A CRITIQUE OF THE ICRC'S CUSTOMARY RULES CONCERNING DISPLACED PERSONS: GENERAL ACCURACY, CONFLATION, AND A MISSED OPPORTUNITY†

LIEUTENANT JAMIESON L. GREER°

I. Introduction

The International Committee of the Red Cross (ICRC), in its recent compilation of customary international humanitarian law, distills five customary Rules governing the treatment of displaced persons. These Rules indicate that customary law (1) prohibits parties to a conflict from forcibly transferring civilian populations (allowing an exception for military necessity), (2) prohibits states from transferring portions of their own population to a territory they occupy, (3) insists that displaced persons must receive basic access to the necessities of life and enjoy family unification, (4) asserts a right of voluntary return for displaced persons upon the cessation of the causes of displacement, and (5) insists that the property rights of displaced persons must be respected.[1] Generally, these rules are representative of customary international law; however, there are a few flaws that strip these rules of some of their value. In addition, two broad problems with the ICRC's analysis are (1) the conflation of separate legal groups—refugees, internally displaced persons, and other migrants—into one, affecting the scope of duties to these groups under the law of war, and (2) the curious absence of a rule addressing *nonrefoulement* obligations during armed conflict. This brief critique will review the general accuracy and possible flaws in the Rules, the conflation of separate legal classifications, and the surprising omission of a *nonrefoulement* rule. While the rules on displaced persons have normative or aspirational value, they do not reflect the state of customary law and thus have limited practicality in current law of war issues.

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° Second Lieutenant, U.S. Air Force Reserve. B.A., Brigham Young University (magna cum laude), 2004; J.D., University of Virginia, 2007; M.A., University of Paris I Pantheon-Sorbonne, 2007. This article was written as part of the Spring 2006 Seminar on Advanced Topics in the Law of War at the U.S. Army Judge Advocate General's Legal Center and School. Thanks to Major Sean Watts for commenting on an earlier draft, and, as always, thanks to Marlo Greer.

[1] JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOL. I: RULES 457–74 (2005).

II. The Rules in Particular

In general, the Rules are accurate restatements of customary international law. Some portions of the Rules are, however, aspirational. For example, Rule 129(B) asserts that parties to a non-international armed conflict may not displace the civilian population for reasons related to the conflict unless for the security of the citizens or out of military necessity.[2] This Rule implies that parties to a conflict feel bound by customary international law during wartime in their decisions concerning the placement of their civilian population, an idea challenged by competing notions of sovereignty. The rule is saved, temporarily, by the "military necessity" loophole, which would conceivably allow almost any displacement of civilians during wartime. The military necessity exception would allow forced displacement measures such as moving a group of civilians to work in armaments factories, using their homes for quartering troops, or evacuating an area in the slight chance that it may become a battlefield. The military necessity exception, coupled with the national security exception, is more accurate than an absolute prohibition, but it renders Rule 129(B) largely unhelpful. It is difficult to conceive of a situation that would prevent a party to a non-international conflict from displacing a domestic civilian population.

The ICRC, however, makes a good case for promulgating the Rule. The ICRC cites significant treaty law as evidence, including Additional Protocol II (AP II) to the Geneva Conventions and provisions from the International Criminal Court (ICC), International Criminal Tribunal for the Former Yugoslavia (ICTY), and International Criminal Tribunal for Rwanda (ICTR) Statutes criminalizing civilian displacement.[3] Furthermore, the ICRC looks to bilateral agreements between parties in internal armed conflicts in Bosnia and Herzegovina and the Philippines which have similar provisions.[4] Additional Protocol II is less widely accepted than other international humanitarian law treaties,[5] and is not

[2] *Id*. at 457.
[3] *Id*. at 459.
[4] *Id*.
[5] 158 states are party to Additional Protocol (AP) II, as opposed to 192 states party to the Geneva Conventions and 162 states party to AP I to the Geneva Conventions, which the United States has indicated is partially representative of customary international law. *See* States Party to the Main Treaties, http://www.icrc.org/eng/party-ccw (last visited Oct. 19, 2007) [hereinafter Parties to Treaties].

