



ICRC

# IHL Academic Articles - 3<sup>rd</sup> trimester 2010 -

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## Preliminary remarks

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

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

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

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

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

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

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

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

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

## I. General issues

(General catch-all category, Customary Law)

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

Jean-Marie Henckaerts. - 2009. - p. 225-274. In: Slovenian law review Vol. VI, no. 1-2 - 345.2/820

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

### Military necessity and humanity in international humanitarian law : preserving the delicate balance

Michael N. Schmitt. - 2010. - p. 795-839. In: Virginia journal of international law Vol. 50, no. 4 - 345.2/447 (Br.)

This Essay examines the principle of military necessity and its current trajectory. In IHL, the principle appears in two guises: justification for normative deviation, and as an element of the *lex scripta*. The first notion will be quickly dispatched, for the law surrounding military necessity as a justification for violating IHL is well-settled. With regard to the latter, military necessity appears as both a specific element and a general foundational principle. Although the catalogue of direct references to military necessity in IHL is slim, the principle pervades the entire body of law by undergirding individual rules. In this central role, military necessity exists in equipoise with the principle of humanity, which seeks to limit the suffering and destruction incident to warfare. This symbiotic relationship determines in which direction, and at what speed, IHL evolves. It also determines the manner of its application on the battlefield.

<http://www.vjil.org/wp-content/uploads/2010/05/VJIL-50.4-Schmitt-Essay.pdf>

## II. Types of conflicts

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

### Classification des conflits : le dilemme du soldat

Andrew J. Carswell. - 2009. - p. 65-85. In: Revue internationale de la Croix-Rouge : sélection française Vol. 91

Les forces armées modernes sont engagées dans une vaste gamme d'opérations, qui vont de la lutte antiémeute en temps de paix au conflit armé international. En raison du manque de clarté inhérent au droit et des facteurs politiques qui influencent généralement le processus décisionnel, il n'est pas facile de classer ces différentes situations afin de déterminer le droit international applicable. L'auteur décrit les principales difficultés auxquelles doivent faire face les responsables militaires en matière de classification juridique et propose une solution pour que les personnes visées par le droit - qu'il s'agisse du soldat ou du civil - bénéficient effectivement de la protection que confèrent ses dispositions.

[http://www.icrc.org/Web/fre/sitefre0.nsf/htmlall/review-873-p143/\\$File/irrc-873-Carswell-fre.pdf](http://www.icrc.org/Web/fre/sitefre0.nsf/htmlall/review-873-p143/$File/irrc-873-Carswell-fre.pdf)

## Has human rights law become *lex specialis* for the European Court of Human Rights in right to life cases arising from internal armed conflicts?

Juliet Chevalier-Watts. - July 2010. - p. 584-602. In: The international journal of human rights Vol. 14, no. 4 – Cote 345.27/54 (Br.)

It is generally accepted that although human rights law is applicable in situations of armed conflict, international humanitarian law is *lex specialis*. However, this may not necessarily be the case with regard to internal armed conflicts, and legal authorities provide contradictory views as to what extent human rights principles are applicable in internal armed conflicts. This article explores the relationship between human rights law and international humanitarian law and considers the jurisprudential approach of the European Court of Human Rights in relation to right to life cases arising out of the internal armed conflicts in Turkey and Chechnya. The paper argues that such case law provides evidence that Strasbourg considers the principles of human rights law as *lex specialis* in right to life cases arising out of internal armed conflicts.

## The legal battle to define the law on transnational asymmetric warfare

Eyal Benvenisti. - Spring 2010. - p. 339-359. In: Duke journal of comparative and international law Vol. 20, no. 3 – Cote 345.2/823

The persistence and prevalence of asymmetric transnational armed conflicts have given rise to two rival claims. Governments involved in such conflicts emphasize their added risks in fighting irregular combatants who abuse legal protections. These governments seek to interpret the law in ways that dilute their responsibilities. At the same time, however, various third parties, including national and international courts, commissions of inquiry, and global civil society, converge in an entirely different approach. Informed by the expectation that with more power comes more responsibility, these third parties expect the more powerful side to gradually ensure enemy civilians' lives (not only to respect their lives). This expectation leads to demands for modification of the traditional law in the context of transnational asymmetric warfare in at least three areas: first, the recognition of an obligation to consider alternatives to military action; second, if there were no available alternatives, the army would be expected to invest significant resources to minimize harm to civilians; and finally, following an attack, the army would be obliged to conduct a transparent and accountable investigation to reexamine its own actions. Third parties may also insist on limiting the discretion of the "reasonable military commander." This essay seeks to understand and delineate the fundamental cleavage between the two visions.

<http://www.law.duke.edu/shell/cite.pl?20+Duke+J.+Comp.+&+Int%27L.+339+pdf>

## Typologie des conflits armés en droit international humanitaire : concepts juridiques et réalités

Sylvain Vité. - 2009. - p. 37-63. In: Revue internationale de la Croix-Rouge : sélection française Vol. 91

