A. ICRC Report 1995

[**Source**: *International Humanitarian Law: From Law to Action: Report on the Follow-up to the International Conference for the Protection of War Victims*, Presented by the International Committee of the Red Cross, in consultation with the International Federation of the Red Cross and Red Crescent Societies, at the 26th International Conference of the Red Cross and Red Crescent, Geneva, 3-7 December 1995, Commission I, Question 2 of the Agenda; reproduced in: *IRRC*, No. 311, March-April 1996, pp. 194-222; available on http://www.icrc.org [1]]

INTERNATIONAL HUMANITARIAN LAW: FROM LAW TO ACTION:
REPORT ON THE FOLLOW-UP TO THE INTERNATIONAL CONFERENCE
FOR THE PROTECTION OF WAR VICTIMS

[...]

2. Customary rules of International Humanitarian Law

2.1 The invitation to the ICRC

Recommendation II of the Intergovernmental Group of Experts proposes that "*the ICRC be invited to prepare, with the assistance of experts on IHL representing various geographical regions and different legal systems, and in consultation with experts from governments and international organizations, a report on customary rules of IHL applicable in international and non-international armed conflicts, and to circulate the report to States and competent*

international bodies”.

2.2 The ICRC’s objective

The ICRC is ready to assume this task in order to attain a practical humanitarian objective, that is, to determine what rules are applicable to humanitarian problems that are not covered by treaty provisions, or whose regulation under the treaties can be clarified by practice.

There may be no treaty-based rule governing a problem where no treaty contains such a rule, or when the treaty rule is not applicable in a particular conflict because the State concerned is not bound by the treaty codifying the rule in question.

Knowledge of customary rules is also of vital importance when it comes to determining what rules apply to armed forces operating under the aegis of organizations which are not formally parties to the international humanitarian law treaties, such as the United Nations.

2.3 Importance of the report in regard to international armed conflicts

As far as international armed conflicts are concerned, the question is not of much practical interest in relation to matters governed by the Geneva Conventions of 1949, since 185 States are bound by those treaties.

Admittedly, under the constitutional system of some States, customary rules – in contrast to treaty rules – are directly applicable in domestic law. As explained elsewhere in this report [...], the States party nonetheless have the obligation to enact legislation that ensures the incorporation of international humanitarian law into the domestic legal regime, so that all its rules, and not just those considered as customary, can and must be applied by the executive and judiciary.

Indeed, it would theoretically be very difficult to determine practice and gauge its acceptance in this respect since States, being almost all party to the Geneva Conventions, act either in conformity with or in violation of their treaty obligations. Can such behaviour also form the basis of customary rules?

As for matters governed by Additional Protocol I of 1977, the question is of more practical interest since this treaty has not yet been universally accepted. But considering that there are 137 States party, customary international humanitarian law certainly cannot be determined on the basis of the behaviour of the 54 States that are not yet bound by it. Furthermore, the evolution of international customary law has not been halted by its codification in Protocol I. Quite the contrary, it has been strongly influenced by the drafting of Protocol I and by the behaviour of States vis-à-vis this treaty.

2.4 Importance of the report in regard to non-international armed conflicts

As regards non-international armed conflicts, the rules governing the protection of persons in the power of a party to a conflict have been partially codified in Article 3 common to the Geneva Conventions and in Additional Protocol II, and often do no more than spell out the "hard core" of international human rights law applicable at all times.

The establishment of customary rules will be of particular importance in another area of the law governing non-international armed conflicts, that of the conduct of hostilities. This covers mainly the use of weapons and the protection of civilians from the effects of hostilities.

In the area of the conduct of hostilities, the treaty rules specifically applicable to non-international armed conflicts are in fact very rudimentary and incomplete.

For this reason, knowledge of customary rules will be especially necessary when the ICRC

prepares a model manual on the law of armed conflicts for use by armed forces and when governments produce their national manuals. Indeed, in keeping with the recommendations of the Intergovernmental Group of Experts, these manuals should also cover non-international armed conflicts [...].

It will have to be determined in this regard to what extent a State may use against its own citizens methods and means of combat which it has agreed not to employ against a foreign enemy in an international armed conflict. The potential impact on international customary law of the practice of non-governmental entities involved in non-international armed conflicts and the extent of acceptance they show will also have to be determined. Finally, the question will arise as to the degree to which practices adopted under national law by the parties involved in a non-international conflict reflect acceptance of the tenets of international law.

2.5 ICRC procedure and consultations

To prepare the report, the ICRC intends initially to ask researchers from different geographical regions to assemble the necessary factual material. Without wishing to opt for one or other of the different theories of international customary law, or attempting to define its two elements – the observance of a general practice and acceptance of this practice as law – the ICRC believes that, to establish a universal custom, the report must encompass all forms of practice and all cases of acceptance of this practice as law: not only the conduct of belligerents, but also the instructions they issue, their legislation, and statements made by their leaders; the reaction of other States at the diplomatic level, within international forums, or in public statements; military manuals; general declarations on law, including resolutions of international organizations; and, lastly, national or international court decisions.

Account needs to be taken of all forms of State practice, so as to permit all States – and not

only those embroiled in armed conflict – to contribute to the formation of customary rules.

Basing customary law exclusively on actual conduct in armed conflicts would, moreover, be tantamount to accepting the current inhumane practices as law. Yet at the International Conference for the Protection of War Victims, States rejected such practices unanimously, as does public opinion.

The ICRC will entrust the factual material assembled to experts representing different geographical regions and different legal systems, asking them to draft reports on existing custom in various areas of international humanitarian law where such an exercise would meet a priority humanitarian need. These reports will be discussed in 1997 at meetings of experts representing governments, National Societies and their Federation, and international, intergovernmental and non-governmental organizations. On the basis of the experts' reports and of the discussions, the ICRC will summarize the material in a report which, together with any recommendations, will be submitted to States and to the international bodies concerned before the holding of the subsequent International Conference of the Red Cross and Red Crescent.

2.6 The fundamental importance of treaty law

Although the report to be prepared concerns customary law, the ICRC remains convinced of the need for universal participation in the treaties of international humanitarian law and of the necessity to continue the work of codifying this law. It is very difficult to base uniform application of the law, military instruction and the repression of breaches on custom, which by definition is in constant evolution, is still difficult to formulate and is subject to controversy. In the meantime, the report requested of the ICRC should go some way towards improving the protection of victims of armed conflicts. [...]

B. ICRC, Study on Customary International Humanitarian

[**Source**: ICRC Press release No. 05/17 17 March 2005, “Customary law study enhances legal protection of persons affected by armed conflict”; available on http://www.icrc.org [1]]

Geneva (ICRC) – Following more than eight years of research, the International Committee of the Red Cross (ICRC) has made public a study of customary international humanitarian law applicable during armed conflict. [...]

By identifying 161 rules of customary international humanitarian law, the study enhances the legal protection of persons affected by armed conflict. “This is especially the case in non-international armed conflict, for which treaty law is not particularly well developed,” said [ICRC President] Mr Kellenberger. “Yet civil wars often result in the worst suffering. The study clearly shows that customary international humanitarian law applicable in non-international armed conflict goes beyond the rules of treaty law. For example, while treaty law covering internal armed conflict does not expressly prohibit attacks on civilian objects, customary international humanitarian law closes this gap. Importantly, all conflict parties – not just States but also rebel groups, for example – are bound by customary international humanitarian law applicable to internal armed conflict.”

In addition to treaty law such as the Geneva Conventions and their Additional Protocols, customary international humanitarian law is a major source of rules applicable in times of armed conflict. While treaty law is based on written conventions, customary international humanitarian law derives from the practice of States as expressed, for example, in military manuals, national legislation or official statements. A rule is considered binding customary international humanitarian law if it reflects the widespread, representative and uniform practice of States accepted as law.

In late 1995, the International Conference of the Red Cross and Red Crescent

commissioned the ICRC to carry out the study. It was researched by ICRC legal staff and dozens of experts representing different regions and legal systems, including academics and specialists drawn from governments and international organizations. The experts reviewed State practice in 47 countries as well as international sources such as the United Nations, regional organizations and international courts and tribunals.

“The ICRC fully respected the academic freedom of the authors and editors of the study,” said Mr Kellenberger. “It considers the study an accurate reflection of the current state of customary international humanitarian law. The ICRC will make use of it in its work to protect and assist victims of armed conflict worldwide. I also expect scholars and governmental experts to use the study as a basis for discussions on current challenges to international humanitarian law.”

C. List of Customary Rules of International Humanitarian Law

[**Source**: “Annex to Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict”, by Jean-Marie Henckaerts, *IRRC*, Volume 87, No. 857, March 2005, pp. 198-212; available on http://www.icrc.org [1]]

Annex. List of Customary Rules of International Humanitarian Law

This list is based on the conclusions set out in Volume I of the study on customary international humanitarian law. As the study did not seek to determine the customary nature of each treaty rule of international humanitarian law, it does not necessarily follow the structure of existing treaties. The scope of application of the rules is indicated in square brackets. The abbreviation IAC refers to customary rules applicable in international armed

conflicts and the abbreviation NIAC to customary rules applicable in non-international armed conflicts. In the latter case, some rules are indicated as being “arguably” applicable because practice generally pointed in that direction but was less extensive.

