**Rule 99 of the Customary International Humanitarian Law Study and the Relationship Between the Law of Armed Conflict and International Human Rights Law**

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In 2005, the International Committee of the Red Cross[1] (ICRC) issued a 5000-page study, *Customary International Humanitarian Law*[2] (the Study), examining what the United States military refers to as the law of armed conflict or law of war.[3] The Study's authors, Jean-Marie Henckaerts and Louise Doswald-Beck, did not include a separate analysis or discussion of customary international human rights law (IHRL); however, they considered IHRL a great deal when forming and justifying many of their 161 "rules" of customary international humanitarian law (IHL),[4] especially those rules dealing with the treatment of civilians and combatants placed *hors de combat*. This prompts the question to what degree are IHL and IHRL related? Are they distinct bodies of law as is traditionally thought[5] or are they in fact complementary? This paper will briefly explore these two questions by looking at Rule 99 of the ICRC Study.

Rule 99, appearing in a chapter of the Study labeled "fundamental guarantees," simply states, "Arbitrary deprivation of liberty is prohibited."[6] The authors' discussion of this rule demonstrates that IHL contains specific rules and procedural requirements that protect one's right against arbitrary deprivation of liberty in the context of an international armed conflict (IAC), but almost no rules protecting this right in the context of a non-international armed conflict (NIAC). Consequently, in their discussion of this rule, the authors relied on IHL to establish the customariness of the rule in IAC, and IHRL to establish its customariness in NIAC. One might therefore conclude that Rule 99 illustrates the *lex specialis* principle as set out by the International Court of Justice in its Advisory Opinion on *Nuclear Weapons*[7] and later in its Advisory Opinion on the *Legal Consequences of a Wall in the Occupied Palestinian Territory*.[8] These advisory opinions suggest that international human rights law applies at all times (in IAC and NIAC and, of course, peacetime), but where IHL provides the more specific rule,

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[1] The ICRC plays a unique and important role in promoting the development, implementation, and dissemination of international humanitarian law. *See, e.g.*, Prosecutor v. Tadic, Case No. IT-94-1-l, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 109 (Oct. 2, 1995).

[2] 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES (2005) [hereinafter RULES]; 2 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: PRACTICE (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter PRACTICE]. The Study is divided into two volumes. The first volume is an articulation of the Study's 161 rules, the second is a two-part and roughly 4000-page discussion of the practice that supports the rules. The Study's two leaders, Jean-Marie Henckaerts, the current legal advisor for the ICRC, and Louise Doswald-Beck, former head of the ICRC's legal division, are listed as authors of the first volume and editors of the second volume. For a thorough summary of the Study and its rules, see Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INT'L REV. RED CROSS NO. 857, 175, 178 (2005).

[3] The U.S. Department of Defense (DoD) defines the law of war as "[t]hat part of international law that regulates the conduct of armed hostilities. It is often called the 'law of armed conflict.'" U.S. DEP'T OF DEFENSE, DIR. 2311.01E, DOD LAW OF WAR PROGRAM para. 3.1 (9 May 2006) [hereinafter DoDD 2311.01E]. The ICRC defines international humanitarian law as "a set of international rules, established by treaty or custom, which are specifically intended to solve humanitarian problems directly arising from international or non-international armed conflicts." Advisory Serv. on Int'l Humanitarian Law, Int'l Comm. of the Red Cross, *International Humanitarian Law and International Human Rights Law: Similarities and Differences* (Jan. 2003), http://www.ehl.icrc.org/images/resources/pdf/ihl_and_ihrl.pdf. By contrast, the ICRC defines international human rights law as "a set of international rules, established by treaty or custom, on the basis of which individuals and groups can expect and/or claim certain behavior or benefits from governments." *Id.*

[4] "Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(c)(2) (1987).

[5] Cordula Droege, *The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, 40 ISR. L. REV. 310, 310 (2007).

[6] RULES, *supra* note 2, at 344.

[7] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, para. 282 (July 8). The *Nuclear Weapons* opinion explained the interaction between IHL and IHRL in a similar manner as the *Wall* case. *See infra* note 8.

[8] The Advisory Opinion in the *Wall* case explained this principle thusly:

> As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Advisory Opinion of 9 July 2004, I.C.J. Rep. 36.

then it must be applied as *lex specialis*.[9] Indeed, Rule 99, recognizes what has become the predominant view regarding the relationship between IHL and IHRL: they are complementary regimes that must always be viewed together, subject to the understanding that in some cases IHL-recognized necessities will override IHRL requirements based on the principle of *lex specialis*.