Bien que le droit international humanitaire vise à limiter les effets des conflits armés, il n'intègre pas de définition complète de ces situations relevant de son champ d'application matériel. Il est vrai que les conventions pertinentes se réfèrent à divers types de conflits armés et permettent, de ce fait, d'entrevoir les contours juridiques de cette notion à multiples facettes. Ces instruments ne proposent toutefois pas de critères suffisamment précis pour déterminer le contenu de chacune de ces catégories sans risque d'ambiguïté. Or une certaine clarté est indispensable en la matière. En effet, en fonction de la qualification juridique des situations, les règles applicables de cas en cas varient. Les régimes juridiques à prendre en compte ne sont ainsi pas identiques selon que ces situations sont constitutives, par exemple, d'un conflit armé international ou d'un conflit armé non international. De même, certaines formes de violence, qualifiées de "tensions internes" ou de "troubles intérieurs", n'atteignent pas le seuil d'applicabilité du droit international humanitaire et correspondent de ce fait à d'autres cadres normatifs. Cet article propose une typologie des conflits armés sous l'angle du droit international humanitaire. Il vise d'abord à montrer comment les différentes catégories de conflits armés prévues par celui-ci peuvent être interprétées compte tenu des évolutions de la

pratique juridique internationale. Il convient à cet égard de distinguer les efforts de conceptualisation relevant respectivement du droit des conflits armés internationaux et du droit des conflits armés non internationaux. Cette contribution évoquera ensuite divers cas d'application controversés. La réalité des conflits armés est en effet plus complexe que le modèle décrit en droit international humanitaire, au point que certains observateurs remettent aujourd'hui en question l'adéquation des catégories juridiques.

[http://www.icrc.org/Web/fre/sitefre0.nsf/htmlall/review-873-p69/\\$File/irrc-873-Vite-fre.pdf](http://www.icrc.org/Web/fre/sitefre0.nsf/htmlall/review-873-p69/$File/irrc-873-Vite-fre.pdf)

### III. Armed forces / Non-state armed groups

(Combatant status, compliance with IHL, etc.)

#### The dialogue of difference : gender perspectives on international humanitarian law

Helen Durham and Katie O'Byrne. - March 2010. - p. 31-52. In: International review of the Red Cross Vol. 92, no. 877.

This article examines the meaning and potential usefulness of a 'gender perspective' on international humanitarian law (IHL). In order to do so, it considers a number of 'gendered' themes found within IHL, including the role of women as combatants, and the gendered use of sexual violence during times of armed conflict. The authors suggest that further development and understanding of a gender perspective will contribute to the resilience and effectiveness of IHL as a system of law, and will strengthen the protection of those who are victimized and disempowered during times of war.

[http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-877-p31/\\$File/irrc-877-durham-obyrne.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-877-p31/$File/irrc-877-durham-obyrne.pdf)

#### The international legal framework and armed groups

George J. Andreopoulos. - June 2010. - p. 223-246. In: Human rights review Vol 11, no. 2. - Cote 345.22/161 (Br.)

This article explores the contribution of the international legal framework to strategies for exercising leverage over and engaging with non-state armed groups. In addressing the framework's relevance in meeting these challenges, it examines the tensions between hierarchy and reciprocity in international law; key normative developments in international human rights and international humanitarian laws, the issue of existing gaps in the protective framework envisaged by these two bodies of law, and the impact of their growing intersections; recent trends in the international arena that point toward the expansion, as well as restriction, of the normative space and their implications; and, in light of the opportunities-challenges identified, the international legal framework's prospects for articulating credible engagement strategies with non-state armed groups.

### IV. Multinational forces

N/A

### V. Private actors

#### The status of private military contractors under international humanitarian law

Won Kidane. - 2010. - p. 361-419. In: Denver journal of international law and policy Vol. 38, no. 3. - Cote 345.29/149 (Br.)

This article attempts to characterize the status of civilian military contractors under IHL, which has traditionally governed the conduct of armed conflict where the status of all parties to the conflict is clearly defined, and identify appropriate IHL standards that could be used for the regulation of civilian military contractors. It argues and properly assumes that the most pertinent body of law is IHL because the very existence of the private military industry is inextricably linked to the existence of the threat and use of military force; in other words, the existence of war. It further contends, therefore, that identification of the exact legal status under IHL of all the players is an essential step in understanding and regulating their future role.

<http://law.du.edu/documents/djilp/38No3/Kidane-Final.pdf>

## VI. Protection of persons

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Helen Durham and Katie O'Byrne. - March 2010. - p. 31-52. In: International review of the Red Cross Vol. 92, no. 877

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[http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-877-p31/\\$File/irrc-877-durham-obyrne.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-877-p31/$File/irrc-877-durham-obyrne.pdf)

### **Mécanismes et méthodes visant à mettre en oeuvre le droit international humanitaire et apporter protection et assistance aux victimes de la guerre**

Toni Pfanner. - 2009. - p. 107-160. In: Revue internationale de la Croix-Rouge : sélection française Vol. 91

Cet article présente une vue d'ensemble des mécanismes permettant d'améliorer le sort des personnes touchées par les conflits armés. Certains sont fondés sur le droit international humanitaire, mais, de plus en plus, on voit une multiplicité d'acteurs contribuer à la mise en œuvre de ce droit en dehors du cadre prévu à l'origine. Il peut en résulter différentes façons de faire respecter le DIH : le recours aux tribunaux, la pression publique sur les parties à un conflit, voire la recommandation de l'usage de la force. Quoiqu'il en soit, une action humanitaire indépendante de toute visée politique est souvent le seul moyen d'améliorer la situation des victimes de conflits armés.

<http://www.icrc.org/Web/fre/sitefre0.nsf/html/p4024>

### **Protection of children in armed conflict under customary international humanitarian law: a comment to the 2005 ICRC Study on customary IHL**

Simona Drenik. - 2009. - p. 165-190. In: Slovenian law review Vol. VI, no. 1-2. - Cote 345.2/820

The article reviews the state of customary international humanitarian law specifically applicable to children as referred to in the 2005 ICRC Study on customary international humanitarian law. The question arises: are there any other rules of customary international law, which are applicable specifically to children in armed conflict. This assessment might leave the doors open for a possible review or additions to the 2005 ICRC Study.

