

# Assessing the Laws and Customs of War: The Publication of *Customary International Humanitarian Law*

by Jean-Marie Henckaerts

SINCE THE ADOPTION OF THE GENEVA Conventions of 1949, mankind has experienced an alarming number of armed conflicts affecting almost every continent. During this time the four Geneva Conventions and their Additional Protocols of 1977 have provided legal protection to persons not or no longer participating directly in hostilities (the wounded, sick and shipwrecked, persons deprived of their liberty for reasons related to an armed conflict, and civilians). Even so, there have been numerous violations of these treaties, which has resulted in suffering and death that might have been avoided had international humanitarian law been better respected. The general opinion is that violations of international humanitarian law are not due to the inadequacy of its rules. Rather, they stem from an unwillingness to respect the rules, insufficient means to enforce them, uncertainty as to their application, and a lack of awareness on the part of political leaders, commanders, combatants, and the public.

The International Conference for the Protection of War Victims, convened in Geneva in August–September 1993, discussed ways to address violations of international humanitarian law. Its Final Declaration 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 next session of the International Conference of the Red Cross (ICRC).”<sup>1</sup> Accordingly, the Intergovernmental Group of Experts for the Protection of War Victims met in Geneva in January 1995 and recommended that the ICRC prepare, with the assistance of IHL experts representing various geographical regions and different legal systems, and in consultation with experts from governments and international organizations, a report on customary rules of humanitarian law applicable in international and non-international armed conflicts. This report would seek to clarify the content of customary humanitarian law, which is by definition a body of unwritten rules.

Nearly 10 years later and based on this extensive research, a 5,000 page study by the ICRC, now referred to as the “study,” *Customary International Humanitarian Law*, has been published.<sup>2</sup> It identifies 161 rules found to have attained the status of customary humanitarian law and seeks to provide a snapshot of custom today that is as accurate as possible. This study should not be seen, however, as the final word on custom; it is not exhaustive because the formation of customary law is an ongoing process. Nonetheless, as this article details, the study constitutes an important tool for anyone involved with humanitarian law.

## PURPOSE OF THE STUDY: CUSTOMARY LAW AND THE REGULATION OF ARMED CONFLICT

THE PURPOSE OF THIS STUDY was to overcome some of the problems related to the application of international humanitarian treaty law. Treaty law, principally reflected in the Geneva Conventions of 1949 and their Additional Protocols of 1977, is well developed and covers many

aspects of warfare. It affords protection to a wide range of persons during wartime and limiting permissible means and methods of warfare.<sup>3</sup>

There are, however, two serious impediments to the application of these treaties in current armed conflicts, which explains why a study on customary international humanitarian law is necessary and useful. First, treaties apply only to the states that have ratified them. Different treaties of international humanitarian law apply in different armed conflicts depending on which ones the states involved in the conflict have ratified. Although the four Geneva Conventions of 1949 have been universally ratified, the same is not true for other treaties of humanitarian law, such as the Additional Protocols. Even though Additional Protocol I, which regulates international conflicts, has been ratified by more than 160 states, its applicability today is limited because several states that have been involved in international armed conflicts are not party to it. Similarly, several states in which non-international armed conflicts are taking place have not ratified Additional Protocol II, which



Courtesy of the Center for Human Rights and Humanitarian Law

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regulates non-international conflicts. In these non-international armed conflicts, common Article 3 of the four Geneva Conventions, which sets forth the minimum protections and standards of conduct to which parties to the conflict must adhere, is often the only applicable humanitarian treaty provision. The first purpose of the study was to determine which rules of international humanitarian law are part of customary international law and therefore applicable to all parties to a conflict, regardless of their treaty obligations.

Second, humanitarian treaty law does not regulate in sufficient detail non-international armed conflicts, which comprise a large portion of today’s conflicts because they are subject to far fewer treaty rules. For example, Additional Protocol II contains a mere 15 substantive articles, whereas Additional Protocol I has more than 80. And common Article 3, although still of fundamental importance, only provides a rudimentary framework of minimum standards.<sup>4</sup> The second purpose of the study was therefore to determine whether customary international law regulates non-international armed conflict in more detail than treaty law, and if so, to what extent.

