Using Law to Fight Terror

October 27-29, 2016

Center for Ethics and the Rule of Law (CERL)

University of Pennsylvania Law School

Recent challenges in international security posed by two terrorist organizations, Al Qaeda and the Islamic State of Iraq and Syria (ISIS), have highlighted an urgent domestic and foreign policy challenge, namely, how to address the threat posed by violent non-state actors while adhering to the rule of law values that form the core of democratic governance. In view of the seriousness of the security threat these organizations pose, combating violent extremism has become the highest national security priority among the U.S. and its allies in recent years. Yet the legal framework for conducting operations of this magnitude against non-state actors has never been clearly identified. In order for war to be constrained by law, the rules by which all parties engage must be publicly known, clearly articulated, and consistently applied. Legal scholars and policymakers, however, have had difficulty adapting existing legal frameworks, which focus on relations among states, to the new demands on military practice, a problem made worse by the rapidity of the changes within contemporary armed conflict. With the current project, the Center for Ethics and the Rule of Law (CERL) seeks to sharpen the understanding of policymakers and academics regarding the status of non-state actors under the Law of Armed Conflict (LOAC), and to contribute to the clarification, articulation, and dissemination of a common legal and ethical framework to guide military and political leaders in asymmetric conflict.

LOAC is organized around the assumption that parties to an armed conflict are “combatants,” meaning that they are members of a state military acting in the name of that state. Norms of conduct are unclear with regard to non-state actors, and there are few consistent legal principles to provide guidance. The absence of a clear alternative to traditional law of war principles, coupled with the need for a strong defensive response to the threat of terrorism, has a deleterious effect on the maintenance of rule of law values in the current climate, and may also hinder efforts to carry out such a defensive response effectively.

At present the range of options to address the problem of non-state actors under International Humanitarian Law (IHL) is rather limited: the response thus far has been nearly entirely of a military nature, where the model of military intervention itself takes the form of traditional state-based conflict. Non-state actors like members of ISIS and Al-Qaeda, however, are not agents of an organized state-run military. Under traditional principles of LOAC, they are more like civilians engaged in criminal activity than like combatants in the traditional sense. Yet there has been little exploration of whether enforcement of criminal law norms might be an effective alternative or adjuvant to high level military intervention. This project seeks to assess the promise of novel legal alternatives in fighting international terrorist organizations, with the aim of developing, disseminating, and helping to implement such policy alternatives.

A prominent alternative to top-down military action is provided by the domestic criminal law paradigm involving multi-state cooperation, such as the U.S. has previously employed in the War on Drugs. A significant obstacle to this model lies in the absence of a legal basis for crossing national boundaries of co-equal sovereign states for law enforcement purposes. Efforts to do so are often opposed as violations of international sovereignty. Nor can domestic law enforcement act with the speed and widespread coordinated effort among other nations to accomplish threat reduction on the level that Al Qaeda and ISIS make necessary. CERL’s current project proposes to explore whether an international criminal law framework can provide a viable alternative to both the military and the domestic law frameworks, or whether an integrated international criminal law and military collaboration might be envisioned to address these challenges.

A number of subtopics will structure the conference. These include clearly identifying and examining the following: the problems posed by non-state actors in international security and the rule of law; the drawbacks of attempting to fit such cases into a traditional military framework and just war paradigm; the challenges raised by domestic prosecutions, the possibility and limits of trying non-state actors at the International Criminal Court; and the limits and weaknesses of the ad hoc tribunal model, the precedents set by and lessons to be learned from the military court model, and the promise of using successful international collaborations addressing terrorist networks, along with the legal frameworks applied in such instances, as a model to confront other international law enforcement challenges. The precedent of civil legal action against violent non-state actors will also be considered, using the Klinghoffer family’s lawsuits against the Palestinian Liberation Organization, following the murder of Leon Klinghoffer aboard the PLO-hijacked Achille Lauro cruise liner; a case study. CERL approaches these topics
against the backdrop of an additional challenge, namely the fragility of the U.S. credibility internationally as a leader and a force for shaping norms, following what many see as American violations of the rule of law leading up to and succeeding the US invasion of Iraq in 2003. The military court model may have contributed to this perceived diminution of US legitimacy as well as impaired the ability of the U.S. to provide moral leadership internationally, and this too is topic CERL will address.