THE PRINCIPLE OF DISTINCTION

Distinction between Civilians and Combatants

Rule 1. The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians. [IAC/NIAC]

Rule 2. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited. [IAC/NIAC]

Rule 3. All members of the armed forces of a party to the conflict are combatants, except medical and religious personnel. [IAC]

Rule 4. The armed forces of a party to the conflict consist of all organised armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates. [IAC]

Rule 5. Civilians are persons who are not members of the armed forces. The civilian population comprises all persons who are civilians. [IAC/NIAC]

Rule 6. Civilians are protected against attack, unless and for such time as they take a direct part in hostilities. [IAC/NIAC]

Distinction between Civilian Objects and Military Objectives

Rule 7. The parties to the conflict must at all times distinguish between civilian

objects and military objectives. Attacks may only be directed against military objectives. Attacks must not be directed against civilian objects. [IAC/NIAC]

Rule 8. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage. [IAC/NIAC]

Rule 9. Civilian objects are all objects that are not military objectives. [IAC/NIAC]

Rule 10. Civilian objects are protected against attack, unless and for such time as they are military objectives. [IAC/NIAC]

Indiscriminate Attacks

Rule 11. Indiscriminate attacks are prohibited. [IAC/NIAC]

Rule 12. Indiscriminate attacks are those:

a. which are not directed at a specific military objective;
b. which employ a method or means of combat which cannot be directed at a specific military objective; or
c. which employ a method or means of combat the effects of which cannot be limited as required by international humanitarian law;

and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction. [IAC/NIAC]

Rule 13. Attacks by bombardment by any method or means which treats as a single military objective a number of clearly separated and distinct military objectives located

in a city, town, village or other area containing a similar concentration of civilians or civilian objects are prohibited. [IAC/NIAC]

Proportionality in Attack

Rule 14. Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited. [IAC/NIAC]

Precautions in Attack

Rule 15. In the conduct of military operations, constant care must be taken to spare the civilian population, civilians and civilian objects. All feasible precautions must be taken to avoid, and in any event to minimise, incidental loss of civilian life, injury to civilians and damage to civilian objects. [IAC/NIAC]

Rule 16. Each party to the conflict must do everything feasible to verify that targets are military objectives. [IAC/NIAC]

Rule 17. Each party to the conflict must take all feasible precautions in the choice of means and methods of warfare with a view to avoiding, and in any event to minimising, incidental loss of civilian life, injury to civilians and damage to civilian objects. [IAC/NIAC]

Rule 18. Each party to the conflict must do everything feasible to assess whether the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. [IAC/NIAC]

Rule 19. Each party to the conflict must do everything feasible to cancel or suspend an attack if it becomes apparent that the target is not a military objective or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. [IAC/NIAC]

Rule 20. Each party to the conflict must give effective advance warning of attacks which may affect the civilian population, unless circumstances do not permit. [IAC/NIAC]

Rule 21. When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected must be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects. [IAC/arguably NIAC]

Precautions against the Effects of Attacks

Rule 22. The parties to the conflict must take all feasible precautions to protect the civilian population and civilian objects under their control against the effects of attacks. [IAC/NIAC]

Rule 23. Each party to the conflict must, to the extent feasible, avoid locating military objectives within or near densely populated areas. [IAC/ arguably NIAC]

Rule 24. Each party to the conflict must, to the extent feasible, remove civilian persons and objects under its control from the vicinity of military objectives. [IAC/arguably NIAC]

SPECIFICALLY PROTECTED PERSONS AND OBJECTS

Medical and Religious Personnel and Objects

Rule 25. Medical personnel exclusively assigned to medical duties must be respected and protected in all circumstances. They lose their protection if they commit, outside their humanitarian function, acts harmful to the enemy. [IAC/NIAC]

Rule 26. Punishing a person for performing medical duties compatible with medical ethics or compelling a person engaged in medical activities to perform acts contrary to medical ethics is prohibited. [IAC/NIAC]

Rule 27. Religious personnel exclusively assigned to religious duties must be respected and protected in all circumstances. They lose their protection if they commit, outside their humanitarian function, acts harmful to the enemy. [IAC/NIAC]

Rule 28. Medical units exclusively assigned to medical purposes must be respected and protected in all circumstances. They lose their protection if they are being used, outside their humanitarian function, to commit acts harmful to the enemy. [IAC/NIAC]

Rule 29. Medical transports assigned exclusively to medical transportation must be respected and protected in all circumstances. They lose their protection if they are being used, outside their humanitarian function, to commit acts harmful to the enemy. [IAC/NIAC]

Rule 30. Attacks directed against medical and religious personnel and objects displaying the distinctive emblems of the Geneva Conventions in conformity with international law are prohibited. [IAC/NIAC]

Humanitarian Relief Personnel and Objects

Rule 31. Humanitarian relief personnel must be respected and protected. [IAC/ NIAC]

Rule 32. Objects used for humanitarian relief operations must be respected and protected. [IAC/NIAC]

Personnel and Objects Involved in a Peacekeeping Mission

Rule 33. Directing an attack against personnel and objects involved in a peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians and civilian objects under international humanitarian law, is prohibited. [IAC/NIAC]

Journalists

Rule 34. Civilian journalists engaged in professional missions in areas of armed conflict must be respected and protected as long as they are not taking a direct part in hostilities. [IAC/NIAC]

Protected Zones

Rule 35. Directing an attack against a zone established to shelter the wounded, the sick and civilians from the effects of hostilities is prohibited. [IAC/NIAC]

Rule 36. Directing an attack against a demilitarised zone agreed upon between the parties to the conflict is prohibited. [IAC/NIAC]

Rule 37. Directing an attack against a non-defended locality is prohibited. [IAC/NIAC]

Cultural Property

Rule 38. Each party to the conflict must respect cultural property:

A. Special care must be taken in military operations to avoid damage to buildings dedicated to religion, art, science, education or charitable purposes and historic monuments unless they are military objectives.

B. Property of great importance to the cultural heritage of every people must not be the object of attack unless imperatively required by military necessity.

[IAC/NIAC]

Rule 39. The use of property of great importance to the cultural heritage of every people for purposes which are likely to expose it to destruction or damage is prohibited, unless imperatively required by military necessity. [IAC/NIAC]

Rule 40. Each party to the conflict must protect cultural property:

A. All seizure of or destruction or wilful damage done to institutions dedicated to religion, charity, education, the arts and sciences, historic monuments and works of art and science is prohibited.
B. Any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, property of great importance to the cultural heritage of every people is prohibited.

[IAC/NIAC]

Rule 41. The occupying power must prevent the illicit export of cultural property from occupied territory and must return illicitly exported property to the competent authorities of the occupied territory. [IAC]

Works and Installations Containing Dangerous Forces

Rule 42. Particular care must be taken if works and installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, and other installations located at or in their vicinity are attacked, in order to avoid the release of dangerous forces and consequent severe losses among the civilian population. [IAC/NIAC]

The Natural Environment

Rule 43. The general principles on the conduct of hostilities apply to the natural environment:

A. No part of the natural environment may be attacked, unless it is a military objective.
B. Destruction of any part of the natural environment is prohibited, unless required by imperative military necessity.
C. Launching an attack against a military objective which may be expected to cause incidental damage to the environment which would be excessive in relation to the concrete and direct military advantage anticipated is prohibited.

[IAC/NIAC]

Rule 44. Methods and means of warfare must be employed with due regard to the protection and preservation of the natural environment. In the conduct of military operations, all feasible precautions must be taken to avoid, and in any event to minimise, incidental damage to the environment. Lack of scientific certainty as to the effects on the environment of certain military operations does not absolve a party to the conflict from taking such precautions. [IAC/ arguably NIAC]

Rule 45. The use of methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment is prohibited. Destruction of the natural environment may not be used as a weapon. [IAC/arguably NIAC]

SPECIFIC METHODS OF WARFARE

Denial of Quarter

Rule 46. Ordering that no quarter will be given, threatening an adversary therewith or conducting hostilities on this basis is prohibited. [IAC/ NIAC]

Rule 47. Attacking persons who are recognised as hors de combat is prohibited. A person hors de combat is:

a. anyone who is in the power of an adverse party;
b. anyone who is defenceless because of unconsciousness, shipwreck, wounds or sickness; or
c. anyone who clearly expresses an intention to surrender;

provided he or she abstains from any hostile act and does not attempt to escape. [IAC/NIAC]

Rule 48. Making persons parachuting from an aircraft in distress the object of attack during their descent is prohibited. [IAC/NIAC]

Destruction and Seizure of Property

Rule 49. The parties to the conflict may seize military equipment belonging to an adverse party as war booty. [IAC]

Rule 50. The destruction or seizure of the property of an adversary is prohibited, unless required by imperative military necessity. [IAC/ NIAC]

