Mistreatment of the Wounded, Sick and Shipwrecked
By The International Committee of the Red Cross Study
On Customary International Humanitarian Law
By
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I. Introduction

In 2005 the International Committee of the Red Cross (ICRC) completed a ten-year

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1 This article explores the rationale behind the International Committee of the Red Cross (ICRC) Study on Customary International Humanitarian Law, and discusses three of the study’s 161 rules. It does not, however, purport to provide a complete overview or analysis of the remaining rules. Cf. Yoram Dinstein, The ICRC Customary International Humanitarian Law Study, 36 Isr. Y.B. Hum. Rts. 1, 11 ¶ 21 (2006) (noting “[i]t is not proposed here to parse every Rule in the study.”); Robert Cryer, Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study, 11 J. CONFLICT & SECURITY L. 239, 263 (2006) (explaining that one piece or symposium can only begin to discuss issues raised by the ICRC Study). A preliminary draft of this article was submitted to Dr. Jean-Marie Henckaerts, one of the two co-authors of the ICRC Study for comment, but to date he has not responded.

2 There is some debate as to whether to give credit (and hence responsibility) for the ICRC Study on Customary International Humanitarian Law to the ICRC as an organization, or to its two authors, who led the study while working in the ICRC’s legal division. See infra notes 40-43 and accompanying text (discussing the credentials of the two authors of the ICRC Study). Although the ICRC Study was mandated by the International Red Cross and Red Crescent Movement (see infra note 39 and accompanying text), presumably funded by the ICRC, and has the ICRC logo on the book’s cover, spine and title page, the ICRC President, Dr. Jakob Kellenberger, is careful in his introduction to the book to slightly distance the ICRC from the Study, “[c]onsidering this report primarily as a work of scholarship … [and] respect[ing] the academic freedom both of the report’s authors and of the experts consulted.” 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INTERNATIONAL COMMITTEE OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW xi (2005). See also id. at xvi (noting that “[t]he ICRC’s Legal Division was assigned this difficult task and given the means to do a thorough job. Lavish means were not necessary … How then can such an investment be justified? Why devote large-scale resources ?”). Compare PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 16 n. 7 (Elizabeth Wilmshurst & Susan Breau eds., 2007) [hereinafter PERSPECTIVES ON THE ICRC STUDY] (noting that the disclaimer in the ICRC Study that it represents the authors’ work and should not be attributed to the ICRC “mirrors statements made in relation to the [Pictet] Commentaries [to the Geneva Conventions]”) with George H. Aldrich, Customary International Humanitarian Law – an Interpretation on behalf of the International Committee of the Red Cross, 76 BRIT. Y.B. INT’L L. 503, 504-05 (2006) (noting that the ICRC’s “credibility should not be jeopardized by mistakenly thinking that it is responsible for the conclusions of the study.… While the copyright to this study is held by the ICRC, its findings are solely those of [the two authors].”); Robert Cryer, Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study, 11 J. CONFLICT & SECURITY L. 239, 240 n. 5 (2006) (noting that “[t]he precise status of the study as an ICRC document is a little more complex than might be thought. … it is not a formal ICRC statement of views”); Theodor Meron, Revival of Customary Humanitarian Law, 99 AM. J. INT’L L. 817, 834 (2005) (noting that “the task of elucidating the [ICRC Study] rules based on the evidence was left largely to the two editors”). It could be argued that the ICRC seeks to distance itself from the Study not too far to still be able to claim credit for it if the ICRC Study is well-received, but far enough that the ICRC is not held responsible for it if it is not. See I JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INTERNATIONAL COMMITTEE OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW xlix (2005) [hereinafter ICRC STUDY] (noting that “[t]he authors, jointly, bear the sole responsibility for the content of the study.”). Presumably the reason the ICRC sought to distance itself from the Study was to maintain its appearance as a neutral and impartial observer, instead of as an advocate for the further development of international humanitarian law. See infra note 8 (describing the inherent tension between the ICRC’s role in assisting victims of conflict, which relies on the “special status” afforded to the ICRC based on its principles of neutrality and impartiality, versus the ICRC’s role in advocating the development of international humanitarian law).
study on customary international humanitarian law,\(^3\) based on an assessment of the State practice of forty-seven nations over the preceding thirty years.\(^4\) Somewhat surprisingly,\(^5\) but

\(^3\) International Humanitarian Law (IHL) is synonymous with the Law Of War (LOW), Law Of Armed Conflict (LOAC), and *jus in bello* (i.e. the regulation of the conduct of hostilities *during* the course of war). This concept is to be distinguished from *jus ad bellum*, which is the regulation of resorting to war in the first place (i.e. deciding to use force). The ICRC Study has abbreviated Customary International Law (CIL) in the area of International Humanitarian Law as Customary International Humanitarian Law (CIHL). See also Letter from John B. Bellinger, III, Legal Adviser, U.S. Department of State & William J. Haynes, II, General Counsel, U.S. Department of Defense, to Dr. Jakob Kellenberger, President, International Committee of the Red Cross 1 (Nov. 3, 2006) [hereinafter DOS/DoD Letter to ICRC], available at [http://www.defenselink.mil/home/pdf/Customary_International_Humanitarian_Law.pdf](http://www.defenselink.mil/home/pdf/Customary_International_Humanitarian_Law.pdf) (indicating a U.S. governmental preference for the phrases “law of war” or “laws and customs of war” rather than “international humanitarian law”); ICRC STUDY, *supra* note 2, Vol. I: Rules, at xxv (noting “this branch of international law has traditionally been called” “the ‘laws and customs of war’”); YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 13-14 (2004) [hereinafter DINSTEIN, CONDUCT OF HOSTILITIES] (coining the term “Law of International Armed Conflict” or LOIAC).


\(^5\) The importance of the ICRC Study on Customary International Law to the field of public international law cannot be overstated. See, e.g., Malcolm MacLaren & Felix Schwendimann, An Exercise in the Development of International Law: The New ICRC Study on Customary International Humanitarian Law, 6 GERMAN L. J. 1217, 1241 (2005) (noting that “[w]ith the Study’s publication, it will be possible for the first time to refer to a concrete rule rather than to a nebulous custom, thereby reducing the scope for disagreement among actors.”). To the extent that the rules of the ICRC Study are generally accepted as accurately reflecting norms of customary international law, which are binding on all States except perhaps those whom have established themselves as persistent objectors, the ICRC Study could potentially be as significant to public international law as the four 1949 Geneva Conventions, or at least the Pictet commentaries thereto. PERSPECTIVES ON THE ICRC STUDY, *supra* note 2, at 4 (noting that the ICRC Study “sought to take on the mantle of the Pictet commentaries to the Geneva Conventions” and failed); *id.* at 14 (same, because “[c]rystallising custom is not the same as interpreting a treaty.”). *Contra id.* at 16 n. 7 (arguing that “there is reason to expect that the Study will assume a status equal to that of the [Pictet] Commentaries.”). See generally INT’L COMM. OF THE RED CROSS [ICRC], COMMENTARY ON THE GENEVA CONVENTION (I) FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD (Jean S. Pictet ed., 1952) [hereinafter PICTET GENEVA CONVENTION I]; ICRC, COMMENTARY ON THE GENEVA CONVENTION (II) FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED, SICK AND SHIPWRECKED MEMBERS OF ARMED FORCES AT SEA (Jean S. Pictet ed., 1960) [hereinafter PICTET GENEVA CONVENTION II]; ICRC, COMMENTARY ON THE GENEVA CONVENTION (III) RELATIVE TO THE TREATMENT OF PRISONERS OF WAR (Jean S. Pictet ed., 1960) [hereinafter PICTET GENEVA CONVENTION III]; ICRC, COMMENTARY ON THE GENEVA CONVENTION (IV) RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR (Jean S. Pictet ed., 1958) [hereinafter PICTET GENEVA CONVENTION IV]. See also DOS/DoD Letter to ICRC, *supra* note 3, at 1, attachment p. 7 (statements evidencing the intent of the U.S. to persistently object to the ICRC Study’s findings). But see Posting of Marko Milanovic to Opinio Juris, http://www.opiniojuris.org/posts/1178652249.shtml#3684 (May 9, 2007, 01:54) (arguing that the DOS/DoD letter does not raise persistent objection to the ICRC Study as much as it implies that certain rules do not exist whatsoever); PERSPECTIVES ON THE ICRC STUDY, *supra* note 2, at 16 (expecting the ICRC Study to assume the mantle accorded to the ICRC commentaries on the Geneva Conventions and the Additional Protocols “because of its provenance and the wealth of practice it surveys.”); *infra* note 179 (discussing the absence of persistent objection to *jus cogens* norms). Essentially, to the extent that the ICRC Study is cited by international and
perhaps owing to the sheer size of the ICRC Study, there have been relatively few scholarly articles written about it, and only one State has officially responded to the ICRC: the United

countries. As national tribunals, jurists and practitioners as being dispositive, it will have served as an ICRC end run around what is otherwise a fairly tight defense of staunch, conservative States intent on maintaining the status quo with respect to the law of armed conflict. See generally PERSPECTIVES ON THE ICRC STUDY, supra note 2, at 8

6 The ICRC Study is so massive (taking up over eight inches or 20 centimeters of shelf space), it had to be separated into three separate books, totaling over 5,000 pages, which is the equivalent of over five copies of Leo Tolstoy’s infamous War and Peace. See generally, http://www.amazon.com/exec/obidos/ASIN/1853260622


See generally PERSPECTIVES ON THE ICRC STUDY, supra note 2, at vii. Finally, there are at least two legal weblogs (aka “blogs”) which have also discussed aspects of the ICRC Study. Opinion Juris, http://www.opiniojuris.org/ and
States, in a letter co-signed by the Department of State Legal Adviser, and the Department of Defense General Counsel.8

The ICRC is a venerable organization with noble goals,9 and its study is a


8 DOS/DoD Letter to ICRC, supra note 3, at 1 (noting “that a significant number of the rules set forth in the [ICRC] Study are applicable in international armed conflict because they have achieved universal status, either as a matter of treaty law or – as with many provisions derived from the Hague Regulations of 1907 – customary law.”). See infra notes 63-91 and accompanying text (discussing the U.S. response to the ICRC Study). See also PERSPECTIVES ON THE ICRC STUDY, supra note 2, at 411 (noting that “[r]eactions to the Study by States are not yet sufficiently numerous to give an indicative picture.”); Malcolm MacLaren & Felix Schwendimann, An Exercise in the Development of International Law: The New ICRC Study on Customary International Humanitarian Law, 6 GERMAN L. J. 1217, 1226-27 & n. 45, 1233-34 (2005) (noting that the paucity of such official reaction to the ICRC Study is significant, and that State silence can be viewed as acquiescence, particularly when the ICRC consulted with national authorities in the drafting of the Study). The joint letter to the ICRC from the Legal Adviser to the U.S. Department of State and the General Counsel to the U.S. Department of Defense is well-reasoned and temperate in language compared to the scathing invective contained in a U.S. Senate Republican Committee Policy Paper, Are American Interests Being Disserved by the International Committee of the Red Cross?, (June 13, 2005), available at http://rpc.senate.gov/_files/June1305ICRCDF.pdf (criticizing the ICRC for being funded to a significant extent by the United States, and for supposedly being impartial, and yet promoting the development of international humanitarian law in ways contrary to U.S. national interests); Interview with MAJ Jose Cora, U.S. Army, The Judge Advocate General’s Legal Center and School, in Charlottesville, Va. (Dec. 16, 2007) (questioning whether the silence of other States is due to their simply ignoring the ICRC Study, and waiting until they have an actual dispute to raise any issues). Contra Malcolm MacLaren & Felix Schwendimann, An Exercise in the Development of International Law: The New ICRC Study on Customary International Humanitarian Law, 6 GERMAN L. J. 1217, 1234-35 (2005) (describing the inherent tension between the ICRC’s role “in attending to actual victims of armed conflict,” which is based on lex lata [what the law is] and on the “special status” afforded to the ICRC based on its principles of neutrality and impartiality, versus the ICRC’s role “in advocating the humanitarian cause,” which is based on lex ferenda [what the law ought to be] and which may run contrary to particular States’ interests); Interview with MAJ Jose Cora, U.S. Army, The Judge Advocate General’s Legal Center and School, in Charlottesville, Va. (Dec. 16, 2007) (noting that the ICRC has an “inherent conflict of interest,” and while it purports to be a neutral arbiter in publishing the ICRC Study, it actually does so under its role as an advocate for the development of international humanitarian law). The ICRC Study presumably falls within the ICRC’s latter role. See supra note 2 (discussing whether credit and responsibility for the ICRC Study should be given to the ICRC, or to its two authors). Thus, the ICRC Study may be particularly relevant to the United States, which “is the outstanding laggard in signing IHL treaties and is therefore most likely to be affected by the confirmation of conventional rules as customary law.” Malcolm MacLaren & Felix Schwendimann, An Exercise in the Development of International Law: The New ICRC Study on Customary International Humanitarian Law, 6 GERMAN L. J. 1217, 1232 (2005). See also infra note 124 (noting that at least two scholars claim that the United States is a “specially affected” State with regard to all of international humanitarian law, and therefore that “[an ICRC Study] rule would be hard, if not impossible, to regard as having taken on customary status were a State such as the United States opposed to it; the practice concerned could not be said to be representative.”).

monumental work\(^\text{10}\) compiling a surfeit of State practice.\(^\text{11}\) Nevertheless, the ICRC Study on customary international humanitarian law articulates “rules”\(^\text{12}\) that are not sustainable under the traditional theory of customary international law formation,\(^\text{13}\) as may be seen by analyzing even the three seemingly uncontroversial\(^\text{14}\) rules proposed by the ICRC Study for


\(^{12}\) The ICRC Study’s use of the term “rule” of customary international law is not, in itself, unusual. The present author’s concern is that some of the “rules” in the ICRC Study do not accurately reflect customary international law, and thus may not be accurately described as “rules” of customary international law, hence the quotation marks. See also George H. Aldrich, Customary International Humanitarian Law – an Interpretation on behalf of the International Committee of the Red Cross, 76 BRIT. Y.B. INT’L L. 503, 507 (2006); Peter Rowe, The Effect on National Law of the Customary International Humanitarian Law Study, 11 J. CONFLICT & SECURITY L. 165, 166-67 (2006).

\(^{13}\) See infra notes 92-240 and accompanying text. See also PERSPECTIVES ON THE ICRC STUDY, supra note 2, at 5 (“nagging sense” that the ICRC Study is vague in “too many steps in the process of crystallization and of the formulation of the black letter customary rules”); Yoram Dinstein, The ICRC Customary International Humanitarian Law Study, 36 Isr. Y.B. Hum. Rts. 1, 8 ¶ 15 (2006) (expressing his belief “that there are grave errors in the formulation of some of the Rules, and part of the commentary, in ways that adversely affect the ability of the Study to project an image of objective scholarship.”).

\(^{14}\) PERSPECTIVES ON THE ICRC STUDY, supra note 2, at ix. This companion book to the ICRC Study omitted discussion of these rules because they “were regarded as uncontroversial and an example of Rules where the
handling the wounded, sick and shipwrecked. Thus, this article seeks to add to the discussion of the ICRC Study by focusing in Section IV specifically on the three rules proposed by the ICRC Study pertaining to the treatment of the wounded, sick and shipwrecked (specifically, Rules 109, 110 and 111).

Before analyzing these three rules, however, it will be necessary in Section II to briefly provide a synopsis of the ICRC’s involvement in the development of international humanitarian law and an overview of the ICRC Study itself. Section III discusses the principal issues associated with the traditional theory of customary international law formation, which admittedly involves using “imprecise methods out of uncertain

authors of the Study have comprehensively encapsulated the law.” Id. See also id. at 169 (same); George H. Aldrich, Customary International Humanitarian Law – an Interpretation on behalf of the International Committee of the Red Cross, 76 Brit. Y.B. Int’l L. 503, 522 (2006) (same). The present article seeks to reveal that even the three seemingly uncontentious rules for dealing with the wounded, sick and shipwrecked are fatally flawed, and in doing so, hopes to add to the discussion, admittedly from the perspective of a military lawyer. PERSPECTIVES ON THE ICRC STUDY, supra note 2, at 4.

\[15\] See infra notes 241-378 (evaluating proposed Rule 109: Duty to Search For, Collect and Evacuate the Wounded, the Sick, and the Shipwrecked), infra notes 379-455 (evaluating proposed Rule 110: Duty to Care For the Wounded, the Sick, and the Shipwrecked), and infra notes 456-497 (evaluating proposed Rule 111: Duty to Protect the Wounded, the Sick, and the Shipwrecked).

\[16\] Dr. Yves Sandoz recognizes, in his forward to the ICRC Study, that “this study will have achieved its goal only if it is considered not as an end of a process but as a beginning.” ICRC STUDY, supra note 2, Vol. I: Rules, at xvii. See also DOS/DoD Letter to ICRC, supra note 3, at 5 (hoping “that the material provided in this letter … will initiate a constructive, in-depth dialogue with the ICRC and others on the subject.”); Robert Cryer, Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study, 11 J. Conflict & Security L. 239, 241 (2006) (stating that “it is important, even for those sympathetic to it, to appraise the [ICRC] Study as objectively as possible, even though its aims are unquestionably meritorious.”); George H. Aldrich, Customary International Humanitarian Law – an Interpretation on behalf of the International Committee of the Red Cross, 76 Brit. Y.B. Int’l L. 503, 505 (2006) (noting the ICRC Study’s “importance rests on its being used as a basis for further work, and as a spur to such works, rather than on its conclusions.”).


\[18\] See infra notes 23-35 and accompanying text.

\[19\] See infra notes 36-62 and accompanying text.

\[20\] See infra notes 92-240 and accompanying text.
Finally, Section V contains the author’s conclusions about the ICRC Study.22

II. Overview of ICRC Study

The ICRC has a lengthy and exemplary involvement with the formulation of international humanitarian law,23 and arguably even “act[s] as a guardian of humanitarian law.”24 Henri Dunant, a wealthy Swiss businessman, helped found the ICRC in 1863.25 The

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22 See infra notes 498-535 and accompanying text.


ICRC initiated efforts which led to the adoption in 1864 of the first Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field,26 thereby “la[y]ing the cornerstone of treaty-based international humanitarian law.”27 Subsequent revisions and expansions of the Geneva Conventions in 1906,28 after World War I in 1929,29 and after World War II in 194930 were again led by the ICRC.31 Since every State in the world has


either ratified or acceded to the four Geneva Conventions of 1949, they “constitute the foundation of international humanitarian law in force today.” The ICRC also had its imprimatur on the 1977 Additional Protocols to the Geneva Conventions following the Vietnam War, “which brought up to date both the rules governing the conduct of hostilities and those protecting war victims.” Thus it should come as no surprise that a Swiss-appointed group of experts assigned the ICRC with the monumental task of conducting a study on customary international humanitarian law.

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33 ICRC STUDY, supra note 2, Vol. I: Rules, at ix. See also Additional Protocol I and II, supra note 24, which the majority of States have either ratified or acceded to, and which were again led by the ICRC. ICRC STUDY, supra note 2, Vol. I: Rules, at xxvi.

34 ICRC STUDY, supra note 2, Vol. I: Rules, at ix. See also Additional Protocol I, supra note 24, at arts. 5(3) & (4), 6(3), 33(3), 78(3), 81(1), 97(1), 98(1) & (2); Additional Protocol II, supra note 24, at arts. 18(1), 24(1). Some scholars suggest that the purpose of the ICRC Study is to bind those States who remain non-parties to the 1977 Additional Protocols, such as Eritrea, India, Indonesia, Iran, Iraq, Israel, Malaysia, Morocco, Myanmar, Nepal, Pakistan, Singapore, Somalia, Sri Lanka, Thailand, Turkey, and the United States, as a matter of customary international law. Yoram Dinstein, *The ICRC Customary International Humanitarian Law Study*, 36 ISR. Y.B. HUM. RTS. 1, 3 ¶ 4, 14 (2006) (questioning whether the real impetus for the ICRC Study was an effort to claim that the provisions in Additional Protocol I had achieved the status of customary international law); David Turns, *Weapons in the ICRC Study on Customary International Humanitarian Law*, 11 J. CONFLICT & SECURITY L. 201, 236 (2006) (same); George H. Aldrich, *Customary Humanitarian Law – an Interpretation on behalf of the International Committee of the Red Cross*, 76 BRIT. Y.B. INT’L L. 503, 505-06 (2006) (same); Theodor Meron, *Revival of Customary Humanitarian Law*, 99 AM. J. INT’L L. 817, 833 (2005) (same); PERSPECTIVES ON THE ICRC STUDY, supra note 2, at 9 (noting that the ICRC Study rules rely heavily on the treaty provisions of Additional Protocol I). See also DOS/DoD Letter to ICRC, supra note 3, at 4 (arguing that the assertion that a significant number of rules in the Additional Protocols “have achieved the status of customary international law applicable to all States” is a general error that runs throughout the ICRC Study).

35 See infra notes 37-38 and accompanying text.
(A) Origins

A three-day International Conference for the Protection of War Victims met in Geneva in late August 1993, and called upon the government of Switzerland to assemble a “group of experts to study practical means of promoting full respect for and compliance with [international humanitarian] law.”36 This “Intergovernmental Group of Experts for the Protection of War Victims met in Geneva in January 1995 and adopted a series of recommendations aimed at enhancing respect for international humanitarian law, in particular by means of preventive measures that would ensure better knowledge and more effective implementation of the law.”37

The Intergovernmental Group of Experts for the Protection of War Victims’ second recommendation suggested that “[t]he ICRC be invited to prepare … a report on customary rules of [international humanitarian law] applicable in international and non-international armed conflicts.”38 At the end of 1995, the 26th International Conference of the Red Cross and Red Crescent approved this recommendation “and officially mandated the ICRC to prepare a report on customary rules of international humanitarian law applicable in international and non-international armed conflicts.”39 The ICRC assigned the project to the


37 Id.

38 Id.

39 Id. Cf. Jean-Marie Henckaerts, Customary International Humanitarian Law – A Rejoinder to Judge Aldrich, 76 BRIT. Y.B. INT’L L. 525, 525-26 (2006) (explaining, as one of the co-authors of the ICRC Study, that “[t]he ICRC’s main interest … was precisely in seeing whether customary international law provides a more detailed framework for non-international armed conflicts. In fact, the ICRC preferred to be mandated to prepare a report on non-international armed conflicts only but that was unacceptable to some States at the International Conference of the Red Cross and Red Crescent and so the organization was asked to look at both types of armed conflict.”).
Deputy Head (later Head) of its Legal Division, Ms. Louise Doswald-Beck, who had recently completed her service as the editor of a similar restatement, the San Remo Manual on International Law Applicable to Armed Conflicts at Sea, and Dr. Jean-Marie Henckaerts. These two ICRC lawyers worked on the project over the next decade, coordinating the efforts of six research teams, which consisted of dozens of academic experts.

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40 ICRC STUDY, supra note 2, Vol. I: Rules, at xlix. See also Graduate Institute of International Studies, Geneva, International Law Section Faculty, Professor Louise Doswald-Beck, Curriculum Vitae, http://hei.unige.ch/sections/dr/faculty/doswald-beck/CV.pdf (noting that Professor Doswald-Beck left the ICRC in February 2001 to serve as the Secretary-General of the International Commission of Jurists, which she left in October 2003 to serve as a Professor of Public International Law and Director of the University Centre for International Humanitarian Law at the Graduate Institute of International Studies in Geneva, both of the latter positions which she apparently continues to fill as of the time of this writing).


42 SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA (Louise Doswald-Beck ed., 1995) [hereinafter SAN REMO MANUAL]. Interestingly enough, the San Remo Manual admits to being “a contemporary restatement of the law, together with some progressive development,” (see id. at ix) (emphasis added) an admission only hinted at by the authors of the ICRC Study. See infra note 58 and accompanying text (noting that the ICRC Study hints at its aspirational bias when it admits that eight of its rules only “arguably” apply to non-international armed conflicts. See also Jamieson L. Greer, A Critique of the ICRC’s Customary Rules Concerning Displaced Persons: General Accuracy, Conflation, and a Missed Opportunity, 192 MIL. L. REV. 116, 126 (2007) (arguing that “[t]he aspirational nature of the ICRC Rules concerning displaced persons and the covert attempt to expand IDP protections at refugee expense ensures that the Rules will remain purely of academic interest rather than contributing substantively to the development of customary law.”).

43 Jean-Marie Henckaerts, Legal Adviser, International Committee of the Red Cross, Address at The George Washington University Law School (Sep. 28, 2005) [hereinafter Henckaerts Address]. See also Theodor Meron, Revival of Customary Humanitarian Law, 99 AM. J. INT’L L. 817, 834 (2005) (noting that “the task of elucidating the [ICRC Study] rules based on the evidence was left largely to the two editors; the expert committee that had guided the study was disbanded in 1999. The very good work done by the editors might, in my view, have been further strengthened by the continued involvement of the expert committee, as a group, until the project’s completion in 2004, to ensure that the black-letter rules would reflect a broader range of consultations.”). Cf. supra note 2 (discussing whether credit and responsibility for the ICRC Study should be given to the ICRC, or to its two authors).
and national researchers.\textsuperscript{44}

\textbf{(B) Scope and Methodology}

With the assistance of academic experts and national researchers, the authors collected State practice from forty-seven States over a thirty year period.\textsuperscript{45} Each of the six research teams focused on a separate part of the study.\textsuperscript{46} The authors sought to make the collection of State practice all-encompassing, by including not only physical acts (i.e. behavior on the battlefield),\textsuperscript{47} but also verbal acts, including:

- 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 governments on draft treaties, executive decisions and regulations, pleadings before international tribunals, statements in international organizations and at international conferences and

\footnotesize{\textsuperscript{44} ICRC STUDY, supra note 2, Vol. I: Rules, at xlv, xix-xxii.}

\footnotesize{\textsuperscript{45} ICRC STUDY, supra note 2, Vol. I: Rules, at xlv, xlvii, xlix. See infra note 280 and accompanying text (criticizing the ICRC Study for citing to these “Reports” of State practice as further evidence of State practice, when they merely represent a working draft of the ICRC Study itself, and they are not generally available for examination).}

\footnotesize{\textsuperscript{46} ICRC STUDY, supra note 2, Vol. I: Rules, at xlv, xlvi. See infra note 60 and accompanying text (discussing the six parts of the Study).}

\footnotesize{\textsuperscript{47} Contra W. Hays Parks, The ICRC Customary Law Study: A Preliminary Assessment, 99 AM. SOC’Y INT’L L. PROC. 208, 210, 212 (2005) (criticizing the ICRC Study for its lack of consideration of actual battlefield behavior); W. Hays Parks, Assistant General Counsel for the U.S. Department of Defense and Adjunct Professor at the American University Washington College of Law, Roundtable Discussion at the North American launch of the ICRC Study at the American University Washington College of Law (Sep. 28, 2005), in Sabrina Balgamwalla, Review of Conference: The Reaffirmation of Custom as an Important Source of International Humanitarian Law, 13 HUM. RTS. BR. 13, 16 (2006) (same); W. Hays Parks, Comments on the ICRC Customary Law Study, (Sep. 28, 2005) (unpublished manuscript at 1, on file with author) (arguing that “[b]attlefield realities determine whether treaty texts agreed to in the comfortable diplomatic atmosphere of Geneva are, at the end of the day, practicable. Further, to determine the law, reference to State practice in wartime is essential. A key missing element in the ICRC Study is any consideration as to State practice in wartime.”); David Turns, Weapons in the ICRC Study on Customary International Humanitarian Law, 11 J. CONFLICT & SECURITY L. 201, 203 (2006) (same); DOS/DoD Letter to ICRC, supra note 3, at 2 (criticizing the ICRC Study for placing insufficient weight on “actual operational practice by States during armed conflict.”). Contra PERSPECTIVES ON THE ICRC STUDY, supra note 2, at 37 (noting that “the claim that battlefield practice should be seen as paramount is not without difficulty, particularly if this departs from views previously expressed by a State. Surely a peacetime assessment of what the law requires is more considered, precisely because it is detached from the pressures of conflict?”); id. at 38 (arguing that “[i]f a State’s battlefield behavior differs from its earlier views, in the absence of justification, how can a principled departure from its earlier position be distinguished from its violation?”).}
government positions taken with respect to resolutions of international organizations.\textsuperscript{48}

The authors anticipated objections to the inclusion of some of these ‘verbal acts,’\textsuperscript{49} and thus


\textsuperscript{49} \textit{See}, e.g., DOS/DoD Letter to ICRC, \textit{supra} note 3, at 2 (criticizing the ICRC Study for placing too much emphasis on written materials); \textit{id.} at 3 (noting that “States often include guidance in their military manuals for policy, rather than legal, reasons.”); \textit{id.} at 3-4 (criticizing the ICRC Study’s overly heavy reliance on military manuals, and its inability to “distinguish between military publications prepared informally solely for training or similar purposes and those prepared and approved as official government statements.”); \textit{id.} at attachment p. 8 (explaining that the Operational Law Handbook “is simply an instructional publication and is not and was not intended to be an authoritative statement of U.S. policy and practice.”); Jim Garamone, \textit{DoD, State Department Criticize Red Cross Law of War Study}, AM. FORCES PRESS SERV., Mar. 8, 2007, http://www.globalsecurity.org/military/library/news/2007/03/mil-070308-afps02.htm (quoting W. Hays Parks as saying that the ICRC Study relies on one “study prepared by an Air Force judge advocate for a class he was teaching.”); PERSPECTIVES ON THE ICRC STUDY, \textit{supra} note 2, at 134 (noting that “military manuals often provide a useful indication of whether the issuing State believes a practice to be obligatory (or prohibited) as a matter of law. Yet, manuals also reflect policy and operational concerns. One must, therefore, be cautious not to infuse them with a normative character that may have been unintended by the promulgating States.”); DINSTEIN, \textit{CONDUCT OF HOSTILITIES, supra} note 3, at 5 (noting that “[s]pecial importance in the context of LOAC [Law of International Armed Conflict] is attached to military manuals and operational handbooks.”); Yoram Dinstei, \textit{The ICRC Customary International Humanitarian Law Study}, 36 Isr. Y.B. Hum. Rts. 1, 6 ¶ 12 (2006) (making a similar argument regarding “the so-called Israeli Manual on the Laws of War of 1998” which he informed the Study editors that “this is merely a tool used to facilitate instruction and training, and it has no binding or even authoritative standing.”). \textit{See}, e.g., ICRC STUDY, \textit{supra} note 2, Vol. I: Rules, at 391 (citing to the “manual used for instruction in the Israeli army”). As both a member of the faculty and a contributor, the present author can attest to the limited utility in the realm of international law of the “Operational Law Handbook,” published annually by the International and Operational Law Department of The Judge Advocate General’s Legal Center and School, U.S. Army. Although this fine publication is helpful as a pedagogical aid to instruction at the Army JAG School and as a handy reference for deployed judge advocates, it nevertheless represents the views of at most a couple dozen instructors and military judge advocates, each writing about his or her own area of expertise, with minimal peer review, and with no review whatsoever by the Office of the Army Judge Advocate General, the Department of the Army, or the Department of Defense. THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER AND SCHOOL, U.S. ARMY OPERATIONAL LAW HANDBOOK at i (2007). Unfortunately, the imprimatur of The Judge Advocate General’s Legal Center and School has led to it being quoted, often out of context, by the ICRC Study, and even by the U.S. Supreme Court (to a related publication which is no longer in print). \textit{See}, e.g., ICRC STUDY, \textit{supra} note 2, Vol. II: Practice, at 883 n. 175, 4207 (citing the 1993 edition of the OPLAW Handbook!); Hamdan v. Rumsfeld, 126 S.Ct. 2749, 2796 n. 63 (2006) (citing to the 2004 Law of War Handbook). The ICRC must have found a copy of the 1993 OPLAW Handbook in its archives, because it is not cited by the Report on US practice. \textit{See generally} BURRUS M. CARNAHAN, CUSTOMARY RULES OF INTERNATIONAL HUMANITARIAN LAW: REPORT ON THE PRACTICE OF THE UNITED STATES OF AMERICA (undated, added to UVA Law Library on June 17, 1998) [hereinafter CARNAHAN, REPORT ON U.S. PRACTICE]. Moreover, the 1993 Operational Law Handbook is so out-of-date, that the author of the present article was unable to find a copy, even at The Judge Advocate General’s Legal Center and School. The most current edition of the OPLAW Handbook contains the caveat that “the Handbook is not intended to represent official U.S. policy regarding the binding application of varied sources of law, though the Handbook may reference source documents which themselves do so.” THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER AND SCHOOL, U.S. ARMY OPERATIONAL LAW HANDBOOK at ii (2007). Despite these caveats (express or implied), the ICRC Study consistently cites to a number of “commanders guides” and “teaching manuals.” \textit{See},
HUM. RTS. BR. 13, 14 (2006) (noting that “States place rules in manuals for a variety of reasons, not always with imprimatur. U.S. Navy, and U.S. Coast Guard (quite literally the handbooks, often intended strictly for an internal audience, constitute these military manuals or handbooks are not reviewed at higher levels. Conference: The Reaffirmation of Custom as an Important Source of International Humanitarian Law 38, 43, 49, 74, 128, 130, 134, 216, 219, 224, 228, 231, 243, 248, 280, 356, 358. as well as public measures and other governmental acts and official statements of policy ….”. Restatement of Foreign Relations, supra note 21, at § 102 cmt. b. It is highly suspect whether military manuals and handbooks, often intended strictly for an internal audience, constitute official statements of policy, especially if these military manuals or handbooks are not reviewed at higher levels. Compare The Judge Advocate General’s Legal Center and School, U.S. Army Operational Law Handbook (2007) (representing the views of “subject matter experts” with minimal peer review, and with no review whatsoever by the Office of the Army Judge Advocate General, the Department of the Army, or the Department of Defense) with U.S. Army Field Manual (FM) 27-10, The Law of Land Warfare (1956) (considered the foundational text by the U.S. Army for the law of armed conflict on land, officially vetted within the Department of the Army, and thus under revision for a number of years) and id. at § 1 (noting that “[t]he purpose of this Manual is to provide authoritative guidance to military personnel on the customary and treaty law applicable to the conduct of warfare on land and to relationships between belligerents and neutral States….”. This Manual is an official publication of the United States Army. However, those provisions of the Manual which are either statutes nor the test of treaties to which the United States is a party should not be considered binding upon courts and tribunals applying the law of war. However, such provisions are of evidentiary value insofar as they bear upon questions of custom and practice.”). Thus FM 27-10 constitutes official U.S. Army policy, and hence U.S. State practice, whereas the OPLAW Handbook is merely a handy quick reference guide for judge advocates, does not represent official U.S. Army policy, and hence cannot represent U.S. State practice. Compare NWP 1-14M, Commander’s Handbook on the Law of Naval Operations 3 (2007) (noting that it is “intended for use by operational commanders and supporting staff elements at all levels of command. It is designed to provide officers in command and their staffs with an overview of the rules of law governing naval operations in peacetime and during armed conflict.”) and id. (“letter of promulgation” on joint Department of the Navy and Department of Homeland Security letterhead, and signed by senior representatives of the U.S. Marine Corps, U.S. Navy, and U.S. Coast Guard (quite literally the imprimatur of representatives of those two departments)) with NWP 1-14M, Annotated Supplement to the Commander’s Handbook on the Law of Naval Operations at iii (1997) (noting the caveat “the annotations in this Annotated Supplement are not to be construed as representing official policy or positions of the Department of the Navy or the U.S. Government.”). Thus, while NWP 1-14M constitutes official U.S. Marine Corps, U.S. Navy, and U.S. Coast Guard policy, and hence U.S. State practice, its annotated supplement does not (and is intended primarily as a quick reference guide for judge advocates). See also USAF Pamphlet 110-31, Judge Advocate, General Activities, International Law – The Conduct of Armed Conflict and Air Operations 1 (1976) (containing the caveat “[t]his pamphlet is for the information and guidance of judge advocates and others particularly concerned with international law requirements applicable during armed conflict. It furnishes references and suggests solutions to a variety of legal problems but is not directive in nature. As an Air Force pamphlet, it does not promulgate official US Government policy although it does refer to US, DOD and Air Force policies.”). Thus the USAF Pamphlet 110-31 is also merely a handy quick reference guide for judge advocates, does not represent official U.S. Air Force policy, and hence cannot represent U.S. State practice. The lesson to be learned from this is that U.S. military manuals typically note whether or not they represent official policy, and hence whether they are even potential candidates for U.S. State practice. While these “official policy” caveats are not dispositive, they are at least presumptive. Contra W. Hays Parks, The ICRC Customary Law Study: A Preliminary Assessment, 99 AM. SOC’Y INT’L L. PROC. 208, 209 (2005) (distinguishing between government statements that represent policy decisions versus “a government’s declaration of its interpretation of its law of war obligations”), Joshua Dorosin, Assistant Legal Adviser to the U.S. Department of State (speaking in his personal capacity), Roundtable Discussion at the North American launch of the ICRC Study at the American University Washington College of Law (Sep. 28, 2005), in Sabrina Balgamwalla, Review of Conference: The Reaffirmation of Custom as an Important Source of International Humanitarian Law, 13 HUM. RTS. BR. 13, 14 (2006) (noting that “States place rules in manuals for a variety of reasons, not always because they believe they are legally obligated to do so ….”. Often practice that is reflected in the manuals is
cited to the International Court of Justice, the International Law Commission, the
International Criminal Tribunal for the Former Yugoslavia, and the International Law
Association in similarly considering such sources.\textsuperscript{50} In addition, the authors augmented the
collection of State practice by reviewing the ICRC archives for materials related to forty
recent armed conflicts.\textsuperscript{51}

Once the six research teams had collected this potential surfeit of State practice, they
summarized and consolidated it into “Reports on the Practice of”\textsuperscript{52} specific States, which the
ICRC consolidated into the two parts (i.e. books) of Volume II: Practice of the ICRC
Study.\textsuperscript{53} The authors then went through an iterative process of summarizing this State

\textsuperscript{50} ICRC Study, supra note 2, Vol. I: Rules, at xxxii-xxxiii. See also Perspectives on the ICRC Study,
supra note 2, at 37 (noting that “in principle, the Study’s use of essentially verbal acts in the construction of its
Rules is unimpeachable.”); Custom, Power and the Power of Rules, supra note 21, at 156 (arguing that
“[f]or the purposes of determining whether and to what degree an instance of State practice is legally relevant, it
is not particularly important whether that practice involves statements or acts.”). See generally Custom,
Power and the Power of Rules, supra note 21, at 134-36 (summarizing the different arguments for and
Law Study, 36 Isr. Y.B. Hum. Rts. 1, 4 ¶ 7 (2006) (agreeing that verbal acts of States can constitute State
practice, but arguing that the ICRC Study “go[es] way too far” in generically considering verbal statements and
in not differentiating between statements depending on “who is making the statement, when, where and in what
circumstances.”).