Additionally, both jurisdictional and substantive legal issues are raised by the prosecution of non-state actors. For example, what law applies to a non-state actor that is persecuting individuals of many nationalities or ethnicities? This falls outside the rubric of current international law. Would international law need to be interpreted in a new manner to allow the prosecution of an entity like ISIS, or would new laws, a new code, have to be drafted? These questions prompt not only an examination of extant efforts to investigate and prosecute non-state actors but also the need for thinking outside of the well-worn pathway of military action from a distance. Recent efforts at fighting ISIS, for example, have focused on disrupting its funding apparatus. ISIS has had widespread success in financing its operations through unlawful activity; through the seizure of oil fields, the looting of antiquities, and the subsequent black market sales of seized oil and artifacts. What framework is likely to be most effective—pragmatically, ethically, and legally—for tracing and disrupting the funding operations of non-state actors like ISIS?

The ultimate goal of Using Law to Fight Terror is to enhance the effectiveness of our current approach by (a) exploring the merits of different frameworks for responding forcefully to the threats posed by non-state actors while remaining constrained by ethical principles and rule of law values; (b) identifying the current challenges that confront us in our current reliance on military action; and (c) identifying alternative approaches to the security threat posed by non-state actors, one developed within a legal framework, though perhaps implemented with military aid to civilian authorities. CERL will bring together a wide and prominent group of policymakers, highly placed military leaders, and scholars from a wide variety of different disciplines to collaborate in the development and implementation of strategic complements to current military practice in confronting violent non-state actors.

This event is co-sponsored by the Perry World House, the University of Pennsylvania’s new university-wide hub for international activities, and The Carol and Lawrence Zicklin Center for Business Ethics Research at the Wharton School.
Participants

Mr. Luay al-Khatteeb, Brookings Doha Center; Founder and Director, Iraq Energy Institute; Senior Advisor to Federal Parliament of Iraq for energy policy and economic reform

Major General John D. Altenburg, Of Counsel, Greenberg Traurig LLP

Mr. Joshua Andersen, Fellow, Yale Law School

Major General Thomas E. Ayres, United States Army, Deputy Judge Advocate General

Professor Tom Baker, William Maul Measey Professor Law and Health Sciences, University of Pennsylvania Law School

Major General John W. Baker, Commanding General, U.S. Army Network Enterprise, Technology Command Command

Professor Michael Boyle, Associate Professor of Political Science, LaSalle University

Colonel Gary D. Brown, United States Cyber Command, Staff Judge Advocate

Lieutenant Colonel Bailey Brown, United States Army JAG Corps

Professor William Burke-White, Director, Perry World House, University of Pennsylvania Law School

Professor Seth Cantey, Assistant Professor of Politics, Washington & Lee University

Mr. Andrew J. Carswell, Regional Delegate to the Armed and Security Services of Southern Africa, International Committee of the Red Cross

Mr. Sean Carter, esq., Cozen O'Connor

Mr. Andrew T. Cayley, CMG QC, Director of Service Prosecutions for the United Kingdom.

Ms. Andrea M. Cayley, CERL Program Director, University of Pennsylvania Law School

Mr. William R. Craven, Federal Systems Inc.; CERL Executive Board

Professor John C. Dehn, Assistant Professor, Loyola University School of Law

Ms. Arlene Fickler, esq., Schnader Attorneys at Law; CERL Executive Board

Professor Claire Finkelstein, Algernon Biddle Professor of Law and Professor of Philosophy, University of Pennsylvania; CERL Founder & Director

Professor Marilyn Friedman, Professor of Philosophy, Emeritus, Vanderbilt University

Dr. Christopher Fuller, Lecturer in History, University of Southampton

Professor Kevin H. Govern, Professor of Law, Ave Maria School of Law; CERL Executive Board

Professor Amos Guiora, Professor of Law, University of Utah

Mr. Paul G. Haaga, Jr., esq., Executive Vice-President, National Public Radio; CERL Executive Board Chair

Professor Samuel Helfont, Lecturer, International Relations Program, University of Pennsylvania School of Arts and Sciences

Ms. Ilsa Klinghoffer, Leon and Marilyn Klinghoffer Memorial Foundation

Ms. Lisa Klinghoffer, Leon and Marilyn Klinghoffer Memorial Foundation

Professor Marwan M. Kraidy, University of Pennsylvania, Annenberg School for Communication

