

The Principle of Distinction: Probing the Limits of its Customariness

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Introduction

In the spring of 2004, frenzied crowds dragged and dismembered the bodies of four U.S. civilian contractors through the streets of Fallujah.¹ The crowds hung two of the bodies from a bridge. This depravity and callousness sent tremors throughout the American landscape.² The ghosts of Mogadishu from more than a decade ago came crawling back into the public consciousness.³ Fallujah quickly became the centerpiece for Phase IV⁴ of Operation Iraqi Freedom, and this city of 250,000 became the center of gravity for the organized insurgency movement in Iraq. In November 2004, 15,000 Marines and Soldiers, with their Iraqi counterparts, retook the city in fierce door-to-door fighting not seen by American troops since the Vietnam War.⁵

Widespread reports of “large civilian casualties,” however, tarnished the victory.⁶ The reports, although unconfirmed by most news accounts, exposed and reinvigorated a debate about civilians in war. Fallujah brought to light the blurring of the line between civilians and combatants by both sides to the conflict at opposite ends of the spectrum. For the State powers, like the United States, civilian employees and contractors now flood the battlefield. For the non-State powers, like the insurgents in Iraq, any attempts to identify oneself publicly as a member of an armed force have been totally abandoned. Never before has it been so difficult for the Soldier to distinguish between the targeted and the protected—the combatant and the civilian. Compliance with this concept of distinction is the fundamental difference between heroic Soldier and murderer.

The Law of War, including the concept of distinction, exists first and foremost for the benefit of the combatant, although the protected are an obvious beneficiary.⁷ It is the Law of War that permits the combatant to commit acts that would otherwise be prohibited. For example, under the concept of distinction a Soldier who limits his intentional attacks to the targetable (e.g., insurgent forces) is immune from prosecution for the results of those attacks.

Distinction is the cornerstone of the Law of War.⁸ It is fundamental: combatants are lawful targets during times of war while civilians are protected. Like all legal concepts, however, distinction must be constantly refined and updated to remain relevant and practicable to the modern Soldier. Towards that end, the International Committee of the Red Cross (ICRC) has published an impressive study on the rules governing the Law of War, beginning with a detailed discussion on distinction.⁹ The study goes beyond those rules codified by international treaties, such as the 1907 Hague Regulations¹⁰ and the 1949

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¹ Robert D. Kaplan, *Five Days in Fallujah*, ATLANTIC MONTHLY, July/Aug. 2004, at 116.

² Martha A. Sandweiss, Editorial, *Death on the Front Page*, N.Y. TIMES, Apr. 4, 2004, § 4, at 13.

³ *Id.*

⁴ Phase IV refers to the period following the cessation of major hostilities, sometimes called post-conflict or transition operations.

⁵ James T. Cobb, et al., *The Fight for Fallujah: TF 2-2 IN FSE AAR: Indirect Fires in the Battle of Fallujah*, FIELD ARTILLERY MAG., Mar./Apr. 2005, at 23.

⁶ Dexter Filkins & James Glanz, *The Conflict in Iraq: The Insurgency; Rebels Routed in Falluja; Fighting Spreads Elsewhere*, N.Y. TIMES, Nov. 15, 2004, at 1; Richard A. Opiel, Jr. & Robert F. Worth, *The Conflict in Iraq: Insurgency; G.I.'s Open Attack to Take Falluja from Iraq Rebels*, N.Y. TIMES, Nov. 8, 2004, at 1.

⁷ Gabor Rona, *International Law Under Fire: Interesting Times for International Humanitarian Law: Challenges from the “War on Terror”*, 27 FLETCHER FORUM OF WORLD AFFAIRS 55, 57 (2003).

⁸ YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 82 (2005).

⁹ 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWARD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES (2005) [hereinafter 1 ICRC RULES].

¹⁰ Regulations Concerning the Laws and Customs of War on Land, annexed to Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 BEVANS 631 [hereinafter Hague Regulations].

Geneva Conventions,¹¹ and attempts to identify developments that are customary international law—rules that through State practice should be accepted as law.¹² Of the 161 rules enumerated by the ICRC Study, the first twenty-four focus on the principle of distinction. These rules are subcategorized into the following six areas: distinction between civilians and combatants, distinction between civilian objects and military objectives, indiscriminate attacks, proportionality in attack, precautions in attack, and precautions against the effects of attacks.¹³

This article analyzes the rules that grapple with the principle of distinction for the *individual* in war.¹⁴ Next, this article examines whether the proposed ICRC rules are customary in international armed conflict, as well as non-international armed conflict. The article provides commentary throughout concerning whether the rules analyzed are actually customary international law or an aspiration of what the law should be according to the ICRC.¹⁵ The article concludes that the over 5,000 pages of rules and practice is extraordinarily impressive and a useful resource for every judge advocate. Judge advocates, however, should be aware of the treatise’s shortcomings and should not treat the document as an authoritative source of international law.

Distinction in International Armed Conflict

The General Rule

The first ICRC rule is a restatement of the core concept for the principal of distinction: “The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.”¹⁶ The term attack, although not discussed by the ICRC, is defined by Additional Protocol I, Article 49(1), to mean “acts of violence against the adversary.”¹⁷ The ICRC’s rule follows Article 48 of Additional Protocol I, “the Parties to the conflict shall at all times distinguish between the civilian population and combatants;”¹⁸ Article 51(2), “civilians . . . shall not be the object of attack;”¹⁹ and Article 52(2), “[a]ttacks shall be limited strictly to military objectives,” which has been argued to include personnel.²⁰

The origin of this rule dates back to the middle of the nineteenth century. Article 22 of the 1863 Lieber Code, the laws for war governing the Union Army during the United States Civil War, stated that there exists a “distinction between the private individual belonging to a hostile country and the hostile country itself, with it is men in arms.”²¹ Five years later, the

¹¹ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, opened for signature Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, opened for signature Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, opened for signature Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, opened for signature Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

¹² 1 ICRC RULES, *supra* note 9.

