ARTICLES

An Exercise in the Development of International Law: The New ICRC Study on Customary International Humanitarian Law

By Malcolm MacLaren & Felix Schwendimann[*]

A. Introduction

On 17 March 2005, the President of the International Committee of the Red Cross (ICRC), Jakob Kellenberger, presented a study (hereinafter "the Study") of customary international humanitarian law (IHL).[1] A decade earlier, the International Conference of the Red Cross and Red Crescent had mandated the ICRC to "prepare […] a report on customary rules of IHL applicable in international [IAC] and non-international armed conflicts [NIAC], and to circulate the report to States and competent international bodies."[2] The Study's objective was to capture a "photograph" of the existing, hitherto unwritten rules that make up customary IHL.[3] Comprehensive, high-level research into customary IHL followed; the end result of which is undeniably a remarkable feat and a significant contribution to scholarship and debate in this area of international law.

---

[*] Research fellows, Institute for Public International and Comparative Constitutional Law, University of Zurich (malcolm.maclaren@ivr.unizh.ch / felix.schwendimann@ivr.unizh.ch).

[1] CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (Jean-Marie Henckaerts & Louise Doswald-Beck eds., Vols., I & II, 2005).

[2] Recommendation II, Annex II: Meeting of the Intergovernmental Group of Experts for the Protection of War Victims, Geneva, 23-27 January 1995: Recommendations, *available at* http://www.icrc.org/web/eng/siteeng0.nsf/html/57JMVT (last visited 11 May 2005). Adopted by Resolution 1, International humanitarian law: From law to action. Report on the follow-up to the International Conference for the Protection of War Victims, Resolutions of the 26th International Conference of the Red Cross and Red Crescent, Geneva, 3-7 December 1995, *available at* http://www.icrc.org/web/eng/siteeng0.nsf/html/57JMVH (last visited 11 May 2005).

[3] ICRC, Customary International Humanitarian Law: Questions & Answers (18 March 2005), *available at* http://www.icrc.org/web/eng/siteeng0.nsf/html/6BPK3X (last visited 11 May 2005).

According to the ICRC, the Study will have achieved its goal of generating discussion in this area of international law "only if it is considered not as the end of a process but as a beginning."[4] In this spirit, we will consider the Study as a recent exercise in the development of international law and highlight important issues in it. Rather than summarize its rules, the following article intends to make readers aware of the Study's substance and implications. Specifically, we will discuss the undertaking as an event in itself, namely the Study's objective, relevance and meaning in a wider context. We will then examine tensions – legal (*i.e.* regarding some of its definitions), political (*i.e.* official reactions) and institutional (*i.e.* ICRC's role in regulating IHL) – that arise out of the Study. In conclusion, we will attempt an early assessment of the value of this decade-long effort of the ICRC to the cause of IHL.

B. General Remarks on IHL, Custom and the ICRC Study

IHL's goal is to limit, for humanitarian reasons, the effects of armed conflict. IHL seeks to do so by means of rules that protect persons who do not or are no longer participating in the hostilities, that restrict the means and methods of conducting hostilities, and that prevent the escalation of conflict. It is often argued in the literature, however, that war cannot be waged legally and cannot be humanized through international regulation. (The classically inclined quote Cicero's sceptical statement that "laws are silent amidst the clash of arms.") On this view, the whole IHL project is an illusion, pointless and bound to fail. The fact that the standards of humane conduct prescribed by this body of law in inhumane situations are frequently disregarded is cited as proof. The project has also been argued to be dangerous, even a form of 'systematic hypocrisy'," legitimizing violence and inhumanity. Humanitarian organizations serve as unwitting accomplices to those responsible for the very suffering that they would minimize. These preliminary, general critiques of IHL are themselves a subject worthy of debate[5] and cannot be adequately addressed here. We will assume that the IHL project is, in principle, worthwhile and will discuss instead the Study's significance for legal development in this area.

---

[4] Yves Sandoz, *Foreword*, *in* I CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 1, at xvii. (Sandoz is Member of the ICRC and former Director of its Department of International Law.)

[5] For a summary and analysis of one expression of this view, *see* Volker Heins, *Giorgio Agamben and the Current State of Affairs in Humanitarian Law and Human Rights Policy*, 6 GERMAN LAW JOURNAL (GLJ) 845-860 (1 May 2005), *at* http://www.germanlawjournal.com/pdf/Vol06No05/PDF_Vol_06_No_05_845-860_Articles_Heins.pdf (last visited 11 May 2005).

In our approach to the Study, we are consciously making another important assumption, namely that "[c]ustom lives."[6] Like IHL, customary international law (CIL) has of late been the subject of preliminary, general critiques. Two US law professors in particular have severely discounted the role of CIL in decision-making by States. As an independent normative force, CIL has, they write, little to no effect on state behaviour; considerations of power and the national interest explain the conduct of international relations.[7] While we cannot engage this view here, it is, like the fundamental scepticism about the IHL project, worthy of consideration in broader discussions.[8] Not only does it obviously challenge the whole structure of CIL and understandings of the sources of international law, but it may also exert a (self-fulfilling) influence on US foreign policy.[9]

Some background discussion of IHL and CIL is nonetheless necessary in order to understand the Study: this body and source of international law can in important respects be esoteric, even when taken on their own terms. Paradoxically, the best vantage point is conventional law and the observation that countless detailed positive rules already exist in IHL; this body of international law includes an extensive, impressive list of treaties.[10] These conventional rules may be said to be the most common source of IHL rights and duties. Nonetheless, custom plays an important, continuing role in the formation of IHL. Conventional and customary international law can – but do not have to – develop along the same lines at the same time. Many provisions of the foundational four Geneva Conventions[11] can, for

---

[6] For a summary and analysis of this critique, *see* Detlev F. Vagts, *International Relations Looks at Customary International Law: A Traditionalist's Defence*, 15 EUROPEAN JOURNAL OF INTERNATIONAL LAW 1031-1040, 1040 (2004).

[7] For the leading statement of their view, *see* Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 UNIVERSITY OF CHICAGO LAW REVIEW 1113-1177 (1999).

[8] Instead, we refer interested readers to, *inter alia*, Michael Byers, *Introduction: Power, Obligation, and Customary International Law*, 11 DUKE JOURNAL OF COMPARATIVE AND INTERNATIONAL LAW 81-88 (2001); Mark A. Chinen, *Game Theory and Customary International Law: A Response to Professors Goldsmith and Posner*, 23 MICHIGAN JOURNAL OF INTERNATIONAL LAW 143-189 (2001); Jack L. Goldsmith & Eric A. Posner, THE LIMITS OF INTERNATIONAL LAW Chapter 1 (2005).

[9] The influence of this view on government policy may take a persuasive and / or personal form. Goldsmith and Posner seek through their writings to narrow the scope of the United States' international obligations, and Goldsmith has held high office in the current US administration.

[10] For a comprehensive collection of the conventional texts, *see* THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS (Dietrich Schindler & Jiri Toman eds., 4th ed. 2004).

[11] Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12,

example, be traced back to customary law.[12] As the International Court of Justice (ICJ) remarked in its leading statement on IHL, however, conventional and customary law are not necessarily coterminous and therefore fungible: "Additional Protocol I [hereinafter "AP I"] in no way replaced the general customary rules applicable to all means and methods of combat."[13]

In situations where treaties and other conventional provisions are not applicable or show gaps, customary law can take on a special, determinative significance. Customary law may 'intervene' for the sake of the rule of law in armed conflict where States (or non-state actors *qua definitione*) are not party to the relevant treaty, or where the States are party but the customary provision is more extensive in its coverage than the conventional. In both cases, the custom is binding. Accordingly, custom should always be consulted when researching the relevant law in IHL.[14]

To be more precise: while the Geneva Conventions enjoy universal adherence today, other major treaties in this area of international law have not yet been ratified by all States, the United States being the outstanding laggard.[15] Inasmuch as their provisions are shown to reflect customary law, IHL conventions with fewer

---

1949, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12 1949, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

[12] For more detail, *see* Theodor Meron, *The Geneva Conventions as Customary Law*, 81 AMERICAN JOURNAL OF INTERNATIONAL LAW (AJIL) 348-370 (1987).

