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**Recklessness and War Crimes: Exploring the Role of State Practice and International Criminal Tribunals in Establishing Customary International Humanitarian Law**

“As you know, individuals who commit serious violations of the laws of war with criminal intent – that is, intentionally or recklessly – are responsible for war crimes.” Human Rights Watch offered this assertion in a letter to the then US Secretary of Defense following a catastrophic mistaken attack by US military forces on a Médecins Sans Frontières hospital in Kunduz, Afghanistan. That recklessness is a sufficient *mens rea* to support a war crimes prosecution as a matter of customary international law is a common refrain in contemporary practice and scholarship. Does this perspective, however, warrant the widespread acceptance it has acquired?

This paper examines the extent to which, if at all, recklessness is a sufficient *mens rea* to support a war crime characterization as a matter of customary international law. The inquiry begins by identifying and assessing the evidence typically cited to support the assertion that recklessness is sufficient. The reference most frequently cited to support this perspective is the sweeping survey of customary international humanitarian law published by the International Committee of the Red Cross in 2005. Many assertions that recklessness is sufficient, including that in the letter from Human Rights Watch to the Secretary of Defense, cite to the ICRC survey as the sole reference in support of the recklessness assertion. In turn, the ICRC recklessness claim cites to a single case from the International Criminal Tribunal for the Former Yugoslavia as support for the customary “rule”.

The usual “source” of the recklessness assertion thus identified and assessed, the inquiry turns to an examination of the traditional author of customary international law: state practice. A comparative approach is adopted in the effort to identify state practice and to assess the extent to which existing state practice can be characterized as widespread and uniform and whether it is conducted out of a sense of legal obligation. The outcome of the comparative examination of state practice reveals that recklessness is not included on the spectrum of intent that is sufficient to support a war crimes characterization.

The inquiry concludes with a comparison of state practice with the practice of international criminal tribunals. If state practice and some jurisprudence of international criminal tribunals are at odds, as a survey of the two suggests, what are the implications for the supposed customary nature of recklessness as a sufficient *mens rea* for war crimes? As the traditional author of customary international law, state practice would seem to be the sole source to consider. In the post-World War II era as the role of international criminal tribunals has developed and expanded, however, the fundamental principle that state practice is the *sole* source of customary law is no longer a matter beyond contestation.

The issue of recklessness and war crimes has profound implications in both the theory and the practice of international law. In practice, the characterization as a “war crime” for the Kunduz attack and many other recent attacks on civilians in armed conflict turns on one decisive factor: intent. Beyond individual incidents, the role of international criminal tribunals in shaping – or perhaps even creating – customary international humanitarian law challenges long-established conceptions involving the formulation of international law. This paper examines state practice and explores the relationship between international criminal tribunals and states in the effort to evaluate the widespread assertion that recklessness is a component of the “criminal intent” of potential war crimes.

**Key words:** Law of Armed Conflict, International Humanitarian Law, War Crimes, International Criminal Law, Military Justice

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