Event Report: The Department of Defense Law of War Manual: The Tension Between State and Non-State Expressions of Customary International Humanitarian Law

International Law Weekend, 7 November 2015, Fordham University School of Law

Abstract of Panel:
Only States participate in the formation of customary international humanitarian law (CIHL) through practice and opinio juris. Nevertheless, other actors - such as the International Committee of the Red Cross (ICRC), NGOs, academics, or non-State parties to a conflict - also indirectly contribute to shaping CIHL. Using concrete examples such as the new Department of Defense (DoD) Law of War Manual or the ICRC Study on CIHL, the panelists will discuss how CIHL emerges and the weight to be given to differing assessments of the customary status of specific IHL topics

[1]Moderator:
Michael Schmitt, Naval War College - Stockton Center for the Study of International Law; University of Exeter Law School; Harvard Law School

Panelists:
Gabor Rona, Visiting Professor of Law, Cardozo Law School
[2]**Karl Chang**, Associate General Counsel (International Affairs), Office of the General Counsel, Department of Defense
Dr. Els Debuf, Senior Advisor - Humanitarian Affairs, The Independent Commission on Multilateralism; Former Head of Customary IHL project at ICRC

Michael Schmitt introduced the panel by outlining four expressions of Customary International Humanitarian Law (CIHL):

i) State products
ii) ICRC expressions (e.g., CIHL Study, DPH Guidance)
iii) Group of expert products (e.g., Tallinn Manual)
iv) NGO products (e.g., Human Rights Watch "Losing Humanity" report)

He asked each of the panelists to discuss the following questions:

- What is the role of your type of expression?
- What are the strengths and weaknesses of your type of expression?
- Are there particular obstacles in formulating the expression in question?
- How do they contribute to the identification (and possibly development) of international law?
- What dangers do they pose to the identification (and possibly development)?

Michael Schmitt *read the notes prepared by* ***Karl Chang****.*

In his notes, **Karl Chang** had made three central points:

i) The DoD Manual is not intended to serve as the U.S. position on CIHL rules.
ii) State expressions of CIHL have certain advantages over the expressions of non-State actors.

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[1] Please note that all remarks were made in the personal capacity of the moderator or panelists and were not intended to represent the views of the agencies or organizations of the speakers.
[2] **Karl Chang** was unable to join due to unforeseen circumstances, but he sent his speaking points for the moderator to read for the audience.

iii) Trying to define what is or is not CIHL may not merit the amount of attention that it receives, and work on products more similar to the DoD Manual may be more fruitful.

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For his first point, **Karl Chang** explained that as stated in the first section, the DoD Manual is only intended to provide information on the law of armed conflict for use by DoD personnel. This goes back to the argument made by then-Department of State Legal Adviser John Bellinger and then-DoD General Counsel William Haynes in their letter criticizing the ICRC's CIHL study for excessive reliance on military manuals.[3] According to **Karl Chang**, provisions of military manuals are often based on treaties, domestic law, and policy, not necessarily on what a State believes is CIHL. He recalled that in the DOD Manual, when the intent was to state a position on customary law, the text stated so explicitly.

State expressions of CIHL have certain advantages over the expressions of non-State actors.

Karl Chang continued with why State expressions of CIHL have certain advantages over other kinds of expressions. He believed there were two main advantages. First is the ability of States to contribute to the formation of CIHL through their own practice or statements of opinio juris. He used the example of the March 2011 statement that the U.S. Government would apply the principles of Art. 75 of API to international armed conflicts out of a sense of legal obligation, even though the statement did not say that the rule was customary in nature. This statement was intended to help Art. 75 crystallize as CIHL because the U.S. believes it should be CIHL. Second, States have information advantages. States know their own practice better, and know what it is they do out of a legal obligation. The existence or application of CIHL rules may sometimes depend on practical issues – what is considered "unnecessary" or "feasible," and States also may have more knowledge about such practical implications (e.g., DoD has laboratories that test weapons). CIHL rules sometimes reflect a balance between competing rights and interests, and a State has internal processes that regularly balance such tensions. **Karl Chang** acknowledged that not all State expressions of CIHL reflected these advantages, and that the U.S. is only one State among many.

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Finally, **Karl Chang** argued that it should be recognized that there is more complexity and nuance in issues of CIHL. Trying to determine whether a treaty provision is CIHL is a leading question and might not be particularly meaningful if there are substantial differences in the interpretation of the treaty provision. Take the example of the definition of military objectives in Article 52(2) of API; it might not be significant to conclude that that language reflects custom if some States (such as the U.S.) interpret the language to include "war-sustaining" objects, while others do not. **Karl Chang** also encouraged more transparency about how rules are identified. He said that the Manual sought to implement this approach through the use of many footnotes, to demonstrate to the reader the origins of the statements in the main text of the Manual.

