THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW AND NON-INTERNATIONAL ARMED CONFLICT: PROBLEMS SOLVED?

Corina DODI, master

Articolul dat prezintă o analiză concisă a Studiului efectuat de către experții Comitetului Internațional al Crucii Roșii în ceea ce privește normele cutumiare ale dreptului internațional umanitar aplicabile în timpul conflictelor armete fără caracter internațional. Dezvăluie procesul de creare a Studiului sus menționat și dă o caracteristică generală a celor mai importante norme care se referă la conflictele interne, este important de menționat că aproape toate cele 161 de norme incluse în Studiu se referă și la conflictele interne. Articolul prezintă de asemenea și opiniile critice ale unor experți în domeniul dat precum și reacția guvernului SUA la publicarea acestui Studiu.

International humanitarian law (IHL) is characterized by an interplay between customary law and treaty law. Sometimes norms which develop as customary law are subsequently codified in treaties. The Rome Statute is a good example of this process, as the crimes defined in the Rome Statute and elaborated in the Elements of Crimes were intended to reflect customary international law. Customary law also is important in binding States independent of their treaty obligations. The relative flexibility of customary law enables international law to keep pace with the dynamic and fast-paced world it regulates. Relying on customary law, however, involves a significant challenge in discerning the precise content of the law. The ICRC's important study on customary IHL should assist in this task.[1]

International humanitarian law (IHL) and public international law in general have two main sources: treaty law and customary international 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. There are, however, two serious impediments to the application of the several IHL treaties in current armed conflicts that justify the necessity and usefulness of a study on customary international humanitarian law. First, treaties apply only to the States

1 Kirsch Ph., President of the International Criminal Court, Customary Humanitarian Law, Its Enforcement, and the Role of the International Criminal Court//*Summary of keynote address at the Launch of the ICRC Study on Customary International Humanitarian Law.* [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/hague-conference-310506/$File/conference%20the%20hague.pdf]

that have ratified them, and second, IHL treaty law does not regulate in sufficient detail non-international armed conflicts, subject to far fewer treaty rules than international armed conflicts. The main purpose of the study was, therefore, to overcome some problems related to the application of international humanitarian treaty law. The second purpose was to determine whether customary IHL regulates non-international armed conflicts in more detail than treaty law and if so, to what extent.[1]

The ICRC Study on Customary International Humanitarian Law follows a practice oriented approach in identifying existing rules for the protection of victims of all armed conflict. Rules applicable in non-international armed conflicts may be much more relevant today than rules governing conduct in international wars. But practice shows that the law is widely violated and (what may be even more distressing for victims, international organizations and warring parties alike) means to enforce compliance with existing rules are often weak and sometimes not available. Hence the most important challenge is how to deal with the imperfect situation of compliance and enforcement in a realistic and convincing manner.[2]

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."

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.

The ICRC was 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

1 "International Conference, Customary International Humanitarian Law: challenges, practices and debates, September 29, 30 and October 1, 2005, Montreal, Quebec, Canada", Report from the Canadian Red Cross, [http://www.redcross.ca/cmslib/general/int_crc_mcgill_conference_report_eng.pdf].

2 Fleck D. Improving Enforcement of International Humanitarian Law in Internal Armed Conflicts. [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/hague-conference-310506/$File/conference%20the%20hague.pdf]

international bodies. 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.

Nearly ten years later, in 2005, after extensive research and widespread consultation with experts, this report, now referred to as the study on customary international humanitarian law, has been published.[1]

The result is presented in 161 rules with commentaries (Volume I) and documented practice (Volume II in 2 Parts), in which rules for the protection of victims of all armed conflict are identified.[2]

As declared by ICRC President Jakob Kellenberger in his foreword, the Study serves three main purposes: first it identifies principles and provisions of humanitarian protection that are binding upon States irrespective of their formal adherence to certain instruments of treaty law; second it describes rules applicable in non-international armed conflicts for which only few provisions of treaty law are applicable; and last, but not least, it offers support in the interpretation of treaty law and may even contribute to a change of certain treaty provisions to the extent it is providing evidence for a recently formed rule of customary law that may prevail over the older rule.[3]

The methodology used in the study was described as inductive and classical. Following the Statute[4] and the jurisprudence[5] of the International Court of Justice (ICJ), international custom is a body of legal norms that arises from the general and consistent practice of States (*usus*) motivated by a sense of legal obligation (*opinio iuris*)[6]. Through widespread consultation with experts in IHL representing a variety of geographical regions, legal systems, governments, and international organizations, ICRC researchers from nearly 50 States canvassed State practice and *opinio iuris* over the last 30 years. The practice of States was searched in military manuals, reports on military operations, legislation, jurisprudence, official statements, reservations, etc.

