

II

Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict

Jean-Marie Henckaerts*

Abstract

This article explains the rationale behind a study on customary international humanitarian law recently undertaken by the International Committee of the Red Cross (ICRC) at the request of the International Conference of the Red Cross and Red Crescent. It describes the methodology used and how the study was organized and summarizes some major findings. It does not, however, purport to provide a complete overview or analysis of these findings.

Introduction

In the 50 years or so since the adoption of the Geneva Conventions of 1949, mankind has experienced an alarming number of armed conflicts affecting almost every continent. During this time, the four Geneva Conventions and their Additional

* Legal Adviser, Legal Division, International Committee of the Red Cross (ICRC). The views in this article are those of the author and do not necessarily reflect those of the ICRC. This article was first published in the *International Review of the Red Cross*, Volume 87, Number 857, March 2005, at page 175 and is reprinted with permission. © 2006 by Jean-Marie Henckaerts.

Customary International Humanitarian Law Study

Protocols of 1977 have provided legal protection to persons not or no longer participating directly in hostilities (the wounded, sick and shipwrecked, persons deprived of their liberty for reasons related to an armed conflict, and civilians). Even so, there have been numerous violations of these treaties, resulting in suffering and death which might have been avoided had international humanitarian law been better respected.

The general opinion is that violations of international humanitarian law are not due to the inadequacy of its rules. Rather, they stem from an unwillingness to respect the rules, from insufficient means to enforce them, from uncertainty as to their application in some circumstances and from a lack of awareness of them on the part of political leaders, commanders, combatants and the general public.

The International Conference for the Protection of War Victims, convened in Geneva in August–September 1993, discussed in particular ways to address violations of international humanitarian law but did not propose the adoption of new treaty provisions. Instead, in its Final Declaration adopted by consensus, the Conference reaffirmed “the necessity to make the implementation of humanitarian law more effective” and called upon the Swiss government “to convene an open-ended intergovernmental group of experts to study practical means of promoting full respect for and compliance with that law, and to prepare a report for submission to the States and to the next session of the International Conference of the Red Cross and Red Crescent.”¹

The Intergovernmental Group of Experts for the Protection of War Victims met in Geneva in January 1995 and adopted a series of recommendations aimed at enhancing respect for international humanitarian law, in particular by means of preventive measures that would ensure better knowledge and more effective implementation of the law. Recommendation II of the Intergovernmental Group of Experts proposed that:

The ICRC be invited to prepare, with the assistance of experts in IHL [international humanitarian law] 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

In December 1995, the 26th International Conference of the Red Cross and Red Crescent endorsed this recommendation and officially mandated the ICRC to prepare a report on customary rules of international humanitarian law applicable in international and non-international armed conflicts.³ Nearly ten years later, in 2005, after extensive research and widespread consultation of experts,

this report, now referred to as the study on customary international humanitarian law, has been published.⁴

Purpose

The purpose of the study on customary international humanitarian law was to overcome some of the problems related to the application of international humanitarian treaty law. Treaty law is well developed and covers many aspects of warfare, affording protection to a range of persons during wartime and limiting permissible means and methods of warfare. The Geneva Conventions and their Additional Protocols provide an extensive regime for the protection of persons not or no longer participating directly in hostilities. The regulation of means and methods of warfare in treaty law goes back to the 1868 St. Petersburg Declaration, the 1899 and 1907 Hague Regulations and the 1925 Geneva Gas Protocol, and has most recently been addressed in the 1972 Biological Weapons Convention, the 1977 Additional Protocols, the 1980 Convention on Certain Conventional Weapons and its five Protocols, the 1993 Chemical Weapons Convention and the 1997 Ottawa Convention on the Prohibition of Anti-personnel Mines. The protection of cultural property in the event of armed conflict is regulated in detail in the 1954 Hague Convention and its two Protocols. The 1998 Statute of the International Criminal Court contains, *inter alia*, a list of war crimes subject to the jurisdiction of the Court.

There are, however, two serious impediments to the application of these treaties in current armed conflicts and which explain why a study on customary international humanitarian law is necessary and useful. First, treaties apply only to the States that have ratified them. This means that different treaties of international humanitarian law apply in different armed conflicts depending on which treaties the States involved have ratified. While the four Geneva Conventions of 1949 have been universally ratified, the same is not true for other treaties of humanitarian law, for example the Additional Protocols. Even though Additional Protocol I has been ratified by more than 160 States, its efficacy today is limited because several States that have been involved in international armed conflicts are not party to it. Similarly, while nearly 160 States have ratified Additional Protocol II, several States in which non-international armed conflicts are taking place have not done so. In these non-international armed conflicts, common Article 3 of the four Geneva Conventions often remains the only applicable humanitarian treaty provision. The first purpose of the study was therefore to determine which rules of international humanitarian law are part of customary international law and therefore applicable

Customary International Humanitarian Law Study

to all parties to a conflict, regardless of whether or not they have ratified the treaties containing the same or similar rules.

Second, humanitarian treaty law does not regulate in sufficient detail a large proportion of today's armed conflicts, that is non-international armed conflicts, because these conflicts are subject to far fewer treaty rules than are international conflicts. Only a limited number of treaties apply to non-international armed conflicts, namely the Convention on Certain Conventional Weapons as amended, the Statute of the International Criminal Court, the Ottawa Convention on the Prohibition of Anti-personnel Mines, the Chemical Weapons Convention, the Hague Convention for the Protection of Cultural Property and its Second Protocol and, as already mentioned, Additional Protocol II and Article 3 common to the four Geneva Conventions. While common Article 3 is of fundamental importance, it only provides a rudimentary framework of minimum standards. Additional Protocol II usefully supplements common Article 3, but it is still less detailed than the rules governing international armed conflicts in the Geneva Conventions and Additional Protocol I.

Additional Protocol II contains a mere 15 substantive articles, whereas Additional Protocol I has more than 80. While numbers alone do not tell the full story, they are an indication of a significant disparity in regulation by treaty law between international and non-international armed conflicts, particularly when it comes to detailed rules and definitions. The second purpose of the study was therefore to determine whether customary international law regulates non-international armed conflict in more detail than does treaty law and if so, to what extent.

Methodology

The Statute of the International Court of Justice describes customary international law as "a general practice accepted as law."⁵ It is widely agreed that the existence of a rule of customary international law requires the presence of two elements, namely State practice (*usus*) and a belief that such practice is required, prohibited or allowed, depending on the nature of the rule, as a matter of law (*opinio juris sive necessitatis*). As the International Court of Justice stated in the *Continental Shelf* case: "It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States."⁶ The exact meaning and content of these two elements have been the subject of much academic writing. The approach taken in the study to determine whether a rule of general customary international law exists was a classic one, set out by the International Court of Justice, in particular in the *North Sea Continental Shelf* cases.⁷

State Practice

State practice must be looked at from two angles: what practice contributes to the creation of customary international law (selection of State practice) and whether this practice establishes a rule of customary international law (assessment of State practice).

