Leiden Journal of International Law, 21 (2008), pp. 255–288

BOOK REVIEWS

Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law*, Geneva and Cambridge, International Committee of the Red Cross and Cambridge University Press (2005), 2 volumes, ISBN 9780521539258, 4,411 pp., £320.00 (boxed set, hb); Volume I available separately, ISBN 9780521005289, 621 pp., £32.00 (pb).
doi:10.1017/S0922156507004840

1. Fruit of the Loom: custom revisited

Customary international law nowadays is often referred to as a recently discovered exotic fruit to be explored and exported all over the world. Despite current reference to its novelty, customary law is regarded as the oldest branch of international law and one of its main sources.[1] What is novel, however, is the renewed interest in the codification and methodology of rules of customary international law. The importance of this burgeoning awareness holds especially true for customary international humanitarian law[2] and the way it protects persons and objects in armed conflict.

With increasing suspicion some merely perceive the customary Trojan horse wheeled in under a humanitarian banner, binding them to rules and norms by which they explicitly did not want to be bound. Yet others find it debatable whether one can codify rules that they deem not to exist in the first place.[3] The challenge was finally met by the publication of the long-awaited study, *Customary International Humanitarian Law* (Study) that has been prepared by the International Committee of the Red Cross (ICRC) at the request of the International Conference of the Red Cross and the Red Crescent.[4] This impressive publication of more than 4,400 pages is the result of an extensive process of worldwide consultations and research that, due

1. Art. 38 of the Statute of the International Court of Justice, which is generally considered to state all sources of international law, provides that the ICJ shall apply international conventions, international custom, general principles of law, and (subject to provisions of Art. 59 of the Statute) judicial decisions and doctrine as subsidiary means of interpretation.
2. Meron talks in this regard of the 'revival of customary law' for a number of reasons, one of which is the use of customary international law as a primary source by the ICJ and by international criminal courts while upholding the principle of *nullum crimen sine lege*. T. Meron, 'Revival of Customary Humanitarian Law', (2005) 99(4) AJIL 817.
3. I. Detter, *The Concept of International Law* (1987).
4. 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, 'Res. 1, International Humanitarian Law: From Law to Action: Report on the Follow-up to the International Conference for the Protection of War Victims', (1996) 310 *International Review of the Red Cross* 58.

to the scope of its investigation, took over ten years to complete. The importance attached to the Study by numerous parties is significant not least because it instigates debate and further research on topics of customary international humanitarian law that are still far from clarified. It distinguishes itself by the thoroughness and density of collected practice that, with its publication, is brought within the ambit of, among others, academics, civil servants, non-governmental organizations, and military personnel.

In an era of globalization, internationally available information about conflicts, which is supplied by civil society, states, and international organizations, facilitates the identification of the prospects of and challenges to international humanitarian law. In confronting challenges in this area of law, heavily regulated by treaties, customary international humanitarian law to this day remains an essentially important institution of law for which the ICRC president, Jacob Kellenberger, identifies three reasons: 'First, while the Geneva Conventions enjoy universal adherence today, this is not yet the case for other major treaties, including the Additional Protocols' (Vol. I, p. x).[5] Consequently, depending on which states ratified which treaties, different international humanitarian law treaties apply to different conflicts (p. xxvii). Contrary to treaties that apply only to the parties that ratified them, once a rule of customary international law has been established it generally applies to all states, even when they have not formally consented to it (p. xxxix). As a result, all states are especially affected by the crystallization of customary international humanitarian law and have a specific interest in participating in the process of its formation.

The second driving factor contributing to the initiation of the ICRC Study is the changing nature of conflict, which makes it difficult to apply traditional rules and ideas about armed conflict. Today the vast majority of armed conflict is of a non-international character that occurs in practically every region of the world. The particular difficulty with this type of conflict is the fact that non-international armed conflicts are subject to fewer treaty rules than international armed conflicts. Consequently, non-international armed conflicts are governed by a limited protection regime which itself has insufficient detail in regulation (pp. xxvii, xxix). Thus international law appears deficient in meeting the needs for protection in non-international armed conflicts, since they are not governed by the same legal regime as international armed conflicts, whereas the needs arising from the factual situation of war are essentially the same (p. x). As stated above, customary international humanitarian law, however, applies to all conflicts, irrespective of their international or internal nature. The ICRC Study asserts that the majority of customary international humanitarian law rules applicable to international armed conflicts also apply to non-international armed conflicts, and that state practice in fact 'has gone beyond existing treaty law and expanded the rules applicable to non-international armed conflicts' (p. xxix).

5. (Note that all page references are to Volume I unless otherwise stated.) Even the broadly ratified Additional Protocol I (AP I) is obstructed in its effectiveness, since several states that are or have been party to an international armed conflict did not ratify it. Similarly, some states that are or have been involved in a non-international armed conflict did not ratify Additional Protocol II (AP II), leaving the realm of protective treaty law limited to Common Article 3 of the (four) Geneva Conventions.

https://doi.org/10.1017/S0922156507004840 Published online by Cambridge University Press

Third, customary law, by its nature ever developing, can influence and complement treaty law when that is necessitated by current developments.[6] Where the black letter treaty rules leave room for uncertainties or ambiguities, customary international law, and any debate concerning customary international law, can facilitate their interpretation and further clarification (p. x).

Reactions to the Study are now emerging, voiced at the launching conferences of the Study, in recent publications,[7] and in initial reactions issued by government institutions or officials.[8] At first glance both positive constructive criticism and negative reception of the Study seem fragmented. A closer look reveals that both the Study and the different ways in which it has been received revolve around two fundamental questions related to the general theory of law and the nature of customary rules in international law.[9] The first such question seeks a clarification as to why law is law. The second question relates to the much-heard criticism that, in order to accept a rule as law, as legitimate, one has to be able to examine the black box. In other words, it has to be clear where the authority to determine the law lies and what the process that governs that assertion is.[10]

In customary international law the material element of state practice is a function of the normative element *opinio juris*. The application of this formula in doctrine will lead to different outcomes. This is not generally caused by errors in the evaluation of factual data, but rather stems from divergent views on 'the established passage of fact into law, from the world of *sein* into the world of *sollen*'.[11] The particular exercise of the process of formation of a rule of customary international law is viewed either as a process of law creation or as the exact opposite, a process of law declaration.

> Doctrines will essentially adopt two attitudes: these may, in effect, either seek to explain the appearance of the norm – to 'found' law – or they may limit themselves to recording the existence of the norm, to establishing the existence of law.[12]

On the face of it, the mandate[13] under which the ICRC effectuated the study on the current rules of customary international humanitarian law requires the latter,

---

6. In fact the ever developing practice of the UN Security Council with regard to peacekeeping forces demonstrates that customary law is not only suitable but crucial to enable the Charter to function as a living instrument so that it continues to be an appropriate instrument to address contemporary issues and global threats.
7. E.g. T. Meron, *The Humanization of International Law* (2006); R. Cryer et al., in R. Cryer (ed.), 'Symposium: Studies on the Customary Law Study', 2006 *Journal of Conflict & Security Law* 11 (2), at 163.
8. J. B. Bellinger and W. J. Haynes, 'A U.S. Government Response to the International Committee of the Red Cross's Customary International Humanitarian Law Study', (2007) 46 ILM 514; also available at http://www.defenselink.mil/home/pdf/Customary_International_Humanitiarian_Law.pdf (consulted last July 2007).
9. B. Stern, 'Custom at the Heart of International Law', trans. M. Byers and A. Denise, (2001) 11 *Duke Journal of Comparative and International Law* 89 (first published in *Mélanges offerts à Paul Reuter* (1981)).
10. Some believe that states leave too much of the customary law arena to the decision-making of the ICRC and NGOs that attempt to bind states by issuing 'authoritative' studies and commentaries. States ought to proclaim more what they consider to be customary international law and better provide their opinion on the outcome of such studies. The instigation of such dialogue is in fact one of the aims of the Study.
11. Stern, *supra* note 9, at 91.
12. Ibid.
13. In accordance with recommendation II of the Intergovernmental Group of Experts for the Protection of War Victims as endorsed by the 26th International Conference of the Red Cross and the Red Crescent, *supra* note 4.

a declaration of the law. Indeed the Study in offering its findings promises in its results not to amalgamate *lex lata* with *lex ferenda* by strictly stating the law as it stands. However, drawing a strict separation between law creation and law declaration is by virtue of the normative element required for the establishment of a rule of customary international law an extremely difficult exercise. In particular, the specific characteristics of international humanitarian law and the situations to which international humanitarian law applies provide an additional hurdle in the application of the above-mentioned seemingly straightforward equation to the process of formation of customary international humanitarian law. This evaluation of the ICRC's customary international humanitarian law study describes the mandate and the overall procedure that was used to execute the mandate. In addition it aims to articulate the complications involved and to unveil some of the critiques that have been issued so far.

