

Customary international humanitarian law – a response to US comments

Jean-Marie Henckaerts*

Introduction

The study on customary international humanitarian law (hereinafter "the Study") was carried out by lawyers at the International Committee of the Red Cross at the explicit request of States.¹ The study was proposed by the Intergovernmental Group of Experts for the Protection of War Victims in January 1995 among 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.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 The ICRC took this mandate very seriously and spent nearly ten years on research and consultation involving more than 150 governmental and academic experts.

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

* Jean-Marie Henckaerts is a legal adviser in the Legal Division of the ICRC and head of the ICRC's project on customary international humanitarian law. The views in this article are those of the author and do not necessarily reflect those of the ICRC. This response is based, in part, on Jean-Marie Henckaerts, "Customary international humanitarian law: A rejoinder to Judge Aldrich", *British Year Book of International Law*, 2005, Vol. 76, 2006, pp. 525–532; Jean-Marie Henckaerts, "The ICRC Customary International Humanitarian Law Study: A rejoinder to Professor Dinstein", *Israel Yearbook on Human Rights*, Vol. 37, 2007 (forthcoming); and "ICRC's Jean-Marie Henckaerts responds to my comments on ICRC Customary Law Study", Kenneth Anderson's Law of War and Just War Theory Blog, 24 January 2006, at <http://kennethandersonlawofwar.blogspot.com/2006/01/icrcs-jean-marie-henckaerts-responds.html>.

¹ See Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules and Volume II: Practice*, Cambridge University Press, 2005 [hereinafter Study].

² Meeting of the Intergovernmental Group of Experts for the Protection of War Victims, Geneva, 23–27 January 1995, Recommendation II, *International Review of the Red Cross*, No. 310, 1996, p. 84 (that "the ICRC be invited to prepare, with the assistance of experts on 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.")

³ 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 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", *International Review of the Red Cross*, No. 310, 1996, p. 58.

ICRC at governmental level.⁴ They are proof of the fact that the US Government takes the Study, and international humanitarian law in general, very seriously and as such are to be welcomed. Beyond their symbolic value, these comments are also of academic significance and deserve to be studied in detail.

As one of the co-authors of the Study, I have been given an opportunity to respond to these comments. Below are my principal observations. As the main thrust of the US comments deals with the methodology of the Study, my response focuses largely on methodological issues as well. In so doing, my response follows the structure of the US comments and addresses the following questions:

1. What density of practice is required for the formation of customary international law and what types of practice are relevant?
2. How did the Study assess the existence of *opinio juris*?
3. What is the weight of the commentaries on the rules?
4. What are the broader implications of the Study with respect to Additional Protocols I and II and the law on non-international armed conflicts in particular?

The US comments also address four particular rules, namely Rule 31 (protection of humanitarian relief personnel), Rule 45 (prohibition on causing long-term, widespread and severe damage to the environment), Rule 78 (prohibition of the use of anti-personnel exploding bullets) and Rule 157 (right to establish universal jurisdiction over war crimes). This response does not intend to go into every detail of the US comments on these four rules but will deal with the main aspects of those comments as part of the discussion on methodological issues.

1. State practice

Density of practice

While it is agreed that practice has to be "extensive and virtually uniform" in order to establish a rule of customary international law,⁵ there is no specific mathematical threshold for how extensive practice has to be. This is because the density of practice depends primarily on the subject-matter. Some issues arise more often than others and generate more practice. One

⁴ See John B. Bellinger and William J. Haynes, "A U.S. Government Response to the International Committee of the Red Cross's Customary International Humanitarian Law Study", *International Review of the Red Cross*, No. _____.

⁵ International Court of Justice, *North Sea Continental Shelf cases*, Judgment, 20 February 1969, *ICJ Reports* 1969, p. 43, § 74.

only has to compare, for example, the practice with regard to targeting and to the white flag of truce. Questions of targeting – e.g. the distinction between civilians and combatants and between civilian objects and military objectives – are discussed every day in connection with various armed conflicts, are addressed in nearly every military manual, analysed in international fora, in judgments, and so forth. Practice on the protection of the white flag of truce, on the other hand, is rather sparse. In general, the topic is rarely discussed, as there are relatively few concrete cases. Nevertheless, whatever practice there is on the protection of the white flag of truce is uniform and confirms the continued validity of the rule, regardless of limited practice. Such a differentiated approach is inevitable in any area of international law.⁶