Selection of State Practice

Both physical and verbal acts of States constitute practice that contributes to the creation of customary international law. Physical acts include, for example, battle-field behavior, the use of certain weapons and the treatment afforded to different categories of persons. Verbal acts include military manuals, national legislation, national case law, instructions to armed and security forces, military communiqués during war, diplomatic protests, opinions of official legal advisers, comments by governments on draft treaties, executive decisions and regulations, pleadings before international tribunals, statements in international fora, and government positions on resolutions adopted by international organizations. This list shows that the practice of the executive, legislative and judicial organs of a State can contribute to the formation of customary international law.

The negotiation and adoption of resolutions by international organizations or conferences, together with the explanations of vote, are acts of the States involved. It is recognized that, with a few exceptions, resolutions are normally not binding in themselves and therefore the value accorded to any particular resolution in the assessment of the formation of a rule of customary international law depends on its content, its degree of acceptance and the consistency of related State practice.⁸ The greater the support for the resolution, the more importance it is to be accorded.

Although decisions of international courts are subsidiary sources of international law,⁹ they do not constitute State practice. This is because, unlike national courts, international courts are not State organs. The decisions of international courts were nevertheless included in the study because a finding by an international court that a rule of customary international law exists constitutes persuasive evidence to that effect. In addition, because of the precedential value of their decisions, international courts can also contribute to the emergence of a rule of customary international law by influencing the subsequent practice of States and international organizations.

The practice of armed opposition groups, such as codes of conduct, commitments made to observe certain rules of international humanitarian law and other statements, does not constitute State practice as such. While such practice may contain evidence of the acceptance of certain rules in non-international armed

conflicts, its legal significance is unclear and, as a result, was not relied upon to prove the existence of customary international law. Examples of such practice were listed under “other practice” in Volume II of the study.

Assessment of State Practice

State practice has to be weighed to assess whether it is sufficiently “dense” to create a rule of customary international law.¹⁰ To establish a rule of customary international law, State practice has to be virtually uniform, extensive and representative.¹¹ Let us look more closely at what this means.

First, for State practice to create a rule of customary international law, it must be *virtually uniform*. Different States must not have engaged in substantially different conduct. The jurisprudence of the International Court of Justice shows that contrary practice which, at first sight, appears to undermine the uniformity of the practice concerned, does not prevent the formation of a rule of customary international law as long as this contrary practice is condemned by other States or denied by the government itself. Through such condemnation or denial, the rule in question is actually confirmed.¹²

This is particularly relevant for a number of rules of international humanitarian law for which there is overwhelming evidence of verbal State practice in support of a rule, alongside repeated evidence of violations of that rule. Where violations have been accompanied by excuses or justifications by the party concerned and/or condemnation by other States, they are not of a nature to challenge the existence of the rule in question. States wishing to change an existing rule of customary international law have to do so through their official practice and claim to be acting as of right.

Second, for a rule of general customary international law to come into existence, the State practice concerned must be both *extensive and representative*. It does not, however, need to be universal; a “general” practice suffices.¹³ No precise number or percentage of States is required. One reason it is impossible to put an exact figure on the extent of participation required is that the criterion is in a sense *qualitative* rather than quantitative. That is to say, it is not simply a question of how many States participate in the practice, but also *which* States.¹⁴ In the words of the International Court of Justice in the *North Sea Continental Shelf* cases, the practice must “include that of States whose interests are specially affected.”¹⁵

This consideration has two implications: (1) if all “specially affected States” are represented, it is not essential for a majority of States to have actively participated, but they must have at least acquiesced in the practice of “specially affected States”; and (2) if “specially affected States” do not accept the practice, it cannot mature into a rule of customary international law, even though unanimity is not required

as explained.¹⁶ Who is “specially affected” under international humanitarian law may vary according to circumstances. Concerning the legality of the use of blinding laser weapons, for example, “specially affected States” include those identified as having been in the process of developing such weapons, even though other States could potentially become the objects of their use. Similarly, States whose population is in need of humanitarian aid are “specially affected” just as are States which frequently provide such aid. With respect to any rule of international humanitarian law, countries that participated in an armed conflict are “specially affected” when their practice examined for a certain rule was relevant to that armed conflict. Although there may be specially affected States in certain areas of international humanitarian law, it is also true that all States have a legal interest in requiring respect for international humanitarian law by other States, even if they are not a party to the conflict.¹⁷ In addition, all States can suffer from means or methods of warfare deployed by other States. As a result, the practice of all States must be considered, whether or not they are “specially affected” in the strict sense of that term.

The study took no view on whether it is legally possible to be a “persistent objector” in relation to customary rules of international humanitarian law. While many commentators believe that it is not possible to be a persistent objector in the case of rules of *jus cogens*, there are others who doubt the continued validity of the persistent objector concept altogether.¹⁸ If one accepts that it is legally possible to be a persistent objector, the State concerned must have objected to the emergence of a new norm during its formation and continue to object persistently afterwards; it is not possible to be a “subsequent objector.”¹⁹

While some time will normally elapse before a rule of customary international law emerges, there is no specified timeframe. Rather, it is the accumulation of a practice of sufficient density, in terms of uniformity, extent and representativeness, which is the determining factor.²⁰

Opinio Juris

The requirement of *opinio juris* in establishing the existence of a rule of customary international law refers to the legal conviction that a particular practice is carried out “as of right.” The form in which the practice and the legal conviction are expressed may well differ depending on whether the rule concerned contains a prohibition, an obligation or merely a right to behave in a certain manner.

During work on the study, it proved very difficult and largely theoretical to strictly separate elements of practice and legal conviction. Often, the same act reflects both practice and legal conviction. As the International Law Association pointed out, the International Court of Justice “has not in fact said in so many

words that just because there are (allegedly) distinct elements in customary law the same conduct cannot manifest both. It is in fact often difficult or even impossible to disentangle the two elements.”²¹ This is particularly so because verbal acts, such as military manuals, count as State practice and often reflect the legal conviction of the State involved at the same time.

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*. In situations where practice is ambiguous, however, *opinio juris* plays an important role in determining whether or not that practice counts towards the formation of custom. This is often the case with omissions, when States do not act or react but it is not clear why. It is in such cases that both the International Court of Justice and its predecessor, the Permanent Court of International Justice, have sought to establish the separate existence of an *opinio juris* in order to determine whether instances of ambiguous practice counted towards the establishment of customary international law.²²

In the area of international humanitarian law, where many rules require abstention from certain conduct, omissions pose a particular problem in the assessment of *opinio juris* because it has to be proved that the abstention is not a coincidence but based on a legitimate expectation. When such a requirement of abstention is indicated in international instruments and official statements, the existence of a legal requirement to abstain from the conduct in question can usually be proved. In addition, such abstentions may occur after the behavior in question created a certain controversy, which also helps to show that the abstention was not coincidental, although it is not always easy to prove that the abstention occurred out of a sense of legal obligation.