2. The overall procedure and the plan of action

In armed conflict breaches of the law can have severe consequences and result in unbearable human suffering and death. Sadly, it is generally perceived that infringements of the rules do not result from their inadequacy but rather from

> an unwillingness to respect the rules, from insufficient means to enforce them, from uncertainty as to their application in some circumstances and from a lack of awareness of them on the part of political leaders, commanders, combatants and the general public. (p. xxvii)[14]

The problem of protection of victims under the rules of international humanitarian law and the prevention of violations of these rules is understood to be related to the effective implementation of international humanitarian law (p. xxvii).[15]

That conviction led to the establishment of an Intergovernmental Group of Experts for the Protection of War Victims,[16] convened by the Swiss government. This group adopted a series of recommendations in 1995 recognizing the need to enhance preventive measures and increase knowledge of and respect for the law of war.[17] In support of these recommendations, the usefulness and necessity of an investigation into the rules and theory of customary international law regulating an armed conflict was identified in 1996 by the 26th International Conference of the Red Cross

14. See also J.-M. Henckaerts, 'Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict', (2005) 87 *International Review of the Red Cross* 176.
15. The Final Declaration adopted by the International Conference for the Protection of War Victims, September 1993, emphasizes the 'necessity to make the implementation of humanitarian law more effective', see (1993) 296 *International Review of the Red Cross*, at 381.
16. The International Conference for the Protection of War Victims called upon the Swiss government to 'convene an open-ended intergovernmental group of experts to study practical means of promoting respect for and compliance with that law, and to prepare a report for submission to the states and the next session of the International Conference of the Red Cross and the Red Crescent'. Ibid.
17. These recommendations were adopted in January 1995 during the meeting of the Intergovernmental Groups of Experts for the Protection of War Victims (under the presidency of Lucius Caflisch), Geneva, 23–27 January 1995.

and the Red Crescent. The Conference formally mandated the ICRC to prepare a report in accordance with recommendation II, proposing that

> The ICRC be invited to prepare, with the assistance of experts in IHL [international humanitarian law] representing various geographical regions and different legal systems, and in consultation with experts from governments and international organizations, a report of customary rules of IHL applicable in international and non-international armed conflicts, and to circulate the report to States and competent international bodies.[18]

Under this mandate the ICRC embarked on an enormous research project in undertaking to increase respect for, and knowledge and implementation of, international humanitarian law. In addition, the Study reflects the ongoing discussion and factual situation related to the proclamation that rules of international humanitarian law, and the protection they offer by placing limitations on the ways to conduct a war, should not be applied equally to international and non-international armed conflicts. Not only was the purpose of the Study to provide evidence of the equal application of customary international law rules to both types of conflicts but, in order to overcome impediments to the application of treaty law, it also aimed to demonstrate that state practice has in fact 'gone beyond existing treaty law and expanded the rules applicable to non-international armed conflicts' (p. xxix). For all these reasons substantial knowledge of rules of customary international humanitarian law is important to, among others, academics, members of the judiciary, and government functionaries, but also, most importantly, to fighters and others literally involved in the armed conflict and in need of protection.

In determining the most favourable manner in which to organize the study, the study steering committee[19] decided on a plan of action which arranged the research into six parts: part I, principle of distinction; part II, specifically protected persons and objects; part III, specific methods of warfare; part IV, weapons; part V, treatment of civilians and persons *hors de combat*; and part VI, implementation.[20] Research into the different parts of the study was based on both national and international materials that reflect state practice and on research into the archives of the ICRC, which document nearly forty recent armed conflicts (p. xlvii). The first group were assembled through co-operation with national researchers,[21] who included in their respective country reports material such as military manuals, national legislation, national case law, instructions to armed and security forces, military communiqués during war, diplomatic protests, opinions of official legal advisers, comments by

18. Ibid., at 84.
19. The highly qualified academic experts who formed the steering committee were Professors Georges Abi-Saab, Salah El-Din Amer, Ove Bring, Eric David, John Dugard, Florentino Feliciano, Horst Fischer, Françoise Hampson, Theodor Meron, Djamchid Momtaz, Milan Šahović, and Raul Emilio Vinuesa.
20. The Plan of Action was adopted in June 1996 and the research started in October 1996.
21. The researchers who contributed to the collection of materials for the study were identified in nearly 50 states: 9 in Africa, 11 in the Americas, 15 in Asia, 1 in Australia, and 11 in Europe (pp. xlv and Annex I to the introduction, p. xlix).

governments on draft treaties, executive decisions and regulations, pleadings before international tribunals, statements in international organizations and at international conferences, and government positions taken with respect to resolutions of international organizations (pp. xlv, xlvi).

Six research teams,[22] each assigned to one of the six parts of the study, collected the international materials consisting of practice within international organizations, particularly the United Nations and its organs,[23] preparatory works of treaties, state submissions to international and regional courts, and international case law. An attempt was made to be as globally representative as possible through the contributions of legal scholars around the world, the composition of the steering committee, the country reports, and the other materials that were used.[24] In the end all the collected materials were consolidated into the six identified areas of the study and formed the basis of an 'executive summary' that was prepared by the international research teams for each of the six areas (p. xlvii). The executive summaries were the subject of three rounds of consultations with the steering committee. The last two of these meetings included consultations and evaluations with a group of academic and government experts (p. xlvii). The reviewed assessment of the steering committee provided the starting point for the eventual writing of the report, whose authors, Jean-Marie Henckaerts and Louise Doswald-Beck,[25] scrutinized the formulation and the sequence of the rules, and bear responsibility for drafting the commentaries thereto.

The result of this impressive enterprise is a capacious two-volume publication. Volume I contains the rules according to the findings of the ICRC and Volume II contains the relevant collected practice that was used to evidence the findings in Volume I. Each rule in Volume I makes reference to the relevant chapter and section in Volume II that provides the reader with the state practice used to support the rule.[26]

22. Part I: Georges Abi-Saab (Rapporteur), Jean-Francois Quéguiner (Researcher); Part II: Horst Fischer (Rapporteur), Gregor Schotten and Heike Spieker (Researcher); Part III: Theodor Meron (Rapporteur), Richard Desgagné (Researcher); Part IV: Ove Bring (Rapporteur), Gustaf Lind (Researcher); Part V: Françoise Hampson (Rapporteur), Camille Giffard (Researcher); Part VI: Eric David (Rapporteur), Richard Desgagné (Researcher).
23. Resolutions adopted by the Security Council, General Assembly, and Commissions on Human Rights. Ad hoc investigations conducted by the UN, the work of the International Law Commission, work of UN General Assembly Committees, reports of the Secretary-General, thematic and country-specific procedures of the UN Commission on Human Rights, reporting procedures before the Human Rights Committee, the Committee against Torture, the Committee on the Elimination of Discrimination against Women, and the Committee on the Rights of the Child (p. xlvii).
24. As far as possible the included materials run up to 31 December 2002 and are in limited instances of a more recent date (p. xlvi).
25. The drafting of the six different parts and the overall management and supervision of the Study were in the hands of Louise Doswald-Beck and Jean-Marie Henckaerts. 'The authors, jointly, bear the sole responsibility for the content of the study' (p. xlix). '[The] ICRC respected the academic freedom both of the report's authors and of the experts consulted' (p. xi).
26. The large collection of found practice was made available for two purposes: the reader is thus permitted to verify the basis that was used to establish each rule and it provides practitioners and scholars with an immense collection of information that might be useful for their own professional objectives (p. xlviii).

3. Method matters: selected practice and application of method

An adequate assessment of the contribution made by the ICRC Study views it in connection with the time and period during which it developed[27] and highlights the legal method and theory that form the underlying basis for its assessment.[28] A closer look at the current academic debate on the methodology (that should be) used to identify customary international humanitarian law resolves that it has mostly to do with one's view on the status of customary international humanitarian law and the way in which it is interpreted.