Rule 51. In occupied territory:

a. movable public property that can be used for military operations may be confiscated;
b. immovable public property must be administered according to the rule of usufruct; and
c. private property must be respected and may not be confiscated;

except where destruction or seizure of such property is required by imperative military necessity. [IAC]

Rule 52. Pillage is prohibited. [IAC/NIAC]

Starvation and Access to Humanitarian Relief

Rule 53. The use of starvation of the civilian population as a method of warfare is prohibited. [IAC/NIAC]

Rule 54. Attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population is prohibited. [IAC/ NIAC]

Rule 55. The parties to the conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control. [IAC/NIAC]

Rule 56. The parties to the conflict must ensure the freedom of movement of authorised humanitarian relief personnel essential to the exercise of their functions. Only in case of imperative military necessity may their movements be temporarily restricted. [IAC/NIAC]

Deception

Rule 57. Ruses of war are not prohibited as long as they do not infringe a rule of international humanitarian law. [IAC/NIAC]

Rule 58. The improper use of the white flag of truce is prohibited. [IAC/NIAC]

Rule 59. The improper use of the distinctive emblems of the Geneva Conventions is prohibited. [IAC/NIAC]

Rule 60. The use of the United Nations emblem and uniform is prohibited, except as

authorised by the organisation. [IAC/NIAC]

Rule 61. The improper use of other internationally recognised emblems is prohibited. [IAC/NIAC]

Rule 62. Improper use of the flags or military emblems, insignia or uniforms of the adversary is prohibited. [IAC/arguably NIAC]

Rule 63. Use of the flags or military emblems, insignia or uniforms of neutral or other States not party to the conflict is prohibited. [IAC/arguably NIAC]

Rule 64. Concluding an agreement to suspend combat with the intention of attacking by surprise the enemy relying on that agreement is prohibited. [IAC/NIAC]

Rule 65. Killing, injuring or capturing an adversary by resort to perfidy is prohibited. [IAC/NIAC]

Communication with the Enemy

Rule 66. Commanders may enter into non-hostile contact through any means of communication. Such contact must be based on good faith. [IAC/ NIAC]

Rule 67. Parlementaires are inviolable. [IAC/NIAC]

Rule 68. Commanders may take the necessary precautions to prevent the presence of a parlementaire from being prejudicial. [IAC/NIAC]

Rule 69. Parlementaires taking advantage of their privileged position to commit an act contrary to international law and detrimental to the adversary lose their inviolability.

[IAC/NIAC]

WEAPONS

General Principles on the Use of Weapons

Rule 70. The use of means and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering is prohibited. [IAC/ NIAC]

Rule 71. The use of weapons which are by nature indiscriminate is prohibited. [IAC/NIAC]

Poison

Rule 72. The use of poison or poisoned weapons is prohibited. [IAC/NIAC]

Biological Weapons

Rule 73. The use of biological weapons is prohibited. [IAC/NIAC]

Chemical Weapons

Rule 74. The use of chemical weapons is prohibited. [IAC/NIAC]

Rule 75. The use of riot-control agents as a method of warfare is prohibited. [IAC/NIAC]

Rule 76. The use of herbicides as a method of warfare is prohibited if they:

a. are of a nature to be prohibited chemical weapons;
b. are of a nature to be prohibited biological weapons;
c. are aimed at vegetation that is not a military objective;
d. would cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which may be expected to be excessive in relation

to the concrete and direct military advantage anticipated; or

e. would cause widespread, long-term and severe damage to the natural environment.

[IAC/NIAC]

Expanding Bullets

Rule 77. The use of bullets which expand or flatten easily in the human body is prohibited. [IAC/NIAC]

Exploding Bullets

Rule 78. The anti-personnel use of bullets which explode within the human body is prohibited. [IAC/NIAC]

Weapons Primarily Injuring by Non-detectable Fragments

Rule 79. The use of weapons the primary effect of which is to injure by fragments which are not detectable by X-rays in the human body is prohibited. [IAC/NIAC]

Booby-traps

Rule 80. The use of booby-traps which are in any way attached to or associated with objects or persons entitled to special protection under international humanitarian law or with objects that are likely to attract civilians is prohibited. [IAC/NIAC]

Landmines

Rule 81. When landmines are used, particular care must be taken to minimise their indiscriminate effects. [IAC/NIAC]

Rule 82. A party to the conflict using landmines must record their placement, as far as possible. [IAC/arguably NIAC]

Rule 83. At the end of active hostilities, a party to the conflict which has used landmines must remove or otherwise render them harmless to civilians, or facilitate their removal. [IAC/NIAC]

Incendiary Weapons

Rule 84. If incendiary weapons are used, particular care must be taken to avoid, and in any event to minimise, incidental loss of civilian life, injury to civilians and damage to civilian objects. [IAC/NIAC]

Rule 85. The anti-personnel use of incendiary weapons is prohibited, unless it is not feasible to use a less harmful weapon to render a person hors de combat. [IAC/NIAC]

Blinding Laser Weapons

Rule 86. The use of laser weapons that are specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision is prohibited. [IAC/NIAC]

TREATMENT OF CIVILIANS AND PERSONS *HORS DE COMBAT*

Fundamental Guarantees

Rule 87. Civilians and persons hors de combat must be treated humanely. [IAC/NIAC]

Rule 88. Adverse distinction in the application of international humanitarian law based on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status or on any other similar criteria is prohibited. [IAC/NIAC]

Rule 89. Murder is prohibited. [IAC/NIAC]

Rule 90. Torture, cruel or inhuman treatment and outrages upon personal dignity, in particular humiliating and degrading treatment, are prohibited. [IAC/NIAC]

Rule 91. Corporal punishment is prohibited. [IAC/NIAC]

Rule 92. Mutilation, medical or scientific experiments or any other medical procedure not indicated by the state of health of the person concerned and not consistent with generally accepted medical standards are prohibited. [IAC/NIAC]

Rule 93. Rape and other forms of sexual violence are prohibited. [IAC/NIAC]

Rule 94. Slavery and the slave trade in all their forms are prohibited. [IAC/ NIAC]

Rule 95. Uncompensated or abusive forced labour is prohibited. [IAC/NIAC]

Rule 96. The taking of hostages is prohibited. [IAC/NIAC]

Rule 97. The use of human shields is prohibited. [IAC/NIAC]

Rule 98. Enforced disappearance is prohibited. [IAC/NIAC]

Rule 99. Arbitrary deprivation of liberty is prohibited. [IAC/NIAC]

Rule 100. No one may be convicted or sentenced, except pursuant to a fair trial affording all essential judicial guarantees. [IAC/NIAC]

Rule 101. No one may be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under national or

international law at the time it was committed; nor may a heavier penalty be imposed than that which was applicable at the time the criminal offence was committed. [IAC/NIAC]

Rule 102. No one may be convicted of an offence except on the basis of individual criminal responsibility. [IAC/NIAC]

Rule 103. Collective punishments are prohibited. [IAC/NIAC]

Rule 104. The convictions and religious practices of civilians and persons hors de combat must be respected. [IAC/NIAC]

Rule 105. Family life must be respected as far as possible. [IAC/NIAC]

Combatants and Prisoner-of-War Status

Rule 106. Combatants must distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. If they fail to do so, they do not have the right to prisoner-of-war status. [IAC]

Rule 107. Combatants who are captured while engaged in espionage do not have the right to prisoner-of-war status. They may not be convicted or sentenced without previous trial. [IAC]

Rule 108. Mercenaries, as defined in Additional Protocol I, do not have the right to combatant or prisoner-of-war status. They may not be convicted or sentenced without previous trial. [IAC]

The Wounded, Sick and Shipwrecked

Rule 109. Whenever circumstances permit, and particularly after an engagement, each party to the conflict must, without delay, take all possible measures to search for, collect and evacuate the wounded, sick and shipwrecked without adverse distinction. [IAC/NIAC]

Rule 110. The wounded, sick and shipwrecked must receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. No distinction may be made among them founded on any grounds other than medical ones. [IAC/ NIAC]

Rule 111. Each party to the conflict must take all possible measures to protect the wounded, sick and shipwrecked against ill-treatment and against pillage of their personal property. [IAC/NIAC]

The Dead

Rule 112. Whenever circumstances permit, and particularly after an engagement, each party to the conflict must, without delay, take all possible measures to search for, collect and evacuate the dead without adverse distinction. [IAC/NIAC]

Rule 113. Each party to the conflict must take all possible measures to prevent the dead from being despoiled. Mutilation of dead bodies is prohibited. [IAC/NIAC]

Rule 114. Parties to the conflict must endeavour to facilitate the return of the remains of the deceased upon request of the party to which they belong or upon the request of their next of kin. They must return their personal effects to them. [IAC]

Rule 115. The dead must be disposed of in a respectful manner and their graves respected and properly maintained. [IAC/NIAC]

Rule 116. With a view to the identification of the dead, each party to the conflict must record all available information prior to disposal and mark the location of the graves. [IAC/NIAC]

Missing Persons

Rule 117. Each party to the conflict must take all feasible measures to account for persons reported missing as a result of armed conflict and must provide their family members with any information it has on their fate. [IAC/NIAC]

Persons Deprived of their Liberty

Rule 118. Persons deprived of their liberty must be provided with adequate food, water, clothing, shelter and medical attention. [IAC/NIAC]

Rule 119. Women who are deprived of their liberty must be held in quarters separate from those of men, except where families are accommodated as family units, and must be under the immediate supervision of women. [IAC/NIAC]

Rule 120. Children who are deprived of their liberty must be held in quarters separate from those of adults, except where families are accommodated as family units. [IAC/NIAC]

Rule 121. Persons deprived of their liberty must be held in premises which are removed from the combat zone and which safeguard their health and hygiene. [IAC/NIAC]

Rule 122. Pillage of the personal belongings of persons deprived of their liberty is prohibited. [IAC/NIAC]

Rule 123. The personal details of persons deprived of their liberty must be recorded.

