Article Abstracts

September 11 and the Laws of War

Derek Jinks

Do the laws of war govern the September 11 attacks? Did the attacks constitute "war crimes"? These questions are difficult because they touch upon complex legal problems involving deep conceptual ambiguities in international humanitarian law. It is unclear under what conditions the laws of war apply. This ambiguity arises from the combination of two related developments in the laws of war: (1) The laws of war now govern de facto as well as de jure warfare; and (2) the laws of war now govern internal as well as international armed conflict. The central difficulty is how best to define the scope and content of international humanitarian rules applicable in non-international armed conflict. This Article argues that the September 11 attacks violated the Common Article 3 of the Geneva Conventions; and that this determination has important consequences for both U.S. antiterrorism policy and international humanitarian law. Careful scrutiny of the treaty text, structure, and history of the potentially applicable laws of war strongly supports the conclusion that the terrorist attacks of September 11 constituted the initiation or confirmation of an "armed conflict" within the meaning of international law; and that the attacks were "war crimes." The dual concerns that animate the scope and content of Common Article 3—humanitarian protection and state sovereignty—are best served by this reading of "armed conflicts not of an international character." The laws of war offer a proven, durable mode of imposing principled constraints on organized violence. This widely-accepted, fully articulated normative framework should guide efforts to fashion an effective, humane response to new forms of organized violence—including catastrophic terrorism.

Ethnic Federalism: Its Promise and Pitfalls for Africa

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A salient characteristic of most sub-Saharan African ("SSA") states is ethnic heterogeneity. In most of these states, the constituent ethnic groups not only view themselves as being different from other ethnic groups but also identify themselves with particular regions of the country. Even now at the dawn of the new century and forty years after independence from colonial rule, ethnic differences continue to pose serious challenges for achieving national integration and political stability.

In the past, the vast majority of African states have carefully avoided coming to terms with the heterogeneity of their ethnic make-up. In particular, they have avoided giving ethnic identity any institutional or official expression, preferring instead to pursue policies and practices aimed at supplanting their citizens' ethnic identities with overarching national identities. To that end, they have utilized unitary structures and political institutions, including single party systems and even military forms of government. These formulas for nation-building and political stability, however, have neither avoided ethnic conflict nor engendered feelings of belonging to a broader national community.

Ethiopia's new constitution purports to offer a sounder formula for accommodating ethnic differences. Much of its appeal and promise comes from the fact that it accords constitutional recognition to the claims of ethnic groups to constitute themselves as self-governing polities within their own regions, within a federal framework. In theory, this arrangement would satisfy the desire of ethnic groups to be different, while at the same time remaining a part of the broader national community.

This Article considers the normative and instrumental arguments that might be advanced to justify such a formula for ethnic accommodation. While there is some merit
in these arguments, the Article ultimately concludes that the marriage of ethnicity with territorial sovereignty for ethnic groups is an unworkable and even perilous enterprise. The Article argues that such a system of government is more prone to exacerbate than to mitigate the difficulties that constitute the core of SSA states' predicament: lack of national unity, sluggish economic development, and violation of human rights. Accordingly, the Article suggests that while federalism should serve as a starting point in the search for a solution, a workable system will require a weighing of a number of factors, including the need to promote national unity and state integrity, economic interdependence, human rights, and the wishes of the people.

Standard-Terms Contracting in the Global Electronic Age: European Alternatives

James R. Maxeiner

Standard terms, i.e., the fine print on the backsides of form contracts, have confounded American law for decades. What is to prevent users of forms from unfairly exploiting their contract partners?

The development of the Internet has made the issue still more important and has given it an international dimension. Standard terms are ubiquitous in Internet and other computer information "shrink-wrap" and "click-wrap" licenses. Failure of business and consumer groups to agree on this issue derailed revisions to the Uniform Commercial Code in 1999 and contributed to the creation of a separate law for electronic commerce, the Uniform Computer Information Transactions Act.

United States Internet licenses are subject to foreign standard terms laws. In 1993 the European Union adopted the Unfair Terms Directive, which was inspired by the German Standard Terms Statute of 1976. European laws are much more rigorous than their American counterparts. Typical license terms used domestically by American Internet companies such as AOL and Microsoft are prohibited in Europe.

American legal scholarship has largely ignored foreign standard terms laws. This article discusses the issues that have arisen in the United States and shows how they are treated under European Union and German law. It advances the discussion of standard terms in American law and helps prepare American businesses to comply with laws in Europe.

Monumental Challenges: The Lawfulness of Destroying Cultural Heritage During Peacetime

Kanchana Wangkeo

In March 2001, the Taliban shocked the world by destroying the Bamiyan Buddha statues in Afghanistan. Although international actors sensed that the destruction was wrong, they were left without a legal basis for objection or intervention. The incident highlighted the gaps in the international cultural heritage regime because international law does not address the permissibility of relics destruction during times of peace, though there is considerable attention given to its treatment during times of war. Nonetheless, economic development and the consequences of political ideology, frequently threaten sites of cultural heritage. This Article seeks to discern what operational norms exist with respect to peacetime destruction, particularly in cases of economic development and iconoclasm. The developing norm is traced through four case studies: (1) the Aswan High Dam and its threat to Abu Simbel and Philae Island; (2) Ceausescu's systemization program and its threat to Romanian vernacular heritage; (3) the Ilisu Dam in Turkey and its threat to Hasankeyf; and (4) the Taliban and its destruction of the Bamiyan Buddhas. The Article concludes by evaluating the current norm and making recommendations for the future.