Furthermore, in order to correctly quantify the density of practice it is necessary to determine the correct value of each element of practice. While some elements of practice may constitute single precedents, other elements may reflect numerous precedents. This is particularly the case of military orders, instructions and manuals, which reflect what armed forces are trained and instructed to do and what they end up doing most of the time. Hence, a single military manual may represent numerous precedents and thus a substantial quantum of practice.⁷

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

Permissive rules, on the other hand, are supported by acts that recognize the right to behave in a given way but that do not, however, require such behaviour. This will typically take the form of States taking action in accordance with those rules, together with the absence of

⁶ Thus, in the *"Wimbledon"* case, the Permanent Court of International Justice relied on two precedents only, those of the Panama and Suez canals, to find that the passage of contraband of war through international canals was not a violation of the neutrality of the riparian State. Permanent Court of International Justice, The *"Wimbledon"* case, (1923), PCIJ Series A, No. 1, pp. 1, 28. Obviously the Court could not cite more examples, as the number of international canals is limited. See also C. H. M. Waldock, "General course on public international law", *Recueil des cours*, Vol. 106, 1962, p. 1, at p. 44, who observes that "on a question concerning international canals, of which there are very few in the world, the quantum of practice must necessarily be small".

⁷ This may be compared to the facts in the *"Wimbledon"* case, *ibid.*, in which the Permanent Court of International Justice relied on two precedents only. But those two precedents represented a significant amount of practice, as many vessels, from all over the world, passed through the Panama and Suez canals. So a reference to just two precedents represented a wider body of practice than a first impression might suggest.

protests by other States. The rule that States have the right to vest universal jurisdiction in their courts over war crimes (Rule 157) is such a rule. There are now numerous cases of national prosecution on the basis of universal jurisdiction, without objection from the State concerned – in particular the State of nationality of the accused, for war crimes in both international and non-international armed conflicts. It is true that there are relatively few cases of prosecution on the basis of universal jurisdiction, compared to the number of war crimes possibly committed. But this is so because a foreign court is not necessarily a convenient forum to investigate and prosecute persons suspected of having committed war crimes in their own or a third country, not because of a belief that States are not entitled to prosecute on the basis of universal jurisdiction. This is understandable and explains why States chose to set up ad hoc tribunals and courts and finally a permanent International Criminal Court to deal with this issue. But this does not mean that the practice is not dense enough, as suggested, to demonstrate the existence of a customary rule, in particular as we are dealing with a permissive rule. The principle of universal jurisdiction means that war crimes are crimes under international law, like piracy, slavery and apartheid, and hence that all States have an interest that they be prosecuted. This principle was first established in the Geneva Convention as an obligation with respect to the serious violations (“grave breaches”) enumerated therein and was later confirmed in Additional Protocol I.⁸ It has gradually been expanded to apply to all serious violations of humanitarian law as a permissive rule.

Finally, as a result of the extensive and broad-based research and consultation underlying the Study, never before has so much practice been proffered in such a systematic and detailed manner to explain the existence of rules of customary international law.⁹ As Judge Theodor Meron of the International Criminal Tribunal for the former Yugoslavia has noted: “what makes this study unique is the seriousness and breadth of the method used to identify practice. In addition to the ICRC archives on nearly forty recent armed conflicts and various international sources, including those of the United Nations, regional organizations, and other international organizations, the study drew on research projects in nearly fifty countries that its sponsors had commissioned with a view to identifying national practice in international

⁸ Geneva Conventions I–IV, Articles 49/50/129/146; Additional Protocol I, Article 85(1).

⁹ Each of the 161 rules in Volume I is supported by a specific section in Volume II detailing the practice related to that rule. Many of these practice sections in Volume II are further divided into subtopics addressing such issues as examples (see e.g. examples of acts considered to constitute direct participation in hostilities, Study, Vol. II, p. 115–127), qualifying clauses (see e.g. practice related to the “feasibility” of precautions in attack, *ibid.*, pp. 357–362), exceptions (see e.g. exceptions to the prohibition of attack against objects indispensable for the survival of the civilian population, *ibid.*, pp. 1166–1174), definitions (see e.g. practice related to the definition of torture, cruel, inhuman and degrading treatment, *ibid.*, pp. 2149–2161) etc.

humanitarian law. Such an effort has never been undertaken before. No restatement of international law has even tried to amass such a rich collection of empirical data.”¹⁰

