treat as it pleases its own nationals and other individuals participating in a civil strife. However, a customary rule is gradually crystallizing. Two conditions should be met for rebels to acquire a special status under customary IHL: (i) such status should only be granted when the insurgent group is (a) organized; (b) shows some degree of stability; (c) conducts sustained and concerted military operations; with the consequence that (d) the hostilities are not sporadic or short-lived. It is also necessary (ii) for the rebels to distinguish themselves from the civilian population when engaging in an attack or in a military operation reparatorily of an attack. In addition, rebels as a group must comply with the rules of IHL.

Should the obligations of states and armed groups under international humanitarian law really be equal?


For this first debate, the Review asked two members of its Editorial Board, Professor Marco Sassòli and Professor Yuval Shany, to debate on the topic of equality of states and armed groups under international humanitarian law. Professor René Provost comments on this debate, adding a third dimension to the discussion. The crucial question is whether it is realistic to apply the current legal regime to non-state armed groups. How can armed groups, with sometimes very limited means and low levels of organization, meet the same obligations as states? What are the incentives for armed groups to respect rules that their opponents have enacted? Why should they respect any rules when the very fact of taking arms against the state already makes them ‘outlaws’?


South african private security contractors active in armed conflicts: citizenship, prosecution and the right to work


South Africa has arguably the most aggressive regime of domestic legislation aimed at regulating the activities of PSCs, which is not surprising after it inadvertently found that it was a major exporter of PSCs. South Africa appears to be alone in its mission to adopt such an aggressive stance towards regulating the private security industry. It is unlikely that a few pieces of domestic legislation, like those adopted by South
Africa, will have any noticeable effect on the presence of PSCs as a feature of current and future armed conflicts. The unique situation posed by South Africa’s legislation poses some interesting questions which the authors explore. They begin by looking at the role played by PSCs in armed conflicts, and the status afforded them by international humanitarian law (IHL). They turn then to the issue of prohibited mercenarism, investigating if the actions of PSCs serve to group them with mercenaries (as defined by Additional Protocol I [AP I] and the two international Mercenary Conventions). The article then shifts its focus to the South African situation and discusses the ambit of application of the two main regulations, exploring how these two pieces of legislation measure up to international law obligations regarding mercenarism. They discuss whether or not it is likely that these regulations might be successfully used to prosecute PSCs, and what penalties PSCs might face.

http://www.nwu.ac.za/webfm_send/43762

Sovereignty and neutrality in cyber conflict

Cyber activities in general, and cyber warfare in particular, place stress on the traditional notions of sovereignty, challenging both belligerent nations and neutral nations in the application of law to cyber operations during international armed conflict. Therefore, a neutral state must not knowingly allow acts of cyber warfare to be launched from cyber infrastructure located in its territory or under its exclusive control. Upon arrival at the computer in State H, the malicious malware from the shipboard computer combines with the cyber tool at the beacon and creates cyber malware that is then forwarded to a computer in State X to which State G has previously gained access. In other words, considering the modified scenario, turning the nonparty state into a neutral provides another legal paradigm (along with domestic criminal law) by which the nonparty state could prevent or punish the actions of both the nonstate actor and potentially the state party to the NIAC for cyber operations that violated its neutrality. Cyber activities in general and cyber conflict in particular place stress on traditional LOAC notions, challenging both belligerent nations and neutral nations in the application of law to cyber operations. For example, recognizing that Internet traffic that traverses the computer infrastructure of a neutral nation is not a violation of that nation’s neutrality provides greater clarity to states planning cyber operations of desiring to maintain neutrality.

A square peg in a round hole : stretching law of war detention too far
Laurie R. Blank. In: Rutgers Law Review Vol. 63, no. 4, Summer 2011, p. 1169-1193. - Cote 400.1/16 (Br.)