\textsuperscript{51} ICRC Study, supra note 2, Vol. I: Rules, at xlvi. See Perspectives on the ICRC Study, supra note 2, at
44 (questioning the appropriateness of considering “confidential communications made to the ICRC as evidence
of State practice.”); Gabor Rona, The Humanitarians: The International Committee of the Red Cross, 101 Am.
J. INT’L L. 259, 260-61, 263, 264 (2007) (reviewing David Forsythe (2005)) (noting that the ICRC has to make a
“‘devil’s bargain’ of discretion in return for access”). But see Yoram Dinstein, The ICRC Customary
“[e]verybody hoped that the research [into the otherwise inaccessible ICR archives] would yield a trove of
inaccessible State practice. In [any] event, the results have been quite disappointing.”).

\textsuperscript{52} See infra note 280 and accompanying text (criticizing the ICRC Study for citing to these “Reports” of State
practice as further evidence of State practice, when they merely represent a working draft of the ICRC Study
itself, and they are not generally available for examination).

\textsuperscript{53} ICRC Study, supra note 2, Vol. I: Rules, at xlvi-xlviii. See infra note 280 and accompanying text
(criticizing the ICRC Study for citing to these “Reports” of State practice as further evidence of State practice,
when they merely represent a working draft of the ICRC Study itself, and they are not generally available for examination). See also Garamone, supra note 49 (quoting W. Hays Parks as likening the methodology of the
ICRC Study to “to performing an Internet search and then not assessing the results for applicability or
practice into proposed rules, which they submitted to academic and government experts for comment before consolidating these 161 proposed rules in Volume I: Rules.\(^5^4\) The ICRC published the complete study in 2005. Unfortunately, although the ICRC Study’s stated methodology would appear to be unassailable, its execution does not live up to its promise of academic rigor, as will be seen.\(^5^5\)


\(^5^5\) See, e.g., PERSPECTIVES ON THE ICRC STUDY, supra note 2, at 10 (noting that “although the statement of methodology … is generally sound, the rigorous approach described therein is not always evident in the discussion and evaluation of State practice and opinio iuris.”); id. (noting that while the Study purports to consider ‘density’ or “the weight[] of relevant items of practice, there is often little or no evidence that this is done. For example, resolutions of the UN Commissioner for Human Rights seem to attract the same weight as the legislation or policy statements of specially affected States.”); id. at 402 (noting that “the authors of the Study have sometimes adopted an approach which is less conservative than is claimed.”); id. at 403 (concluding “that the Study has on occasion adopted a fairly relaxed view of what is needed to constitute customary [international] law.”); Dino Kritsiotis, Customary International Humanitarian Law, 101 AM. J. INT’L L. 692, 693 (2007) (book review) (noting that “[t]he results [of the ICRC Study] can be quite deceptive. They lead us to believe that a rule is much older—and its normative pedigree much deeper—than might actually be the case.”); Leah M. Nicholls, The Humanitarian Monarchy Legislates: The International Committee of the Red Cross and its 161 Rules of Customary International Humanitarian Law, 17 DUKE J. COMP. & INT’L L. 223, 243 (2006) (noting that “[i]t is clear that the ICRC did not carry out this study in conformity with the traditional methods of assessing what state practice is customary.”); Robert Cryer, Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study, 11 J. CONFLICT & SECURITY L. 239, 249 (2006) (noting that “one of the problems with the study – it is often silent on the weight given to particular evidences of custom”); id. at 252 (noting that the ICRC Study fails to explain the weight that is to be attached to the elements of crimes adopted under the Rome Statute); DOS/DoD Letter to ICRC, supra note 3, at 2 (noting that although the ICRC Study purports to follow an appropriate approach, “the Study frequently fails to adopt this approach in a rigorous way.”); id. at 2-3 (criticizing ICRC Study for equating “the practice of States that have relatively little history of participation in armed conflict,” and those with a more substantial history of participation in armed conflict); id. at 4 (criticizing the ICRC Study for asserting that certain rules have become customary international law binding in non-international armed conflicts “notwithstanding the fact that there is little evidence in support of those propositions.”)); PERSPECTIVES ON THE ICRC STUDY, supra note 2, at 407 (same); W. Hays Parks, The ICRC Customary Law Study: A Preliminary Assessment, 99 AM. SOC’y INT’L L. PROC. 208, 210, 212 (2005) (criticizing the ICRC Study for its lack of consideration of actual battlefield behavior, despite its claims to the contrary); Dieter Fleck, International Accountability for Violations of the Ius in Bello: The Impact of the ICRC Study on Customary International Humanitarian Law, 11 J. CONFLICT & SECURITY L. 179, 197 (2006) (noting that “[s]ome of [the ICRC Study’s] findings remain rather vague due to the absence of convincing practice.”); George H. Aldrich, Customary International Humanitarian Law – an Interpretation on behalf of the International Committee of the Red Cross, 76 BRIT. Y.B. INT’L L. 503, 507 (2006) (noting that “[w]hile it certainly would be desirable from a humanitarian perspective if the ICRC could establish such [demilitarized] zones in non-international armed conflict, such desirability and a few welcome instances do not make customary law.”); id. at 514-15 (calling Rule 43’s restrictions on conducting hostilities that impact the environment “a wish list that is unnecessary and, to the extent new, has no foundation in existing law.”); David Turns, Weapons in the ICRC Study on Customary International Humanitarian Law, 11 J. CONFLICT & SECURITY L. 201, 202, 237 (2006) (arguing that the ICRC
(C) Organization

The Study is divided into two “volumes”:

Volume I: Rules

Volume II: Practice

Volume I contains 161 annotated proposed rules of customary international humanitarian law (which arguably apply to all States, and most apply to all “parties” to the conflict). Thirteen proposed rules claim to apply only to international armed conflicts, and

Study seems to “assert[] custom without necessarily meeting the standards for proving its existence” thereby conflating the lex lata [what the law is] with the lex ferenda [what the law ought to be]; id. at 210 (noting that “serious methodological problems arise with the breezy manner in which the Study alternatively justifies the extension of weaponry provisions to non-international armed conflicts.”); id. at 223 (noting “flaws in the Study’s tendency to be satisfied with minimal evidence of State practice”); id. at 224-25 (observing that Rule 76’s prohibition on the use of herbicides as a method of warfare “is a quite astonishing exercise in extrapolation of a detailed rule from very little hard evidence…. The inescapable impression is that the Study is essentially relying on itself, rather than on actual State practice”); Theodor Meron, Revival of Customary Humanitarian Law, 99 AM. J. INT’L L. 817, 834 (2005) (predicting that “some critics of the ICRC study might argue that while traditional in methodology, the study was too progressive in interpreting practice and thus in determining black-letter rules.”); infra notes 233-238 (criticizing the ICRC Study’s methodology, and noting at least two intellectual shortcuts taken by the Study). But cf. Leah M. Nicholls, The Humanitarian Monarchy Legislates: The International Committee of the Red Cross and its 161 Rules of Customary International Humanitarian Law, 17 DUKE J. COMP. & INT’L L. 223, 243 (2006) (observing that “[i]f one’s goal is to create a tool that increases compliance with humanitarian principles, as was the purpose of this study, that goal cannot be realized by using only a traditional assessment of customary law; in order to pursue its stated goals, the ICRC had to take a non-traditional approach.”); Ryszard Piotrowicz, Customary International Humanitarian Law, 25 AUSTL. Y.B. INT’L L. 348, 349 (2006) (book review) (noting that anyone could find fault with particular rules of the ICRC Study, but “inevitably there will be differences in attitude towards the weight of various types of state practice … on whether opinio juris is really present … on whether a rule has in fact crystallised…. So the book may not be perfect but I do not think it could be, especially when setting out rules of customary international law.”); Theodor Meron, Revival of Customary Humanitarian Law, 99 AM. J. INT’L L. 817, 834 (2005) (noting that “many of the critics of the less formal approach [to determinations of customary international law formation] that has been in vogue in recent decades will appreciate the traditional approach taken by the ICRC.”).

ICRC STUDY, supra note 2, Vol. I: Rules, at 11 (Rule 3 provides that all members of armed forces are combatants in international armed conflicts, except for medical and religious personnel); id. at 14 (Rule 4 defines armed forces in an international armed conflict as including all groups who subordinate themselves to a party’s command); id. at 135 (Rule 41 requires the occupying power in an international armed conflict to prevent the illicit export of cultural property); id. at 173 (Rule 49 permitting the seizure of military equipment as war booty in international armed conflicts); id. at 178 (Rule 51 permits the use of public property in occupied territory in an international armed conflict); id. at 384 (Rule 106 requires combatants to distinguish themselves from the civilian population in international armed conflicts); id. at 389 (Rule 107 affirms that spies lose their right to POW status in an international armed conflict); id. at 391 (Rule 108 explains that mercenaries do not have the right to either combatant or POW status in international armed conflicts); id. at 411 (Rule 114 requires parties to return the remains and personal effects of deceased to the party to which they belong in an international armed conflict, or upon request to the next of kin); id. at 462 (Rule 130 prohibits the deportation of civilians into occupied territory in international armed conflicts); id. at 513 (Rule 145 limits belligerent reprisals
two proposed rules purport to apply only to *non-international* (i.e. internal) armed conflicts.\(^5\) However, the vast majority of the proposed rules assert that they apply equally to both international and non-international armed conflicts.\(^6\) Volume II is comprised of two lengthy to stringent conditions in international armed conflicts; *id.* at 519 (Rule 146 prohibits belligerent reprisals against protected persons in an international armed conflict); and *id.* at 523 (Rule 147 similarly prohibits belligerent reprisals against protected objects in an international armed conflict).

\(^{57}\) *Id.* at 526 (Rule 148 prohibits belligerent reprisals in non-international armed conflicts); *id.* at 611 (Rule 159 requires States to consider granting amnesty broadly to persons involved in non-international armed conflicts). Although Rule 126 purports to only apply to non-international armed conflicts, it was incorrectly worded in the ICRC Study, and in the original version of the International Review article on the ICRC Study. *See generally ICRC STUDY, supra* note 2, Vol. I: Rules, at 448; International Review of the Red Cross, Vol. 87, no. 857, 209 (2005—original version) (on file with author). Apparently “Rule 126 should have been split into two rules, as is done for other rules with different formulations for IAC and NIAC.” E-mail from Dr. Jean-Marie Henckaerts, Legal Adviser, ICRC Legal Division, to author (ICRC Ref. No. DC_JUR/GVA07E961) (Nov. 22, 2007, 05:10:59 EST) (on file with author). Thus, the corrected rule should read as follows:

**Rule 126.**

A. Civilian internees must be allowed to receive visitors, especially near relatives, to the degree practicable.

B. Persons deprived of their liberty in connection with a non-international armed conflict must be allowed to receive visitors, especially near relatives, to the degree practicable.


\(^{58}\) Henckaerts Address, *supra* note 43. *Cf.* Jean-Marie Henckaerts, *Customary International Humanitarian Law – A Rejoinder to Judge Aldrich*, 76 BRIT. Y.B. INT’L L. 525, 525-26 (2006) (explaining, as one of the co-authors of the ICRC Study, that “[t]he ICRC’s main interest … was precisely in seeing whether customary international law provides a more detailed framework for non-international armed conflicts. In fact, the ICRC preferred to be mandated to prepare a report on non-international armed conflicts only but that was unacceptable to some States at the International Conference of the Red Cross and Red Crescent and so the organization was asked to look at both types of armed conflict.’’). Somewhat surprisingly, the ICRC Study reveals its aspirational bias when it admits that of the 146 rules that apply equally to both international and non-international armed conflicts, eight of them only “arguably” apply to non-international armed conflicts. *ICRC STUDY, supra* note 2, Vol. I: Rules, at 65 (Rule 21 requires military commanders to select the objective with the lowest threat of collateral damage); *id.* at 71 (Rule 23 requires parties to avoid locating military objectives near densely populated areas); *id.* at 74 (Rule 24 requires parties to remove civilians and civilian objects from the vicinity of military objectives); *id.* at 147 (Rule 44 requires military commanders to take all feasible precautions to minimize incidental damage to the environment); *id.* at 151 (Rule 45 prohibits the use of weapons which may be expected to cause serious damage to the environment); *id.* at 213 (Rule 62 prohibits the improper use of an adversary’s flags, emblems, insignia or uniforms); *id.* at 218 (Rule 63 prohibits the use of a neutral State’s flags, emblems, insignia or uniforms); *id.* at 283 (Rule 82 requires parties who use landmines to record their placement). *See* **RESTATEMENT OF FOREIGN**
books containing the State practice corresponding to the proposed rules in Volume I.

Each volume is divided further into six parts, corresponding to the six areas of research:

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* \(^{59}\)
Part VI: Implementation \(^{60}\)

Each part is further divided into topical chapters in both Volumes. Thus, each proposed rule and chapter in Volume I has corresponding State practice in Volume II. \(^{61}\) Due

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\(^{59}\) This article focuses on the rules pertaining to the wounded, sick and shipwrecked, which fall under Part V. ICRC STUDY, *supra* note 2, Vol. I: Rules, at vi.

\(^{60}\) *Id.* at xlv, xlvi.

to the sheer magnitude of the State practice, the section numbers are reset at the beginning of each chapter in Volume II.

(D) U.S. Response to the ICRC Study

As indicated earlier, only the United States has officially responded to the ICRC Study, in a letter co-signed by the Department of State Legal Adviser, and the Department of Defense General Counsel. The U.S. response admits that it simply represents “the U.S. Government’s initial reactions to the ICRC’s recent study” because “[g]iven the Study’s large scope, we have not yet been able to complete a detailed review of its conclusions.” However, the U.S. response envisions the United States “provid[ing] additional comments or otherwise mak[ing its] views known in due course.”

The U.S. response generally criticizes the ICRC Study’s unorthodox methodology,

62 See supra note 6 (discussing the immensity of the ICRC Study).
63 See supra note 8 and accompanying text (discussing the sole U.S. response to the ICRC Study).
64 Leah M. Nicholls, The Humanitarian Monarchy Legislates: The International Committee of the Red Cross and its 161 Rules of Customary International Humanitarian Law, 17 DUKE J. COMP. & INT’L L. 223, 248 (2006) (noting that the U.S. response to the ICRC Study was eagerly awaited, and that “its response could have a significant impact on whether the 161 rules are actually implemented.”).
65 DOS/DoD Letter to ICRC, supra note 3, at 5. These two officials would appear to have the requisite seniority to express the official view of the United States vis-à-vis the ICRC Study. See infra notes 116-118 and accompanying text (discussing which government officials’ statements should be considered in evaluating State practice).
66 DOS/DoD Letter to ICRC, supra note 3, at 1 (emphasis added).
67 Id.
including both the State practice it considered, and its lack of proof of *opinio juris*. With regard to the former, the U.S. response outlines five concerns: (1) the State practice provided is often too thin to support a new norm of customary international law; (2) “too much emphasis on written materials, such as military manuals and other guidelines published by States, as opposed to actual operational practice by States during armed conflict”; (3) overreliance on “statements by non-governmental organizations and the ICRC itself”; (4) inadequate weight given to “negative practice, especially among those States that remain non-parties to relevant treaties”; and (5) inadequate weight given “to the practice of specially affected States.”

With regard to the subjective *opinio juris* element of customary international law, the U.S. response to the ICRC Study raises four additional concerns: (1) the Study’s tendency “to merge the practice and *opinio juris* requirements into a single test”; (2) inferring “*opinio juris* from the practice of States that are parties to conventions, since their actions often are taken pursuant to their treaty obligations”; (3) basing *opinio juris* “predominantly [on] military manuals” which either “implement treaty rules, are intended to

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69 See infra notes 92-133 and accompanying text (discussing these traditional elements of customary international law).


71 See infra notes 92-133 and accompanying text (discussing the objective and subjective elements of customary international law formation).

72 See infra note 237 and accompanying text (criticizing Dean Kirgis’ “sliding scale” approach to customary international law formation).

73 See infra notes 158-163 and accompanying text (discussing the limitations of considering State practice that is merely consistent with existing treaty law obligations in the formation of related norms of customary international law).
provide policy (vs. legal) guidance, or are “prepared informally solely for training or similar purposes”; and (4) lack of “positive evidence of opinio juris that would be necessary to justify concluding that the rules advanced by the Study are part of customary international law and would apply to States even in the absence of a treaty obligation.”

The U.S. response mentions four other general methodological concerns about the ICRC Study: (1) its oversimplification of “complex and nuanced” norms of international law; (2) its overreliance on “non-binding recommendations in human rights instruments”;  

74 Cf. W. Hays Parks, The ICRC Customary Law Study: A Preliminary Assessment, 99 AM. SOC’Y INT’L L. PROC. 208, 209 (2005) (distinguishing between government statements that represent policy decisions versus “a government’s declaration of its interpretation of its law of war obligations”); Joshua Dorosin, Assistant Legal Adviser to the U.S. Department of State (speaking in his personal capacity), Roundtable Discussion at the North American launch of the ICRC Study at the American University Washington College of Law (Sep. 28, 2005), in Sabrina Balgamwalla, Review of Conference: The Reaffirmation of Custom as an Important Source of International Humanitarian Law, 13 HUM. RTS. BR. 13, 14 (2006) (noting that “States place rules in manuals for a variety of reasons, not always because they believe they are legally obligated to do so …. Often practice that is reflected in the manuals is based on a policy of including a certain rule, rather than a sense that the rule flows from a legal obligation.”). See supra note 49 and accompanying text (discussing the differences between legal obligations, statements of policy, and actual battlefield practice); infra notes 114, 316, 423 and accompanying text (same).

75 DOS/DoD Letter to ICRC, supra note 3, at 3-4.

76 See, e.g., infra notes 273-275 (noting the ICRC Study’s overgeneralization or mischaracterization of military manuals of the U.S. and at least nine other States). See also DOS/DoD Letter to ICRC, supra note 3, at 4, attachment p. 6 (criticizing the ICRC Study for its tendency to oversimplify complex and nuanced rules: “many rules are stated in a way that renders them overbroad or unconditional, even though State practice and treaty language on the issue reflect different, and sometimes substantially narrower, propositions.”); PERSPECTIVES ON THE ICRC STUDY, supra note 2, at 405 (same); George H. Aldrich, Customary International Humanitarian Law – an Interpretation on behalf of the International Committee of the Red Cross, 76 BRIT. Y.B. INT’L L. 503, 507, 523-24 (2006) (same); David Turns, Weapons in the ICRC Study on Customary International Humanitarian Law, 11 J. CONFLICT & SECURITY L. 201, 202-03 (2006) (same); infra note 349 (discussing the problems with a customary international law norm that deviates from a related treaty provision); PERSPECTIVES ON THE ICRC STUDY, supra note 2, at 44 (criticizing the ICRC Study for its “tendency to take statements at their face value rather than scrutinise their normative significance.”). But see PERSPECTIVES ON THE ICRC STUDY, supra note 2, at 22 (arguing that in order to reduce uncertainty and to avoid ambiguities inherent in customary international law, “the Study should result in reasonably straightforward rules insofar as this is possible, rather than more sophisticated norms which entail evaluation or discretion in order that they may be applied.”).

77 Contra Heike Krieger, A Conflict of Norms: The Relationship Between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study, 11 J. CONFLICT & SECURITY L. 265, 289 (2006) (applauding the ICRC Study for “successfully demonstrate[ing] how human rights law can complement and reinforce humanitarian law and help[] interpret some of its rules.”); id. at 291 (concluding that “[b]ecause of the importance democratic societies attach to human rights law, it is likely that human rights law, despite the problems that are involved with its application, will play a more and more important role in the context of armed conflicts.”); Louise
(3) its “assertion that a significant number of rules contained in the Additional Protocols … have achieved the status of customary international law” binding on all States, including those States which “have declined to become a party to those Protocols”; and (4) its “assertion that certain rules contained in the Geneva Conventions and the Additional Protocols have become binding as a matter of customary international law in internal armed conflict, notwithstanding the fact that there is little evidence in support of those propositions.”

“[T]o illustrate how these flaws call into question some of the Study’s conclusions,” the U.S. response “review[s] a fair cross-section of the Study” by examining four of the ICRC Study’s proposed rules: Rule 31 dealing with respecting and protecting humanitarian relief personnel; Rule 45, which involves protecting the environment from weapons that

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Doswald-Beck, co-author of ICRC Study, Professor of Public International Law and Director of the University Centre for International Humanitarian Law at the Graduate Institute of International Studies in Geneva, Roundtable Discussion at the North American launch of the ICRC Study at the American University Washington College of Law (Sep. 28, 2005), in Sabrina Balgamwalla, Review of Conference: The Reaffirmation of Custom as an Important Source of International Humanitarian Law, 13 HUM. RTS. BR. 13, 13 (2006) (arguing that “[t]he distinction between humanitarian and human rights law … has become less clear over time, and it is now impossible to create purely humanitarian rules when examining behaviors that reflect both human rights and humanitarian legal norms.”).


79 DOS/DoD Letter to ICRC, supra note 3, at 1.

80 Id. at attachment p. 22.

81 Id. at attachment pp. 1-6.
may cause serious environmental harm;\textsuperscript{82} Rule 78’s prohibition against the anti-personnel use of exploding bullets;\textsuperscript{83} and Rule 157’s support for vesting domestic courts with universal jurisdiction over war crimes.\textsuperscript{84}

Although illustrative, the analysis by the U.S. response to the ICRC Study of these four rules is neither suitably comprehensive nor sufficiently systematic to determine the U.S. position vis-à-vis each rule of the ICRC Study.\textsuperscript{85} This “pars[ing of] every Rule in the Study,”\textsuperscript{86} or at least those to which the United States is opposed, would be necessary in order for the United States to properly register its status as a “persistent objector”\textsuperscript{87} to the new norms of customary international law revealed by the ICRC Study rules. This, of course, assumes that the ICRC Study’s publication of its 161 rules\textsuperscript{88} itself represents the crystallization of these new norms.\textsuperscript{89} If the ICRC Study is correct that it merely represents a “‘photograph’ of customary international humanitarian law as it [already] stands today,”\textsuperscript{89} then arguably it is too late for the United States’ objections to the pre-existing norms of customary international law.

\textsuperscript{82} Id. at attachment pp. 7-12.

\textsuperscript{83} Id. at attachment pp. 12-17.


\textsuperscript{85} The U.S. letter in response to the ICRC Study admits that an “in-depth consideration of many other rules” may “reveal additional concerns.” DOS/DoD Letter to ICRC, \textit{supra} note 3, at attachment p. 22.


\textsuperscript{87} \textit{See infra} notes 173-189 and accompanying text (discussing the theory of persistent objection).

\textsuperscript{88} Theodor Meron, \textit{Revival of Customary Humanitarian Law}, 99 AM. J. INT’L L. 817, 834 (2005) (opining that “[o]ver time, the [ICRC] study may well have the same sort of crystallizing effect as Nicaragua’s holding [by the ICJ] regarding the customary law character of common Articles 1 and 3 of the Geneva Conventions.”).

international law to qualify the United States as a persistent objector to them.\(^90\)

Before the present article discusses three of the ICRC Study’s rules, it will be necessary to understand the traditional theory of customary international law formation,\(^91\) in order to establish the benchmark against which the Study rules will be examined.

### III. Traditional Theory of Customary International Law (CIL) Formation

Although the concept of customary international law certainly predates the formation of the United Nations\(^92\) and its judicial organ, the International Court of Justice (ICJ),\(^93\) the Statute of the ICJ “is the traditional starting point for discussions of [customary international law].”\(^94\) Article 38 of the Statute of the ICJ lists the relevant law which the World Court should follow:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

   a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

\(^90\) See infra note 174 and accompanying text (discussing how persistent objection must begin when the new norm is being formed in order to be effective).

\(^91\) See, e.g., PERSPECTIVES ON THE ICRC STUDY, supra note 2, at 23 (noting that “[t]he mechanics of custom formation is perhaps one of the most contested, yet fundamental, issues in contemporary international law.”).


\(^94\) Id. at 131. See, e.g., DINSTEIN, CONDUCT OF HOSTILITIES, supra note 3, at 5; JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 25 (2005) [hereinafter THE LIMITS OF INTERNATIONAL LAW].
b. **international custom, as evidence of a general practice accepted as law**;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.95

Thus, the traditional view is that customary international law is formed96 when there is “a general and consistent practice of states followed by them from a sense of legal

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95 Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993 (emphasis added). See also **Restatement of Foreign Relations**, supra note 21, at § 102(1); **ICRC Study**, supra note 2, Vol. I: Rules, at xxxi. There are thus generally considered to be three types of international legal obligations, based on treaty law, on customary international law, or on general principles of law. See, e.g. **Restatement of Foreign Relations**, supra note 21, at § 102; **Custom, Power and the Power of Rules**, supra note 21, at 166. “Of these three sources, the first two — treaties and customary international law — are considered much the more important.” **Custom, Power and the Power of Rules**, supra note 21, at 166.

Treaties are binding on those States who have become parties to them, under the Latin maxim *pacta sunt servanda* (meaning treaty obligations must be fulfilled in good faith). Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331; **Custom, Power and the Power of Rules**, supra note 21, at 175-76; **The Limits of International Law**, supra note 94, at 83, 189; **Dinstein, Conduct of Hostilities**, supra note 3, at 7. But cf. **The Limits of International Law**, supra note 94, at 14-15, 84-106, 185-203, 225 (rejecting the traditional assumption that States comply with international law out of good faith instead of because it is in their best interests). Customary international law is generally viewed as a normative rule formed by a relatively consistent practice by a meaningful group of States, especially those States which are uniquely affected by the norm, who have complied with the practice out of a belief or sense that they were legally obligated to do so (i.e. *opinio juris sive necessitatis*). See infra notes 92-133 and accompanying text. See also **Curtis A. Bradley & Jack L. Goldsmith, Foreign Relations Law—Cases and Materials** xxiii, 427 (2003); DOS/DoD Letter to ICRC, supra note 3, at 2-3 (criticizing ICRC Study for equating “the practice of States that have relatively little history of participation in armed conflict,” and those with a more substantial history of participation in armed conflict, which presumably would include the U.S.). But cf. **Limits of International Law**, supra note 94, at 13 (posing their theory that instead of imposing obligations on States, “[i]nternational law emerges from states’ pursuit of self-interested policies on the international stage. … It is not a check on state self-interest; it is a product of state self-interest.”) (emphasis added); id. at 39, 43, 185-203, 225 (same); id. at 225 (arguing that “[m]uch of customary international law is simply coincidence of interest.”).

obligation” or opinio juris sive necessitatis. The fact that the Statute of the ICJ lists treaty law before customary international law may be perceived to represent a hierarchy of legal norms, with the former trumping the latter if both are on point. Of course, this traditional formulation of customary international law begs for its terms to be defined. Other issues

97 RESTATEMENT OF FOREIGN RELATIONS, supra note 21, at § 102(2). See also THE LIMITS OF INTERNATIONAL LAW, supra note 94, at 21, 23; DINSTEIN, CONDUCT OF HOSTILITIES, supra note 3, at 5; Theodor Meron, Revival of Customary Humanitarian Law, 99 AM. J. INT’L L. 817, 817 (2005) (observing “that, at least in the field of humanitarian law, customary law continues to thrive and to depend in significant measure on the traditional assessment of both state practice and opinio juris.”). But cf. THE LIMITS OF INTERNATIONAL LAW, supra note 94, at 14-15, 84-106, 185-203, 225 (rejecting the traditional assumption that States comply with international law out of good faith instead of because it is in their best interests).


99 See, e.g., Jared Wessel, Judicial Policy-Making at the International Criminal Court: An Institutional Guide to Analyzing International Adjudication, 44 COLUM. J. TRANSNAT’L L. 377, 415-16 (2006); Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 137 ¶ 274 (June 27); infra note 167 (discussing how certain provisions of the Geneva Conventions may not be modified by subsequent customary international law). This argument is further supported by the plain language of Article 38(1)(d) of the Statute of the ICJ, which lists “judicial decisions and the teachings of the most highly qualified publicists … as subsidiary means for the determination of rules of law.” Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993 (emphasis added). See, e.g., RESTATEMENT OF FOREIGN RELATIONS, supra note 21, at § 103 reporters’ notes pp. 37-38. This implies that the list is hierarchical. Contra Rome Statute of the International Criminal Court art. 21(1)(b), July 17, 1998, 2187 U.N.T.S. 3, 135 (entered into force July 1, 2002) (listing customary international law on the same tier as treaty law); PERSPECTIVES ON THE ICRC STUDY, supra note 2, at 7 (same); RESTATEMENT OF FOREIGN RELATIONS, supra note 21, at § 102 cmt. j (same); id. at cmt. 1 (only listing general principles of law as a secondary source of international law); CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW—CASES AND MATERIALS xxiii (2003) (same); THE LIMITS OF INTERNATIONAL LAW, supra note 94, at 21 (same). See infra note 171 and accompanying text (discussing the fact that customary international law modifying an existing treaty is relatively rare). At least one author posits that there is no clear answer regarding the preeminence of treaties versus customary international law, and that “[t]hese are complex doctrinal questions which are not answered simply by the affirmation that treaties must be interpreted in the light of any relevant rules of customary international law.

100 See infra notes 107-124 and accompanying text (discussing the State practice element of customary international law); infra notes 125-133 and accompanying text (discussing the opinio juris element of customary international law).
include the role of non-State actors and treaty law in the formation of customary international law, and whether States can opt out of a new norm of customary international law by persistently objecting to its formation. One final issue addressed by the present article is the continued relevance of customary international law in an area “of heavy regulation by treaty”—namely the law of war.

(A) Relevant State Practice

Of the two components required for the formation of customary international law, State practice is considered the objective element, because at least theoretically it should be possible to weigh State practice on some sufficiency scale. However, two primary

101 See infra notes 134-148 and accompanying text (discussing the role of non-State actors in the formation of customary international law).

102 See infra notes 149-172 and accompanying text (discussing the role of treaty law in the formation of customary international law).

103 See infra notes 173-189 and accompanying text (discussing the concept of persistent objection to the formation of customary international law).

104 There are other doctrinal problems associated with the traditional theory of customary international law formation, such as “[t]he traditional paradigm’s inability to explain how customary international law emerges from disorder, or how it changes over time …” THE LIMITS OF INTERNATIONAL LAW, supra note 94, at 25. These issues are beyond the scope of the present article. See generally id. at 10-14, 26-35 (posing a more descriptive paradigm, with four behavioral models based on rational choice theory).

105 PERSPECTIVES ON THE ICRC STUDY, supra note 2, at 6. See also id. at 13 (postulating that “one should approach exercises of distilling customary international law in areas that are heavily regulated by treaty with caution.”).

106 See infra notes 190-240 and accompanying text (discussing the continued relevance of customary international law); supra note 3 (explaining that the Law Of Armed Conflict (LOAC) is synonymous with the Law Of War (LOW), International Humanitarian Law (IHL), and jus in bello (i.e. the regulation of the conduct of hostilities during the course of war).


108 But cf. THE LIMITS OF INTERNATIONAL LAW, supra note 94, at 24 (explaining the difficulties of surveying 194 States for their State practice, and “[t]hus, customary international law is usually based on a highly selective survey of state practice that includes only major powers and interested states”). See also id. (noting that “[i]ncreasingly, courts and scholars ignore the state practice requirement altogether … It is thus unclear when, and to what degree, the state practice requirement must be satisfied.”).
questions arise when considering upon which State practice to base a new norm of customary international law. First, what is considered legitimate evidence of a particular State’s practice?\(^{109}\) Second, how consistent or widespread does the practice have to be?\(^{110}\) In other words, how many, and which States have to abide by the practice?\(^{111}\)

Just as we would consider an individual’s statements and actions to determine her beliefs, we need to consider a State’s statements and actions to determine the practice of that State.\(^{112}\) However, since a State is only a juridical person and cannot technically make statements or take action itself, we must necessarily consider the statements and actions of its leaders, as well as those of its organs.\(^{113}\) Thus, State practice “includes diplomatic acts and instructions as well as public measures and other governmental acts and official statements of policy ….”\(^{114}\) This, of course, raises the question as to which public officials’ statements and

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\(^{109}\) See, e.g., The Limits of International Law, supra note 94, at 23 (noting that “[t]here is little agreement about what type of state action counts as state practice.’’).

\(^{110}\) See, e.g., id. at 24.

\(^{111}\) See infra notes 123-124, 162 and accompanying text (discussing the involvement of important and specially affected States in the formation of customary international law).

\(^{112}\) See infra notes 134-148 and accompanying text (discussing the role of non-state actors in the formation of customary international law).


\(^{114}\) Restatement of Foreign Relations, supra note 21, at § 102 cmt. b. See also id. at reporters’ notes p. 31 (including “what states do in or through international organizations” as contributing to State practice); Dunoff, Ratner & Wippman, International Law Norms, Actors, Process—A Problem-Oriented Approach 74 (2002) (including the following as evidence of State practice: “diplomatic contacts and correspondence, public statements of government officials, legislative and executive acts, military manuals and actions by military commanders, treaties and executive agreements, decisions of international and national courts and tribunals, and decisions, declarations, and resolutions of international organizations.” Contra W. Hays Parks, The ICRC Customary Law Study: A Preliminary Assessment, 99 AM. SOC’Y INT’L L. PROC. 208, 209 (2005) (distinguishing between government statements that represent policy decisions versus “a government’s declaration of its interpretation of its law of war obligations”); Joshua Dorosin, Assistant Legal Adviser to the U.S. Department of State (speaking in his personal capacity), Roundtable Discussion at the North American
actions count towards establishing State practice (i.e. how far down the chain-of-command do we consider)?

For example, certainly presidential statements and presidential actions contribute toward establishing U.S. practice, and, perhaps arguably, those made or done by the President’s cabinet (i.e. the Vice President, and Secretaries of executive departments) since their statements and actions would presumably reflect those of the President. However, what about statements made by the deputy secretaries, the under secretaries, their assistants and legal advisors, or even the deputy legal advisors? In determining whether the statements

launch of the ICRC Study at the American University Washington College of Law (Sep. 28, 2005), in Sabrina Balgamwalla, Review of Conference: The Reaffirmation of Custom as an Important Source of International Humanitarian Law, 13 HUM. RTS. BR. 13, 14 (2006) (noting that “States place rules in manuals for a variety of reasons, not always because they believe they are legally obligated to do so …. Often practice that is reflected in the manuals is based on a policy of including a certain rule, rather than a sense that the rule flows from a legal obligation.”).

115 Cf. Yoram Dinstein, The ICRC Customary International Humanitarian Law Study, 36 Isr. Y.B. Hum. Rts. 1, 4 ¶ 7 (2006) (agreeing that verbal acts of States can constitute State practice, but arguing that the ICRC Study “go[es] way too far” in generically considering verbal statements and in not differentiating between statements depending on “who is making the statement, when, where and in what circumstances.”). Part of the question “how far down the chain-of-command do we consider” is the issue of the consistency of practice within a given State. For example, if presidential statements are at odds with those of the Secretary of Defense, which differ from those of senior military commanders, which are at variance from the statements of members of Congress, what is the U.S. practice? Compare Associated Press, Bush says U.S. ‘does not torture people,’ MSNBC, Oct. 5, 2007, http://www.msnbc.msn.com/id/21148801/ with Understanding American Law and Torture Policy, Posting to Amnesty International, Stanford’s Blog to End America’s Use of Torture, http://torture.stanford.edu/2007/02/understanding_american_law_and.html (Feb. 13, 2007, 19:47) and Dick Durbin, United States Senator, McCain-Graham-Durbin Amendment on U.S. Torture Policy Approved by U.S. Senate (Oct. 6, 2007), http://durbin.senate.gov/record.cfm?id=247007. In the Nicaragua v. U.S. case, the ICJ noted that State practice need not:

be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general be consistent with such rules, and that 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. If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State’s conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.


116 See supra note 65 (discussing the DOS/DoD letter to the president of the ICRC, and concluding that since the letter was signed by the chief legal adviser of each of these executive departments, that it represents the
of particular government officials should count in assessing U.S. practice, factors to consider might include how removed these officials are from the President, whether their position requires Senate confirmation, and even whether or not they have direct access to or guidance official U.S. position vis-à-vis the ICRC Study).

