THE ICRC CUSTOMARY LAW STUDY: A SMALL STEP TOWARDS MORE HUMANE WARTIME PRACTICES?

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The International Committee of the Red Cross Customary Law Study[1] is a 5,000 page, seven-kilogram document reporting on the current status of customary international humanitarian law. It was published in 2005 after 10 years of extensive research and consultation with experts from nearly 50 countries. Despite these herculean proportions, the study has been the subject of serious criticism by governments, international lawyers and judges, while receiving lukewarm acceptance in other contexts. As customary law is the most significant source of international law outside of treaties – given its capacity to bind countries despite their non-ratification of any protocol – and as the ICRC plays such a central role in the general administration of international humanitarian law, such a report has the potential to be extremely significant. In light of this, critical evaluation of this study is crucial, and will be carried out here having regard to three key aspects:

- The study's methodology, in particular the choice of legal materials in establishing state practice and *opinio juris*[2];
- Its legal conclusions, using its rule against bombardment[3] as a case study for the robustness of its results; and
- Critical reception of the study, considering the responses of states and legal professionals, which in turn draw upon practical, jurisdictional, institutional and motivational observations about the study.

METHODOLOGY

The ICRC project was bound to encounter difficulties from the start, as customary international law is an inherently contentious area, laden with "deficiencies, loopholes, and ambiguity,"[4] and resting "not on a rock-solid natural law basis

of divine principles, but on a fabric of rational acts, woven through a multiplicity of relations over time".[5] The resulting ambiguities have led some academics to label customary international law as "doctrinally incoherent",[6] and "behaviourally epiphenomenal",[7] the latter phrase coined to describe the game theory view that what appears to be states' compliance with international law is in fact nothing but an exercise in self-interest, with co-operation occurring only where it is advantageous to all parties.[8] That view, however, tends to discount the importance of *opinio juris* (see definition below) as a legitimating force in customary international law, while the concerns about ambiguities in the law are exactly what this study aims to address.

Given the diversity of opinions that exist on customary international law, the theoretical assumptions that form the backdrop of the ICRC's approach to the study are hugely important – if not determinative – as to the validity of its conclusions. Some aspects of this have not been contentious, such as the Statute of the International Court of Justice's characterisation of customary international law as "a general practice accepted as law,"[9] or its widely accepted dual criteria of state practice (*usus*) and the belief that such practice is required, prohibited or allowed, depending on the nature of the rule, as a matter of law (*opinio juris sive necessitatis*).[10]

Beyond these settled principles, the ICRC was faced with a theoretical decision between adopting an *inductive* (or traditional) approach to establish the existence of customary international law rules, or a *deductive* (or modern) one.[11] The inductive approach tends to emphasise state practice, and was evident in *Lotus* where the Permanent Court of International Justice inferred a general custom about objective territorial jurisdiction over ships on the high seas from previous instances of state action and acquiescence; whereas the deductive emphasises *opinio juris* as it focuses primarily on statements rather than actions, and was heavily relied on in the Merits decision in *Nicaragua*.[12]

Though claiming to adopt an approach that considers state practice and *opinio juris* in equal measure, the ICRC study in reality appears to lean toward a deductive approach, with extremely little evidence of state practice that could not equally be said to be evidence of *opinio juris*. While some influential theorists have endorsed such methods as helpfully progressive,[13] ultimately it is states' acceptance of the study that will determine its future influence. Here we see scepticism of the way the study conflates the two criteria, with the United States retorting that *opinio juris* cannot "simply be inferred from practice".[14] Henckaerts (co-author of the study) responds to this with the justification that without a clear mathematical threshold of how "extensive and uniform" state practice has to be, the density of practice shown will depend instead on the subject matter, and therefore sparse practice is no barrier to establishing a customary rule if its relevance arises only sporadically:[15] an argument with some juridical support,[16] but still lacking wholesale endorsement by states.

