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# Review of Conference: “The Reaffirmation of Custom as an Important Source of International Humanitarian Law”

*by Sabrina Balgamwalla*

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ON SEPTEMBER 28, 2005, the American University Washington College of Law (WCL) hosted the North American launch of the International Committee for the Red Cross’ (ICRC) study, *Customary International Humanitarian Law*. The launch conference, entitled “The Reaffirmation of Custom as an Important Source of International Humanitarian Law,” featured the study’s co-authors, Jean-Marie Henckaerts and Louise Doswald-Beck, as well as a distinguished panel of academics, U.S. government officials, and attorneys. Judge Theodor Meron, President of the International Criminal Tribunal for the Former Yugoslavia, delivered the keynote address, “The Revival of Customary International Law,” in which he discussed the study and the relevance of customary international law to international criminal tribunals.

Jean-Marie Henckaerts, legal advisor to the ICRC, began the conference with an introduction to the 5,000-page study, which took almost 10 years to complete. The study commenced in 1995 and followed a mandate from the parties to the 1949 Geneva Conventions for the ICRC to identify rules found to have attained the status of customary humanitarian law. The study is particularly significant, remarked Henckaerts, because customary rules are considered binding upon all nations, regardless of whether or not they are signatories to the Geneva Conventions or its Additional Protocols. Further, 147 of the 161 rules enumerated in the study were found to be applicable to non-international armed conflicts, which are typically subject to far fewer treaty rules than international conflicts.

## PROFESSOR LOUISE DOSWALD-BECK

FOLLOWING HENCKAERTS’ ADDRESS, a roundtable discussion reflected on the study and its international significance. Louise Doswald-Beck began by elaborating on the process used by the Steering Committee in developing this landmark study. Doswald-Beck specified that the committee inductively gleaned the principles from state practice collected in six separate subject areas. The committee compared the derived principles to the state practice documentation and then reorganized and refined the rules. She noted that the committee did this twice before drafting the commentary. The committee opted to include a separate volume detailing the state practices that support each rule, which Doswald-Beck noted would permit practitioners to look at state practice and draw their own conclusions regarding the principles.

Doswald-Beck also noted that international human rights law played an important role in the study. “I think it is abundantly clear,” she said, “that human rights law has had a direct effect on international humanitarian law. You only have to look at the wording of the Additional Protocols of 1977 to recognize rules, which are typically worded in human rights language.” The distinction between humanitarian and human rights law, she continued, has become less clear over time, and it is now impossible to create purely humanitarian rules when examining behaviors that reflect

both human rights and humanitarian legal norms. For example, Doswald-Beck noted that Rule 99, which includes the requirement of registration of persons in detention, is based on human rights norms pertaining to the prohibition of disappearances. Although human rights law differs from humanitarian law in the sense that the former applies at all times (subject to certain derogations in “states of emergency”) and the latter applies only in “time of war,” the Fundamental Guarantees chapter of the study highlights provisions that protect all those involved in armed conflict, regardless of their status as a civilian, combatant, armed opposition group member, or other classification.

With respect to the rest of the study, Doswald-Beck indicated, the principles were derived primarily from international humanitarian law, but human rights law supports the principles set forth in the chapter on Fundamental Guarantees, including the prohibition on torture (Rule 90), the prohibition against rape and others forms of sexual violence (Rule 93), and the prohibition on slavery and the slave trade (Rule 94).

Doswald-Beck also addressed a scenario in which a customary rule loses support, and a new customary rule arises. She indicated that Rule 53, prohibiting the starvation of civilians as a method of warfare, was not embodied in any treaty prior to the adoption of the Additional Protocols in 1977. The Additional



Col. W. Hays Parks, USMCR (Ret.), Lt. Col. Burrus Carnahan (Ret.), Michael Matheson, Joshua Dorosin, Jordan Paust, Louise Doswald-Beck, and Robert Goldman.

Protocols, however, influenced the formation of such a rule, and there was sufficient state practice to establish it as custom. The assessment of the prohibition of reprisals, specifically attacks on civilians during hostilities, was more difficult for the ICRC committee. Doswald-Beck stated that there used to be a rule that permitted reprisal attacks against civilians in reprisals, but it is clear that the rule has lost support from a vast majority of the international community, and most believe it is now unlawful. She noted, however, that three states have ambiguous practices with respect to this rule, and that the lack of uniformity barred the derivation of a new rule regarding reprisals. On this matter Doswald-Beck cited

an argument by Ian Brownlie that in a situation where customary law has lost support and there is no sufficient state practice to support a new rule, there is no rule, but a web of bilateral relations. Only bilateral agreements would apply. At the same time, Doswald-Beck noted that the ICRC study takes into account other documents, such as the Martens clause,<sup>1</sup> case law, and underlying principles of human rights law, all of which indicate that widespread practices prohibiting reprisals should not be ignored.