## DEFINING CUSTOMARY LAW: METHODOLOGY AND ORGANIZATION

THE STATUTE OF THE INTERNATIONAL COURT of Justice describes customary international law as “a general practice accepted as law.”<sup>5</sup> It is widely agreed that the existence of a rule of customary international law requires the presence of two elements: state practice and a belief

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that such practice is required, prohibited, or allowed, depending on the nature of the rule, as a matter of law (*opinio juris*).

#### SELECTION AND ASSESSMENT OF STATE PRACTICE

State practice must be looked at from two angles: what practice contributes to the creation of customary international law (selection of state practice) and whether this practice establishes a rule of customary international law (assessment of state practice). Both physical and verbal acts of states constitute practice that contributes to the creation of customary international law.<sup>6</sup> Physical acts can be gleaned, for example, from reports on military operations, such as the U.S. Defense Department's report to Congress on the Conduct of the 1991 Gulf War. Verbal acts include various kinds of documents, including military manuals, legislation, case law, and official statements such as diplomatic protests. Resolutions adopted by states in international organizations or at conferences are normally not binding in themselves and therefore the value accorded to any particular resolution in the assessment of

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the formation of a rule of customary international law depends on its content, degree of acceptance, and the consistency of related state practice.<sup>7</sup>

Although decisions of international courts are subsidiary sources of international law,<sup>8</sup> they do not constitute state practice. Unlike national courts, international courts are not state organs. Nevertheless, the decisions of international courts were included in the study because a finding by an international court that a rule of customary international law exists constitutes persuasive evidence to that effect. In addition, because of the precedential value of their decisions, international courts can contribute to the emergence of

a rule of customary international law by influencing subsequent practice of states and international organizations.

The practice of armed opposition groups, such as codes of conduct, commitments made to observe certain rules of international humanitarian law, and other statements, does not constitute state practice. Although such practice may contain evidence of the acceptance of certain rules in non-international armed conflicts, its legal significance is unclear and was not relied upon in the study to prove the existence of customary international law.

Although some time will normally elapse before a rule of customary international law emerges, there is no specified time frame. Rather, state practice has to be weighed to assess whether it is sufficiently “dense” to create a rule of customary international law, which means that it has to be virtually uniform, extensive, and representative.<sup>9</sup> To be virtually uniform means different states must not have engaged in substantially different conduct. The jurisprudence of the International Court of Justice shows that contrary practice that appears at first sight to undermine the uniformity of the practice concerned does not prevent the formation of a rule of customary international law as long as this contrary practice is condemned by other states or denied by the government itself. Through such condemnation or denial, the rule in question is actually confirmed.<sup>10</sup> Where there is overwhelming evidence of state practice in support of a rule, alongside repeated evidence of violations of that rule, such violations do not challenge the existence of the rule in question. States wishing to change an existing rule of customary international law have to do so through official practice and must claim to be acting as of right. In addition, for a rule of general customary international law to come into existence, state practice must be both extensive and representative. It does not, however, need to be universal; a “general” practice suffices.<sup>11</sup> No precise number or percentage is required because it is not simply a question of how many states participate in the practice, but also *which* states participate.<sup>12</sup>

The study took no view on whether it is legally possible to be a “persistent objector” in relation to customary rules of international humanitarian law. Although many commentators believe that it is not possible under Article 53 of the Vienna Convention on the Law of Treaties to be a persistent objector in the case of *jus cogens* norms (peremptory norms of international law from which no derogation is permitted), there are others who doubt the continued validity of the persistent objector concept altogether.<sup>13</sup> If one accepts that it is legally possible to be a persistent objector, the state concerned must have objected to the emergence of a new norm during its formation and continue to object persistently afterward; it is not possible to be a “subsequent objector.”<sup>14</sup>