The practical result of all this is that the selection of materials used by the ICRC to establish customary international law rules is arguably dubious, with an almost exclusive focus on 'verbal' materials, such as military manuals and treaties, at the expense of materials outlining 'physical' state practice. The use of treaty texts is perhaps the least problematic of these, as the ICJ considered in the *North Sea Continental Shelf Cases* that the degree of ratification of a treaty could be relevant to the assessment of customary international law.[17] The use of military manuals, however, is a far more vexed issue, for two key reasons: the first is that

manuals are often relied on in the study as a substitute for physical state practice, posing challenges for countries such as Germany, whose military manual[18] is extremely detailed, but whose military engagement since 1945 has been approximately zero.[19] Secondly, the use of military manuals to establish *opinio juris* is also questionable, as practice that is reflected in manuals is often based simply on government policy, and not a sense of a legal obligation, thus falling short of the threshold to give rise to a customary rule.[20] Proponents of the study retort that military manuals constitute a useful second-best option where state practice is limited or non-existent, and that many of these so-called verbal acts in fact describe practice in actual wars anyhow;[21] but this assumes – rather than demonstrates – compliance on the battlefield, and also fails to disprove the *opinio juris* objection.

LEGAL CONCLUSIONS

The vast majority of the Geneva Conventions' provisions are considered to be customary,[22] and given that these conventions anyhow enjoy near universal ratification (195 parties), the study focussed instead on issues arising in treaties that are only partially ratified, in particular the Additional Protocols, the Hague Convention for the Protection of Cultural Property, and certain conventional weapons treaties. Unable to individually assess all 161 rules laid down by the study, this article will instead focus on just one as a case study: Rule 13. The rule is given in the following terms:

> "Attacks by bombardment by any method or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects are prohibited." [23]

This mirrors the wording of Article 51(5)(a) of Additional Protocol I (hereafter 'API'), which forbids as indiscriminate "an attack by bombardment by any method or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects".[24] Similar wording was also inserted into the draft of Article 26(3)(a) of Additional Protocol II (hereafter 'APII'), however this version of the provision failed to amass enough votes.[25]

On the face of it, it would appear that this rule has gained near-universal consensus and can reasonably be considered to be customary law. However, such a conclusion overlooks several factors, the first of which is the extent of ratification of API. Anderson describes this as the "elephant in the room", the fact that the study tends to proceed as if API has been universally accepted, whereas at the time of the study's publication, it in fact had 163 parties. This might seem like a good enough majority, but considering that the list of 29 non-parties includes India, Indonesia, Pakistan, Iraq, Iran, Israel, Turkey and the United States, and that the reservations made even by ratifying countries are often "dauntingly large",[26] the propriety of simply importing the language of API provisions to be used as putative rules of customary law should be called into question.[27]

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Secondly, the evidence supposed to support the existence of the rule is often of questionable value. As a preliminary observation, not a single piece of evidence forming the "Practice Relating to Rule 13" relates to any physical state practice, a problem discussed above in the methodology section of this article. Specific pieces of evidence cited are intrinsically flawed too, such as the US Air Force Pamphlet[28] which quotes Article 24(3) of the 1923 Hague Rules of Air Warfare (cast in substantially similar terms to Art. 51(5)(a) of API) but states that "they do not represent existing customary law". The study goes on to cite a US proviso to the area bombardment rule stated at the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, that the words "clearly separated" meant "at least sufficiently large to permit the individual military objectives to be attacked separately",[29] a semantic sleight of hand which shifts the test from an objective consideration of separation to a subjective consideration of distinct targetability, which hinges, amongst other things, on the targeting capabilities of the weaponry in question. This fairly self-serving definition was also adopted by three more major world powers at the conference – Canada, Egypt, and the United Arab Emirates – and these endorsements too are cited by the study, misleadingly, as supporting state practice for Rule 13.

Finally, in concluding that Rule 13 applies even in non-international armed conflicts, the study was forced to concede that APII does not contain the rule (as mentioned above), but asserted in the alternative that the rule was inferentially included as it forbids making civilian populations the object of attack – a prohibition cast in terms reminiscent of the canonically accepted principle of distinction. However, to simply treat the prohibition on

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area bombardment as coextensive with the principle of distinction is poor reasoning both on inductive and deductive grounds, and goes directly against the clearly demonstrated intentions of the framers in rejecting the draft provision containing that exact prohibition. Finally, the justification that "it has been included in other instruments pertaining also to non-international armed conflicts"[30] does little to salvage the rule in light of the foregoing considerations, especially given that two of these are bilateral agreements, and the third is Amended Protocol II the Convention on Certain Conventional Weapons, which has only five parties that are not also parties to APII.