On the one hand, legal advisors may help establish policy if their bosses (i.e. clients) follow their legal advice, but on the other hand, legal advisors should feel free to express their professional opinions without fear that these legal opinions (if made public) could somehow be construed as U.S. practice. This is not an academic exercise. In 1987, then U.S. Department of State Deputy Legal Adviser, Mr. Michael Matheson, attended a “Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions.” Note that while the principal legal advisor to many departments of the U.S. executive branch is given the title “General Counsel” (e.g. Department of Defense, Department of the Treasury, Department of Agriculture, etc.), the principal legal counsel to the Department of State is titled “Legal Adviser to the Secretary of State.” See generally http://www.state.gov/s/l/ (last visited Dec. 16, 2007). Mr. Matheson’s remarks were subsequently published in the American University Journal of International Law and Policy. The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, 2 Am. U. J. INT’L & POLICY 419 (1987). Mr. Matheson apparently prefaced his remarks as “a presentation on the United States position concerning the relation of customary international law to the 1977 Protocols Additional to the 1949 Geneva Conventions.” Id. at 419. While the “Legal Adviser holds a rank equivalent to that of Assistant Secretary of State and reports directly to the Secretary of State,” the same cannot be said for his “[four Deputy Legal Advisers].” Practicing Law in the Office of the Legal Adviser, http://www.state.gov/s/l/3190.htm (July 15, 2007). Although Mr. Matheson’s remarks predate the Digest of United States Practice in International Law published by the Office of the Legal Adviser to the Secretary of State, there is no indication that his remarks were subsequently endorsed by higher officials in the Department of State. W. Hays Parks, Comments on the ICRC Customary Law Study, (Sep. 28, 2005) (unpublished manuscript at 8 & n. 14, on file with author) (revealing “personal knowledge” that “Mr. Matheson spoke in a personal capacity” and that Mr. Matheson’s statements were “not cleared by the Department of Defense, and to the best of [Mr. Parks’] knowledge [were] not cleared by any other agency.”). See generally Digest of International Law, http://www.state.gov/s/l/c8183.htm. Nevertheless, Mr. Matheson’s remarks are routinely cited as representing the U.S. view as to which provisions in Additional Protocol I represent customary international law, especially by the ICRC Study. See, e.g., John T. Rawcliffe, Changes to the Department of Defense Law of War Program, 2006 ARMY LAW. 23, 31 n. 56 (2006) (noting that Mr. Matheson’s remarks “are often cited as to the U.S. position regarding Protocols I and II”); Nicholas F. Lancaster, Occupation Law, Sovereignty, and Political Transformation: Should the Hague Regulations and the Fourth Geneva Convention Still be Considered Customary International Law?, 189 MIL. L. REV. 51, 64 n. 95 (2006) (citing Mr. Matheson’s remarks as supporting the proposition that the majority of the provisions in the Additional Protocols “reflect customary international law”); Yoram Dinstein, The ICRC Customary International Humanitarian Law Study, 36 ISR. Y.B. HUM. RTS. 1, 2 ¶ 3 (2006) (same); DINSTEIN, CONDUCT OF HOSTILITIES, supra note 3, at 11 (same); George H. Aldrich, Customary International Humanitarian Law – an Interpretation on behalf of the International Committee of the Red Cross, 76 BRIT. Y.B. INT’L L. 503, 507 (2006) (same); Robert Cryer, Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study, 11 J. CONFLICT & SECURITY L. 239, 256 n. 108 (2006) (noting that Mr. Matheson’s remarks are “[t]he most heavily used piece of academic literature, which is used to assist in the determination of custom” by the ICRC Study); Malcolm MacLaren & Felix Schwendimann, An Exercise in the Development of International Law: The New ICRC Study on Customary International Humanitarian Law, 6 GERMAN L. J. 1217, 1233 & n. 73 (2005) (citing to Mr. Matheson’s remarks as supporting the view that the United States has led the charge in “obstruct[ing] the crystallization of certain rules as customary.”). Cf. Theodor Meron, Revival of Customary Humanitarian Law, 99 AM. J. INT’L L. 817, 820 (2005) (noting that “Additional Protocol I … is also generally viewed as conforming broadly with customary international law.”).
from the President. At some point, one could argue that the statements of lesser officials should not be considered as contributing to State practice unless those statements are ratified or somehow endorsed by more senior officials.\textsuperscript{118}

Even more difficult than the question of which practice counts in determining a particular State’s practice is the question of how consistent does that practice have to be over time and across the 194 States in the world.\textsuperscript{119} The general view on this question is that:

\begin{quote}
[t]he practice necessary to create customary law may be of comparatively short duration, but … it must be “general and consistent.” A practice can be general even if it is not universally followed … but it should reflect wide acceptance among the states particularly involved in the relevant activity. Failure of a significant number of important states to adopt a practice can prevent a principle from becoming general customary law though it might become ‘particular customary law’ for the participating states.\textsuperscript{120}
\end{quote}

Thus, while it may not take much time for a new norm of customary international law to crystallize,\textsuperscript{121} it still must be practiced by a sufficient number of States in order to

\textsuperscript{118} See, e.g. Aug. 1 2002 Memo from Jay Bybee, Asst. Atty. Gen’l. to White House Counsel, \textit{available at http://www.humanrightsfirst.org/us\_law/etn/gonzales/memos\_dir/memo_20020801\_JD\_\%20Gonz\_pdf. Contra PERSPECTIVES ON THE ICRC STUDY, supra note 2, at 40 (arguing that since State responsibility attaches to the actions of lesser officials as long as they are acting in their official capacity, therefore “the presumption must be that acts of officials are acts of State.”). However State responsibility is not coterminous with State practice. For example, arguably “[a] State is responsible for violations of international humanitarian law attributable to it.” ICRC STUDY, supra note 2, Vol. I: Rules, at 530 (Rule 149). Yet isolated instances of law of war violations certainly do not support a conclusion that a particular State has a practice of committing, encouraging or condoning the perpetration of war crimes.


\textsuperscript{120} \textit{RESTATEMENT OF FOREIGN RELATIONS}, supra note 21, at § 102 cmt. b. \textit{See also id. at § 102 cmt. e.}

\textsuperscript{121} Id. at § 102 cmt. b. The concept of a State’s sovereignty over its “continental shelf as the natural prolongation of the land territory of the coastal State,” first proclaimed by President Truman in 1945, is generally cited as the paradigmatic example of “instant customary international law” due to the speed with which similar claims were made by other coastal States and generally acquiesced to by other States. \textit{Id. at § 102 reporters’ notes p. 30. See also North Sea Continental Shelf (F.R.G. v. Den. & Neth.), 1969 I.C.J. 3, 43 ¶ 74 (Feb. 20); Continental Shelf (Libya v. Malta), 1985 I.C.J. 13, 55 ¶ 77 (June 3); David Turns, \textit{Weapons in the ICRC Study on Customary International Humanitarian Law}, 11 J. CONFLICT & SECURITY L. 201, 202 (2006)
constitute a “general practice.” It especially must be practiced by “important States,” and perhaps even more importantly, it must be practiced by those States which are specially affected. Once it is determined that there exists a relatively consistent State practice, it (wondering if the ICRC Study rules differ from their pre-existing norms, but are nevertheless accepted by tribunals as dispositive, whether that will be another instance of instant customary law). For an interesting discussion regarding the role of State power in the formation of the customary international law norm concerning the continental shelf, and “the Truman Proclamation as a classic example of a conscious, successful effort to develop a new customary rule,” see generally CUSTOM, POWER AND THE POWER OF RULES, supra note 21, at 39, 90-92.

122 RESTATEMENT OF FOREIGN RELATIONS, supra note 21, at § 102 cmt. b. See also id. at § 102 cmt. e; DINSTEIN, CONDUCT OF HOSTILITIES, supra note 3, at 6.

123 RESTATEMENT OF FOREIGN RELATIONS, supra note 21, at § 102 cmt. b. The implication of the Restatement is that the United States is one such “important State,” and that it would be difficult for a new norm of customary international law to crystallize without having the support of consistent U.S. State practice. This implication is despite the Restatement’s claimed independence from the U.S. perspective. See id. at 3. See also Robert Cryer, Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study, 11 J. CONFLICT & SECURITY L. 239, 244 (2006) (arguing that because the statements of non-parties are especially relevant to whether treaty provisions have passed into customary international law, “US views on Additional Protocol I are of particular note.”); CUSTOM, POWER AND THE POWER OF RULES, supra note 21, at 37 (likening the formation of customary international law to the “‘gradual formation of a road across vacant land … Among the users are always some who mark the soil more deeply with their footprints than others, either because of their weight, which is to say their power in this world, or because their interests bring them more frequently this way.’) (quoting CHARLES DE VISSCHER, THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW 149 (Percy Corbett trans., Princeton University Press 1957) (1957)); CUSTOM, POWER AND THE POWER OF RULES, supra note 21, at 37 (noting that “[a]mong other things, powerful States generally have large, well-financed diplomatic corps which are able to follow international developments globally across a wide spectrum of issues. This enables those States to object, in a timely fashion, to developments which they perceive as being contrary to their interests.”); id. at 205. But cf. THE LIMITS OF INTERNATIONAL LAW, supra note 94, at 24 (noting the difficulties of surveying 194 States for their State practice, and “[t]hus, customary international law is usually based on a highly selective survey of state practice that includes only major powers and interested states”).

124 Acceptance of a new norm of customary international law does not require universal acceptance, but sufficiently widespread acceptance, particularly by those States specially affected by the proposed norm. See RESTATEMENT OF FOREIGN RELATIONS, supra note 21, at § 102 cmt. b; DUNOFF, RATNER & WIPPMAN, INTERNATIONAL LAW NORMS, ACTORS, PROCESS—A PROBLEM-ORIENTED APPROACH 75 (2002); DINSTEIN, CONDUCT OF HOSTILITIES, supra note 3, at 6; North Sea Continental Shelf (F.R.G. v. Den. & Neth.), 1969 I.C.J. 3, 42 ¶ 73 (Feb. 20); infra note 162. See also DOS/DoD Letter to ICRC, supra note 3, at 2-3 (criticizing ICRC Study for equating “the practice of States that have relatively little history of participation in armed conflict,” and those with a more substantial history of participation in armed conflict, which presumably would include the U.S.); PERSPECTIVES ON THE ICRC STUDY, supra note 2, at 10 (noting that while the Study purports to consider ‘density’ or “the weight[] of relevant items of practice, there is often little or no evidence that this is done. For example, resolutions of the UN Commissioner for Human Rights seem to attract the same weight as the legislation or policy statements of specially affected States.”). Thus, perhaps not too surprisingly, the ICRC Study purports to support the idea that “if ‘specially affected States’ do not accept the [customary] practice, it cannot mature into a rule of customary international law … .” ICRC STUDY, supra note 2, Vol. I: Rules, at xxxviii. See also PERSPECTIVES ON THE ICRC STUDY, supra note 2, at 36, 233; Leah M. Nicholls, The Humanitarian Monarchy Legislates: The International Committee of the Red Cross and its 161 Rules of
still remains to determine whether that practice or custom is followed out of sense of legal obligation.

(B)  **Opinio Juris Sive Necessitatis**

The second component required for the formation of customary international law, a sense of legal obligation or *opinio juris*, is considered the subjective element,\(^{125}\) because of the difficulties inherent in identifying its existence.\(^{126}\) Nevertheless, *opinio juris* remains the essential element of customary international law,\(^{127}\) differentiating it from mere custom or

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\(^{126}\) See generally Custom, Power and the Power of Rules, supra note 21, at 130-33; *The Limits of International Law*, supra note 94, at 24 (positing that “[o]pinio juris is really a conclusion about a practice’s status as international law; it does not explain how a widespread and uniform practice becomes law.”) (emphasis in original).

\(^{127}\) Custom, Power and the Power of Rules, supra note 21, at 18; *The Limits of International Law*,
comity.\textsuperscript{128} A practice that is generally followed but which states feel legally free to disregard does not contribute to customary law. A practice initially followed by states as a matter of courtesy or habit may become law when states generally come to believe that they are under a legal obligation to comply with it.\textsuperscript{129}

Thus the difficulty is in proving that the relatively consistent State practice is followed out of a sense of legal obligation, versus out of mere courtesy or habit.\textsuperscript{130}

The ICRC Study notes the difficulty of proving the subjective element of \textit{opinio juris}:

During work on the study it proved very difficult and largely theoretical to strictly separate elements of practice and legal conviction. More often than not, one and the same act reflects practice and legal conviction…. This is particularly so because verbal acts count as State practice and often reflect the legal conviction of the State involved at the same time.

When there is sufficiently dense practice, an \textit{opinio juris} is generally contained within that practice and, as a result, it is not usually necessary to demonstrate separately the existence of an \textit{opinio juris}. \textit{Opinio juris} plays an important role, however, in certain situations where the practice is ambiguous,

\textit{supra} note 94, at 23.

\textsuperscript{128} \textit{RESTATEMENT OF FOREIGN RELATIONS, supra} note 21, at 23; \textit{THE LIMITS OF INTERNATIONAL LAW, supra} note 94, at 23. \textit{Contra} Christiana Ochoa, \textit{The Individual and Customary International Law}, 48 VA. J. INT’L L. 119, 128 (2007) (arguing that the only difference between custom and customary international law is that the latter has had its legal status recognized by a court). A paradigmatic example of the difference between mere custom and customary international law is the difference between extending diplomatic courtesies to foreign dignitaries out of “considerations of courtesy, convenience or tradition,” versus providing them with diplomatic immunity on the understanding that one’s own diplomatic envoys will likewise enjoy diplomatic immunity (i.e. a reciprocal duty). \textit{See, e.g., North Sea Continental Shelf (F.R.G. v. Den. & Neth.), 1969 I.C.J. 3, 44 ¶ 77 (Feb. 20); Vienna Convention on Diplomatic Relations art. 31, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95. See generally \textit{CUSTOM, POWER AND THE POWER OF RULES, supra} note 21, at 88-105 (discussing the principle of reciprocity in customary international law). \textit{But cf. THE LIMITS OF INTERNATIONAL LAW, supra} note 94, at 54-59 (positing that diplomatic immunity is based on a cooperative strategy between States, which is in their long-term best interests, rather than out of a sense of legal obligation, and that this rational choice model better explains “the many deviations from the [diplomatic] immunity rule.”).}

\textsuperscript{129} \textit{RESTATEMENT OF FOREIGN RELATIONS, supra} note 21, at § 102 cmt. c.

\textsuperscript{130} \textit{See generally RESTATEMENT OF FOREIGN RELATIONS, supra} note 21, at § 102 reporters’ notes p. 30 (noting that the conceptual difficulty of having a sense of legal obligation before the custom has matured into customary international law has not prevented acceptance of norms of customary international law); Christiana Ochoa, \textit{The Individual and Customary International Law}, 48 VA. J. INT’L L. 119, 132 (2007) (describing customary international law’s “circularity problem”).
in order to decide whether or not that practice counts towards the formation of custom.  

Thus, the ICRC Study largely ignores this essential element to the traditional formation of customary international law when it posits its 161 proposed rules. This is particularly troubling, since under the traditional theory, the burden of proving a new norm of customary international law is on the proponent of the new norm. Next we shall consider the degree to which non-State actors play a role in customary international law formation.

131 ICRC STUDY, supra note 2, Vol. I: Rules, at xli. See also CUSTOM, POWER AND THE POWER OF RULES, supra note 21, at 136-41 (discussing the difficulties in separating State practice from opinio juris). Thus, the ICRC Study appears to be following Dean Kirgis’ “sliding scale” of State practice versus opinio juris. See infra note 237 and accompanying text (criticizing Dean Kirgis’ “sliding scale” approach to customary international law formation). See also PERSPECTIVES ON THE ICRC STUDY, supra note 2, at 26 (noting that the ICRC Study uses a traditional approach to customary international law formation “until the issue of ambiguous practice arises. … [when] it then invokes Kirgis’s ‘sliding scale’ analysis.”). See generally Frederic L. Kirgis, Custom on a Sliding Scale, 81 AM. J. INT’L L. 146 (1987).

132 THE LIMITS OF INTERNATIONAL LAW, supra note 94, at 24; DOS/DoD Letter to ICRC, supra note 3, at 4 (arguing that “[a] more rigorous approach to establishing opinio juris is required. … the practice volumes generally fall short of identifying the level of positive evidence of opinio juris that would be necessary to justify concluding that the rules advanced by the Study are part of customary international law and would apply to States even in the absence of a treaty obligation.”). But see International Law Association, 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, available at http://www.ila-hq.org/pdf/CustuumaryLaw.pdf, 40-42 § 19 (2000) [hereinafter ILA Report on CIL] (arguing that “the more the [State] practice, the less the need for the subjective element [opinio juris].”); RESTATEMENT OF FOREIGN RELATIONS, supra note 21, at § 102 cmt. c (noting that “[e]xplicit evidence of a sense of legal obligation (e.g. by official statements) is not necessary; opinio juris may be inferred from acts or omissions.”).

(C) Role of Non-State Actors in Formation of CIL

The principal actors in international law remain States, although non-State actors (such as individuals and international organizations) are beginning to exert a great deal of influence to assert rights and to fulfill international obligations. The relevant question in the present context is to what extent non-State actors play a role in the formation of customary international law.

Since the traditional view still prevails that customary international law is formed by a general and consistent State practice followed out of a sense of legal obligation for the State, the role of non-State actors in the formation of customary international law would appear to be rather limited. Certainly individuals play a role in the formation of customary international law.

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135 RESTATEMENT OF FOREIGN RELATIONS, supra note 21, at 133.


137 Dieter Fleck, International Accountability for Violations of the Ius in Bello: The Impact of the ICRC Study on Customary International Humanitarian Law, 11 J. CONFLICT & SECURITY L. 179, 191-94, 197 (2006). Note that Dieter Fleck was one of the “academic and governmental experts” invited by the ICRC to comment on two drafts before the ICRC Study was published. ICRC STUDY, supra note 2, Vol. I: Rules, at xxii, xxiii, l-li; International Review of the Red Cross, Vol. 87, no. 857, 186 n. 32 (2005).

138 The inverse question is to what extent customary international law can bind non-State actors. See infra notes 194, 216 and accompanying text (noting that custom may bind non-State actors to a greater extent than treaty law).


140 But see infra notes 182-188 (discussing the role of the ICRC Study in possibly establishing customary international law).
international law to the extent their statements and actions are accepted as evidence of State practice.141  “Non-governmental organisations have had a great deal of influence on the development of some customary rules, especially in the human rights field.”142  International (aka intergovernmental) organizations play a role in the formation of customary international law143 either to the extent that States express their official views (i.e. opinio juris)144 in discussions, debates, and votes on declarations and resolutions,145 or to the extent that the

141 See supra notes 116-118 and accompanying text (discussing which government officials’ statements should be considered in evaluating State practice).

142 CUSTOM, POWER AND THE POWER OF RULES, supra note 21, at 86. But see id. (noting that non-governmental organizations (NGOs) lack international legal personality, “and are therefore incapable of participating directly in the customary [international law formation] process.” Instead, NGOs either mobilize public pressure to influence State practice, or NGOs persuade States directly. Id. Note that the ICRC, although a Swiss NGO, may be “in a class of its own” since the ICRC does possess international legal personality. ICRC, The ICRC’s status: in a class of its own, available at http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/5w9fjy?opendocument (last visited Dec. 16, 2007) (arguing that the ICRC is a hybrid between a “private association [i.e. NGO] formed under the Swiss Civil Code,” and an “intergovernmental organization … [because it has] an ‘international legal personality’ … [as well as] privileges and immunities”). Therefore, the ICRC perhaps has a stronger basis for arguing that it can contribute directly to the formation of customary international law. See infra note 305 (noting that the ICRC Study considers the “Practice of the International Red Cross and Red Crescent Movement” on par with other categories of international practice in Volume II); Leah M. Nicholls, The Humanitarian Monarchy Legislates: The International Committee of the Red Cross and its 161 Rules of Customary International Humanitarian Law, 17 DUKE J. COMP. & INT’L L. 223, 232 (2006) (arguing that “the ICRC creates customary law by encouraging states to act in a particular way, and then uses those state actions to justify labeling it as customary law.”). But see Yoram Dinstein, The ICRC Customary International Humanitarian Law Study, 36 Isr. Y.B. Hum. Rts. 1, 5 ¶ 9 (2006) (commenting that despite the ICRC’s unique role in international humanitarian law, it remains a non-governmental organization (NGO), and that “NGOs, whatever their standing, can never contribute directly through their own practice to the creation of customary norms. … The ICRC [may] play[] … the role of a catalyst for the evolution of State practice, but no more.”).


144 CUSTOM, POWER AND THE POWER OF RULES, supra note 21, at 40, 135.

145 See, e.g., Yoram Dinstein, The ICRC Customary International Humanitarian Law Study, 36 Isr. Y.B. Hum. Rts. 1, 4 ¶ 8 (2006) (commenting that “Member States of an IGO may therefore contribute to State practice through their conduct and statements within the fold of the organization.”); RESTATEMENT OF FOREIGN RELATIONS, supra note 21, at § 102 reporters’ notes p. 31 (including “what states do in or through international organizations” as contributing to State practice); id. at § 103 cmt. c & reporters’ notes p. 38 (same); DUNOFF, RATNER & WIPPMAN, INTERNATIONAL LAW NORMS, ACTORS, PROCESS—A PROBLEM-ORIENTED APPROACH 74 (2002) (including the following as evidence of State practice: “diplomatic contacts and correspondence, public statements of government officials, legislative and executive acts, military manuals and actions by military commanders, treaties and executive agreements, decisions of international and national courts and tribunals, and
declarations and resolutions themselves constitute a compilation of State practice.\textsuperscript{146} However, these examples should only serve to re-emphasize the limited, \textit{supporting or secondary} role that non-State actors play in the formation of customary international law.\textsuperscript{147} The international legal system is still generally State-centric.\textsuperscript{148} Less clear is the role of treaty law in the formation of customary international law.

\textbf{(D) Role of Treaty Law in Formation of CIL}

While it is not uncommon to consider treaty law as distinct from customary

\begin{itemize}
  \item decisions, declarations, and resolutions of international organizations.”
\end{itemize}

\textsuperscript{146} \textit{CUSTOM, POWER AND THE POWER OF RULES, supra} note 21, at 42, 156-57, 170; \textit{THE LIMITS OF INTERNATIONAL LAW, supra} note 94, at 23 (noting that “[e]ven more controversially, United Nations General Assembly resolutions and other nonbinding statements and resolutions by multilateral bodies are often viewed as evidence of customary international law.”); ICRC \textit{STUDY, supra} note 2, Vol. II: Practice, at 2611 §§ 173-174 (citing to U.N. General Assembly Resolutions appealing to governments to permit the ICRC to evacuate the wounded from areas of conflict). \textit{ Cf.} Christiana Ochoa, \textit{The Individual and Customary International Law}, 48 \textit{VA. J. INT’L L.} 119, 177-78 (2007) (arguing that General Assembly resolutions are at least a source of world public opinion, which in her view, should play a role in customary international law formation). \textit{But see DOS/DoD Letter to ICRC, supra} note 3, at 2 (criticizing the ICRC Study for relying on non-binding U.N. General Assembly Resolutions); Legality of the Threat or Use of Nuclear Weapons, \textit{Advisory Opinion, 1996 I.C.J. 226, 254-55 ¶ 70 (July 8)} (noting that while General Assembly Resolutions “are not binding, [they] may sometimes have normative value … [in] establishing the existence of a rule or the emergence of an \textit{opinio juris.”}). However, this remains the practice of the \textit{States} themselves, \textit{not the practice of the international organization}. \textit{See, e.g.} Jan Klabbers, \textit{AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW} 231-32 (2002) (noting that the International Court of Justice came close in its 1971 \textit{Namibia} opinion to recognizing the practice of the U.N. Security Council in treating an abstention as a “concurring vote” in terms of Article 27(3) of the U.N. Charter, as customary law, but avoided doing so because “then it would have had to pronounce itself on the possibility of customary law developing within the UN to begin with: Article 108 (the amendment article) may militate against such a conclusion.”).

\textsuperscript{147} \textit{CUSTOM, POWER AND THE POWER OF RULES, supra} note 21, at 170 (noting that “[g]enerally speaking … international organisations remain far less important to the process of customary international law than States.”). \textit{Contra} Christiana Ochoa, \textit{The Individual and Customary International Law}, 48 \textit{VA. J. INT’L L.} 119, 121 (2007); ICRC \textit{STUDY, supra} note 2, Vol. II: Practice, at 400 § 419 (citing to an Amnesty International report).

international law, they are interrelated (or entangled) in a number of ways. Certainly, if there exist lacunae in a multilateral convention, either in terms of its substantive coverage or in terms of its geographic coverage (i.e. the prevalence of non-State parties), customary international law potentially fills the gaps. Customary international law can also serve as

149 See, e.g., PERSPECTIVES ON THE ICRC STUDY, supra note 2, at 8; RESTATEMENT OF FOREIGN RELATIONS, supra note 21, at 18; Jared Wessel, Judicial Policy-Making at the International Criminal Court: An Institutional Guide to Analyzing International Adjudication, 44 COLUM. J. TRANSNAT’L L. 377, 415-16 (2006); CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW—CASES AND MATERIALS xxiii (2003). See also Jean-Marie Henckaerts, Customary International Humanitarian Law – A Rejoinder to Judge Aldrich, 76 BRIT. Y.B. INT’L L. 525, 526 (2006) (one of the ICRC Study’s authors noting that “[i]t may be true that custom and treaty law have a natural tendency to converge to some extent as custom gets codified in treaty form and new treaty rules may become customary over time. But the two sources of international law obviously still remain distinct.”).


153 Jordan J. Paust, The Importance of Customary International Law During Armed Conflict, 12 ILSA J. INT’L & COMP. L. 601, 603 (2006); David Turns, Weapons in the ICRC Study on Customary International Humanitarian Law, 11 J. CONFLICT & SECURITY L. 201, 235-36 (2006); Vienna Convention on the Law of Treaties art. 26, May 31(3)(c), 1969, 1155 U.N.T.S. 331; infra note 209. For example, aside from Common Article 3, the Geneva Conventions do not apply to non-international armed conflicts. Although Additional Protocol II attempts to fill this gap, the U.S. is not a party to that convention. See Parties to Additional Protocol II, available at http://www.cicr.org/ihl.nsf/WebSign?ReadForm&id=475&ps=P (last visited Dec. 16, 2007). Cf. Dieter Fleck, International Accountability for Violations of the lus in Bello: The Impact of the ICRC Study on Customary International Humanitarian Law, 11 J. CONFLICT & SECURITY L. 179, 179-80 (2006) (arguing that the law of war applicable to non-international armed conflicts exceeds Common Article 3 and the few articles contained in Additional Protocol II). Thus, customary international law remains relevant to the U.S. in terms of non-international armed conflicts. See infra notes 190-240 and accompanying text (discussing the continued relevance of customary international law). This ability of customary international law to fill the gaps in treaty law historically has also been the subject of the Martens Clause, which is often inserted as a sort of savings clause in law of war treaties. See, e.g. Convention (IV) respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277 at pmbl. ¶ 8; Geneva Convention I, supra note 24, at art. 63 ¶ 4; Geneva Convention II, supra note 24, at art. 62 ¶ 4; Geneva Convention III, supra note 24, at art. 142 ¶ 4; Geneva Convention IV, supra note 24, at art. 158 ¶ 4; Additional Protocol I, supra note 24, at art. 1 ¶ 2; Additional Protocol II, supra note 24, at pmbl. ¶ 4. The ICRC Study avoided discussing the Martens Clause, saving it for a “future update.” ICRC Study, supra note 2, Vol. I: Rules, at xxx. At least one author argues that the Study’s exclusion of consideration of the Martens Clause “might indicate an underlying structural issue. … does the Study ignore the systemic location and the internal relationships between norms?” PERSPECTIVES ON THE ICRC STUDY, supra note 2, at 18-19. See also id. at 44 (postulating that the Study’s exclusion of consideration of the Martens Clause may have limited “the Study’s ability to engage in a normative assessment of [State] practice”).
the impetus for negotiating certain treaty provisions, with the treaty law “inevitably sharpen[ing] the image” or lending “higher resolution” to the pre-existing customary international law. Yet the fact that customary international law norms have been embodied in multilateral conventions “does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions.” Finally, treaties “may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted.”

As the International Court of Justice (ICJ) noted:

There is no doubt that this process [of a treaty provision passing into customary international law] is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed. At the same time this result is not lightly to be regarded as having been attained.

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154 See, e.g., ILA Report on CIL, supra note 132, at 43-44 §§ 20-21; Dinstein, Conduct of Hostilities, supra note 3, at 7; Robert Cryer, Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study, 11 J. CONFLICT & SECURITY L. 239, 242 (2006). Cf. Restatement of Foreign Relations, supra note 21, at § 102 reporters’ notes p. 33 (arguing that a declaration in an international agreement “that it merely codifies preexisting rules of customary international law … is evidence to that effect but is not conclusive on parties to the agreement.”).

155 Dinstein, Conduct of Hostilities, supra note 3, at 9.

156 Military and Paramilitary Activities (Nicar. v. U.S.), 1984 I.C.J. 392, 424 ¶ 73 (Nov. 26); Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 93 ¶ 174 (June 27); Vienna Convention on the Law of Treaties art. 43, May 23, 1969, 1155 U.N.T.S. 331 (1969). The ICJ noted that “there are no grounds for holding that when customary international law is comprised of rules identical to those of treaty law, the latter ‘supervenes’ the former, so that the customary international law has no further existence of its own.” Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 95 ¶ 177 (June 27). See also Custom, Power and the Power of Rules, supra note 21, at 125-26, 171-72. Cf. Restatement of Foreign Relations, supra note 21, at § 102 reporters’ notes p. 33 (arguing that “an [international] agreement is ordinarily presumed to supplement rather than to replace a customary rule” but that “[m]odification of customary law by agreement is not uncommon”).

157 Restatement of Foreign Relations, supra note 21, at § 102(3). See also id. at § 102 cmts. f and i.

158 North Sea Continental Shelf (F.R.G. v. Den. & Neth.), 1969 I.C.J. 3, 41 ¶ 71 (Feb. 20); Perspectives on the ICRC Study, supra note 2, at 32 (noting that “[t]he assumption that universal participation in a convention inescapably transmutes its provisions into customary law cannot lightly be accepted.”). See also Custom, Power and the Power of Rules, supra note 21, at 167; David Turns, Weapons in the ICRC Study on Customary International Humanitarian Law, 11 J. CONFLICT & SECURITY L. 201, 203 (2006) (noting that “the Study seems to make the transition from treaty to custom – a process traditionally thought of as difficult to
Thus, the primary source of customary international law remains a consistent practice and 
opinio juris of States, versus treaty provisions passing into customary international law.\(^{159}\)

In its 1969 judgment in the \textit{North Sea Continental Shelf Case},\(^{160}\) the ICJ clarified two essential elements before a treaty provision can be considered to have passed into customary international law: first, the treaty provision has to “be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law.”\(^{161}\) Second, the convention must have “very widespread and representative participation … [especially by those] States whose interests were specially affected.”\(^{162}\) Moreover, the ICJ noted that:

over half the States concerned … were or shortly became parties to the Geneva Convention, and were therefore presumably, so far as they were concerned, acting actually or potentially in the application of the Convention. From their action no inference could legitimately be drawn as to the existence

\(^{159}\) Continental Shelf (Libya v. Malta), 1985 I.C.J. 13, 29-30 ¶ 27 (June 3). \textit{See also} Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 97 ¶ 183 (June 27); \textit{infra} notes 221-222 (noting the difficulty of differentiating between State practice consistent with treaty law obligations and State practice which supports a new norm of customary international law). \textit{But cf.} CUSTOM, POWER AND THE POWER OF RULES, \textit{supra} note 21, at 169 (arguing that “treaties would seem to be similar to resolutions and declarations [of international organizations] as instances of legally relevant State practice.”); \textit{The Limits of International Law}, \textit{supra} note 94, at 23 (noting that treaties “are often used as evidence of customary international law, but in an inconsistent way.”); Robert Cryer, \textit{Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study}, 11 J. CONFLICT & SECURITY L. 239, 242-44 (2006) (noting that although “there is no presumption that a treaty is reflective of customary international law at the time of its conclusion … [s]till, a very widely ratified treaty has a considerable ‘pull’ towards acceptance, as there is a feeling that if a treaty is very broadly ratified, it represents the general expectations of those states. That certainly appears to be the approach taken by international tribunals.”).

\(^{160}\) The ICJ judgment in the \textit{North Sea Continental Shelf Case} is generally considered to be a watershed event in the consideration of customary international law. \textit{See}, e.g., Gulf of Maine (Can. v. U.S.), 1984 I.C.J. 246, 293 ¶ 91 (Oct. 12).


of a rule of customary international law ….

Of course the greatest significance of a treaty provision passing into customary international law is its binding nature on all States, especially those States which are not parties to the convention, unless those States have persistently objected.

A related question is whether customary international law can trump treaty law. It is, of course, theoretically possible for subsequent customary international law to modify some existing treaty obligations, although arguably customary international law cannot limit provisions of the Geneva Conventions which provide protections to specific groups of persons affected by war. Moreover, the intention of a significant number of States to

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163 North Sea Continental Shelf (F.R.G. v. Den. & Neth.), 1969 I.C.J. 3, 43 ¶ 76 (Feb. 20) (emphasis added). See also ILA Report on CIL, supra note 132, at 46-47 § 24 (same); CUSTOM, POWER AND THE POWER OF RULES, supra note 21, at 170 (same); Robert Cryer, Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study, 11 J. CONFLICT & SECURITY L. 239, 244 (2006) (same); Joshua Dorosin, Assistant Legal Adviser to the U.S. Department of State (speaking in his personal capacity), Roundtable Discussion at the North American launch of the ICRC Study at the American University Washington College of Law (Sep. 28, 2005), in Sabrina Balgamwalla, Review of Conference: The Reaffirmation of Custom as an Important Source of International Humanitarian Law, 13 HUM. RTS. BR. 13, 15 (2006) (noting that “[i]f Rule 108 of the ICRC Study, denying “combatant or prisoner-of-war status” to mercenaries] 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.”); Burrus M. Carnahan, A “Restatement” of Customary Humanitarian Law?, (Sep. 28,
deviate from existing treaty law must be “clearly manifested.”\footnote{168} State practice supporting this customary international law modification of treaty law would have to be sufficiently dense, and the concomitant \emph{opinio juris sive necessitatis}\footnote{169} would have to be sufficiently clear.\footnote{170} Moreover, examples of customary international law modifying earlier treaty law are relatively rare.\footnote{171} Another rarity is a State persistently objecting to a new norm of customary international law.\footnote{172}

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\footnote{168} \textit{Restatement of Foreign Relations, supra note 21, at § 102 cmt. j; Perspectives on the ICRC Study, supra note 2, at 7.}

\footnote{169} See supra notes 92-133 (explaining the traditional theory of customary international law formation). To constitute a norm of international law, not only must there be a fairly consistent State practice, at least by a meaningful group of States, but these States must have complied with the practice out of a belief or sense that they were legally obligated to do so (i.e. \emph{opinio juris}). See, e.g. \textit{Restatement of Foreign Relations, supra note 21, at § 102; Dunoff, Ratner & Wippmann, International Law Norms, Actors, Process—A Problem-Oriented Approach 75 (2002).}

\footnote{170} See, e.g. \textit{Restatement of Foreign Relations, supra note 21, at § 102.}


\footnote{172} See infra notes 173-189 (discussing persistent objection).
Persistent Objection to Formation of CIL

International law is based on State sovereignty, and hence the consent of States, either to enter into treaties, or to abide by customary international law vis-à-vis State practice or acquiescence.\(^\text{173}\) Therefore, “[a] principle of customary law is not binding on a state that declares its dissent from the principle during its development,”\(^\text{174}\) and continues to object to the new norm.\(^\text{175}\) However, “[h]istorically, such [persistent objection] and consequent

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Cf. Yoram Dinstein, The ICRC Customary International Humanitarian Law Study, 36 Isr. Y.B. Hum. Rts. 1, 12 ¶ 22 (2006) (noting that “[i]t seems that the concept of consent is not an easy construct for the framers of the [ICRC] Study.”). Contra Jordan Paust, Professor at the University of Houston Law Center, Roundtable Discussion at the North American launch of the ICRC Study at the American University Washington College of Law (Sep. 28, 2005), in Sabrina Balgamwalla, Review of Conference: The Reaffirmation of Custom as an Important Source of International Humanitarian Law, 13 HUM. RTS. BR. 13, 15-16 (2006) (arguing that “customary international law is based on general patterns of expectation and practice, and not consent.”); THE LIMITS OF INTERNATIONAL LAW, supra note 94, at 189-93 (arguing that consent is not a real requirement); CUSTOM, POWER AND THE POWER OF RULES, supra note 21, at 188 (noting that the requirement of State consent does not apply to jus cogens norms, which apply to all States even without their consent, i.e. over their persistent objection); Dinstein, CONDUCT OF HOSTILITIES, supra note 3, at 7 (noting that treaties cannot modify jus cogens norms). See infra note 179 (discussing the interplay between persistent objection and jus cogens norms). See also supra note 5 (discussing the potential that non-State parties could view the ICRC Study’s attempt to identify customary international law norms based on the Additional Protocols “as an attempt to circumvent the requirement of express consent necessary for a State to be bound by the treaty-based rule.”).


exemption from a principle that became general customary law has been rare,”¹⁷⁶ and States eventually abandon their persistent objection claims.¹⁷⁷

The ICRC Study purports to “take[] no view as to whether it is legally possible to be a ‘persistent objector’ in relation to customary rules of international humanitarian law,”¹⁷⁸ although it does note that “many authorities believe that this is not possible in the case of rules of jus cogens,”¹⁷⁹ [and that] there are also authorities that doubt the continued validity of this doctrine.”¹⁸⁰ However, “[t]he [ICRC] Study simply does not consider whether, in

¹⁷⁶ RESTATEMENT OF FOREIGN RELATIONS, supra note 21, at § 102 cmt. d. One possible reason for the relative absence of persistent objection is that “the objecting State [is] at a disadvantage, since it can neither freeze the state of general customary international law so as to benefit itself, nor take advantage of any benefits the new rule may offer.” CUSTOM, POWER AND THE POWER OF RULES, supra note 21, at 103.

¹⁷⁷ CUSTOM, POWER AND THE POWER OF RULES, supra note 21, at 104 (discussing the reasons provided by the U.S., U.K. and Japan in abandoning their persistent objection to the development of a twelve nautical mile territorial sea); id. (discussing the Soviet Union’s abandonment of its persistent objection to the doctrine of restrictive State immunity); id. at 105 (noting that “[t]he principle of reciprocity … operates to discourage persistent objection” and “no State, not even the most powerful, persistently objects for an indefinite period of time.”); id. at 181 (revealing that “[t]here appears to be no evidence of any State having persistently objected to a customary rule for an indefinite period of time.”); Michael Matheson, Professor at the George Washington University Law School, Roundtable Discussion at the North American launch of the ICRC Study at the American University Washington College of Law (Sep. 28, 2005), in Sabrina Balgamwalla, Review of Conference: The Reaffirmation of Custom as an Important Source of International Humanitarian Law, 13 HUM. RTS. BR. 13, 15-16 (2006) (“disagree[ing] with the notion that countries could be ‘persistent objectors’ with respect to customary rules” since “customary international law is based on general patterns of expectation and practice, and not consent.”).


¹⁷⁹ See supra note 179 (discussing jus cogens norms).

¹⁸⁰ ICRC STUDY, supra note 2, Vol. I: Rules, at xxxix; CUSTOM, POWER AND THE POWER OF RULES, supra note 21, at 103 (noting that “many States appear reluctant to recognise the rights of persistent objectors.”). See also PERSPECTIVES ON THE ICRC STUDY, supra note 2, at 10 (noting that the ICRC Study gives short shrift to the concept of persistent objection because “some doubt is said to exist about the validity of the doctrine” despite “custom, as in the case of treaties, requir[ing] the consent of States.”); id. at 34 (same).
principle, States not party to Additional Protocol I could qualify as persistent objectors to any supervening customary law arising from its provisions.”

Considering the ICRC Study itself as a potential source of customary international law, the concepts of State consent and persistent objection intersect with the role of non-State actors in the formation of customary international law. Although the ICRC is presumptively a Swiss non-governmental organization (NGO), the ICRC Study may have a substantial impact on the formation of customary international law, especially if its rules

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181 PERSPECTIVES ON THE ICRC STUDY, supra note 2, at 34. Cf. Malcolm MacLaren & Felix Schwendimann, An Exercise in the Development of International Law: The New ICRC Study on Customary International Humanitarian Law, 6 GERMAN L. J. 1217, 1233 (2005) (noting that the U.S. and Israel have voiced their opposition to Article 44(3) of Additional Protocol I, and therefore presumably would also object to ICRC Study Rule 106). But cf. DOS/DoD Letter to ICRC, supra note 3, (objecting to ICRC Study Rules 31, 45, 78 and 157, but not to 106); Malcolm MacLaren & Felix Schwendimann, An Exercise in the Development of International Law: The New ICRC Study on Customary International Humanitarian Law, 6 GERMAN L. J. 1217, 1234 (2005) (arguing that one of the reasons States may not yet have officially responded to the ICRC Study is that they “may believe that if they object only to some of the rules but not to others, they will indirectly confirm the latter’s customary status, which status may rebound to the disadvantage of their national interest in some way later on.”) (emphasis in original).

182 See supra notes 96-109 and accompanying text (discussing the role of non-State actors in the formation of customary international law).