generally considered customary law,[6] but it is evidence of state intent. The ICC has similar customary weight.[7] The ICRC cites Article 5(d) of the ICTY statute, which broadly grants the Tribunal power to prosecute those responsible for deporting any civilian population during internal or international armed conflict.[8] Of course, the Statute is limited in its geographic and temporal jurisdiction to the territory of the former Yugoslavia since 1991[9] and was designed to address the unique circumstances of that conflict. Furthermore, conflicts in the former Yugoslavia were not only internal in nature but also international at times. The later ICTR Statute has a similar provision prohibiting deportation, but rejects the broad scope of the ICTY provision and limits the prohibition on deportation only to those carried out "as part of a widespread and systematic attack against any civilian population on national, political, ethnic, racial or religious grounds."[10] This narrow prohibition is probably more representative than the ICTY provision or the AP II provision, and is more indicative of the exact purpose of the Rule.

A more accurate rule pertaining to non-international armed conflict would read: "Parties to a non-international armed conflict may not order the displacement of the civilian population, in whole or in part, as part of a widespread and systematic attack against any civilian population on national, political, ethnic, racial, or religious grounds." The ICRC references to state practice in the former Yugoslavia and Rwanda both occurred in contexts of discriminatory treatment of civilians. Discrimination was also the central problem in Germany's deportations during World War II, which prompted criminal deportation laws in international conflicts.[11] The state practice cited by the ICRC occurs purely in the context of ethnic or social "cleansing," and the rule should reflect that narrow application. The ICRC construction tends to hide this

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[6] BARRY E. CARTER ET AL., INTERNATIONAL LAW 1108 (2003). *But see* Theodore Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AM. J. INT'L L. 238, 244 (1996) (citing the *Tadic* decision as evidence of the development of customary law governing internal armed conflicts and the influence of AP II).

[7] Only ninety-seven states are party to the Rome Statute establishing the ICC. *See* Parties to Treaties, *supra* note 5.

[8] Statute of the International Criminal Tribunal (Former Yugoslavia) art. 5(d), May 25, 2993, 32 I.L.M. 1159 [hereinafter ICTY Statute].

[9] *Id*. art. 8.

[10] Statute of the International Criminal Tribunal (Rwanda) art. 3(d), Nov. 8, 1994, 33 I.L.M. 1602 [hereinafter ICTR Statute].

[11] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, arts. 49, 147, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV].

main purpose of the Rule by simply restating human rights law applicable domestically and then cutting most of those rights away with the military necessity clause.[12] Although the ICRC rule may hedge against unforeseen circumstances, customary law is not forward-looking in nature, but dependent on historic state practice and *opinio juris*. The alternative construction offered above better reflects state practice and sense of obligation with regard to internal displacement: displacement for discriminatory reasons is unlawful.

Rule 130, prohibiting transfer of citizens into occupied territory, is an accurate statement of customary international law. The most prominent outlier in the international community as to Rule 130 is Israel, which has transferred citizens to occupied territories in Gaza and the West Bank. Officially, Israel does not create settlements on the basis that there is no customary international law preventing population transfers, but rather relies on the murky definition of "occupation" to challenge the application of international humanitarian law. In a de facto sense, however, Israel is settling its population in occupied territories. The ICRC does not directly address Israel's non-compliance, but only refers obliquely to the situation when listing Security Council resolutions bearing on population transfer.[13] The commentary would be more complete with a frank discussion of practice in Israel, but the Rule is accurate nonetheless.