## UN Security Council resolutions 1325 and 1820 : constructing gender in armed conflict and international humanitarian law

Amy Barrow. - March 2010. - p. 221-234. In: International review of the Red Cross Vol. 92, no. 877.

While the Geneva Conventions contain gender-specific provisions, the reality of women's and men's experiences of armed conflict have highlighted gender limitations and conceptual constraints within international humanitarian law. Judgements at the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) ad hoc tribunals have gone some way towards expanding the scope of definitions of sexual violence and rape in conflict. More recent developments in public international law, including the adoption of Security Council Resolutions 1325 and 1820 focused on women, peace and security, have sought to increase the visibility of gender in situations of armed conflict. This paper highlights important developing norms on women, peace and security. Although these norms are significant, they may not be radical enough to expand constructions of gender within international humanitarian law. This leaves existing provisions open to continued scrutiny.

[http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-877-p221/\\$File/irrc-877-barrow.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-877-p221/$File/irrc-877-barrow.pdf)

## VII. Protection of objects

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

### Are aerial fumigations in the context of the war in Colombia a violation of the rules of international humanitarian law ?

Morgane Landel. - Spring 2010. - p. 491-513. In: Transnational law and contemporary problems Vol. 19, no. 2. - Cote 345.25/41 (Br.)

This Article examines the Colombian government's aerial fumigations of coca crops and argues that they are violations of IHL. It initially looks at the legal framework in which IHL applies in Colombia, then at the impact of aerial fumigations on the health of the affected population, the environment, and the eradication of coca crops. Finally, it analyzes whether this spraying can be classified as a violation of IHL.

<http://www.uiowa.edu/~tlcp/TLCP%20Articles/19-2/landel.finalfinal.042210.pdf>

## VIII. Detention, internment, treatment and judicial guarantees

### Obama administration positions in the aftermath of the Supreme court's rejection of the Bush administration's detention policies at Guanta[na]mo

Edward F. Sherman. - 2009. - p. 401-438. In: Revue de droit militaire et de droit de la guerre = The military law and the law of war review Vol. 48, no 3-4

The four Supreme Court cases culminating in the 2008 decision in *Boumediene v. Bush* strengthened the legal basis for limits on the power of the American government to detain alleged enemy combatants, expanded the availability of the writ of habeas corpus to challenge detention, and affirmed the applicability of the international law of armed conflict. The Obama administration's struggle to close Guantanamo, with its attendant problems of release of detainees into the U.S., trial of certain detainees in civilian courts, and trial of others before military commissions, pose difficult political and legal issues that will have to be resolved.

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1518936](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1518936)

## IX. Law of occupation

N/A

## X. Conduct of hostilities

(Distinction, proportionality, precautions, prohibited methods)

### "And for such time as" : the time dimension to direct participation in hostilities

Bill Boothby. - 2010. - p. 741-768. In: Journal of international law and politics Vol. 42, no. 3. - Cote 345.25/238

The author examines the ICRC's declared view that protection is lost only for the duration of a specific act of DPH and the related notion of the "revolving door of protection." He evaluates when direct participation comes to an end, and thereafter evaluates what the time dimensions are to the rule as it appears, respectively, in customary and treaty law. There are three main grounds on which the ICRC's analysis in the Interpretive Guidance can be criticized. First, in deciding what actions constitute direct participation, the ICRC interprets the concepts of preparation, deployment, and return too restrictively. Second, by limiting continuous loss of protection to members of organized armed groups with a continuous combat function, the ICRC gives regularly participating civilians a privileged, unbalanced, and unjustified status of protection in comparison to members of the opposing armed forces, who are continuously targetable. Third, at customary law there is no revolving door of protection and thus the ICRC's interpretation of the word "participates" in the treaty rule excessively narrows the notion of DPH by inappropriately excluding the notion of continuous participation.

[http://www.law.nyu.edu/journals/jilp/issues/jilpvolume42/ECM\\_PRO\\_065933](http://www.law.nyu.edu/journals/jilp/issues/jilpvolume42/ECM_PRO_065933)

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<http://www.uiowa.edu/~tlcp/TLCP%20Articles/19-2/landel.finalfinal.042210.pdf>

### Challenges of twenty-first century conflicts : a look at direct participation in hostilities

Jamie A. Williamson. - Spring 2010. - p. 457-471. In: Duke journal of comparative and international law Vol. 20, no. 3. - Cote 345.2/823

Presently, most armed conflicts are not fought between states in a traditional fashion. A wide range of highly complex and drawn-out internal conflicts of low intensity are replacing interstate warfare. Most conflicts usually involve at least one organized non-state armed group, without a clear start or end to the hostilities. Questions of transnational terrorism further add fuel to the fire of violence. With this metamorphosis of conflicts, it was suggested that certain aspects of IHL were inadequate to deal with the realities of modern warfare. IHL was deemed too outdated to effectively address the threats faced in the fight against terrorism. For the ICRC, there was no one size fits all approach to answering this question. Each situation of violence, whether part of the so called global fight against terrorism or not, needs to be assessed on a case by-case basis. In other words, only by looking at the facts on the ground, at the parties involved,

and nature of the violence, could it be determined whether and to what extent IHL applied to the situation. Individuals at war in the legal sense would be protected by International Humanitarian Law. Outside of legal war, protection would be afforded by other bodies of law, such as human rights law and domestic law.

<http://www.law.duke.edu/shell/cite.pl?20+Duke+J.+Comp.+&+Int'l+L.+457+pdf>

## Cyber warfare and precautions against the effects of attacks

Eric Talbot Jensen. - June 2010. - p. 1533-1569. In: Texas law review Vol. 88, issue 7. - Cote 345.25/40 (Br.)