Impact of Treaty Law

Treaties are also relevant in determining the existence of customary international law because they help shed light on how States view certain rules of international law. Hence, the ratification, interpretation and implementation of a treaty, including reservations and statements of interpretation made upon ratification, were included in the study. In the *North Sea Continental Shelf* cases, the International Court of Justice clearly considered the degree of ratification of a treaty to be relevant to the assessment of customary international law. In that case, the Court stated that “the number of ratifications and accessions so far secured [39] is, though respectable, hardly sufficient”, especially in a context where practice outside the treaty was contradictory.²³ Conversely, in the *Nicaragua* case, the Court placed a great deal of weight, when assessing the customary status of the non-intervention rule, on the fact that the Charter of the United Nations was almost universally ratified.²⁴ It can

even be the case that a treaty provision reflects customary law, even though the treaty is not yet in force, provided that there is sufficiently similar practice, including by specially affected States, so that there remains little likelihood of significant opposition to the rule in question.²⁵

In practice, the drafting of treaty norms helps to focus world legal opinion and has an undeniable influence on the subsequent behavior and legal conviction of States. The International Court of Justice recognized this in its judgment in the *Continental Shelf* case in which it stated that “multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them.”²⁶ The Court thus confirmed that treaties may codify pre-existing customary international law but may also lay the foundation for the development of new customs based on the norms contained in those treaties. The Court has even gone so far as to state that “it might be that . . . a very widespread and representative participation in [a] convention might suffice of itself, provided it included that of States whose interests were specially affected.”²⁷

The study took the cautious approach that widespread ratification is only an indication and has to be assessed in relation to other elements of practice, in particular the practice of States not party to the treaty in question. Consistent practice of States not party was considered as important positive evidence. Contrary practice of States not party, however, was considered as important negative evidence. The practice of States party to a treaty vis-à-vis States not party is also particularly relevant.

Thus, the study did not limit itself to the practice of States not party to the relevant treaties of international humanitarian law. To limit the study to a consideration of the practice of only the 30-odd States that have not ratified the Additional Protocols, for example, would not comply with the requirement that customary international law be based on widespread and representative practice. Therefore, the assessment of the existence of customary law took into account that, at the time the study was published, Additional Protocol I had been ratified by 162 States and Additional Protocol II by 157 States.

It should be stressed that the study did not seek to determine the customary nature of each treaty rule of international humanitarian law and, as a result, did not necessarily follow the structure of existing treaties. Rather, it sought to analyse issues in order to establish what rules of customary international law can be found inductively on the basis of State practice in relation to these issues. As the approach chosen does not analyse each treaty provision with a view to establishing whether or not it is customary, it cannot be concluded that any particular treaty rule is *not* customary merely because it does not appear as such in the study.

Organization of the Study

To determine the best way of fulfilling the mandate entrusted to the ICRC, the authors consulted a group of academic experts in international humanitarian law, who formed the Steering Committee of the study.²⁸ The Steering Committee adopted a plan of action in June 1996, and research started the following October. Research was conducted using both national and international sources reflecting State practice and focused on the six parts of the study identified in the plan of action:

- Principle of distinction
- Specifically protected persons and objects
- Specific methods of warfare
- Weapons
- Treatment of civilians and persons *hors de combat*
- Implementation

Research in National Sources

Since national sources are more easily accessible from within a country, it was decided to seek the cooperation of national researchers. To this end, a researcher or group of researchers was identified in nearly 50 States (9 in Africa, 11 in the Americas, 15 in Asia, 1 in Australasia and 11 in Europe) and asked to produce a report on their respective State's practice.²⁹ Countries were selected on the basis of geographic representation, as well as recent experience of different kinds of armed conflict in which a variety of methods of warfare had been used.

The military manuals and national legislation of countries not covered by the reports on State practice were also researched and collected. This work was facilitated by the network of ICRC delegations around the world and the extensive collection of national legislation gathered by the ICRC Advisory Service on International Humanitarian Law.

Research in International Sources

State practice gleaned from international sources was collected by six teams, each of which concentrated on one part of the study.³⁰ These teams researched practice in the framework of the United Nations and other international organizations, including the African Union (formerly the Organization of African Unity), the Council of Europe, the Gulf Cooperation Council, the European Union, the League of Arab States, the Organization of American States, the Organization of

the Islamic Conference and the Organization for Security and Co-operation in Europe. International case law was also collected to the extent that it provides evidence of the existence of rules of customary international law.

Research in ICRC Archives

To complement the research carried out in national and international sources, the ICRC looked into its own archives relating to nearly 40 recent armed conflicts (21 in Africa, 2 in the Americas, 8 in Asia and 8 in Europe).³¹ In general, these conflicts were selected so that countries and conflicts not dealt with by a report on State practice would also be covered.

The result of this three-pronged approach—research in national, international and ICRC sources—is that practice from all parts of the world is cited. In the nature of things, however, this research cannot purport to be complete. The study focused in particular on practice from the last 30 years to ensure that the result would be a restatement of contemporary customary international law, but, where still relevant, older practice was also cited.

Expert Consultations

In a first round of consultations, the ICRC invited the international research teams to produce an executive summary containing a preliminary assessment of customary international humanitarian law on the basis of the practice collected. These executive summaries were discussed within the Steering Committee at three meetings in Geneva in 1998. The executive summaries were duly revised and, during a second round of consultations, submitted to a group of academic and governmental experts from all regions of the world. These experts were invited in their personal capacity by the ICRC to attend two meetings with the Steering Committee in Geneva in 1999, during which they helped to evaluate the practice collected and indicated particular practice that had been missed.³²

Writing of the Report

The assessment by the Steering Committee, as reviewed by the group of academic and governmental experts, served as a basis for the writing of the final report. The authors of the study re-examined the practice, reassessed the existence of custom, reviewed the formulation and the order of the rules and drafted the commentaries. These draft texts were submitted to the Steering Committee, the group of academic and governmental experts and the ICRC Legal Division for comment. The text was further updated and finalized, taking into account the comments received.

Summary of Findings

The great majority of the provisions of the Geneva Conventions, including common Article 3, are considered to be part of customary international law.³³ Furthermore, given that there are now 192 parties to the Geneva Conventions, they are binding on nearly all States as a matter of treaty law. Therefore, the customary nature of the provisions of the Conventions was not the subject as such of the study. Rather, the study focused on issues regulated by treaties that have not been universally ratified, in particular the Additional Protocols, the Hague Convention for the Protection of Cultural Property and a number of specific conventions regulating the use of weapons.

The description below of rules of customary international law does not seek to explain why these rules are customary, nor does it present the practice on the basis of which this conclusion was reached. The explanation of why a rule is considered customary can be found in Volume I of the study, while the corresponding practice can be found in Volume II.