¹³ All of the rules discussing the principle of distinction in international law armed conflict flow directly from Articles 48 through 58 of the 1977 Protocol I Additional to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflict. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, art. 51, 1125 U.N.T.S. 3, 16 I.L.M. 1391 [hereinafter Additional Protocol I].

¹⁴ Although very important to any discussion on the Law of War, this article will not discuss the distinction between civilian objects and military objective, which are closely analogous to civilians and combatants; bombardment (a subset of indiscriminate attacks); and a state’s obligation to take precautions against the effects of attacks.

¹⁵ The ICRC has been accused of attempting to disguise its positions on issues under debate as dispassionate legal analysis. “One can only wonder if the *Customary Law Study* is a dispassionate legal analysis or a brief for past and future ICRC agenda items.” See W. Hays Parks, *The ICRC Customary Law Study: A Preliminary Assessment*, Presentation at the 99th Annual Meeting of the American Society of International Law, Washington, D.C., Apr. 1, 2005, at 9 [hereinafter Parks Presentation] (unpublished presentation) (on file with authors).

¹⁶ 1 ICRC RULES, *supra* note 9, at 3.

¹⁷ Additional Protocol I, *supra* note 13, art. 49.

¹⁸ *Id.* art. 48.

¹⁹ *Id.* art. 51(2).

²⁰ *Id.* art. 52(2). The U.S. Air Force doctrine on the use of air power is based upon a broad interpretation of “military objectives” that would include such objectives as the will of the enemy populace. For a detailed discussion on this, see Major Jeanne M. Meyer, *Tearing Down the Façade: A Critical Look at the Current Law on Targeting the Will of the Enemy and Air Force Doctrine*, 51 A.F. L. REV. 43 (2001).

²¹ 2 JEAN-MARIE HENCKAERTS & LOUISE DOSWARD-BECK, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: PRACTICE* 4 n.4 (2005) [hereinafter 2 ICRC PRACTICE].

Saint Petersburg Declaration set forth the clearest articulation of the principle of distinction to date: “the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy.”²² These early efforts were mainly centered on military force; there were few rules aimed at protecting civilians. That focus changed with the promulgation of the Geneva Conventions of 1949.

Violence Aimed at Spreading Terror

The second ICRC rule—“acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited”—expands on the third clause of the first rule prohibiting attacks against civilians.²³ This rule is taken verbatim from Additional Protocol I, Article 51(2)²⁴ and stems from Article 33 of the 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War,²⁵ “all measures of intimidation or of terrorism are prohibited.”²⁶ For example, the intentional bombing of a civilian population is illegal.²⁷ The first two ICRC rules are established through State practice in international armed conflicts—they are black letter law.

Delineating Civilians from Combatants

The uncertainty within the principle of distinction emerges when probing the critical delineation between what constitutes a civilian and what constitutes a combatant. The next four rules dissect the differences between these two categories. The third ICRC rule states “[a]ll members of the armed forces of a party to the conflict are combatants, except medical and religious personnel.”²⁸ The fourth rule, in turn, defines who is a member of the armed forces: “The armed forces of a party to the conflict consist of all organized armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates.”²⁹ Rules 5 and 6 follow Rules 3 and 4, except they apply to civilians. Civilians are defined in the negative: “persons who are not members of the armed forces.”³⁰ Rule 6 asserts that civilians lose their protection from attack when “and for such time as they take a direct part in hostilities.”³¹ Like the first two rules, the definitions of combatants, armed forces, and civilians and the loss of protection from attack are taken almost verbatim from the Additional Protocol I.³²

Who Are Combatants?

There is no contrary practice to the fundamental rule that members of the armed forces of a party to the conflict are combatants and non-members of the armed forces are civilians.³³ A split in custom emerges when a hostile force is not a member of their country’s armed force but part of a militia, a paramilitary force, or a volunteer corps, to include organized resistance movements.³⁴ Under Article 1 of the Regulations Annexed to the 1907 Hague Convention Respecting the Laws and Customs of War on Land, if hostiles 1) are commanded by a person responsible for his subordinates; 2) have a fixed distinctive emblem recognizable at a distance; 3) carry their arms openly; and 4) conduct their operations in accordance with

²² 1 ICRC RULES, *supra* note 9, at 3 (citing the St. Petersburg Declaration, pmbl.).

²³ *Id.* at 3.

²⁴ Additional Protocol I, *supra* note 13, art. 51(2).

²⁵ Geneva Convention IV, *supra* note 11, art. 33.

²⁶ *Id.*

²⁷ 2 ICRC PRACTICE, *supra* note 21, paras. 481-85.

²⁸ 1 ICRC RULES, *supra* note 9, at 11.

²⁹ *Id.* at 14.

³⁰ *Id.* at 17.

³¹ *Id.* at 19.

³² See Additional Protocol I, *supra* note 11, art. 43 (addressing armed forces); *id.* arts 50 & 51 (defining civilians and the civilian population as well as announcing protections for the civilian population).

³³ 1 ICRC STUDY, *supra* note 9, at 12, 18.