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1 Хенкертс Ж. — М. Исследование об обычном международном гуманитарном праве: лучше понимать и полнее соблюдать нормы права во время вооруженного конфликта// Международный журнал Красного Креста. — Том 87, номер 857, март 2005. — С. 2-3.

2 Fleck D. "Book Review, J.M. Henckaerts and L. Doswald-Beck (eds.), *Customary International Humanitarian Law*, Cambridge University Press (2005)", in *International Peacekeeping: The Yearbook of International Peace Operations*, 11 (2007). — P. 263.

3 Fleck D., "Book Review, J.M. Henckaerts and L. Doswald-Beck (eds.), *Customary International Humanitarian Law*, Cambridge University Press (2005)". — P. 264.

4 Statute of the International Court of Justice, art. 38.1(b).

5 *North Sea Continental Shelf cases (Federal Republic of Germany/Denmark; Federal Republic of* Germany/Netherlands), Judgment, [1969] I.C.J. Rep. 3; Case concerning Military and Paramilitary activities in and against Nicaragua (Nicaragua v. United States), Merits, Judgment, [1986] I.C.J. Rep. 14 at para. 186 [Nicaragua case]

6 *Opinio juris* is the subjective portion and is commonly determined via verbal pronunciations of the state made in conjunction with the state's actions.

with the belief that these documents reflect what is done in the field, acknowledging nonetheless that the practice is not always reflected at the time of the violation but assists its understanding.[1]

The application of customary law is not necessarily connected with the existence of an applicable treaty as there is no applicable treaty if the relevant treaty to a specific situation has not been ratified by the concerned parties, if questions that arise in the conflict are not solved by the relevant treaty or if the treaty has been derogated by one of the parties and no longer constitute the applicable law. The question is whether customary law has been remedying such deficiencies. The legal nature of customary law defines it as the sum of practice and *opinio iuris*. Yet, a question that arises is where the practice is? The classical understanding in international law points to State practice, but a renewed approach could lead to consider also the practice of international organizations and the fora they provide for States to present their views and evidence State practice. Arguably, this process consolidates practices of customary law as much as the enactment of a treaty.[2]

The state practice as defined in the Study means "physical and verbal acts of states"[3], i.e., of state organs. Both types of acts involve questions of interpretation. In the case of physical acts, their value as proof of customary law is not always easy to assess. It is certain that no US official would claim that the incidents at Abu Ghraib prison constitute proof of customary law that torture is not allowed. They constitute violations of the law, but this becomes clear only if one refers to related verbal practice, both of the US and other states.[4]

Commentators have criticized the ICRC in its review of state practices. Specifically, many are concerned that the ICRC did not weigh state practice according to whether the state actually engaged in military conflict: practice by New Zealand seems to be given the same consideration as practice by the United States. Some suggest that countries who do not engage in military operations promulgate and practice customary laws that severely constrain military activity — they need not balance the need for IHL against the costs of an effective military force. Continental Europe, for example, no longer engages in large-scale military defense operations and thus European nations do not have to concern themselves with figuring out the logistics of implementing IHL in real situations or with any negative consequences to military operations, and neither does an international organization such as the ICRC. This

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1 International Conference, Customary International Humanitarian Law: challenges, practices and debates, September 29, 30 and October 1, 2005, Montreal, Quebec, Canada", Report from the Canadian Red Cross, [http://www.redcross.ca/cmslib/general/int_crc_mcgill_conference_report_eng.pdf].

2 Там же.

3 Хенкертс Ж. — М., Досвальд-Бек Л. Обычное международное гуманитарное право. — Том 1, Нормы. — МККК, 2006 (перевод с английского). — С. xliii.

4 Bothe M. "Customary International Humanitarian Law: Some reflections on the ICRC Study", in *Yearbook of International Humanitarian Law* 8 (2005). — P. 156.

criticism has merit to the extent that it raises the issue of implementation: if countries engaged in conflict do not agree with the IHL or find IHL rules overly restrictive of military operations, then the law is not practiced by any relevant state and cannot reasonably be considered "customary."[1]

All manifestations of State practice and legal opinion are relevant for the formation and determination of international custom, in particular: military manuals, national legislation, official statements (protests, declarations, "*prises de position*"), positions adopted by States in international conferences, e. g. unanimity in adopting some provisions, or the prohibition of reservations, official reports on battlefield behavior, case law : decisions of national courts, case law : decisions of international courts.

