A Critique of the ICRC's Customary Rules Concerning Displaced Persons: General Accuracy, Conflation, and a Missed Opportunity

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Abstract

International humanitarian law is a mix of treaty law and customary law. The interpretation of the treaty law is in dispute, and customary law of war is even more uncertain in its scope and application. The International Committee of the Red Cross (ICRC) recently undertook an ambitious project in its attempt to compile a summary of the fluctuating state of customary international humanitarian law. This article addresses the section of this compilation relating to displaced persons in the context of armed conflict. The article acknowledges the general accuracy of these Rules, but points out flaws in their construction that limit their practical use. In particular, the rules assign rights to displaced persons without identifying any avenue of recourse in case of violation. The ICRC volume also overstates the customary law relating to state population transfers, contrary to the letter and spirit of the International Criminal Tribunal for Rwanda (ICTR) and International Criminal Tribunal for the former Yugoslavia (ICTY). Finally, and most seriously, the proposed rules conflate the rights of displaced persons and refugees as defined by the Geneva Convention on the Status of Refugees 1951 (Refugee Convention), which results in the omission of a customary rule relating to states' *non-refoulement* obligation in wartime. These facets of the rules render them of academic or aspirational interest, but the Rules do not have practical value for the development of international humanitarian law with regards to displaced persons.

1. Introduction

The International Committee of the Red Cross (ICRC), in its recent analysis of customary international humanitarian law, distils five customary rules (the 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, the ICRC's volume gives sufficient evidence demonstrating that these rules are representative of customary international law; however, there are a few flaws that strip

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[1] Henckaerts and Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (Cambridge: Cambridge University Press, 2005) at 457-74.

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 (IDPs), 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 *non-refoulement* 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 *non-refoulement* 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.

2. The Rules in Particular

In general, the Rules are accurate restatements of customary international law.[2] 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.[3] This Rule implies that parties to a conflict feel bound by customary international law during times of war in their decisions concerning the placement of their civilian population, an idea challenged by competing notions of sovereignty.[4] 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, to use their homes for quartering troops, or to evacuate an area in the slight chance that it may become a battlefield. Inserting 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 Study however, makes a good case for promulgating the Rule. It cites significant treaty law as evidence, including Additional Protocol II to the Geneva Convention (AP II) and provisions from the International Criminal Court (ICC), ICTY and ICTR Statutes criminalising civilian displacement.[5] Furthermore, it looks to bilateral agreements between parties in internal armed conflicts in Bosnia and Herzegovina and the Philippines which have similar provisions.[6] AP II is less widely accepted than other international humanitarian law treaties,[7] and is not generally considered customary law,[8] but it is evidence of state intent to be bound. The Statute of

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[2] Ibid.
[3] Ibid. at 457.
[4] Scheffer, 'Toward a Modern Doctrine of Humanitarian Intervention', (1992) 23 *University of Toledo Law Review* 253 at 254-9 (explaining the conflict between UN charter non-intervention principles and needs for updated international norms to respond to crises such as displaced persons).
[5] Henckaerts and Doswald-Beck, supra n. 1 at 459.
[6] Ibid.
[7] 158 states are party to AP II, as opposed to 192 states party to the Geneva Conventions and 162 states party to Additional Protocol I to the Geneva Conventions, which the US has indicated is partially representative of customary international law.
[8] Carter et al., *International Law,* 4th edn (Aspen: Aspen Publishers, 2003) at 1108. But see Meron, 'The Continuing Role of Custom in the Formation of International Humanitarian Law', (1996) 90 *American Journal of International Law* 238 at 244 (citing the *Tadic* decision as evidence of the development of customary law governing internal armed conflicts and the influence of AP II).

the International Criminal Court (ICC) has similar customary weight.[9] The ICRC study 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.[10] Of course, the ICTY Statute is limited in its geographic and temporal jurisdiction to the territory of the Former Yugoslavia since 1991[11] 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.[12] 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.'[13] This narrow prohibition is probably more representative of customary law 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 Study 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.[14] The state practice cited by the ICRC Study occurs purely in the context of ethnic or social 'cleansing', so the rule should reflect that narrow application. The ICRC construction tends to hide this 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.[15] 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 regards to internal displacement: displacement for discriminatory reasons are 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

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[9] Only 97 states are party to the Rome Statute establishing the ICC.
[10] Article 5(d), ICTY Statute, (1993) 32 ILM 1159 (ICTY Statute).
[11] Ibid. Article 8.
[12] *Prosecutor v Tadić*, Appeal on Jurisdiction, IT-94-1-AR72 at para. 77 (1995)..
[13] Article 3(d), Statute of the International Criminal Tribunal for Rwanda, (1994) 33 ILM 1602 (ICTR Statute).
[14] Articles 49 and 147, Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949, 75 UNTS 287 (GC IV).
[15] Article 12(1), International Covenant on Civil and Political Rights 1966 999 UNTS 171 (ICCPR) states that 'Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.' Furthermore, Articles 4(1) and 12(3), ICCPR allows an exception from the rule for national security and permits derogation in times of national emergency. Significantly, Article 4, ICCPR does not allow derogation from the obligation to not discriminate on the grounds of race, colour, sex, language, religion, or social origin.