International Armed Conflicts

Additional Protocol I codified pre-existing rules of customary international law but also laid the foundation for the formation of new customary rules. The practice collected in the framework of the study bears witness to the profound impact of Additional Protocol I on the practice of States, not only in international but also in non-international armed conflicts (see below). In particular, the study found that the basic principles of Additional Protocol I have been very widely accepted, more widely than the ratification record of Additional Protocol I would suggest.

Even though the study did not seek to determine the customary nature of specific treaty provisions, in the end it became clear that there are many customary rules which are identical or similar to those found in treaty law. Examples of rules found to be customary and which have corresponding provisions in Additional Protocol I include: the principle of distinction between civilians and combatants and between civilian objects and military objectives;³⁴ the prohibition of indiscriminate attacks;³⁵ the principle of proportionality in attack;³⁶ the obligation to take feasible precautions in attack and against the effects of attack;³⁷ the obligation to respect and protect medical and religious personnel, medical units and transports,³⁸ humanitarian relief personnel and objects,³⁹ and civilian journalists;⁴⁰ the obligation to protect medical duties;⁴¹ the prohibition of attacks on non-defended localities and demilitarized zones;⁴² the obligation to provide quarter and to safeguard an enemy *hors de combat*;⁴³ the prohibition of starvation;⁴⁴ the prohibition of attacks on objects indispensable to the survival of the civilian population;⁴⁵ the

prohibition of improper use of emblems and perfidy;⁴⁶ the obligation to respect the fundamental guarantees of civilians and persons *hors de combat*;⁴⁷ the obligation to account for missing persons;⁴⁸ and the specific protections afforded to women and children.⁴⁹

Non-international Armed Conflicts

Over the last few decades, there has been a considerable amount of practice insisting on the protection of international humanitarian law in this type of conflicts. This body of practice has had a significant influence on the formation of customary law applicable in non-international armed conflicts. Like Additional Protocol I, Additional Protocol II has had a far-reaching effect on this practice and, as a result, many of its provisions are now considered to be part of customary international law. Examples of rules found to be customary and which have corresponding provisions in Additional Protocol II include: the prohibition of attacks on civilians;⁵⁰ the obligation to respect and protect medical and religious personnel, medical units and transports;⁵¹ the obligation to protect medical duties;⁵² the prohibition of starvation;⁵³ the prohibition of attacks on objects indispensable to the survival of the civilian population;⁵⁴ the obligation to respect the fundamental guarantees of civilians and persons *hors de combat*;⁵⁵ the obligation to search for and respect and protect the wounded, sick and shipwrecked;⁵⁶ the obligation to search for and protect the dead;⁵⁷ the obligation to protect persons deprived of their liberty;⁵⁸ the prohibition of forced movement of civilians;⁵⁹ and the specific protections afforded to women and children.⁶⁰

However, the most significant contribution of customary international humanitarian law to the regulation of internal armed conflicts is that it goes beyond the provisions of Additional Protocol II. Indeed, practice has created a substantial number of customary rules that are more detailed than the often rudimentary provisions in Additional Protocol II and has thus filled important gaps in the regulation of internal conflicts.

For example, Additional Protocol II contains only a rudimentary regulation of the conduct of hostilities. Article 13 provides that “the civilian population as such, as well as individual civilians, shall not be the object of attack . . . unless and for such time as they take a direct part in hostilities.” Unlike Additional Protocol I, Additional Protocol II does not contain specific rules and definitions with respect to the principles of distinction and proportionality.

The gaps in the regulation of the conduct of hostilities in Additional Protocol II have, however, largely been filled through State practice, which has led to the creation of rules parallel to those in Additional Protocol I, but applicable as customary law to non-international armed conflicts. This covers the basic principles on the

conduct of hostilities and includes rules on specifically protected persons and objects and specific methods of warfare.⁶¹

Similarly, Additional Protocol II contains only a very general provision on humanitarian relief for civilian populations in need. Article 18(2) provides that “if the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival . . . relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken.” Unlike Additional Protocol I, Additional Protocol II does not contain specific provisions requiring respect for and protection of humanitarian relief personnel and objects and obliging parties to the conflict to allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need and to ensure the freedom of movement of authorized humanitarian relief personnel, although it can be argued that such requirements are implicit in Article 18(2) of the Protocol. These requirements have crystallized, however, into customary international law applicable in both international and non-international armed conflicts as a result of widespread, representative and virtually uniform practice to that effect.

In this respect it should be noted that while both Additional Protocols I and II require the consent of the parties concerned for relief actions to take place,⁶² most of the practice collected does not mention this requirement. It is nonetheless self-evident that a humanitarian organization cannot operate without the consent of the party concerned. However, such consent must not be refused on arbitrary grounds. If it is established that a civilian population is threatened with starvation and a humanitarian organization which provides relief on an impartial and non-discriminatory basis is able to remedy the situation, a party is obliged to give consent.⁶³ While consent may not be withheld for arbitrary reasons, practice recognizes that the party concerned may exercise control over the relief action and that humanitarian relief personnel must respect domestic law on access to territory and security requirements in force.

Issues Requiring Further Clarification

The study also revealed a number of areas where practice is not clear. For example, while the terms “combatants” and “civilians” are clearly defined in international armed conflicts,⁶⁴ in non-international armed conflicts practice is ambiguous as to whether, for purposes of the conduct of hostilities, members of armed opposition groups are considered members of armed forces or civilians. In particular, it is not clear whether members of armed opposition groups are civilians who lose their protection from attack when directly participating in hostilities or whether members of such groups are liable to attack as such. This lack of clarity is also reflected in

treaty law. Additional Protocol II, for example, does not contain a definition of civilians or of the civilian population even though these terms are used in several provisions.⁶⁵ Subsequent treaties, applicable in non-international armed conflicts, similarly use the terms civilians and civilian population without defining them.⁶⁶

A related area of uncertainty affecting the regulation of both international and non-international armed conflicts is the absence of a precise definition of the term “direct participation in hostilities.” Loss of protection against attack is clear and uncontested when a civilian uses weapons or other means to commit acts of violence against human or material enemy forces. But there is also considerable practice which gives little or no guidance on the interpretation of the term “direct participation,” stating, for example, that an assessment has to be made on a case-by-case basis or simply repeating the general rule that direct participation in hostilities causes civilians to lose protection against attack. Related to this issue is the question of how to qualify a person in case of doubt. Because of these uncertainties, the ICRC is seeking to clarify the notion of direct participation by means of a series of expert meetings that began in 2003.⁶⁷

Another issue still open to question is the exact scope and application of the principle of proportionality in attack. While the study revealed widespread support for this principle, it does not provide more clarification than contained in treaty law as to how to balance military advantage against incidental civilian losses.