#### JOSHUA DOROSIN

JOSHUA DOROSIN, ASSISTANT LEGAL ADVISOR to the U.S. Department of State, noted that the ICRC study is an important work, which the State Department considers very useful. But Dorosin, speaking in a personal capacity, took issue with the methodology of the study. He posed a number of questions regarding state practice and *opinio juris*, particularly with respect to specially-affected states and persistent objectors.

Dorosin cited three major criticisms of the study's reliance on state practice. "One of the basic problems with state practice in this field," he noted, "is that so much state practice and so much of this field is already covered by conventions, and so it raises a basic ques-

argued, are problematic because the ICRC study "seemed to indicate that the rules contained in Additional Protocol I are, in fact, applicable to non-international armed conflicts as well, which to me is a surprising result, considering the number of countries that have specifically not signed the First Additional Protocol. So to develop a theory that would bind states as a matter of customary international law to rules that many states specifically decided not to sign up for in the context of specific conventions will be viewed as a surprising result."

When one looks at states that have not signed the Additional Protocols, Dorosin observed, most of them are states that have engaged in armed conflict. On this matter, Dorosin concluded with an argument from Daniel Bethlehem, Professor of Law at Cambridge University, who participated in an earlier panel on the ICRC study. "You have specially-affected states that as yet have not signed up to certain protocols, and then you have a study that seeks to announce rules that are binding as a matter of customary international law on specially-affected states," Dorosin remarked. "I think that raises particularly challenging questions about the methodology."

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tion as to whether one can draw conclusions about customary humanitarian law from the practice of states, which is basically the implementation of a treaty obligation.” Dorosin concluded that it is difficult to draw precise conclusions based on state practice. He also questioned the ICRC’s use of military manuals as corroborating evidence of customary rules. “States place rules in manuals for a variety of reasons, not always because they believe they are legally obligated to do so,” he observed. “Often practice that is reflected in the manuals is based on a policy of including a certain rule, rather than a sense that the rule flows from a legal obligation.” Finally, Dorosin criticized the study for relying on the practices of non-states and non-governmental organizations, particularly with respect to non-binding resolutions. These practices, he concluded, are insufficiently indicative of custom, and cannot support the rules derived from them.

Dorosin explained that, with respect to the challenge of finding *opinio juris* to support its principles, the ICRC examined density of practice and inferred that state practice is based on a clear view of a legal obligation. “I am skeptical whether one can rely heavily on the density of practice approach,” Dorosin contended, although he noted that the U.S. State Department would consider the matter further. Dorosin also noted that many of the rules are readily identifiable as principles in Additional Protocol I, which only applies to international armed conflict. These principles, he

#### PROFESSOR MICHAEL MATHESON

MICHAEL MATHESON, A PROFESSOR at the George Washington University Law School and a member of the United Nations International Law Commission, began by congratulating Henckaerts and Doswald-Beck on the study, which he noted was bound to be a significant event in the field and an important step in the development of customary international law. With respect to the role of dissenting states in the formation of custom, Matheson noted that to establish a customary rule, state practice must be extensive and representative, even among “specially-affected” states. On this point, the ICRC study raises the question of whether it is legally possible in this field for states to be “persistent objectors,” but does not provide an answer. Matheson observed that the issue of persistent objectors is reflected in various aspects of the study, including Rule 43, based on Article 35 of Additional Protocol I, which prohibits means and methods of warfare expected to cause widespread and severe damage to the environment. The study finds this to be a principle of international customary law based on virtually uniform acceptance, notwithstanding objections in whole or in part by the United States, the United Kingdom, and France, which the study considers “specially-affected” with respect to possession of nuclear weapons.

On the other hand, Matheson remarked, when any of these states objects to a treaty but agrees with the principles set forth

therein, their acceptance is bound to have an important impact on customary international law. This was the case with the United States when it did not ratify the First Additional Protocol in the 1980s, but expressed support for many principles set forth in that Protocol and believed that many of them should become customary law. According to the ICRC study, most of these principles are now embodied in international customary law. Matheson contended that the United States approval of these principles likely played an important role in that result, which illustrates that customary international law often crystallizes around the positions of important dissenters. “Nonetheless, neither the United States, nor any other major military power, can effectively protect its interests or advance international law generally by confining itself to the role of a perpetual dissenter,” Matheson argued. “It is particularly important for the U.S. to take a proactive approach in the development of both conventional and customary law and to adhere to international instruments that adequately protect its interests when those instruments are available.”

