

THE HUMANITARIAN MONARCHY LEGISLATES: THE INTERNATIONAL COMMITTEE OF THE RED CROSS AND ITS 161 RULES OF CUSTOMARY INTERNATIONAL HUMANITARIAN LAW

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INTRODUCTION

In March 2005, the International Committee of the Red Cross (ICRC), released its *Customary International Humanitarian Law*, a work intended to articulate and justify the rules of customary international humanitarian law (IHL).¹ This Note will explore some of the issues surrounding the ICRC's publication, such as examining the wider role of the ICRC in IHL, debating the methodology used in the text, and finally, speculating on how the project will impact customary IHL in American and international tribunals. This Note concludes that while the ICRC successfully articulated a global consensus on what international humanitarian law ought to be, it may have sacrificed some of its respect in the international community by departing from a traditional definition of customary law.

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1. The book is divided into two volumes, the first of which is an articulation of the rules, and the second of which is a two-part discussion of the practice that justifies the rules. Altogether, the work is over five thousand pages long. The two primary leaders of the project are listed as authors of the first volume and editors of the second volume. 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT'L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (2005) [hereinafter 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW]; 2 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (Jean-Marie Henckaerts & Louise Doswald-Beck, Int'l Comm. of the Red Cross eds., 2005). See also David B. Rivken & Lee A. Casey, Editorial, *Friend or Foe*, WALL ST. J., Apr. 11, 2005, at A22. For a thorough summary of the study and a list of the rules, see Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INT'L REV. OF THE RED CROSS 175 (2005) [hereinafter Henckaerts, *Study on Customary International Humanitarian Law*].

A. A Brief Overview of Customary International Humanitarian Law

To understand the significance of the ICRC's attempt to articulate the rules of customary IHL, one must know at least the basic structure of the law in this area. International law comes from four sources: (1) treaties and agreements; (2) customary law; (3) general principles of law common to major legal systems; and (4) judicial decisions and scholarly teachings.² Treaties and customary law have equal authority as international law.³ If they conflict, the "last in time" rule operates, meaning that whichever came into force most recently takes precedence.⁴ When treaties and customary law are not helpful, one may then consult general principles, which most frequently come into play to determine procedural matters.⁵ If an issue cannot be resolved after examining these sources, decision-makers should then consult scholarly articles and judicial opinions.⁶ However, as will be discussed in more detail below,⁷ overburdened judges often rely on scholarly works as definitive evidence of customary international law or general principles instead of conducting independent assessments of primary sources.⁸

Customary International Humanitarian Law addresses customary international law, and specifically, customary IHL.⁹ Customary law is "international custom, as evidence of a general practice accepted as law,"¹⁰ resulting from "a general and consistent practice of states followed by them from a sense of legal obligation."¹¹ Thus, a principle

2. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987) (recognizing as sources of international law treaties and agreements; customary law; and general principles of law); see Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, 1060, T.S. No. 993 (recognizing that the International Court of Justice (ICJ) can use "judicial decisions and the teachings of the most highly qualified publicists of the various nations" to decide disputes).

3. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. j (1987).

4. *Id.*

5. *Id.* at cmt. l.

6. Statute of the International Court of Justice, *supra* note 2, art. 38.

7. See *infra* text accompanying notes 167-68.

8. *E.g.*, *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 818 (1993) (Scalia, J., dissenting).

9. See 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 1. IHL, also known as the law of war, is the body of law governing what actions a party to conflict may do. ICRC, International Humanitarian Law (IHL) in Brief, http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/section_ihl_in_brief?OpenDocument (last visited Nov. 4, 2006).

10. See Statute of the International Court of Justice, *supra* note 2, art. 38(b).

11. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987).

is considered customary law if many states across the world feel legally obliged to follow that principle. This sense of legal obligation is commonly referred to as *opinio juris*.

The ICRC spent nearly a decade determining when state practice and *opinio juris* in the area of IHL are sufficient to give rise to customary law and articulating that law. The resulting work closely resembles an American-style restatement's articulation of common law-based rules.¹²

B. An Overview of the International Committee of the Red Cross

The ICRC has its roots in an 1859 battle in Solferino, Italy.¹³ Swiss businessman Henry Dunant, in Solferino on a business trip, was appalled that the wounded of both sides had been left to die and arranged for their care.¹⁴ Following that experience, he founded the predecessor to the ICRC, the International Committee for the Relief of the Wounded, and in 1864 helped to draft the first Geneva Convention, which created the concept of IHL.¹⁵ Today, the four Geneva Conventions and their Protocols are the basis of IHL.¹⁶

From its infancy, the ICRC has been in the practice of creating law, but what is interesting about its most recent foray into law-making is that it claims only to be writing down existing customary law.¹⁷ Whether it has done so accurately or whether it is continuing its practice of creating law is a matter of much debate.