It is difficult to refute Rule 130 despite Israel's state practice. The ICRC presents compelling evidence of the acceptance of this rule, notably the international condemnation of German efforts in WW II to "Germanize" occupied territories and similar events in the former Yugoslavia, which culminated in both instances with criminalization of this activity by treaty.[14] Specifically, Article 49 of the 1949 Geneva Conventions and the Nuremburg Trial decisions, which both have customary law status, stand as a direct response to population transfer

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[12] The International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 [hereinafter ICCPR] states that "[e]veryone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence." *Id*. art. 12(1). Furthermore, the ICCPR allows an exception from the rule for national security and permits derogation in times of national emergency. *Id.* arts. 4(1), 12(3). Significantly, the ICCPR does not allow derogation from the obligation to not discriminate on the grounds of race, color, sex, language, religion, or social origin. *Id.* art. 4(1).

[13] HENCKAERTS & DOSWALD-BECK, *supra* note 1, at 463.

[14] *Id*.

experiences in World War II. Although Israel may be seen as an important de facto objector to the customary principle, state practice and *opinio juris* support the Rule articulated by the ICRC.

Rules 131, 132, and 133 all suffer from a common vagueness problem: none of the rules indicates who bears the obligations for following the Rule. Rule 131 mandates that displaced civilians must receive adequate "shelter, hygiene, health, safety, and nutrition" and requires that "members of the same family are not separated."[15] The ICRC clarifies Rule 131 somewhat in the commentary following the rule with respect to non-international armed conflicts. The commentary indicates that "the government concerned" has the primary responsibility for caring for internally displaced persons (IDPs), but that in some instances a government's duty only extends to facilitating passage of international humanitarian organizations assisting the IDPs.[16] The Rule and the commentary do not explain whether the "government concerned" is the national government of the territory, a national government in absentia working through neutral parties, an occupying government, or a puppet government established by a foreign party. Given this ambiguity, it is difficult to actually distill a precise "rule," and the ICRC's commentary is much more helpful as a description of the current state of affairs than the "rule" is as a representation of customary law.

Rule 132 is also vague because it grants a "right" to displaced persons to return to their homes upon cessation of the causes of their displacement, but it does not indicate to whom the displaced may appeal for redress. The ICRC, in citing evidence for this Rule, implies that states are responsible for facilitating return of the displaced, which is correct.[17] The ICRC gives plenty of evidence supporting this idea from actual state practice, statements, and policy.[18] The ICRC also relies on authority from United Nations (UN) General Assembly resolutions and publications as evidence of this Rule, inferring that the UN has some kind of protective role concerning those displaced in non-international conflicts. The UN does in fact fulfill this role to a degree; however, thus

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[15] *Id.* at 463.
[16] *Id.* at 467.
[17] There may be limitations on this "right of return" for national security reasons or even by waiver. *See* Lewis Saideman, *Do Palestinian Refugees Have a Right of Return to Israel? An Examination of the Scope of and Limitations on the Right of Return*, 44 VA. J. INT'L L. 829 (2004) (discussing possible narrow limitations on the customary right of return).
[18] HENCKAERTS & DOSWALD-BECK, *supra* note 1, at 468–72.

far it is not a *legal* obligation but an assumed one.[19] It seems as if the ICRC is attempting to carve out a niche for the UN in assisting IDPs. The Rule would be more descriptive of the current state of the law and more practical for application by affirmatively declaring that states or parties controlling territory have a duty to facilitate the right of return of the displaced, rather than leaving the internally displaced with a right in the abstract.

Rule 133 is similar to Rules 131 and 132 in that it places a duty on an unknown party. This contrasts with positive treaty law contained, for example, in Geneva Convention IV, Article 53, which takes care to specify that the occupying power bears the duty to respect civilian property. Displaced persons are civilians and therefore covered under the Geneva Conventions, which have the status of customary law. The ICRC's customary rule may be phrased in the terms of rights for displaced persons rather than duties of states in order to expand the law beyond the Geneva Convention standard and require all people and parties to respect this right during wartime. The evidence offered by the ICRC all bears on state responsibility for ensuring property rights, but does highlight international commissions designed to settle property disputes in the former Yugoslavia as support for its broader construction of the Rule.[20] Although these ad hoc commissions may represent the future direction of the Rule, the ICRC could be clearer and more accurate by ascribing the duty of protecting property rights to the state, and discussing the aspirational regime in the commentary.