Matheson also spoke of a gap between the comprehensive, detailed laws governing international armed conflict, and the smaller and less defined body of treaty and customary law pertaining to internal armed conflicts. This gap, Matheson argued, is illustrated by the 1949 Geneva Conventions, in which hundreds of detailed provisions address international armed conflicts, but only Common Article 3, which requires the humane treatment and fundamental protections for civilians, addresses domestic conflicts. The Second Additional Protocol, Matheson continued, and even the statute of the International Criminal Court, still fail to adequately establish protective principles applicable in non-international armed conflicts.

The ICRC study, Matheson argued, is deeply significant in its incorporation of other sources of law, such as the Conventional Weapons Convention, to establish laws pertaining to means and methods of domestic warfare that are not addressed in the Second Additional Protocol or in the jurisprudence of the ad hoc international criminal tribunals for Rwanda and the former Yugoslavia. In conclusion, Matheson noted that the ICRC study “may become an important factor in moving states towards recognition of these principles in internal conflicts.”

#### **LT. COL. BURRUS CARNAHAN (RET.)**

LT. COL. BURRUS CARNAHAN (RET.) of the United States Air Force, principal contributor to the Report to the ICRC on U.S. Practice in the Field of Customary International Humanitarian Law, called the study a “magisterial work,” and said that “from now on every work on the subject of international customary humanitarian law will have to take the study’s position into account.” He also offered a critical perspective on the reasoning behind these rules, in particular Rule 108, which declares that mercenaries are not lawful combatants and therefore not entitled to prisoner-of-war (POW) status. Lt. Col. Carnahan argued that this rule was a regional policy, adopted primarily among sub-Saharan African states, and later inserted as Article 47 of Additional Protocol I in 1977 only because other nations present at the Geneva Diplomatic Conference believed that the term “mercenary” was too narrowly defined to be applicable outside its original context. “It is therefore startling to see what is and was essentially a regional policy elevated to the status of universal, customary law,” Lt. Col. Carnahan said.

Lt. Col. Carnahan cited Common Article 1 of the 1949 Geneva Conventions, which requires the parties to respect the provisions of the Conventions “in all circumstances” and limits special agreements among parties. Yet, he argued, Article 47 and Rule 108 deny POW status to an entire class of persons, even in instances where the combatants distinguish themselves from the civilian population and otherwise follow the laws of war. Lt. Col. Carnahan maintained that if Rule 108 was customary law, the custom must have arisen after the 1949 Geneva Conventions were signed. “If Rule 108 is truly a rule of customary law, then it applies to all states, including parties to the Geneva Conventions who are not parties to Additional Protocol I. Rule 108 thus implies that specific provisions of the 1949 Geneva Conventions can be altered not only through the amendment process of the conventions themselves, but also through subsequent customary practice,” he said.

Looking to the commentary on Rule 108 for interpretive guidance, Lt. Col. Carnahan noted that the study based this rule on military manuals that deny POW status to mercenaries, but that most of these manuals were from states that were either parties to Additional Protocol I or were considering becoming parties to the Protocol. As evidence of state practice, he continued, the manuals of Israel and the United States are particularly significant in that neither state is a party, or intends to become a party, to Additional Protocol I. The Israeli military manual indicates that “Article 47 is accepted as customary international law, and is therefore binding.” On the other hand, Lt. Col. Carnahan observed, the U.S. manual is problematic because it specifically objects to the denial of prisoner-of-war status to mercenaries. He stated that the United States government “has always protested vigorously against any attempt by other nations to punish American citizens as mercenaries.” Lt. Col. Carnahan argued that this objection by the United States is even more important given the U.S. government’s prevalent use of security contractors in conflict situations, which blurs the widely-accepted definition of “mercenary.”

Additionally, Lt. Col. Carnahan was critical of the reasoning underlying Rule 74 of the ICRC study, which finds that customary international law prohibits the use of chemical weapons. He argued that this international norm only pertains to “first use” and that most states maintain the right to retaliate in kind to a chemical weapons attack. He noted that the commentary to the rule indicates that 21 states have reservations to this effect. The ICRC study, however, excuses these reservations, and states that 16 of these states are party to the Chemical Weapons Convention (CWC), which explicitly prohibits all use of chemical weapons, including in-kind retaliation. Lt. Col. Carnahan argued that this reasoning ignores the political nature of the CWC. There is no indication, he argued, that parties to the CWC intended to alter the customary law surrounding the use of chemical weapons in warfare. He also noted that the “supreme interest” clause of the CWC<sup>2</sup> permits States Parties to opt out of its provisions, which can override the provisions’ prohibitions on the use of chemical weapons. Therefore, he concluded, practitioners should cautiously approach the ICRC study with regard to both the rules and their larger implications for the field of customary international humanitarian law.