CRITICAL RECEPTION

The final aspect that demands evaluation is the critical reception of the study. Interestingly, seven years after the study's publication, the US remains the only state to have issued an official response to the findings, leading some critics to argue – perhaps over-simplistically – that this suggests a tacit acceptance on the part of all the other states.[31] Yet the critical responses by lawyers and academics have been diverse and insightful, and can help to illuminate the impact on international humanitarian law the study will have in years to come. Before considering these critiques, it is worthwhile noting that many commentators have indeed praised the study as "comprehensive, high-level research"[32] and "a remarkable feat and a significant contribution to scholarship and debate";[33] and that the study has also been invoked by both advocates and judges in ICTY jurisprudence, for instance in *Hadžihasanović.*[34]

Considering the study from an institutional standpoint, Thürer takes issue with the propriety of the ICRC's dual role as codifier and advocate of international humanitarian law, arguing that the fact that the research is presented as an exercise in 'finding' the law is

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suspicious at best and misleading at worst,[35] with Parks also agreeing that this conflict of interest may have led to the study placing too much weight on its own official statements as relevant to support the customary nature of a rule.[36] These concerns are valid in part, as a body that is invested in the progressive development of international humanitarian law will likely be motivated to do more than merely 'tidy up' the law;[37] however the depth and breadth of scholarly input that went into the study should go some way to assuaging these concerns. Perhaps more defensible is the critique that the ICRC's stated humble expectation that "governmental experts [will] use the study [merely] as a basis for discussions on current challenges to international humanitarian law" is disingenuous and risks provoking a backlash, as it suggests a certain detached neutrality from the project that is clearly artificial.[38]

Other critiques hone in on the research process itself. Anderson labels the study an "edifice of scholasticism"[39] that lacks significant practical value, as its exhaustive cataloguing of the views of many smaller countries might muddy the waters of what constitutes actual state practice. He also notes a bias in the selection of experts for the various national consultations, none of whom "bring to the table any significant scepticism about the desirability of an expanding reach for customary rules".[40] This concern is further bolstered by Meron's observation that expert committee disbanded in 1999 prior to the actual writing of the report,[41] leaving the task of compilation essentially in the hands of Henckaerts and Doswald-Beck alone. These observations may go some way towards explaining the over-simplification evident in the framing of much of the state practice material, and the tendency for the study to assert rules as unqualified customary norms where the evidence is often more controversial. In any case, the study was always intended to be only a starting point for discussion, and now forms the basis of the ICRC's online customary international humanitarian law database:[42] despite its flaws, and with some deliberative input from states and other international actors, the study's rules may yet manage to crystallise as hard and fast custom in years to come. Whether state practice will become more humane as a result remains to be seen.

DESPITE ITS FLAWS, AND WITH SOME DELIBERATIVE INPUT FROM STATES AND OTHER INTERNATIONAL ACTORS, THE STUDY'S RULES MAY YET MANAGE TO CRYSTALLISE AS HARD AND FAST CUSTOM IN YEARS TO COME.

REFERENCES

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1. Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, 2 volumes, Volume I. Rules, Volume II. Practice (2 Parts), Cambridge University Press, 2005.
2. There are other methodological criticisms to be levelled at the study which will not be discussed here, such as its treatment of 'specially affected states'. See International Law Association (2000) "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, Principle 14
3. Rule 13, Henckaerts and Doswald-Beck, Volume II *supra* note 1.
4. Cassesse, A. (1986) *International Law in a Divided World*, at 285.
5. Norman, G. and Trachtman, J. (2005) "The Customary International Law Game", *The American Journal of International Law*, Vol. 99, No. 3 (Jul., 2005), pp. 541-580.
6. Ibid, at 541.
7. Ibid.
8. Engel, C. and Kurschilgen, M. (2011) "The Coevolution of Behaviour and Normative Expectations: Customary Law in the Lab", *Preprints of the Max Planck Institute for Research on Collective Goods*, Bonn 2011/32.
9. Statute of the International Court of Justice, Article 38(l)(b).
10. See for example, International Court of Justice, *Continental Shelf Case (Libyan Arab Jamahiriya v. Malta)*, Judgment, 3 June 1985, ICJ Reports 1985, pp. 29-30, at para. 27.
11. Roberts, A. (2001) "Traditional and Modern Approaches to Customary International Law: A Reconciliation", *The American Journal of International Law*, Vol. 95, No. 4 (Oct., 2001), pp. 757-791.
12. International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Reports 1986.
13. Tasioulas, J. (1996) "In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case", 16 *Oxford Journal of Legal Studies* 85; Kirgis, F. (1987) "Custom on a Sliding Scale", 81 *American Journal of International Law* 146.
14. Bellinger, J. and Haynes, W. (2007) "*A US Government Response to the International Committee of the Red Cross study Customary International Humanitarian Law*", International Review of the Red Cross, Volume 89 Number 866 June 2007.
15. Henckaerts, J-M. (2007) "Customary International Humanitarian Law: a Response to US Comments", International Review of the Red Cross, Volume 89 Number 866 June 2007.
16. Eg. In International Court of Justice, *The S.S. Wimbledon* (1923), PCIJ Series A, No. 1, pp. 1, 28, the PCIJ relied on two precedents only (Panama and Suez canals), to find that the passage of contraband of war through international canals was not a violation of the neutrality of the state.
17. International Court of Justice, *North Sea Continental Shelf Cases*, (1969) ICJ 13 at para 73.
18. Germany, *Humanitarian Law in Armed Conflicts – Manual*, DSK VV207320067, edited by The Federal Ministry of Defence of the Federal Republic of Germany, VR II 3, August 1992.