Selected Issues on the Conduct of Hostilities

Additional Protocols I and II introduced a new rule prohibiting attacks on works and installations containing dangerous forces, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population.⁶⁸ While it is not clear whether these specific rules have become part of customary law, practice shows that States are conscious of the high risk of severe incidental losses which can result from attacks against such works and installations when they constitute military objectives. Consequently, they recognize that in any armed conflict particular care must be taken in case of attack in order to avoid the release of dangerous forces and consequent severe losses among the civilian population, and this requirement was found to be part of customary international law applicable in any armed conflict.

Another new rule introduced in Additional Protocol I is the prohibition of 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. Since the adoption of Additional Protocol I, this prohibition has received such extensive

support in State practice that it has crystallized into customary law, even though some States have persistently maintained that the rule does not apply to nuclear weapons and that they may, therefore, not be bound by it in respect of nuclear weapons.⁶⁹ Beyond this specific rule, the study found that the natural environment is considered to be a civilian object and as such it is protected by the same principles and rules that protect other civilian objects, in particular the principles of distinction and proportionality and the requirement to take precautions in attack. This means that no part of the natural environment may be made the object of attack, unless it is a military objective, and that 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. In its advisory opinion in the *Nuclear Weapons* case, for example, the International Court of Justice stated that “States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives.”⁷⁰ In addition, parties to a conflict are required to take all feasible precautions in the conduct of hostilities to avoid, and in any event to minimize, 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.⁷¹

There are also issues that are not as such addressed in the Additional Protocols. For example, the Additional Protocols do not contain any specific provision concerning the protection of personnel and objects involved in a peacekeeping mission. In practice, however, such personnel and objects were given protection against attack equivalent to that of civilians and civilian objects respectively. As a result, a rule prohibiting attacks 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, developed in State practice and was included in the Statute of the International Criminal Court. It is now part of customary international law applicable in any type of armed conflict.⁷²

A number of issues related to the conduct of hostilities are regulated by the Hague Regulations. These regulations have long been considered customary in international armed conflict.⁷³ Some of their rules, however, are now also accepted as customary in non-international armed conflict. For example, the long-standing rules of customary international law that prohibit (1) destruction or seizure of the property of an adversary, unless required by imperative military necessity, and (2) pillage apply equally in non-international armed conflicts. Pillage is the forcible taking of private property from the enemy’s subjects for private or personal use.⁷⁴

Both prohibitions do not affect the customary practice of seizing as war booty military equipment belonging to an adverse party.

Under customary international law, commanders may enter into non-hostile contact through any means of communication, but such contact must be based on good faith. Practice indicates that communication may be carried out via intermediaries known as *parlementaires* but also by various other means, such as telephone and radio. A *parlementaire* is a person belonging to a party to the conflict who has been authorized to enter into communication with another party to the conflict and who is, as a result, inviolable. The traditional method of making oneself known as a *parlementaire* by advancing bearing a white flag has been found to be still valid. In addition, it is recognized practice that the parties may appeal to a third party to facilitate communication, for example a protecting power or an impartial and neutral humanitarian organization acting as a substitute, in particular the ICRC, but also an international organization or a peacekeeping force. Collected practice shows that various institutions and organizations have acted as intermediaries in negotiations in both international and non-international armed conflicts, and that this is generally accepted. The rules governing *parlementaires* go back to the Hague Regulations and have long been considered customary in international armed conflict. On the basis of practice in the last 50 years or so, they have become customary in non-international armed conflicts as well.⁷⁵

Practice reveals two strains of law that protect cultural property. A first strain dates back to the Hague Regulations and requires that special care 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. It also prohibits seizure of or destruction or willful damage to such buildings and monuments. While these rules have long been considered customary in international armed conflicts, they are now also accepted as customary in non-international armed conflicts.

A second strain is based on the specific provisions of the 1954 Hague Convention for the Protection of Cultural Property, which protects “property of great importance to the cultural heritage of every people” and introduces a specific distinctive sign to identify such property. Customary law today requires that such objects not be attacked nor used for purposes which are likely to expose them to destruction or damage, unless imperatively required by military necessity. It also prohibits any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, such property. These prohibitions correspond to provisions set forth in the Hague Convention and are evidence of the influence the Convention has had on State practice concerning the protection of important cultural property.

Weapons

The general principles prohibiting the use of weapons that cause superfluous injury or unnecessary suffering and weapons that are by nature indiscriminate were found to be customary in any armed conflict. In addition, and largely on the basis of these principles, State practice has prohibited the use (or certain types of use) of a number of specific weapons under customary international law: poison or poisoned weapons; biological weapons; chemical weapons; riot-control agents as a method of warfare; herbicides as a method of warfare;⁷⁶ bullets which expand or flatten easily in the human body; anti-personnel use of bullets which explode within the human body; weapons the primary effect of which is to injure by fragments which are not detectable by X-rays in the human body; booby-traps which are in any way attached to or associated with objects or persons entitled to special protection under international humanitarian law or objects that are likely to attract civilians; and 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.

Some weapons which are not prohibited as such by customary law are nevertheless subject to restrictions. This is the case, for example, for landmines and incendiary weapons.

Particular care must be taken to minimize the indiscriminate effects of landmines. This includes, for example, the principle that a party to the conflict using landmines must record their placement, as far as possible. Also, 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.

With over 140 ratifications of the Ottawa Convention, and others on the way, the majority of States are treaty-bound no longer to use, produce, stockpile and transfer anti-personnel landmines. While this prohibition is not part of customary international law because of significant contrary practice of States not party to the Convention, almost all States, including those that are not party to the Ottawa Convention and are not in favor of their immediate ban, have recognized the need to work towards the eventual elimination of anti-personnel landmines.

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*. In addition, if they are used, particular care must be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects.

Most of these rules correspond to treaty provisions that originally applied only to international armed conflicts. That trend has gradually been reversed, for example by the amendment of Protocol II to the Convention on Certain Conventional Weapons in 1996, which also applies to non-international armed conflicts and,

most recently, by the amendment of the Convention on Certain Conventional Weapons in 2001 to extend the scope of application of Protocols I–IV to non-international armed conflicts. The customary prohibitions and restrictions referred to above apply in any armed conflict.

When the ICRC received the mandate to undertake the study on customary international humanitarian law, the International Court of Justice was considering the legality of the threat or use of nuclear weapons, following a request for an advisory opinion on the issue from the UN General Assembly. The ICRC decided therefore not to embark on its own analysis of this question. In its advisory opinion, the International Court of Justice held unanimously that “a threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law.”⁷⁷ This finding is significant given that a number of States undertook the negotiation of Additional Protocol I on the understanding that the Protocol would not apply to the use of nuclear weapons. The opinion of the Court, however, means that the rules on the conduct of hostilities and the general principles on the use of weapons apply to the use of nuclear weapons. In application of these principles and rules, the Court concluded, “the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law.”⁷⁸

Fundamental Guarantees

Fundamental guarantees apply to all civilians in the power of a party to the conflict and who do not or have ceased to take a direct part in hostilities, as well as to all persons who are *hors de combat*. Because fundamental guarantees are overarching rules that apply to all persons, they were not sub-divided in the study into specific rules relating to different types of persons.