³⁴ *Id.* at 15.

the laws and customs of war, then they are combatants.³⁵ Rule 4, however, eliminates the two middle prongs aimed at the requirement of visibility—fixed distinctive emblem and open arms.³⁶ The ICRC commentary acknowledges this elimination but notes that “[t]he requirement of visibility is relevant with respect to a combatant’s entitlement to prisoner-of-war status.”³⁷ In other words, these types of hostile persons are combatants for definitional purposes but receive none of the benefits of being a combatant—garnering combatant immunity for their war-like actions during hostilities and securing prisoner of war status, if captured.³⁸

Although the language of the ICRC’s fourth rule mirrors Additional Protocol I, Article 43(1), and despite the ICRC’s claim that state practice “establishes this rule as a norm of customary international law,”³⁹ the elimination of visibility requirements is not the accepted practice of States. A number of States—Israel,⁴⁰ Burkina Faso,⁴¹ Cameroon,⁴² Canada,⁴³ Mali,⁴⁴ the United Kingdom,⁴⁵ and the United States⁴⁶—mandate that all four prongs be present to establish non-members of the armed forces as combatants. The reality is that the difference in the two approaches—a civilian versus a combatant without any of the combatant protections—is one of labels. Those labels in today’s military campaigns, especially in information operations, can be extremely important. If someone is a combatant, even though they appeared in civilian clothing and were not a member of an armed force when captured, then certain expectations within the international community could be triggered, namely, a demand for prisoner of war status, including combatant immunity.

The ICRC’s Rule 4 analysis subtly blurs the contours of Rule 6—civilians cannot take direct part in hostilities—and in turn, the entire concept of distinction. If it is not clear what a combatant looks like, then who can be sure of the delineation between civilians and combatants? On a related plane, do individuals who directly participate in hostilities and meet the first and fourth prong of the Hague Regulations (under a uniform command and adhere to the Law of War) transform themselves from civilian status to that of a combatant? The root of making a demarcation between these two groups must be visibility.

Loss of Protection from Attack

As Rule 6 foreshadows, civilians at some level will inevitably take a direct part in hostilities. When they do, they lose their protection from targeting and then may be legally and intentionally targeted. The issues under customary international law are twofold: first, is the term “direct part in hostilities” the acid test for determining if a civilian has crossed the line; and second, regardless of how customary “direct part in hostilities” is viewed, what does that term really mean?

The term “direct part in hostilities” comes from Additional Protocol I, Article 51(3).⁴⁷ The term did not appear in the original Geneva Conventions. Instead, common Article 3 of the Conventions protects “persons taking no *active* part in the hostilities.”⁴⁸ The issue of whether there is a substantive difference between the words direct and active is ignored by the ICRC commentary. In a report prepared by the ICRC in 2003, some members of the Committee conceded that these two terms were distinct when discussing children in armed conflict: direct participation referred to combat operations while

³⁵ Hague Regulations, *supra* note 10, art. 1. The regulations actually use these qualifications to identify “belligerents.” *Id.*

³⁶ 1 ICRC RULES, *supra* note 9, at 14.

³⁷ *Id.* at 15.

³⁸ *Id.* at 15-16.

³⁹ *Id.* at 14. The ICRC makes this claim for all 161 of its rules in relation to international armed conflict. These assertions have been criticized as relying on “statements to the exclusion of acts.” Parks Presentation, *supra* note 15, at 5.

⁴⁰ 2 ICRC PRACTICE, *supra* note 21, at 91 n.650 (citing Israel’s *Manual on the Laws of War*) (citations omitted).

⁴¹ *Id.* at 89 n.640 (citing Burkina Faso’s *Disciplinary Regulations*) (citations omitted).

⁴² *Id.* (citing Cameroon’s *Disciplinary Regulations*) (citations omitted).

⁴³ *Id.* at 89-90 (citing Canada’s *Laws of Armed Conflict Manual*) (citations omitted).

⁴⁴ *Id.* at 91-92 (citing Mali’s *Army Regulations*) (citations omitted).

⁴⁵ *Id.* at 93 (citing the United Kingdom’s *Laws of Armed Conflict Manual*) (citations omitted).

⁴⁶ *Id.* (citing U.S. DEP’T OF THE ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 61 (1956); U.S. DEP’T OF THE AIR FORCE, PAM. 110-31 INTERNATIONAL LAW—THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS para. 3-2 (1976)).

⁴⁷ Additional Protocol I, *supra* note 13, art. 51(3).

⁴⁸ Geneva Convention I, *supra* note 11, art. 3; Geneva Convention II, *supra* note 11, art. 3; Geneva Convention III, *supra* note 11, art. 3; Geneva Convention IV, *supra* note 11, art. 3.

active participation referred to military activities linked to combat.⁴⁹ The Committee, however, concluded that such a distinction, regardless of the context, would be virtually impossible to implement.⁵⁰ Additionally, the International Criminal Tribunal for Rwanda concluded that the two terms were synonymous.⁵¹

Overall, the weight of authority confirms that every State uses the direct part in hostilities standard as an acid test to determine whether a civilian loses his protection against attack. What is not clear, however, is what the term “direct” really means. The commentary to Additional Protocol I, Article 51(3), states that “‘direct’ participation means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces.”⁵² The commentary goes on to clarify that “[t]here should be a clear distinction between direct participation in hostilities and participation in the war effort.”⁵³ Most States have agreed and have attempted to draw a line between direct participation and indirect participation: “indirect participation . . . does not involve acts of violence which pose an immediate threat of actual harm to the adverse party” while direct participation includes “anyone who personally tries to kill, injure, or capture enemy persons or objects.”⁵⁴

