

Sweden, Report of the Swedish International Humanitarian Law Committee

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N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

INTERNATIONAL LAW IN ARMED CONFLICT

[...]

3.2 General international law

As already stated, the system of rules of international law contains two components: the international agreements, or treaties, and international customary law, or general international law. Rules of customary law exist not infrequently in codified form in treaties. Here, the rules are to be considered not only as *jus inter partes*, but also as binding *erga omnes* (upon all states). From time to time regional customary law may develop, although this has not happened in the case of the laws of war.

3.2.1. The practice of states as customary law

General international law (customary law) normally arises from the current practice of states, that is, some regular practice viewed by the states themselves as juridically binding assumes the status of general international law. But this process, normal in peacetime, scarcely gives a complete description of the origin of customary law relating to war. War is despite everything such an irregular and brief occurrence that states during the actual conflict can seldom develop rules of law through their concrete actions. Such rules are more easily established through peacetime practice, that is, by allowing “abstract” state acts such as diplomatic

statements, undertakings and declarations to influence development. It is no accident that those parts of international law that relate to war have been established through diplomatic conferences, where attempts have been made to codify or extend what has been regarded as customary law.

At the maritime law conference in London in 1909 ten states sought to identify and codify legal rules for naval war. Even though the rules brought together in the so-called Declaration of London corresponded essentially with established practice and the rulings of national prize courts, it was impossible to reach an agreement that the states could ratify. The declaration contained certain sections on the taking of prizes which, chiefly from the British side, were considered controversial; yet many of the rules reflected current customary law and were recognised as such during the first World War. In the chapters of the London Declaration relating to blockade, contraband, convoys etc. there are probably several rules that states could recognise as binding customary law even today. Unfortunately, current law in this area still lacks codification, something which is essential in the case of the laws of war.

The situation is somewhat similar in the area of aerial warfare. The rules for protection of civil populations in an air war, adopted by a commission of jurists at the Hague in 1923, have never been ratified. In 1923 the time was not ripe for rules covering [sic] area bombing etc, but in 1977 it was possible to adopt a number of the items in these Hague Rules in a somewhat modified form within the framework of Additional Protocol I. Among these was in fact a rule on area bombing. In the opinion of several experts, this partially constituted a codification of general international law.

In summary it may be said that the part of customary law relating to war has not normally developed through repeated state acts (practice) in time of war but chiefly through the conclusion of agreements in peacetime, that is, through multilateral agreements which have gradually attracted more parties or won general recognition in other ways. These agreements, also a form of state practice, are treated below.

3.2.2. Customary law through international agreement

The fundamental declaration from St. Petersburg in 1868 stated that “the only legal aim states may adopt during war is impairment of the enemy’s military strength” and that “for the achievement of this aim it suffices to place the greatest possible number of men hors de combat”. The declaration was signed by seventeen states, representing the community of civilised states at that time.

There are few further parties to the declaration today, but its principles have won general recognition and are now considered an expression of general international law, binding upon all states.

The situation is comparable for the 1907 Hague Conventions. The IVth convention and its regulations for land warfare had their forerunners in the almost identical texts that were adopted by a limited number of states at the first Peace Conference at the Hague in 1899. When these rules on the prohibition of pillage, the taking of hostages, the poisoning of wells, poisoned weapons, arms and combat methods causing unnecessary

suffering, and on the protection of enemies who had laid down their arms were confirmed at the second Peace Conference in 1907, they were probably already considered as binding under customary law. The thirteen conventions adopted in 1907, however, contained chiefly new rules, and the peace conference did not attempt to give these the status of general international law. On the contrary, as we have seen, the provisions were considered as a *jus inter partes* and each convention, moreover, provided that the provisions were applicable only “in the case where all the Belligerents are Parties to the Convention”. This limiting clause meant that the Hague conventions were not formally applicable during the Second World War, since belligerent states such as Bulgaria, Greece, Italy and Yugoslavia had not acceded. This absurd situation was, however, largely imaginary since by the outbreak of war in 1939 the Hague conventions had won such general recognition that they were in all essential respects binding as general international law. Large parts were in fact respected during the war.