This Article highlights three problems with the past and newly proposed indefinite detention of terrorist suspects, problems that expose how this system stretches the traditional notion of law of war detention beyond its limits. For many reasons, the system poses severe challenges to fundamental American principles of adjudication of individual accountability and granting individuals their "day in court." These broader questions concerning the morality of indefinite detention, the appropriate system for prosecution of terrorist suspects, and the lawfulness generally of detention in the context of counterterror operations are beyond the scope of this Article and are addressed in numerous law review articles, newspaper articles, and opinion pieces. This Article does not purport to analyze the full scope of detention options for persons captured within the context of the conflict with al-Qaeda and other terrorist groups. Rather, this Article will focus on the problems created by affixing the label of "law of war" or "under the laws of war" to the indefinite detention ongoing and further contemplated in Executive Order 13,567 and in the Terrorist Detention Review Reform Act : problems of definition, problems of purpose, and problems of posture.


Standards of proof in international humanitarian and human rights fact-finding and inquiry missions

As human rights and humanitarian commissions of inquiry and other fact-finding mechanisms gain influence in international society, a key question that has not yet been fully addressed is whether such bodies need to apply a minimum formal standard of proof (or degree of certainty) when they adjudicate on such serious matters. This report starts to address that question.


The strange pretensions of contemporary humanitarian law
What's new in today's world is not the effort to persevere in attempts to restrain the violence of war. The most remarkable novelty is the notion that such restraints can be insisted upon, even when one side ignores them, and even when noncompliant fighters gain systematic advantage from their disregard of the agreed-upon standards. Four general claims will be elaborated in this chapter. First: the seeming premise of today's international humanitarian law - that this law binds the conduct of military operations, regardless of circumstances or consequences - is not the culmination of a time-honored tradition, as sometimes portrayed, but is, in fact, a recent and radical innovation. Second: the current standards were, to a large extent, the products of efforts by anti-Western governments and movements, seeking to change previously accepted standards to their own advantage. Third: advocacy organisations such as the International Red Cross, Human Rights Watch and Amnesty International have strong incentives to embrace an anti-Western view of the relevant standards, albeit one disguised as a neutral or internationalist view. Fourth: many Western governments now give credibility to such efforts, because they no longer expect to engage in actual military operations of their own.

Surviving in war zone: the problem of civilian casualties in Afghanistan


William Maley, an analyst of the conflicts in Afghanistan since the invasion of the Soviet Union thrust that country into unceasing turmoil, points out that Afghans have spent more than 30 years trying to survive in an unpromising environment. Recent discussions of appropriate counterinsurgency strategies in Afghanistan have focused on the need to shift away from hunting the enemy in favour of a strategy that gives central place to the protection of civilians. While this is a positive development that resonates with the protections for civilians accorded by international humanitarian law, it leaves a number of questions unanswered. Maley addresses these questions through attention to both Afghan history and contemporary challenges.

Symposium: the 2009 air and missile warfare manual: a critical analysis

Claude Bruderlein (introd.) ; Charles J. Dunlap... [et al.]. In: Texas international law journal Vol. 47, no. 2, Spring 2012, p. 261-425. - Cote 341.226/55

This issue of the Texas International Law Journal focuses on the Manual on International Law Applicable to Air and Missile Warfare (AMW Manual) produced by the Program on Humanitarian Policy and Conflict Research at Harvard University (HPCR). The 2011 Symposium organized in Austin by the editorial team of the Texas International Law Journal represents a first opportunity to reflect on the nature and goals of the AMW Manual and to formulate a critical appraisal of its content.

Targeted killing: the Israeli experience


In this chapter, it is argued that targeted killing is fully consistent with Israeli law. Israel's use of targeted killing also fits with traditional Just War doctrine, in that it is both discriminate and proportionate. By meting out punishment to the guilty, targeted killing also meets the retributive demands of the Israeli population. While the policy of targeted killing makes sense for Israel, however, it is argued that it can be improved upon. Israel should be forthright and unapologetic about its policy of targeted killing, for it is a moral and legal imperative in light of the situation Israel faces. The following pages will explain these points in more detail.

