

THE IMPORTANCE OF CUSTOMARY INTERNATIONAL LAW DURING ARMED CONFLICT

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Customary international law is universal in its reach.¹ It is not subject to control by a few actors in the international legal process,² and it binds all participants in international and non-international armed conflicts to the extent that it is applicable to such conflicts.³

For example, insurgents operating during an armed conflict not of an international character who are nationals of a state that has not ratified the 1949 Geneva Conventions (a rare state, such as Taiwan) are bound by relevant customary humanitarian law reflected, for example, in common Article 3 of the Conventions.⁴ Thus, they are subject to prosecution for violations of common Article 3's prohibitions—technically, not as violations of treaty law as such, but as violations of the customary law reflected in common Article 3. Further, it is widely recognized that common Article 3 reflects customary international law,⁵ as a new study of the International Committee of the Red Cross (ICRC) demonstrates.⁶

That treaties can later reflect customary law and bind nonsignatory nationals was recognized, for example, by the International Military Tribunal at Nuremberg⁷ with respect to German nationals despite the refusal of Germany to ratify the 1907 Hague Convention No. IV⁸ prior to the outbreak of World

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1. See, e.g., JORDAN J. PAUST, *INTERNATIONAL LAW AS LAW OF THE UNITED STATES* 4, 7–8, 22–26 n.14, 420–23, 443–46 (2d ed., 2003).

2. See, e.g., *id.*, at 5, 22–26 n.14.

3. See, e.g., Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law*, 43 COLUM. J. TRANSNAT'L L. 811, 813–14, 816–18, 820–22 (2005).

4. See, e.g., *id.* at 816.

5. *Id.* at 816–17 n.19.

6. See JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES 299, 306–19* (2005).

7. See *International Military Tribunal at Nuremberg, Judgment and Sentences*, Oct. 1, 1946, reprinted in 41 AM. J. INT'L L. 172, 248–49 (1947) [hereinafter *Military Tribunal*].

8. Hague Convention (No. IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277.

War II. Moreover, a general participation clause that limited the treaty's reach to conflicts between signatory states became irrelevant once the rules mirrored in the treaty became customary international law,⁹ which is universal in its reach. The same reach can occur regarding other customary laws of war despite attempted limitations concerning treaties through use of unilateral reservations or understandings, since the effect of such treaty-based limitations are obviated once the rights, duties and protections become customary international law.¹⁰ Further, it did not matter that Germany objected, was a major participant in war-making, and was otherwise a specially affected state. Customary international law is based in general and dynamic patterns of *opinio juris* and practice,¹¹ but when a customary norm comes into existence it is universally applicable.

With respect to Geneva law, it is important to note that common Article 1 of the Conventions, which reflects customary law, requires that signatories and their nationals "respect and . . . ensure respect" for the Conventions "in all circumstances."¹² Thus, customary and treaty-based Geneva obligations flow *erga omnes*—that is, not merely to enemies, but also to all other signatories and, as customary *obligatio erga omnes*, to all of humankind and without putative excuses based on alleged necessity, reciprocity, or reprisals.¹³

Customary international law also provides relevant *rights* for all participants in international or non-international armed conflicts whether or not they are nationals of a state, nation, or belligerent that has ratified a treaty reflecting the same rights. With respect to treaty-based rights, it is worth emphasizing that the nationals of a state that has ratified the 1949 Geneva Conventions are bound by and have numerous express and implied rights under such treaties.¹⁴ It does not matter that such nationals are also members of an entity that is *not* a state, nation, belligerent, or insurgent—such as a private security corporation operating in Iraq, a lawyers' bar association, or al Qaeda.¹⁵ Nationals of signatories to the Geneva Conventions, such as Saudi and Afghan nationals, have *duties* and *rights* under Geneva law applicable to the wars in Afghanistan and Iraq.

Customary international law, which is universal in its reach, also provides states various *competencies* mirrored, for example, in Hague and Geneva law,

9. Military Tribunal, *supra* note 7; *see also* Paust, *supra* note 3, at 819 n.28.

10. *See, e.g.*, Paust, *supra* note 3, at 822–23.