The demarcation of direct participation is particularly important when States, like the United States, use a multitude of contractors and civilian government employees in an area of combat operations. Contractors and civilian government employees are not combatants; therefore, they are civilians. W. Hays Parks, a Law of War scholar and lawyer serving in the Department of Defense Office of General Counsel, concludes that it is a “fairly high threshold” for civilians to lose protection by crossing over from indirect to direct participation.⁵⁵ Professor Michael Schmitt, a professor of international law, agrees.⁵⁶ He cites the commentary of Additional Protocol I as substantiation: “direct participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and the place where the activity takes place.”⁵⁷ Professor Schmitt outlines the following test for determining direct participation: “[it] seemingly requires ‘but for’ causation (in other words, the consequences would not have occurred but for the act), causal proximity (albeit not direct causation) to the foreseeable consequences of the act, and a mens rea of intent.”⁵⁸ Other commentators have devised similar tests.⁵⁹

Professor Schmitt, like most every other law of war commentator, readily admits that “direct participation determinations are necessarily contextual, typically requiring a case-by-case analysis.”⁶⁰ Even the ICRC in their 2003 report on direct participation conceded that “a unanimous interpretation of th[e] legal concept [of direct participation] does not exist and that much work is needed.”⁶¹ The U.S. position that the “decision as to the level at which civilians may be regarded as combatants. . . .and thereby subject to attack generally has been policy rather than a legal matter” seems to be valid and correct.⁶² This ICRC rule, although extremely important to crystallize the extremes—what behavior is beyond the pale for

⁴⁹ INT’L COMM. OF THE RED CROSS, DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 2 (Sept. 2003), available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/\\$File/Direct%20participation%20in%20hostilities-Sept%202003.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/$File/Direct%20participation%20in%20hostilities-Sept%202003.pdf) [hereinafter ICRC DIRECT PARTICIPATION REPORT].

⁵⁰ *Id.*

⁵¹ Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 649 (Sept. 2, 1998).

⁵² YVES SANDOZ, CHRISTOPHE SEIMARSKI, & BRUNO SIMMERMAN, COMMENTARY TO THE FIRST PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 AND RELATING TO THE PROTECTION OF VICTIMS OF INTERNATIONAL ARMED CONFLICT, 8 JUNE 1977, at 619 (1987).

⁵³ *Id.*

⁵⁴ 1 ICRC RULES, *supra* note 9, at 22-23.

⁵⁵ Michael N. Schmitt, *War, International Law, and Sovereignty: Reevaluating The Rule of the Game in a New Century: Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 CHI. J. INT’L L. 511, 533 (2005) (citing W. Hays Parks, *Air Law and the Law of War*, 32 A.F. L. REV. 1, 133 (1990)).

⁵⁶ *Id.*

⁵⁷ *Id.* (quoting SANDOZ ET AL., *supra* note 52, at 516-17).

⁵⁸ *Id.*

⁵⁹ Michael E. Guillory, *Civilianizing the Force: Is the United States Crossing the Rubicon?*, A.F. L. REV. 51, 132 (2001).

⁶⁰ Schmitt, *supra* note 55, at 534.

⁶¹ ICRC DIRECT PARTICIPATION REPORT, *supra* note 49, at 11 (conclusion section).

⁶² 2 ICRC PRACTICE, *supra* note 21, at 122, para. 851 (citing W. Hays Parks, *Memorandum of Law: Executive Order 12333 and Assassination*, ARMY LAW., Dec. 1989, at 4).

civilians—is not black letter law. Instead, the rule is an important *consideration* for commanders to weigh before potentially subjecting a civilian to attack for a military purpose.⁶³

Indiscriminate Attacks and Proportionality

The ICRC Report accurately states that the principles of indiscriminate attacks and proportionality in attack are customary international law. Rule 11—Indiscriminate attacks are prohibited⁶⁴—and Rule 12, which defines indiscriminate attacks, have global acceptance and are taken, once again, almost verbatim from Additional Protocol I, Article 51(4).⁶⁵ The ICRC commentary even notes that non-parties to Additional Protocol I, like the United States and India, consider these tenants to be set in stone.⁶⁶ As the United States has voiced in an official statement: “it is a war crime to employ acts of violence not directed at specific military objectives, to employ a method or means of combat which cannot be directed at a specific military objective, or to employ a means or method of combat the effects of which cannot be limited as required by the law of [war].”⁶⁷

The rule addressing proportionality also flows from Additional Protocol I, Article 51(5)(b)⁶⁸ and correctly states a norm of customary international law applicable to international armed conflicts. Rule 14 reads: “Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct advantage anticipated, is prohibited.”⁶⁹

The one interpretive issue for many States, to include the United States, is the meaning and scope of the term “military advantage.” Specifically, should the advantage anticipated from the military attack be considered as a whole or segmented into isolated or particular parts of the attack?⁷⁰ New Zealand’s Military Manual clearly articulates the meaning and the scope of military advantage: “In deciding whether the principle of proportionality is being respected, the standard of measurement is the contribution to the military purpose of an attack or operation considered as a whole, as compared with other consequences of the action, such as the effect upon civilians or civilian objects.”⁷¹ In other words, proportionality is a balancing of collateral damage against military gains; this holistic approach has received international approval.⁷² Even the recent statute of the International Criminal Court used the phrase “concrete and direct *overall* military advantage anticipated.”⁷³ Just as distinction is the cornerstone of the law of war, proportionality and preventing indiscriminate attacks are the pillars of distinction; they are also black letter law.