The vagueness in these Rules is largely excusable: customary law is inherently vague because it is not the product of deliberate processes but rather is the sum of many parts. Constructing customary law in a clearer and more accurate form, however, would lend more credibility to the ICRC's Rules. By leaving duties and obligations in the abstract in order to give the appearance of a broader legal sweep, the ICRC undermines the usefulness of the Rules beyond the academic sphere. The ICRC does conceive of the Rules "primarily as a work of scholarship," but it also

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[19] The UN Secretary-General appointed a Special Representative of the Secretary-General on Internally Displaced Persons at the request the UN Commission on Human Rights, not at the direction of the Security Council or even the General Assembly. Office of the High Commissioner for Human Rights, *Mandate and Activities of the Representative of the Secretary-General on Internally Displaced Persons, Francis M. Deng*, http://193.194.138.190/html/menu/2/7/b/midpintro.
htm (2003).

[20] HENCKAERTS & DOSWALD-BECK, *supra* note 1, at 473.

hoped that it would assist in the "implementation, clarification, and development of international humanitarian law."[21] The ICRC's Rules concerning displaced populations are a welcome contribution to legal literature, but the inclusion of aspirational evidence brings with it unnecessary vagueness, reducing the practical value of the Rules.

III. Conflation, and a Missed Opportunity

The customary rules distilled by the ICRC do not adequately reflect the different duties owed to different types of displaced persons. There are several categories of displaced persons who, judging by international instruments and state practice, are due differing levels of protection. These categories include (1) internally displaced persons, (2) refugees as defined by the 1951 Geneva Convention, (3) "refugees" that are civilians fleeing real danger but who do not quite fall under the 1951 Convention, and (4) "refugees" that face no danger in their home state but are merely migrants for economic or other reasons. At the beginning of Chapter 38 on displacement and displaced persons, the ICRC declares that Rules 129 to 133 apply to both refugees and internally displaced persons, and never makes any further distinction between these groups.[22] Refugees under the 1951 Convention are persons fleeing their home state due to a well-founded fear of persecution based on social factors such as race, religion, or politics,[23] and internally displaced persons are those who, for reasons of violence, human rights violations, or natural disaster, have been forced to leave their homes.[24]

Lumping these groups together under international humanitarian law is appropriate as a baseline, since that regime protects civilians in wartime generally and all of these groups of displaced persons fall under that protective structure during armed conflict. A great host of positive and customary law has grown up around refugees, however, and very little around IDPs. Consequently, refugees enjoy more specific legal

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[21] *Id*. at xi.
[22] *Id.* at 457.
[23] Geneva Convention Relating to the Status of Refugees art. 1(A), July 28, 1951, 189 U.N.T.S. 2545 [hereinafter 1951 Convention].
[24] UN OFFICE FOR THE COORDINATION OF HUMANITARIAN AFFAIRS, GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT, *available at* http://www.relieftweb.int/ocha_ol/pub/idp_gp/idp.html [hereinafter UN HUMANITARIAN AFFAIRS GUIDING PRINCIPLES] (last visited Oct. 19, 2007).

protections than IDPs.[25] The invocation of human rights norms on behalf of IDPs is the most effective form of legal protection for them, in peace and war, while refugees benefit from human rights law and refugee law.[26]

The ICRC's primary evidence for customary protections for IDPs is reference to the Guiding Principles on Internal Displacement, a document produced by Francis Deng, the Representative of the Secretary General of the UN on Internally Displaced Persons. The ICRC, in Chapter 38 relating to displaced persons, refers to the Guiding Principles twelve times over 112 footnotes, or over ten percent of the citations. The UN, however, has affirmed that these principles are unbinding and serve only as guidelines, as the title suggests. While the UN asserts that these guidelines "are based upon existing international humanitarian law and human rights instruments," it simultaneously recognizes that they are given for "practical application in the field" and to "clarify grey areas and fill in the gaps" in IDP protection.[27] Most scholars lament the absence of a protective legal regime for IDPs, rather than relying on the Guiding Principles as evidence of a developing regime.[28] The ICRC's attempt to bring the Guiding Principles into the fold of customary law is aspirational at best, and does not greatly support the ICRC's equalization of IDP rights and refugee rights.