A. The ICRC Study and Rule 99

The Study's authors began their study of customary IHL at the behest of the participants of the 26th International Conference of the Red Cross and Red Crescent in order to identify and facilitate the application of existing rules of customary IHL in IAC and NIAC.[10] As such, the Study's authors claimed that the end product does not create new rules of international humanitarian law but rather, "seeks to provide the most accurate snapshot of existing rules of international humanitarian law."[11] In an article summarizing the Study, one of its two authors, Jean-Marie Henckaerts, said that its purpose was "to overcome some of the problems related to the application of international humanitarian treaty law."[12]

Next, the Study's authors aimed to plug the gap that they believe exists between IAC and NIAC.[13] According to the Study, there is insufficient treaty law regulating the latter type of armed conflict, the type that exists most often today.[14] Thus, for each of the 161 rules of customary IHL in the Study, the authors stated whether the rule also applies in NIAC. In the case of Rule 99, they concluded that the rule applies in NIAC, a conclusion they also reached with 146 of the Study's 160 other rules.[15]

Chapter 32 of the Study contains Rules 87–105 and is entitled "Fundamental Guarantees." According to the authors, "[t]he fundamental guarantees listed in this chapter all have a firm basis in [IHL] applicable in both international and non-international armed conflicts."[16] Notably, Chapter 32 contains references to human rights instruments, documents, and case-law.[17] "This was done," claimed the authors, "not for the purpose of providing an assessment of customary human rights law, but in order to support, strengthen, and clarify analogous principles of humanitarian law." Citing United Nations (U.N.) General Assembly Resolution 2675[18] and the International Court of Justice's (ICJ) Advisory Opinion on the Legality of *Nuclear Weapons*,[19] the authors stated that "[h]uman rights law applies at all times although some human rights treaties allow for certain derogations in a "state of emergency."[20] They argued that the human rights provisions cited in Chapter 32 are listed in widely-ratified human rights treaties as rights that may not be derogated from in any circumstance.[21] Also, they noted that "it is the consistent practice of human rights treaty bodies to insist on a strict interpretation of the provision that any derogation measures during a state of emergency be limited 'to the extent strictly required by the exigencies of the

[9] *Id.*; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226.

[10] Henckaerts, *supra* note 2, at 176.

[11] Press Release, Int'l Comm. of the Red Cross, Customary International Humanitarian Law: Questions and Answers, Question 2 (Aug. 15, 2005), http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/customary-law-q-and-a-150805?opendocument.

[12] Henckaerts, *supra* note 2, at 177.

[13] RULES, *supra* note 2, at xxviii.

[14] *Id.* From 1997–2006, only three conflicts were fought between states: Eritrea-Ethiopia, India-Pakistan, and Iraq-United States and coalition forces. Lotta Harbom & Peter Wallensteen, *Patterns of Major Armed Conflicts, 1997–2006*, *in* STOCKHOLM INT'L PEACE RES. INST. YEARBOOK 2007: ARMAMENTS, DISARMAMENT, AND INTERNATIONAL SECURITY app. 2A (2007), *available at* http://www.sipri.org/contents/conflict/YB07%20079%2002Asm.pdf. The other thirty-one major armed conflicts (defined as a conflict including at least one state resulting in at least 1000 battle deaths in one year) recorded for this period were fought within states and concerned either governmental power or territory. RULES, *supra* note 2, at xxviii.

[15] *See* RULES, *supra* note 2, at 156–57; *see also* Henckaerts, *supra* note 2, at 198–212.

[16] RULES, *supra* note 2, at 299.

[17] *Id.*

[18] "[F]undamental human rights, as acceped in international law and laid down in international instruments, continue to apply fully in situations of armed conflict." G.A. Res. 2675 (XXV), pmbl. and § 1, U.N. Doc. A/8028 (1971) (adopted by 109 in favor, 0 against, 8 abstentions on 9 December 1970).

[19] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J (July 8).

[20] RULES, *supra* note 2, at 300–01.

[21] *Id.*

situation.'"[22] The authors listed several examples to "show how IHL and IHRL reinforce each other, not only to reaffirm rules applicable in times of armed conflict, but in all situations."[23]

Citing various U.N. General Assembly resolutions, official statements condemning violations of the fundamental guarantees in armed conflict, and the work of the U.N. Human Rights Commission, the authors concluded that "[t]here is extensive state practice to the effect that human rights law must be applied during armed conflicts."[24] The authors briefly discussed the territorial scope of IHRL concluding that state practice has "interpreted widely" the "within its territory and subject to its jurisdiction" language of the International Covenant of Civil and Political Rights (ICCPR). The Study's authors follow the lead of human rights treaty bodies who have viewed this requirement to be met, even extraterritorially, if there is "effective control."[25]