11. *See, e.g.*, Paust, *supra* note 1, at 3–7.

12. *See, e.g.*, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 1, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Civilian Convention].

13. *See, e.g.*, Paust, *supra* note 3, at 814–16.

14. *See, e.g., id.* at 814, 816–20, 829 n.62.

15. *Id.* at 829.

whether or not persons under control or enemies in battle are nationals of signatories to such treaties. Thus, for example, the customary competence to detain certain persons under definite suspicion of activity hostile to the security of a state when reasonably necessary for security purposes that is reflected in Articles 5, 42–43, and 78 of the Geneva Civilian Convention¹⁶ can be exercised also with respect to nonsignatory nationals. Detention of non-prisoners of war, of course, is subject to required review of the propriety of detention.¹⁷ Customary state competencies to detain prisoners of war¹⁸ that are reflected in the Geneva Prisoner of War Convention¹⁹ also apply with respect to nonsignatory nationals.

Customary international law also provides a necessary background as an *interpretive aid*. As recognized internationally in Article 31 of the Vienna Convention on the Law of Treaties²⁰ and domestically by various decisions of the U.S. Supreme Court, customary international law is a relevant and necessary background for interpretive purposes, resolving ambiguities, and filling in gaps.²¹ Such a role of customary law is all the more important with respect to norms *jus cogens* or peremptory norms that preempt other norms with respect to rights and duties.²² An example is the customary and *jus cogens* prohibition of *torture* as well as *cruel, inhuman, or degrading* treatment,²³ such as the stripping of persons naked for interrogation purposes, the use of dogs for interrogation and even terror purposes, and hooding for interrogation purposes—each of which is a patently illegal tactic that was authorized and ordered in memos by Secretary Rumsfeld and others as part of a common plan for use in Guantanamo and even in Iraq.²⁴ These were clearly illegal tactics under customary laws of war and nonderogable human rights law, and their authorization and use can lead to criminal and civil responsibility for

16. See, e.g., Jordan J. Paust, *Judicial Power To Determine the Status and Rights of Persons Detained Without Trial*, 44 HARV. INT'L L.J. 503, 512–14 (2003).

17. See, e.g., *id.* at 507–10 (judicial review under human rights law), 514 (review under the Geneva Civilian Convention).

18. See, e.g., *id.* at 510–12; *Hamdi v. Rumsfeld*, 542 U.S. 507, 520 (2004).

19. Geneva Convention Relative to the Treatment of Prisoners of War, Aug., 12 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

20. Vienna Convention on the Law of Treaties, art. 31, May 22, 1969, 1155 U.N.T.S. 331.

21. *Id.* art. 31(3)(c); See, e.g., PAUST, *supra* note 1, at 12–13, 370, 388 n.64, 435–37 (concerning such a use of customary international law in U.S.).

22. See PAUST, *supra* note 1, at 48 n.57, 164–65 n.127, 370–71, 376–77.

23. See, e.g., Paust, *supra* note 3, at 821–22.

24. See, e.g., *id.* at 834–36, 838–50.

perpetrators, conspirators, complicitors, and those guilty of the separate offense of dereliction of duty.²⁵

Brigadier General Janis Karpinski has stated in an August 3, 2005 interview with Professor Marjorie Cohn that she saw a Rumsfeld authorization on a pole outside at Abu Ghraib: "It was a memorandum signed by Secretary of Defense Rumsfeld, authorizing a short list, maybe 6 or 8 techniques: use of dogs; stress positions; loud music; deprivation of food," and so forth, adding "[a]nd then a handwritten message over to the side that appeared to be the same handwriting as the signature . . . said 'Make sure this happens' with two exclamation points."²⁶ On Frontline on October 18, 2005, she also stated that Major General Miller came to Iraq to GTMOize interrogation tactics.²⁷