[13] *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion of 8 July 1996 , ICJ Reports 1996, 224, para. 84.

[14] Customary IHL can also be useful in armed conflicts involving a coalition of States. When the States in question are not party to the same treaties and therefore do not have the same conventional obligations, customary IHL prescribes rules common to all coalition members. These rules can in turn be relied upon as a minimum standard for drafting joint rules of engagement or adopting targeting policies. *See* ICRC Questions, *supra* note 3. This approach could have circumvented difficulties experienced by NATO during the Kosovo bombing campaign.

[15] Major IHL and related treaties that the United States have yet to ratify include: Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609; Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 18 September 1997, 36 ILM 1507; Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 90. *See* ICRC, States Party to the Main Treaties (29 March 2005) *available at* http://www.icrc.org/Web/Eng/siteeng0.nsf/html/party_main_treaties (last visited 17 May 2005).

ratifications[16] will benefit from the Study's findings. Their provisions will effectively become invocable against every State, without the need for ratification.[17] Perhaps more importantly, customary IHL binds not just States but also armed opposition groups who, as non-state actors, are not party to IHL conventions. Customary law thereby extends – in theory, if not in practice – the reach of law into NIAC. These represent a growing majority of current armed conflicts and often result in the worst human suffering.[18]

As ICJ Judge Koroma observed in his foreword to the Study, "treaty law, by its very nature, is unable to provide a complete picture of the state of the law."[19] Three instances where conventional IHL may be deficient illustrate this observation. First, IHL must keep pace with developments in armed conflicts, especially as regards rapid advances in military technology. It has signally failed to do so in the past.[20] Second, there are few and rudimentary treaty rules regulating NIAC; the set of existing rules falls far short of meeting the protection needs arising from these conflicts.[21] Third, custom may take effect in instances where terms of conventional law are (or are claimed by States to be) ambiguous: it can obligate States to observe

---

[16] For example, the two Additional Protocols, *id*. *See also* the Convention on Certain Conventional Weapons, 10 October 1980, 1342 UNTS 137 (and its protocols); the Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, 249 UNTS 240 (and its protocols).

[17] As one newspaper report specifically noted, States like Sudan, Sri Lanka and Nepal will no longer be able to claim that they are free from an obligation to respect certain humanitarian standards in their internal conflicts because they are not party to Additional Protocol II (hereinafter "AP II"). Samuel Gardaz, *Le CICR dévoile son étude sur le droit coutumier humanitaire*, LE TEMPS (18 March 2005).

[18] *See infra* Section C II.

[19] Abdul G. Koroma, *Foreword*, *in* I CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 1, at xxi.

[20] For example, the lack of a treaty regarding the legality of the bombing of civilians led Allied and Axis powers to attempt to justify large-scale air attacks on enemy cities during World War II. As a UK military official described the process, "debate at the international level tends to focus on the identification of military behaviour, or consequences, which cause humanitarian concern whereupon an initiative is then developed to identify changes in the law to meet that concern." William Boothby, Remarks, The Law of Armed Conflict: Problems and Prospects, Chatham House, London, 18-19 April 2005, Transcripts and Summaries of Presentations and Discussions, 28, *available at* http://www.riia.org/pdf/research/il/ILParmedconflict.pdf (last visited 15 June 2005). Current concerns include the regulation of explosive remnants of war and anti-vehicle mines.

[21] Only one treaty provision of the Geneva Conventions regulates NIAC, namely common Art. 3. While Art. 3 has been extensively and expansively used, it is far from complete. AP II was originally intended to remedy this recognized deficiency, but it is itself relatively narrow in scope and is not universally adhered to.

standards of humanitarian conduct whose binding effect may otherwise be uncertain.[22]

In principle, gaps in IHL could be filled by new treaty provisions rather than custom. Obtaining the state support necessary for their adoption and ratification would, however, be tricky, time-consuming and treacherous. This is ever the case but is today, as an ICRC legal adviser observes, all the more so: the divisions prevailing in the state community and a climate dominated by 11.9.2001 might, if anything, lead to a codification to the detriment of the protection of individuals through the enhancement of coercive measures available for state security. Accordingly, the ICRC is not at present preparing any draft comprehensive revision of the Geneva Conventions or its AP.[23] Instead, the objective of the Study is to identify rules that already bind all States in armed conflict.[24] The regulatory potential inherent in IHL is thereby more likely to be realized and the body of law's further development encouraged.[25]

To achieve this objective, the editors[26] and researchers had to define and document customary IHL. This exercise has been – and with the publication of the Study is sure to be even more – subject to much academic discussion. For the purposes of the Study, customary IHL was defined in keeping with the statute and jurisprudence of the ICJ, namely as virtually uniform, extensive and representative

---

[22] A contemporary example of this effect regards the US administration's interpretation of the Geneva Conventions and its treatment of detainees at Guantanamó Bay. By virtue of the Study, the ICRC will be able to press its argument even more forcefully that these persons, whom the administration refuses to accord the status of prisoners of war (POW), may not according to customary IHL be tortured or otherwise mistreated.

[23] François Bugnion, *The International Committee of the Red Cross and the Development of International Humanitarian Law*, 5 CHICAGO JOURNAL OF INTERNATIONAL LAW 191, 211-212 (2004).

[24] The Study may be used to convince governments to ratify particular treaties. If the treaties in question can be shown to embody customary law, States will presumably be less hesitant to ratify them. The opposite argument can, however, be made as well, namely that a State that is not a party to a treaty will have little incentive to ratify it if the relevant principles have been shown to constitute customary IHL. Daniel Bethlehem, Remarks, *supra* note 20, at 13.

[25] From a historical perspective, this effort to develop IHL further through customary law represents a 'back-to-the-future' manoeuvre. The laws of war were originally thrashed out on the battlefield between armies, not in negotiating chambers by state representatives. The laws remained customary in nature until codification began in the mid-nineteenth century.

[26] We use the term "editors" to describe Henckaerts and Doswald-Beck. This description is in keeping with the publication information provided and the fact that, though these experts have set down the rules and corresponding *opinio juris* and *usus*, they have not authored (*i.e.* originated) them.

state practice accepted as law.[27] State practice (or *usus*) and opinion (or *opinio juris sive necessitatis*) can, however, be hard to ascertain in this area of international law.[28] This reality presents several methodological challenges that must be addressed by those who, like the Study's editors and researchers, seek to derive and formulate customary rules.

Above all, customary IHL tends to develop during wartime, but wars are (relatively) infrequent,[29] and the development is therefore non-continuous. In order to circumvent this difficulty, *usus* was not defined for the purposes of the Study as "age-old" state practice but as practice during the last twenty years, with the caveat that sufficiently dense practice can accumulate over an even shorter period of time.[30] In situations where relevant practice is sparse or ambiguous, *opinio juris* plays an important role, but it too proves elusive because States rarely provide reasons for what they do or do not do.[31] The Study's editors were evidently tempted to adopt a teleological approach that international courts and tribunals have occasionally shown, namely that a rule of customary international law exists "when that rule is a desirable one for international peace and security or for the protection of the human person, provided that there is no important contrary *opinio juris*."[32] Despite the attractiveness of this approach, the editors concluded that sufficient consistent support in the international community (including from so-called specially affected States[33]) remains necessary to establish a customary international rule.

---

[27] *Introduction*, *in* I CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 1, at xxxvi.

[28] Peter Malanczuk, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 345 (7th ed. 1997).