#### OPINIO JURIS

The requirement of *opinio juris* in establishing the existence of a rule of customary international law refers to the legal conviction that a particular practice is carried out “as of right.” It is usually not necessary to demonstrate separately the existence of an *opinio juris* because it is generally contained within a particularly dense practice. In situations where a practice is ambiguous, however, *opinio juris* plays an important role in determining whether or not that practice counts toward the formation of custom. This is often the case with omissions, i.e., when states do not act or react but it is not clear why. In such cases both the International Court of Justice and its predecessor, the Permanent Court of International Justice, have sought to establish the separate existence of an *opinio juris* to determine whether instances of ambiguous practice counted toward the establishment of customary international law.<sup>15</sup>

## IMPACT OF TREATY LAW

Treaties are also relevant in determining the existence of customary international law because they help shed light on how states view certain rules of international law. Hence, the ratification, interpretation, and implementation of a treaty, including reservations and statements of interpretation made upon ratification, were included in the study. The study took the cautious approach that widespread ratification is only an indication and has to be assessed in relation to other elements of practice, specifically the practice of states not party to the treaty in question.

## ORGANIZATION OF THE STUDY

TO DETERMINE THE BEST WAY of fulfilling the mandate entrusted to the ICRC, the authors consulted a group of academic experts in international humanitarian law, who formed the study's 12-member Steering Committee.<sup>16</sup> The Steering Committee adopted a plan of action in June 1996 and research started the following October. Research was conducted using both national and international sources reflecting state practice, including 47 reports on state practice, 40 reports on recent conflicts from the ICRC archives, and two consultations with 35 humanitarian law experts from around the world. The study focused on six areas, around which the rules were structured: (1) the principle of distinction; (2) specifically protected persons and objects; (3) specific methods of warfare (4) weapons; (5) treatment of civilians and persons *hors de combat*; and (6) implementation.

## SIGNIFICANCE OF FINDINGS

IN TOTAL, THE STUDY ARTICULATED 161 rules of customary international humanitarian law.<sup>17</sup> Several of the study's main conclusions are summarized below.

## INTERNATIONAL AND NON-INTERNATIONAL ARMED CONFLICTS

The practice collected in the framework of the study bears witness to the profound impact of Additional Protocol I on the practice of states in both international and non-international armed conflicts. In particular, the study found that the basic principles of Additional Protocol I, many of which were already considered to be customary at the time of the Protocol's adoption in 1977, have been very widely accepted, even more widely than its ratification record would suggest. Although the study did not seek to determine the customary nature of specific treaty provisions, it became clear that many customary rules are identical or similar to those found in treaty law.<sup>18</sup> With respect to non-international armed conflict, Additional Protocol II similarly has had a far-reaching effect on practice and, as a result, many of its provisions are now considered to be part of customary international law.<sup>19</sup>

Yet the most significant contribution of customary international humanitarian law to the regulation of internal armed conflicts is that it goes beyond the provisions of Additional Protocol II. Indeed, practice has created a substantial number of customary rules that are more detailed than the often rudimentary provisions of Additional Protocol II. Practice has thus filled important gaps in the regulation of internal conflicts parallel to those in Additional Protocol I, but applicable as customary law to non-international armed conflicts. This covers basic principles on the conduct of hostilities, rules on specifically protected persons, and objects and specific methods of warfare.<sup>20</sup>

For example, Additional Protocol II contains only a very general provision on humanitarian relief. Unlike Additional Protocol

I, it does not contain specific provisions requiring respect for the protection of humanitarian relief personnel, as well as objects and obliging parties to a conflict, to allow and facilitate the passage of humanitarian relief for civilians in need. These requirements have crystallized, however, into customary international law applicable in both international and non-international armed conflicts as a result of widespread, representative, and virtually uniform practice to that effect.