Behind the apparent first step of analysing the elements involved in the process of rule creation lies a particular approach towards international law and the choice in method that has been made. Method for many if not most scholars generally refers to 'the application of a conceptual apparatus or framework – a theory of international law – to the concrete problems faced in the international community'.[29] Each legal theory, be it international legal process, legal positivism, or feminist jurisprudence,[30] employs its own method.[31] Although differentiation between methods may at times prove difficult because they can share common denominators or pursue the same goal, the preference for a certain method presupposes certain assumptions one has about international law. The method implies assumptions about the nature of international law and its function, and about who the decision makers are whose acts of law creation, interpretation, and application are relevant to the general process of rule creation in international law.[32] The authors of the ICRC Study display a modern positivist view on international law in describing the law as it is and in regarding it as a unified body of treaty and customary law rules that is based on formal criteria and subject to the consent of states (p. i).[33] It assumes that states are the primary actors under international law, negating the role of non-state actors in the process of law creation. However, modern positivism, as opposed to traditional positivism,

27. The collection of materials and the consultation process was concluded on 31 December 2002, so that events taking place after that could not be taken into consideration. Some topics that seemed fairly evident, such as granting prisoner-of-war status, appeared not to be so after, for example, the Guantánamo Bay situation. It was argued that a great number of individuals held in Guantánamo Bay could not be regarded as civilians, nor did their situation meet the legal requirements attached to prisoner-of-war status. They were consequently deprived of rights attached to either status. This position regarding their status is considered to be highly controversial.
28. Although exceeding the scope of this review, a worthwhile theoretical and methodological examination could be conducted into other legal theories that might have been suitable to serve as a basis but were not selected as such.
29. Conclusion in A. M. Slaughter and S. R. Ratner, 'Appraising the Methods of International Law: A Prospectus for Readers', (1999) 93 (2) AJIL 291, at 292.
30. The symposium's queries are addressed to a selection of seven major methods representative of international legal scholarship: legal positivism, the New Haven School, international legal process, critical legal studies, international law and international relations, feminist jurisprudence, and law and economics, ibid., at 293.
31. With the arguable exception of critical legal studies (CLS), which does not propose to establish a method different from or contradictory to the various existing approaches. Rather CLS represents a manner of viewing international law choosing to emphasize the general failures of the international legal process and to provide critical constructive criticism to that process.
32. A. M. Slaughter and S. R. Ratner, 'The Method is the Message', (1999) 93 (2) AJIL 410, at 412.
33. Slaughter and Ratner, *supra* note 29, at 293. See also H. McCoubrey and N. D. White, *Textbook on Jurisprudence* (1996); H. Kelsen, *Principles of International Law* (1952), 438–9.

https://doi.org/10.1017/S0922156507004840 Published online by Cambridge University Press

seems to allow a broader perspective to this framework in that it acknowledges that decisions of international courts and tribunals (in taking into account the particular value of such decisions – p. xxxiv) and, owing to their international legal personality, the practice of international organizations fulfil a role in the process of law creation (p. xxxv). Nonetheless, the predominant exclusion of potential contributions of non-state actors, such as armed opposition groups, from the international lawmaking process by the method decided on by the ICRC is evident. The practice generated from these specific groups is mentioned in the study as 'other practice' (p. xxxvi), leaving it unclear in what way, if any, it contributes to the process or how it influences the eventual conclusion (rule) reached by the ICRC.

3.1. Dilemma

Within the choice of legal philosophy underlying the approach to international law there is a methodology that is used to appraise what the rules of customary international law are. Textbooks on international law generally follow the jurisprudence of the International Court of Justice (ICJ) and identify customary international law to be a source of law, the rules of which are created on the basis of two elements: state practice (*usus*) and *opinio juris* (*opinio juris sive necessitates*). References to the two-element doctrine would include passages of the *North Sea Continental Shelf* cases, in which the ICJ analyses general custom creation:

> Not only must the acts concerned amount to a settled practice, they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitates*.[34]

In legal reasoning two main approaches can be distinguished with regard to establishing a new rule: deductive methodology and inductive methodology. The inductive methodology entails that one starts with the facts, the instances of practice, from which one can derive the existence of the general rule. The deductive methodology on the other hand assumes a general statement of the rule which is then further supported by instances of practice that can be found. The essential difference is that 'in a *deductive* argument, the truth of the premises is supposed to guarantee the truth of the conclusion; in an *inductive* argument, the truth of the premises merely makes it probable that the conclusion is true'.[35]

The choice to be made between the two seemingly straightforward methodologies is not at all apparent. The dilemma and its complexities become evident when one attempts to apply this twofold methodology to the formation of customary international law rules, specifically customary international humanitarian law rules, based on the two-element doctrine. Experience in the practical application of the theory leads to the conclusion that the elements can easily become intertwined

34. *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, Judgment, 20 February 1969, [1969] ICJ Rep. 4, at 3, para. 77.
35. S. W. Jevons, *Elementary Lessons in Logic, Deductive and Inductive:* '*with copious questions and examples and a vocabulary of logical terms*' (1918) (emphasis in original).

https://doi.org/10.1017/S0922156507004840 Published online by Cambridge University Press

with the methodology and that, depending on the case, they are often difficult to assess separately. The available variety of opinions suggesting types of interpretation of the theoretical models demonstrates that many different appraisals are indeed possible. Roberts, for example, links the distinction between traditional and modern customary law to the distinction between inductive and deductive methodology.[36] The traditional approach to custom implies that one looks at the practice and then assesses the *opinio juris*. Roberts seems to describe this operation as one of induction, the two elements of custom being the two pillars of the inductive approach. The new modern approach of custom, mainly focusing on *opinio juris*, would then be assimilated to deduction, as starting by the psychological element would amount to stating the existence of a rule. Therefore Roberts makes a connection between the intellectual operation and elements to be weighed.

An example of an entirely different exercise given by Corten[37] demonstrates a link between flexibility or rigidity in the approach or methodology and the way in which one understands the constitutive elements of custom. According to Corten, each approach has a different understanding of what amounts to state practice and, in fact, of which element – practice or *opinio juris* – has the more dominant role in the assessment of custom. The extensive approach places emphasis on the act of deduction by viewing practice as the dominant element, while the restrictive approach assigns this role to *opinio juris*.[38]

The Study decisively states that it 'sought to analyse issues in order to establish what rules of customary international law can be found *inductively* on the basis of State practice' (p. xxx, emphasis added). However, the careful depiction of the inductive methodology as claimed to be employed in the Study proves less transparent as one delves deeper into individual assessment of rules and finds that the distinction between what is assessed by means of induction becomes blurred with what is assessed by deduction. As Meron articulates this development, 'The movement from the inductive to the deductive method of ascertaining custom is a result of the expansion in what counts as practice of States and the enhanced significance of *opinio juris*.'[39]

3.2. A classical approach and a cautious choice

After the publication of the ICRC Study, state representatives and academic experts seemed determined to identify 'apparent' flaws in the Study and particularly to fire their ammunition at part IV, dealing with weapons. Constructive criticism should of course be received as positive input which will further advance both debate and law. However, it would be helpful to appraise the quality of the work with which both authors were charged, in the light of its place in legal literature and, especially,

36. A. E. Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation', (2001) 95 (4) AJIL 757, at 758.
37. O. Corten, 'The Controversies over the Customary Prohibition on the Use of Force: A Methodological Debate', (2005) 16 EJIL 803.
38. Ibid., at 804.
39. T. Meron, *The Humanization of International Law* (2006), 361.

https://doi.org/10.1017/S0922156507004840 Published online by Cambridge University Press

the manner in which they argue the existence or emergence of a rule of customary international humanitarian law.

Volume I of the Study, containing the assessment of customary international humanitarian law rules, is based on the evidence provided in Volume II, offering a dense coverage of state practice. The rules are stated to be derived from the evidence. As mentioned, some of the practice in Volume II concerns materials that do not form part of state practice, such as jurisprudence from international courts and tribunals, practice from international organizations, and so-called 'other practice', generated by armed opposition groups. In addition, one finds expert opinions that were considered useful to give expression to different interpretations of theory, rules, and formulation. The Study emphasizes that what is written down reflects not what ought or should be the rules of customary international humanitarian law, *lex ferenda*, but rather what could be found to be the current rules of customary international humanitarian law based on the actual practice of states, *lex lata*, at that point in time. Before the ICRC could draw conclusions on the contents and formulation of the rules two difficult questions had first and foremost to be answered: how does one decide what constitutes state practice, and when does that practice contribute to the creation of a rule of customary international humanitarian law?

These questions go back to the assessed arena for this exercise that features on the one hand a wide and flexible notion of methodology[40] favouring flexibility in the place and content of customary law, but on the other hand a narrow and rigid approach to methodology that favours strict interpretation and inflexibility towards changes or new exceptions to a rule.[41] These opposite poles have complicated and finely divergent variants in between. However, in order to facilitate what is a difficult dialogue these two approaches are distinguished.