[29] In 2004, all 19 major armed conflicts were classified as intra-state conflicts. Stockholm International Peace Research Institute (SIPRI), YEARBOOK 2005 - ARMAMENTS, DISARMAMENT AND INTERNATIONAL SECURITY, *available at* http://yearbook2005.sipri.org/ch2/ch2 (last visited 14 June 2005). In 2003, only two of the 19 major armed conflicts were classified as inter-state conflicts. Stockholm International Peace Research Institute (SIPRI), YEARBOOK 2004 - ARMAMENTS, DISARMAMENT AND INTERNATIONAL SECURITY, *available at* http://editors.sipri.se/pubs/yb04/ch03.html (last visited 14 June 2005).

[30] Jean-Marie Henckaerts, ICRC Study on Customary Rules of International Humanitarian Law (5 March 2005), *available at* http://www.cicr.org/web/eng/siteeng0.nsf/htmlall/5MXLAD (last visited 8 June 2005).

[31] As the Study's editors noted, abstentions from the conduct in question combined with silence pose a particular problem in determining *opinio juris* because it has to be proved that the absention is not a coincidence but is based on a legitimate expectation regarding the existence of a prohibition. *Introduction*, *in* I CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 1, at xxxix-xlii.

[32] *Id*. at xlii.

[33] *See infra* Section C III.

In addition, the standards prescribed by IHL are, as noted, frequently disregarded. *Prima facie*, violations undermine the required uniformity of the practice concerned. The editors took the view that the contrary practice does not prevent the formation of a rule as long as this practice is condemned by other States or is denied by the perpetrator itself as not representing its *official* practice. Indeed, "[t]hrough such condemnation or denial, the original rule is actually confirmed."[34]

A third difficulty concerns the legal position of a State that persistently objects to being bound by an emerging customary rule. Does its objection suffice to free it from an obligation to respect the rule? The literature is sceptical but not unanimous in answer: some authorities doubt the continued validity of the doctrine outright, others its applicability contrary to *jus cogens* norms.[35] For their part, the Study's editors avoided taking a position as to whether it is legally possible to be a persistent objector in relation to customary IHL. They state merely that one cannot be a "subsequent objector": the State concerned must have objected to the emergence of a new norm *during* its formation and must continue to object to it thereafter.[36]

Lastly, attempting to identify customary international law in areas like IHL that are heavily regulated by treaty can bring certain risks[37] as well as the benefits outlined. For example, States that are not party to the treaties concerned may view the attempt to identify customary rules as an attempt to get around the express consent that is required for them to be bound by the related treaty articles.[38] These States

---

[34] *Introduction*, *in* I CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 1, at xxxvii (emphasis in original).

[35] For more detail, *see* Maurice Mendelson, Remarks, *supra* note 20, at 21; *see also* Marco Sassòli, BEDEUTUNG EINER KODIFIKATION FÜR DAS ALLGEMEINE VÖLKERRECHT MIT BESONDERER BETRACHTUNG DER REGELN ZUM SCHUTZE DER ZIVILBEVÖLKERUNG VOR DEN AUSWIRKUNGEN VON FEINDSELIGKEITEN 52-53 (1990).

[36] *Introduction*, *in* I CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 1, at xxxix. Bethlehem finds this methodological decision unsatisfying: "[v]irtually no account is taken of persistent objection, on grounds that some doubt is said to exist about the validity of the doctrine. But custom, as in the case of treaties, requires the consent of states. […] Objections cannot simply be ignored." Bethlehem, Remarks, *supra* note 20, at 14. In rebuttal, one of the editors claims that great weight was given to objector States' concerns and that the Study was carried out inductively, without preconceptions as to the customary nature of any rules. Louise Doswald-Beck, Remarks, *supra* note 20, at 23.

[37] *See* Bethlehem, Remarks, *supra* note 20, at 13-14.

[38] But see rebuttal of the ICRC Director for International Law and Cooperation: "in no circumstances was the objective to circumvent the refusal of certain states to ratify certain treaties [...] Indeed, the contrary was true [. ... T]he idea of the ICRC was to build on [...] consent." François Bugnion, Remarks, *supra* note 20, at 83.

will likely object to the application to them of any of the rules that are identified.[39] Undertakings like the Study also run the risk of *in*creasing not *de*creasing legal uncertainty in the interpretation and application of the relevant standards. In IHL and other areas of international law where customary law is complex and imprecise, there is a natural tendency to rely on the wording of the treaty articles in the formulation of the customary rules. If the wording of the article and rule in question diverge for no apparent reason, the normative content of the standard will be brought into doubt, and legal protection may be undermined.

C. Specific Issues Raised by the ICRC Study

The 5,000-page, 7-kilogram report is divided into two volumes with six parts. Volume I contains 161 rules identified as customary IHL and explains why they are considered customary. Volume II documents the corresponding practice, summarizing for each aspect of IHL the relevant treaty law and state practice (including military manuals, national legislation, national case-law from nearly 50 countries) as well as practice of international organisations, international conferences, international judicial and quasi-judicial bodies (including of the International Red Cross and Red Crescent Movement). As regards the Study's scope, customary human rights law was not assessed; human rights law was included only to complement principles of IHL where appropriate. Customary law applicable to naval warfare was also not researched, as this area was subject to a major restatement in 1995.[40] Within these terms of reference, the Study did not seek to determine the customary nature of each treaty rule of IHL, especially those in the Geneva Conventions and the 1907 Hague Regulations already considered customary law.[41] The Study sought instead to analyse issues regulated by treaties that have not been universally ratified, so as to establish on the basis of state practice the customary law that exists in relation to those issues. These issues comprise the Study's six parts, namely the principle of distinction, specifically protected persons and objects, specific methods of warfare, weapons, treatment of civilians and persons *hors de combat*, and implementation.

---

[39] For example, see the critique of US commentators regarding the 'custom-ization' of AP I articles in the Study rules. (*See supra* Section D.)

[40] *See* SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA (Louise Doswald-Beck ed., 1995).

[41] Accordingly, it cannot be concluded that a given treaty rule is not customary because it does not appear as such in the Study.

In a similar sense, we will not discuss the findings by going through them one by one. We will look rather at some specific, important issues raised by the Study, namely when the rules of customary IHL apply; differences between the customary rules of IAC and NIAC; as well as official reactions and the crystallization of custom.

I. When Exactly Do the Rules of Customary IHL Apply?

All 161 rules contained in the report on customary IHL apply only in the case of an "armed conflict," which in turn may be either international or non-international in character. The existence of an armed conflict is both a necessary and sufficient condition for the application of humanitarian law. A formal declaration of war is not required and the reason as to why military force was used is irrelevant to IHL's applicability in a given situation.[42] The Conventions, however, provide no definition of the term "armed conflict"; state practice must be consulted instead.[43] In the case of a confrontation between States, any use of armed force by one State against the physical integrity of another has traditionally been held to trigger the application of the Conventions between the parties. Thereafter the armed forces of the one State must, insofar as they exercise the requisite authority, comply with the relevant rules. In the case of a confrontation between government forces and armed opposition groups, the threshold for IHL's application is not as clear. It is the subject of some disagreement among States, when, that is, States are willing to discuss the matter and do not declare it a sovereign concern. For their part, internal disturbances and tensions, such as riots and sporadic acts of violence, are conventionally not considered armed conflicts.[44]

The Study fails to clarify this ambiguity in the conventions by offering a more precise definition of armed conflict from a customary law perspective. Why was no

---

[42] Regarding confrontations between two or more States, see common Art. 2 of the Geneva Conventions or regarding confrontations between government forces and armed opposition groups, see common Art. 3 of the Geneva Conventions.