A general principle which since 1907 has been considered to contain features of customary law is the thesis of the so-called Martens Clause. This clause in the Preamble to the IVth Hague Convention on Land Warfare, is named after the Russian professor of international law and conference delegate, Frederick de Martens. [...]

Even the 1949 Geneva conventions with over 150 accessories – e.g. practically the whole community of nations – consist predominantly of customary law. The first three of the 1949 conventions are based on earlier, less far-reaching conventions. The first Geneva convention relating to the wounded and the sick in land war came about on the initiative of Henry Dunant as early as 1864. Its successor of 1906 was replaced in 1929 by two new conventions, one on the wounded and the sick in land war and the other on prisoners of war. The IInd Geneva convention of 1949 concerning the protection of the wounded, the sick and those shipwrecked at sea is a replacement of the Xth Hague Convention of 1907. Since these so-called Geneva rules were all the time limited to the protection of persons not participating in combat (being thus clearly delimited from the “combat law” of the Hague rules) a fixed core of humanitarian rules for protection as developed and acquired an increasingly solid status as international law. By the time the present Geneva conventions were adopted in 1949, the element of general international law was already appreciable.

3.2.3. Customary law in Additional Protocol I

When the 1949 Geneva conventions were to be supplemented with two Additional protocols, a diplomatic conference was convened. This was to meet in Geneva for four sessions during 1974-1977. Officially named “The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian law Applicable in Armed Conflict”, it was intended both to *confirm* and to *further develop* current law. Initially there were many who believed that the starting point would be the Geneva Rules alone, but the result became a reaffirmation and a reinforcement of both the Hague and the Geneva rules.

The first additional protocol (relating to international conflicts), accordingly contains items of customary law taken over from the 1949 rules and those of 1907. It is safe to assume that all the rules then considered worthy of confirmation possess the character of customary law.

In what follows an attempt will be made to list the rules in the protocol that have the status of customary law. The list may be of practical significance in a situation in which Sweden (which has ratified Additional Protocol I) is involved in conflict with an adversary who has not ratified. According to the chief rule in Article 96 the protocol applies only among states that have ratified it or acceded to it. It may not, however, be concluded from this that Sweden, in the above situation, can disregard the protocol in its entirety. Rules constituting general international law must always be respected, just as an adversary must respect the same rules. If an adversary fails to do so, Sweden may – if this is considered possible and appropriate – resort to whatever reprisals are still consonant with international law [...].

The following rules in Additional Protocol I would in the opinion of the Swedish International Humanitarian Law Committee have the status of customary law, at the times however only in their main outlines.

- general protection for the wounded, the sick and the shipwrecked, Art. 10;
- general protection for persons deprived of their liberty, Art. 11:1-3;
- protection of medical units, Art. 12 and of medical personnel, Art 15;
- recognition of the role of aid organisations, Art. 17;
- identification of medical personnel and medical units, Art. 18:1-3;
- protection of medical vehicles, Art. 21;
- general protection of medical aircraft, Art. 25-27;
- prohibition of methods or means of warfare which cause superfluous injury or unnecessary suffering, Art. 35:2;
- prohibition of perfidy, Art. 37;
- prohibition of improper use of recognised emblems and emblems of nationality, Art. 38-39;
- prohibition of orders of no quarter, Art. 40;
- safeguard of an enemy *hors de combat*, Art. 41;
- prisoner-of-war status for regular combatants, Art. 44:1;
- the principle of distinguishment, Art. 48;
- the principle of proportionality, Art. 51:5(b);
- prohibition of starvation of the civilian population if the intention is to kill and not primarily to force a capitulation: this prohibition is part of Art.54;
- the chief rule relating to non-defended localities, Art. 59;
- protection of personnel in relief actions, Art. 71:2;
- fundamental guarantees for persons in the power of one party to the conflict, Art. 75, and
- general protection of women and children, Art. 76:1 and 77:1. [...]

There are however no guarantees that other states share this Committee's opinion on which rules have the status of customary law, any more than it can be guaranteed that these rules will be respected by an adversary.

Apart from the articles listed above, Sweden has also reason to follow, in all circumstances, other articles in Additional Protocol I that are important in a humanitarian perspective, even where these have little or no connection with customary law. These articles concern protection of the sick, the wounded, medical

transports, civil defence (Art. 61-67), basic needs in occupied territories (Art. 69), protection of refugees and stateless persons (Art. 73), reunion of families (Art. 74) and protection of journalists (Art. 79).