In the broad interpretation method of the wide or flexible approach custom is both a formal and a material source.[42] Because this method of legal interpretation takes political and moral considerations into deliberation it is in effect policy-oriented. The narrow methodology takes international treaties, especially the UN Charter, as a point of reference. In this framework of reasoning, Article 38 of the ICJ Statute is of critical importance, since it is considered to form the constructive basis of a 'textually-oriented, hierarchical series of sources set out in Articles 31 and 32 of the Vienna Conventions'.[43]

---

40. See Corten in discussing the extensive approach, *supra* note 37, at 803.
41. Corten identifies this as the restrictive approach, ibid.
42. Formal sources provide legal procedures and methods for the creation of rules of general application. These rules have a legally binding effect. In turn, material sources provide evidence that proves the existence of rules of general application that have legally binding effect. However, in international law it is difficult to maintain a clear distinction between formal and material sources. For further general discussion see I. Brownlie, *Principles of Public International Law* (2003), 3; O. Schachter, in R. MacDonald and D. M. Johnston (eds.), *The Structure and Process of International Law* (1983), 745; V. D. Degan, *Sources of International Law* (1997).
43. M. Byers, 'The Shifting Foundations of International Law: A Decade of Forceful Measures against Iraq', (2002) 13 EJIL 21, at 25. On this analysis see Corten, *supra* note 37, at 812.

In effect there are different ways to approach the issue of formation of customary law.[44] One example is doctrine which emphasizes the need to recognize that 'new' or contemporary custom is not custom as we traditionally understand it but a new process of formation[45] which includes non-state actors.[46] The ICRC chooses a classical approach based on Article 38(1)(b) of the ICJ Statute,[47] under which customary international humanitarian law as 'a general practice accepted as law' traditionally holds two constitutive elements: practice (*usus*) and *opinio juris* (*opinio juris sive necessitates*) of states.

3.2.1. Selection of state practice

In the assessment of rules of customary international law in areas involving controversial issues such as state responsibility, protective rules in non-international armed conflict, or humanitarian intervention, the lack of state practice proves a constant source of concern for the international positivist lawyer. Modern positivist views, however, promote a 'broader view of the ways and fora in which states can express their will', including through the practice of international institutions, such as international tribunals, 'and of states in accepting the jurisprudence of those tribunals'.[48] The selection of state practice that was found to be relevant 'official practice' consists of both physical and verbal acts contributing to the creation of a rule. Although many critics do not consider verbal acts to constitute state practice, the ICRC finds that their inclusion as such is consistent with the approach taken by states and international bodies such as the International Court of Justice, the International Law Commission (ILC), the International Criminal Tribunal for the former Yugoslavia (ICTY), and the International Law Association (pp. xxxii, xxxiii).

The term 'official practice' is not defined in the Study; however, with reference to Article 4 of the ILC Draft Articles on 'Responsibility of States for Internationally Wrongful Acts' in combination with the examples of practice listed in the Study (pp. xxxiv–xxxvi), it could be concluded that 'official practice' means the conduct of any state organ (executive, legislative, or judicial branch), including a person or entity which has that status in accordance with the internal law of the state. It is not entirely clear from the chapter 'Assessment of Customary International Law' whether the ICRC follows Articles 5 and 8 of the ILC's Draft Articles on the attribution

44. The current paper does not reflect doctrinal debate that pleads to make a distinction between general customary law and special or regional customary law.
45. As argued by M. Sassòli during the ICRC Conference on the occasion of the publication of the Study, October 2005, in Montreal, 'The study strictly applies theory of customary law but proves that the "old" theory doesn't work.' This view is promulgated by Sir Robert Jennings, *Reflections on the Subsidiary Means for the Determination of Rules of Law* (2003); R. Y. Jennings, 'The Judiciary, International and National, and the Development of International Law', (1996) 45 ICLQ, at 1.
46. Sassòli, *supra* note 45. The argument is that non-state actors, such as armed groups, contribute to creating custom because custom is formed by the addressees of the rule. The ICRC is very cautious towards this approach, saying that its legal significance is unclear, and has listed such practice under 'other practice' that might be evidence of acceptance of rules. Comparably, under the law of the sea every captain can contribute to the formation of the rules; under international humanitarian law could any soldier do the same? Certainly not when that individual soldier is condemned and/or punished for his or her behaviour, but what if the soldier's actions are condoned by one or more superiors? Would that make the situation different?
47. The Court addresses this in several cases, particularly in the *North Sea Continental Shelf* cases, *supra* note 34.
48. Ratner and Slaughter, *supra* note 32, at 411.

https://doi.org/10.1017/S0922156507004840 Published online by Cambridge University Press

of conduct to a state by including conduct of persons or entities exercising elements of government authority (Art. 5) or conduct of person(s) that is directed or controlled by a state (Art. 8). The latter type of conduct is a material form of attribution and would, for the purpose of the Study, arguably be close to impossible to assess. In fact, the ICRC lists further requirements to official practice that would exclude this conduct for the most part. For official practice to be relevant it 'has to be public or communicated to some extent' (p. xxxiv) to at least one other state or international organization. Undisclosed acts are not considered to contribute to the creation of a rule, neither are internally inconsistent acts.

The choice to accept both physical and verbal acts as state practice seems all-encompassing and potentially problematic. Although the two are not always easily distinguished, verbal acts seem to belong to the realm of *opinio juris*; however, they are presented as state practice. The complexity of assessing battlefield practice in the midst of armed conflict understandably leads current debate on what counts as practice to allow official statements of states to be included in that category. The 'fog of war' also led the ICTY to conclude that in the process of identifying customary international humanitarian law it is justifiable to look at what states 'say' rather than what they 'do'.[49] In the same breath the ICTY indicates military manuals as being an element that is relevant to the equation. In line with this reasoning Volume II of the Study contains as practice military manuals, which arguably, in particular according to military lawyers,[50] do not constitute state practice.[51] However, military manuals form the basis of the 'skills and drills' and 'techniques, tactics and procedures' (TTP) on which military personnel act in the field. Consequently, the contents of the rules of military manuals have a direct effect in the field and on the actions of the involved military personnel. The authors of the Study maintain that individual actions and exercises of individual military personnel are indeed difficult to assess in the course of armed conflict; however, the actions are in fact based on the prescribed military

49. *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94–1-T, T.Ch. II, 2 October 1995, para. 99. The opposite is also held. '[I]t focuses on statements to the exclusion of acts and relies on a government's words rather than deeds. Yet, war is the ultimate test of law. Government-authorized actions in war speak louder than peacetime government statements.' H. Parks, 'The ICRC Customary Law Study: A Preliminary Assessment', *Proceedings of the Annual Meeting – American Society of International Law*, 99 (2005), 208, at 210. Parks's initial suggestion that the ICRC Study lacks battlefield practice is primarily based on his observations in relation to the ICRC rules on weapons.

50. Military circles are generally dissatisfied with the inclusion of military manuals as state practice, and maintain that primary reliance should be placed on battlefield practice instead. It is important to note that battlefield practice was not excluded from the study but included to the extent possible, meaning to the extent that it could be identified, since battlefield practice is extremely difficult to assess due to the characteristics of armed conflict situations (p. xxxii). For more detailed remarks see Garraway's argument that military manuals are policy documents: C. Garraway, 'The Use and Abuse of Military Manuals', (2004) 7 *Yearbook of International Humanitarian Law* 425. Similarly, Greenwood identifies the German manual reference to Common Article 3 as being a policy application of Germany rather than a statement about the existing state of the law: C. Greenwood, 'International Humanitarian Law and the *Tadić* Case', (1996) 7 EJIL 265, at 276.

51. Some claim that military manuals are at a minimum *opinio juris*, since they contain instruction to troops on how to behave during armed conflicts. The question of how this practice/*opinio juris* contributes to the formation of customary law is another matter. The answer is found in the reactions to the practice; how is it received by other states? Is it considered to be in accordance with the law or is it considered a breach, as deviant behaviour? It is important to emphasize this because otherwise the ongoing practice of torture, for example, would develop to be the rule. It is the actual condemnation of such practice that reaffirms the prohibition of torture.

instructions manuals. The same reasoning also holds true for national case law condemning military personnel for violations of international humanitarian law during armed conflict.[52]

Evidently, international organizations and international courts and tribunals are not state organs. Nonetheless, practice derived from these institutions has a particular value which the Study takes into account in the assessment of customary international humanitarian law: 'Although decisions of international courts do not constitute state practice their decisions have nevertheless been included because a finding by an international court that a rule of customary international law exists constitutes persuasive evidence to that effect' (p. xxxiv).[53] Moreover, their decisions have a potential influence on state practice and on the practice of international organizations. The latter are equipped with international legal personality. The Study proposes that international organizations, by virtue of possessing international legal personality,

> can participate in international relations in their own capacity, independently of their member states. In this respect their practice can contribute to the formation of customary international law.[23] . . . In addition, official ICRC statements . . . have been included as relevant practice because the ICRC has international legal personality[25] . . . [and] works under its official mandate from states. (p. xxxv)
>
> [23] See, e.g. *Case concerning Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 28 May 1951, [1951] ICJ Rep. 15, p. 25.
>
> [25] See, e.g., ICTY, *Prosecutor v. Simić et al.*, Case No. IT-95–9-PT, Decision on the Prosecutor's Motion . . . , 27 July 1999, . . . para. 46 and footnote 9.