183 See, e.g., PERSPECTIVES ON THE ICRC STUDY, supra note 2, at 16 (noting that “the Study is fundamentally the work of a non-governmental institution.”); Yoram Dinstein, The ICRC Customary International Humanitarian Law Study, 36 Isr. Y.B. Hum. Rts. 1, 5 ¶ 9 (2006) (commenting that despite the ICRC’s unique role in international humanitarian law, it remains a non-governmental organization (NGO), and that “NGOs, whatever their standing, can never contribute directly through their own practice to the creation of customary norms. … The ICRC [may] play[] … the role of a catalyst for the evolution of State practice, but no more.”). But see ICRC, The ICRC’s status: in a class of its own, available at http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/5w9fjy?opendocument (last visited Dec. 16, 2007) (arguing that the ICRC is a hybrid between a “private association [i.e. NGO] formed under the Swiss Civil Code,” and an “intergovernmental organization … [because it has] an ‘international legal personality’ … [as well as] privileges and immunities”); Leah M. Nicholls, The Humanitarian Monarchy Legislates: The International Committee of the Red Cross and its 161 Rules of Customary International Humanitarian Law, 17 DUKE J. COMP. & INT’L L. 223, 227-28 (2006) (arguing that the ICRC “is a sort of monarch in the realm of IHL” because of the way in which it operates).

184 See PERSPECTIVES ON THE ICRC STUDY, supra note 2, at 17 (observing that “while the Study is not an ‘official’ (State sponsored) codification of customary international humanitarian law, given the role and responsibilities of the ICRC in relation to international humanitarian law, it is undoubtedly a quasi-official codificatory text”).
are widely viewed as accurately reflecting norms of customary international law. If so, is the sole U.S. response to the ICRC Study sufficient to qualify the U.S. as a persistent objector, at least with regards to those few rules mentioned in the U.S. response? Or is the United States a “specially affected State” or perhaps an “important State,” without whose agreement the ICRC Study rules cannot crystallize into customary international law?

Next we shall consider the continued relevance of customary international law in the area of the law of armed conflict, aspects of which have been regulated since antiquity.

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185 See infra notes 513-522 (discussing the inevitability that the ICRC Study will be used as a reference for customary international law). Cf. Leah M. Nicholls, The Humanitarian Monarchy Legislates: The International Committee of the Red Cross and its 161 Rules of Customary International Humanitarian Law, 17 DUKE J. COMP. & INT’L L. 223, 247 (2006) (noting that “[i]f the international community regards these [ICRC Study] rules as being a reasonable articulation of what IHL ought to be [lex ferenda], it will cite to them frequently, and over time, the ICRC’s list will probably become law through precedent.

186 Although there have been a few articles written about the ICRC Study, and even a book offering its perspectives on the ICRC Study, as of the date of this writing, the United States is the only State to publicly respond to the ICRC Study. See supra note 7 (discussing the articles written about the ICRC Study, as well as the book “Perspectives on the ICRC Study on Customary International Humanitarian Law”). See generally supra note 8 (discussing how the U.S. is the only State to thus far respond to the ICRC Study).

187 DOS/DoD Letter to ICRC, supra note 3, at 1, attachment p. 7 (statements evidencing the intent of the U.S. to persistently object to the ICRC Study’s findings). See supra notes 87-90 and accompanying text (discussing whether or not the United States can qualify as a persistent objector to the ICRC Study rules depends on whether the ICRC Study’s publication of its 161 rules itself represents the crystallization of these new norms, in which case the U.S. objection may be considered timely, or whether the ICRC Study is correct that it merely represents a “‘photograph’ of customary international humanitarian law as it stands today,” in which case it is too late for the United States’ objections to the rules to qualify the United States as a persistent objector to them). But see Posting of Marko Milanovic to Opinio Juris, http://www.opiniojuris.org/posts/1178652249.shtml#3684 (May 9, 2007, 01:54) (arguing that the DOS/DoD letter does not raise persistent objection to the ICRC Study as much as it implies that certain rules do not exist whatsoever).

188 Supra note 124 (noting that at least two scholars claim that the United States is a “specially affected” State with regard to all of international humanitarian law, and therefore that “[an ICRC Study] rule would be hard, if not impossible, to regard as having taken on customary status were a State such as the United States opposed to it; the practice concerned could not be said to be representative.”). See supra notes 123-124, 162 (discussing the concepts of “specially affected States” and “important States”).

Continued Relevance of CIL in the Area of the Law of War

The law of armed conflict is an area of international law that is particularly well-regulated by treaty. Yet customary international law retains its utility for at least six reasons.

First, not all treaties enjoy universal adherence, such as the Geneva Conventions, and customary international law binds all States, even non-parties, with the possible exception of States which have persistently objected. “Customary international law is therefore a means for achieving the universal application of principles of international

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190 See supra note 3 (explaining that the Law Of Armed Conflict (LOAC) is synonymous with the Law Of War (LOW), International Humanitarian Law (IHL), and *jus in bello* (i.e. the regulation of the conduct of hostilities during the course of war).

191 PERSPECTIVES ON THE ICRC STUDY, supra note 2, at 6.

192 Malcolm MacLaren & Felix Schwendimann, An Exercise in the Development of International Law: The New ICRC Study on Customary International Humanitarian Law, 6 GERMAN L. J. 1217, 1219 (2005). See also THE LIMITS OF INTERNATIONAL LAW, supra note 94, at 21 (arguing that customary international law retains its important role, even in areas, like the laws of war, where treaties have proliferated, because “[i]t provides interpretive presumptions, it extends treaty norms to nonsignatories, and it influences efforts to expand treaty regimes.”); DINSTEIN, CONDUCT OF HOSTILITIES, supra note 3, at 6 (arguing that even though “treaties encompass much of LOIAC [Law of International Armed Conflict] … no single treaty – and no cluster of treaties – purports to cover the whole span of LOIAC. Hence, customary international law remains of immense significance.”); Theodor Meron, Revival of Customary Humanitarian Law, 99 AM. J. INT’L L. 817, 817 (2005) (observing “that, at least in the field of humanitarian law, customary law continues to thrive and to depend in significant measure on the traditional assessment of both state practice and *opinio juris*.”).

193 See supra note 32 and accompanying text (noting that every State has either ratified or acceded to the four Geneva Conventions of 1949).


195 See supra notes 178-180 (expressing the ICRC Study’s doubt regarding the continued validity of the persistent objection doctrine).

196 See supra notes 173-189 and accompanying text (discussing the concept of persistent objection).
humanitarian law, and notably of those enshrined in the Additional Protocols."197 Thus, States which are non-parties to the Additional Protocols198 will be especially affected by the crystallization of custom in this area,199 and therefore most affected by the ICRC Study’s proposed rules on customary international humanitarian law.200 These non-party States to the Additional Protocols, are a venerable “‘Who’s Who’ of many of the States that have been engaged in conflicts over the past 30 years.”201 Yet surprisingly, only the United States has yet to officially respond to the ICRC Study.202

A second and related justification for the continued relevance of customary international law in this area is that while the rules for international armed conflict are

197 Perspectives on the ICRC Study, supra note 2, at 6. See supra note 34 (questioning whether this was the real impetus behind the ICRC conducting its Study).


199 Perspectives on the ICRC Study, supra note 2, at 6-7.

200 Malcolm MacLaren & Felix Schwendimann, An Exercise in the Development of International Law: The New ICRC Study on Customary International Humanitarian Law, 6 German L.J. 1217, 1220-21 (2005). Another, perhaps related, group of States which will be equally affected by the ICRC Study’s proposed rules are those States which continue to distinguish between the law of war applicable to international vs. non-international armed conflicts, since the vast majority of the ICRC Study rules purport to apply equally to both types of conflict. Malcolm MacLaren & Felix Schwendimann, An Exercise in the Development of International Law: The New ICRC Study on Customary International Humanitarian Law, 6 German L.J. 1217, 1230-31 & n. 63 (2005); supra note 58 and accompanying text (noting that the vast majority of the ICRC Study rules purport to apply equally to international and non-international armed conflicts).

201 Perspectives on the ICRC Study, supra note 2, at 7. Although 167 States as of the time of this writing are now party to Additional Protocol I, and 163 States are party to Additional Protocol II, there are some potentially important States which are not party to either, such as Eritrea, India, Indonesia, Iran, Iraq, Israel, Malaysia, Morocco, Myanmar, Nepal, Pakistan, Singapore, Somalia, Sri Lanka, Thailand, Turkey, and the United States. See George H. Aldrich, Customary International Humanitarian Law – an Interpretation on behalf of the International Committee of the Red Cross, 76 Brit. Y.B. Int’l L. 503, 505 (2006); ICRC Website, parties to Additional Protocol I, available at http://www.cicr.org/ihl.nsf/WebSign?ReadForm&id=470&ps=P (last visited Dec. 16, 2007); id., parties to Additional Protocol II, available at http://www.cicr.org/ihl.nsf/WebSign?ReadForm&id=475&ps=P (last visited Dec. 16, 2007).

202 See supra note 8 and accompanying text.
particularly robust, the related rules for non-international armed conflict are not nearly so robust. Yet the ICRC claims that State practice (i.e. the objective element of customary international law) in non-international armed conflicts goes beyond the “most rudimentary set of rules” contained only in Common Article 3 of the Geneva Conventions and Additional Protocol II. Thus, the ICRC would attempt to bootstrap all of the international law of armed conflict onto non-international armed conflicts by means of its study on customary


204 See supra notes 107-124 and accompanying text (discussing the State practice element of customary international law formation).

205 ICRC STUDY, supra note 2, Vol. I: Rules, at x. Common Article 3 itself is thought to represent customary international law. Id. at 299, 306-19 (Rules 87 to 90); Jordan J. Paust, The Importance of Customary International Law During Armed Conflict, 12 ILSA J. INT’L & COMP. L. 601, 601 (2006); Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 103-05 ¶¶ 218-220 (June 27). Some authors argue that perhaps all of the provisions of the Geneva Conventions may reflect customary international law. Theodor Meron, Revival of Customary Humanitarian Law, 99 AM. J. INT’L L. 817, 819 (2005) (noting that “the customary law character of … practically [] the entire corpus of the Geneva Conventions, is now taken for granted and virtually never questioned.”); George H. Aldrich, Customary International Humanitarian Law – an Interpretation on behalf of the International Committee of the Red Cross, 76 BRIT. Y.B. INT’L L. 503, 506 (2006) (noting that it is “impossible to suggest that the Protocol, like the 1949 Geneva Conventions, should be considered to represent as a whole a codification of customary international humanitarian law.”). At least one author even considers the provisions of the Geneva Conventions to be jus cogens norms. Burrus M. Carnahan, A “Restatement” of Customary Humanitarian Law?, (Sep. 28, 2005) (unpublished manuscript at 4, on file with author). See supra note 179 (discussing jus cogens norms). Contra PERSPECTIVES ON THE ICRC STUDY, supra note 2, at 32 (doubting that the Geneva Convention III Article 119 duty to permit repatriated prisoners of war to carry 25 kilograms of personal effects and baggage, or the Article 26 duty to permit the use of tobacco have achieved customary international law norm status); ICRC STUDY, supra note 2, Vol. I: Rules, at 455 (noting that customary international law deviates from Geneva Convention III in terms of not repatriating or releasing detained personnel until the ICRC can interview the protected persons in private to learn their wishes). Cf. Geneva Convention III, supra note 24, at art. 28 (requiring “[c]anteens shall be installed in all camps, where prisoners of war may procure foodstuffs, soap and tobacco and ordinary articles in daily use.”); id. at arts. 60, 62 (discussing pay given to prisoners of war in Swiss franc equivalents).
international humanitarian law.\footnote{See generally Yoram Dinstein, \textit{The ICRC Customary International Humanitarian Law Study}, 36 Isr. Y.B. Hum. Rts. 1, 3 ¶ 4, 14 (2006) (questioning whether the real impetus for the ICRC Study was an effort to claim that the provisions in Additional Protocol I had achieved the status of customary international law); David Turns, \textit{Weapons in the ICRC Study on Customary International Humanitarian Law}, 11 J. CONFLICT \& SECURITY L. 201, 236 (2006) (same); George H. Aldrich, \textit{Customary International Humanitarian Law – an Interpretation on behalf of the International Committee of the Red Cross}, 76 BRIT. Y.B. INT’L L. 503, 505-06 (2006) (same); Theodor Meron, \textit{Revival of Customary Humanitarian Law}, 99 AM. J. INT’L L. 817, 833 (2005) (same); \textit{PERSPECTIVES ON THE ICRC STUDY}, supra note 2, at 9 (noting that the ICRC Study rules rely heavily on the treaty provisions of Additional Protocol I). \textit{Contra} Jean-Marie Henckaerts, \textit{Customary International Humanitarian Law – A Rejoinder to Judge Aldrich}, 76 BRIT. Y.B. INT’L L. 525, 525-26 (2006) (explaining, as one of the co-authors of the ICRC Study, that “[t]he ICRC’s main interest … was precisely in seeing whether customary international law provides a more detailed framework for non-international armed conflicts. In fact, the ICRC preferred to be mandated to prepare a report on non-international armed conflicts only but that was unacceptable to some States at the International Conference of the Red Cross and Red Crescent and so the organization was asked to look at both types of armed conflict…. The clarification of the customary status of the provisions of Additional Protocol I was therefore a less pressing need than the clarification of the customary rules applicable in non-international armed conflicts.”).}


The recently published book “\textit{Perspectives on the ICRC Study on Customary International Humanitarian Law}”\footnote{\textit{PERSPECTIVES ON THE ICRC STUDY}, supra note 2.} posits three additional reasons why customary international law remains relevant, as well as a number of caveats. Thus, the fourth reason that customary international law remains relevant in the area of the law of armed conflict is
that customary international law may be self-executing\(^{211}\) in the domestic sphere, whereas treaty law often requires subsequent domestic legislation implementing the treaty provisions in order to be effective within States.\(^{212}\)

A fifth reason that customary international law remains important is that customary international law theoretically may trump prior inconsistent treaty law.\(^{213}\) However, there is some disagreement as to whether treaty law is on a higher plane than customary international law.\(^{214}\) In any event, instances of customary international law superseding prior inconsistent treaty law are relatively rare.\(^{215}\)

The sixth proffered reason that customary international law remains significant is that custom may bind non-State actors to a greater extent than treaty law.\(^{216}\) Other reasons may

\(^{211}\) Under the rubric of State consent, “it is ordinarily for the United States to decide how it will carry out its international obligations. Accordingly, the intention of the United States determines whether an agreement is to be self-executing in the United States or should await implementation by legislation or appropriate executive or administrative action.” *RESTATEMENT OF FOREIGN RELATIONS*, supra note 21, at § 111 cmt. h.

\(^{212}\) *PERSPECTIVES ON THE ICRC STUDY*, supra note 2, at 7. *See also id.* at 22 (arguing that “[t]he convergence of international humanitarian and international criminal law gives an additional reason for simplicity. To respect the *nullem crimen sine lege* principle, a degree of clarity is required to enable those subject to the rules to know how to act within the law and thus avoid individual criminal responsibility.”). *But see id.* at 9 (noting that imprecise customary international law “may be ill-suited to interpretation and application by municipal courts and as a foundation for individual criminal responsibility.”); Peter Rowe, *The Effect on National Law of the Customary International Humanitarian Law Study*, 11 J. CONFLICT & SECURITY L. 165, 170 (2006) (arguing that “it is difficult to accept that customary international law should, without more, establish crimes in common law states.”).

\(^{213}\) *PERSPECTIVES ON THE ICRC STUDY*, supra note 2, at 7; Peter Rowe, *The Effect on National Law of the Customary International Humanitarian Law Study*, 11 J. CONFLICT & SECURITY L. 165, 173 (2006); *supra* note 166 and accompanying text. *Cf. supra* note 167 and accompanying text (discussing how customary international law may not be able to limit protections given by the Geneva Conventions).

\(^{214}\) *See supra* note 99 and accompanying text (noting the disagreement between whether treaty law and customary international law are on the same tier of international law or not). One notable exception is *jus cogens* norms, which cannot be derogated from via treaty. *See supra* note 179 (discussing *jus cogens* norms).

\(^{215}\) *See supra* note 171 and accompanying text.

exist for the continued relevance of customary international law in the area of the law of armed conflict, but these six certainly suffice as a justifiable basis for the ICRC conducting its Study of customary international humanitarian law, and for the present Article’s consideration of the three ICRC Study rules pertaining to the treatment of the wounded, sick and shipwrecked.

One caveat that flows from these six justifications for the continued relevancy of customary international law is that:

we must be hesitant about engaging in the crystallisation of custom simply with the object of remedying the defect of the non-participation by States in a treaty regime. If States have objections to particular treaty-based rules, those objections will subsist as regards the formulation of the rules in a customary format.

Thus, merely positing that a particular rule has become a norm of customary international law does not remove objections to provisions of particular treaties.

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Accountability for Violations of the Ius Bello: The Impact of the ICRC Study on Customary International Humanitarian Law, 11 J. CONFLICT & SECURITY L. 179, 179-80 (2006) (noting that the law of war applicable to non-international armed conflicts exceeds Common Article 3 and Additional Protocol II, “but that specific problems of compliance and enforcement, in particular with respect to non-state actors, remain unsolved.”); Jean-Marie Henckaerts, Customary International Humanitarian Law – A Rejoinder to Judge Aldrich, 76 BRIT. Y.B. INT’L L. 525, 525-26 (2006) (explaining, as one of the co-authors of the ICRC Study, that “[t]he ICRC’s main interest … was precisely in seeing whether customary international law provides a more detailed framework for non-international armed conflicts.”).

217 PERSPECTIVES ON THE ICRC STUDY, supra note 2, at 8. See also Custom, Power and the Power of Rules, supra note 21, at 221.

218 See supra notes 241-378 (evaluating proposed Rule 109: Duty to Search For, Collect and Evacuate the Wounded, the Sick, and the Shipwrecked), supra notes 379-455 (evaluating proposed Rule 110: Duty to Care For the Wounded, the Sick, and the Shipwrecked), and supra notes 456-497 (evaluating proposed Rule 111: Duty to Protect the Wounded, the Sick, and the Shipwrecked).

219 PERSPECTIVES ON THE ICRC STUDY, supra note 2, at 7.

220 See, e.g., PERSPECTIVES ON THE ICRC STUDY, supra note 2, at 8 (noting that “[p]articularly when heavy reliance is placed on treaties to which a number of States are not parties, initiatives to derive customary rules may be seen as an attempt to circumvent the requirement of express consent necessary for a State to be bound by the treaty-based rule.”); id. at 9-10 (same). Of course, this raises the question of whether a State’s expressed objections to particular treaty provisions survive as expressions of persistent objection against new norms of customary international law. “Can States be expected to accept as customary that which they have rejected as a
A second caveat to the study of customary international law norms vis-à-vis treaty law provisions is that it is difficult to argue that State practice consistent with treaty law supports a new norm of customary international law when that State is a party to the treaty and is merely effectuating its treaty law obligations: \(^{221}\) "the behaviour of [State parties], and the opinio juris which it might otherwise evidence, is surely explained by their being bound by the [treaty] itself." \(^{222}\) The ICRC Study supposedly:

\(^{221}\) Perspectives on the ICRC Study, supra note 2, at 8, 402; North Sea Continental Shelf (F.R.G. v. Den. & Neth.), 1969 I.C.J. 3, 43 ¶ 76 (Feb. 20); DOS/DoD Letter to ICRC, supra note 3, at 3 (arguing that “[r]eliance on provisions of military manuals designed to implement treaty rules provides only weak evidence that those treaty rules apply as a matter of customary international law in non-treaty contexts.”); supra note 163 and accompanying text. See also ILA Report on CIL, supra note 132, at 46-47 § 24; Custom, Power and the Power of Rules, supra note 21, at 170; Robert Cryer, Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study, 11 J. Conflict & Security L. 239, 244 (2006). Contra ICRC Study, supra note 2, Vol. I: Rules, at xiv (noting that it did not limit “itself to the practice of States not party to the relevant treaties of international humanitarian law” because this “would not comply with the requirement that customary international law be based on widespread and representative practice.”); id., Vol. II: Practice, at 2537 (explaining the ICRC Study’s decision not to examine State practice in treating captured combatants as prisoners of war “because the Third Geneva Convention is considered to be part of customary international law [presumably in toto]”). See supra note 205 and accompanying text (discussing whether all of the provisions of the Geneva Conventions can be considered to also represent norms of customary international law as well).

\(^{222}\) Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 531 (June 27) (Jennings, J., dissenting). See also North Sea Continental Shelf (F.R.G. v. Den. & Neth.), 1969 I.C.J. 3, 43 ¶ 76 (Feb. 20) (noting that for States which were acting consistent with their treaty obligations, “[f]rom their action no inference could legitimately be drawn as to the existence of a rule of customary international law”); ILA Report on CIL, supra note 132, at 46-47 § 24; Custom, Power and the Power of Rules, supra note 21, at 170; DOS/DoD Letter to ICRC, supra note 3, at 3 (noting that “one … must be cautious in drawing conclusions as to opinio juris from the practice of States that are parties to conventions, since their actions often are taken pursuant to their treaty obligations, particularly inter se, and not in contemplation of independently binding customary international law norms.”); id. at 5 n. 5 (“Even universal adherence to a treaty does not necessarily mean that the treaty’s provisions have become customary international law, since such adherence may have been motivated by the...
takes the cautious approach that widespread ratification [of a treaty] is only an indication [of customary international law] and has to be assessed in relation to other elements of practice, in particular the practice of States not party to the treaty in question. … Contrary practice of States not party [to a treaty], however, has been considered as important negative evidence [of a lack of customary international law]. …

This Study has not, however, limited itself to the practice of States not party to the relevant treaties of international humanitarian law. To limit the study to a consideration of this practice … would not comply with the requirement that customary international law be based on widespread and representative practice.223

Thus the ICRC Study avoids the Baxter paradox224 by not limiting itself to consideration of the practice of non-State parties.225 In doing so, it deviates from the traditional approach to

belief that, absent the treaty, no rule applied.”). Cf. RESTATEMENT OF FOREIGN RELATIONS, supra note 21, at § 102 cmt. i (noting that State practice consistent with treaty based obligations arguably still constitutes State practice, and thus can contribute to customary international law, particularly for a multilateral treaty “designed for adherence by states generally, [which] is widely accepted, and is not rejected by a significant number of important states.”). But see Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 99-100 ¶ 188 (June 27) (deducing an opinio juris as to the Article 2(4) prohibition against the use of armed force from the attitude of U.N. State parties to General Assembly resolutions which restated this prohibition).

223 ICRC STUDY, supra note 2, Vol. I: Rules, at xliv (emphasis added). Contra PERSPECTIVES ON THE ICRC STUDY, supra note 2, at 33 (arguing that the ICRC Study’s logic is circular, since it assumes “that customary norms should conform to the provisions of the Protocols, and thus privileging the views of States parties who are, in any case, bound conventionally.”).

224 The “Baxter Paradox” is that:

[a]s the number of parties to a treaty increases, it becomes more difficult to demonstrate what is the state of customary international law dehors the treaty … As the express acceptance of the treaty increases, the number of States not parties whose practice is relevant diminishes. There will be less scope for the development of international law dehors the treaty.

Richard R. Baxter, Treaties and Custom, 129 RECUEIL DES COURS 27, 73 (1970). See also id. at 64, 96 (discussing the Baxter Paradox; PERSPECTIVES ON THE ICRC STUDY, supra note 2, at 33 (same); Theodor Meron, Revival of Customary Humanitarian Law, 99 AM. J. INT’L L. 817, 833 & nn. 118-119 (2005) (same); CUSTOM, POWER AND THE POWER OF RULES, supra note 21, at 170-71, 179 (same); George H. Aldrich, Customary International Humanitarian Law – an Interpretation on behalf of the International Committee of the Red Cross, 76 BRIT. Y.B. INT’L L. 503, 512 (2006) (noting that the authors of the ICRC Study “avoid conditions they find troubling [which] can only increase skepticism about their conclusions on other topics.”).

customary international law formation, as followed by the ICJ in the North Sea Continental Shelf case.\(^{226}\)

A third caveat to the study of customary international law is that an imprecise\(^{227}\) norm of customary international law will necessarily rely on a related but more complex treaty provision.\(^{228}\) Aside from the issue of whether State practice consistent with the treaty can be used as evidence of State practice to support a customary international law norm,\(^{229}\) there exists the issue of how to interpret and apply a customary international law norm that differs from the related treaty provision.\(^{230}\) Has the new customary international law norm supplanted the inconsistent, but more complex treaty law provision?\(^{231}\) Or do the two different rules apply to different spheres of conduct depending on whether the particular

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\(^{227}\) See supra note 21 and accompanying text.

\(^{228}\) PERSPECTIVES ON THE ICRC STUDY, supra note 2, at 9.

\(^{229}\) See supra notes 163, 221-222 and accompanying text.

\(^{230}\) PERSPECTIVES ON THE ICRC STUDY, supra note 2, at 9.

\(^{231}\) See supra notes 157-159 and accompanying text.
State and the particular conduct in question is regulated by the treaty?\textsuperscript{232}

Although the ICRC Study generally posits the traditional theory of customary international law formation,\textsuperscript{233} at best “[t]he Study’s account of the concept of customary international law underlying its conclusions is almost telegraphically concise,”\textsuperscript{234} and at worst, it employs a far less stringent methodology.\textsuperscript{235} The ICRC Study’s relaxed methodology in determining the crystallization of customary international law is based on at least two intellectual shortcuts:\textsuperscript{236} first, the Study’s adoption of Dean Kirgis’ ‘sliding scale’ of *opinio juris* versus State practice,\textsuperscript{237} and second, the Study’s overemphasis on the practice

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{232} See *supra* notes 203-206 and accompanying text (discussing the application of treaty provisions in the law of armed conflict to non-international armed conflicts vis-à-vis related customary international law norms).
\item \textsuperscript{234} PERSPECTIVES ON THE ICRC STUDY, *supra* note 2, at 23.
\item \textsuperscript{235} See *supra* note 55 (listing numerous criticisms of the ICRC Study’s methodology).
\item \textsuperscript{236} PERSPECTIVES ON THE ICRC STUDY, *supra* note 2, at 27.
\item \textsuperscript{237} *Id.* at 27-29. Dean Kirgis essentially argues that seemingly irreconcilable ICJ opinions, which appear to fluctuate between stressing *opinio juris* at the expense of State practice and vice versa, “can be reconciled, however, if one views the elements of custom not as fixed and mutually exclusive, but as interchangeable along a sliding scale.” Frederic L. Kirgis, *Custom on a Sliding Scale*, 81 AM. J. INT’L L. 146, 148-49 (1987). Thus,

\begin{quote}
[o]n the sliding scale, very frequent, consistent state practice establishes a customary rule without much (or any) affirmative showing of an opinio juris, so long as it is not negated by evidence of non-normative intent. As the frequency and consistency of the practice decline in any series of cases, a stronger showing of an opinio juris is required. At the other end of the scale, a clearly demonstrated opinio juris establishes a customary rule without much (or any) affirmative showing that governments are consistently behaving in accordance with the asserted rule.
\end{quote}

of State parties to the relevant conventions.238

The next section evaluates the three ICRC Study rules regarding the wounded, sick and shipwrecked against the traditional theory of customary international law formation as a benchmark.239 The discussion of even these three seemingly innocuous provisions reveals that the ICRC Study rules are not sustainable under the traditional theory of how customary

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238 PERSPECTIVES ON THE ICRC STUDY, supra note 2, at 29-36; supra note 163, 221-222 and accompanying text. See also PERSPECTIVES ON THE ICRC STUDY, supra note 2, at 29-36 (criticizing Dean Kirgis’ doctrine, because “[t]he normative canonization of propositions on the basis of restricted practice raises an obvious danger of the consolidation of norms whose implications have not been fully thought out or thought through.”); CUSTOM, POWER AND THE POWER OF RULES, supra note 21, at 136-37 (calling Kirgis’ sliding scale explanations “flawed”); THE LIMITS OF INTERNATIONAL LAW, supra note 94, at 24 (noting that the occasional practice of inferring opinio juris “from the existence of a widespread behavioral regularity … makes opinio juris redundant with the state practice requirement, which, by assumption, is insufficient by itself to establish customary international law.”); DOS/DoD Letter to ICRC, supra note 3, at 2 (noting that “the Study tends to merge the practice and opinio juris requirements into a single test. … We do not believe that this is an appropriate methodological approach. … we do not agree that opinio juris can be inferred from practice.”); Joshua Dorosin, Assistant Legal Adviser to the U.S. Department of State (speaking in his personal capacity), Roundtable Discussion at the North American launch of the ICRC Study at the American University Washington College of Law (Sep. 28, 2005), in Sabrina Balgamwalla, Review of Conference: The Reaffirmation of Custom as an Important Source of International Humanitarian Law, 13 HUM. RTS. BR. 13, 14 (2006) (expressing skepticism “whether one can rely heavily on the density of practice approach.”).

239 See supra notes 241-378 (evaluating proposed Rule 109: Duty to Search For, Collect and Evacuate the Wounded, the Sick, and the Shipwrecked), supra notes 379-455 (evaluating proposed Rule 110: Duty to Care For the Wounded, the Sick, and the Shipwrecked), and supra notes 456-497 (evaluating proposed Rule 111: Duty to Protect the Wounded, the Sick, and the Shipwrecked).
IV. ICRC Rules Regarding the Wounded, Sick and Shipwrecked

(A) **Rule 109: Duty to Search For, Collect and Evacuate the Wounded, Sick and Shipwrecked**

> Whenever circumstances permit, and particularly after an engagement, each party to the conflict must, without delay, take all possible measures to search for, collect and evacuate the wounded, sick and shipwrecked without adverse distinction.

The ICRC Study recognizes that the obligation espoused by proposed Rule 109 “is an obligation of means. Each party to the conflict has to take all possible measures to search for, collect and evacuate the wounded, sick and shipwrecked. This includes permitting humanitarian organizations to assist in their search and collection.”

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240 While some of the concerns raised below may appear to be prosaic, others may have serious consequences, especially if the ICRC Study rules become binding on non-parties to the Additional Protocols as norms of customary international law. See supra notes 88-89 and accompanying text. Cf. DOS/DoD Letter to ICRC, supra note 3, at 1, attachment p. 7 (statements evidencing the intent of the U.S. to persistently object to the ICRC Study’s findings). But see Posting of Marko Milanovic to Opinio Juris, http://www.opiniojuris.org/posts/1178652249.shtml#3684 (May 9, 2007, 01:54) (arguing that the DOS/DoD letter does not raise persistent objection to the ICRC Study as much as it implies that certain rules do not exist whatsoever). Moreover, even apparently prosaic concerns may either reveal persistent cracks in the Study’s methodology, or may widen into fault lines into which the purported rules disappear altogether.

241 See infra notes 341-342 and accompanying text (discussing how the language “take all possible measures” is identical to that found in the related articles of the first and second Geneva Conventions. Cf. ICRC STUDY, supra note 2, Vol. I: Rules, at 396 with Geneva Convention I, supra note 24, at art. 15, ¶ 1 and Geneva Convention II, supra note 24, at art. 18, ¶ 1.

242 ICRC STUDY, supra note 2, Vol. I: Rules, at 398 (emphasis in original). See also DOS/DoD Letter to ICRC, supra note 3, at attachment pp. 1-6 (questioning obligation of States to permit humanitarian organizations, such as the ICRC, to conduct their business without explicit permission). But see ICRC STUDY, supra note 2, Vol. I: Rules, at 398 (“It is clear that in practice humanitarian organizations will need permission from the party in control of a certain area to carry out such activities, but such permission must not be denied arbitrarily (see also commentary to Rule 55).” ICRC STUDY, supra note 2, Vol. I: Rules, at 196-97, Vol. II: Practice, at 1205 § 539; Jean-Marie Henckaerts, Customary International Humanitarian Law – A Rejoinder to Judge Aldrich, 76 BRIT. Y.B. INT’L L. 525, 527-28 (2006); ICRC, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 § 2805 (Claude Pilloud, Yves Sandoz, Christophe Swinarski & Bruno Zimmerman eds., 1987) [hereinafter AP COMMENTARY].
has built into its proposed rule a notion of military feasibility.\textsuperscript{243} The ICRC Study also professes that this is a customary international law norm “applicable to both international and non-international armed conflicts.”\textsuperscript{244}

The key issues with regard to proposed Rule 109 would appear to be: the obligations owed to combatants versus civilians;\textsuperscript{245} the obligations to search for and collect the wounded, sick and shipwrecked in non-international armed conflicts;\textsuperscript{246} the temporal distinction between when the obligation arises on land versus at sea to search for and collect the wounded, sick and shipwrecked;\textsuperscript{247} the treatment of wounded, sick and shipwrecked without adverse distinction;\textsuperscript{248} and the claimed dearth of contrary State practice as support for the proffered norm.\textsuperscript{249} Each of these issues will be discussed in turn.

\textit{International Armed Conflicts—Combatants vs. Civilians.} The first point of departure between the proposed Rule 109 and existing treaty law obligations is whether or not civilian wounded, sick and shipwrecked are entitled to the same protections as combatant

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\textsuperscript{243} Although this nod to military feasibility is \textit{implicit} in the ICRC Study, it is \textit{explicit} in the Geneva Conventions. See, e.g. Geneva Convention I, \textit{supra} note 24, at art. 15; Geneva Convention II, \textit{supra} note 24, at art. 18; Geneva Convention IV, \textit{supra} note 24, at art. 16, ¶ 2. \textit{See also} PICTET GENEVA CONVENTION II, \textit{supra} note 5, at 132 (noting that “the rescue of shipwrecked military personnel or civilians remains an obligation which can only be evaded because of military necessity or because material conditions make it impossible.”); PICTET GENEVA CONVENTION IV, \textit{supra} note 5, at 136-37 ¶ 2.1.B (“Army or Navy Medical Services … are bound to take military requirements into account.”).

\textsuperscript{244} ICRC STUDY, \textit{supra} note 2, Vol. I: Rules, at 396.

\textsuperscript{245} \textit{See infra} notes 250-283 and accompanying text.

\textsuperscript{246} \textit{See infra} notes 284-340 and accompanying text.

\textsuperscript{247} \textit{See infra} notes 341-359 and accompanying text.

\textsuperscript{248} \textit{See infra} notes 360-363 and accompanying text.

\textsuperscript{249} \textit{See infra} notes 364-368 and accompanying text.
wounded, sick and shipwrecked. The first Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field by title and by design only deals with wounded and sick who are members of traditional categories of armed forces, militias that meet certain criteria, civilians who accompany the force, and le\'ee en masse (i.e. combatants), and does not include noncombatant (i.e. civilian) wounded and sick. The failure to include civilians within the definition of “wounded and sick in armed forces in the field,” who are entitled to special protections, is internally consistent since “the wounded and sick of a belligerent who fall into enemy hands shall be [considered] prisoners of war.”

250 The text of the proposed Rule 109 of the ICRC Study does not explicitly mention combatant versus civilian wounded, sick and shipwrecked, but merely provides protection for: “the wounded, sick and shipwrecked ….” ICRC STUDY, supra note 2, Vol. I: Rules, at 396. However the Commentary to Rule 109 provides that it is a rule applicable to both civilian and combatant wounded, sick and shipwrecked when it mis-cites military manuals as being “phrased in general terms covering all wounded, sick and shipwrecked, whether military or civilian.” Id. (emphasis added). See infra notes 271-275 and accompanying text. Obviously this distinction vanishes for non-international armed conflicts, because one side of the conflict is generally comprised of civilians. See, e.g. Geneva Convention I, supra note 24, at art. 3(2); Geneva Convention II, supra note 24, at art. 3(2); Geneva Convention III, supra note 24, at art. 3(2); Geneva Convention IV, supra note 24, at art. 3(2); Additional Protocol II, supra note 24, at art. 8.

251 Geneva Convention I, supra note 24 (emphasis added).

252 Geneva Convention I, supra note 24, at art. 13. Cf. Geneva Convention III, supra note 24, at art. 4 (using the same categories for determining who is entitled to prisoner of war status). See also PICTET GENEVA CONVENTION I, supra note 5, at art. 16, p. 133 ¶ 1.1 (quoting the primogenitor 1864 Geneva Convention, which simply provided: “Wounded or sick combatants, to whatever nation they may belong, shall be collected and cared for.” (emphasis added)). Cf. PICTET GENEVA CONVENTION IV, supra note 5, at art. 16, p. 136 ¶ 2.1A (noting that “[t]he [first and fourth Geneva Conventions] thus overlap [in allowing military hospitals to treat civilians and vice versa], which shows clearly that in both of them the human aspect takes precedence over the distinction normally drawn between civilians and members of the armed forces.”).

253 Geneva Convention I, supra note 24, at art. 14. In contrast, civilians who fall into enemy hands are either released, or are interned for the duration of the conflict, but are not considered prisoners of war. See generally Geneva Convention IV, supra note 24, at arts. 35-43, 79-135. Further evidence of the distinction between combatant wounded and sick and their civilian counterparts is the fact that article 22 of the first Geneva Convention lists certain activities that do not “depriv[e] a medical unit or establishment of … protection,” including “[t]he humanitarian activities of medical units and establishments or of their personnel extend to the care of civilian wounded or sick.” Geneva Convention I, supra note 24, at art. 22(5). This clearly reveals that the treatment of civilian wounded and sick by military hospitals or units is an extraordinary event, albeit one that does not deprive them of their protected status. Cf. Geneva Convention II, supra note 24, at art. 35(4) (similarly providing that the care of wounded, sick or shipwrecked civilians does not deprive hospital ships or sick-bays of vessels of their protection); THE MANUAL OF THE LAW OF ARMED CONFLICT, UK MINISTRY OF DEFENCE (2004), at ¶ 7.3.2.
The same can be said of the protections afforded under the second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Protections for civilian wounded and sick are provided by the fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, and are markedly different than those afforded wounded and sick soldiers in the field under the first Geneva Convention, or wounded, sick or shipwrecked sailors at sea under the second Geneva

254 Geneva Convention II, supra note 24 (emphasis added).
255 Geneva Convention IV, supra note 24 (emphasis added). With regard to civilian wounded and sick, States involved in an international armed conflict have committed to providing only the following ten protections:

2) Consider proposing the establishment of “neutralized zones” designed to shelter “(a) wounded and sick combatants or non-combatants; (b) civilian persons who take no part in hostilities, and who, while they reside in the zones, perform no work of a military character.” Geneva Convention IV, supra note 24, at art. 15.
3) “As far as military considerations allow … search for the killed and wounded, to assist the shipwrecked and other persons exposed to grave danger, and to protect them against pillage and ill-treatment.” Geneva Convention IV, supra note 24, at art. 16.
4) Attempt “to conclude local agreements for the removal from besieged or encircled areas, of wounded, sick, infirm, and aged persons, children and maternity cases ….” Geneva Convention IV, supra note 24, at art. 17.
5) Not attacking “[c]ivilian hospitals organized to give care to the wounded and sick, the infirm and maternity cases … .” Geneva Convention IV, supra note 24, at art. 18. This remains true even though these civilian hospitals may treat “sick or wounded members of the armed forces.” Geneva Convention IV, supra note 24, at art. 19.
6) Not attacking “[c]onvoys of vehicles or hospital trains on land or specially provided vessels on sea, conveying wounded and sick civilians, the infirm and maternity cases.” Geneva Convention IV, supra note 24, at art. 21.
7) Not attacking “[a]ircraft exclusively employed for the removal of wounded and sick civilians, the infirm and maternity cases or for the transport of medical personnel and equipment ….” Geneva Convention IV, supra note 24, at art. 22.
8) Not transferring “[s]ick, wounded or infirm internees and maternity cases … if the journey would be seriously detrimental to them, unless their safety imperatively so demands.” Geneva Convention IV, supra note 24, at art. 127.
9) Releasing certain internees earlier than others, specifically “children, pregnant women and mothers with infants and young children, wounded and sick, and internees who have been detained for a long time.” Geneva Convention IV, supra note 24, at art. 132.
10) Transmitting “information regarding the state of health of internees who are seriously ill or seriously wounded shall be supplied regularly and if possible every week” to an official Information Bureau. Geneva Convention IV, supra note 24, at art. 138.
Convention.²⁵⁶

Specifically, the duties to search for, collect, and evacuate civilian wounded, sick and shipwrecked under the fourth Geneva Convention are limited to searching for the wounded,²⁵⁷ assisting the shipwrecked,²⁵⁸ and removing the wounded and sick from besieged or encircled areas.²⁵⁹ There are thus lacunae in the duties to search for, collect, and evacuate civilian wounded, sick and shipwrecked under the fourth Geneva Convention.²⁶⁰ For example, there is no explicit mention of an obligation to search for or to collect sick civilians in either the fourth Geneva Convention or in its commentary.²⁶¹ The following table illustrates the limited protections for civilian wounded, sick and shipwrecked provided in the fourth Geneva Convention, as well as those Rule 109 protections which are missing:

²⁵⁶ See generally infra Table 1 through Table 3, pp. T-1 to T-3.