Precautions in Attack

The last section on distinction from the perspective of the attacker’s responsibilities is precautions in attack. This section, although divided into seven distinct rules, is in large measure a restatement of Additional Protocol I, Article 57.⁷⁴ Article 57 is reflective of State practice, providing the attacker’s “obligation to take constant care and/or to take precautions

⁶³ Rule 6 also limits the ability to target civilians who have directly participated in hostilities only for such time as they continue to be directly involved. The United States has come under criticism for violating this concept when the Central Intelligence Agency used a predator unmanned aerial vehicle to attack and kill six members of al-Qaida on 4 November 2002. The ICRC critics have argued that since the individuals were not taking a direct part in hostilities at the time of the attack, despite having done so previously, the legality of the attack is questionable. See Rona, *supra* note 7, at 63.

⁶⁴ 1 ICRC RULES, *supra* note 9, at 37.

⁶⁵ Additional Protocol I, *supra* note 11, art. 51(4).

⁶⁶ 1 ICRC RULES, *supra* note 9, at 41.

⁶⁷ 2 ICRC PRACTICE, *supra* note 21, para. 186 (citing U.S. Letter Annexed to UN Doc. A/C.6/47/3, 28 Sept. 1992)).

⁶⁸ Additional Protocol I, *supra* note 11, art. 51(5)(b).

⁶⁹ 1 ICRC RULES, *supra* note 9, at 46.

⁷⁰ *Id.* at 49-50.

⁷¹ 2 ICRC PRACTICE, *supra* note 21, para. 171 (citing *New Zealand Military Manual*) (citations omitted).

⁷² *Id.* at 326-31.

⁷³ Rome Statute of the International Criminal Court, art. 8(2)(b)(iv), July 17, 1988, U.N. Doc. A/CONF.183/9, 37 I.L.M. 999, available at <http://www.un.org/law/icc/statute/rome.htm> [hereinafter Rome Statute] (emphasis added). It has been argued that a narrow viewing of the concepts of military objective and proportionality could result in greater risk of civilian casualties. See Meyer, *supra* note 20.

⁷⁴ Additional Protocol I, *supra* note 11, art. 57.

to avoid or minimize incidental civilian losses.”⁷⁵ The general principle outlined in Rule 15, also known as the collateral damage rule, is simple: “In the conduct of military operations, constant care must be taken to spare the civilian population, civilians and civilian objects.”⁷⁶ All States, led by the United States, purport to adhere to this principle.⁷⁷

Rule 15, however, adds the following language that does not appear in Additional Protocol I: “All feasible precautions must be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects.”⁷⁸ This language tracks closely the language of ICRC Rule 17, which is taken from Additional Protocol I: “Each party to the conflict must take all feasible precautions in the choice of means and methods of warfare with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.”⁷⁹ The difference in language is of great import, and although Rule 17 is clearly a customary international norm, the second clause of Rule 15 is not. Rule 17 hones in on the attacker’s choice of means and methods of warfare with the stated intent to minimize civilian suffering. The second clause of Rule 15 includes no such governor that the intent is to minimize civilian suffering; instead it is a mandate. No State could adhere to such a high standard.

As the United States articulated in 1991, “[a]n attacker must exercise reasonable precautions to minimize incidental or collateral injury to the civilian population, consistent with mission accomplishment and allowable risk to the attacking force.”⁸⁰ Unless “all feasible precautions,” as a term of art, is permitted to mean something different to every commander, thereby eviscerating its intended plain meaning, the second clause of Rule 15, although humane, is not customary.

The customariness of the remaining rules in the precautions in attack section—Rule 16 on target verification,⁸¹ Rule 18 on the assessment of the probable effects of attacks,⁸² Rule 19 on control during the execution of attacks,⁸³ and Rule 20 on advance warning⁸⁴—is strongly supported. Rule 21 on target selection—“[w]hen a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected must be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects”—has a minor wrinkle, however.⁸⁵ The ICRC commentary notes that “[t]he United States has emphasized that the obligation to select an objective the attack on which may be expected to cause the least danger to civilian lives . . . is not an absolute obligation, as it only applies ‘when a choice is possible.’”⁸⁶ Thus, the provisions of ICRC Rule 21 are not mandatory. Instead, a commander must always consider mission accomplishment and allowable risk. This position gives the commander on the ground great discretionary power. In the end, this nuance encapsulates the tension flowing throughout the principle of precautions in attack: the discretion of the attackers versus the protections accorded to civilians.⁸⁷ It is clear Article 57 of Additional Protocol I and ICRC Rules 15 through 21 weigh in favor of the latter; that is, protecting civilians. State practice, on the other hand, does not.

⁷⁵ 1 ICRC RULES, *supra* note 9, at 53.

⁷⁶ *Id.* at 51.

⁷⁷ 2 ICRC PRACTICE, *supra* note 21, at 351, para. 120 (stating “hostilities must be conducted in a manner so as to minimize injury to civilians”) (citing U.S. diplomatic note to Iraq in 1991) (citation omitted).

⁷⁸ 1 ICRC RULES, *supra* note 9, at 51.

⁷⁹ *Id.* at 56.

⁸⁰ 2 ICRC PRACTICE, *supra* note 21, para. 121 (citing the U.S. Department of Defense’s Report to Congress on the Conduct of the Gulf War) (citations omitted).

⁸¹ 1 ICRC RULES, *supra* note 9, at 55. Rule 16 reads, “Each party to the conflict must do everything feasible to verify that targets are military objectives.” *Id.*

⁸² *Id.* at 58. Rule 18 states, “Each party to the conflict must do everything feasible to assess whether the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.” *Id.*

⁸³ *Id.* at 60.