International organizations have, irrefutably, an effect on the international legal order. However, that assumption derived from a more detailed assessment of the status of the organization in question, and the extent to which its practice contributes to rules of customary international law seems to cut a few corners,[54] in particular considering the impossibility of providing an unambiguous answer to whether or not 'the term practice as used in Art. 38 of the ICJ Statute includes the practice of international organizations'.[55]

With regard to practice derived from international organizations, the Study makes an important distinction between the process preceding the adoption of a resolution and the resolution itself. The preceding process involves the negotiation and adoption of resolutions which constitute acts of the states (p. xxxv, n. 25), while the resolution itself constitutes an act of the organization. The weight and the effect of a resolution on the process of formation of a rule of customary international law depends in large part on which organization adopted the resolution, and particular circumstances such as 'its content, its degree of acceptance and the consistency of state practice outside it' (pp. xxxv–xxxvi).

---

52. An example would be British case law condemning military personnel for the assault and ill-treatment of detainees in Iraq. However, national jurisprudence involving such cases is not widely available.
53. The Study does not explain further why the jurisprudence of international courts is considered 'persuasive evidence'.
54. J. Klabbers, 'International Organizations in the Formation of Customary International Law', in E. Cannizzaro and P. Palchetti (eds.), *Customary International Law on the Use of Force* (2005), 179 at 195.
55. Ibid., at 180.

https://doi.org/10.1017/S0922156507004840 Published online by Cambridge University Press

3.2.2. One swallow does not make a summer

To draw unambiguous conclusions based on the particular forms of practice as described above requires a form of authoritative abstraction and thus a normative evaluation of available practice. This, frequently overlooked, requirement 'results from the fact that norms and the linguistic objectifications cannot be induced from such data alone. The individual instances of practice from which customary law is derived are never identical, as is often presupposed implicitly.'[56]

To address the second question, of how to assess the selected state practice, the ICRC follows the criteria of the ICJ in the *North Sea Continental Shelf* cases to assess whether a rule is of sufficient 'density'. The practice needs to be virtually uniform, extensive, and representative (p. xxxvi).[57] The passage of a long period of time is not a necessity since density of practice can develop over a reasonably short period of time. The fact that practice should be virtually uniform means that it ought not to be substantially different.[58] However, at the same time the ICJ considered it enough for practice to be sufficiently similar: 'too much importance need not be attached to a few uncertainties or contradictions, real or apparent'.[59]

Furthermore, contrary state practice does not necessarily prevent the creation of a rule of customary international humanitarian law 'as long as this contrary practice is condemned by other States or denied by the government itself and therefore does not represent its *official* practice' (p. xxxvii, emphasis in original). In these particular cases the rule is in fact reaffirmed by the reactions of states or the government in question: 'Instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule'.[60]

The further consideration in the ICJ's finding that state conduct incompatible with the rule, that is attempted to be justified or to be regarded as an exception to the rule, has particular significance for international humanitarian law, in the sense that this attitude strengthens rather than weakens the rule.[61] In the Study and the collected materials representing state practice much emphasis is placed on battlefield behaviour and violations of rules of international humanitarian law. The mere fact that violations of certain rules are mostly condemned actually affirms the existence of the rule rather than weakens its position as a rule of customary international humanitarian law. The expression of the Court in the *Nicaragua* case is applied analogously to case law concerning conduct of individuals in an armed conflict, and to resolutions of international organizations condemning a certain act.

---

56. U. Fastenrath, 'Relative Normativity in International Law', (1993) 4 EJIL 317.
57. See also *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, [1996] ICJ Rep. 66, at 254–5, paras. 70–73.
58. *Asylum case (Columbia v. Peru)*, Judgment, 20 November 1950, [1950] ICJ Rep. 266; *Fisheries case (United Kingdom v. Norway)*, Judgment, 18 December 1951, [1951] ICJ Rep. 116, at 138.
59. *Fisheries Case*, *supra* note 58, at 138.
60. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Judgment, 27 June 1986, [1986] ICJ Rep. 14, at 98, para. 186.
61. Ibid.; see also the Study, p. xxxviii. Many frequent violations of international humanitarian law are accompanied by a vast amount of verbal state practice comprising evidence supporting the breached rule(s).

The condemnations show that these practices are considered to be violations of existing rules and not practices accepted as, or aimed at, establishing new rules.[62]

Extensive and representative practice, as is required when assessing the density of a rule, implies the qualitative criterion of state practice, articulated by the ICJ in the *North Sea Continental Shelf* cases, that the practice involved must 'include that of states whose interests are specially affected'.[63] Specially affected states on the one hand can establish a rule of customary international law through their practice without the active participation of a majority of states, and on the other hand can prevent the establishment of a rule by not accepting the practice. The International Law Association (ILA) dealt with the issue of specially affected states.[64] Exactly who is 'specially affected' seems to be a case-by-case decision. However, when it comes to 'specially affected' states in international humanitarian law the ICRC assessed that all states have 'a legal interest in requiring respect for international humanitarian law by other States, even if they are not a party to the conflict (see the commentary to Rule 144)' (p. xxxix).[65] Therefore the Study deems all state practice in this regard to be relevant.[66]

3.2.3. Opinio juris

The legal obligation establishing a rule cannot just be derived from a general practice. In order for a practice to generate a legal obligation it is required that the practice is seen as an action based on the conviction that one is acting under a legal obligation. Again, on this issue different views are distinguished. Some argue that states must express the conviction that they are legally bound through their practice, while others maintain that there must be a belief that what they (states) have done is legally correct. Both theories have their strengths and weaknesses. The theory of consent is difficult in cases where states have not made any statement at all on an issue because they may not have been specifically interested or affected at that time. A solution to this dilemma is to say that the states in question have acquiesced to a rule; they have given a silent consent to it. Should you approach the issue from the perspective of what a state believes to be legally binding you are faced with the difficulty of how to measure that. It is close to impossible to assess what states believe. The only possible way to have an indication of such beliefs is to look at

62. The jurisprudence of the ICJ, in particular in the *Nicaragua* case, begs the question how often a violation of a norm is required in order to be able to conclude that the norm ceases to exist.
63. *North Sea Continental Shelf* cases, *supra* note 34, at 43, para. 74.
64. ILA Final Report of the Committee on the Formation of Customary (General) International Law, statement of principles applicable to the formation of general customary international law, Report of the Sixty-Ninth Conference, London, 2000, Principle 14, Commentary (d) and (e), at 736–7.
65. The text of Rule 144 reads as follows: 'States may not encourage violations of international humanitarian law by parties to an armed conflict. They must exert their influence, to the degree possible, to stop violations of international humanitarian law.' Supporting practice can be found in Vol. II, Chapter 41, Section A. The ICRC does indicate that some specific areas of international humanitarian law do 'specially affect' certain states, depending on the issue and the circumstances.
66. This seems a wide-ranging statement that does not provide answers to the questions it triggers, for example, whether the practice of specially affected states is accorded more weight than the practice of states not specially affected. It is also quite contrary to what was done in the *San Remo Manual*, in which only the practice of specially affected states, meaning seafaring states, was taken into account. L. Doswald-Beck (ed.), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (1995).

what a state says it believes through statements, military manuals, and national case law. Through this practice the belief of what is considered to be legally binding is transmitted. What in this respect is done on a regular, extensive, and repeated basis becomes the rule and the guiding conduct for all states.

The discussion by the ICRC explicitly leaves aside the issue of whether and how states can persistently object to the emergence of a customary rule binding on a particular state. It is generally argued that, even though customary law by nature applies to all states, the controversial persistent-objector principle can free them of their obligations under customary international law. The persistent-objector principle holds that if states utter express and consistent objections to the first developments contributing to the formation of a rule of customary international law at the right point in time, they can avoid being bound by that rule by virtue of being a persistent objector. However, it is unlikely that this position can be maintained when the rule, after its inception, has been established as a rule of customary international law. Some commentators hold it to be impossible for a state to claim persistent-objector status in the case of a norm of *jus cogens*, while others deny that the concept exists in international law in the first place. The notion of persistent objection was considered a controversial topic, and its existence as a doctrine under international law is not uncontested. Therefore the ICRC study took no view on the legal possibility of the concept of persistent objector (p. xxxix).[67] If, however, the Study's point of departure is consent, an assessment of the persistent-objector concept is unavoidable.