[IAC/NIAC]

Rule 124.

A. In international armed conflicts, the ICRC must be granted regular access to all persons deprived of their liberty in order to verify the conditions of their detention and to restore contacts between those persons and their families. [IAC]
B. In non-international armed conflicts, the ICRC may offer its services to the parties to the conflict with a view to visiting all persons deprived of their liberty for reasons related to the conflict in order to verify the conditions of their detention and to restore contacts between those persons and their families. [NIAC]

Rule 125. Persons deprived of their liberty must be allowed to correspond with their families, subject to reasonable conditions relating to frequency and the need for censorship by the authorities. [IAC/NIAC]

Rule 126. Civilian internees and persons deprived of their liberty in connection with a non-international armed conflict must be allowed to receive visitors, especially near relatives, to the degree practicable. [NIAC]

Rule 127. The personal convictions and religious practices of persons deprived of their liberty must be respected. [IAC/NIAC]

Rule 128.

A. Prisoners of war must be released and repatriated without delay after the cessation of active hostilities. [IAC]
B. Civilian internees must be released as soon as the reasons which necessitated internment no longer exist, but at the latest as soon as possible after the close of active hostilities. [IAC]
C. Persons deprived of their liberty in relation to a non-international armed conflict must

be released as soon as the reasons for the deprivation of their liberty cease to exist. [NIAC]

The persons referred to may continue to be deprived of their liberty if penal proceedings are pending against them or if they are serving a sentence lawfully imposed.

Displacement and Displaced Persons

Rule 129.

A. Parties to an international armed conflict may not deport or forcibly transfer the civilian population of an occupied territory, in whole or in part, unless the security of the civilians involved or imperative military reasons so demand. [IAC]
B. Parties to a non-international armed conflict may not order the displacement of the civilian population, in whole or in part, for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand. [NIAC]

Rule 130. States may not deport or transfer parts of their own civilian population into a territory they occupy. [IAC]

Rule 131. In case of displacement, all possible measures must be taken in order that the civilians concerned are received under satisfactory conditions of shelter, hygiene, health, safety and nutrition and that members of the same family are not separated. [IAC/NIAC]

Rule 132. Displaced persons have a right to voluntary return in safety to their homes or places of habitual residence as soon as the reasons for their displacement cease to exist. [IAC/NIAC]

Rule 133. The property rights of displaced persons must be respected. [IAC/ NIAC]

Other Persons Afforded Specific Protection

Rule 134. The specific protection, health and assistance needs of women affected by armed conflict must be respected. [IAC/NIAC]

Rule 135. Children affected by armed conflict are entitled to special respect and protection. [IAC/NIAC]

Rule 136. Children must not be recruited into armed forces or armed groups. [IAC/NIAC]

Rule 137. Children must not be allowed to take part in hostilities. [IAC/NIAC]

Rule 138. The elderly, disabled and infirm affected by armed conflict are entitled to special respect and protection. [IAC/NIAC]

IMPLEMENTATION

Compliance with International Humanitarian Law

Rule 139. Each party to the conflict must respect and ensure respect for international humanitarian law by its armed forces and other persons or groups acting in fact on its instructions, or under its direction or control. [IAC/NIAC]

Rule 140. The obligation to respect and ensure respect for international humanitarian law does not depend on reciprocity. [IAC/NIAC]

Rule 141. Each State must make legal advisers available, when necessary, to advise military commanders at the appropriate level on the application of international humanitarian law. [IAC/NIAC]

Rule 142. States and parties to the conflict must provide instruction in international

humanitarian law to their armed forces. [IAC/NIAC]

Rule 143. States must encourage the teaching of international humanitarian law to the civilian population. [IAC/NIAC]

Enforcement of International Humanitarian Law

Rule 144. States may not encourage violations of international humanitarian law by parties to an armed conflict. They must exert their influence, to the degree possible, to stop violations of international humanitarian law. [IAC/NIAC]

Rule 145. Where not prohibited by international law, belligerent reprisals are subject to stringent conditions. [IAC]

Rule 146. Belligerent reprisals against persons protected by the Geneva Conventions are prohibited. [IAC]

Rule 147. Reprisals against objects protected under the Geneva Conventions and Hague Convention for the Protection of Cultural Property are prohibited. [IAC]

Rule 148. Parties to non-international armed conflicts do not have the right to resort to belligerent reprisals. Other countermeasures against persons who do not or who have ceased to take a direct part in hostilities are prohibited. [NIAC]

Responsibility and Reparation

Rule 149. A State is responsible for violations of international humanitarian law attributable to it, including:

a. violations committed by its organs, including its armed forces;
b. violations committed by persons or entities it empowered to exercise elements of

governmental authority;

c. violations committed by persons or groups acting in fact on its instructions, or under its direction or control; and

d. violations committed by private persons or groups which it acknowledges and adopts as its own conduct.

[IAC/NIAC]

Rule 150. A State responsible for violations of international humanitarian law is required to make full reparation for the loss or injury caused. [IAC/ NIAC]

Individual Responsibility

Rule 151. Individuals are criminally responsible for war crimes they commit. [IAC/NIAC]

Rule 152. Commanders and other superiors are criminally responsible for war crimes committed pursuant to their orders. [IAC/NIAC]

Rule 153. Commanders and other superiors are criminally responsible for war crimes committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had been committed, to punish the persons responsible. [IAC/NIAC]

Rule 154. Every combatant has a duty to disobey a manifestly unlawful order. [IAC/NIAC]

Rule 155. Obeying a superior order does not relieve a subordinate of criminal responsibility if the subordinate knew that the act ordered was unlawful or should have

known because of the manifestly unlawful nature of the act ordered. [IAC/NIAC]

War Crimes

Rule 156. Serious violations of international humanitarian law constitute war crimes. [IAC/NIAC]

Rule 157. States have the right to vest universal jurisdiction in their national courts over war crimes. [IAC/NIAC]

Rule 158. States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects. [IAC/NIAC]

Rule 159. At the end of hostilities, the authorities in power must endeavour to grant the broadest possible amnesty to persons who have participated in a non-international armed conflict, or those deprived of their liberty for reasons related to the armed conflict, with the exception of persons suspected of, accused of or sentenced for war crimes. [NIAC]

Rule 160. Statutes of limitation may not apply to war crimes. [IAC/NIAC]

Rule 161. States must make every effort to cooperate, to the extent possible, with each other in order to facilitate the investigation of war crimes and the prosecution of the suspects. [IAC/NIAC]

D. A US Government Response to the ICRC Study

[**Source**: John B. Bellinger, III and William J. Haynes II, "A US government response to the International Committee of the Red Cross study *Customary International Humanitarian Law*", *IRRC*, Vol. 89, No. 866 (June 2007), pp. 443-471, available on http://www.icrc.org [1]. Footnotes omitted]

A US government response to the International Committee of the Red Cross study *Customary International Humanitarian Law*

John B. Bellinger, III and William J. Haynes II

The United States welcomes the ICRC *Customary International Humanitarian Law* study's discussion of the complex and important subject of the customary ''international humanitarian law'' and it appreciates the major effort that the ICRC and the Study's authors have made to assemble and analyze a substantial amount of material. The United States shares the ICRC's view that knowledge of the rules of customary international law is of use to all parties associated with armed conflict, including governments, those bearing arms, international organizations, and the ICRC. Although the Study uses the term ''international humanitarian law,'' the United States prefers the ''law of war'' or the ''laws and customs of war''.

Given the Study's large scope, the United States has not yet been able to complete a detailed review of its conclusions. The United States recognizes that a significant number of the rules set forth in the Study are applicable in international armed conflict because they have achieved universal status, either as a matter of treaty law or – as with many provisions derived from the Hague Regulations of 1907 – customary law. Nonetheless, it is important to make clear – both to the ICRC and to the greater international community – that, based upon the U.S. review thus far, the United States is concerned about the methodology used to ascertain rules and about whether the authors have proffered sufficient facts and

evidence to support those rules. Accordingly, the United States is not in a position to accept without further analysis the Study's conclusions that particular rules related to the laws and customs of war in fact reflect customary international law.