Types of practice considered

A study on customary international law has to look at the combined effect of what States say and what they actually do. As a result, "operational State practice in connection with actual military operations" was collected and analysed. To the extent that they were available, the Study considered official reports and statements on the conduct of actual military operations. For example, such reports and statements from the United States were examined with respect to targeting decisions in the Korean War, the Vietnam War and the Gulf War, among others.¹¹

But an examination of operational practice alone is not enough. In order to arrive at an accurate assessment of customary international law one has to look beyond a mere description of actual military operations and examine the legal assessment of such operations. This requires an analysis of official positions taken by the parties involved, as well as other States. When a given operational practice is generally accepted – e.g. military installations are targeted – this supports the proposition underlying that practice, namely that military installations constitute lawful military targets. But when an operational practice is generally considered to be a violation of existing rules – e.g. civilian installations are targeted – that is all it is, a violation. Such violations are not of a nature to modify existing rules; they cannot dictate the law.¹² This explains why acts such as attacks against civilians, pillage and sexual violence remain prohibited notwithstanding numerous reports of their commission. The conclusion that these acts are considered to be violations of existing rules can be derived only from the way they are received by the international community through verbal acts, such as military manuals, national legislation, national and international case-law, resolutions of international organizations and official statements. These verbal acts provide the lens through which to look at operational practice.

Weight of resolutions

¹⁰ Theodor Meron, "Revival of customary humanitarian law", *American Journal of International Law*, Vol. 99, No. 4, October 2005, p. 833.

¹¹ See, e.g., Study, Vol. II, pp. 213–215, §§ 549–554, citing *inter alia* Robert F. Futrell, *The United States Air Force in Korea 1950–1953*, Office of Air Force History, US Air Force, Washington, D.C., revised edition, 1983; US Department of Defense, Statement on targeting policy in Vietnam, 26 December 1966, reprinted in Marjorie Whiteman, *Digest of International Law*, Vol. 10, Department of State Publication 8367, Washington, D.C., 1968; and US Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, 10 April 1992.

¹² See International Court of Justice, *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Merits, Judgement, 27 June 1986, *ICJ Reports 1986*, p. 98, § 186.

As a result of the above considerations, the Study had to take into account resolutions adopted by States in the framework of international organizations, in particular the United Nations and regional organizations.¹³ As indicated, the Study is premised on the recognition that “resolutions are normally not binding in themselves and therefore the value accorded to any particular resolution depends on its content, its degree of acceptance and the consistency of State practice outside it.”¹⁴ A list containing the voting record of all cited General Assembly resolutions was therefore included in the Study and used during the assessment.¹⁵ Most importantly, resolutions were always assessed together with other State practice and were not used to tip the balance in favour of a rule being customary.¹⁶

Weight of ICRC statements

As explained in the introduction to the Study, official ICRC statements, in particular appeals and memoranda on respect for international humanitarian law, have been included as relevant practice because the ICRC has international legal personality.¹⁷ The practice of the organization is particularly relevant in that it has received an official mandate from States “to work for the faithful application of international humanitarian law applicable in armed conflicts and (...) to prepare any development thereof”.¹⁸ The Study did not, however, use ICRC statements as primary sources of evidence supporting the customary nature of a rule. They are cited to reinforce conclusions that were reached on the basis of State practice alone. Hence, ICRC practice likewise never tipped the balance in favour of a rule being customary.

State reactions to ICRC memoranda or appeals would clearly be a more important source of evidence. To the extent that these reactions were known, they have been included – both the positive ones (e.g. to the ICRC appeal in October 1973 to the parties to the conflict in the Middle East),¹⁹ as well as the critical ones (e.g. US reply in January 1991 to an ICRC memorandum on the applicability of international humanitarian law in the Gulf region).²⁰ Even when these reactions were not known, it was still considered appropriate to report on these

¹³ The Study looked at resolutions adopted by the UN Security Council, General Assembly, ECOSOC and Commission on Human Rights, as well as by *inter alia* the African Union (AU), Council of Europe, European Union (EU), Gulf Cooperation Council (GCC), League of Arab States (LAS), Organization of American States (OAS), Organization of the Islamic Conference (OCI) and the Organization for Security and Cooperation in Europe (OSCE).

¹⁴ Study, Vol. I, pp. xxxv–xxxvi.

¹⁵ Study, Vol. II, pp. 4351–4382.

¹⁶ For example, when it could not be concluded that Rule 114 was part of customary law in non-international armed conflicts, resolutions in support of such a conclusion did not tip the balance because practice outside them was not consistent. See Study, Vol. I, pp. 413–414.