[43] *Generally see* Hans-Peter Gasser, *International Humanitarian Law: An Introduction, separate print from* HUMANITY FOR ALL: THE INTERNATIONAL RED CROSS AND RED CRESCENT MOVEMENT 22-23 and 70-71 (Hans Haug ed., 1993). For its part, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) defined an armed conflict as existing "whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State." *Prosecutor* v. *Tadic*, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995, 35 ILM 1996, 35, para. 70. The Chamber held that in both cases the protection of human beings *should* be the main criteria. *Id*. at para. 97.

[44] Art. 1(2), AP II.

specific research conducted on this important issue in order to make such a statement? According to one editor, Jean-Marie Henckaerts, no customary definition of "armed conflict" was included in the Study because doing so

would require a study in and of itself. [Short of that] all we could have done was to repeat the various provisions in treaty law (Geneva Conventions, Articles 2 and 3; Additional Protocol II, Article 1(1); ICC Statute) and possibly some *dicta* from case-law of the ICTY. But we felt that this was not sufficiently exhaustive to make any statement and, as a result, we left it out. If we are able to do more research into state practice in the future, we might include a section on this issue in a possible future edition.[45]

With due respect, we find this explanation unsatisfying from a process perspective. The Mandate given the ICRC in 1995 would have permitted researching a customary definition of "armed conflict." Moreover, the already broad and long consultation could presumably have included an additional issue without assuming unmanageable proportions. One can only speculate what the ICRC's ulterior reasons may have been (*e.g.* a desire to maintain maximum flexibility in its interpretation of the applicable law and / or to avoid politically sensitive issues associated with the definition?). Whatever they were, it would surely have been possible to summarize the legal situation in this context in a scientific and progressive way, just as the Study did in 161 other contexts. The decision not to include a customary definition of armed conflict is also unsatisfying from a rule-of-law perspective. A customary definition is crucial for the humanitarian cause. Progress at the UN on establishing fundamental standards of humanity applicable in all situations, not varying between times of peace and "armed conflict", has indefinitely stalled.[46] In the absence of such standards, the parties to an armed conflict must be convinced that IHL is applicable before this body of law can have its humanitarian effect. Detailed rules in the Study risk being a dead letter, if it is left open to States to argue that the situation in question does not constitute an armed conflict (or a NIAC rather than an IAC, inasmuch as the applicable rules differ). The customary definition of an armed conflict is also needed for actors other than States that are involved in hostilities, such as international governmental

[45] Personal e-mail of 25 April 2005 from same to the authors (on file with the authors).

[46] The Study was intended to be a key element in the process of determining these fundamental standards. *See* Secretary-General, *Promotion and Protection of Human Rights – Fundamental standards of humanity*, E/CN.4/2002/103, para. 41 (20 December 2001), *available at* http://www.hri.ca/fortherecord2002/engtext/vol1eng/fshchr.htm (last visited 15 June 2005).

organizations. As these non-state actors are not party to IHL treaties, the customary threshold of an armed conflict is highly relevant to them.[47]

It is indeed to be hoped that any future edition will include customary definitions of the foundational concepts "armed conflict," "international armed conflict" and "non-international armed conflict". All those concerned, but especially victims of war and armed violence, would benefit from the legal predictability and enforceability resulting from an answer to the question: when exactly do the Study's rules apply?

II. What are the Differences Between the Customary Rules of IAC and NIAC?

The rules applicable in IAC and NIAC have traditionally been subject to a substantive distinction, depending on the type of armed conflict. In the *Tadic* judgment, the ICTY adopted a teleological approach to the dichotomy and to the interpretation of IHL more generally. Its Appeals Chamber concluded that "[i]f international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight."[48] This conclusion provoked considerable controversy, especially among States that viewed such a distinction as reasonable, even when it meant affording victims less legal protection. The main concern of these States lay in their sovereignty and protection of their national interests, the same concern that has lead to NIAC being much less regulated by treaties than IAC. Internal armed violence is, on this view, not an appropriate matter for international regulation.

There has nonetheless been a considerable amount of *usus* and *opinio juris* from States and international organizations over the last few decades insisting on the observance of IHL in NIAC as well as IAC.[49] The Study, which comprises rules

[47] For example, the UN must know when the laws of armed conflicts apply to its peacekeeping operations. *See* Secretary-General, *Bulletin on Observance by United Nations Forces of International Humanitarian Law* (1999); Daphna Shraga, *UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damage*, 94 AMERICAN JOURNAL OF INTERNATIONAL LAW 406, 408-409 (2000).

[48] *Tadic*, *supra* note 43, at para. 97.

[49] This understanding within the state community was also recently codified in the Convention on Certain Conventional Weapons, which was amended in 2001 to extend Convention's scope to NIAC. *See also Tadic*, *supra* note 43, at para. 127 (observation of the Appeals Chamber of a closing of the gap between the two regimes).

applicable in *both* IAC and NIAC, *only* IAC,[50] *only* NIAC[51] and *arguably* also NIAC,[52] demonstrates that this practice and conviction has significantly contributed to the formation of customary law. One can speak today of a convergence of the two regimes: most of the 161 rules that the Study identifies as customary IHL apply both in IAC and NIAC.

Where, according to the Study, do differences between the regimes remain? One difference is that there is apparently no *combatant status*[53] in the context of NIAC. More specifically, it remains from a customary law perspective unclear whether members of armed opposition groups are to be considered combatants or civilians for various purposes. Combatants in IAC are allowed to participate directly in hostilities.[54] Captured combatants have a right to POW-status and may not be tried either for taking up arms or for acts not violating IHL.[55] In contrast, direct participation in NIAC remains in principle punishable under (national and international) criminal law,[56] and participants in NIAC have no right to POW-status. The basic humane treatment to be afforded persons deprived of their liberty is the same for both types of armed conflicts according to customary IHL, but their release is regulated differently. In IAC, POWs must be released and repatriated without delay at the end of hostilities,[57] whereas in NIAC, persons deprived of their

---

[50] Rules 3, 4, 41, 49, 51, 106, 107, 108, 114, 124 A, 128 A, 128 B, 129 A, 130, 145, 146, 147, *in* I CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 1.

[51] Rules 124 B, 126, 128 C, 129 B, 148, 159, *in* I CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 1.

[52] "[S]ome rules are indicated as being 'arguably' applicable because practice generally pointed in that direction but was less extensive." Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INTERNATIONAL REVIEW OF THE RED CROSS (IRRC) 175, Annex (March 2005). Rules 21, 23, 24, 44, 45, 62, 63, 82, *in* I CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 1.

[53] Rule 3, *in* I CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 1, at 11-14 ("all members of the armed forces of a conflict party are combatants, except medical and religious personnel").

[54] Regarding the notion of "direct participation in hostilities" and its legal consequences, see the reports of the expert meetings organized by the ICRC and TMC Asser Institute in the Hague in 2003 and 2004, *available at*http://www.cicr.org/Web/Eng/siteeng0.nsf/iwpList575/459B0FF70176F4E5C1256DDE00572DAA (last visited 9 June 2005).

[55] *Note*, I CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 1, at 384.

[56] The authorities in power at the end of the hostilities "must", however, "endeavour to grant the broadest possible amnesty" to participants and detainees except to persons implicated in war crimes. Rule 159, *id*. at 611-614.