²⁵⁷ Geneva Convention IV, supra note 24, at art. 16.

²⁵⁸ Geneva Convention IV, supra note 24, at art. 16.

²⁵⁹ Geneva Convention IV, supra note 24, at art. 17.

²⁶⁰ Yet the commentary to Rule 109 of the ICRC Study attempts to gloss over these lacunae when it claims that “[t]he application of this rule [109] to civilians was already the case pursuant to Article 16 of the Fourth Geneva Convention, which applies to the whole of the populations of the countries in conflict ….” ICRC STUDY, supra note 2, Vol. I: Rules, at 399. Article 16 of the Fourth Geneva Convention reads in its entirety:

The wounded and sick, as well as the infirm, and expectant mothers, shall be the object of particular protection and respect.
As far as military considerations allow, each Party to the conflict shall facilitate the steps taken to search for the killed and wounded, to assist the shipwrecked and other persons exposed to grave danger, and to protect them against pillage and ill-treatment.

Geneva Convention IV, supra note 24, at art. 16. It would appear obvious that the proposed Rule 109 of the ICRC Study and article 16 of Geneva Convention IV are not coterminous.

²⁶¹ See generally Geneva Convention IV, supra note 24, at arts. 13-26; PICTET GENEVA CONVENTION IV, supra note 5, at 118-98. Cf. PICTET GENEVA CONVENTION IV, supra note 5, at art. 16, p. 136 ¶ 2.1A (noting that article 16 of the fourth Geneva Convention includes the duty “to assist the shipwrecked and other persons exposed to grave danger” (emphasis added), with “[a] particular case which the Conference had in mind was civilians trapped in air-raid shelters.”). Presumably assisting civilians trapped in air-raid shelters would involve at least a modicum of searching for them.
Duties for Civilian Wounded Sick Shipwrecked

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<th>Search For</th>
<th>&quot;search for the ... wounded (GC IV, art. 16)</th>
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<tr>
<td>Collect</td>
<td>&quot;assist the shipwrecked&quot; (GC IV, art. 16)</td>
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<tr>
<td>Evacuate</td>
<td>&quot;remov[e] from besieged or encircled areas, of wounded&quot; (GC IV, art. 17)</td>
<td>&quot;remov[e] from besieged or encircled areas, of ... sick&quot; (GC IV, art. 17)</td>
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As previously mentioned, the four Geneva Conventions of 1949 make a clear distinction between the protections afforded to combatant wounded, sick and shipwrecked, versus those given to civilian wounded, sick and shipwrecked.262 Article 8 of the 1977 Additional Protocol I expressly includes civilians in the definitions of wounded and sick, and shipwrecked persons who are entitled to protection.263 However, the official ICRC Commentary to Article 8 of Additional Protocol I recognizes that this article deviates from the earlier Geneva Conventions by:

not retain[ing] the distinction made between [civilians and soldiers] by the Conventions as regards the wounded and sick. … even though, at the same time, there would be a significant difference in the status which applies to the one and the other if they fell into enemy hands (particularly that of prisoner of war for a combatant).264

The ICRC Commentary to Article 8 of Additional Protocol I also recognizes that the inclusion in its protections of shipwrecked civilians “constitutes an important innovation in

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262 See supra notes 251-256 and accompanying text. See generally infra Table 1 through Table 3, pp. T-1 to T-3.

263 Additional Protocol I, supra note 24, at art. 8(1) & (2). Article 8(1) provides a three-part test for whether someone qualifies for the protections afforded to the wounded and sick: (1) “persons, whether military or civilian, who, because of trauma, disease or other physical or mental disorder or disability, … (2) are in need of medical assistance or care and (3) who refrain from any act of hostility.” Id., at art. 8(1) (emphasis added).

264 AP COMMENTARY, supra note 242, at § 304.
relation to the [four 1949 Geneva] Conventions.”265 There can be no doubt that including civilian wounded, sick and shipwrecked within the protections afforded under the proposed Rule 109 of the ICRC Study would reflect a new norm of customary international law, one that deviates from the four Geneva Conventions of 1949, but one which embraces the admittedly innovative rule contained in Additional Protocol I.266

As previously mentioned, a proponent of a new norm of customary international law that purports to modify an earlier treaty-based obligation would have to show sufficiently dense State practice with sufficiently clear opinio juris.267 The materials in the ICRC Study which accompany proposed Rule 109 arguably support extending the obligation to search for and collect shipwrecked civilians.268 However, the ICRC Study materials cited in support of

265 Id. at § 312.

266 See generally Yoram Dinstein, The ICRC Customary International Humanitarian Law Study, 36 Isr. Y.B. Hum. Rts. 1, 3 ¶ 4, 14 (2006) (questioning whether the real impetus for the ICRC Study was an effort to claim that the provisions in Additional Protocol I had achieved the status of customary international law); David Turns, Weapons in the ICRC Study on Customary International Humanitarian Law, 11 J. CONFLICT & SECURITY L. 201, 236 (2006) (same); George H. Aldrich, Customary International Humanitarian Law – an Interpretation on behalf of the International Committee of the Red Cross, 76 BRIT. Y.B. INT’L L. 503, 505-06 (2006) (same); Theodor Meron, Revival of Customary Humanitarian Law, 99 AM. J. INT’L L. 817, 833 (2005) (same); PERSPECTIVES ON THE ICRC STUDY, supra note 2, at 9-10 (noting that the ICRC Study rules rely heavily on the treaty provisions of Additional Protocol I, which may “be seen simply as an attempt to get around the non-application of the treaty to certain States.”).

267 See supra note 133 and accompanying text (discussing how the proponent of a new norm of customary international law has the burden of proving it); supra notes 168-170 (requiring a clear manifestation that a significant number of States intend to deviate from existing treaty law).

268 Geneva Convention IV, supra note 24, at art. 16 (requiring “[a]s far as military considerations allow … assist the shipwrecked”); PICTET GENEVA CONVENTION II, supra note 5, at 132 (noting that “the rescue of shipwrecked military personnel or civilians remains an obligation which can only be evaded because of military necessity or because material conditions make it impossible.”); Additional Protocol I, supra note 24, at art. 8(2) (including civilians within the definition of shipwrecked); SAN REMO MANUAL, supra note 42, at ¶ 47.58 (same); NWP 1-14M, COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 11-4 ¶ 11.6 (2007) (same); NWP 1-14M, ANNOTATED SUPPLEMENT TO THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 11-4 to 11-6 § 11.4 (1997) (same); PICTET GENEVA CONVENTION II, supra note 5, at 86-87 (same). Cf. infra note 344 (discussing the obligation to search for and collect wounded, sick and shipwrecked at sea as being different from the corresponding obligations on land).
extending these obligations to wounded and sick civilians is surprisingly thin.  

The commentary to proposed Rule 109 merely mentions that the military manuals it cites as State practice in support of the proposed rule “are phrased in general terms covering all wounded, sick and shipwrecked, whether military or civilian.” Yet, for example, the U.S. military manuals cited as supporting this proposition not only have the

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269 See PERSPECTIVES ON THE ICRC STUDY, supra note 2, at 10 (noting that the evidence relied upon by the ICRC Study is often “either equivocal on its face as regards the Rule in question or the quoted extracts are insufficient to allow weight to be placed upon it reliably.”).

270 Because the rules are often oversimplified, they “should not be read on their own, without regard to the Commentary. A publication which contained only the Rules would give a misleading account of customary international humanitarian law, for this reason alone.” PERSPECTIVES ON THE ICRC STUDY, supra note 2, at 405-06. See also Robert Cryer, Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study, 11 J. CONFLICT & SECURITY L. 239, 262 (2006) (noting the ICRC Study “rules themselves cannot be seen as self-contained. … the rules in the Study have to be read with their commentaries.”); DOS/DoD Letter to ICRC, supra note 3, at 4 (noting “how the Study’s methodological flaws undermine the ability of States to rely, without further independent analysis, on the rules the Study proposes.”); Jamieson L. Greer, A Critique of the ICRC’s Customary Rules Concerning Displaced Persons: General Accuracy, Conflation, and a Missed Opportunity, 192 MIL. L. REV. 116, 120 (2007) (noting that “the ICRC’s commentary is much more helpful as a description of the current state of affairs than the rule [131] is as a representation of customary law.”). Contra Jean-Marie Henckaerts, Customary International Humanitarian Law – A Rejoinder to Judge Aldrich, 76 BRIT. Y.B. INT’L L. 525, 527 (2006) (one of the ICRC Study’s authors arguing that “only the black letter rules are identified as part of customary international law, and not the commentaries to the rules. The commentaries may, however, contain useful clarifications with respect to the application of the black letter rules and this is sometimes overlooked by commentators.”). Moreover, overreliance should not be placed on the practice in Volume II, because apparently only the State practice referenced in the commentary was used to formulate the rules. PERSPECTIVES ON THE ICRC STUDY, supra note 2, at 45 (citing a personal communication with Dr. Jean-Marie Henckaerts, one of the ICRC Study’s authors). But see Dino Kritsiotis, Customary International Humanitarian Law, 101 AM. J. INT’L L. 692, 693 (2007) (book review) (describing the “capsule explanations and the briefest of summations of practice in the first volume” of the ICRC Study). Thus the commentary to the rules would appear to be more important than either the rules by themselves, or the State practice cited in Volume II. But see Theodor Meron, Revival of Customary Humanitarian Law, 99 AM. J. INT’L L. 817, 834 (2005) (noting that “[i]n what may be symptomatic of future practice, the [ICTY] appeals chamber cited indications of practice demonstrated by the [ICRC] study, rather than the black-letter rule that the study’s authors based on those indications. In my view, this approach is prudent.”); George H. Aldrich, Customary International Humanitarian Law – an Interpretation on behalf of the International Committee of the Red Cross, 76 BRIT. Y.B. INT’L L. 503, 505 (2006) (noting the ICRC Study’s “importance rests on its being used as a basis for further work, and as a spur to such works, rather than on its conclusions.”). Nevertheless, the present article will not confine itself to only examining the practice cited in the commentary, because this limitation was not made clear in the Study itself, as it should have been. Id. See also Yoram Dinstein, The ICRC Customary International Humanitarian Law Study, 36 Isr. Y.B. Hum. Rts. 1, 6 ¶ 11 (2006) (noting that the editors of the ICRC Study “opted, to be on the safe side, to predicate the Rules more on legislative Codes and military Manuals than on any other single source of practice.”).

271 ICRC STUDY, supra note 2, Vol. I: Rules, at 396 (emphasis added). See also id. at 399.
usual weaknesses as evidence of U.S. State practice, but they also make no mention that their rules apply to wounded or sick civilians. In fact, in at least one section not cited by the ICRC Study, the foundational U.S. Army Field Manual on “The Law of Land Warfare” differentiates between the treatment of wounded and sick civilians versus wounded and sick combatants. This same overgeneralization or mischaracterization appears to have been made with regard to at least nine other States’ military manuals erroneously cited for this sweeping proposition.

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272 See supra notes 49, 114 and accompanying text (noting the weaknesses of citing to military manuals as evidence of State practice); infra notes 317, 328, 394 and accompanying text (same).


274 Compare Army FM 27-10, THE LAW OF LAND WARFARE (1956), § 208 (noting that wounded and sick combatants are covered by the first Geneva Convention versus other wounded and sick, who are governed by the fourth Geneva Convention) with ICRC STUDY, supra note 2, Vol. I: Rules, at 396-97 n. 5, 399 n. 25, Vol. II: Practice, at 2598 § 72 & n. 76 (citing to sections 11, 216 and 219 of Army FM 27-10, but not to section 208). See also U.S. Army FM 4-02, FORCE HEALTH PROTECTION IN A GLOBAL ENVIRONMENT 4-3 ¶ 4-4.a(1)(e) (2003) (noting that “[w]ounded and sick civilians have the benefit of the safeguards of the GC.”); U.S. Army FM 4-02.6, THE MEDICAL COMPANY A-5 ¶ A-4 (2002) (explaining that “[c]ivilians who are injured … as a result of military operations may be collected and provided initial medical treatment in accordance with theater policies. If treated, treatment will be on the basis of medical priority only and they shall be transferred to appropriate civil authorities as soon as possible.”) (emphasis added).

275 See, e.g., ICRC STUDY, supra note 2, Vol. II: Practice, at 2593 § 26 (noting that Benin’s Military Manual requires collecting the wounded and sick “whether friend or foe,” which would appear to refer specifically to combatants) (emphasis added), 2594 § 35 (noting that Colombia’s Soldiers’ Manual requires collecting “wounded enemy combatants”) (emphasis added), 2594 § 39 (noting that Croatia’s Soldiers’ Manual “instructs soldiers to search for and collect the wounded, sick and shipwrecked members of the adversary’s armed forces.”) (emphasis added), 2595 § 47 (noting that Italy’s LOAC Elementary Rules Manual instructs soldiers to collect “wounded enemy combatants”) (emphasis added), 2595 § 49 (noting that “Lebanon’s Teaching Manual instructs members of the armed forces to search for and collect enemy wounded”) (emphasis added), 2596 § 55 (noting that “[t]he IFOR Instructions of the Netherlands instructs soldiers to ’collect the wounded … whether friend or foe’.”) (emphasis added), 2596 § 60 (noting that Nigeria’s Soldiers’ Code of Conduct limits its obligations to collecting “wounded enemy”) (emphasis added), 2596 § 61 (noting that “[t]he Soldier’s Rules of the Philippines instruct soldiers to ‘care for the wounded and sick, be they friendly or foe’.”) (emphasis added), 2596 § 62 (noting that “Romania’s Soldiers’ Manual requires that wounded and sick enemy combatants be..."
There are only three instances of cited State practice that are specifically supportive of extending the same protections to wounded and sick civilians as their combatant counterparts: “Canada’s Code of Conduct,”276 “Kenya’s LOAC Manual,”277 and the “Report on the Practice of the Philippines.”278 Even aside from the inherent weaknesses of referencing military manuals as evidence of State practice,279 and the propriety of citing to a working draft of the Study itself which is not generally available for examination,280 it is

276 ICRC STUDY, supra note 2, Vol. II: Practice, at 2593 § 31. But cf. id. at 2593 § 30 (noting that Canada’s LOAC Manual obliges parties “to take all possible measures to search for and collect the wounded and sick and shipwrecked” without any reference to civilians).


278 ICRC STUDY, supra note 2, Vol. II: Practice at 2601 § 101. The Republic of the Philippines is one of the few States which is a party to Additional Protocol II, but not to Additional Protocol I. Compare ICRC Website, parties to Additional Protocol II, available at http://www.cicr.org/ihl.nsf/WebSign?id=475&ps=P (last visited Dec. 16, 2007) with id., parties to Additional Protocol I, available at http://www.cicr.org/ihl.nsf/WebSign?id=470&ps=P (last visited Dec. 16, 2007). Thus, at least the practice of the Republic of the Philippines (with regards to extending the same protections to civilian wounded, sick and shipwrecked) appears to extend beyond its treaty-based obligations, since it is not a party to Additional Protocol I.

279 See supra notes 49, 114 and accompanying text (noting the weaknesses of citing to military manuals as evidence of State practice); infra notes 317, 328, 394 and accompanying text (same).

280 The ICRC Study cites to the “Reports on the Practice of” eight States: Bosnia and Herzegovina, Egypt, Iran, Jordan, Malaysia, Philippines, the United States, and Zimbabwe. See ICRC STUDY, supra note 2, Vol. II: Practice at 2600-02, 2610-11 §§ 97, 99-101, 103-104, 169, 171. These are the working documents the ICRC asserts to have already consolidated into “Volume II: Practice” of the ICRC Study. See id., Vol. I: Rules, at xlv, xlvii-xlviii. Thus, the ICRC Study is essentially citing to an earlier draft of itself as authority! Moreover, these research “Reports on the Practice of” particular States have neither been published separately, nor are they generally available for review, and thus their support for the proposed rule cannot be tested readily. But see supra note 49 (examining the Report on US Practice); infra notes 308, 438, 489 (same). Although these working reports have not been published separately, fortunately Professor Burrus Carnahan, who supervised the U.S. “national research team” for the ICRC Study, donated a copy of the Report on US practice to the
difficult to argue that the practice of three States is sufficient to support a new norm of
customary international law, particularly one that modifies earlier treaty law that is
universally accepted. Thus, the State practice cited by the ICRC Study does not support
the new norm of customary international humanitarian law espoused in the proposed Rule
109 that ignores the distinction made by the first and second Geneva Conventions between
the obligations owed to wounded and sick combatants, versus the obligations owed to their
civilian counterparts.

Non-international armed conflicts. The second key issue with regard to the proposed
Rule 109 relates to a State’s obligation to search for, collect and evacuate the wounded, sick
and shipwrecked in non-international armed conflicts. Given that all States are now party to
the four Geneva Conventions of 1949, there are general treaty law (versus customary
international law) obligations under Common Article 3 of the four Geneva Conventions

University of Virginia Law Library. ICRC STUDY, supra note 2, Vol. I: Rules, at xix-xxi; CARNAHAN, REPORT
ON U.S. PRACTICE, supra note 49.

281 See DOS/DoD Letter to ICRC, supra note 3, at attachment p. 21 (noting that the “[t]he practice of six States
is very weak evidence of the existence of a norm of customary international law.”).

282 See supra note 32 (noting that all States are now party to the four Geneva Conventions of 1949).

283 See supra note 268 (citing references that include civilians within the definition of shipwrecked persons
entitled to protection under the second Geneva Convention).

284 See supra note 32 and accompanying text.

285 See supra note 95 and accompanying text (explaining the two types of international legal obligations based
on treaty law and customary international law).

286 Common Article 3 reads:

In the case of armed conflict not of an international character occurring in the territory of one of the
High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the
following provisions:

(1) Persons taking no active part in the hostilities, including … those placed ‘hors de combat’ by
sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely,
of 1949, for all States in non-international armed conflicts\(^\text{287}\) to collect and care for the wounded, sick\(^\text{288}\) and shipwrecked,\(^\text{289}\) and to treat the wounded and sick humanely.\(^\text{290}\)

Although the obligation under Common Article 3 is similar to that proposed by Rule 109 of the ICRC Study for non-international armed conflicts, the protections afforded to the wounded, sick and shipwrecked under the former are much more circumspect than those pursuant to the latter.\(^\text{291}\)

\[\text{without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. …}\]

(2) The wounded and sick shall be collected and cared for. …

Geneva Convention I, \textit{supra} note 24, at art. 3; Geneva Convention III, \textit{supra} note 24, at art. 3; Geneva Convention IV, \textit{supra} note 24, at art. 3. The second Geneva Convention adds “shipwrecked” to the list of who should be collected and cared for. Geneva Convention II, \textit{supra} note 24, at art. 3.


\(^{288}\) Geneva Convention I, \textit{supra} note 24, at art. 3(2); Geneva Convention II, \textit{supra} note 24, at art. 3(2); Geneva Convention III, \textit{supra} note 24, at art. 3(2); Geneva Convention IV, \textit{supra} note 24, at art. 3(2). \textit{See also} ICRC \textit{STUDY, supra} note 2, Vol. II: Practice, at 2590 § 3.

\(^{289}\) Geneva Convention II, \textit{supra} note 24, at art. 3(2). \textit{See also} ICRC \textit{STUDY, supra} note 2, Vol. II: Practice, at 2590 § 3.

\(^{290}\) Geneva Convention I, \textit{supra} note 24, at art. 3(1); Geneva Convention II, \textit{supra} note 24, at art. 3(1); Geneva Convention III, \textit{supra} note 24, at art. 3(1); Geneva Convention IV, \textit{supra} note 24, at art. 3(1). \textit{See infra} notes 430-432 (discussing the Common Article 3 obligation to care for the wounded, sick and shipwrecked, and to treat them humanely).

\(^{291}\) See Jean-Marie Henckaerts, \textit{Customary International Humanitarian Law – A Rejoinder to Judge Aldrich}, 76 BRIT. Y.B. INT’L L. 525, 525-26 (2006) (explaining, as one of the co-authors of the ICRC Study, that “[t]he ICRC’s main interest … was precisely in seeing whether customary international law provides a more detailed framework for non-international armed conflicts. In fact, the ICRC preferred to be mandated to prepare a report on non-international armed conflicts only but that was unacceptable to some States at the International Conference of the Red Cross and Red Crescent and so the organization was asked to look at both types of armed conflict.”).
Common Article 3 “merely provides for the application of the principles of the Convention and not for the application of specific provisions ….” Thus, unlike the proposed Rule 109 of the ICRC Study, Common Article 3 has no temporal component, no explicit obligation to search for the wounded, sick and shipwrecked, and no obligation to evacuate them. In fact, the only point of agreement between the proposed Rule 109 of the ICRC Study and Common Article 3 would appear to be the duty in non-international conflicts to collect the wounded and sick.295

The lack of commonality between the proposed Rule 109 of the ICRC Study and Common Article 3 is not surprising, since the former appears to be based on Article 8 of Additional Protocol II, which provides: “Whenever circumstances permit and particularly after an engagement, all possible measures shall be taken, without delay, to search for and collect the wounded, sick and shipwrecked, to protect them against pillage and ill-treatment, [and] to ensure their adequate care ….” The official ICRC commentary to Article 8 of Additional Protocol II, supra note 24, at art. 3(2); Geneva Convention II, supra note 24, at art. 3(2); Geneva Convention III, supra note 24, at art. 3(2); Geneva Convention IV, supra note 24, at art. 3(2). This obligation is contained in the proposed Rule 110 of the ICRC Study. See infra notes 379-455 and accompanying text. See generally infra Tables 1 through 3, pp. T-1 to T-3.

292 PICTET GENEVA CONVENTION I, supra note 5, at 48 ¶ “GENERAL” (emphasis added).

293 See infra notes 341-359 and accompanying text.

294 PICTET GENEVA CONVENTION I, supra note 5, at 38-61. See also AP COMMENTARY, supra note 242, at § 4649.

295 Compare ICRC STUDY, supra note 2, Vol. I: Rules, at 396, with Geneva Convention I, supra note 24, at art. 3(2); Geneva Convention II, supra note 24, at art. 3(2); Geneva Convention III, supra note 24, at art. 3(2); Geneva Convention IV, supra note 24, at art. 3(2). Common Article 3 is broader than the proposed Rule 109 of the ICRC Study in its obligation to “collect[,] and care for” the wounded and sick. Geneva Convention I, supra note 24, at art. 3(2); Geneva Convention II, supra note 24, at art. 3(2); Geneva Convention III, supra note 24, at art. 3(2); Geneva Convention IV, supra note 24, at art. 3(2). This obligation is contained in the proposed Rule 110 of the ICRC Study. See infra notes 379-455 and accompanying text. See generally infra Tables 1 through 3, pp. T-1 to T-3.

296 See supra notes 263-266 and accompanying text; Jean-Marie Henckaerts, Customary International Humanitarian Law – A Rejoinder to Judge Aldrich, 76 BRIT. Y.B. INT’L L. 525, 525-26 (2006) (explaining, as one of the co-authors of the ICRC Study, that “[t]he ICRC’s main interest … was precisely in seeing whether customary international law provides a more detailed framework for non-international armed conflicts.”).

297 Additional Protocol II, supra note 24, at art. 8.
Additional Protocol II confirms that it further *develops* (i.e. expands) the principles enunciated in Common Article 3 of the four Geneva Conventions of 1949.298 Yet proposed Rule 109 of the ICRC Study goes even further than Article 8 of Additional Protocol II by adding a requirement to *evacuate* the wounded, sick and shipwrecked, which was “considered … to be rather unrealistic in the context of a non-international armed conflict” by the framers of the Additional Protocols.299 The fact that the ICRC Study Rule 109 expands even on the language of the Additional Protocols is particularly troubling.300

Thus, once again301 the ICRC Study proposes a rule of customary international humanitarian law that expands upon the treaty obligations contained in the four universally subscribed to Geneva Conventions of 1949,302 and even from the more expansive language of Additional Protocol II. As indicated *supra*,303 this departure from treaty obligations will be recognized under international law if there is sufficiently dense State practice with sufficiently clear *opinio juris* in support of the new rule. In support of this new norm of customary international humanitarian law applicable to non-international armed conflicts, besides Article 8 of Additional Protocol II, the ICRC Study cites to: (1) a “number of other instruments pertaining also to non-international armed conflicts,” (2) “a number of military

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298 AP COMMENTARY, *supra* note 242, at § 4649.

299 *Id.* *Cf.* id. at § 4655 (Adequate “care includes ensuring the transport of the wounded to a place where they can be adequately cared for.”). *See generally infra* Table 1, p. T-1.

300 *See infra* note 349 and accompanying text (discussing the implications of an unexplained deviation from treaty language).

301 *See supra* notes 263-266 and accompanying text.

302 *See supra* note 32 and accompanying text.

303 *See supra* note 133 and accompanying text (discussing how the proponent of a new norm of customary international law has the burden of proving it); *supra* notes 168-170 (requiring a clear manifestation that a significant number of States intend to deviate from existing treaty law).
In addition, although conspicuously absent from manuals, and (3) domestic legislation. In addition, although conspicuously absent from

304 See supra notes 49, 114 and accompanying text (noting the weaknesses of citing to military manuals as evidence of State practice); infra notes 317, 328, 394 and accompanying text (same).

305 ICRC STUDY, supra note 2, Vol. I: Rules, at 397. The ICRC Study also provides that “[n]o official contrary practice was found ….” Id. at 398. See infra notes 364-368 and accompanying text (discussing the logical fallacy of arguing a lack of contrary State practice in support of a proposed norm of customary international law). Finally, the ICRC Study notes that “[t]he ICRC has called on parties to both international and non-international armed conflicts to respect this rule.” ICRC STUDY, supra note 2, Vol. I: Rules, at 398. This relatively mild statement belies the fact that the ICRC Study lists “Practice of the International Red Cross and Red Crescent Movement” on par with other categories of international practice in Volume II. Id. Vol. II: Practice, at 2602-03, 2613-14 §§ 109-115, 184-189. This is hubris writ large! See, e.g. Yoram Dinstein, The ICRC Customary International Humanitarian Law Study, 36 Isr. Y.B. Hum. Rts. 1, 5 ¶ 9 (2006) (commenting that despite the ICRC’s unique role in international humanitarian law, it remains a non-governmental organization (NGO), and that “NGOs, whatever their standing, can never contribute directly through their own practice to the creation of customary norms. … The ICRC [may] play[ ] … the role of a catalyst for the evolution of State practice, but no more.”); DOS/DoD Letter to ICRC, supra note 3, at 2 (claiming that the ICRC “Study gives undue weight to statements by non-governmental organizations and the ICRC itself”); PERSPECTIVES ON THE ICRC STUDY, supra note 2, at 44 (questioning the appropriateness of considering “confidential communications made to the ICRC as evidence of State practice.”); id. at 45 (arguing that “non-State materials” are “better seen as secondary, rather than primary, evidence of State practice”). But see id. (citing a personal communication with Dr. Jean-Marie Henckaerts, one of the ICRC Study’s authors, “that only some of the practice detailed in Volume II was taken into account in formulating the Rules contained in Volume I, namely that identified in the commentaries to the Rules. In particular, materials emanating from non-governmental organisations were not used to support any Rules”) (emphasis added); Yoram Dinstein, The ICRC Customary International Humanitarian Law Study, 36 Isr. Y.B. Hum. Rts. 1, 6 ¶ 11 (2006) (noting that the editors of the ICRC Study “opted, to be on the safe side, to predicate the Rules more on legislative Codes and military Manuals than on any other single source of practice.”); Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 175-76 ¶ 97 (July 9) (considering the opinion of the ICRC in interpreting the Geneva Convention IV because of its “special position with respect to execution of the Fourth Geneva Convention”); Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 109 (Oct. 2, 1995), available at http://www.un.org/icty/tadic/appeal/decision-e/51002.htm (deciding that “[t]he practical results the ICRC has thus achieved in inducing compliance with international humanitarian law ought therefore to be regarded as an element of actual international practice; this is an element that has been conspicuously instrumental in the emergence or crystallization of customary rules.”). Contra Leah M. Nicholls, The Humanitarian Monarchy Legislates: The International Committee of the Red Cross and its 161 Rules of Customary International Humanitarian Law, 17 DUKE J. COMP. & INT’L L. 223, 240 (2006) (opining that “[t]he ICTY’s point in Tadic seems to be that the impetus for state action counted as customary law could come from the ICRC, not that the ICRC’s activities themselves could be considered state practice.”). Certainly, State practice may include what actions States take in international organizations. RESTATEMENT OF FOREIGN RELATIONS, supra note 21, at § 102 reporters’ notes p. 31. See, e.g. ICRC STUDY, supra note 2, Vol. II: Practice, at 2611 §§ 173-174 (citing to U.N. General Assembly Resolutions appealing to governments to permit the ICRC to evacuate the wounded from areas of conflict). But see DOS/DoD Letter to ICRC, supra note 3, at 2 (criticizing the ICRC Study for relying on non-binding U.N. General Assembly Resolutions); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 254-55 ¶ 70 (July 8) (noting that while General Assembly Resolutions “are not binding, [they] may sometimes have normative value … [in] establishing the existence of a rule or the emergence of opinio juris.”); supra notes 142-146 and accompanying text (discussing the role of international organizations in the formation of customary international law). However, this remains the practice of the States themselves, not the practice of the international organization. See, e.g. Jan Klubbers, An Introduction to International Institutional Law 231-32 (2002) (noting that the International Court of Justice came close in its 1971 Namibia opinion to recognizing the practice of the U.N. Security Council in treating an abstention as a “concurring vote” in terms of Article 27(3) of the U.N. Charter, as customary law,
the commentary to Rule 109, Volume II provides a rare cite to five instances of “battlefield practice” in support of the proposed rule in non-international armed conflicts.

but avoided doing so because “then it would have had to pronounce itself on the possibility of customary law developing within the UN to begin with: Article 108 (the amendment article) may militate against such a conclusion.”). Moreover, as Professor Dinstein mentions above, the ICRC is not even an international organization, but merely a Swiss NGO. Yoram Dinstein, The ICRC Customary International Humanitarian Law Study, 36 Isr. Y.B. Hum. Rts. 1, 5 ¶ 9 (2006). But see ICRC, The ICRC’s status: in a class of its own, available at http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/5w9fjy?opendocument (last visited Dec. 16, 2007) (arguing that the ICRC is a hybrid between a “private association [i.e. NGO] formed under the Swiss Civil Code,” and an “intergovernmental organization … [because it has] an ‘international legal personality’ … [as well as] privileges and immunities”).

306 Because the rules are often oversimplified, they “should not be read on their own, without regard to the Commentary. A publication which contained only the Rules would give a misleading account of customary international humanitarian law, for this reason alone.” PERSPECTIVES ON THE ICRC STUDY, supra note 2, at 405-06. See also Robert Cryer, Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study, 11 J. CONFLICT & SECURITY L. 239, 262 (2006) (noting the ICRC Study “rules themselves cannot be seen as self-contained. … the rules in the Study have to be read with their commentaries.”); Jamieson L. Greer, A Critique of the ICRC’s Customary Rules Concerning Displaced Persons: General Accuracy, Conflation, and a Missed Opportunity, 192 MIL. L. REV. 116, 120 (2007) (noting that “the ICRC’s commentary is much more helpful as a description of the current state of affairs than the rule [131] is as a representation of customary law.”). Contra Jean-Marie Henckaerts, Customary International Humanitarian Law – A Rejoinder to Judge Aldrich, 76 BRIT. Y.B. INT’L L. 525, 527 (2006) (one of the ICRC Study’s authors arguing that “only the black letter rules are identified as part of customary international law, and not the commentaries to the rules. The commentaries may, however, contain useful clarifications with respect to the application of the black letter rules and this is sometimes overlooked by commentators.”). Moreover, overreliance should not be placed on the practice in Volume II, because apparently only the State practice referenced in the commentary was used to formulate the rules. PERSPECTIVES ON THE ICRC STUDY, supra note 2, at 45 (citing a personal communication with Dr. Jean-Marie Henckaerts, one of the ICRC Study’s authors). But see Dino Kritsiotis, Customary International Humanitarian Law, 101 AM. J. INT’L L. 692, 693 (2007) (book review) (describing the “capsule explanations and the briefest of summations of practice in the first volume” of the ICRC Study). Thus the commentary to the rules would appear to be more important than either the rules by themselves, or the State practice cited in Volume II. But see Theodor Meron, Revival of Customary Humanitarian Law, 99 AM. J. INT’L L. 817, 834 (2005) (noting that “[i]n what may be symptomatic of future practice, the [ICTY] appeals chamber cited indications of practice demonstrated by the [ICRC] study, rather than the black-letter rule that the study’s authors based on those indications. In my view, this approach is prudent.”); George H. Aldrich, Customary International Humanitarian Law – an Interpretation on behalf of the International Committee of the Red Cross, 76 BRIT. Y.B. INT’L L. 503, 505 (2006) (noting the ICRC Study’s “importance rests on its being used as a basis for further work, and as a spur to such works, rather than on its conclusions.”). Nevertheless, the present article will not confine itself to only examining the practice cited in the commentary, because this limitation was not made clear in the Study itself, as it should have been. Id. See also Yoram Dinstein, The ICRC Customary International Humanitarian Law Study, 36 Isr. Y.B. Hum. Rts. 1, 6 ¶ 11 (2006) (noting that the editors of the ICRC Study “opted, to be on the safe side, to predicate the Rules more on legislative Codes and military Manuals than on any other single source of practice.”).

307 See supra notes 47, 55 (criticizing the ICRC Study for a lack of citations to actual battlefield behavior versus verbal acts as State practice).
Specifically with regard to the first category of support for the new norm of customary international law in non-international armed conflicts, the commentary to the ICRC Study lists four instruments purportedly supportive of the proposed Rule 109—the first three are agreements between parties to the disintegration of the Socialist Federal Republic of

308 Specifically, Volume II refers to an unnamed opposition group “express[ing] its acceptance of the fundamental principles of IHL as formulated by the ICRC” in 1980 (ICRC STUDY, supra note 2, Vol. II: Practice, at 2603 § 116); the evacuation of wounded from East Timor by Indonesian forces in 1984 (id. at 2614 § 190); Iran evacuating wounded Iraqi soldiers during the Iran-Iraq War in accordance with Sharia Law (id. at 2611, § 171); the French government soliciting international support in 1987 for the evacuation of wounded from besieged Palestinian camps (id. at 2610-11 § 170); and the Commanding General of the Bosnia and Herzegovina Army instructing subordinate Corps Commanders regarding the evacuation of the wounded and sick in 1993 (id. at 2610 § 169). But see PERSPECTIVES ON THE ICRC STUDY, supra note 2, at 45 (citing a personal communication with Dr. Jean-Marie Henckaerts, one of the ICRC Study’s authors, “that only some of the practice detailed in Volume II was taken into account in formulating the Rules contained in Volume I, namely that identified in the commentaries to the Rules. In particular, materials emanating from non-governmental organisations were not used to support any Rules”) (emphasis added); id. (noting that “the Study claims not to have relied on the practice of armed opposition groups” despite the numerous references to this practice in Volume II); id. at 44 (questioning the appropriateness of considering “confidential communications made to the ICRC as evidence of State practice.”). But see Yoram Dinstein, The ICRC Customary International Humanitarian Law Study, 36 Isr. Y.B. Hum. Rts. 1, 7 ¶ 14 (2006) (remembering that “[e]verybody hoped that the research [into the otherwise inaccessible IRCR archives] would yield a trove of inaccessible State practice. In any event, the results have been quite disappointing.”). Although not expressly cited by the commentary to Rule 109, Volume II refers to the Report on US Practice that “it is the opinio juris of the US that, whenever circumstances permit, all possible measures should be taken to search for the wounded and sick in accordance with Article 8 AP II.” ICRC STUDY, supra note 2, Vol. II: Practice, at 2601 § 103 n. 109 (citing to Report on US Practice, 1997, Chapter 5.1). Since the ICRC Study cites to Additional Protocol II, this “opinio juris of the US” is presumably limited to non-international armed conflicts, which is consistent with the caveats contained in the Report on US Practice itself. CARNANAH, REPORT ON U.S. PRACTICE, supra note 49, at iv, 5-2 § 5.0. However, although the Report on US Practice supports a customary international law requirement “to search for the wounded, dead and missing in action,” it neither contains a temporal component, nor does it recognize an obligation to evacuate them. Id. at 5-3 § 5.1. Moreover, the Report on US Practice admits that:

Since an internal armed conflict has not occurred on U.S. territory in this century, primary reliance for United States practice has been on …

(1) The 1973 Agreements to end the war in Viet-Nam. …

(2) Documents from 1987 submitting Protocol II Additional to the Geneva Conventions to the U.S. Senate for advice and consent to ratification.