The study cites the following order: treaties, national practice (military manuals, national legislation, national case-law, and other national practice), practice of international organizations and conferences (UN, other international organizations, international conferences), practice of international judicial and quasi-judicial bodies, practice of the International Red Cross and Red Crescent Movement, and other practice. In fact, the "other national practice" cited to support Rule 52 (the prohibition of pillage), includes twenty public, verbal statements condemning and reporting pillage (mostly in the context of UN debate), two internal documents opposing pillage, one denial of pillage in response to accusations, one boasting of pillage, one order to refrain from pillage, one opinion of a military lawyer, and one actual instance of a state refraining from pillage. This shows a picture of states publicly denouncing pillage, but in many cases, actually participating in pillage.[2]

Gathering this practice from all over the world was a major challenge and a huge research undertaking for which the ICRC benefited from the contributions of more than 100 academic and government experts. The authors relied on forty-seven country reports, reflecting and analyzing the practice of as many States, including the five permanent members of the Security Council and other countries involved in armed conflicts. The practice of some forty recent armed conflicts was examined on the basis of ICRC archives.

Customary International Humanitarian Law frequently cites the reports and activities of other international organizations, such as United Nations (UN) bodies, regional organizations such as the League of Arab States, and international tribunals as evidence. The ICRC's reliance on its own activities as well as those of non-state parties are, by definition, not actually state practice.[3] In this sense the introduction of the Study states that international organizations have international legal personality and can participate in international relations in their own capacity, independently of

1 Nicholls L.M. "The Humanitarian Monarchy legislates: The International Committee of the Red Cross and its 161 Rules of Customary International Humanitarian Law", in *Duke Journal of Comparative and International Law* 17 (2006). — P. 239-240.

2 Nicholls L.M. Указ. соч. — С. 242.

3 Nicholls L.M. Указ. соч. — С. 241.

their member states. In this respect, their practice can contribute to the formation of customary international law.[1]

The military manuals and national legislation of countries not covered by country reports on State practice were also collected and analyzed. Six thematic groups of experts focused on essential issues: the principle of distinction, specifically protected persons and objects, methods of warfare, weapons, treatment of civilians and persons *hors de combat*, and implementation.

The introduction to the Study highlights as its major general result that it "provides evidence that many rules of customary international law apply in both international and non-international armed conflicts". The elements of state practice repeatedly note in this respect are usually the same: relevant treaties, the Rome statute, provision of military manuals applicable in the case of non-international armed conflict, claims of violation of the rule, Red Cross and Red Crescent Conference resolutions, UN resolutions, case law of the ICJ, case law of the ICTY and ICTR, absence of contrary practice. [2]

All 161 rules contained in the report on customary IHL apply only in the case of an "armed conflict," which in turn may be either international or non-international in character. The existence of an armed conflict is both a necessary and sufficient condition for the application of humanitarian law. A formal declaration of war is not required and the reason as to why military force was used is irrelevant to IHL's applicability in a given situation. The Conventions, however, provide no definition of the term "armed conflict"; state practice must be consulted instead.

According to one editor, Jean-Marie Henckaerts, no customary definition of "armed conflict" was included in the Study because doing so would require a study in and of itself. [Short of that] all we could have done was to repeat the various provisions in treaty law (Geneva Conventions, Articles 2 and 3; Additional Protocol II, Article 1(1); ICC Statute) and possibly some *dicta* from case law of the ICTY. But we felt that this was not sufficiently exhaustive to make any statement and, as a result, we left it out. If we are able to do more research into state practice in the future, we might include a section on this issue in a possible future edition.

The decision not to include a customary definition of armed conflict is also unsatisfying from a rule-of law perspective. A customary definition is crucial for the humanitarian cause. In the absence of such standards, the parties to an armed conflict must be convinced that IHL is applicable before this body of law can have its humanitarian effect. Detailed rules in the Study risk being a dead letter, if it is left open to States to argue that the situation in question does not constitute an armed conflict (or a NIAC rather than an IAC, inasmuch as the applicable rules differ). The customary definition of an armed conflict is also needed for actors other than States that are involved in hostilities, such as international governmental organizations. As

1 Bothe M. Указ. соч. — С. 160.

2 Bothe M. Там же. — С. 174.

these non-state actors are not party to IHL treaties, the customary threshold of an armed conflict is highly relevant to them.[1]

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 custom-ary 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.[2]

It has been noted that the practice regarding the use of customary IHL in non-international armed conflicts has improved, for instance, while there is no 'prisoner of war' status in common article 3 or Additional Protocol II there is practice where the prisoners of war treatment was granted in non-international armed conflicts (*e.g.* in some military manuals, and on the U.S. actions in South Vietnam, and France actions in Indochina and Algeria). Another example cited was the 2005 World Summit Outcome in which the responsibility of States to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity was enounced. Alongside State responsibility, the role of the United Nations and other international and regional organizations was set as complementary in the exercise of such responsibility by means of encouragement and support for States to fulfill their responsibilities.

