

The Evolution and Identification of the Customary International Law of Armed Conflict

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TABLE OF CONTENTS

I.	INTRODUCTION.....	727
II.	THE METHODOLOGY FOR IDENTIFYING CIHL.....	729
III.	WHOSE PRACTICE COUNTS?.....	731
IV.	SPECIALLY AFFECTED STATES.....	733
V.	INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW.....	734
VI.	CONCLUSION.....	735

I. INTRODUCTION

Despite the many widely ratified treaties on the law of armed conflict (LOAC, also referred to as international humanitarian law (IHL)), customary international law remains of great importance in this branch of international law. So far as concerns international armed conflicts, customary international humanitarian law (CIHL) is of special importance in connection with states not party to Additional Protocol I of 1977.¹ So far as concerns non-international armed conflicts, CIHL is of crucial importance for all states, since, for the most part, treaty provisions are rudimentary. The International Court of Justice has also had occasion to state that “a great many rules of humanitarian law applicable in armed conflict . . . are to be observed by all states whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.”²

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1. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3. States not party to the Protocol include Israel and the United States.

2. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 79 (July 8) [hereinafter ICJ Nuclear Weapons Opinion].

The present contribution concerns the evolution and identification of CIHL. It does not deal with the substance of that law, on which there is a good deal of material, including in the impressive study under the auspices of the International Committee of the Red Cross (ICRC).³ It addresses in particular the relevance for CIHL of the UN International Law Commission (ILC)'s recent work on the topic *Identification of customary international law*.⁴ While working on the topic, the Commission had LOAC very much in mind and tried to take into account lessons learned in the field of CIHL.

Identification and evolution of the law are obviously not the same thing, but as the ILC noted when it changed the topic's title from *Formation and evidence of customary international law* to *Identification of customary international law*, in that context they are in many ways closely related.⁵ In particular, the requirement—for identification of customary international law—to ascertain “a general practice” that is “accepted as law” reflects the fact that rules of customary international law evolve through a general practice and *opinio juris*. In other words, the two constituent elements of customary international law are also the twin criteria for its identification. The ILC's commentary to draft conclusion 1 on the topic, adopted on first reading in 2016, thus notes:

Dealing as they do with the identification of rules of customary international law, the draft conclusions do not address, directly, the processes by which customary international law develops over time. Yet in practice identification cannot always be considered in isolation from formation; the identification of the existence and content of a rule of customary international law may well involve consideration of the processes by which it has developed. The draft conclusions thus inevitably refer in places to the formation of rules; they do not, however, deal systematically with how rules emerge, or how they change or terminate.⁶

3. See JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT'L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (Cambridge Univ. Press 2005) [hereinafter ICRC STUDY]; Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INT'L REV. RED CROSS 175 (2005); see also Michael Wood (Special Rapporteur), *Fourth Rep. on Identification of Customary International Law*, U.N. Doc. A/CN.4/695/Add.1 (May 25, 2016) (enumerating other writings on the customary international law of armed conflict, including the role of nonstate actors in the customary process).

4. See generally Int'l Law Comm'n, Rep. on the Work of Its Sixty-Third Session, U.N. Doc. A/66/10, at 305–14 (2011); see also Int'l Law Comm'n, Rep. on the Work of Its Sixty-Fourth Session, U.N. Doc. A/67/10, at 133 (2012) (recording the decision to include the topic on the Commission's current programme of work).

5. For the change of title, see Int'l Law Comm'n, Rep. on the Work of Its Sixty-Fifth Session, U.N. Doc. A/68/10, at 93 (2013).

6. Int'l Law Comm'n, Rep. on the Work of Its Sixty-Eighth Session, U.N. Doc. A/71/10, at 81 (2016) [hereinafter ILC Report 2016]. The full set of sixteen draft conclusions (with commentaries) was adopted on first reading following debate within the ILC, its Drafting Committee, and a working group, over four sessions (2013–2016). A second (and final) reading is expected in 2018.