[57] Rule 128 A, *id*. at 451-456.

liberty must only be released after the reasons for the deprivation no longer pertain.[58]

As far as *civilians* are concerned, they seem almost equally well protected by the respective customary rules. The principle of distinguishing between civilians and combatants has come to apply in both types of armed conflict,[59] and only a few rules concerning civilians arguably apply in NIAC.[60] The lack of clarity in the definition of "combatant" and "civilian" in NIAC undermines, however, the sought-for equal protection. As Henckaerts asks, are members of armed opposition groups civilians who lose their protection from attack when directly participating in hostilities or are they liable to attack as such?[61]

In short, differences between the customary legal regimes applicable in IAC and NIAC remain, the foremost being that there is no clear combatant status in NIAC.[62] Are there sufficient justifications for maintaining these differences and for the resultant varying levels of protection? Arguments for a complete unification of the law applicable to armed conflict seem as convincing as ever.[63] The onus is now very much on States resisting complete unification to justify maintaining a distinction. In one sense, this demand for justification is less pressing, as the Study has confirmed the widespread convergence of customary law in IAC and NIAC. In another, however, this trend renders those regulatory differences that do remain all the more egregious – and hence questionable. The convincing nature of any

---

[58] Rule 128 C, *id*. at 451-456.

[59] Rule 1, *id*. at 3-8.

[60] Namely some rules about precautions in attack and against the effects of attacks, see Rules 21, 23 and 24, *id*. at 65-67 and 71-76.

[61] Henckaerts, *supra* note 52, at 190.

[62] It should be noted that the customary rules of IAC and NIAC also differ in the (il-)legality of belligerent reprisals but in favour of higher standards of protection in the latter. During IAC, belligerent reprisals are subject to stringent conditions, where not prohibited by international law. Rule 145, *in* I CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 1, at 513-518. During NIAC, a right to resort to belligerent reprisals is denied outright. Rule 148, *id*. at 526-529.

[63] From a humanitarian perspective, different standards of treatment for the defenceless according to the conflict type are undesirable, frustrating the purpose of the law in most armed conflicts today. From the perspective of the law itself, this distinction is arbitrary, as the traditional typology of armed conflict is no longer factually tenable. Lastly, "for the average person [… distinguishing is] completely absurd. Indeed, how can one claim the right to employ against one's own population means of warfare which one has prohibited for use against an invader?" Sandoz, *supra* note 4, at xvi. For further commentary, *see* James G. Stewart, *Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict*, 85 IRRC 313, 313-314 (June 2003).

justification must be that much greater: why exactly should state interests continue to override countervailing humanitarian, legal and 'common-sensical' considerations? Is a distinction between the rules for IAC and NIAC on the basis, for example, of whether both parties to the armed conflict are deemed have a right to bear arms and use violence against one another still sensible?[64]

III. Official Reactions and the Crystallization of Custom

The Study has already had a demonstrable impact on the work of international tribunals.[65] In contrast, no State has so far registered any reaction to the Study other than to express gratitude for receiving a copy.[66] This official reaction may seem trivial but is in fact significant. State practice is, as noted, the most decisive source for the formation of customary international law. Moreover, silence can generally be taken as consent, and it is in the present circumstances an especially plausible inference, since production of the Study included extensive consultations with national authorities that continued up until its publication and since the ICRC was explicitly mandated to circulate the Study to States.[67] The precise significance of official reactions on the Study's binding effect depends on the degree to which the individual findings are not certain and / or set; there are several steps in the process of the derivation and formulation of customary rules, questions about any of which may cast the whole into doubt. No contrary practice for most customary rules was found for either IAC or NIAC, alleged violations being generally condemned by States. Different interpretations of customary rules are, however, frequently noted in the Study. Lastly, the appropriate formulation of a particular rule may be a matter of concern for States or more specifically for their military

[64] "[I]t isn't a question as to how you treat the individuals but the claim to be treated as a POW is often an important political claim made by the insurrectionist movement during a NIAC. And if that claim were to be conceded, it would be an enormous political event with huge implications. One can see that in the terrorism field." Berman, Remarks, *supra* note 20, at 80.

[65] Before the ICJ, Philippe Sands relied on the Study in his statement on behalf of the Democratic Republic of the Congo in the case concerning armed activities on the territory of the Congo. *Democratic Republic of the Congo* v. *Uganda*, Public sitting of the ICJ, 25 April 2005, CR 2005/13, 32. ICTY President Theodor Meron cited the Study several times in his decision in *Hadzihasanovic. Prosecutor* v. *Enver Hadzihasanovic and Amir Kubura*, Case IT-01-47-AR73.3, Decision on the Interlocutory Appeal of 11 March 2005, footnotes 54, 55, 56, 74, 95, 96 and 99.

[66] Bugnion, Remarks, *supra* note 20, at 84.

[67] See one critique of the US (non-)reaction on this basis: "[the] US government does not seem to understand that by saying nothing and allowing its response to drift with the wind over decades, it effectively ratifies the study's questionable views." Kenneth Anderson, *Another ICRC Issue – The New Customary Humanitarian Law Study*, *in* KENNETH ANDERSON'S LAW OF WAR AND JUST WAR THEORY BLOG (23 May 2005), *available at* http://kennethandersonlawofwar.blogspot.com/2005/05/another-icrc-issue-new-customary.html (last visited 12 June 2005).

lawyers. Difficulties in this regard can even arise when a customary rule in the Study repeats – but not verbatim – the wording of a treaty article.[68]

The matter of the legal status and the exact terms of particular rules should be of particular interest to the United States. As noted, the country is the outstanding laggard in signing IHL treaties and is therefore most likely to be affected by the confirmation of conventional rules as customary law. The United States are also very active abroad militarily and are at the forefront of developing new weapons technology, giving the country's armed forces a strong interest in ascertaining what the applicable rules are. In addition, the status and terms of the rules raise important issues in US municipal law: inferred consent could have a specific - but potentially considerable - impact in the context of Alien Tort Claims Act (ACTA) cases: the 'custom-ization' of IHL could broaden the prescribed "law of nations" and thus US federal courts' *ratione materiae* jurisdiction for civil actions by aliens for torts.[69] Prior actions have aroused much public controversy[70] and the extent to which the Study's findings are in future drawn on by judges in making such determinations[71] can only serve to fan it.

As in international law more generally, States' persistent objection in the form of contrary practice can obstruct the establishment of a particular customary rule of IHL, that is, if the practice in question is not widely considered to violate the existing rule, rather than to indicate the emergence of a new rule. The international interests just cited make the United States a specially affected State, with a correspondingly greater potential influence on the course of legal development. A rule would be hard, if not impossible, to regard as having taken on customary

---

[68] *See supra* Section B.

[69] The Alien Tort Claims Act, 28 U.S.C. § 1350 (1994). *See also Sosa* v. *Alvarez-Machain*, 124 S.Ct. 2739 (2004) (most recent United States Supreme Court statement on the role of the ACTA); William S. Dodge, *Bridging Erie: Customary International Law in the U.S. Legal System after Sosa v. Alvarez-Machain*, 12 TULSA JOURNAL OF COMPARATIVE INTERNATIONAL LAW 87-108 (2004).

[70] Among academics, Goldsmith has been especially critical of the cases in this area and the way in which customary international law may become part of national legal systems. *See* Curtis A. Bradley & Jack L. Goldsmith, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM LAW REVIEW 319-369 (1997). *Compare* Gerald L. Neuman, *Sense and Nonsense about Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM LAW REVIEW 371-392 (1997); Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 HARVARD LAW REVIEW 2260–2275 (1998); Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARVARD LAW REVIEW 1824-1861 (1998).