Each party to the conflict must do everything feasible to cancel or suspend an attack if it becomes apparent that the target is not a military objective or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

Id. at 60 (R. 19).

⁸⁴ *Id.* at 62. This rule states that “Each party to the conflict must give effective advance warning of attacks which may affect the civilian population, unless circumstances do not permit.” *Id.*

⁸⁵ *Id.* at 65.

⁸⁶ *Id.* at 67.

⁸⁷ 2 ICRC PRACTICE, *supra* note 21, para. 539.

Non-International Armed Conflict

Distinction Generally

Most discussions on the principle of distinction center on international armed conflicts. Importantly, the ICRC also analyzes each customary rule in the context of non-international armed conflicts.⁸⁸ This commentary is extremely helpful because it dissects the 1977 Additional Protocol II to the Geneva Conventions Relating to the Protection of Victims of Non-International Armed Conflict (Additional Protocol II),⁸⁹ a document that does not have wide circulation among U.S. judge advocates. The first ICRC rule—parties to the conflict must at all times distinguish between civilians and combatants—and the second—prohibition on violence aimed at spreading terror among civilians—both stem from Additional Protocol II, Article 13(2).⁹⁰ In addition to Additional Protocol II, the ICRC commentary assembles an impressive array of international documents to support the proposition that both rules are customary in the non-international armed conflict context: the International Criminal Court Statute,⁹¹ the Ottawa Convention,⁹² Protocol III to the Convention on Certain Conventional Weapons,⁹³ and the Statute of the International Criminal Tribunal for Rwanda.⁹⁴

When determining if an ICRC rule is customary, however, unlike the rules commentary, the ICRC fails to track which documents support the establishment of customary law in international armed conflicts and which support customary law in non-international armed conflict. Therefore, when the ICRC cites a military's Law of War regulation, for example, it is not clear whether the regulation is proffered to support the international law context, the non-international law context, or both.

Definition of Combatants

This lack of tracking—which documents support which type of conflict—becomes critical when considering the customariness of the ICRC's third rule in non-international armed conflict—all members of the armed forces of a party to the conflict are combatants. The commentary admits that “the lawfulness of direct participation in hostilities in non-international armed conflicts is governed by national law.”⁹⁵ It further states that “[c]ombatant status . . . exists only in international armed conflicts.”⁹⁶

The ICRC does not cite one national law that would offer combatant status to persons taking a direct part in hostilities in non-international armed conflicts.⁹⁷ Even Additional Protocol II, the very treaty relating to the Protection of Victims of Non-International Armed Conflict, falls short of labeling dissident armed forces as combatants.⁹⁸ Hostiles fighting the State might be called fighters, insurgents, or any other term of art, but not combatants. The third rule not only falls short of being customary in the non-international setting, but it also has no currency in the non-international scenario. Therefore, it follows that there is no customary definition of armed forces, ICRC Rule 4, in non-international armed conflicts. The ICRC in their commentary concedes this finding; in fact, there is no section on non-international armed conflict within the commentary of the fourth ICRC Rule.

⁸⁸ The ICRC study claims that State practice has established eighteen out of twenty-four rules as customary international law in non-international armed conflicts. See generally 1 ICRC RULES, *supra* note 9. Rules 3 and 5 concede that State practice is “ambiguous.” *Id.* at 12-13, 19. Rules 21, 23 and 24 claim “arguable” customary law status in non-international armed conflicts. *Id.* at 66, 72-73, and 75. Rule 4 does not address the issue. *Id.* at 14-17.

⁸⁹ 1977 Protocol II Additional to the Geneva Conventions, opened for signature Dec. 12, 1977, 16 I.L.M. 1391 [hereinafter Additional Protocol II].

⁹⁰ *Id.* art. 13(2).

⁹¹ Rome Statute, *supra* note 73, art. 8(2)(e)(i) (stating “intentionally directing attacks against the civilian population as such or against individual civilians not taking a direct part in hostilities” constitutes a war crime in non-international armed conflicts).

⁹² Ottawa Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and on Their Destruction pmb., Sept. 18, 1997, 36 I.L.M. 1507 (stating “a distinction must be made between civilians and combatants”).

⁹³ Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (1980 Protocol III) to the 1980 UN Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, art. 2(1), 1342 U.N.T.S. 171, 19 I.L.M. 1534 (stating that “it is prohibited in all circumstances to make the civilian population as such [or] individual civilian . . . the object of attack . . .”).

⁹⁴ Statute of International Criminal Tribunal for Rwanda art. 4(d), S.C. Res. 955, U.N. Doc. S/RES/955 (1994) (prohibiting acts of terror against civilians).

⁹⁵ 1 ICRC RULES, *supra* note 9, at 13.

⁹⁶ *Id.* at 11.

⁹⁷ *Id.* at 12-13.

⁹⁸ *Id.* at 12.