Although in principle state practice and *opinio juris* are two separate elements contributing to the formation of a rule of customary international humanitarian law, it turns out that they are very difficult to separate in practice. In fact the ICRC found that often 'one and the same act reflects practice and legal conviction' (p. xl). In identifying a rule of customary international humanitarian law an abundance of available state practice makes it less necessary to demonstrate the existence of separate *opinio juris*, since the latter is often contained within the practice. On the other hand, however, when there is little, or only ambiguous, practice to provide evidence to a rule, it is essential to identify *opinio juris* in order to decide whether the practice in fact establishes a rule of customary international humanitarian law. Omissions and abstentions from certain conduct constitute a particular problem in this respect.

4. The product: contents, comments, and criticism

4.1. What you can(not) find in the Study

The foreword of the Study, emphasizing the need for it, its timeliness, and the challenges that lie ahead, is followed by the introduction that outlines the mandate,

67. For more information on this issue see L. Condorelli, 'Nuclear Weapons: A Weighty Matter for the International Court of Justice', (1997) 316 *International Review of the Red Cross* 9; J. Currie, *Public International Law* (2001), 176; H. Thirlway, 'The Sources of International Law', in M. Evans (ed.), *International Law* (2003), at 117; M. Villiger, *Customary International Law and Treaties* (1997), at 35; ILA Final Report, *supra* note 64, commentary (b) to principle 15.

https://doi.org/10.1017/S0922156507004840 Published online by Cambridge University Press

drafting history, and purpose of the Study. Additionally, the introduction details the scope and organization of the Study and the way in which the elements of customary international law were assessed for the purposes of the Study. The reader then dives straight into the substance of the rules, starting with Rule 1 on the distinction between civilians and combatants as contained in chapter 1 of part I. Parts I to VI of the Study deal respectively with the principle of distinction, specifically protected persons and objects, specific methods of warfare, weapons, treatment of civilians and persons *hors de combat*, and implementation. The parts are divided into 44 chapters that together cover the 161 rules of customary international humanitarian law identified by the Study.

The Study is not exhaustive in nature, nor was it intended to be. Some issues were, for a number of reasons, not included. For example, chapters on general principles, identification, or occupation are missing. The Study specifically emphasizes treaties not universally ratified, such as the Additional Protocols, the Hague Convention for the Protection of Cultural Property, and specific conventions on the use of weapons, because that was considered more pressing than universally ratified treaties such as Geneva Conventions. Topics that might be included in future updates of the Study are, for example, the Martens Clause, identification of specifically protected persons and objects, and civil defence.

In addition, a number of topics that have been included in the Study are revealed as requiring further clarification.[68] The definition of 'civilians' in non-international armed conflict has not been clarified in practice or treaty law (Rule 5, p. 19). Although the protection of civilians is often mentioned in treaties, there is no definition of who is included in this category. It is particularly unclear in the case of members of armed opposition groups and in the case of civilians who become engaged in the armed conflict. Consequently, it is equally unclear whether individuals in captivity who are categorized as such should or should not be granted prisoner-of-war status.

The concept of direct participation in hostilities is also far from transparent. Although some human rights bodies have distinguished between 'direct' and 'indirect' participation (Rule 6, pp. 22–3),[69] 'a clear and uniform definition of direct participation in hostilities has not been developed in State practice' (Rule 6, p. 23). Civilians lose their immunity from attack when they engage, or directly participate, in an armed conflict; however, it is not clear exactly when that is. The temporal scope or the acts that constitute direct participation have not been identified.[70] In dealing with crimes against persons taking no active part in hostilities, the ICTY

68. Conference transcripts, statement J.-M. Henckaerts (on file with author).
69. See for instance the Report by the Special Representative of the Commission of Human Rights on the Situation of Human Rights in El Salvador, UN Doc. A/38/53, 22 November 1983.
70. See further J. F. Quéguiner, 'Direct Participation in Hostilities under International Humanitarian Law', Working Paper, 2003, International Humanitarian Law research initiative 'Reaffirmation and Development of IHL: Direct Participation in Hostilities under International Humanitarian Law', Program on humanitarian policy and conflict research at Harvard University (the 'Alabama Process'); see http://www.ihlresearch.org/portal/ihli/alabama.php.

trial chamber in the *Tadić* case stated that

> it is unnecessary to define exactly the line dividing those taking an active part in hostilities and those who are not so involved. It is sufficient to examine the relevant facts of each victim and to ascertain whether, in each individual's circumstances, that person was actively involved in hostilities at the relevant time.[71]

This approach was also taken by the United States, which includes the following paragraph in its naval handbook:

> Direct participation in hostilities must be judged on a case-by-case basis. Combatants in the field must make an honest determination as to whether a particular civilian is or is not subject to deliberate attack based on the person's behaviour, location and attire, and other information available at the time.

In 2003 the ICRC started a series of expert consultations to explore further and identify the scope and legal consequences of the concept of direct participation (p. 23, n. 137).[72]

The issue of qualification of a person as a civilian in case of doubt is related to the concept of direct participation and requires further investigation into its complexities. Additional Protocol II to the Geneva Conventions (APII) offers a solution by stating that in case of doubt a person should be qualified as a civilian; however, since this provision of APII was the object of a number of state reservations and declarations, the Study could not draw any conclusion as to the customary nature of this rule.

4.2. Vexing issues

The following section aims to provide an overview of some critical issues in relation to the Study that consist either of general comments or of detailed concerns. As previously discussed, much criticism has been ventilated as regards subjects that are missing from the Study's content or issues that were not properly addressed or clarified to a satisfactory level. In addition, the basis on which the assertion of rules has been made is subject to query. In particular, certain sources, such as military manuals, are often deemed unsuitable to serve as a source of evidence for the Study, since they are considered to be an expression of policy and not necessarily of what is believed to be the law. This criticism has received firm rebuttal from the authors[73] and holds less authority than arguments related to, for example, the density of practice from which some rules have been derived or the failure to include deviant practice. A striking example in this respect is that, despite the Study's intention of including worldwide state practice, the analysis of statutory limitation of international crimes, commencing with Rule 160,

> does not represent all legal systems and case law on this aspect. For instance, its survey on domestic provisions on the non-applicability of statutory limitations to

71. *Prosecutor v. Tadić*, Opinion and Judgement, Case No. IT-94–1, T. Ch. II, 7 May 1997, at para. 616.
72. The first two expert meetings were convened on 27–9 January 2003 and 25–27 June 2004 respectively. The Third Informal High-Level Expert Meeting on Current Challenges to International Humanitarian Law took place in Montreux, Switzerland, on 22–4 May 2006.
73. Henckaerts, for example, issued a firm rebuttal in his '*Customary International Humanitarian Law*: A Response to US Comments', (2007) 89 *International Review of the Red Cross* 473.

https://doi.org/10.1017/S0922156507004840 Published online by Cambridge University Press

> international crimes failed to include such provisions contained in Latin American legal systems, except for Cuba. In addition, the ICRC study fails to include deviant state practice on this matter.[74]

Some doubts regarding the customary nature of specific rules in the Study stem from the belief that the legal reasoning based on the evidence used to support a rule is not persuasive enough at all times to affirm a rule of customary international humanitarian law. For example, Rule 108 of the Study, granting states the right to deny mercenaries combatant or prisoner-of-war status, could have alarming consequences, to which Guantánamo Bay bears witness.

> If Rule 108 is truly a rule of customary law, then it applies to all states, including parties to the Geneva Conventions who are not parties to Additional Protocol I. Rule 108 thus implies that specific provisions of the 1949 Geneva Conventions can be altered not only through the amendment process of the conventions themselves, but also through subsequent customary practice.[75]

Another point of contention that has been identified is the use of certain terminology and the way in which the rules of the Study are phrased: the language of the Study differs in many instances from treaty language. On the one hand this practical approach seems reasonable and in fact it keeps simple what is simple by e.g. calling captives what they are: 'persons deprived of their liberty' (chapter 37, p. 428). On the other hand terms used such as 'humane treatment' are not clarified, leaving ambiguity regarding the actual implementing treatment.[76] Not to mention the difficulties that arise while applying and interpreting the law when a codification of customary international law rules applies such different wording from the simultaneously applicable treaty body of law.