II. THE METHODOLOGY FOR IDENTIFYING CIHL

The ILC took up the topic *identification of customary international law* in 2012, as there was felt to be a need for some reasonably authoritative guidance on the methodology to be employed in identifying rules of customary international law and their content. This need resulted largely from the difficulties sometimes encountered by national courts in this regard, as well as from the potential confusion to which the theories propounded by various writers might give rise.

When the ILC began its work on the topic in 2012, almost the only recent and reasonably detailed statements by states on how rules of customary international law were to be identified were those stimulated by the ICRC study on CIHL. The very fact that the ICRC had produced its study gave rise to important statements on how to identify rules of customary international law, not only by certain governments,⁷ but also by the ICRC itself and by individual experts. This has also been the effect of the ILC's own work on the topic; but at its outset, the Commission benefitted greatly from the debate concerning the methodology referred to by the ICRC authors. That methodology also has much in common with the methodology set out by the ILC in its draft conclusions.

To begin with, an important conclusion of the ILC, as of the ICRC, is that the same basic approach—the two-element approach—applies to the identification of the existence and content of rules of customary international law in all fields of international law. This is confirmed in the practice of states and in the case law. It is also consistent with the unity and coherence of international law, which is a single legal system and is not divided into separate branches, each with its own approach to sources.⁸ This includes CIHL, just as it includes customary international human rights law.

At the same time, the ILC's commentary acknowledges that the application in practice of the basic approach may well take into account the particular circumstances and context in which an alleged rule has arisen and operates.⁹ The ILC's draft conclusion 3 similarly recognizes the need for such flexibility, stating, in part, that:

7. See, e.g., J.B. Bellinger, III & W.J. Haynes II, *A US Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law*, 89 INT'L REV. RED CROSS 443 (2007); Legal Adviser of the Foreign and Commonwealth Office, *Statement at the Meeting of National Committees on International Humanitarian Law of Commonwealth States, Nairobi, 20 July 2005*, 76 BRIT. Y.B. INT'L L. 694 (2005); PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (Elizabeth Wilmshurst & Susan Breau eds., 2007).

8. ILC Report 2016, *supra* note 6, at 84.

9. *Id.*; see also, by way of example, *Jurisdictional Immunities of the State* (Ger. v. It.; Greece intervening), Judgment, 2012 I.C.J. Rep. 99, ¶ 55 (Feb. 3).

In assessing evidence for the purpose of ascertaining whether there is a general practice and whether that practice is accepted as law (*opinio juris*), regard must be had to the overall context, the nature of the rule, and the particular circumstances in which the evidence in question is to be found.¹⁰

This means, *inter alia*, that the type of evidence consulted (and consideration of its availability or otherwise) ought to be adjusted to the situation at hand and that certain forms of practice and evidence of acceptance as law (*opinio juris*) may be of particular significance depending on the context. The reference to the “nature of the rule” indicates, for example, that where prohibitive rules are concerned, it may sometimes be difficult to find positive state practice (as opposed to state inaction); cases involving such alleged rules will thus most likely turn on evaluating whether there is deliberate inaction that is accepted as law.

Such issues may well arise when applying the two-element methodology in the field of the LOAC. Operational conduct “on the ground,” for example, which the ILC’s conclusion 6 refers to among the possible “forms of practice,” is not always easily accessible. (The commentary to this provision explains that “[o]perational conduct ‘on the ground’ includes law enforcement and seizure of property, as well as battlefield or other military activity, such as the movement of troops or vessels, or deployment of certain weapons.”¹¹) At times it may be unclear whether it reflects official policy at all. In such situations, military manuals may assume particular relevance. As for prohibitive rules, one may recall the International Court of Justice’s finding in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* that “the members of the international community are profoundly divided on the matter of whether non-recourse to nuclear weapons over the past 50 years constitutes the expression of an *opinio juris*. Under these circumstances the Court does not consider itself able to find that there is such an *opinio juris*.”¹² This is a reminder, if you will, of the importance for states to make clear their *opinio juris* when interest or circumstances so require.