Targeted killings and international law: with special regards to human rights and international humanitarian law


Existing international law is capable to govern the “war on terror” also in the aftermath of September 11, 2001. The standards generally applicable to targeted killings are those of human rights law. Force may be used in order to address immediate threats, preventive killings are permitted under strict preconditions but targeted killings are prohibited. In the context of armed conflicts, these standards are complemented by international humanitarian law as lex specialis. Civilians may only be targeted while directly taking part in hostilities and posing a threat to the adversary. Also in Israel and the Occupied Territory, these standards apply. Contrary to the Israeli Supreme Court’s view, international humanitarian law is not complemented by human rights law, but human rights law is – to some degree – complemented by international humanitarian law. According to these standards, many killings which would be legal according to the Israeli Supreme Court violate international law.
Targeting the "terrorist enemy" : the boundaries of an armed conflict against transnational terrorists

Following the terrorist attacks of 11 September 2001, the US declared Al-Qaeda and its associates as "the terrorist enemy". Under the previous and current administrations, the US's security strategies have focused on combating this "terrorist enemy" in various ways including the so-called "war on terror" or "war with Al-Qaeda" – an armed conflict against transnational terrorists to which international humanitarian law ("IHL") supposedly applies. This article considers the notion of targeting transnational terrorists under IHL. The article addresses the issue of whether an armed conflict against terrorists exists and what sort of armed conflict it may be. It then examines whether terrorists are legitimate targets in and outside an armed conflict, drawing on the recent "Interpretive guidance on direct participation in hostilities" by the International Committee of the Red Cross. The article concludes that terrorist attacks in general do not give rise to armed conflict; that there is no legitimate war against transnational terrorists; and therefore, that military targeting of such transnational terrorists can only occur in limited circumstances.

Full text: only from ICRC headquarters: http://tinyurl.com/72segr5

To transfer or not to transfer : identifying and protecting relevant human rights interests in non-refoulement
Vijay M. Padmanabhan. In: Fordham law review Vol. 80, no. 1, October 2011, p. 73-123. - Cote 345.1/369 (Br.)

Human rights law imposes upon States an absolute duty not to transfer an individual to another State where there are substantial grounds for believing he or she will be tortured or subjected to cruel, inhuman or degrading treatment. In recent years the obligation to provide non-refoulement protection has run into conflict with the State’s obligation to protect its public from aliens suspected of involvement in terrorism. Expulsion is the traditional tool available to States to mitigate the threat posed by dangerous aliens. With this tool removed, States often lack an alternative route to mitigate this threat, with criminal prosecution and indefinite detention pending deportation not available for various reasons. The result has been numerous cases where States have been forced either to release dangerous aliens back into their State, consistent with international law, or to find alternative means to deal with the threat in the shadow of human rights law. This Article argues that human rights law should recognize the important clash of human rights duties that arises in these transfer situations: the State’s duty to protect aliens from post-transfer mistreatment clashes with its duty to protect members of the public from rights violations committed by dangerous private persons within society. Recognition of this rights competition is important for two reasons. First, for too long human rights scholars and bodies have dismissed the security consequences of non-refoulement as outside the concern of human rights. Second, once a rights competition is accepted, human rights law prescribes a methodology for mediating between conflicting rights: balancing. A balancing approach would allow States a margin of appreciation to determine in the first instance how to choose between competing duties. The role of human rights apparatus, including national courts, international institutions and non-governmental organizations is to monitor this balance and to push States where the balance chosen appears over or under rights protective.

http://fordhamlawreview.org/assets/pdfs/Vol_80/Padmanabhan_October.pdf

The tools to combat the war on women’s bodies : rape and sexual violence against women in armed conflict

Without doubt since the 1990s inroads have been made in the development of international law in the sphere of sexual violence and armed conflict. Due to the progress made in international law itself and the tribunals of the former Yugoslavia and Rwanda, international law can now be seen to have an array of tools with which to combat and prosecute perpetrators of sexual violence. These tools include humanitarian law, the Genocide Convention, crimes against humanity, customary international law, in particular the rules of jus cogens and the Rome Statute. An analysis will be made in this article of the effectiveness of these tools and how they can be utilised in order to prevent the on-going onslaught on women’s bodies. It will be seen that the gradual acknowledgement of rape and sexual violence as an international crime has the potential of empowering women and can give them the ability to use international law as a powerful tool to redress violence perpetrated against them in armed conflict. This article will then examine whether this potential is in fact a reality for women who have suffered sexual abuse in armed conflict or have the developments merely paid lip service to these crimes and not been as progressive as was first hoped.
Transcending, but not abandoning the combatant-civilian distinction: a case study