The ICRC study is a very relevant tool for the implementation of customary IHL in non-international armed conflicts. Statistics were presented to support this position: in 2005, there are 23 conflicts taking place and other 28 'hot spots' where non-international armed conflicts could emerge including conflicts related to the 'war on terrorism'. Non-international armed conflicts have been historically classified as 'small wars' and today they are known as the 'three block wars' in which the first block is the actual fight in the armed conflict, the second is the stabilization period and the third is the act of delivering humanitarian assistance and reconstruction. Taking this context into account the important next step is to make the ICRC study operational.[3]

Though there are few treaties that address non-international conflict, the ICRC has determined that there are 133 rules of customary IHL that govern both international and non-international conflict in an identical fashion; another nine that govern international conflict and that "arguably" also govern non-international conflict; and four rules which are similar, but not identical, in governing the two types of

1 Maclaren M., Schwendimann F. "An Exercise in the Development of International Law: The New ICRC Study on Customary International Humanitarian Law", in *German Law Journal* 6 (2005), pp. 1227-1228.

2 Хенкертс Ж. — М. Указ. соч. — С. 18.

3 International Conference, Customary International Humanitarian Law: challenges, practices and debates, September 29, 30 and October 1, 2005, Montreal, Quebec, Canada", Report from the Canadian Red Cross, [http://www.redcross.ca/cmslib/general/int_crc_mcgill_conference_report_eng.pdf].

conflict. Only twelve of the 161 rules promulgated by the ICRC apply exclusively to international conflict. These numbers indicate that the ICRC's assessment of what constitutes customary IHL in non-international conflict is far more expansive than mainstream opinion.

Therefore, according to the Study, we can mention some differences between those two (international and non-international armed conflicts) regimes. One difference is that there is apparently no *combatant status* in the context of non-international armed conflicts. More specifically, it remains from a customary law perspective unclear whether members of armed opposition groups are to be considered combatants or civilians for various purposes. Combatants in international armed conflicts are allowed to participate directly in hostilities.

Captured combatants have a right to POW- status and may not be tried either for taking up arms or for acts not violating IHL. In contrast, direct participation in non-international armed conflicts remains in principle punishable under (national and international) criminal law, and participants in non-international armed conflicts have no right to POW status. The basic humane treatment to be afforded persons deprived of their liberty is the same for both types of armed conflicts according to customary IHL, but their release is regulated differently. In international armed conflicts, POWs must be released and repatriated without delay at the end of hostilities, whereas in non-international armed conflicts, persons deprived of their liberty must only be released after the reasons for the deprivation no longer pertain.

The principle of distinguishing between civilians and combatants has come to apply in both types of armed conflict, and only a few rules concerning civilians arguably apply in non-international armed conflicts. The lack of clarity in the definition of "combatant" and "civilian" in non-international armed conflicts undermines, however, the sought-for equal protection.[1]

Examples of rules found to be customary and which have corresponding provisions in Additional Protocol II include: the prohibition of attacks on civilians; the obligation to respect and protect medical and religious personnel, medical units and transports; the obligation to protect medical duties; the prohibition of starvation; the prohibition of attacks on objects indispensable to the survival of the civilian population; the obligation to respect the fundamental guarantees of civilians and persons *hors de combat*; the obligation to search for and respect and protect the wounded, sick and shipwrecked; the obligation to search for and protect the dead; the obligation to protect persons deprived of their liberty; the prohibition of forced movement of civilians; and the specific protections afforded to women and children.

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

1 Maclaren M., Schwendimann F. Указ. соч. — С. 1229 — 1230.

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.[1]

Some authors consider that the ICRC's treatment of Protocol II is very controversial. Protocol II provides numerous and specific protections for victims and holds individuals criminally liable if they violate IHL during non-international conflict. Many of these protections mirror those afforded to victims of international conflicts in the Geneva Conventions. As was the case for Protocol I, there is virtually no state practice of the provisions of Protocol II by non-signatories. However, the ICRC appeals to "common sense" in deciding that most of its rules of customary IHL, particularly the parts stemming from the Geneva Conventions and Protocol II, apply evenly to all types of conflict. This move is an important one in promulgating IHL because many states with ongoing internal conflicts are not party to Protocol II. However, the ICRC has been criticized for its unwarranted narrowing of the gap between the IHL governing international conflict and that governing non-international conflict; in this particular area, the ICRC efforts have especially been viewed more as making law than merely documenting it.[2] (*continuare în numărul următor*)

1 Хенкертс Ж. — М. Указ. соч. — С. 18 — 19.

2 Nicholls L.M. Указ. соч. — С. 236.