CIHL provided fertile ground for considering other general questions, such as the old debate on whether statements (as opposed to physical conduct not limited to words) may qualify as practice for the purposes of customary international law. While cautioning that words cannot always be taken at face value, the ILC readily accepted that practice may comprise both physical and verbal (written and oral) conduct; taking a contrary view might be seen as encouraging confrontation and, in some cases, even the use of force.¹³ It was also

10. ILC Report 2016, *supra* note 6, at 76.

11. *Id.* at 92.

12. ICJ Nuclear Weapons Opinion, *supra* note 2, at 254.

13. Michael Wood (Special Rapporteur), *Second Rep. on Identification of Customary International Law*, U.N. Doc. A/CN.4/672, at 19–21 (May 22, 2014).

understood that, in the particular context of CIHL, states not directly involved in a conflict are not necessarily silent about it; their statements may be important evidence of *opinio juris* (just as practice they may engage in outside the battlefield, such as training simulations and weapon acquisition, may also be of relevance).

III. WHOSE PRACTICE COUNTS?

This leads to another issue that is particularly relevant in relation to CIHL: Whose practice counts? A frequent question is whether the practice of nonstate actors is relevant.¹⁴ For example, it is sometimes argued that the practice and *opinio juris* of nonstate armed groups should count for the purposes of determining whether a rule of CIHL exists or not. It is said, for example, that since they are bound by that law, their acts, omissions, and opinions should contribute to its making. Such arguments do not stand up. Individuals are also bound by international criminal law, but that does not mean that their actions should contribute to the necessary practice. The ICRC Study states the position clearly: “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.”¹⁵

This question is also dealt with in the ILC’s draft conclusions. Conclusion 4, paragraph 1, confirms the primacy of state practice as creative, or expressive, of rules of customary international law, while paragraph 2 stipulates that “in certain cases” the practice of international (intergovernmental) organizations may also be of relevance. Paragraph 3 then clarifies that the conduct of “other actors” (and this would include nonstate armed groups) may not. It reads: “Conduct of other actors is not practice that contributes to the formation, or expression, of rules of customary international law, but may be relevant when assessing the practice referred to in paragraphs 1 and 2.”¹⁶ This paragraph is explained in the commentary as follows:

14. “Nonstate actors” is not a term of art and not without ambiguity. There is no accepted definition in general use. In the ILC, for example, some members understood the term to include international organizations, while others rejected such classification; hence, “other actors” in paragraph 3 of the ILC’s draft conclusion 4: ILC Report 2016, *supra* note 6, at 76.

15. ICRC STUDY, *supra* note 3, at xlii.

16. ILC Report 2016, *supra* note 6, at 76. This conclusion is similar to the Commission’s approach in the context of its work on the topic ‘Subsequent agreements and subsequent practice in relation to the interpretation of treaties’. There it was decided that “[o]ther conduct, including by non-State actors, does not constitute subsequent practice . . . Such conduct may, however, be relevant when assessing the subsequent practice of parties to a treaty.” *Id.* at 121.

Paragraph 3 makes explicit . . . that the conduct of entities other than States and international organizations—for example, NGOs, non-State armed groups, transnational corporations and private individuals—is neither creative nor expressive of customary international law. As such, their conduct does not serve as direct (primary) evidence of the existence and content of rules of customary international law. The paragraph recognizes, however, that such conduct may have an important indirect role in the identification of customary international law, by stimulating or recording practice and acceptance as law (*opinio juris*) by States and international organizations. *Although the conduct of non-State armed groups is not practice that may be said to be constitutive or expressive of customary international law, the reaction of States to it may well be.* . . .