## SELECTED ISSUES ON THE CONDUCT OF HOSTILITIES

In addition to reaffirming a number of customary rules, Additional Protocols I and II introduced a number of rules that were new at the time of adoption in 1977. One such rule is the prohibition of attacks on works and installations containing dangerous forces, even when these objects are military objectives, if such attack may cause the release of dangerous forces and severe losses among the civilian population.<sup>21</sup> Although it is not clear whether these spe-

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cific rules have become part of customary law, practice shows that states are conscious of the high risk of severe incidental losses that can result from attacks against such works and installations when they constitute military objectives. Consequently, they recognize that in any armed conflict particular care must be taken in case of attack to avoid severe losses among the civilian population. This requirement was found to be a part of customary international law that is applicable in any armed conflict.

Another new rule introduced in Additional Protocol I is the prohibition of the use of methods or means of warfare that are intended, or may be expected, to cause widespread, long-term, and severe damage to the natural environment. Since the adoption of Additional Protocol I, this prohibition has received such extensive support in state practice that it has crystallized into customary law, even though some states have persistently maintained that the rule does not apply to nuclear weapons.<sup>22</sup> Beyond this specific rule, the study found that the natural environment is considered to be a civilian object and is protected by the same principles and rules that

protect other civilian objects, in particular the principles of distinction and proportionality and the requirement to take precautions in attack. This means that no part of the natural environment may be made the object of attack unless it is a military objective. Further, an attack against a military objective that may be expected to cause incidental damage to the environment, which would be excessive in relation to the military advantage anticipated, is prohibited.

There are also issues that are not addressed in the Additional Protocols. For example, the Protocols do not contain any specific provision concerning the protection of personnel and objects involved in a peacekeeping mission. In practice, however, such personnel and objects were given protection against attack equivalent to that of civilians and civilian objects. As a result, Rule 33 prohibits attacks against personnel and objects involved in a peacekeeping mission in accordance with the Charter of the United Nations. Finally, a number of issues related to the conduct of hostilities are regulated by the Hague Regulations, which have long been considered customary in international armed conflict.<sup>23</sup> Some of their rules, however, are now also accepted as customary in non-international conflict, such as the rules that prohibit destruction or seizure of the property of an adversary, unless required by military necessity, and pillage.<sup>24</sup>

### ISSUES REQUIRING FURTHER CLARIFICATION

The study revealed a number of areas where practice is not clear. For example, although the terms “combatants” and “civilians” are clearly defined in international armed conflicts,<sup>25</sup> practice is ambiguous as to whether members of armed opposition groups are considered members of armed forces or civilians in non-international armed conflicts. It is not clear, therefore, whether members of armed opposition groups are civilians who lose their protection from attack when directly participating in hostilities or whether members of these groups are liable to attack as such. Additional Protocol II, for example, does not contain a definition of civilians or of the civilian population even though these terms are used in several provisions.<sup>26</sup> Subsequent treaties that are applicable in non-international armed conflicts similarly use the terms civilians and civilian population without defining them.<sup>27</sup>

A related area of uncertainty affecting the regulation of both international and non-international armed conflicts is the absence of a precise definition of the term “direct participation in hostilities.” Loss of protection against attack is clear and uncontested when a civilian uses weapons or other means to commit acts of violence, but there is considerable practice that gives little or no guidance on the interpretation of the term. Related to this issue is the question of how to qualify a person in case of doubt.<sup>28</sup> Another issue still open to question is the exact scope and application of the principle of proportionality in attack. Although the study revealed widespread support for this principle, it does not provide more clarification than contained in treaty law as to how to balance military advantage against incidental civilian losses.

### IMPLEMENTATION

A number of rules on the implementation of international humanitarian law have become part of customary international law. In particular, each party to a conflict must respect and ensure respect for international humanitarian law by its armed forces and other persons or groups acting on its instructions or under its direction or control. As a result, each party, including armed opposition groups, must provide instruction in international humanitarian law to its armed forces. Beyond these general obligations, it

is less clear to what extent other specific implementation mechanisms that are binding upon states are also binding upon armed opposition groups.