Definition of Civilians

The fifth ICRC rule—the definition of civilians—suffers the same fate as the third rule: there is little, if any, practice to support the proposition that this rule is customary in non-international conflicts. The commentary highlights this lack of support: “th[e] definition [of civilians] was dropped at the last moment of the [Additional Protocol II] conference. . . .”⁹⁹ Since additional Protocol II does not provide a definition of civilian, the only evidence the ICRC can muster is a Colombian military manual stating that “civilians must be understood as those who do not participate directly in military hostilities (internal conflict, international conflict).”¹⁰⁰ One military manual, however, cannot establish customary international law.¹⁰¹

Direct Participation

Although there is no definition of what constitutes a civilian in non-international armed conflicts, Article 13(3) of Additional Protocol II mandates that “[c]ivilians shall enjoy . . . protection . . . unless and for such time as they take a direct part in hostilities.”¹⁰² Common Article 3 of the Geneva Conventions protects “persons taking no active part in the hostilities,” regardless of their label, i.e., combatants who have laid down their arms or civilians.¹⁰³ Thus, in non-international armed conflict scenarios, the ICRC’s sixth rule—loss of protection from attack for direct participation—focuses on an individual’s conduct, not on their inherent status. But like the other ICRC rules, Rule 6 fails to rise to the level of being customary international law when the conflict is not international. This failure becomes clear with the ICRC’s lack of citation germane to this point.

Indiscriminate Attacks

Failure to define indiscriminate attacks in the non-international armed conflict setting also plagues Rule 11: Indiscriminate Attacks.¹⁰⁴ Like Rule 5, which defines civilian status, the draft of Additional Protocol II had a definition of indiscriminate attacks but, “at the last moment as part of a package aimed at the adoption of a simplified text,” it was dropped.¹⁰⁵ The ICRC offers some examples of State’s military manuals, national legislation, and official statements defining indiscriminate attacks; but, in the end, the list is scant.¹⁰⁶ Indiscriminate attacks might be a violation of national law,¹⁰⁷ but their prohibition has not gained international currency and has not risen to the level of customary international law in non-international armed conflicts.¹⁰⁸

Proportionality

Although proportionality—ICRC Rule 14—is not defined by Additional Protocol II, there are numerous official statements, national legislation, and military manuals by States, not to mention the jurisprudence of several international tribunals that provide “evidence of the customary nature of this rule in non-international armed conflicts.”¹⁰⁹

⁹⁹ *Id.* at 19.

¹⁰⁰ *Id.* (citing 1999 Colombian *Instructors’ Manual*) (citation omitted).

¹⁰¹ The ICRC concedes that State Practice is “ambiguous” as to the application of Rule 5 to non-international armed conflicts.

¹⁰² Additional Protocol II, *supra* note 89, art. 13(3).

¹⁰³ Geneva Convention I, *supra* note 11, art. 3; Geneva Convention II, *supra* note 11, art. 3; Geneva Convention III, *supra* note 11, art. 3; Geneva Convention IV, *supra* note 11, art. 3.

¹⁰⁴ 1 ICRC RULES, *supra* note 9, at 38-39.

¹⁰⁵ *Id.* at 38.

¹⁰⁶ *Id.* at 39 nn.15-17. While it is doubtful, in the information age, that any State would be so brazen as to publish policy that sanctions indiscriminate attacks, States continue to employ them, (e.g., the indiscriminate use of land mines during the Balkans conflicts).

¹⁰⁷ *Id.* at 42 n.35 (discussing the draft legislation of El Salvador and Nicaragua).

¹⁰⁸ The significance of this for U.S. judge advocates, however, is nominal. Discrimination is a precept of the Law of Armed Conflict under U.S. policy. Indiscriminate attacks are *per se* prohibited.

¹⁰⁹ 1 ICRC RULES, *supra* note 9, at 49.

Although the ICRC commentary fails to show that the United States has officially stated the principle of proportionality applies to non-international armed conflicts, the Department of Defense's (DoD) longstanding policy, through directives,¹¹⁰ instructions,¹¹¹ and operational rules of engagement,¹¹² "ensure[s] [service members] comply with the law of war during all armed conflicts, however such conflicts are characterized, and with the principles and spirit of the law of war during all other operations."¹¹³ Proportionality is a cornerstone principle of the Law of War. The principle transcends conflict categorization. Consider, for example, the following phrase in a recent DoD Directive: "during all armed conflict, however such conflicts are characterized."¹¹⁴ Unlike the discussion of indiscriminate attacks, the international commentary on proportionality is far more extensive and mature and less contradicted by State practice. Proportionality from the U.S. perspective, among other States, is customary international law regardless of designation of the armed conflict as international.¹¹⁵

Precautions in Attack

The fundamental nature of proportionality in non-international armed conflict does not follow for the principle of precautions in attack. The ICRC commentary concedes that even Additional Protocol II—the primary international treaty on internal armed conflicts—does not include an explicit reference to the principle of precautions in attack.¹¹⁶ The most persuasive authority that the ICRC Study provides is Article 13(1) of Additional Protocol II, which states that "the civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations."¹¹⁷ There are a smattering of military manuals and official statements of States that support the ICRC's position, but for the most part, support is scant.

There is no customary international law, with the possible exception of the overarching general rule requiring armed forces to take constant care to spare civilian life, governing precautions in attack. This conclusion, albeit weak, could be defended based on the language of the following international instruments: Article 13(1) of the Additional Protocol II; Article 3(10) of Amended Protocol II to the Convention on Certain Conventional Weapons;¹¹⁸ and Article 7 of the Second Protocol to the Hague Convention for the Protection of Cultural Property.¹¹⁹ Each instrument cited cannot be read without the assumption that "it would be difficult to comply with th[ese] requirement[s] without taking precautions in attack."¹²⁰ The number of States that have explicitly agreed to this general rule, however, are limited.

ICRC Methodology Shortcomings

Regardless of how an armed conflict is viewed, the ICRC Study's single biggest shortcoming when discussing the principle of distinction is its lack of cited practice, particularly in the context of non-international armed conflict. The volume of footnotes in this Herculean effort are fascinating: text from the International Court of Justice; Law of War manuals and handbooks from around the world; and United Nation reports and studies. These resources are extremely helpful in understanding and dissecting issues from an academic perspective, but this type of information falls short of demonstrating actual practice. Within the distinction sections, the ICRC rarely cites State's rules of engagement—the tactical

¹¹⁰ U.S. DEP'T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM para. 5.1 (9 Dec. 1998).