Dr. Els Debuf gave the history of the ICRC's mandate with respect to the development of IHL and the background of the CIHL Study. She responded to Karl's point about transparency by noting that the ICRC study included the majority of sources it used as evidence of State practice or opinio juris. All of

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[3] John B. Bellinger, III and William J. Haynes II, "A US government response to the International Committee of the Red Cross study Customary International Humanitarian Law," *IRRC*, Volume 89 Number 866 June 2007.

the information is available online, and is constantly being updated. The CIHL Study is not meant to be a comprehensive assessment of CIHL, as it only covers certain topics of IHL.

One of the main findings of the CIHL Study was that the normative gap between NIAC and IAC is far less wide under CIHL than it is under treaty IHL, as it found that 146 out of the 163 rules applied in both (13 rules applied only in IAC and 2 applied only in NIAC).

Dr. Els Debuf explained that the purpose of the CIHL Study had been to codify CIHL, because if the rule is known it is easier to enhance respect of it. The ICRC's mandate and objective with the Study had been to identify existing rules of CIHL and explain their scope of application, not to propose new rules. While 161 rules had been initially identified, the ICRC continues to collect evidence of state practice and opinio juris in order to monitor and identify emerging or disappearing rules and evolutions in the scope of these rules.

As an online database, the ICRC's CIHL Study provides a practical tool for a wide range of audiences. More substantively, the Study represents an authoritative expression by an independent organization.

Gabor Rona remonstrated that the DoD Manual was a missed opportunity to provide either precise, practical guidance to commanders in the field, or a comprehensive statement of U.S. visions of customary IHL. Trying in some respects to be both, it ends up being neither. Had the Manual attempted to be the latter, it could have been influential in light of the fact that the U.S. has a massive military presence and a loud voice in the international community with respect to international law. Yet the U.S. has not really experienced war on its own territory, and much of the U.S. population does not appreciate the impact of conflict on civilian lives. **Gabor Rona's** view was that Europeans, including their militaries, weigh civilian lives more while the U.S. prioritizes force protection, which leads to differing interpretations of the law. **Gabor Rona** used the example of the U.S. "obsession" with remote killing to illustrate this point.

Nonetheless, **Gabor Rona** expressed dismay that the U.S. is not particularly aggressive about expressing its views of the law. **Gabor Rona** identified three principal objections to the Manual as an expression of the U.S. views on IHL:

i) It is not an interagency view;
ii) The Manual, in several respects, reflects an "anti-golden rule" rule, meaning that it promotes actions that would outrage the U.S. if they were used against the U.S.;
iii) The Manual is unsuitable and unusable for practitioners without creating an imprimatur of CIHL.

Focusing on the point that the Manual is not a practical tool for practitioners, **Gabor Rona** argued that the unwillingness of the U.S. to take strong positions on the law or to express its views on these positions, led to a vacuum that would continue to be filled by independent experts and the ICRC. He lauded the role of independent experts and processes such as the Tallinn Manual Process, as these processes were made credible through the quality of their scholarship and the reputation of their members.

Gabor Rona conceded that NGOs have an advocacy mission which may make their assertions suspect and biased towards the *lex ferenda* (what the law should be, not what it is).

Michael Schmitt responded to some of the comments made by the panelists. He took issue with the assertion that the interagency process produces better rules, as he found that it can also lead to promulgation of the lowest common denominator. He also said that while the ICRC is independent

and has some of the best IHL lawyers in the world, the organization will understandably tend to weigh the humanitarian aspect of the military necessity-humanitarian considerations balance that underlies IHL heavily when interpreting IHL or trying to identify customary IHL. He also noted that militaries may sometimes do the same with respect to military necessity. Expert groups, assuming they are properly and fairly built, can therefore sometimes be more objective by alleviating the impact of perspective.

Michael Schmitt also disagreed with the argument that the U.S. disagreed with the European States due to their differing experiences during the World Wars with respect to civilian casualties. Instead, he suggested that differences between States with respect to interpreting and identifying IHL can often be explained by whether the States concerned actually fight with any frequency. Again, his point is that what a State/organization/person sees with respect to IHL usually depends on where they stand with respect to the military necessity/humanitarian considerations balance.

Dr. Els Debuf responded to the points made in **Karl Chang's** written remarks about States having more knowledge of their own practice. She agreed that although States have more knowledge of their own practice and perhaps the practice of their allies, States did not really have a global view, they only have a more intimate knowledge of their own practice and that of their allies. Also, she encouraged the U.S. to make that intimate knowledge available to the public so it could be better taken into account in the assessment of evidence of practice and opinio juris and thus into the identification of rules of CIHL. She pointed out that several States have made such information available to the ICRC so that it could be taken into account in the Study. She also refuted the notion that the CIHL Study was binary in nature, as certain rules expressly stated that there was not sufficient practice to conclude that a rule or certain elements of a rule had crystallized as CIHL.

Gabor Rona disagreed with the proposition that DoD had more of a right to identify CIHL than ICRC, reminding the audience that DoD was one agency of one government.