As stated, Rule 99 stands for the principle that "[a]rbitrary deprivation of liberty is prohibited."[26] The Study's authors claimed that "State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts."[27] The authors noted that common Article 3 of the Geneva Conventions and both Additional Protocols require that all civilians and persons *hors de combat* be treated humanely and, without further support, concluded that the arbitrary deprivation of liberty is incompatible with the humane treatment norms of these instruments.[28] In their brief summary of Rule 99, the authors stated:

> The concept that detention must not be arbitrary is part of both international humanitarian law and human rights law. Although there are differences between these branches of international law, both international humanitarian law and human rights law aim to prevent arbitrary detention by specifying the grounds for detention based on needs, in particular, security needs, and by providing for certain conditions and procedures to prevent disappearance and to supervise the continued need for detention.[29]

As with each of the other 160 rules, the authors discussed Rule 99's application in IAC and NIAC separately. In addition, with Rule 99, the authors discussed grounds for detention and procedural requirements related to detention separately. The legal regimes that dictate grounds for detention and procedural requirements in IAC and NIAC are, according to the Study, much different. The authors' discussion of both aspects of this "customary" rule in IAC focused almost completely on IHL, particularly Geneva Convention IV (GC IV),[30] which discusses the internment of civilians in Articles 42, 43, and 78.[31] With respect to IAC, the authors also pointed to the role of Protecting Powers, also contained in the Geneva Conventions, and the "grave breach" of unlawful confinement mentioned in the GC IV to defend Rule 99's customary status in IAC.[32] It is interesting to note that nowhere in their separate discussion of Rule 99 in IAC did the authors specifically mention IHRL although their comment in the summary portion of the Rule suggests that they considered IHRL and IHL together when formulating the rule.

By contrast, the authors' discussion of Rule 99 in NIAC is dominated by IHRL, so much so that one might even conclude that it, and not IHL, is the regime that establishes the customariness of this rule in NIAC. The very first sentence of the NIAC section of Rule 99 states, "The prohibition of arbitrary deprivation of liberty in non-international armed conflicts is established by State practice in the form of military manuals, national legislation and official statements, as well as on the

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[22] *Id.* at 301.

[23] *Id.* at 302. These examples were all in the form of comments made by various human rights treaty bodies on the conduct of states in armed conflict.

[24] *Id.* at 303–04. Here too the authors relied on the "practice" of human rights treaty bodies to establish the state practice requirement of customary international law. One might question whether such practice truly qualifies as state practice.

[25] *See, e.g.*, Loizidou v. Turkey, App. No. 15318/89, Eur. H.R. Rep. 99 § 62 (1995) (Preliminary Objections); Bankovic v. Belgium et al, App. No. 52207/99, 11 B.H.R.C. 435 § 71 (2001) (Decision as to Admissibility). The Inter-American Commission has cited these cases with approval.

[26] RULES, *supra* note 2, at 344.

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

[31] *Id.* at 345–46.

[32] *Id.*

basis of international human rights law."[33] Many of the Study's rules are defended by their presence in various military manuals as opposed to "harder" sources of IHL.[34] The problem with this is that military manuals, as well as the national legislation and official statements upon which the authors relied, almost never make a distinction between obligations in IAC and NIAC.[35] And because most of the written law of armed conflict is geared towards IAC, it is fair to say that these manuals are primarily aimed at IAC. Consequently, one must question the evidentiary weight of military manuals and national legislation to establish customary rules in NIAC.

As it pertains to NIAC, therefore, Rule 99, as well as many of its sister rules in the fundamental guarantees section, is based less on military manuals and legislation than on IHRL, specifically the ICCPR, the Convention on the Rights of the Child (CRC) and the European and American Conventions on Human Rights, all of which include this rule against the arbitrary deprivation of liberty.[36] The authors pointed to these references, and to human rights treaty bodies' interpretation of them, in their explanation of the three procedural requirements that must accompany any deprivation of liberty in NIAC: (1) an obligation to inform a person who is arrested of the reasons for arrest; (2) an obligation to bring a person arrested on a criminal charge promptly before a judge; and (3) an obligation to provide a person deprived of liberty with an opportunity to challenge the lawfulness of detention (*i.e.*, the writ of habeas corpus).[37] Citing advisory opinions of the Inter-American Court of Human Rights, the Study's authors claimed that the writ of habeas corpus is an essential and non-derogable remedy that protects humans from the arbitrary deprivation of liberty in NIAC.[38] Having discussed the way in which the Study's authors defended Rule 99 in the Study, this article will now consider how Rule 99 demonstrates the principles of complementarity and *lex specialis*.