Official statements of the International Committee of the Red Cross (ICRC), such as appeals and memoranda on respect for international humanitarian law, may likewise play an important role in shaping the practice of states reacting to such statements; and publications of ICRC may serve as helpful records of relevant practice. Such activities may thus contribute to the development and determination of customary international law; but they are not practice as such.¹⁷

The tripartite division set out in conclusion 4 is quite similar to that given in a 2012 article by Anthea Roberts and Sandesh Sivakumaran on the possible relevance of “lawmaking by nonstate actors.”¹⁸ Their division into states, state-empowered bodies, and nonstate actors corresponds largely to the ILC’s division into states, international organizations, and other actors.¹⁹ However, while there is much to be learnt from their generally cautious approach, and from their description of the current position, the main thrust of their article is policy oriented and is unlikely to be embraced by states. The ILC, by contrast, has sought to describe the current position and not to promote radical change in the way that customary international law develops.

In the Sixth Committee and elsewhere, there seems to be a consensus as well as to the proposition regarding the primacy of the practice of states (the primary subjects of international law). There is also general agreement with respect to the role of “other actors”: they may have an indirect but sometime important role in stimulating, influencing, or recording the practice and *opinio juris* of states and international organizations. It is noteworthy that the ICRC, whose unique mandate and activity during armed conflicts and other emergencies may have much influence on international humanitarian law, appears to be in agreement with this view as well.²⁰

17. *Id.* at 89–90 (emphasis added).

18. Anthea Roberts & Sandesh Sivakumaran, *Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law*, 37 YALE J. INT’L L. 107 (2012).

19. *Id.* at 110.

20. See *Report of the International Law Commission: ICRC Statement to the United Nations, 2016*, INT’L COMM. RED CROSS (Nov. 15, 2016), <https://www.icrc.org/en/document/report-international-law-commission-icrc-statement-2016> [https://perma.cc/SZB6-P2RK] (archived Feb. 5, 2018).

With regard to the suggestion by some that the practice of individuals, such as fishermen, has been recognized as giving rise to customary international law, it is probably more accurate to say that while:

[i]t cannot be denied, of course, that actions of individuals may create certain facts which may subsequently become the subject matter of inter-state dialogue . . . in such circumstances the actions of individuals do not constitute a law-creating practice: they are just simple facts giving rise to international practice of states.²¹

IV. SPECIALLY AFFECTED STATES

The ILC's draft conclusion 8, paragraph 1, reads: "The relevant practice must be general, meaning that it must be sufficiently widespread and representative, as well as consistent."²² This is explained in more detail in the commentary:

Paragraph 1 explains that the notion of generality, which refers to the aggregate of the instances in which the alleged rule of customary international law has been followed, embodies two requirements. First, the practice must be followed by a sufficiently large and representative number of States. Second, such instances must exhibit consistency. In the words of the International Court of Justice in the *North Sea Continental Shelf* cases, the practice in question must be both "extensive and virtually uniform": it must be a "settled practice."²³

The notion of "states whose interests are specially affected" or "specially affected states" is often referred to in connection with customary international law, including CIHL. But there is some misunderstanding of the concept, including within the ILC. While the text of the draft conclusion does not refer to "specially affected states" (even though a reference was proposed by the Special Rapporteur²⁴), it is mentioned in the commentaries in the following terms:

In assessing generality, an important factor to be taken into account is the extent to which those States that are particularly involved in the relevant activity or most likely to be concerned with the alleged rule have participated in the practice. It would clearly be impractical to determine, for example, the existence and content of a rule of customary international law relating to navigation in maritime zones without taking into account the practice of coastal states and major shipping states, or the existence and content of a rule on foreign investment without evaluating the practice of the capital-exporting States as

21. G.M. DANILENKO, LAW-MAKING IN THE INTERNATIONAL COMMUNITY 84 (1993).

22. ILC Report 2016, *supra* note 6, at 94.

23. *Id.* (internal citations omitted).