These fundamental guarantees all have a firm basis in international humanitarian law applicable in both international and non-international armed conflicts. In the study, most of the rules relating to fundamental guarantees are couched in traditional humanitarian law language, because this best reflected the substance of the corresponding customary rule.⁷⁹ Some rules, however, were drafted so as to capture the essence of a range of detailed provisions relating to a specific subject, in particular the rules prohibiting uncompensated or abusive forced labor, enforced disappearances and arbitrary detention and the rule requiring respect for family life.⁸⁰

Where relevant, practice under international human rights law was included in the study and in particular in the chapter on fundamental guarantees. This was done because international human rights law continues to apply during armed

conflicts, as expressly stated in the human rights treaties themselves, although some provisions may, subject to certain conditions, be derogated from in time of public emergency. The continued applicability of human rights law during armed conflict has been confirmed on numerous occasions in State practice and by human rights bodies and the International Court of Justice.⁸¹ Most recently, the Court, in its advisory opinion on the legal consequences of the construction of a wall in the occupied Palestinian territories, confirmed that “the protection offered by human rights conventions does not cease in case of armed conflict” and that while there may be rights that are exclusively matters of international humanitarian law or of human rights law, there are others that “may be matters of both these branches of international law.”⁸² The study does not set out, however, to provide an assessment of customary human rights law. Instead, practice under human rights law has been included in order to support, strengthen and clarify analogous principles of international humanitarian law.

Implementation

A number of rules on the implementation of international humanitarian law have become part of customary international law. In particular, 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. As a result, each party to the conflict, including armed opposition groups, must provide instruction in international humanitarian law to its armed forces. Beyond these general obligations, it is less clear to what extent other specific implementation mechanisms that are binding upon States are also binding upon armed opposition groups. For example, the obligation to issue orders and instructions to the armed forces which ensure respect for international humanitarian law is clearly set forth in international law for States but not so for armed opposition groups. Similarly, there is an obligation on States to make legal advisers available, when necessary, to advise military commanders at the appropriate level on the application of international humanitarian law, but not on armed opposition groups.

A State is responsible for violations of international humanitarian law attributable to it and is required to make full reparation for the loss or injury caused by such violations. It is unclear whether armed opposition groups incur an equivalent responsibility for violations committed by their members and what the consequences of such responsibility would be. As stated above, armed opposition groups must respect international humanitarian law and they must operate under a “responsible command.”⁸³ As a result, it can be argued that armed opposition groups incur responsibility for acts committed by persons forming part of such groups. The consequences of such responsibility, however, are not clear. In particular, it is

unclear to what extent armed opposition groups are under an obligation to make full reparation, even though in many countries victims can bring a civil suit for damages against the offenders.

When it comes to individual responsibility, customary international humanitarian law places criminal responsibility on all persons who commit, who order the commission of or who are otherwise responsible as commanders or superiors for the commission of war crimes. The implementation of the war crimes regime, that is, the investigation of war crimes and the prosecution of the suspects, is an obligation incumbent upon States. States may discharge this obligation by setting up international or mixed tribunals to that effect.

Conclusion

The study did not attempt to determine the customary nature of each treaty rule of international humanitarian law but sought to analyse issues in order to establish what rules of customary international law can be found inductively on the basis of State practice in relation to these issues. A brief overview of some of the findings of the study nevertheless shows that the principles and rules contained in treaty law have received widespread acceptance in practice and have greatly influenced the formation of customary international law. Many of these principles and rules are now part of customary international law. As such, they are binding on all States regardless of ratification of treaties and also on armed opposition groups in case of rules applicable to all parties to a non-international armed conflict.

The study also indicates that many rules of customary international law apply in both international and non-international armed conflicts and shows the extent to which State practice has gone beyond existing treaty law and expanded the rules applicable to non-international armed conflicts. The regulation of the conduct of hostilities and the treatment of persons in internal armed conflicts is thus more detailed and complete than that which exists under treaty law. It remains to be explored to what extent, from a humanitarian and military perspective, this more detailed and complete regulation is sufficient or whether further developments in the law are required.

As is the case for treaty law, effective implementation of the rules of customary international humanitarian law is required through dissemination, training and enforcement. These rules should be incorporated into military manuals and national legislation, wherever this is not already the case.

The study also reveals areas where the law is not clear and points to issues which require further clarification or agreement, such as the definition of civilians in

Customary International Humanitarian Law Study

non-international armed conflicts, the concept of direct participation in hostilities and the scope and application of the principle of proportionality.

In the light of the achievements to date and the work that remains to be done, the study should not be seen as the end but rather as the beginning of a new process aimed at improving understanding of and agreement on the principles and rules of international humanitarian law. In this process, the study can form the basis of a rich discussion and dialogue on the implementation, clarification and possible development of the law.

Notes

1. International Conference for the Protection of War Victims, Geneva, Aug. 30–Sept. 1, 1993, *Final Declaration*, 296 INTERNATIONAL REVIEW OF THE RED CROSS 381 (1993).
2. Meeting of the Intergovernmental Group of Experts for the Protection of War Victims, Geneva, Jan. 23–27, 1995, *Recommendation II*, 310 INTERNATIONAL REVIEW OF THE RED CROSS 84 (1996).
3. 26th International Conference of the Red Cross and Red Crescent, Geneva, Dec. 3–7, 1995, Resolution 1, International humanitarian law: From law to action; Report on the follow-up to the International Conference for the Protection of War Victims, 310 INTERNATIONAL REVIEW OF THE RED CROSS 58 (1996).
4. JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (2005) (2 volumes: Volume I, Rules; Volume II, Practice (2 Parts)).
5. Statute of the International Court of Justice, art. 38.1(b), June 26, 1945, 33 U.N.T.S. 993.
6. Continental Shelf (Libya v. Malta), Judgment, 1985 I.C.J. 13, 29–30 (June 3).
7. North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), Judgment, 1969 I.C.J. 3 (Feb. 20).
8. The importance of these conditions was stressed by the International Court of Justice. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 254–255 (July 8).
9. Statute of the International Court of Justice, *supra* note 5, art. 38.1(b).
10. The expression “dense” in this context comes from Sir Humphrey Waldock, *General Course on Public International Law*, in 106 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 44 (1962).
11. North Sea Continental Shelf, *supra* note 7, at 43.
12. See Military and Paramilitary Activities (Nicar. v. U.S.), Merits, Judgment, 1986 I.C.J. 14, 98 (June 27).
13. International Law Association, Final Report of the Committee on the Formation of Customary (General) International Law, Statement of Principles Applicable to the Formation of General Customary International Law, Report of the Sixty-Ninth Conference 23 (Principal 14) (2000), available at <http://www.ila-hq.org/pdf/CustomaryLaw.pdf> [hereinafter ILA Report].
14. *Id.* at 25–26 (commentary (d) and (e) to Principle 14).
15. North Sea Continental Shelf, *supra* note 7, at 43.
16. ILA Report, *supra* note 13, at 26 (commentary (e) to Principle 14).
17. See HENCKAERTS & DOSWALD-BECK, *supra* note 4, Vol. I, commentary to Rule 144.