## B. Complementarity and *Lex Specialis*

Rule 99 appears to be a textboook example of the paradigms of complementarity and *lex specialis* as they are described and defended by the ICJ, by human rights treaty bodies, and by the majority of modern legal scholarship.[39] These sources tend to view the question of how to consider IHRL in armed conflict as one of application and not applicability.[40] Thus, IHRL always applies, but IHL may modify how it applies based on IHL's status as *lex specialis*. One commentator put it this way:

> If it is accepted that both humanitarian law and human rights law may be simultaneously applicable [complementarity], there is a need for a principle [*lex specialis*] which will ensure at the minimum that the application of the two sets of rules will not lead to conflicting results and ideally that the fit between the two sets of rules will be as close as possible. That could be achieved by saying that one area of law should be interpreted in the light of the other.[41]

This is clearly the approach that the Study's authors followed with regard to Rule 99, a rule that well demonstrates the principles of complementarity and *lex specialis*. As stated in the previous section, IHL has much to say about the deprivation of liberty in IAC but is virtually silent on the subject in NIAC. Applying complementarity, the Study's authors thus looked to IHRL as providing the only applicable norms in NIAC (since IHL is silent) and, applying *lex specialis*, they looked to

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[33] *Id.* at 347.

[34] Rule 45 of the Study, for example, bases its prohibition of "methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment" primarily on military manuals. *See, e.g.*, RULES, *supra* note 2, at 151–58.

[35] *See, e.g.*, INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CTR. & SCH., U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK (2008). The Study authors viewed the *Operational Law Handbook* (*OLH*) as a "military manual" for purposes of the Study even though it is better viewed as a training guide for Judge Advocates. *See, e.g.*, PRACTICE, *supra* note 2, at 883. However one chooses to view it, the *OLH* seldom separately considers how the law of war applies in IAC and NIAC. In addition, it is the stated policy of the DoD to comply with the law of war in all military operations, no matter how characterized. *See* DoDD 2311.01E, *supra* note 3.

[36] RULES, *supra* note 2, at 348–50.

[37] *Id.* at 348–51.

[38] *Id.* at 351. *See, e.g.*, INTER-AMERICAN COMM'N ON HUMAN RIGHTS, REPORT ON TERRORISM AND HUMAN RIGHTS, III(B)(1), para. 126 (Oct. 22, 2002), *available at* http://www.cidh.oas.org/Terrorism/Eng/toc.htm ("[W]hile the right to personal liberty and security is derogable, the right to resort to a competent court . . . which by its nature is necessary to protect non-derogable rights during a criminal or administrative detention . . . may not be the subject of derogation in the inter-American system.").

[39] *See, e.g.*, Droege, *supra* note 5 (discussing modern scholarship on IHRL).

[40] Francoise Hampson, *Other Areas of Customary Law in Relation to the Study, in* PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 66–68 (Elizabeth Wilmshurst & Susan Breau eds., 2007).

[41] *Id.* at 67.

IHL—no doubt interpreted "in the light of" IHRL—as providing the applicable norms in IAC. One might question whether it is appropriate to apply only IHRL to establish a customary norm of IHL in NIAC. According to the same commentator who wrote the above quote, it is appropriate so long as the IHRL materials relied on to establish the norms specifically relate to situations of armed conflict and there is no conflict between the IHRL norm and IHL norms.[42] The key is that the IHRL norm being relied on to establish the rule overlaps and does not conflict with IHL.

Perhaps because Rule 99 represents such an overlap between IHL and IHRL, it should not surprise the reader to find "arbitrary" undefined in the Study's formulation of a rule against the arbitrary deprivation of liberty. It is as if the Study's authors understand that what is arbitrary will depend on not only on the context but also on variables that may apply differently in situations of IAC and NIAC. By leaving arbitrary undefined the authors adhered to the idea that the two regimes are complementary but that the *lex specialis* of IHL may modify how a rule like Rule 99 is applied and what is, in a given situation, arbitrary.

## C. Conclusion

"It is submitted that the way in which human rights law and human rights material is used in the Study is legitimate, necessary and conservative,"[43] claimed Francoise Hampton, who commented on the fundamental guarantees section of the Study. The approach embodied in Rule 99—applying IHL and IHRL as complementary regimes subject to the *lex specialis* principle—is indeed now so ingrained as to warrant the label customary by the ICRC. While certain key actors in the international community such as the United States and Israel may prefer to view these two regimes as separate and distinct, it is now beyond argument that the majority of the international community views them as complementary.[44] That being the case, Hampton's submission is at least partially correct: the authors' use of IHRL in the ICRC Study, and particularly with respect to Rule 99, appears to be both legitimate and necessary, and it is certainly understandable given the trend towards complementarity. Whether the authors' use of IHRL in the Study is conservative is a separate question that is perhaps best left for another day and another article.

[42] *Id.* at 298.

[43] *Id.* at 73.

[44] *See generally* Droege, *supra* note 5.