Id. at 5-2 § 5.0 (internal citations omitted). The present author is not so sanguine that the excerpts from these two sources provided in the Report on US Practice support this proposition, let alone that they carry sufficient weight. Id. at Chapter 5, Annexes 8 and 9. See also PERSPECTIVES ON THE ICRC STUDY, supra note 2, at 134 n. 12 (noting that the ICRC Study “editors were constrained by the comprehensiveness (or lack thereof) of State practice reports provided by the national research teams.”).
Yugoslavia (SFRY). The fourth is an agreement between the Government of the Republic of the Philippines and the National Democratic Front of the Philippines. However, Common Article 3 expressly provides that “[t]he Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.” Even if these special agreements deviate significantly from the principles of Common Article 3, which they do not, it is difficult to argue that the special agreements of two States is sufficiently dense State practice to justify

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311 Geneva Convention I, supra note 24, at art. 3(2); Geneva Convention II, supra note 24, at art. 3(2); Geneva Convention III, supra note 24, at art. 3(2); Geneva Convention IV, supra note 24, at art. 3(2).

312 For example, of the two provisions cited from the Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law Between the Government of the Republic of the Philippines and the National Democratic Front of the Philippines, the first one repeats the obligation under Common Article 3 almost verbatim: “The wounded and the sick shall be collected and cared for by the party to the armed conflict which has them in its custody or responsibility.” Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law Between the Government of the Republic of the Philippines and the National Democratic Front of the Philippines, Mar. 16, 1998, Part IV, art. 4(2), available at http://www.philsol.nl/A03a/CARHRIHL-mar98.htm. The second provision cited from this agreement provides: “[e]very possible measure shall be taken, without delay, to search for and collect the wounded, sick and missing persons and to protect them from any harmful and ill treatment, to ensure their adequate care and to search for the dead, prevent despoliation and mutilation and to dispose of them with respect.” Id. at art. 9. Although this is consistent with the language in proposed Rule 109 of the ICRC Study, it is also consistent with article 8 of Additional Protocol II, to which the Republic of the Philippines acceded on December 11, 1986. See ICRC, State Parties to Additional Protocol II, available at http://www.cicr.org/ihl.nsf/WebSign?ReadForm&id=475&ps=P (last visited Dec. 16, 2007). Thus, it appears that by entering the agreement with the separatist group, the Republic of the Philippines was simply abiding by its treaty obligations under Common Article 3 of the four Geneva Conventions of 1949, as well as Additional Protocol II. Absent additional evidence of opinio juris, it would be difficult to argue that by this act the Republic of the Philippines was evincing State practice in support of a new norm of customary international law.

313 This list of two States (Croatia, and Bosnia and Herzegovina) does not include the Republic of the Philippines, as it was merely abiding by its treaty obligations. See supra notes 163, 221-222 and accompanying text. However, Croatia apparently signed the special agreement with the SFRY in 1991, before it acceded to Additional Protocol II on May 11, 1992. Compare ICRC STUDY, supra note 2, Vol. II: Practice, at 2592 § 16 with ICRC, State Parties to Additional Protocol II, available at
a new norm of customary international humanitarian law.\footnote{Acceptance of a new norm of customary international law does not require universal acceptance, but sufficiently widespread acceptance, particularly by those States especially affected by the proposed norm. \textit{See generally Restatement of Foreign Relations}, \textit{supra} note 21, at § 102 cmt. b. \textit{See also Dunoff, Ratner & Wippman, International Law Norms, Actors, Process—A Problem-Oriented Approach} 75 (2002); \textit{supra} note 133 and accompanying text (discussing how the proponent of a new norm of customary international law has the burden of proving it); \textit{supra} notes 168-170 (requiring a clear manifestation that a significant number of States intend to deviate from existing treaty law).}

refer expressly to provisions in the four Geneva Conventions of 1949, and not to the Additional Protocols, from which the proposed Rule 109 borrows its language. Moreover, of the remaining military manuals cited by the ICRC Study in support of the proposed Rule 109, most of the manuals use language remarkably similar to provisions in the four Geneva Conventions of 1949, and not to the Additional Protocols. Of those military manuals which do appear to support the expanded language of Article 8 of Additional Protocol II, and hence much of the language of the proposed Rule 109, the manuals of eight States are all merely consistent with their treaty obligations, as they all became parties to Additional Protocol II before the publication of the military manuals cited. As difficult as it is to

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319 See supra notes 263-266 and accompanying text.

320 ICRC STUDY, supra note 2, Vol. I: Rules, at 397, Vol. II: Practice, at 2592-98 §§ 21-22 (Argentina), § 23 (Australia), § 26 (Benin), §§ 32-35 (Colombia), § 41 (Ecuador), §§ 42-43 (France), § 44 (Germany), § 46 (Indonesia), § 47 (Italy), § 49 (Lebanon), § 57 (Nicaragua), § 62 (Romania), § 63 (Russia), § 64-65 (Senegal), § 66 (Spain), § 68 (Switzerland), § 69 (Togo), § 75 (Yugoslavia).

321 Compare ICRC STUDY, supra note 2, Vol. I: Rules, at 397, Vol. II: Practice, at 2592-96 § 27 (Burkina Faso), §§ 30-31 (Canada), § 36 (Congo), § 45 (Hungary), § 50 (Madagascar), §§ 53-55 (the Netherlands), § 56
discern *opinio juris*, it is doubly difficult when the State practice cited is merely consistent with existing treaty law obligations.\(^{322}\)

Finally, assuming that any credence can be given to military manuals as evidence of State practice,\(^{323}\) Cameroon, Croatia, Mali,\(^{324}\) and Morocco stand out as the four sole supporters of a new norm of customary international law, as their military manuals cited in support of the proposed Rule 109 of the ICRC Study either predate their accession to the Additional Protocols,\(^{325}\) or they are not party to the Additional Protocols at all (which is the case for Morocco).\(^{326}\) Of course, this begs the question whether their compliance with an arguably new norm of customary international law was subsumed by their subsequent accession to the Additional Protocols\(^{327}\) (except for Morocco, of course).\(^{328}\) Moreover, as

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\(^{322}\) *See supra* notes 163, 221-222 and accompanying text.

\(^{323}\) *See supra* notes 49, 114, 317 and accompanying text; *infra* notes 328, 394 and accompanying text.


\(^{327}\) As questionable as it is whether subsequent customary international law can alter pre-existing treaty obligations, it is clear that the reverse is true: that treaty law can alter pre-existing customary international law, unless, perhaps, it is a *jus cogens* norm. *See supra* note 179. *See generally RESTATEMENT OF FOREIGN RELATIONS, supra* note 21, at § 102 cmt. j. *But cf. supra* note 156 (discussing the ICJ’s opinion in the Nicaragua case, that customary international law can continue to exist alongside an identical treaty norm).

\(^{328}\) Another limiting variable is whether the cited military manuals intended to support a new norm of customary
previously stated, it is difficult to argue that the military manuals of four States is sufficiently dense State practice upon which to base a new norm of customary international humanitarian law, especially in non-international armed conflicts, the rules for which are inherently more controversial.

The third and final category of support for the new norm of customary international law in Rule 109 of the ICRC Study, applicable to non-international armed conflicts, is domestic legislation. The ICRC Study does not cite separately to domestic legislation that

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329 See supra notes 281, 313 and accompanying text.

330 Anthony Cullen, The Parameters of Internal Armed Conflict in International Humanitarian Law, 12 U. MIAMI INT’L & COMP. L. REV. 189, 191-92 (2004). Cf. David Turns, Weapons in the ICRC Study on Customary International Humanitarian Law, 11 J. CONFLICT & SECURITY L. 201, 208-09 (2006) (noting that “the law in non-international armed conflicts is very much less specific and less developed than that applicable in international armed conflicts.”). One reason the law applicable to non-international armed conflicts is so “very much less specific and less developed” is not because there are fewer non-international armed conflicts (just the contrary), but because States cannot agree (in multilateral treaties or in customary practice) on the application of the law of armed conflict in the realm of non-international armed conflicts. See, e.g., Malcolm MacLaren & Felix Schwendimann, An Exercise in the Development of International Law: The New ICRC Study on Customary International Humanitarian Law, 6 GERMAN L. J. 1217, 1228 (2005) (noting that States have not regulated non-international armed conflicts out of concern for “their sovereignty and protection of their national interests”); George H. Aldrich, Customary International Humanitarian Law – an Interpretation on behalf of the International Committee of the Red Cross, 76 BRIT. Y.B. INT’L L. 503, 506-07 (2006) (same).

331 ICRC STUDY, supra note 2, Vol. I: Rules, at 397, Vol. II: Practice, at 2598-600, 2609-10 §§ 76-95, 163-167. Domestic legislation is of limited utility as evidence of a new norm of customary international law, at least vis-à-vis the four universally subscribed Geneva Conventions of 1949, which require all State-parties to penalize “grave breaches” of the Conventions, and to “take measures necessary for the suppression” of other violations. Geneva Convention I, supra note 24, at art. 49; Geneva Convention II, supra note 24, at art. 50; Geneva Convention III, supra note 24, at art. 129; Geneva Convention IV, supra note 24, at art. 146. For example, the United States fulfilled its commitment to criminalize “grave breaches” and to suppress other violations of the Geneva Conventions by finally enacting the War Crimes Act in 1996. War Crimes Act, 18 USC § 2441 (2006). The War Crimes Act penalizes grave breaches of the four 1949 Geneva Conventions, as well as violations of Common Article 3. 18 USC § 2441(c)(1) and (3) (2006) (respectively). For a list of potential examples of grave breaches that might constitute war crimes, see NWP 1-14M, COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 6-5 to 6-6 ¶ 6.2.6 (2007) (including offenses against the wounded, sick and shipwrecked, deliberate attack on medical facilities, etc.). See also id. at 6-7 to 6-9 ¶ 6.3 (listing examples of incidents that need to be reported as potential law of war violations under the Department of Defense Law of War Program, including offenses against the wounded, sick and shipwrecked “when military interests do permit,” deliberate attacks on
putatively supports its proposed rule in non-international conflicts than that cited in support of the proposed rule in international armed conflicts. The only domestic legislation that specifically criminalizes violations of the Additional Protocols (including Article 8 of Additional Protocol II, upon which Rule 109 of the ICRC Study appears to be based), are Ireland and Norway, whose domestic legislation was amended ten and six months respectively before they ratified the Additional Protocols. Following the ICJ’s reasoning...
in the *North Sea Continental Shelf Case*, when Ireland and Norway amended their domestic legislation shortly before ratifying the Additional Protocols, they were “acting actually or potentially in the application of the [Additional Protocols]. From their action no inference could legitimately be drawn as to the existence of a rule of customary international law …” 334 Therefore, the domestic legislation cited by the ICRC Study does not support its

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334 North Sea Continental Shelf (F.R.G. v. Den. & Neth.), 1969 I.C.J. 3, 43 ¶ 76 (Feb. 20) (emphasis added). See also ILA Report on CIL, supra note 132, at 46-47 ¶ 24; CUSTOM, POWER AND THE POWER OF RULES, supra note 21, at 170. See infra notes 163, 221-222 and accompanying text (arguing that State actions in compliance...
proposed norm of customary international law.

Thus, even when considered collectively the special agreements of two States, the military manuals of four States, and the domestic legislation of two additional States is not sufficiently dense State practice with sufficiently clear *opinio juris* upon which to base a new norm of customary international humanitarian law applicable to *non-international* armed conflicts, particularly one that deviates from the universally subscribed Geneva Conventions of 1949.

*International Armed Conflicts—Temporal Distinction.* The third point of departure between the proposed Rule 109 and existing treaty law provisions relates to *when* the obligation arises to search for and collect the wounded, sick and shipwrecked. For the wounded and sick *on land*, all States have agreed to “[a]t all times, and particularly after an engagement … take all possible measures to search for and collect the wounded and sick ….” For similar persons *at sea*, all States have agreed to “[a]fter each engagement …

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335 See supra notes 309-314 and accompanying text.

336 See supra notes 315-330 and accompanying text.

337 See supra notes 331-334 and accompanying text.

338 See supra notes 281, 313, 329 (noting similar concerns about the State practice of only a few States being insufficient upon which to base a new norm of customary international law).

339 See also DOS DOS/DoD Letter to ICRC, supra note 3, at 4 (criticizing the ICRC Study for asserting that certain rules have become customary international law binding in non-international armed conflicts “notwithstanding the fact that there is little evidence in support of those propositions.”).

340 See supra note 32 (noting that all States are now party to the four Geneva Conventions of 1949).

341 Geneva Convention I, supra note 24, at art. 15, ¶ 1 (emphasis added).

342 Cf. Geneva Convention II, supra note 24, at art. 12, ¶ 1 (explaining coverage of the second Geneva
take all possible measures to search for and collect \textit{the shipwrecked, wounded and sick} …\textsuperscript{343} Therefore, treaty law recognizes a \textit{temporal distinction} between the obligation to search for and collect the wounded and sick \textit{on land} (i.e. to do so “[a]t all times, and particularly after an engagement,”) versus the obligation to search for and collect the wounded, sick and shipwrecked \textit{at sea} (i.e. to do so only “[a]fter each engagement.”)\textsuperscript{344}

\textsuperscript{343} Geneva Convention II, \textit{supra} note 24, at art. 18, ¶ 1 (emphasis added). \textit{See also} ICRC STUDY, \textit{supra} note 2, Vol. II: Practice, at 2590 § 2.

\textsuperscript{344} PICTET GENEVA CONVENTION II, \textit{supra} note 5, at 132 (noting that: “The words ‘after each engagement’ with which the paragraph opens were already included in the corresponding provision of the 1907 text, which had taken them from the Geneva Convention of 1906. In the First Convention, the 1949 Conference replaced the phrase by the words ‘at all times, and particularly after an engagement’, but left the old wording in the Second Convention, thus tacitly accepting the view of the Government experts, who had met in 1947, that the words ‘after each engagement’ were better suited to the special conditions prevailing at sea.”) (emphasis added). \textit{See also} AP COMMENTARY, \textit{supra} note 242, at §§ 4650-4651, 4653 (same); NWP 1-14M, COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 8-9 to 8-10 ¶ 8.6.1 (2007) (same); DINSTEIN, CONDUCT OF HOSTILITIES, \textit{supra} note 3, at 143-44 (exploring the differences between the duty to search for and collected the wounded and sick under the First and Second Geneva Conventions). \textit{See generally infra} Table 1, p. T-1. There is a long tradition of coming to the aid of mariners in distress from perils of the sea. \textit{See, e.g.}, PICTET GENEVA CONVENTION II, \textit{supra} note 5, at 85 (noting that: “as long ago as the XVIIth century, noble and generous gestures were made in behalf of the wounded and shipwrecked. It was not until the beginning of the XIXth century, however, when Nelson ordered that as a general rule the crews of enemy ships set on fire were to be rescued, that there was a definite alleviation of the sometimes implacable nature of war at sea.” (footnotes omitted)). However, there is also an implicit recognition that such requirement only exists \textit{after} the engagement (i.e. there is no requirement to risk one’s vessel or the safety of one’s crew to rescue shipwrecked sailors during the heat of battle). \textit{See also} Geneva Convention II, \textit{supra} note 24, at art. 21, ¶ 1 (“Parties to the conflict may appeal to the charity of commanders of neutral merchant vessels, yachts or other craft, to take on board and care for wounded, sick or shipwrecked persons, and to collect the dead.”); ICRC STUDY, \textit{supra} note 2, Vol. II: Practice, at 2591 § 8; PICTET GENEVA CONVENTION II, \textit{supra} note 5, at 131 (noting that: “Of course, one cannot always require certain fighting ships, such as fast torpedo-boats and submarines, to collect in all circumstances the crews of ships which they have sunk, for they will often have inadequate equipment and insufficient accommodation. Submarines stay at sea for a long time and sometimes they neither wish nor are able to put in at a port where they could land the persons whom they have collected. Generally speaking, one cannot lay down an absolute rule that the commander of a warship must engage in rescue operations if, by so doing, he would expose his vessel to attack.”); NWP 1-14M, COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 8-12 ¶ 8.7 (2007) (noting that “[t]o the extent that military exigencies permit, submarines are also required to search for and collect the shipwrecked, wounded, and sick following an engagement,” but that if “such
Thus, the treaty law obligation for soldiers\textsuperscript{345} to search for and collect the wounded and sick would appear to begin earlier in the engagement (i.e. during the heat of the land battle, if “possible,”\textsuperscript{346} perhaps during a lull in fighting),\textsuperscript{347} versus sailors, who are permitted to wait for the naval battle to have ended before doing so.\textsuperscript{348}

The ICRC Study glosses over this temporal distinction\textsuperscript{349} by adopting a more generic

humanitarian efforts would subject the submarine to undue additional hazard or prevent it from accomplishing its military mission, the location of possible survivors should be passed at the first opportunity to a surface ship, aircraft, or shore facility capable of rendering assistance.”) (emphasis added); \textit{id.} at 8-13 to 8-14 ¶ 8.8 (similar requirement for military aircraft “to search for the shipwrecked, wounded, and sick following an engagement at sea.”). Having been the recipient of such largesse at sea, the author can attest to the fact that this is more than the naval equivalent of the civilian population coming to the aid of the wounded and sick on land. \textit{See generally} Geneva Convention I, \textit{supra} note 24, at art. 18; Additional Protocol I, \textit{supra} note 24, at art. 17; Additional Protocol II, \textit{supra} note 24, at art. 18(1); ICRC STUDY, \textit{supra} note 2, Vol. II: Practice, at 2591. As the age-old adage goes, “the sea is a harsh mistress.”

\textsuperscript{345} The author’s use of the terms “soldiers” versus “sailors” is admittedly a proxy for the duty on land versus at sea. There are obviously soldiers who operate at sea, (see, e.g., Go.Army.com, Careers & Jobs, Watercraft Operator (88K), \textit{available at} http://www.goarmy.com/JobDetail.do?id=183 (last visited Dec. 16, 2007)) and sailors who operate on land (see, e.g., Navy.com, Careers, Special Ops, \textit{available at} http://www.navy.com/careers/enlisted/specialops/ (last visited Dec. 16, 2007)).

\textsuperscript{346} Geneva Convention I, \textit{supra} note 24, at art. 15, ¶ 1.


\textsuperscript{348} Geneva Convention II, \textit{supra} note 24, at art. 18, ¶ 1. \textit{See also} ICRC STUDY, \textit{supra} note 2, Vol. II: Practice, at 2590 § 7. \textit{See generally supra Table 1, p. T-1.}

\textsuperscript{349} The ICRC Study cites the different language in the first and second Geneva Conventions, but does not make note of the temporal distinction. ICRC STUDY, \textit{supra} note 2, Vol. II: Practice, at 2591 §§ 5, 7. \textit{Cf. NWP 1-14M, COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 11-4 ¶ 11.6 (2007) (similarly glossing over the temporal distinction between land and naval warfare, but by applying the “after each engagement” standard to both the duty “to search for and collect the wounded and sick on the field of battle” and the duty “to search for and rescue the shipwrecked.”).} By deviating from the treaty language with neither explanation nor discussion of its importance, Rule 109 raises the level of uncertainty as to which language prevails. \textit{See supra} notes 166-171 (discussing whether a subsequent norm of customary international law can modify earlier treaty language). \textit{See also PERSPECTIVES ON THE ICRC STUDY, supra} note 2, at 10 (noting that “if the customary formulation diverges from the treaty language without any apparent reason. … questions may arise as to which formulation reflects the normative content of the Rule. This carries risks of uncertainty and perhaps even of a lowering of standards of protection.”); \textit{id.} at 13, 406 (same); Malcolm MacLaren & Felix Schwendimann, \textit{An Exercise in the Development of International Law: The New ICRC Study on Customary International Humanitarian Law}, 6 \textit{German L. J.} 1217, 1225 (2005) (same); PERSPECTIVES ON THE ICRC STUDY, \textit{supra} note 2, at 10 (noting that the ICRC Study rules have varying degrees of deviation from existing treaty law provisions,
“whenever circumstances permit” standard in its proposed Rule 109, applicable to all wounded and sick (whether on land or at sea), and to the shipwrecked. This with neither explanatory reasons therefor nor any discussion as to the importance of these deviations, be they minor or significant; id. at 11-12 (noting the omissions in the language of the ICRC Study rules versus the supporting treaty language for the principle of taking precautions against the effects of attacks, and the principle of distinction); Robert Cryer, Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study, 11 J. CONFLICT & SECURITY L. 239, 259-60 (2006) (noting that the ICRC Study deviates from the language of Additional Protocol I in favor of that used by the Rome Statute, but without explaining why). Cf. ICRC STUDY, supra note 2, Vol. I: Rules, at xxix (arguing that the ICRC Study “may also be helpful in reducing the uncertainties and the scope for argument inherent in the concept of customary international law.”). At the very least, unexplained deviations from treaty language raises a number of questions: “Why? What are the implications …? Which formulation is to be preferred?” PERSPECTIVES ON THE ICRC STUDY, supra note 2, at 11. The fact that these questions go unanswered, leaves one “with a degree of uncertainty about the normative centre of gravity of the particular Rule.” Id. at 12. But see id. at 17 (noting that “the inevitability of progressive development” is endemic in any codification simply “through the elimination of ambiguity and discarding of anomalous cases, and the systemisation of a field of law.”); Leah M. Nicholls, The Humanitarian Monarchy Legislates: The International Committee of the Red Cross and its 161 Rules of Customary International Humanitarian Law, 17 DUKE J. COMP. & INT’L L. 223, 246-47 (2006) (arguing that the ICRC Study’s progressive formulation of customary international law norms “is not unique in the arena[] of IHL” where judges are guided more by lex ferenda [what the law ought to be] than lex lata [what the law is]); Malcolm MacLaren & Felix Schwendimann, An Exercise in the Development of International Law: The New ICRC Study on Customary International Humanitarian Law, 6 GERMAN L. J. 1217, 1236-37 (2005) (noting that the end result of the ICRC Study “may be a progressive development of the law.”); Dieter Fleck, International Accountability for Violations of the Ius in Bello: The Impact of the ICRC Study on Customary International Humanitarian Law, 11 J. CONFLICT & SECURITY L. 179, 181 (2006) (arguing that “[w]here there are gaps in existing positive law, states should be encouraged to use the ICRC Study with a view to closing such gaps, rather than criticizing progressive statements made in the Study, or taking advantage of legal lacunae in a spirit of advocating freedom of operations”). Contra David Turns, Weapons in the ICRC Study on Customary International Humanitarian Law, 11 J. CONFLICT & SECURITY L. 201, 202 (2006) (criticizing the ICRC Study for its progressive development and for “the suppression of the anomalies and inconsistencies inherent to customary law, with a view to arriving at a clear statement of the contemporary law” with the attendant “danger of unduly sanitizing the law by seeking to reconcile the irreconcilable.”).

350 ICRC STUDY, supra note 2, Vol. I: Rules, at 396 (emphasis added). This language is remarkably similar to that in article 8 of Additional Protocol II, which deals with non-international armed conflicts: “Whenever circumstances permit and particularly after an engagement, all possible measures shall be taken, without delay, to search for and collect the wounded, sick and shipwrecked, to protect them against pillage and ill-treatment, [and] to ensure their adequate care ….” Additional Protocol II, supra note 24, at art. 8 (emphasis added). See also ICRC STUDY, supra note 2, Vol. I: Rules, at 397, Vol. II: Practice, 2591 § 13. However, State practice in non-international armed conflicts consistent with article 8 of Additional Protocol II could not be directly cited as support for the proposed Rule 109 in international armed conflicts, except by analogy. The evacuation language is apparently borrowed from the second paragraphs of the relevant articles in the first and second Geneva Conventions, which discuss arranging for an armistice, suspension of fire, or local arrangements to permit the removal of the wounded. See Geneva Convention I, supra note 24, at art. 15, ¶ 2; Geneva Convention II, supra note 24, at art. 18, ¶ 2.

351 This glossing over of the temporal distinction between land and naval warfare by the ICRC Study’s proposed Rule 109 is not saved by adding the “take all possible measures” language, which is also found in the related articles of the first and second Geneva Conventions. Cf. ICRC STUDY, supra note 2, Vol. I: Rules, at 396 with Geneva Convention I, supra note 24, at art. 15, ¶ 1 and Geneva Convention II, supra note 24, at art. 18, ¶ 1. Under the rules of statutory (or treaty) construction, one may not assume that two different phrases in the same
oversimplification\textsuperscript{352} fails to recognize that within the law of armed conflict,\textsuperscript{353} the law of naval warfare is a particularly specialized \textit{lex specialis}.\textsuperscript{354}

\begin{thebibliography}{99}
\bibitem{note_76} See supra note 76 and accompanying text (criticizing the ICRC Study for oversimplifying complex and nuanced rules).
\bibitem{note_3} See supra note 3 (explaining that the Law Of Armed Conflict (LOAC) is synonymous with the Law Of War (LOW), International Humanitarian Law (IHL), and \textit{jus in bello} (i.e. the regulation of the conduct of hostilities during the course of war).
\bibitem{note_354} The Latin maxim \textit{lex specialis derogat lex generali} (or in the plural form \textit{lex specialis derogat legi generali}, both usually abbreviated \textit{lex specialis}) is loosely translated as meaning that the more specific rule derogates from (or prevails over) the more general rule (or rules). This rule of interpretation may also be expressed as “\textit{'generalia specialibus non derogant’}, meaning, general things do not derogate from special. The other rule of interpretation meaning the same thing is – ‘\textit{specialia generalibus derogant’} – special things derogate from the general one.” Martin Shroeder & Co. v. Major & Co., [1989] 84 N.S.C.C. 1986 (Nigeria), available at http://www.nigeria-law.org/Martin\%20Shroeder\%20&\%20Co\%v\%20Major\%20\%20Co.htm. See, e.g., PIERRE-ANDRE COTE, THE INTERPRETATION OF LEGISLATION IN CANADA 312 (3d ed. 2000). However, at least since the 1996 ICJ advisory opinion on the threat or use of nuclear weapons, in which the World Court used the maxim to describe the law of armed conflict, the maxim has taken on a slightly different connotation. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 240 ¶ 25 (July 8). See also Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 178 ¶ 106 (July 9) (same). \textit{Lex specialis} is commonly used today to indicate that the law of war is a particularly specialized area of the law, to which the general norms of international law may not apply, especially human rights norms. See, e.g., John T. Rawcliffe, \textit{Changes to the Department of Defense Law of War Program}, 2006 \textit{ARMY LAW.} 23, 29 n. 39 (2006) (noting that the traditional view is that human rights law is preempted during armed conflict); Dieter Fleck, \textit{International Accountability for Violations of the Ius in Bello: The Impact of the ICRC Study on Customary International Humanitarian Law}, 11 J. CONFLICT & SECURITY L. 179, 191 (2006) (same; see note following this string citation); Michael J. Dennis, \textit{AGORA: ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory: Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation}, 99 AM. J. INT'L L. 119, 132-33 (2005) (same); Heike Krieger, \textit{A Conflict of Norms: The Relationship Between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study}, 11 J. CONFLICT & SECURITY L. 265, 266 (2006) (same); DINSTEIN, \textit{CONDUCT OF HOSTILITIES}, supra note 3, at 22-25 (explaining that while “[n]ot all peacetime human rights are derogable in wartime” that “most of the substantive protection of human rights in the course of an international armed conflict stems from LOIAC [Law of International Armed Conflict] and not from the continued operation of non-derogable (peacetime) human rights.”); Louise Doswald-Beck, co-author of ICRC Study, Professor of Public International Law and Director of the University Centre for International Humanitarian Law at the Graduate Institute of International Studies in Geneva, Roundtable Discussion at the North American launch of the ICRC Study at the American University Washington College of Law (Sep. 28, 2005), in Sabrina Balgamwalla, \textit{Review of Conference: The Reaffirmation of Custom as an Important Source of International Humanitarian Law}, 13 HUM. RTS. BR. 13, 13 (2006) (arguing that “[t]he distinction between humanitarian and human rights law … has become less clear over time, and it is now impossible to create purely humanitarian rules when examining behaviors that reflect both human rights and humanitarian legal norms.”). Note that Dieter Fleck was one of the “academic and governmental experts” invited by the ICRC to comment on two drafts before the ICRC Study was published. ICRC STUDY, supra note 2, Vol. I: Rules, at xxii, xxiii, l-li; \textit{INTERNATIONAL REVIEW OF THE RED CROSS}, Vol. 87, no. 857, 186 n. 32 (2005). \textit{But see PERSPECTIVES ON THE}
The ICRC Study’s oversimplification (of the temporal distinction between when the obligation to search for and collect the wounded and sick begins on land versus at sea)

ICRC STUDY, supra note 2, at 41-42 (noting that “there is substantial authority to support the proposition that, in general, the outbreak of hostilities at most only suspends the operation of a multilateral treaty in relations between the opposing States”). This article postulates that the law of naval warfare is a particularly specialized area of the law of war, or *lex specialis specialis*. See, e.g. Canada, Law of Armed Conflict Manual (1999), 9-1 § 10 (cited by ICRC STUDY, supra note 2, Vol. II: Practice, at 2606 § 132) (differentiating between the rules regarding the evacuation of the wounded and sick during land versus sea engagements); New Zealand, Military Manual (1992), §§ 314(2), 1003(1) (cited by ICRC STUDY, supra note 2, Vol. II: Practice, at 2607 § 145) (same); NWP 1-14M, COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 2-1 ¶ 2.1 (2007) (explaining the sovereign immunity of naval vessels); id. at 12-2 ¶ 12.3.3 (explaining that “[t]he law of armed conflict applicable to land warfare has no rule of law analogous to that which permits belligerent warships to display neutral colors. Belligerents engaged in armed conflicts on land are not permitted to use the flags, insignia, or uniforms of a neutral nation to deceive the enemy.”); DINSTEN, CONDUCT OF HOSTILITIES, supra note 3, at 206 (same). This view is also somewhat supported by the ICRC Study’s decision “not to research customary law applicable to naval warfare as this area of the law was recently the subject of a major restatement, namely the San Remo Manual on Naval Warfare.” ICRC STUDY, supra note 2, Vol. I: Rules, at xxx. The historic origin of this distinction between land and naval warfare relates “to the special conditions prevailing at sea.” PICTET GENEVA CONVENTION II, supra note 5, at 132. See supra note 344. Naval warfare is, by definition, a more fluid battlefield than land warfare. Unlike land warfare, which is conducted in a fixed territory typically controlled by one of the combatants, naval warfare typically occurs in international waters, which are controlled by no one. UNCLOS, supra note 171, at art. 87. Thus, the concept of “battlespace” at sea is less well-defined. See, e.g., 2007 U.S. Maritime Strategy 7, available at http://www.navy.mil/maritime/MaritimeStrategy.pdf (noting that “[t]he sea is a vast maneuver space”). Moreover, naval warfare tends to drift more than land warfare, with the risk of maneuvering into a third State’s sovereign territorial seas. A case in point is Combat Search and Rescue (CSAR, pronounced “sea sar”), which is greatly simplified on land versus on the sea. The location of a downed airman or the crew of a disabled vehicle on land is generally either known, or more readily verifiable than a downed airman or the crew of a disabled small boat at sea. Moreover, the former tend to drift less than the latter, which are subject to the prevailing winds and to sea currents. Interview with LCDR Jason Krajewski, U.S. Coast Guard, The Judge Advocate General’s Legal Center and School, in Charlottesville, Va. (Aug. 28, 2007). Whereas it may be possible to send a small CSAR team to search for and collect a downed airman or the crew of a disabled vehicle *on land* with a calculated risk to themselves of succumbing to enemy fire, the risk of doing so *at sea* rises exponentially; the crew of the small boat sent on the CSAR mission could never be assured of successfully rendezvousing with its mother ship afterwards, particularly during the intense maneuvering of a naval battle. Moreover, a small boat would potentially need to contend with a myriad of associated risks, such as a high sea state, the risk of being swamped or capsizing, the risk of being lost at sea, the risk of running aground, etc. The higher natural threat environment of naval warfare would preclude a military commander from assessing the reward of such an endeavor to be worth the tremendous risks involved. But see Scott T. Price, The U.S. Coast Guard at Normandy, http://www.uscg.mil/history/h_normandy.html (last visited Dec. 16, 2007) (detailing the heroic efforts of the USCG Rescue Flotilla Onew (aka “matchbox fleet”) during the D-Day invasion of Normandy on June 5, 1944). One final point of distinction, is the role of civilians in the search and rescue effort. Civilians may play a permissive role in search and rescue on land. Geneva Convention I, supra note 24, at art. 18. Thus, civilians would not be expected to enter the *land* battlespace to search for persons requiring assistance, absent an armistice, suspension of fire, or local arrangements. See Geneva Convention I, supra note 24, at art. 15, ¶ 2; Geneva Convention II, supra note 24, at art. 18, ¶ 2. However, civilians *at sea* are obligated to render assistance to persons in distress, wherever they may find them (i.e. even in the naval battlespace). See generally Craig H. Allen, The Maritime Law Forum: Australia’s Tampa Incident: The Convergence of International and Domestic Refugee and Maritime Law in the Pacific Rim: The Tampa Incident: IMO Perspectives and Responses on the Treatment of Persons Rescued at Sea, 12 PAC. RIM L. & POL’Y 143, 148-53 (2003).
conflates two different legal obligations under the first and second Geneva Conventions. The ICRC Study’s “whenever circumstances permit” standard departs from the treaty law standard under the first Geneva Convention by lowering the land warfare standard of “[a]t all times.”\footnote{\textit{Geneva Convention I}, supra note 24, at art. 15, ¶ 1 (emphasis added). For example, a properly advised Army commander might feel obligated to send a squad of soldiers to search for and collect wounded and sick earlier in the land battle if he is advised that the requirement is to do so “[a]t all times, and particularly after an engagement,” versus if he is advised that the requirement is the less rigorous “whenever circumstances permit” standard of the proposed Rule 109 of the ICRC Study. \textit{Cf.} \textit{Geneva Convention I}, supra note 24, at art. 15, ¶ 1} It simultaneously departs from the treaty law standard under the second Geneva Convention by raising the naval warfare standard of “[a]fter each engagement”\footnote{\textit{Geneva Convention II}, supra note 24, at art. 18, ¶ 1 (emphasis added). \textit{See also} ICRC STUDY, supra note 2, Vol. I: Rules, at 396.} to perhaps earlier in the engagement if “circumstances permit.”\footnote{\textit{ICRC STUDY}, supra note 2, Vol. I: Rules, at 396 (emphasis added). For example, a properly advised Navy commander might feel obligated to send a small boat to search for and collect wounded, sick and shipwrecked earlier in the naval battle if she is advised that the requirement is the more rigorous “whenever circumstances permit” standard of Rule 109 of the ICRC Study versus if she is advised that the requirement is to do so “[a]fter each engagement.” \textit{Cf. ICRC STUDY, supra note 2, Vol. I: Rules, at 396 with Geneva Convention II, supra note 24, at, art. 18, ¶ 1. See generally infra Table 1, p. T-1.} As previously mentioned, a proponent of a new norm of customary international law that purports to modify an earlier treaty-based obligation would have to show sufficiently dense State practice with sufficiently clear \textit{opinio juris}.\footnote{\textit{See supra} note 133 and accompanying text (discussing how the proponent of a new norm of customary international law has the burden of proving it); \textit{supra} notes 168-170 (requiring a clear manifestation that a significant number of States intend to deviate from existing treaty law).} Unfortunately, neither the commentary to proposed Rule 109 in Volume I, nor the related State practice in Volume II of the ICRC Study addresses this temporal distinction between land and naval warfare whatsoever.\footnote{\textit{See generally ICRC STUDY, supra note 2, Vol. I: Rules, at 396-99, Vol. II: Practice, at 2590 § 7. \textit{Cf.} NWP 1-14M, \textit{COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS} 11-4 ¶ 11.6 (2007) (similarly glossing over the temporal distinction between land and naval warfare, but by applying the “after each engagement” standard to both the duty “to search for and collect the wounded and sick on the field of battle” and the duty “to}}

Thus, the State practice cited by the ICRC Study does not support the new
norm of customary international humanitarian law espoused in the proposed Rule 109 that ignores the temporal distinction made by the first and second Geneva Conventions (between when the obligation to search for and collect the wounded and sick on land arises versus when to do so for those at sea).

International Armed Conflicts—Without Adverse Distinction. The one aspect of the proposed Rule 109 of the ICRC Study which is consistent with the Geneva Conventions is that the wounded, sick and shipwrecked must be treated “without adverse distinction” based on any non-medical grounds.360 In other words, it is permissible to discriminate among the wounded, sick and shipwrecked in terms of care provided, but the only grounds for doing so must be medical ones.361 However, this begs the question whether the prohibition against adverse distinction among wounded, sick and shipwrecked is followed by States pursuant to a general sense of legal obligation,362 or pursuant to treaty obligations under the Geneva

360 ICRC STUDY, supra note 2, Vol. I: Rules, at 396. See also id. at 308-11; Geneva Convention I, supra note 24, at art. 12, ¶ 3; Geneva Convention II, supra note 24, at art. 12, ¶ 3; Additional Protocol I, supra note 24, at art. 10(2); AP COMMENTARY, supra note 242, at §§ 452-453. Although the wounded, sick and shipwrecked must not be discriminated against on the basis of any non-medical reason, the protections afforded civilian versus combatant wounded, sick and shipwrecked remain. See supra notes 250-283 and accompanying text. Put alternatively, a group of civilian wounded, sick or shipwrecked can only be sorted using medical triage principles, but not according to nationality. Geneva Convention I, supra note 24, at art. 12, ¶ 3; Geneva Convention II, supra note 24, at art. 12, ¶ 3. See also PICTET GENEVA CONVENTION I, supra note 5, at 55 ¶ 2.A (citing to 1864, 1906 and 1929 Geneva Conventions’ use of terminology “whatever the nation to which they belong” and “without distinction of nationality”). Nevertheless, civilian wounded, sick and shipwrecked can be segregated from combatant wounded, sick and shipwrecked. See, e.g. THE MANUAL OF THE LAW OF ARMED CONFLICT, UK MINISTRY OF DEFENCE (2004), at ¶ 7.3.2 (noting that “[t]here is no absolute obligation on the part of the military medical services to accept civilian wounded and sick—that is to be done only so far as it is practicable to do so. … Once the treatment of a civilian patient has commenced, however, discrimination against him on other than medical grounds is not permissible.”). See generally infra Table 1, p. T-1.

361 See, e.g., Geneva Convention I, supra note 24, at art. 12, ¶ 3; Geneva Convention II, supra note 24, at art. 12, ¶ 3. Another way to put this obligation towards the wounded, sick and shipwrecked is that it is not derogable on the basis of any non-medical reason (e.g. “sex, race, nationality, religion, political opinions, or any other similar criteria”). Geneva Convention I, supra note 24, at art. 12, ¶ 3; Geneva Convention II, supra note 24, at art. 12, ¶ 3.

Conventions. See supra notes 163, 221-222 and accompanying text (discussing the ICJ’s admonition to not consider lightly the possibility of treaty law passing into customary international law); supra note 205 (arguing that the provisions of the Geneva Conventions have become customary international law in toto).