[…]

This is not intended to suggest that each of the U.S. methodological concerns applies to each of the Study's rules, or that the United States disagrees with every single rule contained in the study – particular rules or elements of those rules may well be applicable in the context of some categories of armed conflict. Rather, the United States hopes to underline by its analysis the importance of stating rules of customary international law correctly and precisely, and of supporting conclusions that particular rules apply in international armed conflict, internal armed conflict, or both. […]

Methodological Concerns

There is general agreement that customary international law develops from a general and consistent practice of States followed by them out of a sense of legal obligation, or opinio juris. Although it is appropriate for commentators to advance their views concerning particular areas of customary international law, it is ultimately the methodology and the underlying evidence on which commentators rely – which must in all events relate to State practice – that must be assessed in evaluating their conclusions.

State practice

Although the Study's introduction describes what is generally an appropriate approach to assessing State practice, the Study frequently fails to apply this approach in a rigorous way.

- First, for many rules proffered as rising to the level of customary international law, the State practice cited is insufficiently dense to meet the ‘‘extensive and virtually

uniform'' standard generally required to demonstrate the existence of a customary rule.

- Second, the United States is troubled by the type of practice on which the Study has, in too many places, relied. The initial U.S. review of the State practice volumes suggests that the Study places too much emphasis on written materials, such as military manuals and other guidelines published by States, as opposed to actual operational practice by States during armed conflict. Although manuals may provide important indications of State behavior and *opinio juris*, they cannot be a replacement for a meaningful assessment of operational State practice in connection with actual military operations. The United States also is troubled by the extent to which the Study relies on non-binding resolutions of the General Assembly, given that States may lend their support to a particular resolution, or determine not to break consensus in regard to such a resolution, for reasons having nothing to do with a belief that the propositions in it reflect customary international law.
- Third, the Study gives undue weight to statements by non-governmental organizations and the ICRC itself, when those statements do not reflect whether a particular rule constitutes customary international law accepted by States.
- Fourth, although the Study acknowledges in principle the significance of negative practice, especially among those States that remain non-parties to relevant treaties, that practice is in important instances given inadequate weight.
- Finally, the Study often fails to pay due regard to the practice of specially affected States. A distinct but related point is that the Study tends to regard as equivalent the practice of States that have relatively little history of participation in armed conflict and the practice of States that have had a greater extent and depth of experience or that have otherwise had significant opportunities to develop a carefully considered military doctrine. The latter category of States, however, has typically contributed a significantly greater quantity and quality of practice.

Opinio juris

The United States also has concerns about the Study's approach to the *opinio juris*

requirement. In examining particular rules, the Study tends to merge the practice and *opinio juris* requirements into a single test. In the Study's own words,

''it proved very difficult and largely theoretical to strictly separate elements of practice and legal conviction. More often than not, one and the same act reflects both practice and legal conviction. … When there is sufficiently dense practice, an *opinio juris* is generally contained within that practice and, as a result, it is not usually necessary to demonstrate separately the existence of an *opinio juris*.''

The United States does not believe that this is an appropriate methodological approach. Although the same action may serve as evidence both of State practice and *opinio juris*, the United States does not agree that *opinio juris* simply can be inferred from practice. Both elements instead must be assessed separately in order to determine the presence of a norm of customary international law. For example, Additional Protocols I and II to the Geneva Conventions contain far-reaching provisions, but States did not at the time of their adoption believe that all of those instruments' provisions reflected rules that already had crystallized into customary international law; indeed, many provisions were considered ground-breaking and gap-filling at the time. One therefore must be cautious in drawing conclusions as to *opinio juris* from the practice of States that are parties to conventions, since their actions often are taken pursuant to their treaty obligations, particularly inter se, and not in contemplation of independently binding customary international law norms. Even if one were to accept the merger of these distinct requirements, the Study fails to articulate or apply any test for determining when state practice is ''sufficiently dense'' so as to excuse the failure to substantiate *opinio juris*, and offers few examples of evidence that might even conceivably satisfy that burden.

The United States is troubled by the Study's heavy reliance on military manuals. The United States does not agree that *opinio juris* has been established when the evidence of a

State's sense of legal obligation consists predominately of military manuals. Rather than indicating a position expressed out of a sense of a customary legal obligation, in the sense pertinent to customary international law, a State's military manual often (properly) will recite requirements applicable to that State under treaties to which it is a party. Reliance on provisions of military manuals designed to implement treaty rules provides only weak evidence that those treaty rules apply as a matter of customary international law in non-treaty contexts. Moreover, States often include guidance in their military manuals for policy, rather than legal, reasons. For example, the United States long has stated that it will apply the rules in its manuals whether the conflict is characterized as international or non-international, but this clearly is not intended to indicate that it is bound to do so as a matter of law in non-international conflicts. Finally, the Study often fails to distinguish between military publications prepared informally solely for training or similar purposes and those prepared and approved as official government statements. This is notwithstanding the fact that some of the publications cited contain a disclaimer that they do not necessarily represent the official position of the government in question.

A more rigorous approach to establishing *opinio juris* is required. It is critical to establish by positive evidence, beyond mere recitations of existing treaty obligations or statements that as easily may reflect policy considerations as legal considerations, that States consider themselves legally obligated to follow the courses of action reflected in the rules. In this regard, the practice volumes generally fall far short of identifying the level of positive evidence of *opinio juris* that would be necessary to justify concluding that the rules advanced by the Study are part of customary international law and would apply to States even in the absence of a treaty obligation.

[…]

Illustrative Comments on Four Rules in the Study

[…]

Rule 31: ‘‘Humanitarian relief personnel must be respected and protected.’’

[…] It is clearly impermissible intentionally to direct attacks against humanitarian relief personnel as long as such personnel are entitled to the protection given to civilians under the laws and customs of war.

Rule 31, however, sets forth a much broader proposition without sufficient evidence that it reflects customary international law. The Study fails to adduce a depth of operational State practice to support that rule. Had it examined recent practice, moreover, its discussion might have been more sensitive to the role of State consent regarding the presence of such personnel (absent a UN Security Council decision under Chapter VII of the UN Charter) and the loss of protection if such personnel engage in particular acts outside the terms of their mission. The Study summarily dismisses the role of State consent regarding the presence of humanitarian relief personnel but fails to consider whether a number of the oral statements by States and organizations that it cites actually reflected situations in which humanitarian relief personnel obtained consent and were acting consistent with their missions. To be clear, these qualifications do not suggest that humanitarian relief personnel who have failed to obtain the necessary consent, or who have exceeded their terms of mission short of taking part in hostilities, either in international or internal armed conflicts, may be attacked or abused. Rather, it would be appropriate for States to take measures to ensure that those humanitarian relief personnel act to secure the necessary consent, conform their activities to their terms of mission, or withdraw from the State. […]

Terms of mission limitation

Rule 31 also disregards the obvious fact that humanitarian relief personnel who commit

acts that amount to direct participation in the conflict are acting inconsistent with their mission and civilian status and thus may forfeit protection. […]

Non-international armed conflicts

Although the Study asserts that Rule 31 applies in both international and non-international armed conflict, the Study provides very thin practice to support the extension of Rule 31 to non-international armed conflicts, citing only two military manuals of States Parties to AP II and several broad statements made by countries such as the United Kingdom and United States to the effect that killing ICRC medical workers in a non-international armed conflict was ‘‘barbarous’’ and contrary to the provisions of the laws and customs of war. The Study contains little discussion of actual operational practice in this area, with citations to a handful of ICRC archive documents in which non-state actors guaranteed the safety of ICRC personnel. Although AP II and customary international law rules that apply to civilians may provide protections for humanitarian relief personnel in non-international armed conflicts, the Study offers almost no evidence that Rule 31 as such properly describes the customary international law applicable in such conflicts.

[…]

Rule 45: ‘‘The use of methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment is prohibited.’’ (First sentence)

[…] [T]he Study fails to demonstrate that Rule 45, as stated, constitutes customary international law in international or non-international armed conflicts, either with regard to conventional weapons or nuclear weapons. […]

Specially affected States

[…]

In addition to maintaining that Articles 35(3) and 55 are not customary international law with regard to the use of weapons generally, specially affected States possessing nuclear weapon capabilities have asserted repeatedly that these articles do not apply to the use of nuclear weapons. For instance, certain specially affected States such as the United States, the United Kingdom, Russia, and France so argued in submissions to the International Court of Justice (‘‘ICJ’’). […]

Rule 78: ‘‘The anti-personnel use of bullets which explode within the human body is prohibited.’’