¹⁷ See e.g. ICTY, *The Prosecutor v. Blagoje Simić et al.*, Case No. IT-95-9-PT, Decision on the prosecution motion under Rule 73 for a ruling concerning the testimony of a witness, 27 July 1999, released as a public document by Order of 1 October 1999, § 46 and footnote 9.

¹⁸ Statutes of the International Red Cross and Red Crescent Movement, adopted by the 25th International Conference of the Red Cross, Geneva, 23–31 October 1986, Article 5(2)(c) and (g).

¹⁹ See e.g. Study, Vol. I, pp. 5, 9 and 20–21.

²⁰ See e.g. *ibid.*, p. 67.

memoranda and appeals. The role of ICRC appeals and of States' reaction thereto in the formation of customary international law is also acknowledged by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia in the Interlocutory Appeal on Jurisdiction in the *Tadić* case in 1995:

“As is well known, the ICRC has been very active in promoting the development, implementation and dissemination of international humanitarian law. From the angle that is of relevance to us, namely the emergence of customary rules on internal armed conflict, the ICRC has made a remarkable contribution by appealing to the parties to armed conflicts to respect international humanitarian law. It is notable that, when confronted with non-international armed conflicts, the ICRC has promoted the application by the contending parties of the basic principles of humanitarian law. In addition, whenever possible, it has endeavoured to persuade the conflicting parties to abide by the Geneva Conventions of 1949 or at least by their principal provisions. When the parties, or one of them, have refused to comply with the bulk of international humanitarian law, the ICRC has stated that they should respect, as a minimum, common Article 3. This shows that the ICRC has promoted and facilitated the extension of general principles of humanitarian law to internal armed conflict. The practical results the ICRC has thus achieved in inducing compliance with international humanitarian law ought therefore to be regarded as an element of actual international practice; this is an element that has been conspicuously instrumental in the emergence or crystallization of customary rules.”²¹

Weight of NGO statements

NGO statements were included in Volume II under the category of “Other Practice”, which served as a residual category of materials that were not given any weight in the determination of what is customary. The term “practice” in this context was not at all used to denote any form of State (or other) practice that contributes to the formation of customary international law. Like Volume I, Volume II of the Study was shared with the experts consulted. The types of practice included in Volume II did not change from the time of the first expert consultations in 1999 to final publication in 2005. There was no objection expressed to the inclusion of such a category in 1999, nor later on.

Hence, only part of the practice collected in Volume II was actually taken into account in Volume I. In that respect, Volume II may give the wrong impression that everything included in it was somehow considered relevant for the establishment of customary law. This is clearly

²¹ ICTY, *The Prosecutor v. Duško Tadić aka “Dule”*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, Case No. IT-94-1-AR72, para. 109.

not the case, and the practice in Volume II was assessed on the basis of the methodology as set out in the introduction to the Study.²² In general, only the practice cited in the commentaries on the rules was deemed relevant, and this never included statements of non-governmental organizations.

It is important in this respect to explain that the methodology set out in the introduction was applied for each rule without necessarily repeating the various considerations of that methodology. To do so would have made the Study unnecessarily long and not very user-friendly. The purpose was to produce a user-friendly tool for practitioners and this explains much of the format.

Weight of practice from non-party States

The Study in no way assumed that a rule is customary merely because it is contained in a widely ratified treaty. As stated in the introduction:

"This study takes 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 has been considered as important positive evidence. Contrary practice of States not party, however, has been considered as important negative evidence. The practice of States party to a treaty vis-à-vis States not party is also particularly relevant."²³

The distinction between contracting parties and non-contracting parties was taken into consideration in the assessment of each rule.²⁴ To this effect, a list of ratifications for all cited treaties was included in the Study,²⁵ and so-called "negative lists" were used – lists of countries that are not party to relevant treaties – to identify practice of non-party States. It is interesting to note how these lists can differ considerably from one treaty regime to the other. For example, the list of States party to Additional Protocol I differs considerably from the list of States party to the 1954 Hague Convention on the Protection of Cultural Property.²⁶ This also means that to the extent that different treaties contain the same or similar rules, a State's practice and ratification record have to be matched up with respect to all relevant

²² See, in particular, Study, Vol. I, pp. xxxii–xxxvi.

²³ *Ibid.*, p. xlv.