A state is responsible for violations of international humanitarian law attributable to it and is required to make full reparation for the loss or injury caused by such violations. It is unclear whether armed opposition groups incur an equivalent responsibility for violations committed by their members. As stated above, armed opposition groups must respect international humanitarian law and operate under a “responsible command.” As a result, it can be

argued that armed opposition groups incur responsibility for acts committed by persons forming a part of such groups. The consequences of such responsibility, however, are not clear. In particular, it is unclear to what extent armed opposition groups are under an obligation to make full reparation, even though in many countries victims can bring a civil suit for damages against the offenders.

When it comes to individual responsibility, customary international humanitarian law places

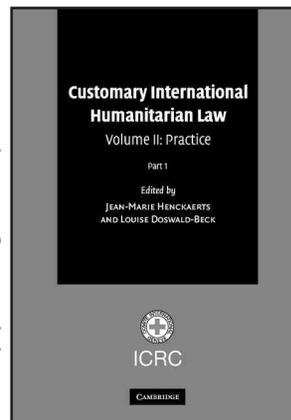
criminal responsibility on all persons who commit, who order the commission of, or who are otherwise responsible as commanders or superiors for the commission of war crimes. The implementation of the war crimes regime is an obligation incumbent upon states. States may discharge this obligation by setting up international or mixed tribunals to that effect.

### CONCLUSION

A BRIEF OVERVIEW of some of the findings of the study shows that the principles and rules contained in treaty law have received widespread acceptance in practice and have greatly influenced the formation of customary international law. Although many of these rules were already customary at the time of their adoption, others have since become part of customary international law. As such, they are binding on all states regardless of the ratification status of treaties and, in the case of those rules applicable to all parties in non-international armed conflicts, on armed opposition groups as well.

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

The study also reveals areas where the law is not clear and points to issues that require further clarification, such as the definition of civilians in non-international armed conflicts, the concept of direct participation in hostilities, and the scope and application of the principle of proportionality. In light of the achievements to date and the work that remains to be done, the study should not be seen as the end, but rather as the beginning of a new process aimed at improving understanding of and agreement on the principles and rules of international humanitarian law. *HRB*



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## ENDNOTES: Assessing the Laws and Customs of War

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<sup>1</sup> *Final Declaration, International Conference for the Protection of War Crimes Victims*, 296 *Int'l. Rev. Red Cross* 377, 381 (1993).

<sup>2</sup> Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol. 1 and 2 (Cambridge University Press 2005). For ordering information, see <http://www.cambridge.org/uk/catalogue/catalogue.asp?isbn=0521539250>.

<sup>3</sup> The regulation of means and methods of warfare in treaty law goes back to the 1868 St. Petersburg Declaration, the 1899 and 1907 Hague Regulations, and the 1925 Geneva Gas Protocol, and has most recently been addressed in the 1972 Biological Weapons Convention, the 1977 Additional Protocols, the 1980 Convention on Certain Conventional Weapons and its five Protocols, the 1993 Chemical Weapons Convention, and the 1997 Ottawa Convention on the Prohibition of Anti-personnel Mines. The 1998 Statute of the International Criminal Court contains, *inter alia*, a list of war crimes subject to the jurisdiction of the Court.

<sup>4</sup> The few treaties that do apply to non-international armed conflicts include the Convention on Certain Conventional Weapons as amended, the Statute of the International Criminal Court, the Ottawa Convention on the Prohibition of Anti-personnel Mines, the Chemical Weapons Convention, the Hague Convention for the Protection of Cultural Property and its Second Protocol and, as already mentioned, Additional Protocol II and Article 3 common to the four Geneva Conventions. Although common Article 3 is of fundamental importance, it only provides a rudimentary framework of minimum standards. Additional Protocol II usefully supplements common Article 3, but it is still less detailed than the rules governing international armed conflicts in the Geneva Conventions and Additional Protocol I.

<sup>5</sup> Rome Statute of the International Court of Justice, ch. II, art. 38, sec. 1(b) (June 26, 1945), available at <http://www.yale.edu/lawweb/avalon/decade/decad026.htm> (accessed Oct. 30, 2005).