[71] Similarly, see "this immensely expansionary work will make it much, much easier for a judge to conclude that there is a violation of non-treaty, customary international law – a violation of a kind that the US government might well reject as being part of international law." Anderson, *supra* note 67.

status were a State such as the United States opposed to it; the practice concerned could not be said to be representative.[72]

In past, the United States (and Israel) foremost among States have sought to obstruct the crystallization of certain rules as customary.[73] It is now to be expected that their governments and armed forces will disagree with findings in the Study. To cite an example: Rule 106 provides that combatants in IAC "must distinguish themselves from the civilian population while engaged in an attack or in a military operation preparatory to an attack" if they are to have the right to POW-status. According to Art. 44(3) of AP I, it suffices for resistance and liberation movements to carry arms openly in order to meet this requirement. The United States, and for that matter Israel, have yet to ratify the Protocol and have voiced opposition to this article.[74] To the extent that Rule 106 is considered coterminous with Art. 44(3), their officials will logically be against its characterization as customary.[75]

How then is the reaction (or lack thereof) so far from the United States,[76] *inter alia*, to be explained? Some speculative answers may be offered. First, the Study has just been released and the 'wheels of bureaucracy' turn notoriously slowly; the national authorities may be still working through its 5,000 pages. Second, some States may not yet have officially reacted to the Study's findings as they are in the process of agreeing a joint response. They would hope thereby to lodge more convincing and effective objections – *i.e.* wider-spread and better-grounded – to the customary nature of particular rules identified in the Study. Lastly, it may be the case that some States intend to register no reaction at all so as to avoid validating *any* of the

---

[72] Although the Study's editors had taken the view that the practice of all States must be examined in order to identify a customary rule, they recognized that it makes a great difference *which* and not only how many States participate in the practice in question. *Introduction*, *in* I CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 1, at xxxviii-xxxix.

[73] For example, see the statement of the Deputy Legal Adviser at the US State Department, who stresses that his country does "not support the prohibition in article 39 (of Additional Protocol I) of the use of enemy emblems and uniforms during military operations". Rule 62, *id*. at 216 (citation).

[74] Rule 106, *id*. at 389 (citation).

[75] For example, see the assessment of this finding by two former US Justice Department officials. David B. Rivkin Jr. & Lee A. Casey, *Friend or Foe? – The International Committee of the Red Cross Should stop championing terrorists or lose U.S Funding*, WALL STREET JOURNAL (10 June 2005), *available at* http://www.opinionjournal.com/extra/?id=110006570 (last visited 12 June 2005).

[76] An Assistant Judge Advocate General of the US Army did participate at the Chatham House meetings, but his comments about the Study were explicitly made in a personal capacity. He studiously avoided committing the US government as to whether the Study should be accepted as a codification of customary IHL or whether it is rather an academic opinion of what the ICRC would like customary IHL to be. Michael J. Marchand, Remarks, *supra* note 20, at 38.

rules. These States may believe that if they object only to *some* of the rules but not to others, they will indirectly confirm the latter's customary status, which status may rebound to the disadvantage of their national interest in some way later on. The safer course on this view is to ignore the Study's findings outright and to attempt thereby to maintain maximum legal room to manoeuvre.[77]

D. ICRC's Role in Developing IHL and ICRC's Relationship to the Study

The ICRC plays a central role in carrying out and supervising the so-called requirements of humanity as well as in disseminating and developing IHL.[78] The ICRC's field work is crucial to the practical realization of IHL, in the form of attending to actual victims of armed conflict according to the existing IHL conventions and customs (*e.g.* by providing emergency help for the civilian population during armed conflict and by exercising its right to visit prisoners and internees). In the latter role, the ICRC seeks to reduce suffering in armed conflict by promoting and strengthening IHL and universal humanitarian principles. For example, the ICRC conducted the "People on War" campaign in 1998 - 1999, which was intended to increase consciousness of and knowledge about the existing humanitarian norms for the protection of individuals in armed conflict and to stimulate discussion concerning IHL's role in various types of modern conflict. As regards development, the ICRC has been a handmaiden to numerous treaties, from the original Geneva Convention of 1864 to the 1998 Rome Statute.

For a long time, the ICRC asserted that its real role lay not in attending to actual victims of armed conflict but in advocating the humanitarian cause.[79] It now

---

[77] The authors are grateful to David Kennedy of Harvard Law School for this insight, which was made during private discussions in Zurich on 30 June 2005.

[78] The tasks of the ICRC are variously derived from treaty, custom and the Committee's statute. For example, see the mandate given to the ICRC by the international community to work for "the faithful application of international humanitarian law applicable in armed conflicts" and for "the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof." Statutes of the International Red Cross and Red Crescent Movement, adopted by the 25th International Conference of the Red Cross, Geneva, 23-31 October 1986, Article 5(2)(c) and (g) respectively. Regarding the ICRC's work generally, see François Bugnion, LE COMITE INTERNATIONAL DE LA CROIX-ROUGE ET LA PROTECTION DES VICTIMES DE LA GUERRE Volume 2 (2nd ed., 2002); Yves Sandoz, *Réflexions sur la mise en oeuvre du droit international humanitaire et sur le rôle du Comité international de la Croix-Rouge en Ex-Yougoslavie*, 3 SCHWEIZERISCHE ZEITSCHRIFT FÜR INTERNATIONALES UND EUROPÄISCHES RECHT 461-490 (1993).

[79] Bugnion, *supra* note 23, at 215.

acknowledges that these roles are inter-related:[80] indeed, the ICRC's operations on the ground are a - if not the - driving force behind the development of IHL today.[81] The ICRC's involvement in the emergence of customary IHL offers a good example of how these roles may overlap. The ICRC has made, as the *Tadic*-Appeals Chamber noted, "a remarkable contribution" to its emergence by successfully appealing to the parties to NIAC to respect IHL, either by applying its basic principles or better, by their abiding by provisions of the Geneva Conventions. The ICRC's achievements in inducing compliance should be regarded, the Chamber concluded, as an element of actual international practice.[82]

In playing this dual role, the ICRC is presented with an institutional challenge as well as a possible synenergy. A fundamental tension arises out of the fact that the one role is based on the *lege lata* and may be characterized as reactive and administrative, while the other is essentially proactive and legislative, concerned with the *lege ferenda*. The way in which the ICRC manages this challenge is always open to outside critique, but the ICRC's relationship to the Study has brought the Committee under particularly 'heavy fire'. The special status in the greater IHL project that governments have accorded the ICRC is due to the neutrality, impartiality and independence that it, in contrast to most humanitarian NGOs, maintains in its practice. The ICRC's role in developing IHL in the context of the Study has, however, been severely criticized by politicians and commentators, especially US-American.

The dual role of the ICRC in the humanitarian project is reflected in its ambivalent relationship to the undertaking itself. In several respects, this relationship may be best described as being at 'half' arm's-length. As noted, the ICRC undertook the Study at the request of the international state community, in the form of the 1995 mandate from the International Conference. The undertaking involved extensive and thorough research into national, international and ICRC sources, which was carried out by a mix of national and international research teams, a steering committee of scholars and an ICRC research team. The practice collected was evaluated by academic and governmental experts. The Study's editors are a legal advisor at the ICRC (Henckaerts) and a law professor at the Graduate Institute of International Studies in Geneva who was formerly with the ICRC (Doswald-Beck).

---

[80] "A lawyer in an office working on the development of international humanitarian law is doing a job different from that of the surgeon treating wounded people or a nutritionist in a refugee camp. But all three are in fact pursuing the same objective, each with his or her place in the indispensable circle of law and humanitarian action." Sandoz, *supra* note 4, at xv.

[81] Bugnion, *supra* note 23, at 208.

[82] *Tadic*, *supra* note 43, at para. 109.