Rules 131 and 133 are areas where refugees, as understood by the 1951 Geneva Convention, enjoy greater protection than displaced persons in general. Rule 131 sets a minimum standard for "satisfactory conditions of shelter, hygiene, health, safety and nutrition" and family unity for displaced persons. Rule 133 requires others to respect displaced persons' property rights. These Rules are accurate as to internal migrants and non-refugee international migrants, but those with refugee status benefit from more robust protections. In addition to these basic protections, the 1951 Convention requires states to give refugees

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[25] *See* Patrick L. Schmidt, *The Process and Prospects for the UN Guiding Principles on Internal Displacement to Become Customary International Law: a Preliminary Assessment*, 35 GEO. J. INT'L L. 483, 489 (2004).

[26] *Id*. at 491–92; Francois Bugnion, *Refugees, Internally Displaced Persons, and International Humanitarian Law*, 28 FORDHAM INT'L L.J. 1397, 1408–09 (2005).

[27] UN HUMANITARIAN AFFAIRS GUIDING PRINCIPLES, *supra* note 24; *Foreword to the Guiding Principles by Under-Secretary-General for Humanitarian Affairs Mr. Sergio Vieira de Mello*, http://www.reliefweb.int/ocha_ol/pub/idp_gp/idp.html (1998).

[28] *See generally* Schmidt, *supra* note 25 (assuming that the Guiding Principles are not yet customary law and, at best, soft law).

employment rights equal to that of legal immigrants,[29] to protect refugees' tangible and intangible property rights,[30] and to extend social welfare benefits of housing, health care, and food equal to that of legal immigrants.[31] The 1951 Convention constitutes customary international law, and is a treaty obligation states and their agent military forces are bound to respect.[32] By mixing duties to and rights of refugees with those of a less-protected legal status, the ICRC diluted the Rules pertaining to displaced persons.

The conflation of legal groups is not only an inaccurate portrayal of the current state of customary law, but it is a missed opportunity for the ICRC. In an attempt to equalize protections for IDPs and other migrants with Convention-style refugee protections, the ICRC failed to put forth a customary rule of international humanitarian law mandating parties to the conflict to respect *nonrefoulement* rights of Convention refugees. *Nonrefoulement* is the most basic protection for a refugee, ensuring that a person fleeing to another state because of a well-founded fear of persecution in his or her home state for religious, political, racial, or other reason, will not be returned to the home state by the receiving country.[33] This principle, codified in the 1951 Convention, is by birth a creature of refugee law rather than human rights law or international humanitarian law. Perhaps, recognizing this doctrinal distinction, the ICRC omitted discussion of *nonrefoulement* in this volume on customary international humanitarian law. This cannot be the case, however, because the ICRC looks to other non-law of war treaties, some less accepted than the Refugee Convention, as support for its rules concerning displaced populations.[34] The omission of a *nonrefoulement* Rule seems startling considering that international humanitarian law is the first line of protection for refugees.

Nonrefoulement prevents a state or its agents from returning Convention refugees to a country where they have a well-founded fear of danger from persecution based on race, religion, nationality, political opinion, or other social characteristic, unless the refugee is a threat to

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[29] 1951 Convention, *supra* note 23, art. 17.
[30] *Id*. arts. 13, 14.
[31] *Id*. arts. 20, 21, 23.
[32] Bugnion, *supra* note 26, at 1404.
[33] 1951 Convention, *supra* note 23, art. 1(A)(2).
[34] *See, e.g.*, HENCKAERTS & DOSWALD-BECK, *supra* note 1, at 466 n.61 (relying on the Convention on the Rights of the Child as evidence of customary international humanitarian law).