Ninety-eight percent of all U.S. government communications travel over civilian-owned-and-operated networks. Additionally, the government relies almost completely on civilian providers for computer software and hardware products, services, and maintenance. This near-complete intermixing of civilian and military computer infrastructure makes many of those civilian objects and providers legitimate targets under the law of armed conflict. Other civilian networks, services, and communications may suffer collateral damage from legitimate attacks on government targets. To protect those civilian objects and providers from the effects of attacks, the law of armed conflict requires a state to segregate its military assets from the civilian population and civilian objects to the maximum extent feasible. Where segregation is not feasible, the government must protect the civilian entities and communications from the effects of attacks. The current integration of U.S. government assets with civilian systems makes segregation impossible and therefore creates a responsibility for the United States to protect those civilian networks, services, and communications. The U.S. government is already taking some steps in that direction, as illustrated by a number of plans and policies initiated over the past decade. However, the current actions do not go far enough. This Article identifies six vital actions the government must take to comply with the law of armed conflict and to ensure not only the survivability of military communication capabilities during times of armed conflict, but also the protection of the civilian populace and civilian objects.

<http://www.texasrev.com/issues/vol/88/issue/7/jensen>

## Deconstructing direct participation in hostilities : the constitutive elements

Michael N. Schmitt. - 2010. - p. 697-739. In: Journal of international law and politics Vol. 42, no. 3. - Cote 345.25/238

This article, written from the perspective of a participant in the ICRC process, critically analyzes one facet of the Interpretive Guidance — its criteria for activities that qualify as “direct participation,” which it labels “constitutive elements.” The article is devoted to a comprehensive deconstruction of the three constitutive elements — threshold of harm, direct causation, and belligerent nexus — and an examination of how to characterize conduct in grey area situations. The constitutive elements evidence serious shortcomings with respect to both law and military common sense. Taken together, the deficiencies identified demonstrate a general failure to fully appreciate the operational complexity of modern warfare. Accordingly, States involved in 21st century warfare are unlikely to view the document favourably, let alone use it to provide direction to their forces in the field.

[http://www.law.nyu.edu/journals/jilp/issues/jilpvolume42/ECM\\_PRO\\_065931](http://www.law.nyu.edu/journals/jilp/issues/jilpvolume42/ECM_PRO_065931)

## Direct participation in hostilities : some personal reflections

A.P.V. Rogers. - 2009. - p. 143-160. In: Revue de droit militaire et de droit de la guerre = The military law and the law of war review Vol. 48, no 1-2.

Civilians are protected from attack under the law of armed conflict but lose that protection “for such time as they take a direct part in hostilities”. However, this phrase has never been defined in the law. In an effort to clarify its meaning, the ICRC and the Asser Institute convened a series of expert meetings from 2003 to 2008 to discuss how it should be interpreted in practice and, following those meetings, the ICRC adopted guidance, which was published in the International review of the Red Cross in December 2008. This article examines the problems that can arise in

the absence of a generally accepted definition, provides insight into the expert process as seen by one of its participants and comments on the guidance that was finally produced.

### **The ICRC interpretive guidance on the notion of direct participation in hostilities under international humanitarian law**

Ryan Goodman... [et al.]. - 2010. - p. 637-916. In: Journal of international law and politics Vol. 42, no. 3. - Cote 345.25/238

In 2009, the International Committee of the Red Cross (ICRC) issued its Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law ("Interpretive Guidance"). The Interpretive Guidance will generate discussions of great consequence for ongoing and future wars. This special issue gathers the contributions to a Forum that convened leading IHL and military experts who were directly involved in the expert meetings over the past six years. The authors include senior-level legal advisors to the militaries of Canada, the United Kingdom, and the United States. Each expert provides a thorough description and critical analysis of a different component of the Interpretive Guidance. Dr. Nils Melzer, Legal Adviser at the ICRC and author of the Interpretive Guidance, provides a detailed response to these criticisms.

<http://www.law.nyu.edu/journals/jilp/issues/jilpvolume42/index.htm>

### **Israel's invasion of Gaza in international law**

George E. Bisharat ; with Timothy Crawley... [et al.]. - Winter 2010. - p. 41-114. In: Denver journal of international law and policy Vol. 38, no. 1. - Cote 345.25/39 (Br.)

Israel commenced an aerial bombardment of the Gaza Strip on December 27, 2008 in a military operation it dubbed "Operation Cast Lead." Israel augmented its attack with a ground invasion beginning on January 3, 2009. This article considers the possible violations of international humanitarian law entailed in Israel's twenty-two day assault on the Gaza Strip. The main bodies of law applicable to the Gaza invasion are international humanitarian law, the central purpose of which is to minimize human suffering in times of armed conflict, and international criminal law, which establishes state and individual culpability for grave violations of international law, including for war crimes and crimes against humanity.

<http://law.du.edu/documents/djilp/38No1/Bisharat-Final.pdf>

### **Keeping the balance between military necessity and humanity : a response to four critiques of the ICRC's interpretive guidance on the notion of direct participation in hostilities**

Nils Melzer. - 2010. - p. 831-916. In: Journal of international law and politics Vol. 42, no. 3. - Cote 345.25/238

The purpose of the present article is to respond to four critiques of the ICRC's interpretive guidance prepared by four authors who participated along with more than 50 other experts in the ICRC's clarification process on the notion of "direct participation in hostilities" (DPH). As the topics of the four critiques illustrate, a number of particularly difficult issues remained controversial until the end, including, most notably: (1) the criteria for distinguishing civilians from members of organized armed groups; (2) the so-called "revolving door" of protection according to which civilians can repeatedly lose and regain protection against direct attack; and (3) the restraints imposed on the use of force against legitimate military targets. Finally, although the three defining elements of DPH were far less controversial, their application to certain activities, such as voluntary human shielding and hostage taking, still gave rise to significant disagreement among the participating experts.