Although anti-personnel bullets designed specifically to explode within the human body clearly are illegal, and although weapons, including exploding bullets, may not be used to inflict unnecessary suffering, Rule 78, as written, indicates a broader and less well-defined prohibition. The rule itself suffers from at least two problems. First, it fails to define which weapons are covered by the phrase ‘‘bullets which explode within the human body.’’ To the extent that the Study intends the rule to cover bullets that could, under some circumstances, explode in the human body (but were not designed to do so), State practice and the ICRC’s Commentary on the 1977 Additional Protocol reflect that States have not accepted that broad prohibition. Second, there are two types of exploding bullets. The first is a projectile designed to explode in the human body, which the United States agrees would be prohibited. The second is a high-explosive projectile designed primarily for anti-matériel purposes (not designed to explode in the human body), which may be employed for anti-matériel and anti-personnel purposes. Rule 78 fails to distinguish between the two. If, as the language suggests, the Study is asserting that there is a customary international

law prohibition on the anti-personnel use of anti-matérial [*sic*] exploding bullets, the Study has disregarded key State practice in this area. […]

Non-international armed conflict

The Study also asserts that Rule 78 is a norm of customary international law applicable in non-international armed conflicts. […] In fact, the Study's only evidence of *opinio juris* in this regard is the failure, in military manuals and legislation cited previously, to distinguish between international and non-international armed conflict. Since governments normally employ, for practical reasons unrelated to legal obligations, the military ammunition available for international armed conflict when engaged in non-international armed conflict, and since there is ample history of the use of exploding bullets in international armed conflict, the Study's claim that there is a customary law prohibition applicable in non-international armed conflict is not supported by examples of State practice. […]

Rule 157: ''States have the right to vest universal jurisdiction in their national courts over war crimes.''

[…]

The Study […] does not offer adequate support for the contention that Rule 157, which is stated much more broadly, represents customary international law.

Clarity of the asserted rule

If Rule 157 is meant to further the overall goal of the Study to ''be helpful in reducing the uncertainties and the scope for argument inherent in the concept of customary international law,'' it must have a determinate meaning. The phrase ''war crimes,'' however, is an

amorphous term used in different contexts to mean different things. The Study's own definition of this term, laid out in Rule 156, is unspecific about whether particular acts would fall within the definition. For the purpose of these comments, we assume that the ''war crimes'' referred to in Rule 157 are intended to be those listed in the commentary to Rule 156. These acts include grave breaches of the Geneva Conventions and AP I, other crimes prosecuted as ''war crimes'' after World War II and included in the Rome Statute, serious violations of Common Article 3 of the Geneva Conventions, and several acts deemed ''war crimes'' by ''customary law developed since 1977,'' some of which are included in the Rome Statute and some of which are not.

Assuming this to be the intended scope of the rule, we believe there are at least three errors in the Study's reasoning regarding its status as customary international law. First, the Study fails to acknowledge that most of the national legislation cited in support of the rule uses different definitions of the term ''war crimes,'' making State practice much more diverse than the Study acknowledges. Second, the State practice cited does not actually support the rule's definition of universal jurisdiction. Whereas Rule 157 envisions States claiming jurisdiction over actions with no relation to the State, many of the State laws actually cited invoke the passive or active personality principle, the protective principle, or a territorial connection to the act before that State may assert jurisdiction. Furthermore, the Study cites very little evidence of actual prosecutions of war crimes not connected to the forum State (as opposed to the mere adoption of legislation by the States). […]

Conclusion

The United States selected these rules from various sections of the Study, in an attempt to review a fair cross-section of the Study and its commentary. Although these rules obviously are of interest to the United States, this selection should not be taken to indicate that these are the rules of greatest import to the United States or that an in-depth consideration of many other rules will not reveal additional concerns. In any event, the United States reiterates its appreciation for the ICRC's continued efforts in this important area, and hopes

that the discussion in this article, as well as the responses to the Study by other governments and by scholars, will foster a constructive, in-depth dialogue with the ICRC and others on the subject.

E. ICRC's Response to US Comments

[**Source**: Jean-Marie Henckaerts, "*Customary International Humanitarian Law*: a response to US comments", IRRC Vol. 89, No. 866 (June 2007), pp. 473-488; available on http://www.icrc.org [1]. Footnotes omitted]

Customary International Humanitarian Law: a response to US comments

Jean-Marie Henckaerts

Introduction

[…]

The comments on the Study provided by two of the most prominent US government lawyers, John Bellinger, Legal Adviser of the Department of State, and William Haynes, General Counsel of the Department of Defense, are the first formal comments to be received by the ICRC at governmental level. […]

As one of the co-authors of the Study, I have been given an opportunity to respond to these comments. Below are my principal observations. As the main thrust of the US comments deals with the methodology of the Study, my response focuses largely on methodological issues as well. […]

1. State practice

Density of practice

While it is agreed that practice has to be ‘‘extensive and virtually uniform’’ in order to establish a rule of customary international law, there is no specific mathematical threshold for how extensive practice has to be. This is because the density of practice depends primarily on the subject-matter. Some issues arise more often than others and generate more practice. One only has to compare, for example, the practice with regard to targeting and to the white flag of truce. Questions of targeting – for example the distinction between civilians and combatants and between civilian objects and military objectives – are discussed every day in connection with various armed conflicts, are addressed in nearly every military manual, analysed in international fora, in judgments, and so forth. Practice on the protection of the white flag of truce, on the other hand, is rather sparse. In general, the topic is rarely discussed, as there are relatively few concrete cases. Nevertheless, whatever practice there is on the protection of the white flag of truce is uniform and confirms the continued validity of the rule, regardless of limited practice. Such a differentiated approach is inevitable in any area of international law.

[…]

In addition, the nature of the rule has to be taken into account – whether it is prohibitive, obligatory or permissive. Prohibitive rules for example, of which there are many in humanitarian law, are supported not only by statements recalling the prohibition in question but also by abstention from the prohibited act. Hence, rules such as the prohibition of use of certain weapons, for example blinding laser weapons, are supported by the continued abstention from using such weapons. However, it is difficult to quantify this abstention, which occurs every day in every conflict in the world.

Permissive rules, on the other hand, are supported by acts that recognize the right to behave

in a given way but that do not, however, require such behaviour. This will typically take the form of states taking action in accordance with those rules, together with the absence of protests by other states. The rule that states have the right to vest universal jurisdiction in their courts over war crimes (Rule 157) is such a rule. There are now numerous cases of national prosecution on the basis of universal jurisdiction, without objection from the state concerned – in particular the state of nationality of the accused, for war crimes in both international and non-international armed conflicts. It is true that there are relatively few cases of prosecution on the basis of universal jurisdiction, compared to the number of war crimes possibly committed. But this is so because a foreign court is not necessarily a convenient forum to investigate and prosecute persons suspected of having committed war crimes in their own or a third country, not because of a belief that states are not entitled to prosecute on the basis of universal jurisdiction. […] But this does not mean that the practice is not dense enough, as suggested, to demonstrate the existence of a customary rule, in particular as we are dealing with a permissive rule. […]

Types of practice considered

A study on customary international law has to look at the combined effect of what states say and what they actually do. As a result, ‘‘operational State practice in connection with actual military operations’’ was collected and analysed. […]

But an examination of operational practice alone is not enough. In order to arrive at an accurate assessment of customary international law one has to look beyond a mere description of actual military operations and examine the legal assessment of such operations. […] When a given operational practice is generally accepted – for example military installations are targeted – this supports the proposition underlying that practice, namely that military installations constitute lawful military targets. But when an operational practice is generally considered to be a violation of existing rules – for example civilian

installations are targeted – that is all it is, a violation. Such violations are not of a nature to modify existing rules; they cannot dictate the law. This explains why acts such as attacks against civilians, pillage and sexual violence remain prohibited notwithstanding numerous reports of their commission. The conclusion that these acts are considered to be violations of existing rules can be derived only from the way they are received by the international community through verbal acts, such as military manuals, national legislation, national and international case-law, resolutions of international organizations and official statements. These verbal acts provide the lens through which to look at operational practice.

Weight of resolutions

As a result of the above considerations, the Study had to take into account resolutions adopted by states in the framework of international organizations, in particular the United Nations and regional organizations. As indicated, the Study is premised on the recognition that ‘‘resolutions are normally not binding in themselves and therefore the value accorded to any particular resolution depends on its content, its degree of acceptance and the consistency of State practice outside it’’. A list containing the voting record of all cited General Assembly resolutions was therefore included in the Study and used during the assessment. Most importantly, resolutions were always assessed together with other state practice and were not used to tip the balance in favour of a rule being customary.

Weight of ICRC statements

As explained in the introduction to the Study, official ICRC statements, in particular appeals and memoranda on respect for international humanitarian law, have been included as relevant practice because the ICRC has international legal personality. The practice of the organization is particularly relevant in that it has received an official mandate from states ‘‘to work for the faithful application of international humanitarian law applicable in

armed conflicts and … to prepare any development thereof''. The Study did not, however, use ICRC statements as primary sources of evidence supporting the customary nature of a rule. They are cited to reinforce conclusions that were reached on the basis of state practice alone. Hence, ICRC practice likewise never tipped the balance in favour of a rule being customary.