12. Scott Horton, Book Review, N.Y.L.J., June 1, 2005, at 2.

13. François Bugnion, *The International Committee of the Red Cross and the Development of International Humanitarian Law*, 5 CHI. J. INT'L L. 191, 191-93 (2004) [hereinafter *ICRC and the Development of IHL*].

14. *Id.* at 191-92.

15. Dunant was a member of the Committee and the Committee circulated the first draft of the Conventions. *Id.* at 192-93.

16. ICRC, *The Geneva Conventions: The Core of International Humanitarian Law*, <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/genevaconventions> (last visited Nov. 4, 2006). However, Protocol III, adopted December 8, 2005, is not really a basis for IHL as it simply adds an emblem to the Red Cross Movement (the Red Crystal) in order to include nations (such as Israel) whose religious traditions prevented them from adopting the Red Cross or the Red Crescent or who wished to use both symbols (such as Eritrea). ICRC, *About the Adoption of an Additional Emblem: Questions and Answers*, <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/emblem-questions-answers-281005>, (last visited July 24, 2006).

17. *See Introduction to 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW*, *supra* note 1, at xxx-xxxii.

In addition to interpreting, articulating, and creating IHL,¹⁸ the ICRC is also associated with the national Red Cross societies, which work in areas decimated by war or natural disaster to reunite families and otherwise provide relief. The ICRC also attempts to enforce laws protecting detainees by visiting detention centers and recommending changes that would bring the detaining state or party into compliance with IHL.¹⁹

The ICRC's authority to conduct these activities during armed conflict comes directly from the Geneva Conventions.²⁰ The ICRC offers itself as a neutral organization which provides relief to affected persons and checks to ensure that all parties to the conflict are affording detainees appropriate detention conditions as well as communication with family members.²¹ Practically, to carry out these tasks, states must consent to the ICRC's presence because the ICRC has no military force—a non-consenting state could simply push the ICRC out with tanks and guns.²² However, the ICRC is a highly-regarded institution, and because it “operates with the expectation of being allowed to act,” it can harness a fair amount of political capital to obtain state consent.²³

18. This comment is not meant to reflect the conclusion that the ICRC created law in its 2005 assessment of customary IHL, but rather that the ICRC promotes IHL treaties, proposes United Nations programmes of action, and otherwise generally lobbies for the expansion of IHL and its enforcement. See 2005 ICRC ANN. REP., 25-28 (2006); ICRC, United Nations, <http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/section-united-nations> (last visited Oct. 12, 2006).

19. ICRC, Strengthening Protection and Respect of Prisoners and Detainees, <http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/detention> (last visited Nov. 4, 2006).

20. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field arts. 9-11, Aug. 12, 1949, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea arts. 9-11, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Convention Relative to the Treatment of Prisoners of War arts. 9-11, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949 arts. 10-12, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV]. There are some articles that appear identically in all four Geneva Conventions, which are commonly referred to as “Common Articles,” such as Common Article 3. The articles cited here are similar, but not identical.

21. ICRC, ICRC Visits to Persons Deprived of their Freedom: An Internationally Mandated Task, Implemented Worldwide, <http://www.icrc.org/Web/eng/siteeng0.nsf/html/57JRME> (last visited Oct. 27, 2006).

22. Alain Aeschlimann, *Protection of Detainees: ICRC Action Behind Bars*, 87 INT'L REV. OF THE RED CROSS 83, 90 (2005). Though the ICRC has a treaty-based mandate to work in international conflicts, it still needs consent to physically enter a state. *Id.* E.g., Geneva Convention III, *supra* note 20, art. 125.