Council resolutions bearing on population transfer.[16] 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 Study presents compelling evidence of the acceptance of this rule, notably the international condemnation of German efforts in World War II to 'Germanise' occupied territories and similar events in the Former Yugoslavia, which culminated in both instances of criminalisation of this activity by treaty.[17] Specifically, the Nuremburg Trial holdings and Article 49 of the 1949 Geneva Conventions, which both have customary law status, stand as a direct response to population transfer 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 in the ICRC Study.

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'.[18] Rule 131 is clarified 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 IDPs, but that in some instances a government's duty only extends to facilitating passage of international humanitarian organisations assisting the IDPs.[19] 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 potentially puppet government established by a foreign party. Given this ambiguity, it is difficult to actually distil 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 evidence for this Rule implies that states are responsible for facilitating return of the displaced, which is correct.[20] The ICRC Study gives plenty of evidence supporting this idea from actual state practice, statements, and policy.[21] The ICRC Study also relies on authority from UN General Assembly resolutions and publications as evidence of this Rule, inferring that the United Nations has some kind of protective role concerning those displaced in non-international conflicts. The United Nations does in fact fulfil this role to a degree; however, thus far it is not a legal obligation but an assumed one.[22] It seems as if the ICRC is attempting to carve out a niche for the United Nations and non-governmental

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[16] Henckaerts and Doswald-Beck, supra n. 1 at 463.
[17] Ibid.
[18] Ibid. at 463.
[19] Ibid. at 467.
[20] There may be limitations on this 'right of return' for national security reasons or even by waiver. See Saideman, 'Do Palestinian Refugees Have a Right of Return to Israel? An Examination of the Scope of and Limitations on the Right of Return', (2004) 44 *Virginia Journal of International Law* 829 (discussing possible narrow limitations on the customary right of return).
[21] Henckaerts and Doswald-Beck, supra n. 1 at 468-72.
[22] 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', available at: http://193.194.138.190/html/menu2/7/b/midpintro.htm.

bodies in assisting internally displaced persons. The Rule would be more descriptive of the current state of the law and more practical for application by affirmatively stating 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 132 and 131 in that it places a duty on an unknown party. This contrasts with positive treaty law contained, for example, in Article 53 of Geneva Convention IV, which takes care to specify that the occupying power bears the duty to respect civilian property. Displaced persons are civilians, and therefore covered by 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 war time. 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.[23] Although these ad hoc commissions may represent the future direction of property rights in war time, the ICRC Study 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 Study undermines the usefulness of the Rules outside the academic sphere. The ICRC does conceive of the Rules 'primarily as a work of scholarship', but it also hoped that it would assist in the 'implementation, clarification, and development of international humanitarian law.'[24] 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.

3. Conflation, and a Missed Opportunity

The customary rules distilled by the ICRC Study 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 Refuge Convention; (3) 'refugees' that are civilians fleeing real danger but who do not quite fall under the Refugee 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 Study declares that Rules 129 to 133 apply to both refugees and internally displaced persons, and never makes any further distinction between these groups.[25] Refugees under the Refugee Convention are persons fleeing their home state based on a

[23] Henckaerts and Doswald-Beck, supra n. 1 at 473.
[24] Ibid. at xi.
[25] Henckaerts and Doswald-Beck, supra n. 1 at 457.

well-founded fear of persecution based on social factors such as race, religion, or politics,[26] and internally displaced persons are those who, for reasons of violence, human rights violations, or natural disaster, have been forced to leave their homes.[27]

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 protections than IDPs.[28] 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.[29]

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 United Nations on Internally Displaced Persons. The ICRC Study, in Chapter 38 relating to displaced persons, refers to the Guiding Principles in 12 footnotes out of 112: over 10% of the Chapter's citations. The United Nations, however, has affirmed that these principles are not binding and serve only as guidelines, as the title suggests. While the United Nations asserts that these Guidelines 'are based upon existing international humanitarian law and human rights instruments', it simultaneously recognises that they are given for 'practical application in the field' and to 'clarify grey areas and fill in the gaps' in IDP protection.[30] Most scholars lament the absence of a protective legal regime for IDPs, rather than rely on the Guiding Principles as evidence of a developing regime.[31] The ICRC attempt to bring the Guiding Principles into the fold of customary law is aspirational at best, and does not greatly support the ICRC's equalisation of IDP and refugee rights.

Rules 131 and 133 are areas where refugees, as understood by the Refugee 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 Refugee Convention requires states to give refugees employment rights equal to that of legal immigrants,[32] to protect refugees' tangible and intangible property rights,[33] and extend social

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[26] Article 1(A), Geneva Convention Relating to the Status of Refugees 1951, 189 UNTS 2545 (Refugee Convention).