[http://www.law.nyu.edu/journals/jilp/issues/jilpvolume42/ECM\\_PRO\\_065934](http://www.law.nyu.edu/journals/jilp/issues/jilpvolume42/ECM_PRO_065934)

## Opportunity lost : organized armed groups and the ICRC "direct participation in hostilities" interpretive guidance

Kenneth Watkin. - 2010. - p. 641-695. In: Journal of international law and politics Vol. 42, no. 3. - Cote 345.25/238

The treatment of "organized armed groups" will be analyzed in four parts. In the first part, the principle of distinction and the need to ensure respect for, as well as provide credible interpretation of, the law, thereby enhancing compliance with the Rule of Law, is discussed. Second, the conclusions reached in respect of organized armed groups in the Interpretive Guidance will be set out in order to provide a base-line from which to conduct a critical analysis. This includes separate charts for international and non-international armed conflict that summarize the categories of direct participants and the criteria by which they may be targeted. These charts highlight the complexity of the approach suggested in the Interpretive Guidance. In the third part the analysis will critique the Interpretive Guidance by looking at how well it has assessed the applicable law in respect of contemporary armed conflict and recognized the lingering impact of Just War theory on participation in conflict. It will also look at how armed groups are organized in practice and compare that reality to the approach adopted by the Interpretive Guidance. In the fourth part an alternate theory of membership in organized armed groups will be provided which reflects the common attributes of all members in armed forces regardless of whether they are fighting for a State or a non-State actor.

[http://www.law.nyu.edu/journals/jilp/issues/jilpvolume42/ECM\\_PRO\\_065932](http://www.law.nyu.edu/journals/jilp/issues/jilpvolume42/ECM_PRO_065932)

## Part IX of the ICRC "Direct participation in hostilities" study : no mandate, no expertise, and legally incorrect

W. Hays Parks. - 2010. - p. 769-830. In: Journal of international law and politics Vol. 42, no. 3. - Cote 345.25/238

Experts' discussions resurrected the historic tension between Hague and Geneva law, that is, balancing the ability of a military force lawfully to accomplish its wartime missions while protecting individual civilians and civilian populations as a whole. This article concentrates on, and is a critical history and analysis of, Section IX - 'Restraints on the use of force in direct attack' of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law.

[http://www.law.nyu.edu/journals/jilp/issues/jilpvolume42/ECM\\_PRO\\_065930](http://www.law.nyu.edu/journals/jilp/issues/jilpvolume42/ECM_PRO_065930)

## Reconsidering reprisals

Michael A. Newton. - Spring 2010. - p. 361-388. In: Duke journal of comparative and international law Vol. 20, no. 3. - Cote 345.2/823

The prohibition on the use of reprisals is widely regarded as one of the most sacrosanct statements of the jus in bello applicable to the conduct of modern hostilities. Supporters of the bright line ban describe it as a vital "bulwark against barbarity." In the words of the International Committee of the Red Cross, the prohibition is "absolute", despite the fact that the declarations of key states indicate residual ambiguity over the scope of permissible reprisals, particularly in the context of non-international armed conflicts. Reasonable reprisals grounded on an empirical assessment of their deterrent value or framed as appropriate punishment for prior acts of terror may be the most humane strategy for serving the strategic imperatives of civilized society confronted with a persistent and adaptive terrorist enemy. Thoughtful and multilateral reassessment of the lawful scope and rationale for reasonable reprisals is overdue.

<http://www.law.duke.edu/shell/cite.pl?20+Duke+J.+Comp.+&+Int'l+L.+361+pdf>

## XI. Weapons

### None to be trusted : Israel's use of cluster munitions in the second Lebanon war and the case for the convention on cluster munitions

Eitan Barak. - 2010. - p. 423-483. In: American university international law review Vol. 25, no. 3. - Cote 341.67/132 (Br.)

Israel's extensive use of the Cluster Munitions in the 2006 Lebanon War provided a major impetus for drafting the 2008 Convention on Cluster Munitions (CCM). Israel, blamed for severe humanitarian post-conflict harm to civilians in South Lebanon, simultaneously faced an extensive diplomatic entanglement with the U.S. based on suspicions that Israel had violated U.S. legislation as well as a classified bilateral end-use agreement specifying the conditions of use of U.S.-made CMs. Relying on numerous sources, especially the recent declassified (June 2008) IDF's Military Advocate General's legal opinion into whether Israel's CM use complied with International Humanitarian Law (IHL) and the 2008 Israel's Inquiry Commission into the 2006 War final report, this Article lists seven intriguing lessons learned from that War regarding the legality of CM under IHL. These lessons also highlight the fundamental differences in the approaches taken by CCM supporters vis-à-vis the U.S. and other major CM stockpilers, which hold that restricting and regulating the use of CMs (through adopting a new Protocol to the Convention on Certain Conventional Weapons) is sufficient to avoid future harm to civilians from these weapons. Beyond the legality issue, this Article draws conclusions to the Protocol's fragility and, importantly, to the CCM's necessity

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1626792](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1626792)

## XII. Implementation

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

### The approach of the Committee on the elimination of racial discrimination to interpreting and applying international humanitarian law

David Weissbrodt. - Summer 2010. - p. 327-362. In: Minnesota journal of international law Vol. 19, no. 2. - Cote 345.1/19 (Br.)

Recognizing that the Committee on the Elimination of Racial Discrimination (CERD) represents a major human rights treaty body with the capability of interpreting international humanitarian law. Analyzing the jurisprudence of the CERD from a detailed study of the relevant decisions of Individual Communications, General Recommendations, Concluding Observations, and the Decisions and Recommendations issued through its early warning measures and urgent procedures.