At the Study's presentation, the ICRC President stated that the Committee "respected the academic freedom both of the report's authors and of the experts consulted" and described the Study as primarily "a work of scholarship".[83] At the same time, the report has been published under the ICRC's name and is being strategically promoted by the Red Cross.[84]

The findings themselves pose awkward questions about the ICRC's efforts to 'establish' customary IHL. Above all, the Study has served to narrow the gap between the highly regulated treaty regime applicable in IAC and the rudimentary provisions in NIAC by documenting a convergence in the respective customary rules. These rules are set out in the Study under the guise of settled customary law: the research is presented as an exercise in 'finding' the law in force and the outcome as a restatement of what already exists. The reality, however, may well be otherwise. As one scholar put it, did not the contributors to the Study in fact, consciously or unconsciously, craft new rules in the shadow of the law or at least extend the law to hitherto unregulated concerns? "Codifying bodies like the ICRC's are not merely 'tidying up' areas of international law but are already engaging in their progressive development." They have, so his broader observation, intruded thereby on the traditional privilege of States as the exclusive creators of international law.[85] If the preceding is a fair characterization of the undertaking and its meaning, it cannot be reasonably expected that this progressive development and this intrusion will go unremarked in the humanitarian debate. Indeed they have not, being described by influential US-Republican commentators, for example, as a legal "sleight of hand unworthy of the ICRC."[86]

Given its multifarious input, its own self-interest and the contribution of the findings to the law, not surprisingly the ICRC has endorsed the Study. It concluded "that the study does indeed present an accurate assessment of the current state of

---

[83] Jakob Kellenberger, *Foreword*, *in* I CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 1, at xi.

[84] *See infra* Section E.

[85] Daniel Thürer, *Comment – The Democratization of Contemporary International Law-Making Processes and the Differentiation of Their Application*, *in* DEVELOPMENTS OF INTERNATIONAL LAW IN TREATY MAKING 53, 58-59 (Rüdiger Wolfrum & Volker Röben eds., 2005). (Thürer is Member of the ICRC but was speaking in his academic capacity on the occasion.)

[86] Rivkin and Casey allege that the ICRC is attempting to change the traditional rules of international law applicable to irregular or "unlawful" combatants: "the ICRC's Customary Law Study now claims that this rule [106] – which the ICRC effectively invented [in preparing AP I] – has become so widely accepted that it is a universally binding customary law norm, binding on the United States even without its consent. […] It is, however, a sleight of hand unworthy of the ICRC. Acceptance of the broad, basic principles contained in Protocol I […] does not imply agreement to Protocol I's detailed and prospective provisions [such as Art. 44]." Rivkin, *supra* note 75.

customary international humanitarian law"[87] and has committed itself to making full use of the findings in its work to protect and assist victims of armed conflict. As regards what States might make of the Study, the ICRC President said that he expects "governmental experts to use the study as a basis for discussions on current challenges to international humanitarian law."[88] His modest expectation is surely disingenuous. The process itself of distinguishing among States supporting and opposing particular rules can serve to isolate different views on a point of law. If in addition public opinion is, as in the present case,[89] mobilized against singular views, pressure can be put on the States concerned to revise their positions. The end result may be not merely a more effective implementation of pre-existing but hitherto unwritten rules; it may be a progressive development of the law.

There is, of course, nothing wrong *per se* with the ICRC advocating the humanitarian cause; it is a role expressly and variously assigned to the Committee just like that of monitoring IHL's implementation. The ICRC's margin of manoeuvre – or better, margin of error – in meeting the challenge of this dual role is also admittedly small; judgments, internal and external, may reasonably diverge as to the propriety of its approach in any given circumstance. As regards its reaction to US treatment of detainees in Cuba and Iraq, the approach chosen has allegedly induced "soul-searching" even within the ICRC as to whether the Committee should act as advocates, pushing governments to change the law, or whether it should confine itself to enforcing the law as it is.[90] As regards the Study, more clarity and frankness from the Committee in the way that IHL is being developed might have been hoped for. The ICRC risks provoking a backlash against it and the Study otherwise. This backlash may take the form of charges that the Committee has overstepped its mandate, and of States withholding their support for the Study's findings. See, for example, a recent report conducted for US Senators from the Republican party. The report concludes that the ICRC, having abandoned its guiding principles of neutrality, impartiality and independence, no longer serves as the guardian of conventional obligations and as an unprejudiced international interlocutor. Intent upon reinterpreting international law, it has become an "aggressive advocate – like Amnesty International – for enforcing a broader set of

---

[87] Kellenberger, *supra* note 83, at xi.

[88] ICRC, Customary law study enhances legal protection of persons affected by armed conflict, Press Release No. 05 / 17 (17 March 2005), *available at* http://www.cicr.org/web/eng/siteeng0.nsf/html/6AKDPF!OpenDocument (last visited 10 May 2005).

[89] *See infra* Section E.

[90] Claim by Ruth Wedgwood, Professor of International Law at Yale University. Cited in Josh Gerstein, *Red Cross Has 'Lost Its Way,' Study Says*, NEW YORK SUN (14 June 2005), *available at* http://www.nysun.com/article/15361 (last visited 16 June 2005).

obligations, whether nations have ratified relevant treaties or not."[91] Such reactions cannot serve to advance the humanitarian cause. Indeed, the report urges Congress to audit the ICRC so as to ensure that US tax dollars are not being used for "lobbying", in which case withholding the corresponding funding should be considered.[92]

E. 'Selling' the Study's Findings

Attempts like the Study's to establish customary international law can reveal significant divergences in *usus* and *opinio juris* among States. If they are to prove successful, such attempts must proceed slowly and carefully. Haste risks failure, and failure may even cast doubt on rules that had hitherto seemed established.[93] A strategic approach is even more advisable when the intent behind the attempt is to reconcile state views rather than simply to ascertain them, as in the present case.[94] According to the ICRC, the 'target audience' of the Study consists of those who have to apply customary IHL and those that can assist in gaining and mobilizing support for the findings.[95] By targeting the latter audience as well as the former, the ICRC is indirectly putting pressure on governments that do not subscribe to its findings to change their attitudes and / or behaviour. The Committee is, in other words, not only seeking to convince governments of the Study's authority, it is also seeking to mobilize public opinion to act as an additional constraint on decision-makers.[96]

---

[91] Republican Policy Committee (United States Senate), ARE AMERICAN INTERESTS BEING DISSERVED BY THE INTERNATIONAL COMMITTEE OF THE RED CROSS? 7 (13 June 2005), *available at* http://rpc.senate.gov (last visited 16 June 2005).

[92] *Id*. at 7-9. Similarly but more specifically, Rivkin and Casey criticize the Study as an exercise in "political advocacy". Rivkin, *supra* note 75. Lastly, see the concurring opinion of a law professor at the American University, Washington, DC. Kenneth Anderson, *Lee Casey and David Rivkin on the ICRC*, *in* KENNETH ANDERSON'S LAW OF WAR AND JUST WAR THEORY BLOG (11 April 2005), *available at* http://kennethandersonlawofwar.blogspot.com/2005/04/lee-casey-and-david-rivkin-on-icrc.html (last visited 15 June 2005).

[93] It may be the case that the editors realized that the definition of armed conflict was a matter of such disagreement in the state community that attempting to define it in the Study could be counter-productive, resulting in a lowered standard of protection.

[94] *See supra* Section D; *infra* Section E.

[95] ICRC, Study on Customary International Humanitarian Law – Communication Strategy (undated internal memorandum on file with the authors).

[96] There is historical precedent for the involvement of public opinion in the process of customary international law. For example, general concerns about asserted violations of customary law played a

Among the specific challenges facing the ICRC as it publicizes the Study is to convince persons and entities that apply customary IHL that the Study is thorough and representative on one hand, and that it is legally accurate on the other. This target audience of government authorities and forces, armed opposition groups as well as national and international judiciary must come to see the Study as a definitive report on the current state of customary IHL. The ICRC sought to meet the challenge of showing that the Study is representative and thorough by consulting widely with governmental and other experts in their personal capacity during its research.[97] The ICRC sought to meet the other challenge of showing that the Study is legally accurate by consulting one last time with governmental experts prior to publishing it.