365 See supra notes 96-98 and accompanying text.

366 ICRC STUDY, supra note 2, Vol. I: Rules, at xliv (emphasis added). Although certainly a violation of a customary international law norm “[d]oes not prove its non-existence, if the violation is met by protestations from observer nations about the illegality of the action.” Legitimate Conquests?, Posting of Eugene Kontorovich to Opinio Juris, http://www.opiniojuris.org/posts/1185508439.shtml (July 27, 2007 11:31). See, e.g. Theodor Meron, Revival of Customary Humanitarian Law, 99 AM. J. INT’L L. 817, 820 (2005) (same); DOS/DoD Letter to ICRC, supra note 3, at 2 (arguing that the ICRC Study gives inadequate weight to negative practice); id. at attachment p. 9 (noting that the ICRC Study Rule 45 mischaracterizes France, the U.K., and the U.S. as merely being persistent objectors to a customary international law norm against the use of nuclear weapons (because the use of nuclear weapons may be expected to cause widespread, long-term and severe damage to the natural environment), when in fact “these three States are not simply persistent objectors, but rather [provide contrary State practice] that the rule has not formed into a customary rule at all.”); PERSPECTIVES ON THE ICRC STUDY, supra note 2, at 36, 41, 233 (same); Yoram Dinstein, The ICRC Customary International Humanitarian Law Study, 36 ISr. Y.B. Hum. Rts. 1, 13-14 ¶ 13 (2006) (same). Contra Posting of Dapo Akande to Opinio Juris, http://www.opiniojuris.org/posts/1178652249.shtml#3680 ¶ 3 (May 8, 2007, 18:16) (arguing that no State is a specially affected State with regard to nuclear weapons, since their potential use affects all States erga omnes).

367 See David Turns, Weapons in the ICRC Study on Customary International Humanitarian Law, 11 J. CONFLICT & SECURITY L. 201, 210 (2006) (“Positive affirmation of the existence of a customary rule, in international law, demands strict proof; to extrapolate the existence of a rule from a lack of State practice to the
The absence of contrary State practice is not the equivalent of consistent State practice, and thus cannot ipso facto imply that a new norm of customary international law exists.\textsuperscript{368}

**Summary.** Proposed Rule 109 of the ICRC Study postulates a new norm of customary international humanitarian law that deviates from existing treaty obligations in at least three significant ways. First, it conflates the protections owed to combatant versus civilian wounded, sick and shipwrecked.\textsuperscript{369} Second, it seeks to extend the obligations to search for, collect and evacuate wounded, sick and shipwrecked in toto to non-international armed conflicts.\textsuperscript{370} Third, it ignores the temporal distinction between land and naval warfare contrary is, at the very least, wrong as a matter of doctrine.”). Cf. id. at 227 (arguing that “the fact that there is no State practice to support the use of a given weapon does not ipso facto mean that there is a rule of customary international law prohibiting that weapon’s use.”). The ICRC Study’s argument that a lack of contrary State practice supports a new norm of customary international law is logically fallacious for at least three reasons. First, the ICRC argument attempts to shift the burden of proof to an opponent to disprove a proposed norm, rather than for the proponent to prove its existence, as is the standard. See supra note 133 and accompanying text. Any proponent of a new norm of customary international law, however farfetched (see infra note 368), could argue that a lack of contrary State practice supports the new norm. If this were the standard, the burden would then shift to an opponent of the proposed norm to rally evidence to the contrary. The ICRC approach thus turns the formation of customary international law on its head! See supra notes 92-133 (discussing the traditional understanding of how customary international law is formed). Second, the argument assumes that there are only two possible choices: either for or against the proposed norm, as formulated and in its entirety. However, there are a myriad of other possible choices. See, e.g., DOS/DoD Letter to ICRC, supra note 3, at 1 (noting that “particular rules or elements of those rules may well be applicable in the context of some categories of armed conflict.”) (emphasis added). For example, with regard to Rule 109, State A could generally support the proposed norm, but not its application to civilians. State B could agreed with the proposed rule, but think that there is a paucity of State practice in support of it, and thus that it had not yet ripened into a norm of customary international law. Presumably the practice of neither State A nor State B would be contrary to the proposed rule, yet neither would support it as a new norm of customary international law in its entirety, at least not at this time. The third logical fallacy with the ICRC argument is that it ignores the opinio juris requirement. Even supposing that a lack of contrary practice somehow qualifies as State practice, it still must be done out of a sense of legal obligation. Interview with MAJ Jose Cora, U.S. Army, The Judge Advocate General’s Legal Center and School, in Charlottesville, Va. (Aug. 6, 2007). See supra notes 125-133 and accompanying text. However, proving a negative (i.e. that a State refrains from a particular practice out of a sense of legal obligation) is very difficult indeed.

\textsuperscript{368} There are sufficient wild claims of the existence of customary international law norms without adding to the clutter by proving a customary international law norm by the absence of contrary State practice. See, e.g. Justin L. Koplow, *Assessing the Creation of a Duty Under International Customary Law Whereby the United States of America Would be Obligated to Defend a Foreign State Against the Catastrophic but Localized Damage of an Asteroid Impact*, 17 GEO. INT’L ENVT’L. L. REV. 273 (2005).

\textsuperscript{369} See supra notes 250-283 and accompanying text.
regarding when to search for and collect the wounded, sick and shipwrecked.\textsuperscript{371}

The State practice cited for the proposed new norm is either surprisingly thin,\textsuperscript{372} or nonexistent.\textsuperscript{373} Nor can the absence of contrary State practice support a new norm of customary international law.\textsuperscript{374} The only two aspects of the proposed Rule 109 which appear to be supportable as norms of customary international law are that the wounded, sick and shipwrecked must be treated “without adverse distinction” based on any non-medical grounds,\textsuperscript{375} and that shipwrecked civilians are entitled to the same protections as shipwrecked combatants.\textsuperscript{376} However, since the former obligation is required by the first and second Geneva Conventions of 1949, to which every State is a party,\textsuperscript{377} the ICRC Study poses the paradox of attempting to use State practice consistent with treaty-based obligations to support a subsequent norm of customary international law.\textsuperscript{378}

\textsuperscript{370} See supra notes 284-340 and accompanying text; Jean-Marie Henckaerts, Customary International Humanitarian Law – A Rejoinder to Judge Aldrich, 76 BRIT. Y.B. INT’L L. 525, 525-26 (2006) (explaining, as one of the co-authors of the ICRC Study, that “[t]he ICRC’s main interest … was precisely in seeing whether customary international law provides a more detailed framework for non-international armed conflicts.”).

\textsuperscript{371} See supra notes 341-359 and accompanying text.

\textsuperscript{372} See supra note 281 (discussing the relatively thin State practice cited in support of the application of obligations to civilians); supra notes 313, 329, 338 (discussing the relatively thin State practice in support of the application of obligations in non-international armed conflicts). See also DOS/DoD Letter to ICRC, supra note 3, at 2 (noting that “for many rules proffered as rising to the level of customary international law, the State practice cited is insufficiently dense to meet the ‘extensive and virtually uniform’ standard generally required to demonstrate the existence of a customary rule.”); id. at attachment p. 21 (noting that the “[t]he practice of six States is very weak evidence of the existence of a norm of customary international law.”).

\textsuperscript{373} See supra note 359 (discussing the complete lack of State practice addressing the temporal distinction).

\textsuperscript{374} See supra notes 364-368.

\textsuperscript{375} See supra notes 360-363 and accompanying text.

\textsuperscript{376} See supra note 268.

\textsuperscript{377} See supra note 32 and accompanying text.

\textsuperscript{378} See supra notes 163, 221-222 and accompanying text.
(B) Rule 110: Duty to Care For the Wounded, Sick and Shipwrecked

The wounded, sick and shipwrecked must receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. No distinction may be made among them founded on any grounds other than medical ones.

Proposed Rule 110 of the ICRC Study requires that the wounded, sick and shipwrecked be treated humanely, which is “the fundamental principle underlying the four Geneva Conventions.” However, similarly to Rule 109, the ICRC Study recognizes that the obligation espoused by Rule 110 “is an obligation of means.” Similarly, whereas the obligation under Rule 109 is “to take all possible measures to search for, collect and evacuate the wounded, sick and shipwrecked,” the obligation under Rule 110 is to provide care “to the fullest extent practicable,” or in other words, “[e]ach party to the conflict must use its best efforts to provide … care for the wounded, sick and shipwrecked.” This includes “permitting humanitarian organisations to provide for their protection and care.”

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379 PICTET GENEVA CONVENTION I, supra note 5, at 52 ¶ 2.A. See also Additional Protocol II, supra note 24, at art. 10(2).


381 See supra note 341-342 and accompanying text (discussing how the language “take all possible measures” is identical to that found in the related articles of the first and second Geneva Conventions. Cf. ICRC STUDY, supra note 2, Vol. I: Rules, at 396 with Geneva Convention I, supra note 24, at art. 15, ¶ 1 and Geneva Convention II, supra note 24, at art. 18, ¶ 1.


383 Id. at 400 (emphasis added).

384 Id. at 402 (emphasis added).

385 Id. See also DOS/DoD Letter to ICRC, supra note 3, at attachment pp. 1-6 (questioning obligation of States to permit humanitarian organizations, such as the ICRC, to conduct their business without explicit permission). But see ICRC STUDY, supra note 2, Vol. I: Rules, at 402 (“It is clear that in practice these [humanitarian] organizations need permission from the party in control of a certain area to provide protection and care, but such permission must not be denied arbitrarily (see also commentary to Rule 55).”); Jean-Marie Henckaerts, Customary International Humanitarian Law – A Rejoinder to Judge Aldrich, 76 Brit. Y.B. Int’l L. 525, 527-28 (2006); AP COMMENTARY, supra note 242, at § 2805.
Thus, once again the ICRC Study has built into its proposed rule a notion of military feasibility or practicability.\footnote{See supra note 243 and accompanying text (discussing the military feasibility implicit in Rule 109 of the ICRC Study).} The ICRC Study also again professes that this is a customary international law norm “applicable in both international and non-international armed conflicts.”\footnote{ICRC STUDY, supra note 2, Vol. I: Rules, at 400. See also id. at 402.}

Similar to those with regard to Rule 109, the key issues with regard to proposed Rule 110 would appear to be: the obligations owed to combatants versus civilians;\footnote{See infra notes 392-429 and accompanying text.} the obligations to care for the wounded, sick and shipwrecked in non-international armed conflicts;\footnote{See infra notes 430-440 and accompanying text.} the treatment of wounded, sick and shipwrecked without adverse distinction;\footnote{See infra notes 441-445 and accompanying text.} and the claimed dearth of contrary State practice as support for the proffered norm.\footnote{See infra notes 446-447 and accompanying text.} Each of these issues will be discussed in turn.

\textit{International Armed Conflicts—Combatants vs. Civilians.} Unlike the proposed Rule 109, Rule 110 of the ICRC Study does not expressively include civilians within the duty to care for the wounded, sick and shipwrecked.\footnote{Compare ICRC STUDY, supra note 2, Vol. I: Rules, at 396 with id. at 400.} Nevertheless, the commentary\footnote{Because the rules are often oversimplified, they “should not be read on their own, without regard to the Commentary. A publication which contained only the Rules would give a misleading account of customary international humanitarian law, for this reason alone.” PERSPECTIVES ON THE ICRC STUDY, supra note 2, at 405-06. See also Robert Cryer, Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study, 11 J. CONFLICT & SECURITY L. 239, 262 (2006) (noting the ICRC Study “rules themselves cannot be seen as self-contained. . . . the rules in the Study have to be read with their commentaries.”); DOS/DoD Letter to ICRC, supra note 3, at 4 (noting “how the}
intimates that civilians arguably may be included because it: (1) cites military manuals as being “phrased in general terms covering all wounded, sick and shipwrecked,”394 and (2) cites to Article 10 of Additional Protocol I, which repeats the “[a]ll the wounded, sick and

shipwrecked” language, \(^{395}\) with these groups being defined earlier in Article 8 of Additional Protocol I as including “persons, \(\textit{whether military or civilian}^{396}\).” Moreover, the language of Rule 110 is substantially similar to that used in Article 10(2) of Additional Protocol I and Article 7 of Additional Protocol II, both of which include civilians within their protections. \(^{397}\) Thus, just as Rule 109 expressly seeks to extend the duty to search for, collect and evacuate the wounded, sick and shipwrecked to include civilians, \(^{398}\) Rule 110 \textit{implicitly} extends the duty to care for wounded, sick and shipwrecked combatants to include caring for their civilian counterparts.

Including civilian wounded, sick and shipwrecked within the protections afforded under the proposed Rule 110 of the ICRC Study proposes a new norm of customary international law that deviates from the four Geneva Conventions, and that embraces the admittedly innovative rule contained in the Additional Protocols. \(^{399}\) As previously mentioned, a proponent of a new norm of customary international law that purports to

\(^{395}\) Additional Protocol I, \textit{supra} note 24, at art. 10(1).

\(^{396}\) \textit{Id.} at art. 8(1) & (2).

\(^{397}\) \textit{Compare ICRC STUDY, supra} note 2, Vol. I: Rules, at 400 \textit{with} Additional Protocol I, \textit{supra} note 24, at art. 10(2) \textit{and} Additional Protocol II, \textit{supra} note 24, at art. 7. \textit{See also AP COMMENTARY, supra} note 242, at § 4639. \textit{See generally infra} Table 1, p. T-1.

\(^{398}\) \textit{See supra} notes 250-283 and accompanying text (analyzing how Rule 109 extends protections beyond the Geneva Conventions to include civilians).

\(^{399}\) \textit{See supra} notes 264-266 and accompanying text (citing to the ICRC Commentary to the 1977 Additional Protocols as recognizing that the rules were an innovation \textit{vis-à-vis} the four Geneva Conventions of 1949). \textit{See generally AP COMMENTARY, supra} note 242; Yoram Dinstein, \textit{The ICRC Customary International Humanitarian Law Study}, 36 Isr. Y.B. Hum. Rts. 1, 3 § 4, 14 (2006) (questioning whether the real impetus for the ICRC Study was an effort to claim that the provisions in Additional Protocol I had achieved the status of customary international law); David Turns, \textit{Weapons in the ICRC Study on Customary International Humanitarian Law}, 11 J. CONFLICT & SECURITY L. 201, 236 (2006) (same); George H. Aldrich, \textit{Customary International Humanitarian Law – an Interpretation on behalf of the International Committee of the Red Cross}, 76 BRIT. Y.B. INT’L L. 503, 505-06 (2006) (same); Theodor Meron, \textit{Revival of Customary Humanitarian Law}, 99 AM. J. INT’L L. 817, 833 (2005) (same); \textit{PERSPECTIVES ON THE ICRC STUDY, supra} note 2, at 9-10 (noting that the ICRC Study rules rely heavily on the treaty provisions of Additional Protocol I, which may “be seen simply as an attempt to get around the non-application of the treaty to certain States.”).
modify an earlier treaty-based obligation would have to show sufficiently dense State practice with sufficiently clear *opinio juris*. The materials cited by the ICRC Study in support of proposed Rule 110 do neither.

The commentary to proposed Rule 110 cites to military manuals and domestic legislation in support of the new norm of customary international law. However, the vast majority of the military manuals cited by Rule 110 are consistent with existing treaty obligations under the Geneva Conventions (i.e. they do not extend their protections to civilians). Of those military manuals which *do* appear to support the expanded language of the Additional Protocols, and hence the language of the proposed Rule 110, the manuals of six States are all merely consistent with their treaty obligations, as they all became parties to one or both of the Additional Protocols *before* the publication of the military manuals.

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*See supra* note 305 and accompanying text (noting the weaknesses of citing to military manuals as evidence of State practice).

*See supra* notes 49, 114, 317, 328, 394 and accompanying text (noting the ICRC Study’s mischaracterization of military manuals of the U.S. and at least nine other States with regard to Rule 109); *ICRC Study, supra* note 2, Vol. II: Practice, at 2635 §§ 241, 266 (noting that Hungary’s Military Manual “makes an explicit reference to GC I as being the regime applicable to the wounded and sick.”

*See supra* note 133 and accompanying text (discussing how the proponent of a new norm of customary international law has the burden of proving it); *supra* notes 168-170 (requiring a clear manifestation that a significant number of States intend to deviate from existing treaty law).


This, once again, raises the difficulty of discerning *opinio juris* from State practice that is merely consistent with existing treaty law obligations.\(^{406}\)

This leaves El Salvador, India, Nigeria, Sweden and Uganda as the five sole supporters of a new norm of customary international law, as their military manuals cited in support of the proposed Rule 110 of the ICRC Study either are undated,\(^{407}\) predate their accession to the Additional Protocols,\(^{408}\) or they are not party to the Additional Protocols at all (which is the case for India).\(^{409}\) However, as previously noted, it is difficult to argue that the military manuals of five States constitute sufficiently dense State practice upon which to base a new norm of customary international humanitarian law.\(^{410}\)


\(^{406}\) *See supra* notes 163, 221-222.


\(^{410}\) *See supra* notes 281, 313, 329, 338, 359 (discussing the paucity of State practice cited by the ICRC Study in support of new norms of customary international law). *See also* PERSPECTIVES ON THE ICRC STUDY, *supra* note 2, at 202 (noting that “[t]he paucity and reliance on recent practice is a continuing problem with the
The commentary to proposed Rule 110 also cites to domestic legislation in support of the new norm of customary international law.\textsuperscript{411} As for Rule 109,\textsuperscript{412} Rule 110 cites to the domestic legislation of Ireland and Norway, which specifically criminalize violations of the Additional Protocols.\textsuperscript{413} Yet their domestic legislation was amended only months before their respective ratifications of the Additional Protocols, and thus “[f]rom their action no inference could legitimately be drawn as to the existence of a rule of customary international law . . . .”\textsuperscript{414} In addition, Colombia’s Penal Code criminalizes the failure to provide care to “protected persons,” which it defines as including those protected by the Additional Protocols.\textsuperscript{415} However, Colombia likewise was merely complying with its treaty obligations, since it had ratified the Additional Protocols in 1993 and 1995 respectively.\textsuperscript{416}


\textsuperscript{412} \textit{See supra} note 333.


\textsuperscript{414} North Sea Continental Shelf (F.R.G. v. Den. & Neth.), 1969 I.C.J. 3, 43 ¶ 76 (Feb. 20) (emphasis added). \textit{See also} ILA \textit{Report on CIL, supra} note 132, at 46-47 § 24; \textit{CUSTOM, POWER AND THE POWER OF RULES, supra} note 21, at 170. \textit{See infra} notes 163, 221-222 and accompanying text (arguing that State actions in compliance with treaty obligations do not generally provide evidence of State practice in support of a related customary international law norm); \textit{supra} note 333 (discussing Ireland’s and Norway’s domestic legislation, which was passed within a few months before they ratified the Additional Protocols).


The only “battlefield practice” cited by the ICRC Study for extending the duty to care for civilians are instructions given to French armed forces during a French military simulation in 1995. However, since the commentary to the ICRC Study did not mention this “battlefield” practice, it was presumably not considered in developing Rule 110. The only additional State practice cited as being supportive of extending the same protections to civilian wounded, sick and shipwrecked as their combatant counterparts is the “Report on the Practice of the Philippines.” Once again we must question the propriety of citing to a working draft of the Study itself which is not generally available for examination.

Thus even taken altogether, the State practice cited in support of Rule 110’s new norm of customary international humanitarian law, extending the duty to care for wounded, sick and shipwrecked civilians, is not sufficiently dense upon which to base a new norm of customary international law.

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418 PERSPECTIVES ON THE ICRC STUDY, supra note 2, at 45 (citing a personal communication with Dr. Jean-Marie Henckaerts, one of the ICRC Study’s authors, that apparently only the State practice referenced in the commentary was used to formulate the rules.). See also Yoram Dinstein, The ICRC Customary International Humanitarian Law Study, 36 Isr. Y.B. Hum. Rts. 1, 6 ¶ 11 (2006) (noting that the editors of the ICRC Study “opted, to be on the safe side, to predicate the Rules more on legislative Codes and military Manuals than on any other single source of practice.”). But see Dino Kritsiotis, Customary International Humanitarian Law, 101 Am. J. Int’l L. 692, 693 (2007) (book review) (describing the “capsule explanations and the briefest of summations of practice in the first volume” of the ICRC Study).

419 ICRC STUDY, supra note 2, Vol. II: Practice, at 2628, § 309. See also supra note 278 and accompanying text (referencing the same portion of the report of the practice of the Republic of the Philippines). But see supra note 280 and accompanying text (criticizing the ICRC Study for citing to these “Reports” of State practice as further evidence of State practice, when they merely represent a working draft of the ICRC Study itself, and they are not generally available for examination).

420 See supra note 280 and accompanying text (questioning the propriety of citing to a working draft document of the ICRC Study, which is not generally available for review).

421 Although not presented by the ICRC Study, a viable argument could be made that the requirement under Article 16 of Geneva Convention IV to “assist the shipwrecked” is sufficiently broad to include caring for them. Geneva Convention IV, supra note 24, at art. 16. See also supra note 268 (citing references that include civilians within the definition of shipwrecked persons entitled to protection).
Nevertheless, there exists additional relevant U.S. “battlefield practice” regarding providing medical treatment to wounded civilians that was not considered by the ICRC Study.422 However, it is important to distinguish in this context between official recognition of legal obligations, U.S. Department of Defense policy, and actual battlefield practice.423

U.S. Army field manuals and other documents officially recognize that there is no legal obligation to treat wounded civilians.424 Yet at least one Army field manual and a Department of Defense instruction recognize the policy of possibly providing initial treatment to civilians injured by U.S. military operations.425 This possible provision of initial

422 See infra notes 426–428 and accompanying text.

423 See, e.g., W. Hays Parks, The ICRC Customary Law Study: A Preliminary Assessment, 99 AM. SOC’Y INT’L L. PROC. 208, 209 (2005) (distinguishing between government statements that represent policy decisions versus “a government’s declaration of its interpretation of its law of war obligations”); Joshua Dorosin, Assistant Legal Adviser to the U.S. Department of State (speaking in his personal capacity), Roundtable Discussion at the North American launch of the ICRC Study at the American University Washington College of Law (Sep. 28, 2005), in Sabrina Balgamwalla, Review of Conference: The Reaffirmation of Custom as an Important Source of International Humanitarian Law, 13 HUM. RTS. BR. 13, 14 (2006) (noting that “States place rules in manuals for a variety of reasons, not always because they believe they are legally obligated to do so … Often practice that is reflected in the manuals is based on a policy of including a certain rule, rather than a sense that the rule flows from a legal obligation.”).


425 U.S. Army FM 4-02.6, The Medical Company A-5 ¶ A-4 (2002) (explaining that “[c]ivilians who are injured … as a result of military operations may be collected and provided initial medical treatment in accordance with theater policies. If treated, treatment will be on the basis of medical priority only and they shall be transferred to appropriate civil authorities as soon as possible.”) (emphasis added); Department of Defense Instruction 3020.41, Contractor Personnel Authorized to Accompany the U.S. Armed Forces 19 ¶ 6.3.8 (Oct. 3, 2005) (mentioning the possible provision of “resuscitative care, stabilization, hospitalization …, and assistance with patient movement” for “contingency contractor personnel”); Department of Defense Instruction 3020.41, Contractor Personnel Authorized to Accompany the U.S. Armed Forces 24 ¶ E2.1.3 (Oct. 3, 2005) (defining “Contingency Contractor Personnel” as “including U.S. citizens, U.S. legal aliens, TCNs [Third Country Nationals], and citizens of HNs [Host Nations] who are authorized to accompany U.S. military forces in contingency operations or other military operations”).
treatment to wounded civilians was limited as a matter of policy during OPERATION ENDURING FREEDOM (OEF) in Afghanistan and OPERATION IRAQI FREEDOM (OIF) to “local nationals” employed by either the United States or by a U.S. defense contractor, and “only for injuries that threatened their life, limbs, or eyesight.” However, the actual battlefield practice was that “U.S. military medical personnel ordinarily treated individuals [i.e. civilians] injured by coalition forces, regardless of their injuries [and presumably regardless of whether they were employees of the U.S. or of a U.S. defense contractors].”

Thus, this additional relevant U.S. “battlefield practice” does not support the proposed rule either, due to the number of caveats and limitations on its application.

**Non-international armed conflicts.** The treaty law obligation under Common Article 3 of the Geneva Conventions is simply for all States in non-international armed conflicts to collect and care for the wounded, sick and shipwrecked, and to treat them humanely.

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429 Thus, while no civilian could be assured of receiving emergency medical treatment from military personnel, a civilian employee (of either the U.S. or of a U.S. defense contractor) could hope to be treated if she was injured as a result of coalition operations (no pre-existing conditions), and her injuries were sufficiently serious that they were either life-threatening, or she risked losing one or more limbs or her eyesight. Then, perhaps, she would get initial treatment sufficient to stabilize her medical condition long enough to transfer her to a civilian hospital. It would be difficult to argue that this was a relatively consistent State practice by the United States, let alone that it was performed out of a sense of legal obligation. See supra notes 107-133 and accompanying text (discussing these traditional elements of customary international law).

430 Geneva Convention I, supra note 24, at art. 3(2); Geneva Convention II, supra note 24, at art. 3(2); Geneva Convention III, supra note 24, at art. 3(2); Geneva Convention IV, supra note 24, at art. 3(2). See also ICRC STUDY, supra note 2, Vol. II: Practice, at 2615 § 192.
The ICRC Study departs from this universal standard when it borrows language from the Additional Protocols: “must receive, to the fullest extent practicable and with the least possible delay.” Yet the ICRC Study provides no discussion, analysis or support for using the more expansive language of the Additional Protocols either in the commentary to Rule 110 in Volume I, or in the related State practice in Volume II, other than pro forma citations to the Additional Protocols as “codifying” this proposed norm.434

Moreover, the sole domestic case,435 and all seven of the military manuals cited by the ICRC Study in support of Rule 110’s application to non-international armed conflicts either expressly refer to Common Article 3, or use language remarkably similar to provisions in the Geneva Conventions, and not to the Additional Protocols.436 Only the single piece of

431 Geneva Convention II, supra note 24, at art. 3(2). See also ICRC STUDY, supra note 2, Vol. II: Practice, at 2615 § 192.
432 Geneva Convention I, supra note 24, at art. 3(1); Geneva Convention II, supra note 24, at art. 3(1); Geneva Convention III, supra note 24, at art. 3(1); Geneva Convention IV, supra note 24, at art. 3(1). See supra notes 286-290 (discussing the Common Article 3 obligation to collect the wounded, sick and shipwrecked).
433 Compare ICRC STUDY, supra note 2, Vol. I: Rules, at 400 with Additional Protocol I, supra note 24, at art. 10(2) and Additional Protocol II, supra note 24, at art. 7(2). This language even extends beyond the obligation owed to wounded, sick and shipwrecked in international armed conflicts under the Geneva Conventions: “without delay, take all possible measures.” Geneva Convention I, supra note 24, at art. 15, ¶ 1; Geneva Convention II, supra note 24, at art. 18, ¶ 1. See also Jean-Marie Henckaerts, Customary International Humanitarian Law – A Rejoinder to Judge Aldrich, 76 BRIT. Y.B. INT’L L. 525, 525-26 (2006) (explaining, as one of the co-authors of the ICRC Study, that “[t]he ICRC’s main interest … was precisely in seeing whether customary international law provides a more detailed framework for non-international armed conflicts.”).
436 ICRC STUDY, supra note 2, Vol. I: Rules, at 400, Vol. II: Practice, at 2618, 2620-24, 2635 §§ 218 (Belgium), § 243 (India), §§ 252, 369 (Netherlands), § 255 (New Zealand), § 256 (Nicaragua), §§ 262-264 (Philippines), § 277 (U.K.). The ICRC Study also references a 1997 statement by “a senior officer of the RPF [Rwanda Police Force] … that civilians caught in crossfire were being brought to hospital by members of the RPF in order to receive care.” Id., Vol. II: Practice, at 2628 § 311. However, this brief description raises more questions than it answers. Was this simply an isolated police action, or part of the Rwandan Civil War? In any
domestic legislation (from Azerbaijan) cited by Rule 110 in support of its application to non-international armed conflicts uses language which is arguably similar to that of Rule 110 and the Additional Protocols.\footnote{ICRC STUDY, supra note 2, Vol. I: Rules, at 400, Vol. II: Practice, at 2625, 2637 § 283 (Azerbaijan). Article 25 of the 1995 Azerbaijan “Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War” apparently “provides that, in both international and non-international armed conflicts, ‘the Armed Forces of the Azerbaijan Republic … shall ensure [in all circumstances and with the least possible delay] medical assistance and care needed for the wounded and sick’.” ICRC STUDY, supra note 2, Vol. II: Practice, at 2625 § 283 (bracketed language in original; emphasis added).} The only additional source of State practice cited by the ICRC Study to support a new norm of customary international law is remarkably the unpublished “Report on US Practice.”\footnote{ICRC STUDY, supra note 2, Vol. II: Practice, at 2628 § 313. See also CARNAHAN, REPORT ON U.S. PRACTICE, supra note 49, at 5-3 § 5.1. Once again, the present author is not so confident that the excerpts from the two sources provided in the Report on US Practice support this proposition, let alone that they carry sufficient weight. Id. at Chapter 5, Annexes 8 and 9. See supra notes 49, 308 (examining the sources cited in the Report on US Practice); infra note 489 (same); supra note 280 and accompanying text (criticizing the ICRC Study for citing to these “Reports” of State practice as further evidence of State practice, when they merely represent a working draft of the ICRC Study itself, and they are not generally available for examination). See also The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, 2 AM. U. J. INT’L & POLICY 419 (1987); W. Hays Parks, et al., Memorandum for Mr. John H. McNeill, Assistant General Counsel (International), OSD, subject: 1977 Protocols Additional to the Geneva Conventions: Customary International Law Implications (8 May 1986). But see John T. Rawcliffe, Changes to the Department of Defense Law of War Program, 2006 ARMY LAW. 23, 31 n. 56 (2006) (noting that lawyers “should be cautious of overreliance on these documents as expressions of current U.S. policy”).}

Once again, it is extremely difficult to argue that the domestic legislation of one State (and an unpublished summary from another State) constitutes sufficiently dense State practice upon which to support a new norm of customary international law, particularly one that modifies earlier treaty law that is universally accepted.\footnote{See supra note 32 (noting that all States are now party to the four Geneva Conventions of 1949).} Thus, the minimal State event, bringing civilians to a presumably civilian hospital during a non-international armed conflict would appear to be consistent with the duty under Common Article 3 to care for the wounded, sick and shipwrecked. Moreover, Rwanda acceded to the Additional Protocols in 1984, and thus was simply abiding by its treaty obligations if it cared for “civilians caught in crossfire” in 1997. See generally ICRC, State Parties to Additional Protocol I, available at http://www.cicr.org/ihl.nsf/WebSign?ReadForm&id=470&ps=P (last visited Dec. 16, 2007) and ICRC, State Parties to Additional Protocol II, available at http://www.cicr.org/ihl.nsf/WebSign?ReadForm&id=475&ps=P (last visited Dec. 16, 2007).
practice cited in support of Rule 110’s new norm of customary international law applicable to non-international armed conflicts fails to reveal sufficiently dense State practice with sufficiently clear opinio juris to justify a State departing from its treaty-law obligations under the Geneva Conventions.  

*International Armed Conflicts—Without Adverse Distinction.* The least contentious element of the proposed Rule 110 of the ICRC Study is that “[t]he duty to care for wounded and sick combatants without distinction is a long-standing rule of customary international law ….” This principle is consistent with the Geneva Conventions, which recognize that it is only permissible to make a beneficial distinction (e.g. treating the most urgent patients first). However, this consistency between the proposed rule and existing treaty provisions once again begs the question whether the prohibition against making adverse distinctions among wounded, sick and shipwrecked is followed by States pursuant to a general sense of legal obligation (which could support a norm of customary international law), or merely pursuant to their treaty obligations under the Geneva Conventions.

440 See supra note 133 and accompanying text (discussing how the proponent of a new norm of customary international law has the burden of proving it); supra notes 168-170 (requiring a clear manifestation that a significant number of States intend to deviate from existing treaty law).


442 Geneva Convention I, supra note 24, at art. 12, ¶ 3; Geneva Convention II, supra note 24, at art. 12, ¶ 3. See also Additional Protocol I, supra note 24, at art. 10(2); AP COMMENTARY, supra note 242, at §§ 452-453.

443 See, e.g., Geneva Convention I, supra note 24, at art. 12, ¶ 3; Geneva Convention II, supra note 24, at art. 12, ¶ 3; ICRC STUDY, supra note 2, Vol. I: Rules, at 402. Another way to put this obligation towards the wounded, sick and shipwrecked is that it is not derogable on the basis of any non-medical reason (e.g. “sex, race, nationality, religion, political opinions, or any other similar criteria”). Geneva Convention I, supra note 24, at art. 12, ¶ 3; Geneva Convention II, supra note 24, at art. 12, ¶ 3.

Claimed dearth of “official contrary [State] practice.” The final point to be made regarding the proposed Rule 110 is the Study’s reliance once again on a lack of “official contrary [State] practice” as being supportive of the proposed rule.\textsuperscript{446} As previously discussed, it is not true that the absence of contrary State practice necessarily supports the existence of a customary international law norm—two negatives do not make a positive.\textsuperscript{447}

Summary. The ICRC Study’s Rule 110 proposes a new norm of customary international law that deviates from existing treaty obligations in at least two significant ways. First, it implicitly conflates the protections owed to combatant versus civilian wounded, sick and shipwrecked.\textsuperscript{448} Second, it seeks to extend the obligations to care for wounded, sick and shipwrecked \textit{in toto} to non-international armed conflicts.\textsuperscript{449}

The State practice cited for the proposed new norm is once again surprisingly thin.\textsuperscript{450}

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\textsuperscript{446}ICRC \textit{STUDY}, supra note 2, Vol. I: Rules, at 401.

\textsuperscript{447}See supra notes 364-368 (discussing the logical fallacy of relying on an absence of contrary State practice in support of a proposed norm of customary international law).

\textsuperscript{448}See supra notes 392-429 and accompanying text.

\textsuperscript{449}See supra notes 430-440 and accompanying text; Jean-Marie Henckaerts, \textit{Customary International Humanitarian Law – A Rejoinder to Judge Aldrich}, 76 Brit. Y.B. Int’l L. 525, 525-26 (2006) (explaining, as one of the co-authors of the ICRC Study, that “[t]he ICRC’s main interest … was precisely in seeing whether customary international law provides a more detailed framework for non-international armed conflicts.”).

\textsuperscript{450}See supra notes 410, 421 (discussing the relatively thin State practice cited in support of the application of obligations to civilians); supra note 439 (discussing the relatively thin State practice in support of the application of obligations in non-international armed conflicts). \textit{See also} DOS/DoD Letter to ICRC, supra note
Nor can the absence of contrary State practice support a new norm of customary international
law. The only aspect of the proposed Rule 110 which appears to be supportable as a norm
of customary international law is that the wounded, sick and shipwrecked must be treated
“without adverse distinction” based on any non-medical grounds. However, since this
obligation is required by the first and second Geneva Conventions of 1949, to which every
State is a party, the ICRC Study poses the paradox of attempting to use State practice
consistent with treaty-based obligations to support a subsequent norm of customary
international law.

(C) **Rule 111: Duty to Protect the Wounded, Sick and Shipwrecked**

*Each party to the conflict must take all possible measures to protect the wounded, sick and shipwrecked against ill-treatment and against pillage of their personal property.*

This proposed rule is based, not on the general principle of “respect and protect,”
which is found throughout the Geneva Conventions, but rather on the specific requirement
to protect the wounded, sick and shipwrecked from the “hyena[s] of the battlefield.”

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3, at 2 (noting that “for many rules proffered as rising to the level of customary international law, the State
practice cited is insufficiently dense to meet the ‘extensive and virtually uniform’ standard generally required to
demonstrate the existence of a customary rule.”).

451 See supra notes 446-447.

452 See supra notes 441-445 and accompanying text.

453 Geneva Convention I, supra note 24, at art. 12, ¶ 3; Geneva Convention II, supra note 24, at art. 12, ¶ 3.

454 See supra note 32 and accompanying text.

455 See supra note 163, 221-222 and accompanying text.

456 Geneva Convention I, supra note 24, at arts. 12, 19, 24, 25, 35; Geneva Convention II, supra note 24, at arts.
12, 22, 27, 36, 37; Geneva Convention IV, supra note 24, at arts. 18, 20, 21.

457 PICTET GENEVA CONVENTION I, supra note 5, at 152 ¶ 1.C; PICTET GENEVA CONVENTION II, supra note 5, at
133 ¶ 1; PICTET GENEVA CONVENTION IV, supra note 5, at 137 ¶ 2.2. See also Geneva Convention I, supra
note 24, at art. 15, ¶ 1; Geneva Convention II, supra note 24, at art. 18, ¶ 1; Geneva Convention IV, supra note
Rules 109 and 110, the ICRC Study has built into its proposed Rule 111 a notion of military feasibility or practicability, by limiting the duty to protect the wounded, sick and shipwrecked to merely “tak[ing] all possible measures.” The ICRC Study once again professes that this is a customary international law norm “applicable in both international and non-international armed conflicts.”

Similar to those with regard to Rules 109 and 110, the key issues with regard to proposed Rule 111 would appear to be: the temporal distinction between when the obligation arises on land versus at sea to protect the wounded, sick and shipwrecked from pillage and ill-treatment; the obligations to so protect them in non-international armed conflicts; and the claimed dearth of contrary State practice as support for the proffered norm. Each of these issues will be discussed in turn.

International Armed Conflicts—Temporal Distinction. Unlike proposed Rule 109, which glosses over the temporal distinction between land and naval warfare by adopting a more generic “whenever circumstances permit” standard, Rule 111 omits any timing

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458 See supra notes 243, 386 and accompanying text (discussing the military feasibility implicit in Rules 109 and 110 of the ICRC Study, respectively).


461 See infra notes 464-478 and accompanying text.

462 See infra notes 479-493 and accompanying text.

463 See infra notes 494-495 and accompanying text.

464 See supra notes 341-359 and accompanying text.
Yet for the wounded and sick on land, all States have agreed to “at all times, and particularly after an engagement … take all possible measures … to protect [the wounded and sick] against pillage and ill-treatment ….” For similar persons at sea, all States have agreed to “[a]fter each engagement … take all possible measures … to protect [the wounded and sick] against pillage and ill-treatment ….” Thus, treaty law recognizes the same temporal disparity between the obligation to protect the wounded and sick on land (i.e. to do so “[a]t all times, and particularly after an engagement,”) versus at sea (i.e. to do so only “[a]fter each engagement.”), as it does for the duty to search for and collect them.