<http://minnijil.org/wp-content/uploads/2010/04/weissbrodtweb-pdf.pdf>

### Bringing treaties home : the domestic incorporation of international humanitarian law

Christopher Harland. - January - June 2009. - p. 121-140. In: Journal of international affairs Vol. 13, no. 1. - Cote 345.22/165 (Br.)

This article concentrates on 28 IHL treaties, protocols and declarations. It reviews each international instrument, includes whether Bangladesh is a party or has signed the instrument and then discusses potential action Bangladesh could take with respect to the instrument. This paper draws heavily from publications of the ICRC, including fact sheets regarding measures necessary to implement IHL in the domestic legal order of states party to each instrument.

## The international legal framework and armed groups

George J. Andreopoulos. - June 2010. - p. 223-246. In: Human rights review Vol 11, no. 2. - Cote 345.22/161 (Br.)

This article explores the contribution of the international legal framework to strategies for exercising leverage over and engaging with non-state armed groups. In addressing the framework's relevance in meeting these challenges, it examines the tensions between hierarchy and reciprocity in international law; key normative developments in international human rights and international humanitarian laws, the issue of existing gaps in the protective framework envisaged by these two bodies of law, and the impact of their growing intersections; recent trends in the international arena that point toward the expansion, as well as restriction, of the normative space and their implications; and, in light of the opportunities-challenges identified, the international legal framework's prospects for articulating credible engagement strategies with non-state armed groups.

## Mécanismes et méthodes visant à mettre en oeuvre le droit international humanitaire et apporter protection et assistance aux victimes de la guerre

Toni Pfanner. - 2009. - p. 107-160. In: Revue internationale de la Croix-Rouge : sélection française Vol. 91

Cet article présente une vue d'ensemble des mécanismes permettant d'améliorer le sort des personnes touchées par les conflits armés. Certains sont fondés sur le droit international humanitaire, mais, de plus en plus, on voit une multiplicité d'acteurs contribuer à la mise en oeuvre de ce droit en dehors du cadre prévu à l'origine. Il peut en résulter différentes façons de faire respecter le DIH : le recours aux tribunaux, la pression publique sur les parties à un conflit, voire la recommandation de l'usage de la force. Quoi qu'il en soit, une action humanitaire indépendante de toute visée politique est souvent le seul moyen d'améliorer la situation des victimes de conflits armés.

[http://www.icrc.org/Web/fre/sitefre0.nsf/htmlall/p4024/\\$File/ICRC\\_001\\_4024.PDF](http://www.icrc.org/Web/fre/sitefre0.nsf/htmlall/p4024/$File/ICRC_001_4024.PDF)

## Punishing war criminals

by Agnieszka Szpak. - 2010. - p. 57-75. In: Hague yearbook of international law = Annuaire de la Haye de droit international Vol. 22 (2009)

Review of legal instruments and provisions related to the punishment of war crimes.

## Right bombs, right target : law of armed conflict instruction for United States air force officer candidates

Brian L. Bengs, Brady J. Augustin. - 2010. - p. 397-413. In: Journal of applied security research Vol. 5, issue 3. - Cote 345.24/3 (Br.)

Mixing a discussion of the law with a discussion of pedagogical methods, this article examines the source and scope of the international legal obligation to educate military members on the law of armed conflict (LOAC). United States Air Force officer candidate education systems serve as the vehicle to identify a quantitative and qualitative baseline LOAC education requirement and assess how such a baseline standard is met by Air Force officer commissioning sources. This article asserts that such a baseline is no longer sufficient for professional military officers engaged in modern armed conflicts. The quantitative and qualitative methodology employed by the United States Air Force Academy to achieve an aspirational level of LOAC education is offered as an example of what the new LOAC education baseline should become to properly instruct future officers for the unique nature of modern armed conflict.

## The role of the human rights committee in interpreting and developing humanitarian law

David Weissbrodt. - Winter 2009. - p. 1185-1237. In: University of Pennsylvania journal of international law Vol. 31, no. 4. - Cote 345.1/4 (Br.)

This article reviews the jurisprudence of the Human Rights Committee (HRC). It examines the Committee's general approach to interpreting the International Covenant on Civil and Political Rights, to addressing relevant issues of international law, and to specifically addressing the rules of international humanitarian law. It considers all relevant documents that the HRC has produced including its Decisions and Views, its General Comments, and its Concluding Observations. It synthesizes the methodology and approach taken by the Committee in its three realms. It recommends that in order for the Committee to produce precedential material interpreting international humanitarian law, it must explicitly consider the Geneva Conventions and their Optional Protocols when individual submissions raise issues of international humanitarian law. Under the Optional Protocol to the Civil and Political Covenant, the ultimate findings must be limited to violations of the Covenant itself, but the Committee could provide useful and precedential analysis of international humanitarian obligations in reaching a finding of a Covenant violation.

## XIII. International Human Rights Law

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

### The approach of the Committee on the elimination of racial discrimination to interpreting and applying international humanitarian law

David Weissbrodt. - Summer 2010. - p. 327-362. In: Minnesota journal of international law Vol. 19, no. 2. - Cote 345.1/19 (Br.)

Recognizing that the Committee on the Elimination of Racial Discrimination (CERD) represents a major human rights treaty body with the capability of interpreting international humanitarian law. Analyzing the jurisprudence of the CERD from a detailed study of the relevant decisions of Individual Communications, General Recommendations, Concluding Observations, and the Decisions and Recommendations issued through its early warning measures and urgent procedures.