Senior Researcher Dustin A. Lewis, Harvard Law School Program on International Law and Armed Conflict
Professor Duncan MacIntosh, Professor and Chair of the Department of Philosophy, Dalhousie University; CERL Executive Board

Mr. David McCraw, General Counsel, The New York Times

Professor Barak Mendelsohn, Associate Professor of Political Science, Haverford College

Professor Christopher Morris, Chair, Department of Philosophy, University of Maryland, CERL Executive Board

Professor Madeline Morris, Professor of Law, Duke Law

Judge Howard Morrison, International Criminal Court (ICC)

Professor Tim Nichols, Duke Sanford School of Public Policy

Professor Jens D. Ohlin, Associate Dean & Professor of Law, Cornell Law School; CERL Executive Board

Lieutenant Colonel Douglas A. Pryer, Strategic Planner, Middle East Directorate, Joint Staff J-5

Professor Evan R. Seamon, Mississippi College of Law; Senior Defense Counsel, Army Reserve

Ms. Patricia Sellers, Special Advisor on International Criminal Law Prosecution Strategies, International Criminal Court (ICC); Sellers Easton Media

Professor Jessica Stern, Research Professor, Pardee School of Global Studies at Boston University; Journalist

Mr. Nelson Thayer, Assistant Attorney General, Department of Justice

Mr. Adam Thurschwell, American University Washington College of Law

Professor Alex Whiting, Former Prosecutor International Criminal Court (ICC); Practice Professor, Harvard Law School

Brigadier General (ret.) Stephen Xenakis, MD, Physician for Human Rights, CERL Executive Board Member

Mr. Jules Zacher, Attorney at Law; CERL Executive Board
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Required Readings


Finkelstein, Claire, *Contemporary Armed Conflict and the Non-State Actor* (abstract) (article)

Seamone, Evan, *Counting the Ripples: The Challenge of Extraterritorial Jurisdiction to Prosecute Non-State Actors* (abstract)

More Readings Coming Soon.
Background Readings

**General Theory**

Prosecuting ISIS, Gerald Waltman, University of Mississippi School of Law, October 17, 2014.

List of All Security Council resolutions dealing with Terrorism

**Article III Courts**

The Supreme Court, the War on Terrorism and the Separation of Powers, by Stephen Vladeck Vol. 38, 1 ABA Human Rights Magazine, 2011.


http://scholarship.law.georgetown.edu/facpub/1428/

**U.S. Common Law Regarding Guantánamo**

The Supreme Court held that Article III Courts have jurisdiction over Guantánamo Detainees as they are not nationals of countries at war with the United States and therefore, do not qualify under the Eisenhanger exception (see below) to Article III jurisdiction over U.S. detainees.

The Supreme Court held that the U.S. government could not hold U.S. citizens in Guantánamo Bay without granting them due process rights under the U.S. Constitution. The Supreme Court rejected that government’s assertions that the government’s designation of a U.S. citizen as an enemy combatant under the Authorization for Use of Military Force, 18 U.S.C.S. § 4001 did not confer on the government the power to detain citizens as enemy combatants and that the separation of powers doctrine required minimal intervention by Article III courts under these circumstances.

**Hamdan v. Rumsfeld 548 U.S. 557 (2006)**
The Supreme Court held that U.S. established military commission in Guantánamo Bay were unconstitutional as they violated defendant’s due process rights under the Uniform Code of Military Justice and the Geneva Conventions’ common article 3’s requirements.

**Boumediene v. United States 553 U.S. 723 (2008)**
The Supreme Court Held that detainees held in Guantánamo are entitled to protections under the U.S. Constitution as the military site was under the control and jurisdiction of the United States. The court held that the President cannot deprive liberties to individuals by enforcing laws in some territories and not others and held that the Military Commissions Act of 2006 were unconstitutional as a result.

**US Criminal Prosecutions Regarding Abu Ghrairb**

No major common law was established by these cases. Individual defendants were found guilty of maltreatment of
detainees and in some cases, falsification of evidence. Court found that no structural or inherent issues with military detention system attributed to cases.

U.S. Common Law regarding U.S. Detainees and Right to Due Process

Ex parte Milligan, 71 U.S. 2 (1866)
Defendant was sentenced to death by a military commission and was under the custody of the U.S. military during the Civil War. The Supreme Court ruled that even in war Article III courts have jurisdiction over a military commission and found that defendant's trial under the military commission violated due process.