#### **PROFESSOR JORDAN PAUST**

JORDAN PAUST, LAW FOUNDATION PROFESSOR at the University of Houston Law Center, addressed the role of customary humani-

tarian law and its interface with treaty law. First, he noted that customary international law is based on general patterns of expectation and practice, and not consent. Paust therefore disagreed with the notion that countries could be “persistent objectors” with respect to customary rules. He noted that the Nuremberg Tribunal upheld the provisions of the 1907 Hague Convention with respect to Germany, despite Germany’s objections to the Hague Convention, because many of these provisions were found to be binding as a matter of customary international law by 1939.

Paust further noted that the study would be useful as an interpretive aid, not only for international criminal tribunals, but also for other international and domestic legal bodies. Article 31 of the Vienna Convention Law of Treaties states that customary law is an important resource for the interpretation of treaties. The U.S. Supreme Court, as well as other judicial bodies throughout the world, has used customary law in decisions concerning treaties and other questions of international law. Paust remarked that customary law is also a useful source of *jus cogens* norms (i.e., norms that cannot be violated by any state), particularly with respect to issues such as cruel, inhuman, and degrading treatment; due process; and prohibitions against disappearances.

Finally, Paust spoke of the universal applicability of customary international law and its potential to bind both state and non-state entities in armed conflicts. Because customary international humanitarian law applies to individuals, non-states, and belligerent entities, Paust argued, its provisions also apply to stateless insurgents and binds them to many of the provisions set forth in the Geneva Conventions and Additional Protocols. Customary international law, Paust continued, also provides states with various competencies, such as the customary competence to detain individuals without trial when reasonably necessary, which is reflected in Articles 5, 42, and 43 of the Fourth Geneva Convention. In this manner, Paust concluded, customary international law fills gaps in treaty law to provide consistent, reflexive, and binding obligations to all parties in an armed conflict, and affords basic protections to all individuals.

#### COL. W. HAYS PARKS, USMCR (RET.)

COL. W. HAYS PARKS, USMCR (RET.), Adjunct Professor at WCL, raised specific examples to question the soundness of the customary rules identified in the ICRC study. His remarks concerned the failure of customary international humanitarian law to adequately protect medical aircraft. He agreed that the ICRC

study was a tremendous achievement, but argued that future elaborations on the study should incorporate details from the practice of warfare.

With respect to the protection of medical aircraft, Col. Parks explained, there are six international conventions with relevant provisions, including Additional Protocols I and II. No military commander has ever relied on a single one of these provisions, however, to protect medical aircraft. Col. Parks concluded, therefore, that one must consider actual practices in the context of war to determine the functionality of these provisions. There are no provisions, he continued, that protect medical aircraft flying in enemy airspace. For medical aircraft to fly over contact zones, the aircraft must be subject to orders to land and to be inspected for purposes of identification. The aircraft can only receive protection in these narrow circumstances and receives no special protection under other conditions in enemy airspace.

With regard to Rule 29, which involves protection for medical transports, Col. Parks contended that the provision effectively protects ground transportation, but neglects to do the same for medical aircraft. The Geneva Conventions have more specific provisions for the protection of medical aircraft that the ICRC study should seek to incorporate, such as conveying protected status upon aircraft painted with Red Cross or Red Crescent insignia. Col. Parks concluded that the ICRC study is an important contribution to the field of international customary humanitarian law and that, as a continued exercise, further detail may be incorporated into these rules to provide more comprehensive protections to parties in situations of armed conflict.

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#### ENDNOTES: Review of Conference

<sup>1</sup> The Martens clause is a principle embodied in the preamble of the Second Additional Protocol to the Geneva Convention of 1977, which reads, “[R]ecalling that in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of public conscience.”

<sup>2</sup> The “supreme interest” clause states that “[e]ach State Party shall, in exercising its national sovereignty, have the right to withdraw from this Convention if it decides that extraordinary events, related to the subject-matter of this Convention, have jeopardized the supreme interests of its country.” See Chemical Weapons Convention, art. 16, ¶ 2 (Apr. 29, 1997), available at [http://www.opcw.org/html/db/cwc/eng/cwc\\_frameset.html](http://www.opcw.org/html/db/cwc/eng/cwc_frameset.html) (accessed Feb. 6, 2006).

#### ENDNOTES: ASSESSING THE LAWS AND CUSTOMS OF WAR *continued from page 12*

*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/iwplList74/459B0FF70176F4E5C1256DDE00572DAA> (Sept. 2003).