3.3 The situation where an adversary has not ratified Additional Protocol I

What is the scope of the rules of humanitarian law when a lack of agreement exists between the explicit undertaking of the parties? Sweden ratified Additional Protocol I (and II) on 31 August 1979. What applies in a conflict to which Sweden is a party and where the adversary has not ratified the protocol? This question has been touched upon in another connection: an opinion is here given in summary.

According to general international law and Article 96 of Additional Protocol I, the principle of reciprocity applies. Sweden shall not be required to abide by more comprehensive obligations than those applying to our adversary. From the point of view of humanitarian law that the Humanitarian Law Committee was instructed to consider, it is natural to imagine that Sweden in such a situation would do all in her power to ensure that Additional Protocol I were applied by all the parties to a conflict in which we were involved. This might take the form of an official declaration, addressed to the non-ratifying parties, stating that Sweden for its part would apply Additional Protocol I in its entirety as long as the adversary did not, through lack of respect for the rules of the protocol, make this impossible. Thereby, the presumption that Additional Protocol I is capable of application could be maintained, which is important not least because of the example it would set.

If however the adversary failed in his respect for the protocol, Sweden would in turn have to reserve the possibility of waiving full application of the protocol rules. The adversary should be made aware that Sweden in such a case was not considering herself able to follow the protocol's rules of warfare, i.e. the main parts of Articles 51-58. [...]

If during the conflict an adversary announced officially his intention of applying the rules of the Protocol and did so in practice, Sweden would be bound by the Protocol in the normal way (P I, Art. 96(2)). Since the condition is that the adversary really abides by the rules of the Protocol, Sweden would in this case have the right to reserve full application during a "trial period". The customary law parts of the Protocol must however, as already shown, be respected even in the case outlined. If the adversary were to commit only small infringements of the rules, Sweden could hardly motivate non-application: such would conflict with the spirit of the protocol. Above all, a state that has ratified the protocol should not too readily and categorically choose a line of non-application in relation to an adversary that has not ratified. The principle of reciprocity is intended to give reasonable protection against obvious military disadvantages (a "safety net"), not to be an unconditional mechanism for setting aside the provisions of the protocol.

Discussion

1. a. What kind of rules of customary IHL could be derived from the actual practice of belligerents? Can those contributing to the formation of customary law thus be confined to belligerents? How can such practice be established? Are reports of humanitarian organizations on "violations" useful?

Does every act by a combatant constitute State practice? Is it at least State practice in cases where the combatant is not punished?

- b. Can customary IHL be derived only from “‘abstract’ State acts such as diplomatic statements, undertakings and declarations”? Acts by belligerents? Acts by non-belligerents? Acts by both? What if the belligerents’ actual behaviour is incompatible with their statements?
 - c. Do statements made at diplomatic conferences for the development and the reaffirmation of IHL count as State practice for the development of customary IHL? Which such statements have a greater weight than others?
 - d. Does widespread State participation in an IHL treaty make its rules customary law? Does such participation count as State practice?
2. How can a rule of the Geneva Conventions which was not yet customary in 1949 later become customary? Does the practice of States Parties also count as practice forming customary IHL, or only that of a State not party?
 3. Does the list of the customary rules of Protocol I compiled in 1984 (section 3.2.3 above) constitute State practice that helps to make those rules customary? Is the list still valid in 2010? How can a rule have become customary since then? Does the practice of more than 160 States Parties also count as practice forming customary IHL or only that of the States not party?
 4.
 - a. What consequences could the prospect that Sweden might be involved in an armed conflict with a State not party to Protocol I have for the peacetime training of Swedish troops?
 - b. Would Sweden, by not respecting non-customary parts of Arts 51-58 of Protocol I vis-à-vis an adversary that is neither bound by nor respecting Protocol I, violate the obligation laid down in Art. 1 thereof to respect that Protocol “in all circumstances”? Would it be violating the prohibition of reciprocity in the application of humanitarian treaties as laid down in Art. 60(5) of the Vienna Convention on the Law of Treaties? The prohibition of reprisals laid down in Protocol I, Art. 51(6)?