State reactions to ICRC memoranda or appeals would clearly be a more important source of evidence. […]

Weight of NGO statements

NGO statements were included in Volume II under the category of ''Other Practice'', which served as a residual category of materials that were not given any weight in the determination of what is customary. The term ''practice'' in this context was not at all used to denote any form of state (or other) practice that contributes to the formation of customary international law. […]

Weight of practice from non-party states

The Study in no way assumed that a rule is customary merely because it is contained in a widely ratified treaty. […]

The distinction between contracting parties and non-contracting parties was taken into consideration in the assessment of each rule. To this effect, a list of ratifications for all cited treaties was included in the Study, and so-called ''negative lists'' were used – lists of countries that are not party to relevant treaties – to identify practice of non-party states. […] This also means that to the extent that different treaties contain the same or similar rules, a state's practice and ratification record have to be matched up with respect to all relevant

treaties. Although the United States is not a party to Additional Protocol I, for example, it is a party to Protocol II and Amended Protocol II to the Convention on Certain Conventional Weapons (CCW), which contain a number of rules that are identical to those in Additional Protocol I. Thus while the United States has not supported the principle of distinction, the prohibition of indiscriminate attacks and the principle of proportionality through ratification of Additional Protocol I, it has supported these rules inter alia through ratification of Amended Protocol II to the CCW, which applies in both international and non-international armed conflicts.

In addition, a number of provisions in Additional Protocol I were not found to be customary, as a result of the weight accorded to negative practice of states that remain non-parties to the Protocol. This was the case, for example, for the presumption of civilian status in case of doubt, the prohibition of attacks on works and installations containing dangerous forces, the relaxed requirement for combatants to distinguish themselves and the prohibition of reprisal attacks against civilians as contained in Additional Protocol I. […]

Specially affected states

The Study did duly note the contribution of states that have had ‘‘a greater extent and depth of experience’’ and have ‘‘typically contributed a significantly greater quantity and quality of practice’’. […]

Hence, it is clear that there are states that have contributed more practice than others because they have been ‘‘specially affected’’ by armed conflict. Whether, as a result of this, their practice counts more than the practice of other states is a separate question. […]

Nevertheless, with respect to Rule 45 on widespread, long-term and severe damage to the environment, the Study notes that France, the United Kingdom and the United States have

persistently objected to the rule being applicable to nuclear weapons. As a result, we acknowledge that with respect to the employment of nuclear weapons, Rule 45 has not come into existence as customary law. With regard to conventional weapons, however, the rule has come into existence but may not actually have much meaning, as the threshold of the cumulative conditions of long-term, widespread and severe damage is very high. The existence of this rule under customary international law is supported, in part, by the abstention from causing such damage. The United States may be considered a persistent objector with respect to Rule 45 in general, including for conventional weapons, but that is a case the United States would have to make.

2. *Opinio juris*

Although the commentaries on the rules in Volume I do not usually set out a separate analysis of practice and *opinio juris*, such an analysis did in fact take place for each and every rule to determine whether the practice attested to the existence of a rule of law or was inspired merely by non-legal considerations of convenience, comity or policy. […] Hence, the Study did not simply infer *opinio juris* from practice. […] It is true that it can never be proven that a state votes in favour of a resolution condemning acts of sexual violence, for example, because it believes this to reflect a rule of law or as a policy decision (and it could be both). However, the totality of the practice on that subject indicates beyond doubt that the prohibition of sexual violence is a rule of law, not merely a policy.

In the same vein, military manuals and teaching manuals may put forward propositions that are based on law, but may also contain instructions based on policy or military considerations that go beyond the law (although they may never fall below the law). This distinction was always kept in mind. Rules that were supported by military manuals were, considering the totality of practice, supported by practice of such a nature as to conclude that a rule of law was involved and not merely a policy consideration or a consideration of military or political expediency that can change from one conflict to the next. For example,

the fact that the United States has decided, as a matter of policy rather than law, that it ‘‘will apply the rules in its manuals whether the conflict is characterized as international or non-international’’ was recognized as a policy decision in the Study. Hence, US military manuals are never cited as supporting evidence for rules applicable in non-international armed conflicts.

Finally, it was considered that teaching manuals authorized for use in training represent a form of state practice. In principle, a state will not allow its armed forces to be taught on the basis of a document whose content it does not endorse. As a result, training manuals, instructor handbooks and pocket cards for soldiers were considered as reflecting state practice. […]

3. Formulation of rules

Any description of customary rules inevitably results in rules that in many respects are simpler than the detailed rules to be found in treaties. It may be difficult, for example, to prove the customary nature of each and every detail of corresponding treaty rules. […]

For example, in connection with Rules 31 and 55 on the protection of humanitarian relief personnel and access for humanitarian relief missions respectively, the issue of consent to receive such personnel and missions is openly discussed in the commentary and there was no intention to go beyond the content of the Additional Protocols. The problem lay in the formulation of a rule that would cover both international and non-international armed conflicts. It was problematic to use the term ‘‘consent from the parties’’, including consent from armed opposition groups, in a rule that would cover both international and non international armed conflicts. It is also clear that, by reading these rules together with Rule 6, humanitarian relief personnel lose their protection when they take a direct part in hostilities.

[…]

As to the formulation of Rule 78 on exploding bullets, the wording was carefully chosen and clearly is not a literal transcription of the St. Petersburg Declaration, thereby reflecting the evolution of state practice. On the other hand, the wording that only projectiles ‘‘designed’’ or ‘‘specifically designed’’ to explode within the human body are prohibited was not used, because this requires proof of the intent of the designer of the projectile. Instead the formulation used in Rule 78 is based on the understanding that projectiles that foreseeably detonate within the human body in their normal use do so as a result of their design, though perhaps not through specific intent, and that it is the explosion of projectiles within the human body which states have sought to prevent through practice in this field. The argument that states have allegedly used anti-matériel exploding bullets that ‘‘may have tended to detonate on impact or within the human body’’ is not accompanied by evidence that they actually did so detonate. The argument therefore does not provide evidence of ‘‘foreseeable’’ detonation, as outlined above and in the text explaining Rule 78, and so does not contradict it.

[…]

4. Implications

First, the conclusion of the Study that a significant number of rules contained in the Additional Protocols to the Geneva Conventions have achieved the status of customary international law applicable to all states is supported by the evidence proffered. This should not come as a surprise, as many of them were already customary in 1977, exactly thirty years ago. It is true, on the other hand, that a number of provisions in the Protocols were new in 1977, but they have become customary in the thirty years since their adoption because they have been extensively and virtually uniformly accepted in practice. In addition, as pointed out above, a number of their provisions have not become customary

because they are not uniformly accepted in practice.

[…]

Second, the conclusion of the Study that many rules contained in the Geneva Conventions and the Additional Protocols have become binding as a matter of customary international law in non-international armed conflict is the result of state practice to this effect. States set this evolution in motion as early as 1949 with the adoption of common Article 3 and their subsequent practice confirmed it. They built further on this practice and in 1977, now 30 years ago, adopted Additional Protocol II, the first-ever treaty devoted entirely to the regulation of non-international armed conflict. This process has been further accelerated since the establishment of the International Criminal Tribunals for the former Yugoslavia and for Rwanda in 1993 and 1994 respectively.

Indeed, developments of international humanitarian law since the wars in the former Yugoslavia and Rwanda point towards an application of many areas of humanitarian law to non-international armed conflicts. For example, every humanitarian law treaty adopted since 1996 has been made applicable to both international and non-international armed conflicts. Furthermore, in 2001, Article 1 of the CCW was amended so as to extend the scope of application of all existing CCW Protocols to cover non-international armed conflict.

See

Amendment to Article 1 of the 1980 Convention, in Order to Extend it to Non-International Armed Conflicts [2]

The criminal tribunals and courts set up, first for the former Yugoslavia and Rwanda and later for Sierra Leone, deal exclusively or mostly with violations committed in non-

international armed conflicts. Similarly, the investigations and prosecutions currently under way before the International Criminal Court are related to violations committed in situations of internal armed conflict. These developments are also sustained by other practice such as military manuals, national legislation and case-law, official statements and resolutions of international organizations and conferences. In this respect particular care was taken in Volume I to identify specific practice related to non-international armed conflict and, on that basis, to provide a separate analysis of the customary nature of the rules in such conflicts. Finally, where practice was less extensive in non-international armed conflicts, the corresponding rule is acknowledged to be only ‘‘arguably’’ applicable in non-international armed conflicts.

When it comes to ‘‘operational practice’’ related to non-international armed conflicts, there is probably a large mix of official practice supporting the rules and of their outright violation. To suggest, therefore, that there is not enough practice to sustain such a broad conclusion is to confound the value of existing ‘‘positive’’ practice with the many violations of the law in non-international armed conflicts. This would mean that we let violators dictate the law or stand in the way of rules emerging. The result would be that a whole range of heinous practices committed in non-international armed conflict would no longer be considered unlawful and that commanders ordering such practices would no longer be responsible for them. This is not what states have wanted. They have wanted the law to apply to non-international armed conflicts and they have wanted commanders to be responsible and accountable. As a result, the expectations of lawful behaviour by parties to non-international armed conflicts have been raised to coincide very often with the standards applicable in international armed conflicts. This development, brought about by states, is to be welcomed as a significant improvement for the legal protection of victims of what is the most endemic form of armed conflict, non-international armed conflicts.