²⁴ See, e.g., the considerations in the commentary on numerous rules related to the principle of distinction, including Rule 1, Study, Vol. I, p. 4 ; Rule 2, *ibid.*, p. 9 ; Rule 6, *ibid.*, p. 20, Rule 7, *ibid.*, p. 26 ; Rule 8, *ibid.*, p. 30 ; Rule 11, *ibid.*, p. 38 ; Rule 14, *ibid.*, p. 47 ; Rule 15, *ibid.*, p. 52. See also Rule 83, *ibid.*, p. 284; and Rule 86, *ibid.*, p. 293.

²⁵ Study, Vol. II, pp. 4153–4180.

²⁶ Azerbaijan, India, Indonesia, Iran, Iraq, Israel, Malaysia, Morocco, Myanmar, Pakistan, Thailand and Turkey are not party to Additional Protocol I but are party to the 1954 Hague Convention on the Protection of Cultural Property (at 1 June 2007).

treaties. Although the United States is not a party to Additional Protocol I, for example, it is a party to Protocol II and Amended Protocol II to the Convention on Certain Conventional Weapons (CCW), which contain a number of rules that are identical to those in Additional Protocol I. Thus while the United States has not supported the principle of distinction, the prohibition of indiscriminate attacks and the principle of proportionality through ratification of Additional Protocol I, it has supported these rules *inter alia* through ratification of Amended Protocol II to the CCW, which applies in both international and non-international armed conflicts.²⁷

In addition, a number of provisions in Additional Protocol I were not found to be customary, as a result of the weight accorded to negative practice of States that remain non-parties to the Protocol. This was the case, e.g., for the presumption of civilian status in case of doubt,²⁸ the prohibition of attacks on works and installations containing dangerous forces,²⁹ the relaxed requirement for combatants to distinguish themselves³⁰ and the prohibition of reprisal attacks against civilians as contained in Additional Protocol I.³¹ Many would probably argue that the Study accorded too much weight to such limited contrary practice. But when apparent contrary practice of a non-party State was not deemed sufficient to block the emergence of a rule of customary law, this is also explained in the commentary.³² The commentaries never hide or gloss over negative practice that was collected.

Specially affected States

The Study did duly note the contribution of States that have had “a greater extent and depth of experience” and have “typically contributed a significantly greater quantity and quality of practice”. A perusal of both Volumes I and II reveals evidence of the significant contribution to practice made by such States. Because of its experience with armed conflict, the United States, in particular, has contributed a significant amount of practice to the formation of customary humanitarian law. It also has taken positions on many points of interpretation of the law and these are often noted in the commentaries.³³

Hence, it is clear that there are States that have contributed more practice than others because they have been "specially affected" by armed conflict. Whether, as a result of this,

²⁷ See Amended Protocol II, Articles 2–3.

²⁸ Compare Additional Protocol I, Article 50(1), second sentence, with commentary to Rule 6, Study, Vol. I, pp. 23–24.

²⁹ Compare Additional Protocol I, Article 56 with Rule 42, *ibid.*, Vol. I, pp. 139–142.

³⁰ Compare Additional Protocol I, Article 44(3), second sentence, with commentary to Rule 106, *ibid.*, Vol. I, pp. 387–389.

³¹ Compare Additional Protocol I, Article 51(6) with commentary to Rule 146, *ibid.*, Vol. I, pp. 520–523.

³² See e.g. Rule 21 (precaution in attack, related to the choice of military objectives), *ibid.*, Vol. I, p. 67, and Rule 65 (prohibition of killing, injuring or capture by resort to perfidy), *ibid.*, Vol. I, p. 225.

³³ See, e.g., in Part I alone of the Study, Vol. I, pp. 13, 24, 31, 36, 45, 64–65 and 76.

their practice *counts more* than the practice of other States is a separate question. The statement of the International Court of Justice in respect to the need for the practice of "specially affected" States to be included was made in the context of the law of the sea – and in particular in order to determine whether a rule in a (not widely ratified) treaty had become part of customary international law.³⁴ Given the specific nature of many rules of humanitarian law, it cannot be taken for granted that the same considerations should automatically apply. Unlike the law of the sea, where a State either has or does not have a coast, with respect to humanitarian law any State can potentially become involved in armed conflict and become "specially affected". Therefore, all States would seem to have a legitimate interest in the development of humanitarian law. But again, this does not preclude the contribution by some States of more, and more detailed, practice than others in fields in which they are "specially affected".