23. David P. Forsythe, *Human Rights and the International Committee of the Red Cross*, 12 HUM. RTS. Q. 265, 270 (1990).

Moreover, if the ICRC discovers violations of IHL, it usually keeps its findings confidential.²⁴ The ICRC justifies this practice by stressing that its utmost goal is to ensure better conditions for detainees and if it wants to continue to have access to detainees, which depends on the willingness of the detaining party, confidentiality is vital. The ICRC is interested in maintaining a working relationship with the state involved and is not interested in its findings being exploited for political gain.²⁵ Despite this goal of confidentiality, information gathered by the ICRC about the conditions under which the United States is detaining alleged Taliban and Al Qaeda members captured in Afghanistan did find its way into the media. The ICRC denies having leaked that information to the press.²⁶

The ICRC stresses that its independence and neutrality are what enable it to continue this kind of work.²⁷ If the organization appears to favor a certain ideology, many states would be less likely to permit the ICRC access to provide disaster relief and to aid detainees within their borders. Because the ICRC has a reputation of being ‘above the fray’ and because states so often give the ICRC consent, many states fear the political backlash of denying the ICRC entrance.²⁸ Over the years, the ICRC has gained substantial political capital. In articulating the rules of customary IHL, the organization spent a lot of that capital, and the question is whether it spent too much. In other words, does the ICRC still have legitimacy and respect as an impartial organization, or did it push its agenda too far to be taken seriously as a neutral body?

Unlike most international organizations, the ICRC is not made up of member states, nor was it originally established by treaty agreement.²⁹ As a result, the ICRC does not have to answer directly to states, the very bodies the ICRC is trying to force to comply with IHL. In this way, the organization is a sort of monarch in the realm

24. *Id.*; Aeschlimann, *supra* note 22, at 99-100.

25. ICRC, US Detention Related to the Events of 11 September 2001 and its Aftermath—the Role of the ICRC: Confidentiality. Why?, <http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/usa-detention-update-121205?OpenDocument> (last visited Oct. 12, 2006). See ICRC, ICRC Visits to Persons Deprived of their Freedom, *supra*, note 21.

26. ICRC, US Detention Related to the Events of 11 September 2001 and its Aftermath—The Role of the ICRC, *supra* note 25.

27. Aeschlimann, *supra* note 22, at 98-99.

28. The ICRC visited 570,000 detainees in eighty states during 2004. ICRC, Strengthening Protection and Respect of Prisoners and Detainees, *supra* note 19.

29. See *supra* notes 13-16 and accompanying text.

of IHL. It both created the body of IHL and wrote its most recently articulated rules; it is one of the most effective enforcers of IHL; and because it is considered an expert in the interpretation and application of IHL, it is often called upon to advise judges in international tribunals.³⁰ The ICRC has legislative, executive, and judicial qualities, making it effectively a monarch. With the publication of *Customary International Humanitarian Law*, the ICRC may have overstepped the limits of its legislative power, and may have prompted a revolt.

The ICRC has maintained its monarchical position by not pushing states too far, and by remaining neutral. Neutrality is so important, that “[f]or the ICRC, neutrality is a condition for action”; the ICRC cannot offer services to parties engaged in conflict if it has taken a side.³¹ The ICRC has remained, fundamentally, a private Swiss organization—even the symbol of the Red Cross was never intended to be a religious symbol, but merely a reverse of the Swiss flag.³² Switzerland was designated the depository for the ICRC-inspired Geneva Conventions.³³ The Swiss tradition of neutrality still plays an important role in the ICRC’s ability to legitimately claim neutrality, and the ICRC’s need to maintain its humanitarian work is cited by Switzerland as a reason for remaining neutral.³⁴ The ICRC was able to thrive through both world wars due to Switzerland’s neutral position—it ensured that the organization was not overtaken by warring parties, causing it to lose its own neutral status.³⁵

30. The ICRC is consistently called upon as an expert witness in the International Criminal Tribunals for Rwanda and the former Yugoslavia. However, because of the ICRC’s mandate of confidentiality, it generally does not testify as a factual witness. See Anne-Marie La Rosa, *Humanitarian Organizations and International Criminal Tribunals, or Trying to Square the Circle*, 88 INT’L REV. OF THE RED CROSS 169, 175-76 (2006); Kate Mackintosh, *Current Issues and Comments, Note for Humanitarian Organizations on Cooperation with International Tribunals*, 86 INT’L REV. OF THE RED CROSS 131, 135-36, 138-41 (2004).

31. François Bugnion, Dir. of Int’l Law and Cooperation, ICRC, *Swiss Neutrality as Viewed by the International Committee of the Red Cross, Address Before the Nouvelle Société Helvétique at the International Red Cross and Red Crescent Museum* (May 26, 2004) (ICRC, trans.), <http://www.icrc.org/eng> (follow “About the ICRC” hyperlink; then follow “Swiss Neutrality as Viewed by the International Committee of the Red Cross” hyperlink) [hereinafter *Swiss Neutrality*].