In explaining this approach in formulating and articulating, the authors of the Study indicated that they concluded their formulations on basis of the actual state practice that was found, and in fact the language of that practice differed substantially from treaty language.[77] For instance rule 42 addresses potential attacks on works and installations containing dangerous forces (Rule 7, p. 25) and is related to the protection of civilians. Dams, dykes, and nuclear power plants may not be the object of any attack if they are civilian objects; however, this immunity from attack is revoked when they become military objects. Additional Protocol I deals with this in a very elaborate and complicated rule[78] which has not been ratified by a number of states. The Study identifies the grave concerns states have in relation to such attacks and embedded these considerations in the formulation of Rule 42, which is considered to be a norm of customary international humanitarian law applicable in both international and non-international armed conflicts. Rule 42 cannot be found

74. R. A. Kok, *Statutory Limitations in International Criminal Law* (2007). Kok refers to Vol. I, pp. 614–18, and Vol. II, pp. 4044–73, of the ICRC Study.
75. Statement by Lt. Col. B. Carnahan, launching the conference on the ICRC Study, 'The Reaffirmation of Custom as an Important Source of International Humanitarian Law', Washington College of Law, 28 September 2005.
76. Particular concern is raised with respect to individuals who are subject to interrogation while in captivity. What type of interrogation techniques are or are not considered acceptable under 'humane treatment'?
77. Statements at launching conferences of the Study, e.g. 'The Reaffirmation of Custom as an Important Source of International Humanitarian Law', *supra* note 75; Canadian Red Cross and McGill University, '*Customary International Humanitarian Law*: Challenges, Practices and Debates', Montreal, 29 September–1 October 2005.
78. Additional Protocol I, 1977, Art. 56, Protection of Works and Installations Containing Dangerous Forces.

https://doi.org/10.1017/S0922156507004840 Published online by Cambridge University Press

in treaty law and in fact appears less restrictive than the formulation of Article 56 of Additional Protocol I.

Another example relates to the use in two different contexts of the term 'combatant' in a number of rules in the Study. First, Rule 1 (p. 3) talks about combatants in referring to the fact that one participates in an armed conflict and therefore is a combatant. In this sense the term has a broad meaning that relates to the action, the activity. In the second context, Rule 106 (p. 384) refers to the combatant as indicating a certain status. The problem with this specific use of the term 'combatant' is that a word is employed that has legal connotation and significance. The original term used to indicate the first context was 'fighter'; by mixing two different concepts the meaning has become unclear.

A third example to illustrate that some rules might be phrased with more clarity is Rule 137, which prohibits the participation of children in hostilities. The commentary that follows the rule elaborates on the age limit that is put on the participation in hostilities and states that 'there is agreement that it should not be below 15 years of age' (p. 488). There is no mention of age in the rule itself, although this is an important piece of information that could have been made clear in the rule.

It is important to assess the forum through which states can react to the findings of the Study. So far, most reactions have come from scholars and relate to the methodology and conclusions drawn. However, emerging reactions from a military perspective often focus on the accuracy of the formulation of rules relating to weapons. In addition, there appears to be quite some disagreement with the theory that many rules of Additional Protocol I, although differing in wording and scope in some instances, now also apply as customary rules to non-international armed conflict, particularly in consideration of the fact that states specifically did not sign the protocol. These reactions are to be noted seriously as they, directly or indirectly, voice the challenge by states to certain rules. It is in the reactions of states to the Study that we can find affirmation or denial of the existence of a rule of customary international humanitarian law. Also, the question is raised of whether customary law is not in fact an implementation of treaty obligations. The next section deals with the interplay between these two sources of law – treaty rules and rules of customary law – and pays special attention to criticisms related to the assessment of rules on weapons.

4.3. The relationship between treaty rules and rules of customary international humanitarian law and some specific issues relating to weapons

Customary international law and treaties have a particular effect on each other. The relevance of treaties to the interpretation and assessment of customary international law is that treaties give expression to the view of states on certain rules.[79] Treaties can reflect customary international law when they codify already established customary international law. On the other hand, the treaty can be the normative framework,

79. As is the case in assessing the weight of a particular resolution, the weight of a particular treaty is assessed by looking at 'reservations and statements of interpretation made upon ratification' (p. xliii), but also at the widely ratified or universal status of treaties such as the UN Charter (p. xliii).

the first step, stimulating the creation of a new rule of customary international law. The jurisprudence of the ICJ, as summarized by the ILA, provides four ways in which customary international law and treaty law influence each other:

> [I]t [a multilateral treaty] can provide evidence of existing custom; it can provide the inspiration or model for the adoption of new custom through State practice; it can assist in the so-called 'crystallization' of emerging custom; and it can even give rise to new custom of 'its own impact' if the rule concerned is of a fundamentally norm-creating character and is widely adopted by States with a view to creating a new general legal obligation. (pp. xliii–xliv)

By using the widespread ratification of treaties as indicative evidence that they should be appraised in conjunction with other state practice[80] giving evidence to the existence of a rule, the ICRC is vigilant in its approach (p. xliv).

After the publication of the study, much of the debate reflected in publications and held among military practitioners and legal advisers attending international conferences focused on practical issues such as weapons, since the Study draws conclusions on issues related to weapons whose customary nature is subject to debate. The discussion of some issues related to weapons might further clarify how the ICRC dealt with the relation between treaty rules and rules of customary international humanitarian law and how they have been formulated.

Practice involving exploding bullets (weighing less than 4 g), which have been banned by the St Petersburg Declaration of 1868, shows that this type of bullet has in fact been used and there have been no objections.[81] Therefore, according to the assessment of the ICRC, the rule[82] that has developed in custom is slightly different from the treaty rule. In effect, according to formulation in the customary law study, the anti-personnel use of exploding bullets is prohibited; however, the anti-material use is nowadays accepted.

The second example concerns the use of land mines. The 1997 Ottawa Convention banning the use of anti-personnel mines[83] is not universally ratified. Even though the majority of states are party to the Ottawa Convention and as such are bound by the prohibitions under this convention, there is sufficient official contrary practice[84] that the use of land mines cannot clearly be considered as prohibited under customary international humanitarian law. Therefore the rule was not at this stage found to be customary. With regard to specific restrictions to the anti-personnel and

80. It is said that practice contributing to a rule of customary international law should per se be practice of states not party to a treaty since the practice of states parties does not reflect custom but is practice under treaty obligations. It is true that the first type of practice is a good indicator of (emerging) customary rules, but it could not be the only form of practice that should be taken in account, since custom would then be a rule created by a minority of states that is binding on all states. 'A rule of customary international law is only emerging when there is acquiescence and positive practice.' Statement by L. Doswald-Beck, September 2005 (on file with author).

81. The introduction of exploding anti-aircraft bullets in the First World War did not trigger any protest (pp. 272–3).

82. The text of Rule 78 reads as follows: 'The anti-personnel use of bullets which explode within the human body is prohibited.'

83. 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on Their Destruction.

84. Non-signatory states to the convention, such as China, Finland, India, South Korea, Pakistan, Russia, and the United States, consider that they are allowed to use anti-personnel mines (p. 282).

anti-vehicle use of land mines there are a number of provisions such as Protocol II to the Convention on Certain Conventional Weapons (CCW) and the amended Protocol II to the CCW. The ICRC did not assign all these detailed rules as customary, but at the same time it is noted that there is much concern among states at the way in which land mines are used. The ICRC therefore included a general rule in the study indicating that all steps must be taken to limit their indiscriminate effects.[85] The same can be said for the rules in the Study that deal with the issue of the placing and removal of land mines.[86] These rules are not the same rules as can be found in treaty law since they are less detailed; however, they more or less summarized the many instances of practice that can be found dealing with this issue.

The third and last example concerns Rule 86,[87] dealing with blinding laser weapons. The use of these weapons was outlawed by Protocol IV to the CCW, adopted in 1995. This prohibition was found to be a rule of customary international law even though the protocol was only adopted ten years ago. This particular example illustrates that the formation of custom does not require age-old practice but can develop rather quickly.[88] This can also be seen with regard to developments regarding, for example, peacekeeping forces or the prohibition of crimes of sexual violence.