Ex Parte Quirin, 317 U.S. 1 (1942)
This case involves a group of German saboteurs who landed on U.S. soil for purposes of espionage. The court ruled that the Germans were “unlawful combatants” and therefore, were not entitled to trial under a U.S. court event though they were found on U.S. soil and were handed over to the executive in order to face a military tribunal without jury.

Johnson v. Eisentrager, 339 U.S. 763 (1950)
This case involved a German war criminal who had been tried by a U.S. military commission and detained in a U.S. administered prison in Germany. The German was seeking a writ of Habeas Corpus from a U.S. Article III Court to overturn his conviction by the U.S. military commission. The Supreme Court held that Article III Courts do not have jurisdiction over an alien enemy engaged in the service of a hostile government at war with the United States. Furthermore, it held that the Constitution does not confer a right of personal security or immunity from military trial and punishment of alien enemies.

Braden v. 30th Judicial Circuit of Kentucky, 410 U.S. 484 (1973)
This case involves a detainee in an Alabama prison who was seeking a writ of Habeas Corpus from a U.S. Article III Court. The appellate court squashed the petition as the detainee was not in the territorial limits of the U.S. District Court. The Supreme Court overturned the appellate court’s decision and held that Article III courts have jurisdiction over detainees as long as the custodian of the prisoner is under the jurisdiction of the court even if the detainee is not.

This case involved a detainee who was transferred from federal custody to military custody. The detainee argued that the federal judicial district was the proper custodial official for habeas purposes as he was originally arraigned in the district. However, the Supreme Court held that for habeas purposes the detainee was under the jurisdiction of the immediate detainee and therefore, the detainee was under the jurisdiction of the military judicial district.

U.S. Common Law Regarding Judicial Limits on Executive War Powers

Prize Cases, 67 U.S. 635 (1863)
This case involved the constitutionality of a blockade established by the President during the Civil War and the seizure of property held on enemy ships. The Supreme Court ruled that the President had the authority to institute of a blockade of ships during the war and was the first major instance of the judicial branch reviewing an action of the executive during wartime.

In Re Yamashita, 327 U.S. 1 (1946)
Defendant argued that the U.S. military commission that convicted defendant of war crimes was illegally created as it violated the Geneva Conventions, part 3, Chapter 3, Section V, Title III. The court held that the defendant the protections afforded under this portion of the Geneva Convention were not applicable to the defendant as the apply to prisoners of war and defendant was a combatant when he committed these crimes not a prisoner of war.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1953)
During the Korean War in response to number of strikes against steel companies, the President issued an executive order directing the Secretary of Commerce to take possession of most of the nation’s steel mills. Even though it was during wartime, the Supreme Court ruled that the action was unconstitutional as the action was not authorized by an Act of Congress.

International Prosecutions Regarding Illegal Detentions and Torture

Case was heard by Inter-American Commission on Human Rights. Petitioners were the parents of a student who was seized by heavily armed men in Honduras and transferred to a military facility. The student was subjected to cruel interrogations and torture by the Honduran military and was never seen alive after the incident. The court found that the state of Honduras had failed to protect the student’s human rights and forced the state to compensate the family of the student.

Delalić Case (1997)
This case involved four Bosnian guards and commanders of a Bosnian Camp during the dissolution of Yugoslavia. The four figures were accused of killing, torturing, and raping Serbian minorities held within the camp. The International Criminal Tribunal for the Former Yugoslavia found the four individuals guilty of human rights violations.

Pinochet and Schioppo Cases (2000/2001)
In 1996, an NGO, Union Progresistas de Fiscales, called for the states of Chile and Argentina to prosecute crimes against humanity that took place under the military juntas that existed in those countries. In the early 2000s, both countries began prosecutions of military figures involved with disappearances of individuals and torture of political opponents. The Chilean Court found the leader of its prior Junta, Augusto Pinochet, guilty of torture and other human rights abuses. The Argentinian Court found the military officer Schioppo of the Junta guilty of genocide, terrorism and torture.