The distinction between combatants and civilians determines who can be prosecuted for using force, who can be subjected to long-term preventive (as opposed to punitive) detention, and who can be killed even when they do not pose an imminent threat. The traditional law of war uses the first issue as the key to understanding the second two. Many argue for a more functional definition of a combatant, such that if a person is part of a group that uses military levels of force, then he is a combatant. The conflict between these two models - the traditional law of war model and the functionalist model - is at the heart of the recent five-to-four decision of the Fourth Circuit in al-Marri v. Pucciarelli. Both models, however, are inadequate. The functionalist approach is insufficiently respectful of basic civil rights, and the traditional approach is too dismissive of the problems presented by using traditional criminal law techniques when fighting enemies who use military levels of force. In this paper, the author describes the two sides, as developed in al-Marri and argues that we should transcend the combatant-civilian distinction. He argues that the traditional combatant category, at least as applied to aliens, successfully marks out people who can be justifiably be subject to long term detention without trial. The category of combatants should not be taken to arise in some sort of fundamentally different legal regime. Rather, the law with regard to combatants should be viewed as grounded in a deeper liberal, constitutional legal order that is committed to respecting autonomy. Within that deeper legal order, some, but not all, suspected members of groups like al-Qaeda can justifiably be detained for long periods of time without trial. Ultimately, the most important questions, as I have argued at length elsewhere, are not limited to whether an individual is a combatant in the traditional sense; they also include (a) whether he can be held accountable for any future use of force against the state, and (b) whether the detaining state has an obligation to release and police him if it cannot or chooses not to try to convict him for a past crime.


Transformations of conflict status in Libya


The qualification of a conflict as international or non-international is of key importance in determining the legal regime to be applied under the law of armed conflict. Despite recent developments suggesting an increasing convergence of the law applied in international armed conflicts and non-international armed conflicts, there remain a number of significant differences between the minimum protections of Common Article 3 and the comprehensive regulation of the Common Article 2 regime. The fact pattern of the 2011 civil war in Libya is complex, and there have been allegations of breaches of international humanitarian law by all parties. This article will track the transformations of conflict status in Libya, arguing that the initial internal uprising rose to the level of a non-international armed conflict, triggering the application of Common Article 3, and was then transformed by foreign intervention into an international armed conflict, governed by the stricter standards of Common Article 2. This international conflict was then 're-internalized' by international recognition of the National Transitional Council as the legitimate government of Libya in mid-July. It is hoped that, by clarifying the legal regimes applicable to actors over the course of the conflict, this article will help make it possible to reach sound judgments as to the legality of the actions of those taking part in hostilities. These transformations also expose a certain arbitrariness in the Geneva system, as conflict status shifts in response to political events, rather than humanitarian concerns.

Understanding when and how domestic courts apply IHL

Laurie R. Blank. In: Case western reserve journal of international law Vol. 44, 2011, 20 p.. - Cote 345.22/197 (Br.)

This essay will analyze what factors courts to choose to apply—or not apply—International Humanitarian Law (IHL) and how much of it they will apply. Knowing how the law actually applies to the facts at hand is, of course, critical to the preparation of any case, military operation, advocacy campaign, or other action. A strategic analytical approach to the way that courts approach IHL is also useful for the overall development of IHL. When courts simply refuse to apply IHL or apply it in a limited manner in conjunction with other legal regimes, the failure to tackle new challenges can stunt the development of the law. IHL's development and effectiveness will be richest when courts of all kinds, whether national, regional or international, address current complexities and controversies head-on and grapple with how to maintain IHL's central goals of civilian protection and lawful conduct of hostilities even in the face of new challenges. In the broadest sense, therefore, understanding how and why courts do or do not apply IHL, and to what extent,
in particular situations can help trigger deeper understandings of how the law is likely to develop and what its impact will be in the future.