<http://minnijil.org/wp-content/uploads/2010/04/weissbrodtweb-pdf.pdf>

### Customary international humanitarian law study : fundamental guarantees

Cyril Laucci. - December 2009. - p. 191-204. In: Slovenian law review Vol. 6, no. 1-2. - Cote 345.2/820

The paper presents the nineteen rules contained in chapter 32 on fundamental guarantees of the ICRC Customary IHL Study. These rules all derive from the first basic principle that civilians and persons hors de combat must be treated humanely, and contain the fundamental guarantees that must be respected to that effect. The author claims that most of these guarantees exemplify the cumulative applicability of both international humanitarian law and human rights law, thus renouncing as fallacious the assumptions of the classical view which found them to be mutually exclusive (such as that international humanitarian law only applies in armed conflicts and not during internal disturbances, while human rights law applies in time of peace). Furthermore, substantiated by an analysis of the individual rules, the author finds that these guarantees find their roots in both sets of norms in situations of armed conflicts.

### Has human rights law become *lex specialis* for the European Court of Human Rights in right to life cases arising from internal armed conflicts?

Juliet Chevalier-Watts. - July 2010. - p. 584-602. In: The international journal of human rights Vol. 14, no. 4. - Cote 345.27/54 (Br.)

It is generally accepted that although human rights law is applicable in situations of armed conflict, international humanitarian law is *lex specialis*. However, this may not necessarily be the case with regard to internal armed conflicts, and legal authorities provide contradictory views as to what extent human rights principles are applicable in internal armed conflicts. This article explores the relationship between human rights law and international humanitarian law and considers the jurisprudential approach of the European Court of Human Rights in relation to right to life cases arising out of the internal armed conflicts in Turkey and Chechnya. The paper argues that such case law provides evidence that Strasbourg considers the principles of human rights law as *lex specialis* in right to life cases arising out of internal armed conflicts.

### **The role of the human rights committee in interpreting and developing humanitarian law**

David Weissbrodt. - Winter 2009. - p. 1185-1237. In: University of Pennsylvania journal of international law Vol. 31, no. 4. - Cote 345.1/4 (Br.)

This article reviews the jurisprudence of the Human Rights Committee (HRC). It examines the Committee's general approach to interpreting the International Covenant on Civil and Political Rights, to addressing relevant issues of international law, and to specifically addressing the rules of international humanitarian law. It considers all relevant documents that the HRC has produced including its Decisions and Views, its General Comments, and its Concluding Observations. It synthesizes the methodology and approach taken by the Committee in its three realms. It recommends that in order for the Committee to produce precedential material interpreting international humanitarian law, it must explicitly consider the Geneva Conventions and their Optional Protocols when individual submissions raise issues of international humanitarian law. Under the Optional Protocol to the Civil and Political Covenant, the ultimate findings must be limited to violations of the Covenant itself, but the Committee could provide useful and precedential analysis of international humanitarian obligations in reaching a finding of a Covenant violation.

## **XIV. International Criminal Law**

### **The ICC's jurisdiction over war crimes in internal armed conflicts : an insurmountable obstacle for China's accession ?**

Jing Guan. - Spring 2010. - p. 703-754. In: Penn state international law review Vol. 28, no. 4. - Cote 344/48 (Br.)

This paper argues that the ICC's jurisdiction over war crimes in internal armed conflicts does not pose real difficulty for China if it wishes to join the ICC. Although the Taiwan issue is potentially the most fatal conflict between China and the ICC, the Chinese government is being over-cautious on the Taiwan issue vis-à-vis possible reaches by the ICC for war crimes purposes. This paper also briefly analyzes China's other four major official reasons for not joining the ICC and forwards many positive reasons for China to join the ICC. What really explains China's current reluctance to join the ICC is the political reluctance of a rising power, who still confronts thorny domestic issues that are susceptible to mass violence, to be fettered by yet another multilateral restrictive mechanism.

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1673615](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1673615)

### **Nowhere to run ? : punishing war crimes**

Michael Clark, Peter Cave. - May 2010. - p. 197-207. In: Res publica Vol. 16, no. 2. - Cote 344/245 (Br.)

This paper's aim is to pose problems appropriate for the first paper of this issue, to provide something of an overview of the punishment of war crimes. It considers first the rationale of the law of war, the identification and scope of war crimes, and proceeds to consider the justification of punishing war crimes, arguing for a consequentialist view with side-constraints. It then considers the alternative of reconciliation.

## War crimes in the armed conflict in Pakistan

Niaz A. Shah. - 2010. - p. 283-306. In: Studies in conflict and terrorism Vol. 33, no. 4. - Cote 344/510 (Br.)

This article argues that an internal armed conflict exists in Pakistan and the law of armed conflict together with human rights law applies to it. It is further argued that both the security forces of Pakistan and the Pakistani Taliban have and will continue to violate these laws and to expose the Taliban's violations alone is only a half-truth. To conclude, the reasonable prospects, or lack thereof, of the war crimes committed in this conflict to be prosecuted are discussed.

## XV. Contemporary challenges

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

### Challenges of twenty-first century conflicts : a look at direct participation in hostilities

Jamie A. Williamson. - Spring 2010. - p. 457-471. In: Duke journal of comparative and international law Vol. 20, no. 3. - Cote 345.2/823

Presently, most armed conflicts are not fought between states in a traditional fashion. A wide range of highly complex and drawn-out internal conflicts of low intensity are replacing interstate warfare. Most conflicts usually involve at least one organized non-state armed group, without a clear start or end to the hostilities. Questions of transnational terrorism further add fuel to the fire of violence. With this metamorphosis of conflicts, it was suggested that certain aspects of IHL were inadequate to deal with the realities of modern warfare. IHL was deemed too outdated to effectively address the threats faced in the fight against terrorism. For the ICRC, there was no one size fits all approach to answering this question. Each situation of violence, whether part of the so called global fight against terrorism or not, needs to be assessed on a case by-case basis. In other words, only by looking at the facts on the ground, at the parties involved, and nature of the violence, could it be determined whether and to what extent IHL applied to the situation. Individuals at war in the legal sense would be protected by International Humanitarian Law. Outside of legal war, protection would be afforded by other bodies of law, such as human rights law and domestic law.