Al-Adansi v. United Kingdom (2001)
A British national, Al-Adansi, sought civil compensation from the state of Kuwait for torturing him under British courts. The court found that under its sovereign immunity law, the state of Kuwait could not be sued for torture. Al-Adansi appealed to the European Court of Human Rights. The European Court of Human Rights held that although international human rights law can override national law in criminal cases, it is not the same authority in civil cases, and upheld the decision of the British courts.

Ad Hoc Courts


http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1381&context=aulr


ICC

Prosecuting ISIS poses Challenges to International Justice, Al Arabiya News, August 28, 2014

http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1200&context=icp

Asymmetric War

http://muse.jhu.edu/journals/washington_quarterly/v031/31.3.mazzar.html

Non State Actors


Notes from the International Law Association's biennial conferences in Washington D.C. The International Law Association established a committee to research the rights and obligations of non-state actors (NSA) under international law. The committee issued three reports between 2010 and 2014, and intends to publish a final, concluding report in 2016. The committee's first report discusses NSA activities with respect to international law focusing on norm-creation (treaty, customary, and general principle), monitoring compliance (administration), and enforcement (dispute settlement, accountability, responsibility, and immunity). The second report discusses NSA influence on legal arrangements dominated by states focusing on NSA influence on international government organizations, institutional regimes (UN & non-UN), and international dispute settlement mechanisms. The third report focuses on the methodology of the committee's reports, the conceptual frameworks of international responsibility, and an overview of the prior reports as a whole. These reports go into deep detail about the international law and historical precedent governing non-state actors, even if not focusing directly on non-state
actors in asymmetric conflict.


This journal article discusses improvements that can be made to international law to better deal with non-state actors in military conflicts. In particular, this piece focuses on the background of international laws governing conflicts (with a focus on NSAs), criticisms of current international conflict resolution and international criminal law that regard NSAs, the 2010 reviews of the Rome Statute, and the benefits of better defining aggression under the Rome Statute in order to more effectively classify militant non-state actors.

**Statehood**

The Power of Sovereignty: The Political and Ideological Philosophy of Sayyid Qutb


**Threat Financing**

European Commission/US Treasury: Joint Report on Threat Financing

**Funding of ISIS**


The New Yorker

The Atlantic

31 USCS § 5324
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United States v. Scario, 900 F.2d 485 (2d Cir. N.Y. 1990) – found that this ban applied merely for trying to knowingly avoid disclosure requirements by structuring your transactions, irrespective of whether you knew that doing so was illegal. The Supreme Court found knowledge of illegality was required in Ratzlaf v. United States, 510 U.S. 135 (U.S. 1994), but Congress subsequently re-wrote the statute to its current form to make clear that the Scario standard applied.

Lawsuit against Saudi Arabia

Justice Against Sponsors of Terrorism Act

2040, 105th Cong. (2016)
https://www.congress.gov/bill/114th-congress/senate-bill/2040?q=%7B%22search%22%3A
%5B%22 justice+against+sponsors+terrorism+act%22%5D%7D&resultIndex=1
134 F. Supp. 3d 774

Foreign Sovereign Immunity United States Law


Purpose of Justice Against State Sponsors of Terrorism Act


Senate Passes Cornyn Bill to Help Victims of Terror Attacks Seek Justice, John Cornyn- United States Senator for Texas, (2016)
https://www.cornyn.senate.gov/content/senate-passes-cornyn-bill-help-victims-terror-attacks-seek-justice


http://www.reuters.com/article/us-saudi-usa-congress-idUSKCN0Y8239

Obama Administration’s Response

IN AN INTERVIEW WITH CHARLIE ROSE, PRESIDENT BARACK OBAMA DISCUSSES THE DECISION TO SEND MORE U.S. TROOPS TO IRAQ AND IF THE MYSTERIOUS 28 PAGES OF 9/11 DOCUMENTS SHOULD REMAIN CLASSIFIED – ON THE “CBS EVENING NEWS WITH SCOTT PELLEY”, CBS News, April 18, 2016
https://www.cbspressexpress.com/cbs-news/releases/view?id=45067

Press Briefing by the Press Secretary Josh Earnest, 4/18/2016, the White House, (2016)

Saudi Arabia’s Response

Mazzetti, Saudi Arabia Warns of Economic Fallout if Congress Passes 9/11 Bill, Apr. 15, 2016

Mazzetti, Senate Passes Bill Exposing Saudi Arabia to 9/11 Legal Claims, May 17, 2016