18. For an in-depth discussion of this issue, see Maurice H. Mendelson, *The Formation of Customary International Law*, in 272 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 227–244 (1998).
19. ILA Report, *supra* note 13, at 27 (commentary (b) to Principle 15).
20. *Id.* at 20 (commentary (b) to Principle 12).
21. *Id.* at 7 (para. 10(c)). For an in-depth analysis of this question, see Peter Haggemacher, *La doctrine des deux éléments du droit coutumier dans la pratique de la Cour internationale*, 90 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 5 (1986).
22. See, e.g., *S.S. Lotus (Fr. v. Turk.)*, Judgment, P.C.I.J. Ser. A, No. 10, at 28 (Sept. 7) (the Court found that States had not abstained from prosecuting wrongful acts aboard ships because they felt prohibited from doing so); *North Sea Continental Shelf*, *supra* note 7, at 43–44 (the Court found that States that had delimited their continental shelf on the basis of the equidistance principle had not done so because they felt obliged to); ILA Report, *supra* note 13, at 36–38 (Principle 17(iv) and commentary).
23. *North Sea Continental Shelf*, *supra* note 7, at 42.
24. *Military and Paramilitary Activities*, *supra* note 12, at 99–100. Another important factor in the decision of the Court was that relevant UN General Assembly resolutions had been widely approved, in particular Resolution 2625 (XXV) on friendly relations between States, which was adopted without a vote.
25. *Continental Shelf*, *supra* note 6, at 33. (The Court considered that the concept of an exclusive economic zone had become part of customary international law, even though the United Nations Convention on the Law of the Sea had not yet entered into force, because the number of claims to an exclusive economic zone had risen to 56, which included several specially affected States.)
26. *Continental Shelf*, *supra* note 6, at 29–30.
27. *North Sea Continental Shelf*, *supra* note 7, at 42; see also ILA Report, *supra* note 13, at 43–54 (Principles 20–21, 24, 26 and 27).
28. The Steering Committee consisted of Professors Georges Abi-Saab, Salah El-Din Amer, Ove Bring, Eric David, John Dugard, Florentino Feliciano, Horst Fischer, Françoise Hampson, Theodor Meron, Djamchid Momtaz, Milan Šahović and Raúl Emilio Vinuesa.
29. Africa: Algeria, Angola, Botswana, Egypt, Ethiopia, Nigeria, Rwanda, South Africa and Zimbabwe; Americas: Argentina, Brazil, Canada, Chile, Colombia, Cuba, El Salvador, Nicaragua, Peru, United States of America and Uruguay; Asia: China, India, Indonesia, Iran, Iraq, Israel, Japan, Jordan, Republic of Korea, Kuwait, Lebanon, Malaysia, Pakistan, Philippines and Syria; Australasia: Australia; Europe: Belgium, Bosnia and Herzegovina, Croatia, France, Germany, Italy, Netherlands, Russian Federation, Spain, United Kingdom and Yugoslavia.
30. Principle of distinction: Professor Georges Abi-Saab (rapporteur) and Jean-François Quéguiner (researcher); Specifically protected persons and objects: Professor Horst Fischer (rapporteur) and Gregor Schotten and Heike Spieker (researchers); Specific methods of warfare: Professor Theodor Meron (rapporteur) and Richard Desgagné (researcher); Weapons: Professor Ove Bring (rapporteur) and Gustaf Lind (researcher); Treatment of civilians and persons *hors de combat*: Françoise Hampson (rapporteur) and Camille Giffard (researcher); Implementation: Eric David (rapporteur) and Richard Desgagné (researcher).
31. Africa: Angola, Burundi, Chad, Chad–Libya, Democratic Republic of the Congo, Djibouti, Eritrea–Yemen, Ethiopia (1973–1994), Liberia, Mozambique, Namibia, Nigeria–Cameroon, Rwanda, Senegal, Senegal–Mauritania, Sierra Leone, Somalia, Somalia–Ethiopia, Sudan, Uganda and Western Sahara; Americas: Guatemala and Mexico; Asia: Afghanistan, Cambodia, India (Jammu and Kashmir), Papua New Guinea, Sri Lanka, Tajikistan, Yemen and Yemen–

Customary International Humanitarian Law Study

Eritrea (also under Africa); Europe: Armenia–Azerbaijan (Nagorno-Karabakh), Cyprus, Former Yugoslavia (conflict in Yugoslavia (1991–1992), conflict in Bosnia and Herzegovina (1992–1996), conflict in Croatia (Krajinas) (1992–1995)), Georgia (Abkhazia), Russian Federation (Chechnya) and Turkey.

32. The following academic and governmental experts participated in their personal capacity in this consultation: Abdallah Ad-Douri (Iraq), Paul Berman (United Kingdom), Sadi Çaycı (Turkey), Michael Cowling (South Africa), Edward Cummings (United States of America), Antonio de Icaza (Mexico), Yoram Dinstein (Israel), Jean-Michel Favre (France), William Fenrick (Canada), Dieter Fleck (Germany), Juan Carlos Gómez Ramírez (Colombia), Jamshed A. Hamid (Pakistan), Arturo Hernández-Basave (Mexico), Ibrahim Idriss (Ethiopia), Hassan Kassem Jouni (Lebanon), Kenneth Keith (New Zealand), Githu Muigai (Kenya), Rein Müllerson (Estonia), Bara Niang (Senegal), Mohamed Olwan (Jordan), Raul C. Pangalangan (Philippines), Stelios Perrakis (Greece), Paulo Sergio Pinheiro (Brazil), Árpád Prandler (Hungary), Pemmaraju Sreenivasa Rao (India), Camilo Reyes Rodríguez (Colombia), Itse E. Sagay (Nigeria), Harold Sandoval (Colombia), Somboon Sangianbut (Thailand), Marat A. Sarsembayev (Kazakhstan), Muhammad Aziz Shukri (Syria), Parlaungan Sihombing (Indonesia), Geoffrey James Skillen (Australia), Guoshun Sun (China), Bakhtyar Tuzmukhamedov (Russia) and Karol Wolfke (Poland).

33. Legality of the Threat or Use of Nuclear Weapons, *supra* note 8, at 257–258 (with respect to the Geneva Conventions) and Military and Paramilitary Activities, *supra* note 12, at 114 (with respect to common Article 3).