[27] 'Further Promotion and Encouragement of Human Rights and Fundamental Freedoms, Including the Question of the Programme and Methods of Work of the Commission on Human Rights, Mass Exoduses and Displaced Persons', 11 February 1998, E/CN.4/1998/53/Add.2.

[28] Schmidt, 'The Process and Prospects for the UN Guiding Principles on Internal Displacement to Become Customary International Law: A Preliminary Assessment', (2004) 35 *Georgetown Journal of International Law* 483 at 489.

[29] Ibid. at 491-2; and Bugnion, 'Refugees, Internally Displaced Persons, and International Humanitarian Law', (2005) 28 *Fordham International Law Journal* 1397 at 1408-9.

[30] UN Office for the Coordination of Humanitarian Affairs, 'Foreword to the Guiding Principles by Under-Secretary-General for Humanitarian Affairs Mr. Sergio Vieira de Mello', available at: http://www.reliefweb.int/ocha_ol/pub/idp_gp/idp.html (1998).

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

[32] Article 17, Refugee Convention.

[33] Articles 13 and 14, Refugee Convention.

welfare benefits of housing, health care, and food equal to that of legal immigrants.[34] The Refugee Convention constitutes customary international law, and is a treaty obligation states and their agent military forces are bound to respect.[35] By mixing duties to and rights of refugees with those of a less-protected legal status, the ICRC Study 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 equalise protections for IDPs and other migrants with Convention-style refugee protections, the ICRC Study failed to put forth a customary rule of international humanitarian law mandating parties to the conflict to respect *non-refoulement* rights of Convention refugees. *Non-refoulement* 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.[36] This principle, codified in the Refugee Convention, is by birth a creature of refugee law rather than human rights law or international humanitarian law. Perhaps, recognising this doctrinal distinction, the ICRC omitted discussion of *non-refoulement* in this volume on customary international humanitarian law. This cannot be the case, however, because the ICRC Study looks to other non-law of armed conflict treaties, some less accepted than the Refugee Convention, as support for its rules concerning displaced populations.[37] The omission of a *non-refoulement* rule seems startling considering that international humanitarian law is the first line of protection for refugees.

Non-refoulement prevents a state or its agents from returning refugees to a country where they have a well-founded fear of danger from persecution based on their race, religion, nationality, political opinion, or other social characteristic, unless the refugee is a threat to national security.[38] 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.[39] This would mean that states could not derogate from *non-refoulement* duties, even in times of national emergency or war. At the very least, state practice indicates that *non-refoulement* during international armed conflict is a customary rule. For example, the US Department of Defense incorporated into its instructions a directive ordering the military to abide by the *non-refoulement* principle and follow a regulation designed to receive asylum claims and channel them to the proper authorities within the US government.[40] Furthermore, the principle of *non-refoulement* is alluded to in Article 45, Geneva Convention IV, which prevents a state 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.'

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[34] Articles 20, 21 and 23, Refugee Convention. In a country where legal immigrants have few rights, however, the ICRC's customary rule may be more robust than that of the Refugee Convention, which refers to domestic legal systems as a baseline for social welfare protections.

[35] Bugnion, supra n. 26 at 1404.

[36] Article 1(A)(2), Refugee Convention.

[37] See, for example, Henckaerts and Doswald-Beck, supra n. 1 at 466, n. 61 (relying on the Convention on the Rights of the Child as evidence of customary international humanitarian law).

[38] Article 33, Refugee Convention.

[39] See, for example, Cartagena Declaration on Refugees 1984, OEA/Ser.L/V/II.66/doc.10, rev. 1, at 190-3; and Koh, 'The Haitian Centers Council Case: Reflections on *Refoulement* and Hatian Centers Council', (1994) 35 *Harvard International Law Journal* 1 at 30.

[40] US Department of Defence, Dir. 2000.11, Procedures for Handling Requests for Political Asylum and Temporary Refuge, 3 March 1972, amended 17 May 1973.

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 insert IDPs as a special group in international humanitarian law is largely unnecessary because of these protections, and is otherwise imprudent, because no customary or treaty-based legal regime has developed giving IDPs any special status. Inclusion of IDPs in a *non-refoulement* rule would dilute it by placing a duty on states inconsistent with sovereignty rights and thus unworkable in international politics: not to return 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 Study should have differentiated between refugees and other displaced groups[41] and should have included a rule of customary international humanitarian law specific to refugees simply adapting the principle from the Refugee 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 threatened on account of race, religion, nationality, membership of a particular social group or political opinion. This rule applies only to a specific type of refugee, consistent with the Refugee 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 *non-refoulement* 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 associated with discriminatory violence.

4. 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 minimise 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, and resulted in a complete omission of a Rule on *non-refoulement*. This last error is truly unfortunate: this is a missed opportunity to affirm the robust rights of refugees in the conflict context. 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.

[41] Bugnion, supra n. 29 at 1410-1 (explaining that refugees and IDPs have different needs for protection).