<sup>6</sup> Physical acts include, for example, battlefield behavior, the use of certain weapons, and the treatment afforded to different categories of persons. Verbal acts include military manuals, national legislation, national case-law, instructions to armed and security forces, military communiqués during war, diplomatic protests, opinions of official legal advisers, comments by governments on draft treaties, executive decisions and regulations, pleadings before international tribunals, statements in international fora, and government positions on resolutions adopted by international organizations.

<sup>7</sup> The importance of these conditions was stressed by the International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. at 254–255, §§ 70–73 (July 8, 1996).

<sup>8</sup> Statute of the International Court of Justice at art. 38(1)(d).

<sup>9</sup> The expression “dense” in this context comes from Sir Humphrey Waldock, *General Course on Public International Law*, 106 *Collected Courses Hague Acad. Int'l. L.* 44 (1962).

<sup>10</sup> See *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Merits, Judgment, 1986 I.C.J. at 98, § 186 (June 27, 1986).

<sup>11</sup> International Law Association, *Final Report of the Committee on the Formation of Customary (General) International Law, Statement of Principles Applicable to the Formation of General Customary International Law, Report of the Sixty-Ninth Conference*, principle 14 (2000) [hereinafter ILA Report].

<sup>12</sup> *Id.* at commentary (d) and (e) to principle 14.

<sup>13</sup> Article 53 of the Vienna Convention (Jan. 27, 1980) states, “A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” Available at <http://www.un.org/law/ilc/texts/treaties.htm> (accessed Feb. 1, 2006). For an in-depth discussion of this issue, see Maurice H. Mendelson, *The Formation of Customary International Law*, 272 *Collected Courses Hague Acad. Int'l. L.* 227 (1998).

<sup>14</sup> ILA Report at commentary (b) to principle 15.

<sup>15</sup> See, e.g., *Lotus case (France v. Turkey)*, Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 28 (Sept. 7, 1927) (finding that states had not abstained from prosecuting wrongful acts aboard ships because they felt prohibited from doing so); *North Sea Continental Shelf*, Judgment, 1969 I.C.J. at 43–44, §§ 76–77 (Feb. 20) (finding that states that had delimited their continental shelf on the basis of the equidistance principle had not done so because they felt obliged to); ILA Report at principle 17(iv) and commentary.

<sup>16</sup> The Steering Committee consisted of Professors Georges Abi-Saab, Salah El-Din Amer, Ove Bring, Eric David, John Dugard, Florentino Feliciano, Horst Fischer, Françoise Hampson, Theodor Meron, Djamchid Momtaz, Milan Šahović, and Raúl Emilio Vinuesa.

<sup>17</sup> For a complete list of all 161 rules, see *Intraspec.ca*, “Customary International Humanitarian Law,” [http://intraspec.ca/customary\\_law.php](http://intraspec.ca/customary_law.php) (last updated Oct. 1, 2005).

<sup>18</sup> Examples of customary rules that have corresponding provisions in Additional Protocol I include the principle of distinction between civilians and combatants and between civilian objects and military objectives (Rules 1, 17); the prohibition of indiscriminate attacks (Rules 11–13); the principle of proportionality in attack (Rule 14); the obligation to take feasible precautions in attack and against the effects of attack (Rules 15–24); the obligation to respect and protect medical and religious personnel, medical units, and transports (Rules 25, 27–30), humanitarian relief personnel and objects (Rules 31–32), and civilian journalists (Rule 34); the obligation to protect medical duties (Rule 26); the prohibition of attacks on non-defended localities and demilitarized zones (Rules 36–37); the obligation to provide quarter and to safeguard an enemy *hors de combat* (Rules 46–48); the prohibition of starvation (Rule 53); the prohibition of attacks on objects indispensable to the survival of the civilian population (Rule 54); the obligation to respect the fundamental guarantees of civilians and persons *hors de combat* (Rules 87–105); the obligation to account for missing persons (Rule 117); and the specific protections afforded to women and children (Rules 134–137).