State practice and customary humanitarian law have thus filled important gaps in the treaty

law governing non-international armed conflicts. The divide between the law on international and non-international armed conflicts, in particular concerning the conduct of hostilities, the use of means and methods of warfare and the treatment of persons in the power of a party to a conflict, has largely been bridged. But this is not to say that the law on international and non-international armed conflicts is now the same. Indeed, concepts such as occupation and the entitlement to combatant and prisoner-of-war status still belong exclusively to the domain of international armed conflicts. Consequently, the Study also contains a number of rules whose application is limited to international armed conflict, and a number of rules whose formulation differs for international and non-international armed conflicts.

[…]

Discussion

1. a. In your opinion, what are the main findings of the ICRC study? With regard to international armed conflicts? To non-international armed conflicts?
   b. Which rules go beyond the existing treaty law applicable to each category of armed conflicts?
   c. Which rules go less far than the corresponding treaty rules? Which treaty rules (in the fields covered by the study) have not been found to be customary?
   d. What are the risks of the ICRC study and what opportunities does it present?
2. a. What are the advantages of treaty rules over customary rules in protecting the victims of war? What are the advantages of customary rules over treaty rules?
   b. How can there be customary humanitarian law if the practice in armed conflicts is inhumane?
3. a. As IHL is a well codified branch of international law, why and when is it necessary to determine the rules of customary IHL?
   b. Are there particularities in creating or assessing customary law in the field of international humanitarian law (compared e.g. with the law of treaties or the law of the sea)?

4. Why should (only) the customary rules of IHL apply to operations of UN peacekeeping forces? Does that not beg the question whether UN military operations are governed by the same rules as those of States? Is there any practice on this very question?
5. Is the customary rule always less detailed than the corresponding treaty rule? For which types of treaty rules is it difficult to find a detailed customary rule?
6. What is the relationship between general principles and customary law? Are rules which may be deduced from general principles or from other rules more important than rules based on practice?
7. What is the relevance of the Martens Clause for assessing customary international humanitarian law? [**See** The Hague Regulations [3]]
8. a. In matters regulated by Protocol I, did the study have to analyse only the practice of the then 33 States not party to it or also the practice of the then 163 States Parties? How can one determine whether an act by a State Party respecting or violating the Protocol also counts as practice for customary international law? Can you imagine an example of such “treaty practice” clearly counting or clearly not counting as practice for customary law? Are the same criteria applicable in assessing acts of respect for and violations of treaty obligations?
   b. Did the study have to focus, as far as States Parties are concerned, on their practice before they became bound by the treaty? Is the development of customary IHL frozen or at least slowed down by a successful codification (*lato sensu*)? Or is it on the contrary speeded up by crystallization of the treaty norms, which then triggers conformity of State practice with those rules?
   c. How could State behaviour in drafting Protocol I be relevant for customary international law? Do statements made at the Diplomatic Conference drafting Protocol I count as State practice for the development of customary IHL? Which of such statements carry greater weight than others?
   d. How could the behaviour of States vis-à-vis Protocol I, since its drafting, be relevant? Does widespread State participation in an IHL treaty make its rules customary? Does such participation count as State practice?
   e. Can violations of treaty obligations count as custom ?

9. Are the answers given to question 8 the same when asked with regard to the Geneva Conventions (instead of Protocol I), which have been universally ratified? Can you explain any differences?
10. Must humanitarian behaviour adopted for policy reasons be distinguished from behaviour adopted out of a sense of legal obligation? How can the distinction be made between these motives? In particular in the event of omissions?
11. a. Do all expressions of custom listed in Part A, para. 2.5, of the Case constitute practice? Or do some of them rather express *opinio juris*? Or do all of them express practice and *opinio juris*
    b. How widespread must practice be in the field of IHL to lead to a customary rule?
    c. Is the practice of some States more important than that of others? Are some States specially affected by IHL? What about States affected by armed conflicts? States with large armed forces? States with detailed military manuals?
    d. Does the practice of belligerents and of non-belligerents count equally?
    e. What kind of rules of customary IHL could be derived from "operational practice", i.e. the actual practice of belligerents? May one thus limit those contributing to the formation of customary law to belligerents? How can one establish such practice? Does it count even if it is contrary to official declarations? Are reports of humanitarian organizations on "violations" useful? Does every act of a combatant constitute State practice? Is it at least State practice when the combatant is not punished? Are difficulties of knowing operational practice a reason for giving it less weight in establishing customary IHL? [**See also** ICTY, The Prosecutor v. Tadic, A., Jurisdiction [4], para. 99 [5]]
    f. When compiling State practice with a view to establishing customary IHL, may one ignore certain instances of practice as "violations"? How does one know that a certain act is a violation before knowing the rule? Should violators be allowed to dictate the rules? Should they be allowed to change existing rules of customary IHL by their violation? To stand in the way of new rules of customary IHL emerging? g. Can customary IHL be derived from abstract State acts such as diplomatic statements, undertakings and declarations? By belligerents? By non-belligerents? By both?
12. Must practice in international and in non-international armed conflicts be analyzed

separately to determine customary IHL? If yes, what if the classification of a given conflict was controversial? Does practice in international and that in non-international armed conflicts each influence the other?

13. Is customary IHL of non-international armed conflicts binding upon armed groups fighting in such conflicts? Are all rules found in the ICRC study to be applicable in non-international armed conflicts realistic for all armed groups involved in such conflicts?

14. a. What weight should be given to military manuals? Should they be taken into account only as State practice? Cannot they also reflect opinio juris? Do you think that governments include certain rules of IHL in their military manuals only for political considerations, and not out of a sense that they are bound by the rule?

    b. Do you agree with the US position (Part D) that one should distinguish between "military publications prepared informally solely for training or similar purposes and those prepared and approved as official government statements"? What do you think of Jean-Marie Henckaerts's response, i.e. that "a state will not allow its armed forces to be taught on the basis of a document whose content it does not endorse. As a result, training manuals, instructor handbooks and pocket cards for soldiers were considered as reflecting state practice"?

15. a. Whose practice should be taken into account when assessing practice? Is it exclusively that of States? Or may other entities' practice also be taken into consideration, such as that of international organizations, that of non-governmental organizations, or that of the ICRC?

    b. If only State practice is to be taken into account, may any State practice be considered? Or should it be restricted to operational conduct? To official statements made in official fora? What weight should be given to UN General Assembly resolutions? To other international and regional governmental organizations? To statements by States made during the travaux préparatoires of a treaty?

    c. Does the practice of armed groups in non-international armed conflicts contribute to customary IHL applicable in such conflicts?

    d. When does the practice of parties to non-international armed conflicts respecting

their obligations under national law contribute to customary IHL? How would you assess the *opinio juris*? Is an acceptance of the practice as international law necessary to make it customary IHL?

e. Are non-governmental armed groups bound by customary law? f. If States refuse to improve the protection of victims of non-international armed conflicts through treaties bringing the applicable rules closer to those of international armed conflicts, can one expect (to see) such a result from a study of customary law?

16. Is it possible to clearly separate practice from *opinio juris*? Aren't they linked? Would not an analysis of *opinio juris* separated from practice result in a theoretical and hypothetical work?
17. (*See Rule 31 of the Study*);
    a. Do you agree with the US position that a reference to State consent should be included in the phrasing of the rule? Under IHL, do humanitarian personnel enjoy a different protection according to whether their presence has been accepted by the State? Do the treaty rules reflect the role of State consent? If yes, do the treaty rules condition protection to State consent? (P I, Art. 71 [6]; P II, Art. 18 [7])
    b. What does "terms of mission" mean? Do humanitarian personnel lose their protection under IHL if they act outside the terms of their mission? Does acting outside the terms of mission necessarily mean participating in hostilities?
    c. Do you think that Rule 31 should include a reference to the loss of protection in the case of direct participation in hostilities? Or do you agree with Jean-Marie Henckaerts that Rule 31 should be read in conjunction with Rule 6?
18. (*See Rule 78 of the Study*) May a State, in a non-international armed conflict, use means and methods prohibited in international armed conflicts? From a moral and political point of view? From a legal point of view? Could a study of State practice answer the latter question? A study of actual State behaviour? Did practice in both international and non-international armed conflicts, or only in the latter, have to be studied in order to answer that question?
19. (*See Rule 157 of the Study*)
    a. When establishing a customary obligation to prosecute war crimes, does it

matter that States use a different definition of war crimes? If most States recognize the same acts as war crimes? If one can at least find a common core of conduct generally considered by States as war crimes?

b. Do you think that the right to exercise universal jurisdiction over war crimes has not attained customary status? For this, is it necessary that States actually prosecute war crimes under universal jurisdiction? Does not the fact that States allow their national courts to prosecute war crimes under universal jurisdiction already show that States consider it as a right?

Links

[1] http://www.icrc.org

[2] http://www.icrc.org/ihl.nsf/FULL/600

[3] http://www.icrc.org/ihl.nsf/FULL/195

[4] https://casebook.icrc.org/case-study/icty-prosecutor-v-tadic

[5] https://casebook.icrc.org/case-study/icty-prosecutor-v-tadic#para99

[6] https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/ART/470-750090?OpenDocument

[7] https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/ART/475-760024?OpenDocument