24. See Wood, *supra* note 13, at 38–40, 45.

well as that of the States in which investment is made. In many cases, all or virtually all States will be equally concerned.²⁵

The importance of the notion of “specially affected states” should not be overstated. It does not imply that we *only* look at the practice of specially affected states, as some seem to fear. It simply means that their practice has to be included. In the *North Sea Continental Shelf* cases, the International Court of Justice referred to “a very widespread and representative participation in the convention [that] might suffice of itself, provided it included that of States whose interests were specially affected.”²⁶

Whether there are specially affected states depends upon the specific rules in question, not the branch of international law concerned. For some rules, there are likely to be no states that are specially affected—all states may be equally affected. It is perhaps difficult to say in all cases that only those states that are fighting are specially affected; again, depending on the specifics, other involved states may also be affected, for example, by a use of nuclear weapons.

V. INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW

There was much discussion at the IDF conference about the relationship between international human rights law and international humanitarian law. There are at least three major differences between these two branches of the law, at least one of which is relevant to the subject matter of this contribution.

First, they are quite different in substance; they reflect different policies and objectives.

Second, at least as important as the substantive differences, there are the different enforcement mechanisms. In the case of international human rights law there is often a comprehensive and compulsory jurisdiction of the courts, national or regional, and/or of international supervisory bodies. Conversely, questions concerning the responsibility of states for violations of international humanitarian law are less likely to be subject to the compulsory jurisdiction of a court. Except in the case of international criminal law, international courts and tribunals will only have jurisdiction where the state concerned has consented. Thus, despite substantive treaty provisions for reparations, enforcement through the courts is rarely possible.

Third, and here we return to customary international law, IHL is universal. The Geneva Conventions (though not the Additional

25. ILC Report 2016, *supra* note 6, at 95 (internal citations omitted).

26. *North Sea Continental Shelf* (Ger./Den.; Ger./Neth.), Judgment, 1969 I.C.J. Rep. 3, ¶ 73 (Feb. 20).

Protocols) have been ratified by virtually all states, and CIHL, which plays so important a role in non-international armed conflicts, is by definition universal (unless a state can establish itself as a persistent objector²⁷). Conversely, human rights law shows great regional differences. One example concerns detention. Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms contains what the European Court of Human Rights has declared to be an exhaustive list of five circumstances in which detention is permitted. Article 9 of the International Covenant on Civil and Political Rights, by contrast, prohibits “arbitrary arrest or detention.” This is more open-ended. Despite welcome signs of a more realistic approach in a 2014 case, *Hassan v. the United Kingdom*, the Strasbourg Court’s case law remains unpredictable. Moreover, the case law of the Strasbourg Court is liable to have an important impact in domestic courts. For example, under the United Kingdom’s Human Rights Act of 1998, any court in the United Kingdom determining a question that has arisen in connection with a right set forth in the European Convention *must* take into account any judgment of the European Court of Human Rights so far as, in the opinion of the court, it is relevant to the proceedings in which that question has arisen.

VI. CONCLUSION

In conclusion, it bears emphasizing that IHL is one of the fields of international law to which the ILC has had particular regard in its current work on *Identification of customary international law*. That is only natural, since it is a field in which customary international law still plays a central role, especially in relation to non-international armed conflicts. The experience of CIHL was especially important for the ILC in relation to a number of central questions.

The ICRC Study was a catalyst for much thinking about the methodology for determining the rules of customary international law, just as CIHL itself was a laboratory for appreciating the customary process more broadly. It is also a field in which there is a considerable number of recent and important judgments of international and national courts and tribunals that shed light on several key questions that arise in the general context of identifying rules of customary international law.

While the study of CIHL has proven not only important in itself, but also essential for appreciating the wider issues involved in the identification of all rules of customary international law, it is believed that the converse is also true. The general approach to customary international law, as expounded by the ILC, should assist those called

27. See ILC Report 2016, *supra* note 6, at 112 (discussing the persistent objector rule).

upon to identify rules of CIHL. That basic approach is widely supported by states, in case law, and in scholarly writings. It serves to ensure that the exercise of identifying any rules of customary international law results in determining only such rules as actually exist, thus promoting the credibility both of the particular determination and of international law more broadly.