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Customary international law and Protocol I : an analysis of some provisions / L.R. Penna

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Abstract:	<p>The author uses the case study of the enforcement of Additional Protocol I (AP I) to argue that conventional rules often develop into customary rules. Firstly, the author reviews the conditions governing when a conventional rule becomes a customary rule, arguing that the nature of the rule must be of a norm-creating character, and there must be widespread, but not necessarily universal, participation among states. Further, he emphasizes that an important distinction between conventional and customary rules is that the latter can become into binding through <i>opinio juris</i>, and does not require explicit state consent. With these theoretical arguments in place, the author then attempts to ascertain which rules of AP I have become customary. He finds that the conventional rules have become customary with regards to: constraints on the use of force, perfidy, use of emblems, refusal of quarter, immunity of those hors de combat, the treatment of individuals with an unknown status, the recruitment of mercenaries, the treatment of civilians and relief for civilians, providing subsistence, the treatment of refugees, and the treatment of women and children. The author observes that with respect to these standards, widespread practice has led to states feeling normatively bound to these rules. However, the conventional standards concerning prisoner of war status for non-“distinguished” guerrilla combatants have not yet been recognized as customary law as practice is not yet sufficiently widespread or consistent. The author concludes that since many of the rules in AP I are now customary, the functional cost of a state’s ratification has diminished. [Summary by students at the University of Toronto, Faculty of Law (IHRP)]</p>
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