19. Anderson, K. (2005) “My Initial Reactions to the ICRC Customary International Humanitarian Law Study”, Kenneth Anderson’s Law of War and Just War Theory Blog (Nov 15th 2005).

20. Balgamwalla, S. (2005) “Review of Conference: The Reaffirmation of Custom as an Important Source of International Humanitarian Law”, Human Rights Brief 13, no. 2 (2006): 13-16, reporting on a speech given by Joshua Dorosin (Assistant Legal Advisor to the US) at that Conference.

21. Henckaerts, J-M. (2006) “ICRC’s Jean-Marie Henckaerts responds to my comments on ICRC Customary Law Study”, Kenneth Anderson’s Law of War and Just War Theory Blog (Jan 24th 2006).

22. International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports 1996, p. 226.

23. Rule 13, Henckaerts and Doswald-Beck, *supra* note 1.

24. Additional Protocol I, Article 51(5)(a).

25. CDDH, Official Records, Vol. VII, CDDH/SR.52, 6 June 1977, p. 134.

26. Anderson, *supra* at 26.

27. Balgamwalla, *supra* at 27.

28. United States, *Air Force Pamphlet 110-31, International Law – The Conduct of Armed Conflict and Air Operations*, US Department of the Air Force, 1976, s 5-2(c).

29. United States, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.31, 14 March 1975, p. 307, paragraph 50.

30. Rule 13, Henckaerts and Doswald-Beck, Volume II *supra* note 1.

31. Bugnion, F. (2004) “The International Committee of the Red Cross and the Development of International Humanitarian Law”, 5 *Chicago Journal of International Law* 191, 211-212.

32. MacLaren and Schwendimann, *supra* at 18.

33. Ibid.

34. *Prosecutor v. Hadžihasanović and Kubura (Appeal Judgment)*, IT-01-47-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 22 April 2008

35. Thürer, D. (2005) “The Democratisation of Contemporary International Law-Making Processes and the Differentiation of Their Application”, in Developments of International Law in Treaty Making 53 (2005).

36. Parks, W. (2005) “The ICRC Customary Law Study: A Preliminary Assessment”, *Proceedings of the Annual Meeting (American Society of International Law)* , Vol. 99, (March 30-April 2, 2005), pp. 208-212

37. Wolfrum, R. (2005) *Developments of International Law in Treaty Making*, Rüdiger; Röben, Volker (Eds.).

38. International Committee of the Red Cross, Customary law study enhances legal protection of persons affected by armed conflict, Press Release No. 05 / 17 (17 March 2005).

39. Anderson, K. (2005) “My Initial Reactions to the ICRC Customary International Humanitarian Law Study”, Kenneth Anderson’s Law of War and Just War Theory Blog (Nov 15th 2005).

40. Ibid.

41. Meron, T. (2005) “Revival of Customary Humanitarian Law”, *The American Journal of International Law*, Vol. 99, No. 4 (Oct., 2005), pp. 817-834.

42. International Committee of the Red Cross (2011) “ICRC database on customary international humanitarian law: new update”, ICRC Resource Centre, 18-11-2011 News Release 11/233.