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

2. *Opinio juris*

Although the commentaries on the rules in Volume I do not usually set out a separate analysis of practice and *opinio juris*, such an analysis did in fact take place for each and every rule to determine whether the practice attested to the existence of a rule of law or was inspired merely by non-legal considerations of convenience, comity or policy. When the establishment of *opinio juris* was difficult, this is discussed in more detail in the commentaries.³⁵ Hence, the Study did not simply infer *opinio juris* from practice. The conclusion that practice established a rule of law and not merely a policy was never based

³⁴ International Court of Justice, *North Sea Continental Shelf cases*, *op. cit.* (note 3).

³⁵ See e.g. the commentary on Rule 114 for non-international armed conflicts, Study, Vol. I, p. 414.

on any single instance or type of practice but was the result of consideration of all the relevant practice. It is true that it can never be proven that a State votes in favour of a resolution condemning acts of sexual violence, for example, because it believes this to reflect a rule of law or as a policy decision (and it could be both). However, the totality of the practice on that subject indicates beyond doubt that the prohibition of sexual violence is a rule of law, not merely a policy.

In the same vein, military manuals and teaching manuals may put forward propositions that are based on law, but may also contain instructions based on policy or military considerations that go beyond the law (although they may never fall *below* the law). This distinction was always kept in mind. Rules that were supported by military manuals were, considering the totality of practice, supported by practice of such a nature as to conclude that a rule of law was involved and not merely a policy consideration or a consideration of military or political expediency that can change from one conflict to the next. For example, the fact that the United States has decided, as a matter of policy rather than law, that it “will apply the rules in its manuals whether the conflict is characterized as international or non-international” was recognized as a policy decision in the Study. Hence, US military manuals are never cited as supporting evidence for rules applicable in non-international armed conflicts.

Finally, it was considered that teaching manuals authorized for use in training represent a form of State practice. In principle, a State will not allow its armed forces to be taught on the basis of a document whose content it does not endorse. As a result, training manuals, instructor handbooks and pocket cards for soldiers were considered as reflecting State practice. Several such documents were found and incorporated, including, for example, from Germany,³⁶ the United Kingdom,³⁷ and the United States.³⁸ A complete listing of the military manuals, including teaching manuals and other similar documents, is included in Volume II of the Study.³⁹

3. Formulation of rules

³⁶ See e.g. Germany: Publication ZDv 15/1, *Humanitäres Völkerrecht in bewaffneten Konflikten: Grundsätze*, DSK VV230120023, Bundesministerium der Verteidigung, June 1996; and Taschenkarte (pocket card), “Humanitäres Völkerrecht in bewaffneten Konflikten: Grundsätze”, bearbeitet nach ZDv 15/2, *Humanitäres Völkerrecht in bewaffneten Konflikten: Handbuch*, Zentrum Innere Führung, June 1991.

³⁷ See e.g. UK: *The Law of Armed Conflict*, D/DAT/13/35/66, Army Code 71130 (Revised 1981), Ministry of Defence, prepared under the direction of the Chief of the General Staff, 1981 (updated yearly).

³⁸ See e.g. US: *Your Conduct in Combat under the Law of War*, Publication No. FM 27-2, Headquarters Department of the Army, Washington, November 1984, and *Instructor’s Guide: The Law of War*, Headquarters Department of the Army, Washington, April 1985.

³⁹ See Study, Vol. II, pp. 4916–4207.

Any description of customary rules inevitably results in rules that in many respects are simpler than the detailed rules to be found in treaties.⁴⁰ It may be difficult, for example, to prove the customary nature of each and every detail of corresponding treaty rules. The formation of customary law through practice cannot yield the same amount of detail as complicated negotiations at a diplomatic conference. It was therefore necessary to discuss certain issues in more detail in the commentary.

For example, in connection with Rules 31 and 55 on the protection of humanitarian relief personnel and access for humanitarian relief missions respectively, the issue of consent to receive such personnel and missions is openly discussed in the commentary and there was no intention to go beyond the content of the Additional Protocols.⁴¹ The problem lay in the formulation of a rule that would cover both international and non-international armed conflicts. It was problematic to use the term "consent from the parties", including consent from armed opposition groups, in a rule that would cover both international and non-international armed conflicts. It is also clear that, by reading these rules together with Rule 6, humanitarian relief personnel lose their protection when they take a direct part in hostilities.