34. See HENCKAERTS & DOSWALD-BECK, *supra* note 4, Vol. I, Rules 1 and 7.

35. See *id.*, Rules 11–13.

36. See *id.*, Rule 14.

37. See *id.*, Rules 15–24.

38. See *id.*, Rules 25 and 27–30.

39. See *id.*, Rules 31–32.

40. See *id.*, Rule 34.

41. See *id.*, Rule 26.

42. See *id.*, Rules 36–37.

43. See *id.*, Rules 46–48.

44. See *id.*, Rule 53.

45. See *id.*, Rule 54.

46. See *id.*, Rules 57–65.

47. See *id.*, Rules 87–105.

48. See *id.*, Rule 117.

49. See *id.*, Rules 134–137.

50. See *id.*, Rule 1.

51. See *id.*, Rules 25 and 27–30.

52. See *id.*, Rule 26.

53. See *id.*, Rule 53.

54. See *id.*, Rule 54.

55. See *id.*, Rules 87–105.

56. See *id.*, Rules 109–111.

57. See *id.*, Rules 112–113.

58. See *id.*, Rules 118–119, 121 and 125.

59. See *id.*, Rule 129.

60. See *id.*, Rules 134–137.

61. See, e.g., *id.*, Rules 7–10 (distinction between civilian objects and military objectives), Rules 11–13 (indiscriminate attacks), Rule 14 (proportionality in attack), Rules 15–21 (precautions in attack); Rules 22–24 (precautions against the effects of attack); Rules 31–32 (humanitarian relief personnel and objects); Rule 34 (civilian journalists); Rules 35–37 (protected zones); Rules 46–48 (denial of quarter); Rules 55–56 (access to humanitarian relief) and Rules 57–65 (deception).
62. See Protocol Additional (I) to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 70(1), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I] and Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, art. 18(2), June 8, 1977, art. 18(2), 1125 U.N.T.S. 609, [hereinafter Additional Protocol II], *reprinted in* DOCUMENTS ON THE LAWS OF WAR (Adam Roberts & Richard Guelff eds., 3d ed. 2000) at 422 and 483, respectively.
63. See COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at para. 4885 (Yves Sandoz, Christophe Swinarski, Bruno Zimmermann eds., 1987); see also para. 2805.
64. See HENCKAERTS & DOSWALD-BECK, *supra* note 4, Vol. I, Rule 3 (combatants), Rule 4 (armed forces) and Rule 5 (civilians and civilian population).
65. Additional Protocol II, *supra* note 62, arts. 13–15, 17–18.
66. See, e.g., Amended Protocol II to the Convention on Certain Conventional Weapons, art. 3(7)–(11), May 3, 1996, 35 INTERNATIONAL LEGAL MATERIALS 1206; Protocol III to the Convention on Certain Conventional Weapons, art. 2, Oct. 10, 1980, 1342 U.N.T.S. 137; Ottawa Convention on the Prohibition of Anti-personnel Mines, preamble, Sept. 18, 1997, 36 INTERNATIONAL LEGAL MATERIALS 1507; Statute of the International Criminal Court, *supra* note 5, art. 8(2)(e)(i), (iii) and (viii).
67. See, e.g., Direct Participation in Hostilities under International Humanitarian Law, Report prepared by the International Committee of the Red Cross (Sept. 2003), *available at* www.icrc.org.
68. Additional Protocol I, *supra* note 62, art. 56(1) (followed, however, by exceptions in paragraph 2) and Additional Protocol II, *supra* note 62, art. 15 (with no exceptions).
69. See HENCKAERTS & DOSWALD-BECK, *supra* note 4, Vol. I, Rule 45.
70. Legality of the Threat or Use of Nuclear Weapons, *supra* note 8, para. 30.
71. See HENCKAERTS & DOSWALD-BECK, *supra* note 4, Vol. I, Rule 44.
72. See *id.*, Rule 33.
73. International Military Tribunal at Nuremberg, Case of the Major War Criminals, Judgment, Oct. 1, 1946, Official Documents, Vol. I, pp. 253–254.
74. See Statute of the International Criminal Court, *supra* note 5, art. 8(2)(b)(xvi) and (e)(v) (Elements of Crimes for the International Criminal Court, Pillage as a war crime).
75. See HENCKAERTS & DOSWALD-BECK, *supra* note 4, Vol. I, Rules 67–69.
76. This rule incorporates a reference to a number of other rules of customary international law, namely the prohibition of biological and chemical weapons; the prohibition of attacks against vegetation that is not a military objective; the prohibition of attacks that 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; and the prohibition on causing widespread, long-term and severe damage to the natural environment. See *id.*, Rule 76.
77. Legality of the Threat or Use of Nuclear Weapons, *supra* note 8, at 226.
78. *Id.*; see also United Nations General Assembly, 51st session, First Committee, Statement by the International Committee of the Red Cross, UN Doc. A/C.1/51/PV.8, 18 October 1996, p. 10,

Customary International Humanitarian Law Study

reprinted in 316 INTERNATIONAL REVIEW OF THE RED CROSS 118–119 (1997) (“the ICRC finds it difficult to envisage how a use of nuclear weapons could be compatible with the rules of international law”).

79. These rules include the fundamental guarantees that civilians and persons *hors de combat* be treated humanely and without adverse distinction; the prohibition of murder; the prohibition of torture, cruel or inhuman treatment and outrages upon personal dignity, in particular humiliating and degrading treatment; the prohibition of corporal punishment; the prohibition of mutilation, medical or scientific experiments; the prohibition of rape and other forms of sexual violence; the prohibition of slavery and the slave trade in all their forms; the prohibition of hostage-taking; the prohibition of the use of human shields; fair trial guarantees; the prohibition of collective punishments; and the requirement to respect the convictions and religious practices of civilians and persons *hors de combat*. See HENCKAERTS & DOSWALD-BECK, *supra* note 4, Vol. I, Rules 87–94, 96–97 and 100–104.

80. *See id.*, Rules 95, 98–99 and 105.

81. *See id.*, Introduction to Chapter 32, Fundamental Guarantees.

82. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, (July 9, 2004), 43 INTERNATIONAL LEGAL MATERIALS 1009, para. 106 at 1038, available at <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm>.

83. Additional Protocol II, *supra* note 62, art. 1(1).

Annex

List of Customary Rules of International Humanitarian Law

Note. 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 organized 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 neutralization, 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 minimize, 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 minimizing, 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 demilitarized 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 willful 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]

Customary International Humanitarian Law Study

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 minimize, 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 recognized 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 defenseless 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 authorized 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]

Customary International Humanitarian Law Study

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 authorized by the organization. [IAC/NIAC]

Rule 61. The improper use of other internationally recognized 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]

Customary International Humanitarian Law Study

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 minimize 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 minimize, 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, color, 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 labor 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]

Customary International Humanitarian Law Study

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.

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.

[IAC (A)/NIAC (B)]

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. [IAC/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.
- 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.
- 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.

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. [IAC (A&B)/NIAC (C)]

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.
- 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.

[IAC (A)/NIAC (B)]

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]

Customary International Humanitarian Law Study

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]