However, Rule 111 of the ICRC Study ignores this distinction in timing, and fails to adopt even the more lenient “whenever circumstances permit” standard of Additional Protocol II, as it did for Rule 109. Instead, the proposed Rule 111 simply removes any suggestion that this duty may have a temporal component. Neither the commentary to


466 Geneva Convention I, supra note 24, at art. 15, ¶ 1 (emphasis added).

467 Geneva Convention II, supra note 24, at art. 18, ¶ 1 (emphasis added).

468 See supra notes 341-359 and accompanying text.

469 The ICRC Study cites the different language in the first and second Geneva Conventions, but does not make note of the temporal distinction. ICRC STUDY, supra note 2, Vol. II: Practice, at 2640 §§ 405, 406.


471 See supra note 350 and accompanying text.


473 Because the rules are often oversimplified, they “should not be read on their own, without regard to the Commentary. A publication which contained only the Rules would give a misleading account of customary international humanitarian law, for this reason alone.” PERSPECTIVES ON THE ICRC STUDY, supra note 2, at
proposed Rule 111 in Volume I, nor the related State practice in Volume II of the ICRC Study addresses either the distinction between land and naval warfare, or the absence of a time element.474

As discussed previously, it is possible for subsequent customary international law to modify existing treaty obligations.475 However, a proponent of a new norm of customary international law that purports to modify an earlier treaty-based obligation would have to

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475 See supra notes 166-171 and accompanying text. See generally RESTATEMENT OF FOREIGN RELATIONS, supra note 21, at § 102 cmt. j (“A new rule of customary [international] law will supersede inconsistent [treaty] obligations created by earlier agreement if the parties so intend and the intention is clearly manifested.”) (emphasis added).

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show sufficiently dense State practice with sufficiently clear opinio juris. Yet, there is absolutely no State practice cited by the ICRC Study to support the absence of a temporal component in the new norm of customary international law espoused by the proposed Rule 111. The ICRC Study just oversimplified the temporal component out of existence.

Non-international armed conflicts. Although Common Article 3 lists certain acts which are prohibited against “those placed hors de combat by sickness [or] wounds,” there is no specific treaty obligation under the Geneva Conventions to protect the wounded, sick or shipwrecked from pillage or ill treatment in non-international armed conflicts. This requirement was added by Article 8 of Additional Protocol II in 1977 with language that generally tracks that used in the first and second Geneva Conventions for international armed conflicts.

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476 See supra note 133 and accompanying text (discussing how the proponent of a new norm of customary international law has the burden of proving it); supra notes 168-170 (requiring a clear manifestation that a significant number of States intend to deviate from existing treaty law).


478 See also DOS/DoD Letter to ICRC, supra note 3, at 4, attachment p. 6 (criticizing the ICRC Study for its tendency to oversimplify complex and nuanced rules: “many rules are stated in a way that renders them overbroad or unconditional, even though State practice and treaty language on the issue reflect different, and sometimes substantially narrower, propositions.”); supra note 76 and accompanying text (criticizing the ICRC Study for oversimplifying complex and nuanced rules); supra note 349 (discussing the problems with a customary international law norm that deviates from a related treaty provision).

479 Geneva Convention I, supra note 24, at art. 3; Geneva Convention II, supra note 24, at art. 3; Geneva Convention III, supra note 24, at art. 3; Geneva Convention IV, supra note 24, at art. 3.

480 See generally Geneva Convention I, supra note 24, at art. 3; Geneva Convention II, supra note 24, at art. 3; Geneva Convention III, supra note 24, at art. 3; Geneva Convention IV, supra note 24, at art. 3.

481 Compare Additional Protocol II, supra note 24, at art. 8 with Geneva Convention I, supra note 24, at art. 15, ¶ 1 and Geneva Convention II, supra note 24, at art. 18, ¶ 1. See also AP COMMENTARY, supra note 242, at § 4654; Jean-Marie Henckaerts, Customary International Humanitarian Law – A Rejoinder to Judge Aldrich, 76 BRIT. Y.B. INT’L L. 525, 525-26 (2006) (explaining, as one of the co-authors of the ICRC Study, that “[t]he ICRC’s main interest … was precisely in seeing whether customary international law provides a more detailed framework for non-international armed conflicts.”).
Thus, to claim that there now exists a customary international law norm that imposes this obligation in *non-international armed conflicts* on States which are not party to Additional Protocol II would require fairly dense State practice and fairly clear opinio juris. Yet the State practice cited by the ICRC Study is, once again, remarkably thin. The ICRC Study cites to three military manuals that specifically support the new norm, but all three of these States were merely complying with their existing treaty obligations, since they had already either ratified or acceded to Additional Protocol II.

Of the four domestic laws cited by the ICRC Study in support of this new norm, Tajikistan’s legislation also merely complies with its existing treaty obligations since it had already acceded to Additional Protocol II. The three remaining domestic laws cited by the ICRC Study were passed by Azerbaijan (which is not a party to the Additional Protocols), Ireland and Norway, with the latter two being amended within months of their respective

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482 See *supra* note 133 and accompanying text (discussing how the proponent of a new norm of customary international law has the burden of proving it); *supra* notes 168-170 (requiring a clear manifestation that a significant number of States intend to deviate from existing treaty law).


ratifications of the Additional Protocols, and thus “[f]rom their action no inference could
legitimately be drawn as to the existence of a rule of customary international law ….”\textsuperscript{488}

The only two additional sources of State practice cited by the ICRC Study to support
a new norm of customary international law are remarkably the unpublished “Report on US
Practice,”\textsuperscript{489} and a rare instance of battlefield practice in Yugoslavia.\textsuperscript{490} Thus, even when
considered collectively, Azerbaijan’s legislation, the unpublished “Report on US Practice,
and one instance of battlefield practice is not sufficiently dense State practice\textsuperscript{491} with
sufficiently clear \textit{opinio juris} upon which to base a new norm of customary international
humanitarian law applicable to \textit{non-international} armed conflicts,\textsuperscript{492} particularly one that
deviates from the universally subscribed Geneva Conventions of 1949.\textsuperscript{493}

\textit{Claimed dearth of “official contrary [State] practice.”} The final point to be made
regarding the proposed Rule 111 is the Study’s reliance once again on a lack of “official

\textit{See also} ILA \textit{Report on CIL, supra} note 132, at 46-47 § 24; \textit{Custom, Power and the Power of Rules, supra}
note 21, at 170. \textit{See infra} notes 163, 221-222 and accompanying text (arguing that State actions in compliance
with treaty obligations do not generally provide evidence of State practice in support of a related customary
international law norm); \textit{supra} note 333 (discussing Ireland’s and Norway’s domestic legislation, which was
passed within a few months before they ratified the Additional Protocols.

\textsuperscript{489} ICRC \textit{Study, supra} note 2, Vol. II: Practice, at 2650 § 518. \textit{See also} Carnahan, \textit{Report on U.S.
Practice}, \textit{supra} note 49, at 5-3 § 5.1. Once again, the present author is not so optimistic that the excerpts from
the two sources provided in the Report on US Practice support this proposition, let alone that they carry
sufficient weight. \textit{Id.} at Chapter 5, Annexes 8 and 9. \textit{See supra} note 280 and accompanying text (criticizing the
ICRC Study for citing to these “Reports” of State practice as further evidence of State practice, when they
merely represent a working draft of the ICRC Study itself, and they are not generally available for
examination).

\textsuperscript{490} ICRC \textit{Study, supra} note 2, Vol. II: Practice, at 2650 § 519.

\textsuperscript{491} \textit{See supra} notes 281, 313, 329, 338, 359, 410, 421, 439 (noting similar concerns about the State practice of
only a few States being insufficient upon which to base a new norm of customary international law).

\textsuperscript{492} \textit{See also} DOS DOS/DoD Letter to ICRC, \textit{supra} note 3, at 4 (criticizing the ICRC Study for asserting that
certain rules have become customary international law binding in non-international armed conflicts
“notwithstanding the fact that there is little evidence in support of those propositions.”).

\textsuperscript{493} \textit{See supra} note 32 (noting that all States are now party to the four Geneva Conventions of 1949).
contrary [State] practice” as being supportive of the proposed rule. As previously discussed, it is not true that the absence of contrary State practice necessarily supports the existence of a customary international law norm—two negatives do not make a positive.495

Summary. The ICRC Study’s Rule 111 proposes a new norm of customary international law that deviates from established treaty obligations in at least two significant ways. First, Rule 111 omits any temporal reference to its duty to protect wounded, sick and shipwrecked from pillage and ill-treatment.496 Second, the proposed Rule 111 claims to apply to non-international armed conflicts, yet it has, at best, only five instances of State practice in support.497

V. Conclusions

The ICRC Study is an enormous achievement, if only in terms of its compilation of a wealth of State practice. Moreover, some of the ICRC Study rules “undoubtedly [are]


495 See supra notes 364-368 (discussing the logical fallacy of relying on an absence of contrary State practice in support of a proposed norm of customary international law).

496 See supra notes 464-478 and accompanying text.

497 See supra notes 479-493 and accompanying text.

498 See supra note 10 and accompanying text (admiring the ICRC Study).

part of the corpus of customary international law." However, some of the ICRC Study rules are unsustainable under the traditional theory of customary international law formation, as was revealed by analyzing the three seemingly uncontentious rules proposed by the ICRC Study for handling the wounded, sick and shipwrecked.502

The ICRC Study attempts to bootstrap new norms of customary international law that plug perceived gaps, but which deviate from the existing treaty law obligations, and by citing to State practice only a few instances of which actually support the new norms. Moreover, its methodological approach is not rigorous but slipshod, not laser-accurate506


502 See supra notes 241-378 (evaluating proposed Rule 109: Duty to Search For, Collect and Evacuate the Wounded, the Sick, and the Shipwrecked), supra notes 379-455 (evaluating proposed Rule 110: Duty to Care For the Wounded, the Sick, and the Shipwrecked), and supra notes 456-497 (evaluating proposed Rule 111: Duty to Protect the Wounded, the Sick, and the Shipwrecked).

503 David Turns, Weapons in the ICRC Study on Customary International Humanitarian Law, 11 J. CONFLICT & SECURITY L. 201, 235-36 (2006); Dieter Fleck, International Accountability for Violations of the Ius in Bello: The Impact of the ICRC Study on Customary International Humanitarian Law, 11 J. CONFLICT & SECURITY L. 179, 181 (2006) (arguing that “[w]here there are gaps in existing positive law, states should be encouraged to use the ICRC Study with a view to closing such gaps, rather than criticizing progressive statements made in the Study, or taking advantage of legal lacunae in a spirit of advocating freedom of operations”).


505 See supra notes 55, 233-238 (criticizing the ICRC Study for its sloppy methodology).

but oversimplified,\textsuperscript{507} and not descriptive but aspirational.\textsuperscript{508} By striving for too much,\textsuperscript{509} the ICRC Study should have “systematically examin[ed] AP I, Article by Article” rather than “go[ing] in several different directions.”).

\textsuperscript{507}See supra note 76 (criticizing the ICRC Study for its tendency to oversimplify complex and nuanced rules); supra note 280 and accompanying text (criticizing the ICRC Study for citing to “Reports” of State practice as further evidence of State practice, when they merely represent a working draft of the ICRC Study itself, and they are not generally available for examination); supra notes 47 and 55 (criticizing the ICRC Study for not considering actual battlefield behavior); supra notes 49, 114, 317, 328, 394 (criticizing the ICRC Study for its overreliance on military manuals). Cf. Leah M. Nicholls, \textit{The Humanitarian Monarchy Legislates: The International Committee of the Red Cross and its 161 Rules of Customary International Humanitarian Law}, 17 DUKE J. COMP. & INT’L L. 223, 244-45 (2006) (observing that the problem with the ICRC Study citing to non-traditional sources as reflecting State practice is that States have “not consented to being governed by that law” and thus won’t follow the ICRC Study rules).

\textsuperscript{508}\textit{Perspectives on the ICRC Study}, supra note 2, at 406-07; Jamieson L. Greer, \textit{A Critique of the ICRC’s Customary Rules Concerning Displaced Persons: General Accuracy, Conflation, and a Missed Opportunity}, 192 MIL. L. REV. 116, 116-17 (2007); Leah M. Nicholls, \textit{The Humanitarian Monarchy Legislates: The International Committee of the Red Cross and its 161 Rules of Customary International Humanitarian Law}, 17 DUKE J. COMP. & INT’L L. 223, 223 (2006); David Turns, \textit{Weapons in the ICRC Study on Customary International Humanitarian Law}, 11 J. CONFLICT & SECURITY L. 201, 202 (2006); supra note 58. See also Yoram Dinstein, \textit{The ICRC Customary International Humanitarian Law Study}, 36 Isr. Y.B. Hum. Rts. 1, 2 ¶ 3 (2006) (recounting his earlier suggestions to the ICRC to identify those API “provisions reflecting customary \textit{lex lata} [what the law is] or wide supported \textit{lex ferenda} [what the law ought to be].”); \textit{id.} at 12 ¶ 22 (citing Rule 55 as “a prime example that the Study – instead of looking for a compromise between Contracting and non-Contracting Parties to API – actually transcends API (which is \textit{lex lata} for the former States) and moves into the realm of the \textit{lex ferenda} (for both the former and the latter States).”); George H. Aldrich, \textit{Customary International Humanitarian Law – an Interpretation on behalf of the International Committee of the Red Cross}, 76 BRIT. Y.B. INT’L L. 503, 521 (2006) (citing Rule 85’s prohibition on the anti-personnel use of incendiary weapons “as an effort to propose a new rule of law” that “is not soundly based in the practice of States and, even as a proposal, it is flawed.”). \textit{Contra ICRC Study, supra note 2, Vol. I: Rules, at xi, xiii, xviii. But see Leah M. Nicholls, \textit{The Humanitarian Monarchy Legislates: The International Committee of the Red Cross and its 161 Rules of Customary International Humanitarian Law}, 17 DUKE J. COMP. & INT’L L. 223, 232 (2006) (arguing “that such a project conducted by the ICRC could not possibly be objective: the ICRC is not a disinterested bystander, but an organization that actively promotes more comprehensive IHL”); \textit{id.} at 233 (noting that the progressive mandate given to the ICRC in conducting the Study was to “enable more effective implementation of IHL” which “provided another strong incentive for the ICRC to push for an expansive view of customary IHL.”); \textit{id.} at 245 (concluding that “none of [the ICRC Study’s] rules are particularly surprising because they reflect the ICRC’s previously-stated impression of the law (which is of course a major methodological problem.”)); \textit{id.} at 247 (noting that “[i]f the international community regards these [ICRC Study] rules as being a reasonable articulation of what IHL ought to be [\textit{lex ferenda}], it will cite to them frequently, and over time, the ICRC’s list will probably become law through precedent.”); supra notes 38-39 (summarizing the mandate given to the ICRC in conducting the Study).

\textsuperscript{509}\textit{Perspectives on the ICRC Study}, supra note 2, at 4 (noting that the ICRC Study “sought to take on the mantle of the Pictet commentaries to the Geneva Conventions” and failed); \textit{id.} at 14 (same, because “[c]rystallising custom is not the same as interpreting a treaty.”); \textit{id.} at 5-6 (observing that the ICRC Study is too sanguine in its formulation of rules, while simultaneously admitting that the rules have attendant “ambiguity or controversy in respect of some element”). See generally PICTET \textit{GENEVA CONVENTION I, supra note 5; PICTET GENEVA CONVENTION II, supra note 5; PICTET GENEVA CONVENTION III, supra note 5; PICTET GENEVA CONVENTION IV, supra note 5. But see PERSPECTIVES ON THE ICRC STUDY, supra note 2, at 16 (expecting the ICRC Study to assume the mantle accorded to the ICRC commentaries on the Geneva Conventions and the Additional Protocols “because of its provenance and the wealth of practice it surveys.”).

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ICRC Study perhaps achieves too little.\textsuperscript{510} As the proponent of new norms of customary international law, the ICRC Study simply fails to muster sufficiently dense State practice, and sufficiently clear \textit{opinio juris}.\textsuperscript{511}

Nevertheless, despite these shortcomings, and despite admonitions that “[i]t is premature to speculate upon the influence the Study will exert,”\textsuperscript{512} it is inevitable that the ICRC Study will be used at least as a reference,\textsuperscript{513} or perhaps as the “first port of call for the existence of customary international law on a particular issue.”\textsuperscript{514} The ICRC Study might even be viewed as “the leading source of customary IHL,”\textsuperscript{515} if only because of the

\textsuperscript{510} See, e.g., Leah M. Nicholls, \textit{The Humanitarian Monarchy Legislates: The International Committee of the Red Cross and its 161 Rules of Customary International Humanitarian Law}, 17 DUKE J. COMP. \& INT’L L. 223, 227-28 (2006) (questioning whether the ICRC expended too much of its hard-won “political capital” in publishing the ICRC Study, and possibly “push[ing] its agenda too far”); Yoram Dinstein, \textit{The ICRC Customary International Humanitarian Law Study}, 36 Isr. Y.B. Hum. Rts. 1, 14 (2006) (arguing that the ICRC Study overreached in trying “to show that controversial provisions of API are declaratory of customary international law (not to mention the occasional attempt to go even beyond API). By overreaching, I think that the Study has failed in its primary mission [of systematically examining API, article by article, and declaring which provisions have clearly crystallized into customary international law norms].”); \textit{id.} at 15 (arguing that the ICRC Study “authors missed a golden opportunity to bring Contracting and non-Contracting Parties to API closer together. … [instead] the Study will only drive the two sides of the ‘Great Schism’ farther away from each other.”); \textit{CUSTOM, POWER AND THE POWER OF RULES}, \textit{supra} note 21, at 119 (noting that “international actors prefer stability and determinacy to instability and indeterminacy”).

\textsuperscript{511} See supra note 133 and accompanying text (discussing how the proponent of a new norm of customary international law has the burden of proving it); \textit{supra} notes 168-170 (requiring a clear manifestation that a significant number of States intend to deviate from existing treaty law).

\textsuperscript{512} \textit{PERSPECTIVES ON THE ICRC STUDY}, \textit{supra} note 2, at 47.


\textsuperscript{515} Malcolm MacLaren \& Felix Schwendimann, \textit{An Exercise in the Development of International Law: \textit{The}
imprimatur of the ICRC itself,\textsuperscript{516} and the ease of referencing putative rules of customary international law that were hitherto difficult to discern.\textsuperscript{517} The problem with this is that the ICRC Study will be and has been cited as final authority\textsuperscript{518} by the uninitiated public,\textsuperscript{519} by putative scholars who only read the rules without carefully analyzing either the commentary\textsuperscript{520} or supporting State practice, and by overburdened judges\textsuperscript{521} or those

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\textsuperscript{516} Perspectives on the ICRC Study, supra note 2, at 14, 16; Leah M. Nicholls, The Humanitarian Monarchy Legislates: The International Committee of the Red Cross and its 161 Rules of Customary International Humanitarian Law, 17 DUKE J. COMP. \\& INT'L L. 223, 251 (2006). Cf. supra note 2 (discussing whether credit and responsibility for the ICRC Study should be given to the ICRC, or to its two authors). Contra Peter Rowe, The Effect on National Law of the Customary International Humanitarian Law Study, 11 J. CONFLICT \\& SECURITY L. 165, 166-67 (2006) (noting that it is difficult to conclude that any of the ICRC Study rules are binding on States as customary international law norms, and that merely because the ICRC has stated that the rules are “reflective of customary international law does not, ipso facto, make them so.”).

\textsuperscript{517} Leah M. Nicholls, The Humanitarian Monarchy Legislates: The International Committee of the Red Cross and its 161 Rules of Customary International Humanitarian Law, 17 DUKE J. COMP. \\& INT'L L. 223, 248 (2006) (noting that “it can be assumed that those involved in the process were aware that such articulation [of the ICRC Study rules] may be too easy a tool for judges and lawyers to resist.”); id. at 249 (explaining that “[t]he legal minds of the world are tempted to use articulations of vague areas of the law as law, though the articulations may contain inaccuracies.”). See supra note 21 and accompanying text (discussing the uncertainty of discerning customary international law).

\textsuperscript{518} David Turns, Weapons in the ICRC Study on Customary International Humanitarian Law, 11 J. CONFLICT \\& SECURITY L. 201, 236 (2006); Frederic L. Kirgis, Some Proportionality Issues Raised by Israel’s Use of Armed Forces in Lebanon, American Society for International Law, ASIL Insight, Aug. 17, 2006, http://www.asil.org/insights/2006/08/insights060817.html. See infra note 525 (noting that the ICRC Study should be viewed as a starting point for the discussion of customary international humanitarian law, not as the final word).

\textsuperscript{519} In fact, the ICRC could use the national Red Cross and Red Crescent Societies to disseminate the Study, as part of their duty to disseminate international humanitarian law, in order to inform public opinion, and thus “it might be more difficult for governments to disregard its Rules.” Perspectives on the ICRC Study, supra note 2, at 21. See also ICRC Study, supra note 2, Vol. I: Rules, at xxix (discussing the dissemination of the ICRC Study via the International Red Cross and Red Crescent Movement); Malcolm MacLaren \\& Felix Schwendimann, An Exercise in the Development of International Law: The New ICRC Study on Customary International Humanitarian Law, 6 GERMAN L. J. 1217, 1239 (2005) (same).

\textsuperscript{520} See Perspectives on the ICRC Study, supra note 2, at 405-06 (noting that because the rules are often oversimplified, they “should not be read on their own, without regard to the Commentary. A publication which contained only the Rules would give a misleading account of customary international humanitarian law, for this reason alone.”). See also Robert Cryer, Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study, 11 J. CONFLICT \\& SECURITY L. 239, 262 (2006) (noting the ICRC Study “rules themselves cannot be seen as self-contained. … the rules in the Study have to be read with their commentaries.”); DOS/DoD Letter to ICRC, supra note 3, at 4 (noting “how the Study’s methodological flaws undermine the ability of States to rely, without further independent analysis, on
unfamiliar with the law of armed conflict and seeking an anchor in this admittedly complex area of international law. This concern is only partially obviated by the recent publication of the companion book “Perspectives on the ICRC Study on Customary International Humanitarian Law,” because it is one step removed from the Study itself, and because it does not carry the imprimatur of the ICRC.

In publishing the study, the ICRC intended to start the conversation, but it may

the rules the Study proposes.

521 Leah M. Nicholls, The Humanitarian Monarchy Legislates: The International Committee of the Red Cross and its 161 Rules of Customary International Humanitarian Law, 17 DUKE J. COMP. & INT’L L. 223, 224 & n. 8, 232, 249, 252 (2006). ICTY Judge Meron has already acknowledged the potential usefulness of the ICRC Study in “ascertaining customary rules.” Theodor Meron, Revival of Customary Humanitarian Law, 99 AM. J. INT’L L. 817, 833 (2005); id. at 834 (noting that “the [ICRC] study is certain to enter the repertoire of courts and tribunals, especially insofar as statements of practice are concerned.”).


523 PERSPECTIVES ON THE ICRC STUDY, supra note 2.

524 See supra note 516 and accompanying text (discussing the effect of the ICRC’s imprimatur on the perceived utility of the ICRC Study).

525 Dr. Yves Sandoz recognizes, in his forward to the ICRC Study, that “this study will have achieved its goal only if it is considered not as an end of a process but as a beginning.” ICRC STUDY, supra note 2, Vol. I: Rules, at xvii. See also PERSPECTIVES ON THE ICRC STUDY, supra note 2, at 14 (noting “[T]hat the Study is and should be the appropriate starting point in a review of State practice and opinio iuris relevant to the crystallization of custom is clear. It is less evident that it is the last word on the subject.”); DOS/DoD Letter to ICRC, supra note 3, at 5 (hoping “that the material provided in this letter … will initiate a constructive, in-depth dialogue with the ICRC and others on the subject.”); George H. Aldrich, Customary International Humanitarian Law – an Interpretation on behalf of the International Committee of the Red Cross, 76 BRIT.
have unwittingly ended it.\textsuperscript{526} Although the ICRC Study was published in 2005, there has only been one State to officially comment on it, and then only cursorily.\textsuperscript{527} What is needed is for States and “the most highly qualified publicists”\textsuperscript{528} “to parse every Rule in the Study,”\textsuperscript{529} and then to provide their observations and objections.\textsuperscript{530} Obviously, due to the enormity of the ICRC Study, this would be a massive undertaking that might dwarf even the monumental work represented by the ICRC Study. However, this process of commenting on the ICRC Study could be achieved more efficiently, and perhaps more effectively, if interested

\begin{itemize}
\item \textsuperscript{526} See, e.g. PERSPECTIVES ON THE ICRC STUDY, \textit{supra} note 2, at 8 (asking “[w]hy should a State that is not now a party to the 1977 Additional Protocols ratify these treaties if the relevant principles therein operate at the level of customary international law?”); Malcolm MacLaren & Felix Schwendimann, \textit{An Exercise in the Development of International Law: The New ICRC Study on Customary International Humanitarian Law}, 6 \textit{German L. J.} 1217, 1221 (2005) (noting that the provisions of the Additional Protocols, to the degree they reflect customary international law, “will benefit from the Study’s findings. Their provisions will effectively become invocable against every State, without the need for ratification.”). \textit{Cf.} David Turns, \textit{Weapons in the ICRC Study on Customary International Humanitarian Law}, 11 \textit{J. Conflict & Security L.} 201, 211 (2006) (arguing that “States that do not accept the prohibition of certain weapons may refuse to sign up to the relevant treaties and may ignore or denounce the Study, in which case it will have contributed very little to the cause of international humanitarian law”). \textit{Contra} Robert Cryer, \textit{Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study}, 11 \textit{J. Conflict & Security L.} 239, 263 (2006) (arguing that “by even setting down the rules, [the ICRC Study] has provided both impetus for further study in the area and a basis for debate.”).
\item \textsuperscript{527} DOS/DoD Letter to ICRC, \textit{supra} note 3, at 1 (admitting that “[g]iven the Study’s large scope, we have not yet been able to complete a detailed review of its conclusions.”); \textit{id.} at attachment (only analyzing Rules 31, 45, 78 and 157 in depth).
\item \textsuperscript{528} Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993 (emphasis added). \textit{See also} \textit{Restatement of Foreign Relations}, \textit{supra} note 21, at § 102(1); ICRC STUDY, \textit{supra} note 2, Vol. I: Rules, at xxxi.
\item \textsuperscript{530} \textit{See supra} notes 87-90, 186-187 (discussing whether the U.S. response to the ICRC Study constitutes persistent objection, if any of the ICRC Study rules become recognized as norms of customary international law).
\end{itemize}
institutions sponsored regular conferences or symposia that each focused on a single subset of related rules in the ICRC Study. This series of conferences, and their related scholarship, would help cement the international community’s understanding of just what exactly are the rules of customary international humanitarian law.\footnote{To be sure, the recently published “Perspectives on the ICRC Study” contributes to the debate, and serves as a handy companion reference to the ICRC Study. \textit{Perspectives on the ICRC Study}, supra note 2, at ix.}

If States and scholars were to begin this process of adding commentary to the corpus of the ICRC Study, that \textit{public debate} would serve as the Study’s lasting legacy, rather than

\footnote{\textit{Cf.} Robert Cryer, \textit{Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study}, 11 J. CONFLICT \& SECURITY L. 239, 263 (2006) (explaining that one piece or symposium can only begin to discuss issues raised by the ICRC Study).}
the perhaps less-than-candid\textsuperscript{533} rules of the ICRC Study itself.\textsuperscript{534} Once again the ICRC will have served as the \textit{catalyst}\textsuperscript{535} for the development of international humanitarian law.

\textsuperscript{533} See David Turns, \textit{Weapons in the ICRC Study on Customary International Humanitarian Law}, 11 J. CONFLICT & SECURITY L. 201, 236 (2006) (using the metaphor that if the ICRC Study is a photograph, then it has been airbrushed); \textit{id.} at 202 (noting that “the more closely one reads the Study, the more certain flaws become apparent.”); Robert Cryer, \textit{Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study}, 11 J. CONFLICT & SECURITY L. 239, 241 (2006) (using the metaphor that the ICRC Study is an impressionist painting—the closer you look, the less beautiful it seems); W. Hays Parks, \textit{The ICRC Customary Law Study: A Preliminary Assessment}, 99 AM. SOC'Y INT'L L. PROC. 208, 208 (2005) (agreeing that the ICRC Study “is, on first appearance, an impressive effort.”).

\textsuperscript{534} This commentary could also be used to update the ICRC Study itself, which may be a useful enterprise. \textit{See}, e.g. ICRC STUDY, supra note 2, Vol. I: Rules, at xxx (saving discussion of the Martens Clause for a “future update.”); Malcolm MacLaren & Felix Schwendimann, \textit{An Exercise in the Development of International Law: The New ICRC Study on Customary International Humanitarian Law}, 6 GERMAN L. J. 1217, 1241 (2005) (arguing that “[t]he ICRC’s research data should be updated to keep pace with the constantly changing circumstances, and if the Study is to maintain its authority, editions will have to be published in [the] future.”). Additional topics might also be added to subsequent editions of the ICRC Study, such as a rule for determining the existence of an armed conflict, or whether it is international or non-international in scope. \textit{Id.} Another potential rule could concern the legality or illegality of using nuclear weapons. \textit{See supra} note 58 (discussing these \textit{lacunae} in the ICRC Study).

\textsuperscript{535} Yoram Dinstein, \textit{The ICRC Customary International Humanitarian Law Study}, 36 ISR. Y.B. HUM. RTS. 1, 5 ¶ 9 (2006). \textit{See also} George H. Aldrich, \textit{Customary International Humanitarian Law – an Interpretation on behalf of the International Committee of the Red Cross}, 76 BRIT. Y.B. INT'L L. 503, 505 (2006) (noting the ICRC Study’s “importance rests on its being used as a basis for further work, and as a spur to such works, rather than on its conclusions.”); Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 109 (Oct. 2, 1995), available at http://www.un.org/icty/tadic/appeal.decision-e/51002.htm (deciding that “[t]he practical results the ICRC has thus achieved in inducing compliance with international humanitarian law ought therefore to be regarded as an element of actual international practice; this is an element that has been conspicuously instrumental in the emergence or crystallization of customary rules.”)
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<thead>
<tr>
<th><strong>“Search For, Collect &amp; Evacuate”</strong></th>
<th><strong>International Armed Conflicts (IAC)</strong></th>
<th><strong>Non-International Armed Conflicts (NIAC)</strong></th>
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| **1949 Geneva Conventions** | Treaty of 1949 Geneva Conventions - Wounded & Sick, Article 12:  
- Members of the armed forces … who are wounded or sick, shall be respected and protected in all circumstances  
- They shall be treated humanely …  
- Without any adverse distinction founded on sex, race, nationality, religion, political opinions, or any other similar criteria  
- Only urgent medical reasons will authorize priority in the order of treatment to be administered | Treaty of 1949 Geneva Conventions - Wounded & Sick, Article 15:  
- At all times, and particularly after an engagement  
- Parties to the conflict shall, without delay, take all possible measures  
- To search for and collect  
- The wounded and sick [members of armed forces]  
- Whenever circumstances permit, an armistice … suspension of fire … or local arrangements [shall be] made, to permit the removal, exchange and transport of the wounded left on the battlefield  
- Likewise, local arrangements may be concluded between Parties to the conflict for the removal or exchange of wounded and sick from a besieged or encircled area, and for the passage of medical and religious personnel and equipment on their way to that area |
| **Geneva—Wounded, Sick & Shipwrecked, Article 18:**  
- After each engagement  
- Parties to the conflict shall, without delay, take all possible measures  
- To search for and collect  
- The shipwrecked, wounded and sick [members of armed forces]  
- Whenever circumstances permit, the Parties … shall conclude local arrangements for the removal of the wounded and sick by sea from a besieged or encircled area and for the passage of medical and religious personnel and equipment on their way to that area | **Additional Article 3(2):**  
- The wounded, sick and shipwrecked  
- Shall be collected and cared for |
| **Geneva—Civilians, Article 16:**  
- As far as military considerations allow  
- Each Party to the conflict shall facilitate the steps taken  
- To search for the killed and wounded [civilians]  
- To assist the shipwrecked [civilians] and other persons exposed to grave danger | **Additional Protocol II, Article 8:**  
- Whenever circumstances permit, and particularly after an engagement  
- All possible measures shall be taken, without delay  
- To search for and collect  
- The wounded, sick and shipwrecked  
- Without adverse distinction |
| **Geneva—Civilians, Article 17:**  
- The Parties to the conflict shall endeavour to conclude local agreements  
- For the removal from besieged or encircled areas  
- Of [civilian] wounded, sick, infirm, and aged persons, children and maternity cases  
- And for the passage of ministers of all religions, medical personnel and medical equipment on their way to such areas | **Additional Protocol II, Article 9:**  
- Whenever circumstances permit, and particularly after an engagement  
- Each party to the conflict must, without delay, take all possible measures  
- To search for, collect and evacuate  
- The wounded, sick and shipwrecked (military or civilian)  
- Without adverse distinction |
| **1977 Additional Protocols** | Additional Protocol I, Article 10(1):  
- All the [military or civilian] wounded, sick and shipwrecked …  
- Shall be respected and protected |  
| **2005 ICRC Study on CIHL** | Rule 109:  
- Whenever circumstances permit, and particularly after an engagement  
- Each party to the conflict must, without delay, take all possible measures  
- To search for, collect and evacuate  
- The wounded, sick and shipwrecked (military or civilian)  
- Without adverse distinction |
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</table>
| 1949 Geneva Conventions | **Geneva—Wounded & Sick, Article 12:**  
- Members of the armed forces … who are wounded or sick, shall be respected and protected in all circumstances  
- They shall be treated humanely and cared for …  
- Without any adverse distinction founded on sex, race, nationality, religion, political opinions, or any other similar criteria  
- … they shall not wilfully be left without medical assistance and care, nor shall conditions exposing them to contagion or infection be created  
- Only urgent medical reasons will authorize priority in the order of treatment to be administered  
- Women shall be treated with all consideration due to their sex  
- [A party who] is compelled to abandon wounded or sick to the enemy shall, as far as military considerations permit, leave with them a part of its medical personnel and material to assist in their care | **Common Article 3(1):**  
- Members of armed forces ... placed ‘ hors de combat ’ by sickness, wounds  
- Shall in all circumstances be treated humanely  
- Without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria  
**Common Article 3(2):**  
- The wounded, sick and shipwrecked  
- Shall be collected and cared for |
|  | **Geneva—Wounded & Sick, Article 15:**  
- At all times, and particularly after an engagement  
- Parties to the conflict shall, without delay, take all possible measures  
- To ensure [the] adequate care [of wounded and sick members of armed forces] |  |
|  | **Geneva—Wounded, Sick & Shipwrecked, Article 12:**  
- Members of the armed forces … who are at sea and who are wounded, sick or shipwrecked, shall be respected and protected in all circumstances …  
- Such persons shall be treated humanely and cared for …  
- Without any adverse distinction founded on sex, race, nationality, religion, political opinions, or any other similar criteria  
- … they shall not wilfully be left without medical assistance and care, nor shall conditions exposing them to contagion or infection be created  
- Only urgent medical reasons will authorize priority in the order of treatment to be administered  
- Women shall be treated with all consideration due to their sex |  |
|  | **Geneva—Wounded, Sick & Shipwrecked, Article 18:**  
- After each engagement  
- Parties to the conflict shall, without delay, take all possible measures  
- To ensure [the] adequate care [of wounded and sick members of armed forces] |  |
|  | **Geneva—Civilians, Article 16:**  
- The wounded and sick, as well as the infirm, and expectant mothers  
- Shall be the object of particular protection and respect |  |
| 1977 Additional Protocols | **Additional Protocol I, Article 10(2):**  
- [All the military or civilian wounded, sick and shipwrecked]  
- Shall be treated humanely and  
- Shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition  
- There shall be no distinction among them founded on any grounds other than medical ones | **Additional Protocol II, Article 7:**  
- All the wounded, sick and shipwrecked …  
- In all circumstances they shall be treated humanely and  
- Shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition  
- There shall be no distinction among them founded on any grounds other than medical ones  
**Additional Protocol II, Article 8:**  
- Whenever circumstances permit, and particularly after an engagement  
- All possible measure shall be taken, without delay  
- To ensure [the] adequate care [of the wounded, sick and shipwrecked] |
|  | **Additional Protocol II, Article 8:**  
- Whenever circumstances permit, and particularly after an engagement  
- All possible measure shall be taken, without delay  
- To ensure [the] adequate care [of wounded, sick and shipwrecked] |  |
| 2005 ICRC Study on CIHL | **Rule 11B:**  
- The wounded, sick and shipwrecked (military or civilian)  
- Must receive, to the fullest extent practicable and with the least possible delay  
- The medical care and attention required by their condition  
- No distinction may be made among them founded on any grounds other than medical ones |  |
<table>
<thead>
<tr>
<th>“Protect Against Pillage &amp; Ill-treatment”</th>
<th>International Armed Conflicts (IAC)</th>
<th>Non-International Armed Conflicts (NIAC)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>1949 Geneva Conventions</strong></td>
<td><strong>Geneva—Wounded &amp; Sick, Article 15:</strong></td>
<td><strong>Common Article 3(1):</strong></td>
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<tr>
<td></td>
<td>• At all times, and particularly after an engagement</td>
<td>• The following acts are and shall remain prohibited …</td>
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<tr>
<td></td>
<td>• Parties to the conflict shall, without delay, take all possible measures</td>
<td>(a) violence to life and person, in particular murder of all kinds,</td>
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<td>• To protect [the wounded and sick] against pillage and ill-treatment</td>
<td>mutilation, cruel treatment and torture</td>
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<tr>
<td></td>
<td><strong>Geneva—Wounded, Sick &amp; Shipwrecked, Article 18:</strong></td>
<td>(b) taking of hostages</td>
</tr>
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<td></td>
<td>• After each engagement</td>
<td>(c) outrages upon personal dignity, in particular humiliating and</td>
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<td></td>
<td>• Parties to the conflict shall, without delay, take all possible measures</td>
<td>degrading treatment</td>
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<td></td>
<td>• To protect [the shipwrecked, wounded and sick] against pillage and ill-treatment</td>
<td>(d) the passing of sentences and the carrying out of executions</td>
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<td><strong>Geneva—Civilians, Article 16:</strong></td>
<td>without previous judgment pronounced by a regularly</td>
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<td></td>
<td>• As far as military considerations allow</td>
<td>constituted court, affording all the judicial guarantees which are</td>
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<td></td>
<td>• Each Party to the conflict shall facilitate the steps taken</td>
<td>recognized as indispensable by civilized peoples</td>
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<td></td>
<td>• To protect [the killed, wounded, shipwrecked [civilians], and other persons exposed to grave danger] against pillage and ill-treatment</td>
<td></td>
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<td><strong>1977 Additional Protocols</strong></td>
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<td>• Shall be respected and protected</td>
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<td><strong>Rule 111:</strong></td>
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<td>• To protect the wounded, sick and shipwrecked</td>
<td>engagement</td>
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<td></td>
<td>• Against ill-treatment and</td>
<td>• All possible measure shall be taken, without delay</td>
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<td></td>
<td>• Against pillage of their personal property</td>
<td>• To protect [the wounded, sick and shipwrecked]</td>
</tr>
</tbody>
</table>

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