With respect to the weight of the commentary, the reader should be aware of the Authors' Note which had been inadvertently omitted from Volume I when it was first published in 2005 but which has been included in its 2007 reprint:

"This volume catalogues rules of customary international humanitarian law. As such, only the black letter rules are identified as part of customary international law, and not the commentaries to the rules. The commentaries may, however, contain useful clarifications with respect to the application of the black letter rules and this is sometimes overlooked by commentators.⁴²

The commentaries are particularly important to determine the content of a number of rules which are formulated as summaries capturing a range of practice, without having a specific equivalent in treaty law.⁴³ However, the Study does not claim to have proven that each and

⁴⁰ Compare the description of the principle of distinction in Additional Protocol I, Articles 48–52 with the terse statement in the ICJ's Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons that the principle of distinction constitutes a "cardinal principle" of humanitarian law and one of the "intransgressible principles of international customary law", *Advisory Opinion*, 8 July 1996, *ICJ Reports* 1996, p. 226, §§ 78–79.

⁴¹ See Study, Vol. I, pp. 109 and 196–197.

⁴² See Study, Vol. I, 2007 reprint (with corrections), p. li.

⁴³ See, e.g., Study, Vol. I, Rule 42 (works and installations containing dangerous forces); Rules 43–44 (protection of the environment); Rule 84–85 (incendiary weapons); Rule 94 (slavery and slave trade); Rule 95 (uncompensated or abusive forced labour); Rule 98 (enforced disappearance); Rule 99 (arbitrary deprivation of liberty); Rule 105 (respect for family life); Rule 116 (identification of the dead); Rule 133 (respect for property rights of displaced persons); and Rule 134 (respect for specific needs of women).

every element of the commentaries themselves is part of customary law, such as the list of war crimes in Rule 156.

As to the formulation of Rule 78 on exploding bullets, the wording was carefully chosen and clearly is not a literal transcription of the St. Petersburg Declaration, thereby reflecting the evolution of State practice. On the other hand, the wording that only projectiles "designed" or "specifically designed" to explode within the human body are prohibited was not used, because this requires proof of the intent of the designer of the projectile. Instead the formulation used in Rule 78 is based on the understanding that projectiles that foreseeably detonate within the human body in their normal use do so as a result of their design, though perhaps not through specific intent, and that it is the explosion of projectiles within the human body which States have sought to prevent through practice in this field. The argument that States have allegedly used anti-matériel exploding bullets that "may have tended to detonate on impact or within the human body"⁴⁴ is not accompanied by evidence that they actually did so detonate. The argument therefore does not provide evidence of "foreseeable" detonation, as outlined above and in the text explaining Rule 78, and so does not contradict it.

It is important to note that the ICRC did not, as suggested, propose at the Second CCW Review Conference "negotiating a protocol" that would prohibit the anti-personnel use of bullets that explode within the human body and so the lack of State action in this direction is not relevant. The reference to a "1998 ICRC test that subsequently proved flawed" is incorrect as the test in question, like the subsequent test in 1999, was conducted by the Swiss Ballistic Test Range in Thun, Switzerland, using internationally accepted test protocols, and not by the ICRC.

4. Implications

First, the conclusion of the Study that a significant number of rules contained in the Additional Protocols to the Geneva Conventions have achieved the status of customary international law applicable to all States is supported by the evidence proffered. This should not come as a surprise, as many of them were already customary in 1977, exactly thirty years ago.⁴⁵ It is true, on the other hand, that a number of provisions in the Protocols were

⁴⁴ Bellinger and Haynes, *op. cit.* (note 4), footnote 69.

⁴⁵ The Additional Protocols were adopted on 8 June 1977 after four negotiation sessions (1974–1977) of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts. As its title suggests, the Conference thus sought to reaffirm existing rules of customary humanitarian law as well as developing new rules.

new in 1977, but they have become customary in the thirty years since their adoption because they have been extensively and virtually uniformly accepted in practice.⁴⁶ In addition, as pointed out above, a number of their provisions have not become customary because they are not uniformly accepted in practice.⁴⁷

The Study has approached the Additional Protocols, and for that matter any other treaty, in a cautious manner and has not assumed that a rule is customary merely because it is contained in a widely ratified treaty.⁴⁸

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

Indeed, developments of international humanitarian law since the wars in the former Yugoslavia and Rwanda point towards an application of many areas of humanitarian law to non-international armed conflicts. For example, every humanitarian law treaty adopted since 1996 has been made applicable to both international and non-international armed conflicts.⁴⁹ Furthermore, in 2001, Article 1 of the CCW was amended so as to extend the scope of application of all existing CCW Protocols to cover non-international armed conflict.⁵⁰

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

⁴⁶ See e.g. the prohibition of starvation in Article 54 of Additional Protocol I and Article 14 of Additional Protocol II, which is now considered to be part of customary international law (Rule 53 of the Study).