http://law.case.edu/journals/JIL/Documents/(10)%20Blank%20_Darby.pdf

**Universal jurisdiction : a means to end impunity or a threat to friendly international relations?**


Ending impunity for perpetrators of serious international crimes such as genocide, crimes against humanity, and war crimes is considered important because convictions may achieve justice and deter future acts. A controversial tool for ending impunity is the exercise of universal jurisdiction by states. The recent resistance of the African Union to attempted prosecutions of nationals of A.U. member states on the basis of universal jurisdiction highlights the controversy surrounding the exercise of universal jurisdiction. Through an analysis of the African Union reaction, this Article examines and assesses the arguments in favor and against universal jurisdiction, and proposes how a proper balance may be struck between enforcement of international criminal law on the basis of universal jurisdiction and respect for state sovereignty. This Article argues that, under international law, states have the right to exercise universal jurisdiction over certain international crimes. Rather than disregarding international justice, such prosecutions may achieve justice by imposing individual responsibility for serious international crimes. It is undeniable, however, that difficulties may accompany the exercise of universal jurisdiction. Although there may be few legal restrictions on its use, states should adopt a balanced approach that makes universal jurisdiction a useful tool for ending impunity while minimizing the risks associated with its exercise. Ultimately, an international agreement may be required to resolve the outstanding disagreement among states surrounding the doctrine; until then, states should implement universal jurisdiction legislation and exercise it with care.

**Unregulated armed conflict : non-state armed groups, international humanitarian law, and violence in Western Sahara**

Orla Marie Buckley. In: North Carolina journal of international law and commercial regulation Vol. 37, Spring 2012, p. 793-845. - Cote 345.29/168 (Br.)

The majority of armed conflict today occurs within states and involves one or more non-state armed groups (NSAGs). Despite the increasing role of NSAGs in armed conflict, international humanitarian law remains state-centric and provides limited opportunities for armed groups to comply with its provisions or engage in its development. This comment argues that the legal framework regulating internal armed conflict and NSAGs is inadequate and much weaker than the rules that govern states involved in international armed conflict. Part II examines the definition and development of NSAGs and discusses the advantages and disadvantages of accommodating NSAGs under IHL. Part III outlines the current legal framework of IHL to determine the level of regulation of NSAGs during an internal armed conflict. Part IV looks specifically at the application of IHL to one NSAG, the Polisario Front. Part V offers recommendations, focusing on measures to hold NSAGs more accountable and to better incorporate NSAGs into the IHL legal framework.

**Untangling belligerency from neutrality in the conflict with Al-Qaeda**

Rebecca Ingber. In: Texas international law journal Vol. 47, no. 1, Fall 2011, p. 75-114. - Cote 345.29/171 (Br.)

This Article provides a survey of the legal architecture currently governing the conflict with al-Qaeda and the Taliban, and — considering that operating framework — presents a defense of critical law of war constraints on state action. It responds to Karl Chang’s Article, “Enemy Status and Military Detention in the War Against Al-Qaeda,” which proposes a broad legal theory of detention based on the law of neutrality and divorced from core protective law of war constraints. In responding to this and other calls for broad authority, this Article supports the complex though crucial practice of applying jus in bello principles, such as the principle of distinction between belligerents and civilians, to modern armed conflicts such as that with al-Qaeda and the Taliban. To the extent the U.S. government and other states rely on an armed conflict paradigm to support broad authorities, they must likewise constrain themselves in accordance with the international legal regimes governing such conflicts.

http://www.tijl.org/content/journal/47/num1/Ingber75.pdf
The use of unmanned aerial vehicles in contemporary conflict: a legal and ethical analysis
Sarah Kreps, John Kaag. In: Polity advance online publication 13 February 2012, 26 p.. - Cote 345.25/258 (Br.)