national security.[35] This is a robust and largely uncontested duty established by treaty law and has developed into customary international law, and some even contend that it represents a *jus cogens* principle.[36] This implies that states cannot derogate from *nonrefoulement* duties, even in war. At the very least, state practice indicates that *nonrefoulement* during international armed conflict is a customary rule. For example, the U.S. Department of Defense incorporated into its instructions a directive ordering the military to abide by the *nonrefoulement* principle and follow a regulation designed to receive asylum claims and channel them to the proper authorities within the U.S. government.[37] Furthermore, the principle of *nonrefoulement* was alluded to in Geneva Convention IV, Article 45, which prevented a Party from transferring a civilian "to a country where he or she may have reason to fear persecution for his or her political opinions or beliefs."

In contrast, there is no comparable absolute duty to protect IDPs. Much customary international humanitarian law applies to IDPs, including Geneva and Hague Convention protections for civilians, customary law protecting civilians, and nonderogable human rights. Attempts to label IDPs as a special group in international humanitarian law is largely unnecessary because of these protections; it is otherwise imprudent because no legal regime has developed to give IDPs any special status. Inclusion of IDPs in a *nonrefoulement* rule would dilute the rule by placing a duty on states inconsistent with sovereignty rights and thus unworkable in international politics—a duty not to *refouler* an IDP to an area or region within their state where they would be subject to persecution based on religion, politics, or other social factors.

The ICRC should have differentiated between refugees and other displaced groups[38] and should have included a rule of customary international humanitarian law specific to refugees, simply adapting the principle from the 1951 Convention: that a party to a conflict may not return a civilian to a state he has fled where his life or freedom would be

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[35] 1951 Convention, *supra* note 23, art. 33.

[36] *See, e.g.*, Cartagena Declaration on Refugees, Nov. 22, 1984, OAS Doc. OEA/Ser.L/V/II.66/doc.10, rev. 1, at 190–93 (1984–85); Harold Hongju Koh, *The Haitian Centers Council Case: Reflections on* Refoulement *and Haitian Centers Council*, 35 HARV. INT'L L.J. 1, 30 (1994).

[37] U.S. DEP'T OF DEFENSE, DIR. 2000.11, PROCEDURES FOR HANDLING REQUESTS FOR POLITICAL ASYLUM AND TEMPORARY REFUGE (3 Mar. 1972) (amended 17 May 1973)).

[38] Bugnion, *supra* note 26, at 1410–11 (explaining that refugees and internally displaced persons have different needs for protection).

threatened on account of race, religion, nationality, membership in a particular social group, or political opinion. This rule applies only to a specific type of refugee, consistent with the 1951 Convention definition, and excludes protections for other displaced populations. This does not lessen the protections for other displaced groups, which are still protected by basic principles of international humanitarian law, but it does affirm the robust *nonrefoulement* duty parties to a conflict owe to refugees. This proposed rule is not only a realistic reflection of customary law, but a valuable tool for refugee protection at a time when many refugees flee as a result of armed conflict resulting in discriminatory violence.

IV. Conclusion

Military forces are often the first entity that displaced persons can rely on for legal protection, so international humanitarian law on the topic is vital to minimize the effects of war on civilians. The ICRC Rules generally describe the state of customary international humanitarian law with respect to displaced persons, with the exception of vague allocations of duties and an overbroad Rule on internal displacement. The Rules are valuable in that they address IDPs, which have become a great humanitarian concern in recent years, but conflating the separate legal classifications of IDPs, refugees, and other groups unfortunately dilutes some of the Rules, resulting in a complete omission of a Rule on *nonrefoulement*. This last error is truly unfortunate; this is a missed opportunity to affirm the robust rights of refugees in the context of conflict. The aspirational nature of the ICRC Rules concerning displaced persons and the covert attempt to expand IDP protections at refugee expense ensures that the Rules will remain purely of academic interest rather than contributing substantively to the development of customary law.