<sup>19</sup> Examples of rules found to be customary and that have corresponding provisions in Additional Protocol II include the prohibition of attacks on civilians (Rule 1); the obligation to respect and protect medical and religious personnel, medical units, and transports (Rules 25, 27–30); the obligation to protect medical duties (Rule 26); the prohibition against starvation (Rule 53); the prohibition of attacks on objects indispensable to the survival of the civilian population (Rule 54); the obligation to respect the fundamental guarantees of civilians and persons *hors de combat* (Rules 87–105); the obligation to search for and respect and protect the wounded, sick, and shipwrecked (Rules 109–111); the obligation to search for and protect the dead (Rules 112–113); the obligation to protect persons deprived of their liberty (Rules 118–119, 121, 125); the prohibition of forced movement of civilians (Rule 129); and the specific protections afforded to women and children (Rules 134–137).

<sup>20</sup> See, e.g., Rules 7–10 (distinction between civilian objects and military objectives), Rules 11–13 (indiscriminate attacks), Rule 14 (proportionality in attack), Rules 15–21 (precautions in attack); Rules 22–24 (precautions against the effects of attack); Rules 31–32 (humanitarian relief personnel and objects); Rule 34 (civilian journalists); Rules 35–37 (protected zones); Rules 46–48 (denial of quarter); Rules 55–56 (access to humanitarian relief) and Rules 57–65 (deception).

<sup>21</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict [hereinafter Additional Protocol I], art. 56(1) (June 8, 1977), available at <http://www.unhcr.ch/html/menu3/b/93.htm> (accessed Oct. 30, 2005) (followed by exceptions in paragraph 2); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflict [hereinafter Additional Protocol II], art. 15 (June 8, 1977), available at <http://www.unhcr.ch/html/menu3/b/94.htm> (accessed Oct. 30, 2005) (with no exceptions).

<sup>22</sup> See Henckaerts & Doswald-Beck at vol. 1, Rule 45.

<sup>23</sup> International Military Tribunal at Nuremberg, *Case of the Major War Criminals*, Judgment (Oct. 1, 1946), Official Documents, vol. I, 253–54.

<sup>24</sup> See Rome Statute of the International Criminal Court pt. 2, art. 8, §§ 2(b)(xvi), (e)(v) (July 17, 1998), available at <http://www.un.org/law/icc/statute/romefra.htm> (accessed Oct. 30, 2005).

<sup>25</sup> See Henckaerts & Doswald-Beck, *Customary International Humanitarian*

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Law, vol. 1, Rule 3 (combatants), Rule 4 (armed forces), Rule 5 (civilians and civilian population).

<sup>26</sup> Additional Protocol II at arts. 13–15, 17–18.

<sup>27</sup> See, e.g., Amended Protocol II to the Convention on Certain Conventional Weapons, art. 3, §§ 7–11 (May 3, 1996), *available at* <http://www.icrc.org/ihl.nsf/FULL/575?OpenDocument> (accessed Oct. 30, 2005); Protocol III to the Convention on Certain Conventional Weapons, art. 2 (Oct. 10, 1990), *available at* <http://www.icrc.org/ihl.nsf/FULL/515?OpenDocument> (accessed Oct. 30, 2005); Ottawa Convention on the Prohibition of Anti-personnel Mines, preamble (Sept. 18, 1997), *available at* <http://www.icrc.org/ihl.nsf/FULL/580?OpenDocument> (accessed Oct. 30, 2005); Rome Statute of the Interna-

tional Criminal Court at pt. 2, art. 8, §§ 2(e)(i), (e)(iii), (e)(viii).

<sup>28</sup> Because of these uncertainties, the ICRC is seeking to clarify the notion of direct participation by means of a series of expert meetings that began in 2003. See, e.g., International Committee of the Red Cross, “Direct Participation in Hostilities under International Humanitarian Law,” <http://www.icrc.org/web/eng/siteeng0.nsf/iwpList74/459B0FF70176F4E5C1256DDE00572DAA> (Sept. 2003).