The increased use of unmanned aerial vehicles (UAVs) in contemporary conflict has stirred debate among politicians, government officials, and scholars. Spokespeople for the U.S. government often highlight the precision of UAVs and argue that this quality enables military action to comply with the international humanitarian law principles of distinction and proportionality. This article criticizes the technologically advanced weapons on the same ground on which the U.S. government has defended them: meeting international standards of distinction and proportionality. The article opens with a discussion of the legal implications of Just War theory. It then offers a critique of the politico-military discourse surrounding UAVs and presents a philosophical framework that might lessen the confusion surrounding the ethics of modern warfare. The article closes with a discussion of the various ways that defenders of the UAVs overstate the ability of technology to answer difficult legal and political questions that the principles of distinction and proportionality pose.

http://ssrn.com/abstract=2023202

Les violations du droit humanitaire au Proche-Orient : le cas de l’opération "Plomb durci" à la lumière du rapport Goldstone

La mission d’établissement des faits, dont le Rapport Goldstone est issu, avait pour mandat d’enquêter sur toutes les violations des droits de l’homme et du droit international humanitaire qui auraient pu être commises dans le contexte des opérations militaires a Gaza en décembre 2008 et janvier 2009, que ce soit avant, pendant ou après. Il ressort des conclusions que les violations constatées du DIH ne relèvent pas de faits commis par des officiers ou des soldats isolés, mais de la politique adoptée par les autorités militaires pour engager une action. Les violations répertoriées concernent principalement le non-respect de deux principes fondamentaux du DIH, les principes de "distinction" et de "proportionnalité" dans l’attaque. Ce chapitre revient sur les violations constatées par le Rapport chez les deux parties au conflit.

Full text : only from ICRC headquarters: https://ext.icrc.org/library/docs/ArticlesPDF/33260.pdf

Virtual battlegrounds: direct participation in cyber warfare

This paper looks at the question of direct participation in cyber hostilities under the international law of armed conflict, or international humanitarian law (IHL) as it is also known. The paper examines the history and development of the concept of direct participation in hostilities by civilians, which serves as an exception to the principle of civilian or non-combatant immunity. In charting the development of the concept, this paper looks at landmark attempts to legally define the concept of direct participation, including the Israeli Targeted Killings Case, and the International Committee of the Red Cross (ICRC) study into direct participation. Using this legal background, this paper then analogises direct participation in the context of cyber hostilities, and critically examines the ways in which civilians may be deemed to be direct participating in cyber hostilities. The paper also posits some solutions to potentially problematic situations raised by civilian participation in cyber warfare.

http://ssrn.com/abstract=2001794

Waging waterfare: Israel, Palestinians, and the need for a new hydro-logic to govern water rights under occupation

As water becomes scarcer, its role as both a tool and target of international politics becomes more pronounced. The power dynamics of military occupation further complicate transnational water management. As evidenced by Israel’s administration of Palestinian water resources, states occupying neighboring riparians maintain a selfish interest in shared watercourses and may use administration of those resources to advance their own hydrological and political priorities. This self-interested administration of occupied populations’ water resources is termed “waterfare.” The author argues that a more particularized rule, as opposed to the currently existing guiding principles, is not only appropriate, but critical to promote efficient and equitable governance of water resources under coriparian occupation.
First, he sketches the hydrological dimension of Israel’s occupation of the West Bank and Gaza in order to demonstrate the reality and gravity of waterfare and to justify the rule proposed. The author next outlines and overlays International Humanitarian Law and Transboundary Resource Law to expose the doctrinal gaps necessitating each component of the proposed rule, which he then formulates and defends. By reducing doctrinal ambiguity that obfuscates occupants’ obligations, the rule proposed would belie many of the issues arising out of occupants’ control of coriparian communities’ water resources in general, and with regard to Israel’s occupation of the Palestinian territories in particular.

http://tinyurl.com/6oc9c4u

War and the vanishing battlefield

Frédéric Mégret. In: Loyola University Chicago international law review Vol. 9, no. 1, Fall/Winter 2011, p. 131-155. - Cote 345.2/881 (Br.)