4.4. Practicalities: the user-friendliness of the Study for the practitioner

From the perspective of a researcher or practitioner some criticism of the user-friendliness of the Study would be justified, as it is not necessarily easy to retrieve information from it. The first point relates to the overall relation between appendix and preceding text, that could use further clarification. All sources that were used throughout the study can be retrieved from the appendices to Volume II. However, since there is no reference to where they are used in the Study, it is impossible to assess the extent to which state practice from a specific country contributes to which rules. This could be the indirect result of having national reports that were then merged into the international reports from which the ICRC later again extracted national practice. Another slight hindrance when using the Study is that the appendices contain long lists of resolutions and cases, for which there is no index. It is near impossible to find a particular resolution, for example a resolution on child soldiers as adopted by the European Parliament. In addition, it is also not possible to assess the effect and contribution of specific situations to the formulation of a rule. For example, one could not find information by searching under the term 'Kosovo'. A final practical point is that the authors have, either in writing or in statements,[89]

85. The text of Rule 81 reads as follows: 'When landmines are used, particular care must be taken to minimize their indiscriminate effects' (p. 280).
86. These are Rule 82, 'A party to the conflict using landmines must record their placement, as far as possible', and Rule 83, 'At the end of active hostilities, a party to the conflict which has used landmines must remove or otherwise render them harmless to civilians, or facilitate their removal' (pp. 283, 285).
87. The text of Rule 86 reads as follows: 'The use of laser weapons that are specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision is prohibited' (p. 292).
88. See also *North Sea Continental Shelf* cases, *supra* note 34, at 44, para. 74.
89. When launching conferences or in individual articles (Henckaerts).

https://doi.org/10.1017/S0922156507004840 Published online by Cambridge University Press

drawn main conclusions from the Study that have not been clearly articulated as such in the Study itself. They can be found implicitly or in a few sentences scattered throughout the introduction; it would have been useful to have them clearly and separately identified.

5. Conclusions

5.1. The contributions of the Study to international humanitarian law

If one were to assess the chief contributions of the Study to international humanitarian law, the following three crucial points, as a bare minimum, should be identified. The first evident achievement of the ICRC in this respect is that, finally, a written document identifying rules of customary international humanitarian law and their scope of application to international or non-international armed conflicts has been produced. Although not all the rules identified by the ICRC are universally accepted, there seems to be a widespread practice and acceptance of basic rules and principles, such as rules relating to the conduct of hostilities or the treatment of persons in the power of a party to the armed conflict.

Second, a comparison of the rules that the Study deems applicable to international armed conflicts and non-international armed conflicts shows that the normative framework for non-international armed conflicts is much more detailed in customary law than it is under treaty law. State practice seems to have substantially developed rules and obligations that have gone beyond existing treaty law and increased the rules applicable to non-international armed conflicts.

The third distinct advantage offered by the Study relates to the difficulties in qualification of conflicts. Qualification of the type of conflict – international or non-international – triggers the appropriate regime of protection under international humanitarian law. The protective regime applicable to international armed conflicts is much broader than the protective rules available for non-international armed conflict. In practice, the decision of how to qualify a conflict can be very difficult to make, while the past decade has shown that the majority of conflicts nowadays are internal in nature. The Study seems to indicate that a common standard of behaviour has developed that applies to all armed conflicts regardless of whether the conflict in question is international or non-international – of the 161 rules that the study contains 155 are declared to apply to both international and non-international armed conflicts. There seems to have developed an understanding of forms of behaviour that are required from a party to an armed conflict and others that are absolutely prohibited. The particular importance of this assessment is that the level of protection that is provided to parties involved in an armed conflict no longer depends on this complex appraisal of the nature of armed conflict.

5.2. Closing remarks

The Study can be considered to be an epic work whose conclusions are not always accepted. Faced with its magnitude, some choose to narrow their focus and highlight a specific part or number of rules as the object of their criticism. Many reactions so far to the Study centre on the question of whether it is justifiable either to

https://doi.org/10.1017/S0922156507004840 Published online by Cambridge University Press

criticize or to applaud the method of assessment employed by the ICRC. While some might consider the debate on methodology a capricious fashion among scholars, the discussion is still very much alive, since it touches on the grey area between law, policy, and policy-oriented interpretation of the law.

For a comparative perspective, the milestone decision on jurisdiction of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia in the *Tadić* case[90] gave rise to similar dialogue reflecting this train of thought.[91] In the *Tadić* case the grounds for the defendant's challenge to the jurisdiction of the ICTY offered ample opportunity for the Tribunal to make statements on some important questions of law and to develop the law further, in particular extending the international humanitarian law applicable to non-international armed conflict. However, the decision received criticism, mostly related to the methodology it employed to arrive at its just conclusions.[92] The Tribunal's at first apparently cautious approach develops a very broad assessment of international humanitarian law[93] to elucidate the basis of its legal findings, while in the end substance is tackled in accordance with the Tribunal's mentioned objective by the use of a 'reverse methodology'.[94] This tendency seems to have been followed in the Study, at the risk of amalgamating *lex lata* and *lex ferenda*, in pursuit of a lofty purpose.

There was also criticism for the incremental vagueness of the Tribunal's statement on 'general principles'; however, the comparison with the Study ends here. The Study should be commended for its effort to articulate the rules with clarity, while 'the whole exercise of identifying general customary law has become immensely complex, and correspondingly uncertain; and in so many areas it is not just a question of enquiry but also of a policy-choice'.[95] That the fine line between law and policy is not always evident does not appear so odd when one comes to realize that law is a social phenomenon which originates from within society and which is in constant need of an active moral conscience that compels it to develop further in accordance with the interests of the people it governs.

Impossible as it is to write a thorough review of the study as a whole in a single article it remains essential to observe simultaneously results and methodology. While making use of the traditional two-element approach of state practice and *opinio juris*, the study also contains practice other than state practice. However, it

90. *Prosecutor v. Tadić*, *supra* note 49.
91. 'Like the Nuremberg and Tokyo trials, the trial of the first defendant in the custody of the new ad hoc war crimes tribunal for the former Yugoslavia is foundational in that it seeks not only to effect legal justice for Tadić but to reinvigorate the Nuremberg principles, and indirectly, the rule of law. It is political insofar as intended to deter future war crimes, make reconciliation possible in the former Yugoslavia, and help restore peace.' J. E. Alvarez, 'Nuremberg Revisited: The Tadić Case', (1996) 7 EJIL 245, at 245.
92. For a thorough analysis see C. Greenwood, *supra* note 50, at 275–6, discussing aspects of the development of customary international humanitarian law. See also D. Turns, 'At the "Vanishing Point" of International Humanitarian Law: Methods and Means of Warfare in Non-international Armed Conflicts', 2002 *German Yearbook of International Law* 45, at 115.
93. See Alvarez, *supra* note 91, at 277: '[I]t discussed at length the evolution of customary international law rules relating to the conduct of hostilities . . . in internal conflicts, notwithstanding that this body of substantive law was not relevant to the *Tadić* case'.
94. Turns, *supra* note 92, at 130.
95. R. Y. Jennings, 'What Is International Law and How Do We Tell When We See It?', (1981) 37 *Schweizerisches Jahrbuch für internationales Recht* 59, at 67.

is left unclear what influence is accorded to contributing other practice on the formation of a rule of customary international humanitarian law. It is regrettable that, whereas the study contains detailed information on how weight is attributed to, for instance, resolutions from international organizations, this is not specified at all for non-state actors or persistent objectors. It seems a less important question in situations where state practice overwhelmingly points in the same direction; the issue becomes more pressing, however, when there is little state practice available and the weight accorded to other practice has consequence for the formation of a rule of customary international humanitarian law. The present author maintains that a view of the content of the 'black box' would have made a stronger case for general acceptance of the innovative and most welcome rules put forward by the ICRC.

I would venture to conclude that anyone with a genuine interest in the process of law creation would immediately identify the ICRC Study as an impressive example of the influence exercised by a unique institution that, by virtue of its special status in international law, with certain authority affects the process of discourse on the law. If anything a primary objective of the ICRC Study has been to instigate further debate and dialogue, and to identify areas in the law that require clarification and further development. The Study is beyond doubt impressive and the first, most wide-ranging word on this particular topic; however, it should certainly not be the last. Although the Study offers an invaluable reference guide on actual practice it should not be mistaken for a legal document but understood as a statement of the law. It is an important tool in a worldwide process of discourse on the law that should lead to more insights into the current state and the process of the formation of customary international humanitarian law. The Study will, hopefully, find its way to the bookshelves of many practitioners, policymakers, and military specialists, where it may provide guidance and its statements may stimulate the expansion of the protection that is provided to those unfortunates exposed to the brutalities of warfare.

*Eloisa Newalsing**

Giorgio Sacerdoti, Alan Yanovich, and Jan Bohanes (eds.), *The WTO at Ten: The Contribution of the Dispute Settlement System*, Cambridge, Cambridge University Press, 2006, ISBN 9780521863148, 531 pp., £60.00 (hb).
doi:10.1017/S0922156507004852

The World Trade Organization (WTO) dispute settlement system involves a unique method for dispute resolution in international law, and it has become an influential point of reference. Irrespective of their proficiency in WTO law, many international

* Ph.D. candidate, Leiden University; visiting scholar, Asia Pacific Centre for Military Law, Melbourne University. With thanks to Horst Fischer, Jan Klabbers, and Marten Zwanenburg for their insightful comments. This work forms part of the project 'The Formation of Customary International Humanitarian Law Applicable to Non-international Armed Conflicts', funded by the Netherlands Organization for Scientific Research.