¹¹¹ CHAIRMAN, JOINT CHIEFS OF STAFF INSTR. 5810.01, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM (12 Aug. 1996).

¹¹² See generally INT'L AND OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK ch. 5 (2006).

¹¹³ DOD INSTR. 5100.77, *supra* note 110, para. 5.3.1.

¹¹⁴ U.S. DEP'T OF DEFENSE, DIR. 2311.01E, DOD LAW OF WAR PROGRAM para. 4.1 (9 May 2006).

¹¹⁵ See International Law Note, *Principle 3: Endeavor to Prevent or Minimize Harm to Civilians*, ARMY LAW., Oct. 1998, at 54.

¹¹⁶ 1 ICRC RULES, *supra* note 9, at 52, 56, 57, 59, 61, 63, and 66.

¹¹⁷ *Id.* at 52; Additional Protocol II, *supra* note 89, art. 13(1).

¹¹⁸ Amended Protocol II to the 1980 UN Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, S. Treaty Doc. No. 105-1, art. 3(10) (1997) (stating that "[a]ll feasible precautions shall be taken to protect civilians from the effects of weapons to which this Article applies.").

¹¹⁹ Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, Mar. 26, 1999, art. 7, 38 I.L.M. 769 (1999) (protecting cultural property in an attack).

¹²⁰ 1 ICRC RULES, *supra* note 9, at 52 (citing Additional Protocol II, *supra* note 89, art. 13(1)).

directives issued to guide military forces on the use of force.¹²¹ Only twice within the distinction section does the ICRC commentary provide actual examples of these rules; and never does the ICRC show what a commander did in compliance with customary international law.

The importance of this gap in supporting data cannot be overstated. It is the actual conduct in war that gives birth to the practice. Customary international law is based on State practice, not policy, and rules of engagement are the paragon of State practice with respect to discrimination. Rules of engagement are the bridge between national policy and real world application. Absent evidence of State practice through employment of rules of engagement, national policy should be viewed merely as ideals and not statements of intended practice.

However, this criticism, in part, is unfair. It would be a virtual impossibility to comb through every rule of engagement, every operational order of every command, and every written order issued by a commander to determine custom. The ICRC simply limited their citations to national level documents. But even there, for example, the ICRC seldom cites a Department or Ministry of Defense policy, memorandum, or instruction. The U.S. Naval Commander's Handbook, which is often cited by the ICRC, although certainly helpful, is not U.S. policy and, therefore, not entirely reflective of U.S. practice.

Despite these flaws, the ICRC Report is necessary for every judge advocate's library because it provides a wealth of information on the development of distinctions by legal scholars. The ICRC culls through recent records to find documents and policy positions supporting their proposed rules. While these are excellent rules, they are not rules that should take the weight of law, particularly in non-international armed conflicts. The ICRC, in its pursuit to forge new ground in the Law of War, has not separated the wheat from the chaff. And in failing to do so, it has undercut the very value of the wheat it aims to sell.

Conclusion

Let us return to the fight for Fallujah. Assuming this battle was an international armed conflict, the killing of the four U.S. civilians by the enemy raises the specter of violating a core principle of distinction: protection of civilians. If the civilians were participating directly in hostilities then these civilians were no longer immune from attack. These civilians, like combatants, can be targeted and killed or captured. If on the other hand, they were merely supporting the war effort and were not taking a direct part in the hostilities, then they never lost their protected status and the intentional killing of these civilians was a crime.¹²² Difficulties arise when the conduct of the civilians is questionable, e.g., the civilian is repairing a weapon system on the front lines that will, in turn, destroy the enemy. In these grey areas, the conduct of the combatant will be a matter of national policy in interpreting customary international law, not an acid test of what customary international law mandates.

If the reports of "large civilian casualties" were accurate and a result of the commander intentionally targeting civilians, then he crossed the line; the commander is a war criminal. But absent that intent, the commander must balance mission accomplishment and the risks involved to civilians. His determination to use force has both a subjective aspect and an objective one. In other words, great deference will be given to the commander's decision as long as it was reached "on the basis of [the commander's] assessment of the information from all sources which is available to them at the relevant time."¹²³ Even though a commander kills civilians, that alone is not a crime.

The focuses, as so aptly noted by Professor Schmitt, are on the intent and the common sense of the commander to know reasonable consequences of his unit's actions. If the commander attacked an area that was known to be dense with civilians, absent a very significant military advantage, customary international law weighs against the commander and shifts to the side of protecting the civilian. The Monday morning quarterbacking of what a commander or Soldier did is difficult,¹²⁴ but a rigorous examination of the facts will meet the intent of what ICRC set out to do with these rules. "It will ensure greater protection of war victims."¹²⁵

¹²¹ JOINT PUBLICATION 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 465 (as amended 31 Aug. 2005).

¹²² Regardless of this finding, the dragging of the four bodies through the streets of Fallujah would violate Article 17 of Geneva Convention I, *supra* note 11.

¹²³ 1 ICRC RULES, *supra* note 9, at 71.

¹²⁴ The commander should be presumed to have acted lawfully in the wake of civilians deaths during an engagement absent evidence to the contrary.

¹²⁵ 1 ICRC RULES, *supra* note 9, at xi (foreword of Dr. Jakob Kellenberger).