These days, the battlefield hardly seems to be a term of art in international humanitarian law discourse. The laws of war are about conflicts, international or non-international, and hostilities or zones of combat. It is customary to contrast the conventional war of yesterday that occurred in relatively neatly delineated spaces with today’s complex, asymmetrical, or even post-modern wars that do not depend on the classical battlefield. Certainly, the idea of disciplined armies meeting in a rural setting at dawn to fight each other off belongs to distant memories. This article will suggest that the application of the laws of war nonetheless remains more haunted by the idea of the battlefield than is commonly acknowledged, and that the concept provides a crucial variable to understand the law’s evolution. Indeed, it will contend that the “battlefield” continues to serve a strong role in assessing why, when and how international humanitarian law applies (or does not). In turn, the destructuring of the concept of the battlefield has had a strong impact on the very possibility of the laws of war, and of war itself. These issues have not escaped the attention of some international lawyers but they have tended to be seen mostly through the prism of the most recent developments, notably the "War on Terror." This article will suggest that the definition of the battlefield has always been central to the genesis and evolution of the laws of war, and that the idea of the battlefield captures more of what constitutes war as an activity than many other indicators.

The war crimes trial that never was: an inquiry into the war on terrorism, the laws of war, and presidential accountability

Stuart Streichler. In: University of San Francisco law review Vol. 45, no. 4, Spring 2011, p. 959-1004. - Cote 344/573 (Br.)

While President George W. Bush was in office, a cottage industry developed calling for his impeachment. Some even made a case for prosecuting him in a court of law. Many of the criminal offenses the President allegedly committed involved his conduct in the war on terrorism. Actions taken in the war on terrorism during President Bush’s years in office have raised a number of disturbing questions. One of the most significant is whether members of the U.S. armed forces, Central Intelligence Agency (“CIA”) agents, security contractors, and others working for the United States committed war crimes. If so, was this attributable to a “few bad apples, or does culpability extend to the highest officials in the Bush Administration, including the President? Although no trial is forthcoming, it is still possible to explore the issue of presidential accountability and assess the President’s actions under the laws of war. Part I of this Article examines what constitutes a war crime under U.S. law by comparing the legal definition with the popular understanding of that term. Part II explains how, in a political system structured to curb the abuse of power, it could have been possible for the executive to violate the laws of war. Part III then analyzes the case against the President as if it were going to trial. It does not address every technical legal issue that could arise. Instead, the aim is to show generally how a war crimes trial could clarify what happened and resolve outstanding questions of criminal liability. To that end, this last section suggests lines of questioning for the cross-examination of President Bush.

White phosphorous munitions: international controversy in modern military conflict


This article examines the current state of international law governing the use of white phosphorus munitions and argues that the ambiguous legal status of white phosphorus has become untenable given recent controversies in Fallujah and Gaza. This article further argues that the deployment of white phosphorous munitions may already be illegal in many circumstances under either the Chemical Weapons Convention or the Convention on Certain Conventional Weapons or both. However, changes may be necessary to one or both treaty regimes to explicitly ban the use of white phosphorus munitions in some situations, particularly when used in urban areas. A more definitive consensus on the legality of white phosphorus use will reduce the current state of confusion, which is obscuring the debate in the public, the media, the military, and even among legal scholars and commentators.
Who is protected under international humanitarian law? : finding a definition for "direct participation in hostilities"


Helen Durham and Eve Massingham, of the Australian Red Cross, explain that the current complex global conflict waged against those engaged in acts of terrorism has led certain commentators to question the relevance and use of some of the principles found in international humanitarian law (IHL). But they argue that a deeper examination of the issues in both the practical and the academic discourse indicates that problems do not lie with the actual principles themselves - such as distinction and proportionality - but rather in the capacity to implement these requirements on a battlefield that is no longer neatly divided between civilian and combatant. The ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities is an attempt to stimulate debates on the practical application of the requirement of distinction in situations where fighters do not adequately differentiate themselves from the civilian population and where civilians directly engage in fighting. Durham and Massingham outline the guidelines and reflect on the major criticisms of them. They go on to examine other useful principles found within IHL, such as the requirement of precautions in attack, which might enhance attempts to protect civilians during times of armed conflict.