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### Cyber warfare and precautions against the effects of attacks

Eric Talbot Jensen. - June 2010. - p. 1533-1569. In: Texas law review Vol. 88, issue 7. - Cote 345.25/40 (Br.)

Ninety-eight percent of all U.S. government communications travel over civilian-owned-and-operated networks. Additionally, the government relies almost completely on civilian providers for computer software and hardware products, services, and maintenance. This near-complete intermixing of civilian and military computer infrastructure makes many of those civilian objects and providers legitimate targets under the law of armed conflict. Other civilian networks, services, and communications may suffer collateral damage from legitimate attacks on government targets. To protect those civilian objects and providers from the effects of attacks, the law of armed conflict requires a state to segregate its military assets from the civilian population and civilian objects to the maximum extent feasible. Where segregation is not feasible, the government must protect the civilian entities and communications from the effects of attacks. The current integration of U.S. government assets with civilian systems makes segregation impossible and therefore creates a responsibility for the United States to protect those civilian networks, services, and communications. The U.S. government is already taking some steps in that direction, as illustrated by a number of plans and policies initiated over the past decade. However, the current actions do not go far enough. This Article identifies six vital actions the government must take to comply with the law of armed conflict and to ensure not only the survivability of military communication capabilities during times of armed conflict, but also the protection of the civilian populace and civilian objects.

<http://www.texasrev.com/issues/vol/88/issue/7/jensen>

## The legal battle to define the law on transnational asymmetric warfare

Eyal Benvenisti. - Spring 2010. - p. 339-359. In: Duke journal of comparative and international law Vol. 20, no. 3. - Cote 345.2/823

The persistence and prevalence of asymmetric transnational armed conflicts have given rise to two rival claims. Governments involved in such conflicts emphasize their added risks in fighting irregular combatants who abuse legal protections. These governments seek to interpret the law in ways that dilute their responsibilities. At the same time, however, various third parties, including national and international courts, commissions of inquiry, and global civil society, converge in an entirely different approach. Informed by the expectation that with more power comes more responsibility, these third parties expect the more powerful side to gradually ensure enemy civilians' lives (not only to respect their lives). This expectation leads to demands for modification of the traditional law in the context of transnational asymmetric warfare in at least three areas: first, the recognition of an obligation to consider alternatives to military action; second, if there were no available alternatives, the army would be expected to invest significant resources to minimize harm to civilians; and finally, following an attack, the army would be obliged to conduct a transparent and accountable investigation to reexamine its own actions. Third parties may also insist on limiting the discretion of the "reasonable military commander." This essay seeks to understand and delineate the fundamental cleavage between the two visions.

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## Soixante ans des Conventions de Genève : tirer les enseignements du passé pour mieux faire face à l'avenir : cérémonie organisée pour le 60e anniversaire des Conventions de Genève, 12 août 2009, Genève

déclaration de Jakob Kellenberger. - 2009. - p. 355-361. In: Revue internationale de la Croix-Rouge : sélection française Vol. 91

Déclaration de Jakob Kellenberger, président du CICR, lors de la cérémonie organisée pour le 60e anniversaire des Conventions de Genève, le 12 août 2009 à Genève.

[http://www.icrc.org/Web/fre/sitefre0.nsf/htmlall/p4024/\\$File/ICRC\\_001\\_4024.PDF](http://www.icrc.org/Web/fre/sitefre0.nsf/htmlall/p4024/$File/ICRC_001_4024.PDF)

## The structure of terrorism threats and the laws of war

Matthew C. Waxman. - Spring 2010. - p.429-455. In: Duke journal of comparative and international law Vol. 20, no. 3. - Cote 345.2/823

This article considers a major debate in the American and European counterterrorism analytic community – whether the primary terrorist threat to the West is posed by hierarchical, centralized terrorist organizations operating from geographic safe havens, or by radicalized individuals conducting a loosely organized, ideologically common but operationally independent fight against western societies – and this debate's implications for both *jus ad bellum* and *jus in bello*. Analysis of how the law of armed conflict might be evolving to deal with terrorism should engage in more nuanced and sophisticated examination of how terrorism threats are themselves evolving. Moreover, the merits of legal reform proposals depend on their capacity to meet strategic needs while protecting humanitarian, liberty, and conflict-resolution interests. That capacity, in turn, depends on how well the assumptions underlying those proposals track accurately the anticipated – but uncertain – future terrorism threat environment.

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## War bound by law : non-state actors and the law of armed conflict in the twenty-first century

John Bellinger... [et al.]. - Spring 2010. - p. 331-471. In: Duke journal of comparative and international law Vol. 20, no. 3. - Cote 345.2/823

Special issue on the symposium held by the Duke Journal of Comparative & International Law and the Center for International and Comparative Law. Since the attacks of Sept. 11, 2001, violence perpetrated by non-state terrorist organizations has become an increasingly serious threat to global peace and security. This symposium considers how international humanitarian law can respond to this development and evolve from its existing focus on interstate armed conflicts. Three panels have addressed (1) current and future issues concerning the detention and trial of suspected terrorists; (2) targeting and other uses of force against terrorist organizations and militants; and (3) comparative trends on these issues in key national jurisdictions.

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