⁴⁷ See notes 28–31 above and accompanying text. In addition, the Study does not deal with the customary nature of a number of provisions, as they are not as such addressed in it, including Article 1(4) (wars of national liberation), Article 36 (new weapons), Article 45 (presumption of prisoner-of-war status) and Articles 61–67 (civil defence) of Additional Protocol I.

⁴⁸ See note 23 above and accompanying text.

⁴⁹ See the 1996 Amended Protocol II to the CCW on mines, booby-traps and other devices, the 1997 Ottawa Convention banning anti-personnel landmines, the 1998 Rome Statute of the International Criminal Court, the 1999 Second Protocol to the Hague Convention on the protection of cultural property, the 2000 Protocol to the Convention on the Rights of the Child on involvement of children in armed conflict, the 2003 Protocol V to the CCW on explosive remnants of war.

⁵⁰ Until then only Amended Protocol II of 1996 was applicable to non-international armed conflict. The amendment of Article 1 thus affected the scope of application of the existing Protocols I–IV.

armed conflicts. Similarly, the investigations and prosecutions currently under way before the International Criminal Court are related to violations committed in situations of internal armed conflict. These developments are also sustained by other practice such as military manuals, national legislation and case-law, official statements and resolutions of international organizations and conferences. In this respect particular care was taken in Volume I to identify specific practice related to non-international armed conflict and, on that basis, to provide a separate analysis of the customary nature of the rules in such conflicts. Finally, where practice was less extensive in non-international armed conflicts, the corresponding rule is acknowledged to be only “arguably” applicable in non-international armed conflicts.⁵¹

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

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

⁵¹ These are Rules 21, 23–24, 44–45, 62–63 and 82.

whose application is limited to international armed conflict,⁵² and a number of rules whose formulation differs for international and non-international armed conflicts.⁵³

Conclusion

As pointed out above, the ICRC was requested by States to undertake this study in order to assist in the difficult task of identifying customary humanitarian law. It is no exaggeration to say that nearly 10 years of broad-based research and widespread consultation have resulted in the most comprehensive and thorough study of its kind to date. The Study represents, therefore, a best possible effort in providing a snapshot of customary international humanitarian law that is as accurate as possible. Because of its origin – a mandate from the international community – the Study seeks to be a working tool at the service of practitioners involved with humanitarian law, not a handbook of theoretical considerations, and has already found its way into the jurisprudence of several States, including the US.⁵⁴

Although the Study has now become the starting point of any discussion on customary humanitarian law, it should not be seen as the final word on custom because, per definition, it cannot be exhaustive and the formation of customary law is an ongoing process. The ICRC has accordingly teamed up with the British Red Cross Society and initiated a project, based at the Lauterpacht Centre for International Law of Cambridge University, to update the practice contained in Volume II of the Study.

With a view to this update we remain receptive to further comments on the Study in general but also to information and comments on any further specific practice States and experts wish to share with us. This should be part of an ongoing dialogue. The US comments and this response should be seen as part of that dialogue.

⁵² These are Rules 3–4, 41, 49, 51, 106–108, 114, 130 and 145–147.

⁵³ These are Rules 124, 126 and 128–129.

⁵⁴ See US, Supreme Court, *Hamdan v. Rumsfeld, Secretary of Defense, et al.*, Case No. 05-184, 29 June 2006, p. 69. See also Israel, The Supreme Court Sitting as the High Court of Justice, *Adalah and others v. GOC Central Command, IDF and others*, 23 June 2005, HCJ 3799/02, paras. 20, 21 and 24, and *The Public Committee against Torture in Israel and others v. The Government of Israel and others*, 13 December 2006, HCJ 769/02, paras. 23, 29–30 and 41–42; ICTY, Appeals Chamber, *Prosecutor v. Hadžihasanović and Kubura*, Decision on Joint Defence Interlocutory Appeal of Trial Chamber Decision on Rule 98bis Motions for Acquittal, IT-01-47-AR73.3, 11 March 2005, paras. 29–30, 38 and 45–46.