In promoting the Study (and the cause of IHL more generally), the ICRC should be able to call upon the assistance of other persons and entities that can assist in gaining and mobilizing support for the findings. These include the National Red Cross and Red Crescent Societies, IGOs, NGOs, media as well as academics and opinion leaders. Civil society can use the Study to scrutinize the actions of public authorities. The challenge in this regard for the ICRC will be nowhere near as great as that of convincing persons and entities that apply customary law. The ICRC's name, stature and authority will lead many, predicts one scholar, to view the Study as "the Pictet equivalent for customary international law."[98]

Where the findings of attempts like the Study's to establish customary international law are not formally binding,[99] their impact depends ultimately on the reaction of States and other players. More specifically, the Study's impact will be proportionate to the use that participants in the humanitarian project make of it (*e.g.* in revising military manuals, in making judicial pronouncements and in advocating the humanitarian cause). It may be some time before a clear picture emerges of how the

---

role in moving government positions during the US Civil War (re the Trent affair) and during the First World War (re German U-boat campaign). Vagts, *supra* note 6, at 1035.

[97] This strategy is in keeping with the ICRC's long-standing effort to demonstrate the universal, timeless nature of IHL, rules of war being found "in all cultures" and "since time immemorial." Gasser, *supra* note 43, at 6 and 7. *See also* Hadia Nusrat, *Humanitarian law and Islam*, MAGAZINE OF THE INTERNATIONAL RED CROSS AND RED CRESCENT MOVEMENT 24-25 (2005), *available at* http://www.redcross.int/EN/mag/magazine2005_1/24-25.html (last visited 15 June 2005).

[98] Jean Pictet authored the definitive ICRC commentary to the Geneva Conventions. Bethlehem believes that such an analogy would be a mistake, since crystallizing custom is not the same as interpreting a treaty. Bethlehem, Remarks, *supra* note 20, at 17.

[99] The Study's findings are not the result of a formal codification nor is the ICRC seeking their endorsement by States.

Study has been received, but the world-wide ICRC launch events (such as at Chatham House) planned for the coming year[100] will offer insight into international opinion. Beyond those sponsored events, debate may be expected to be engaged informally. This process has begun in the United States with, as mentioned, the Committee's efforts having encountered resistance in opinion-making circles. In particular, the claims that the Study is not intended by its editors to be a definitive statement of customary IHL and that it is not intended to be drawn upon in ACTA actions have been received by local commentators with scepticism.[101]

F. Outlook

As one of its editors explained, the objective of the Study is to contribute to a deeper understanding of and greater respect for the rule of law in armed conflict.[102] The Study will certainly become the leading source of customary IHL; its unrivalled research in the area cannot but serve as the basis for future discussions about such rules. The ultimate question, however, when assessing the Study's value to the cause of IHL is whether it will promote better protection for victims of armed conflict. The standard by which to measure the Study's contribution is not full compliance with the rules by all parties subsequently. All such humanitarian efforts "will never be enough. War will remain cruel", as put bluntly by Sandoz.[103] The appropriate measure is the degree to which the report advances the goal of IHL.[104]

In answering this ultimate question, the Study's publication should be seen as part of a dynamic process, *i.e.* not as the end of a long and intensive effort but as the basis for the further development of IHL. Whatever particular critiques may be made of the Study, it is incontestable on general legal and practical considerations that such attempts to clarify existing rules can facilitate the rules' effectiveness and improvement. In an area of international law such as IHL beset with "deficiencies,

---

[100] The ICRC has been promoting the Study by staggered launch events around the world, *inter alia* in conjunction with Chatham House (London), The Law of Armed Conflict: Problems and Prospects, 18-19 April 2005; McGill University (Montreal), Customary International Humanitarian Law: Challenges, Practices and Debates, 29 September - 1 October 2005; Centre de recherches et d'études sur les droits de l'Homme et le droit humanitaire (Paris), Le droit international humanitaire, spring 2006.

[101] For example, *see* "I would be surprised if a lawyer as smart, savvy and connected as Louise Doswald-Beck was not perfectly aware of what it would be used for in the United States." Anderson, *supra* note 67.

[102] *See* alone title of Henckaerts' article in IRRC, *supra* note 53.

[103] Sandoz, *supra* note 4, at xv.

[104] See ICRC's own claim in this regard upon the Study's presentation: "Customary law study enhances legal protection of persons affected by armed conflict." ICRC Press Release, *supra* note 88.

loopholes, and ambiguity,"[105] having customary rules written down is especially useful. With the Study's publication, it will be possible for the first time to refer to a concrete rule rather than to a nebulous custom, thereby reducing the scope for disagreement among actors. In the field, this possibility will surely contribute to better protection for the victims of armed conflict. Knowledge of the rules is also relevant to courts and international organizations, which must rely on customary IHL in their work. Moreover, the identification of situations in which the law is unclear and inter-state agreement lacking is valuable in itself: the result enhances the accessibility, precision and interest of customary rules. In academe, the Study will serve as a starting point for further research and discussion; in intergovernmental fora, it should promote dialogue, at best cross-cultural.

The findings and the undertaking must also be considered more broadly, which perspective qualifies the preceding statements about the Study's value. First, unwritten law, by being written down, becomes fixed in time and risks going out of date. The ICRC's research data should be updated to keep pace with the constantly changing circumstances, and if the Study is to maintain its authority, editions will have to be published in future. In this sense, the Study should not be seen as a 'still photograph' of the current state of customary IHL but as 'live footage' of a body of law as it evolves over time.

Second, as far as the Study's parameters are concerned, future editors should consider whether the 'coverage' of customary IHL might be enlarged. No such report can in its breadth (or for that matter, depth) be all inclusive. Nonetheless, research into the rules' scope of application, namely the definition of "armed conflict", might be usefully added next time around.

Third, though treaty and custom may be the main sources of international law, the principles informing IHL as other areas should not be lost sight of. These principles are fundamental, abiding, incontrovertible and more, should ultimately guide all concerned. Where the law in force in a given situation is in doubt, a humanitarian arrangement must be found that ensures the protection of and help for victims of armed conflict. Specifically, the so-called Martens Clause should not be inadvertently neglected in discussions of IHL's sources. The Clause has a significant role in legislating IHL in addition to conventional and customary law, as it constitutes a provision of positive law that is not merely declaratory.[106] Should

---

[105] Antonio Cassesse, INTERNATIONAL LAW IN A DIVIDED WORLD 285 (1986).

[106] The Martens Clause first appeared in the preamble of the Regulations concerning the Laws and Customs of War on Land, Convention (II) with respect to the Laws and Customs of War on Land, The Hague, 29 July 1899. It reads: "[u]ntil a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by

the other sources prove wanting, they are to be completed by reference to the "laws of humanity" and "the requirements of the public conscience."[107]

Lastly, IHL, be it conventional, customary or 'conscientious' in character, must be implemented and enforced. Most violations do not stem from any inadequacy, lack of knowledge or disagreement in principle about the applicability of its rules, but from countervailing political, military and other factors in concrete situations. Accordingly, efforts should be redoubled to ensure that IHL actually has its intended effect at the same time as efforts like the Study's are undertaken to disseminate and develop the rules. Awareness of the rules must be combined with commanders who ensure that they are respected and with the existence of sanctions for their violation, in particular through national and international courts.[108] Discussions about the content of customary IHL will otherwise remain 'academic' in the pejorative sense of the word.

---

them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience." Schindler, *supra* note 10. The Clause has been repeated with slightly different wording in various subsequent treaty provisions.

[107] ICJ statements re Martens Clause: its "continuing existence and applicability is not to be doubted" and it "has proved to be an effective means of addressing the rapid evolution of military technology." *Legality*, *supra* note 13, paras. 78 and 87. According to the Study's editors, the Martens Clause may be included in an update. *Introduction*, I CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 1, at xxx. However, such inclusion would presumably be as customary and not 'conscientious' law.

[108] "Only a few of the states parties [*sic*] to the 1949 Geneva Conventions have so far met their obligation to transform the Conventions into their national legal systems to ensure the punishment of war crimes and the misuse of the sign of the Red Cross." Malanczuk, *supra* note 28, at 363.