Another example of the use of custom involves the *incorporation* of customary human rights to due process into common Article 3 of the Geneva Conventions. This occurs expressly through the phrase "all the judicial guarantees recognized by civilized nations."²⁸ Today, these include the minimum human rights to due process reflected in Article 14 of the International Covenant on Civil and Political Rights,²⁹ which in turn are mirrored in the Rules or Statutes of the ICTY,³⁰ the ICTR,³¹ and the ICC³²—but which are seriously lacking in present rules for the military commissions at Guantanamo.³³

Customary international law can also shift limitations in the Geneva Conventions or override them. An example is the recognized applicability of rights and duties set forth in common Article 3, not merely during insurgencies, but also during belligerencies and wars among nations and/or states such as the wars in Afghanistan and Iraq. Perhaps more appropriately, the rights and duties reflected in common Article 3 are now a minimum set of customary rights and

25. See, e.g., *id.* at 852–55, 862 n.198.

26. Marjorie Cohn, *Abu Ghraib General Lambastes Bush Administration*, TRUTHOUT: PERSPECTIVE, Aug. 24, 2005, http://www.truthout.org/docs_2005/082405Z.shtml (last visited Feb. 15, 2006).

27. Frontline Interview with Janis Karpinski, Gulf War Veteran and Army Reservist, (Aug. 5, 2005), available at <http://www.pbs.org/wgbh/pages/frontline/torture/interviews/karpinski.html> (last visited Feb. 15, 2006).

28. See, e.g., Paust, *supra* note 16, at 511 n.27, 514.

29. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171.

30. See Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY), arts. 20–21, S.C. Res. 827, Annex (May 25, 1993).

31. See Statute of the International Criminal Tribunal for Rwanda (ICTR), arts. 19–20, 24–25, S.C. Res. 955, Annex (Nov. 8, 1994).

32. See Rome Statute of the International Criminal Court, arts. 55, 66–67, 81–83, U.N. Doc. A/Conf. 183/9 (July 17, 1998).

33. See, e.g., Jordan J. Paust, *Antiterrorism Military Commissions: The Ad Hoc DOD Rules of Procedure*, 23 MICH. J. INT'L L. 677, 677–90 (2002).

duties that are also applicable in international armed conflicts.³⁴ Moreover, customary and universally applicable human rights apply during war and provide at least the same or similar rights and restraints.³⁵

Another area of customary law is worth highlighting—the immunity of combatants from prosecution for conduct that is lawful under the customary laws of war.³⁶ Interrelated is the customary definition of “combatant,” which hinges on membership in the armed forces of a belligerent, nation, or state during an armed conflict.³⁷ Attempts to change that test can be dangerous for U.S. and other military personnel.³⁸ Of course, mere insurgents have no combatant status or combatant immunity under customary law.³⁹

Customary international law can also have effects domestically.⁴⁰ For example, when a treaty is not directly incorporable but the customary laws of war can be, customary laws of war can produce direct effects in a domestic legal process.⁴¹ In the United States, the customary laws of war are binding on the President and all persons within the Executive branch.⁴² There have also been recognitions of the primacy of the laws of war over federal statutes.⁴³

34. See, e.g., Paust, *supra* note 3, at 816–17 n.19.

35. See, e.g., *id.* at 820–22. Under the U.N. Charter, human rights would also prevail over inconsistent law of war treaties. See U.N. Charter arts. 55(c), 56, 103. Human rights *jus cogens* would also prevail over more ordinary international law.

36. See, e.g., Jordan J. Paust, *War and Enemy Status After 9/11: Attacks on the Laws of War*, 28 YALE J. INT’L L. 325, 330–33 (2003).

37. *Id.* at 328–330.

38. See, e.g., *id.* at 332–35.

39. *Id.* at 327–29.

40. See, e.g., PAUST, *supra* note 1, at 7–16.

41. See, e.g., *id.* at 10–12, 15, 170–73, 293–96 n.503, 370–71, 489, 492–94, 499–501 n.25, 507–08 n.87.

42. See, e.g., Paust, *supra* note 3, at 856, 858–61.

43. See, e.g., PAUST, *supra* note 1, at 106–07.