32. ICRC, *About the Adoption of an Additional Emblem*, *supra* note 16.

33. Geneva Convention I, *supra* note 20, art. 57; Geneva Convention II, *supra* note 20, art. 56; Geneva Convention III, *supra* note 20, art. 137; Geneva Convention IV, *supra* note 20, art. 152.

34. For a detailed analysis of this argument, see Alexander R. McLin, *Other International Issues, The ICRC: An Alibi for Swiss Neutrality?*, 9 DUKE J. COMP. & INT’L L. 495 (1999).

35. *Id.*

Though the ICRC has recently tried to become more independent, it has retained a cozy relationship with the Swiss government. In fact, the Swiss government is second only to the United States in contributions to the budget of the ICRC.³⁶ Traditionally, the ICRC exclusively recruited Swiss citizens and still requires members of its governing board, the ICRC Assembly, to be Swiss citizens.³⁷ However, in 1992, out of a realization that the Swiss government, though neutral, still had the ability to express strong opinions about world political issues, the ICRC decided to distance itself somewhat from Switzerland.³⁸ It did so in order to disassociate itself from any Swiss condemnation of international behavior that may hinder the ICRC in its mission; Switzerland has a duty to keep itself out of conflicts, but not out of politics.³⁹ Thus in 1992, the ICRC began recruiting employees of non-Swiss nationality.⁴⁰ By 2003, approximately half of new recruits were not Swiss,⁴¹ and English became the working language for many of the delegations.⁴² The ICRC also signed an agreement with the Swiss Federal Council, establishing the independence of the organization from the state, including the inviolability of ICRC premises, except when authorized by the Swiss President.⁴³ All this distancing from Switzerland, however, does not mean the ICRC does not remain appreciative of its neutrality. If the state were to give up its neutrality, “the ICRC should reexamine its relationship with Switzerland,”⁴⁴ but at least one observer believes that the ICRC is so well established and independent that a change in Switzerland’s neutrality would not devastate the organization.⁴⁵

36. 2004 ICRC ANN. REP. 351 (2005).

37. STATUTES OF THE INT’L RED CROSS AND RED CRESCENT MOVEMENT art. 5 §1 (1987) *reprinted in* ICRC, STATUTES AND RULES OF PROCEDURE OF THE INTERNATIONAL RED CROSS AND RED CRESCENT MOVEMENT 10 (1986); *Swiss Neutrality*, *supra* note 31.

38. *Swiss Neutrality*, *supra* note 31.

39. *Id.*

40. *Id.*

41. ICRC, Working for the ICRC: Committed Professionals and People, Policy of Openness, <http://www.icrc.org/eng> (follow “About the ICRC” hyperlink; then follow “Human Resources” hyperlink; then follow “Working for the ICRC: Committed Professionals and People” hyperlink) (last visited July 24, 2006).

42. *Swiss Neutrality*, *supra* note 31.

43. Agreement Between the International Committee of the Red Cross and the Swiss Federal Council to Determine the Legal Status of the Committee in Switzerland, ICRC-Switz., Mar. 19, 1993, *reprinted in* 33 INT’L REV. OF THE RED CROSS 152 (1993).

44. *Swiss Neutrality*, *supra* note 31.

45. McLin, *supra* note 34, at 517-18.

Though the ICRC depends upon its own neutrality, and often believes that all parties to a conflict are committing atrocities, it has not been perfect and is sometimes accused of being partisan.⁴⁶ The most notable is the charge that the ICRC is biased against Israel.⁴⁷ The recent adoption of the Red Crystal as an additional emblem of the organization is one effort the ICRC has taken to ameliorate such allegations and maintain its neutral reputation.⁴⁸ Prior to December 2005, the Israeli equivalent of a national Red Cross or Red Crescent, Magen David Adom (the Red Shield of David), was not able to join the International Red Cross and Red Crescent Movement because it did not use either the Red Cross or Red Crescent emblem.⁴⁹ This policy had been criticized, especially because the Palestinian Red Crescent Society is recognized.⁵⁰ Despite the ICRC's efforts to be more inclusive, some observers see the adoption of the Red Crystal as anti-Semitic because the Shield of David, a Jewish religious symbol, was not simultaneously adopted.⁵¹ However, the new rules do allow Magen David Adom to adopt an emblem incorporating the Shield of David and the new Red Crystal.⁵²

The ICRC has also been viewed as having an anti-American agenda, particularly by conservatives in the United States.⁵³ Much of this criticism stems from the quick and ready ICRC confirmation that leaked reports stating the United States tortured detainees at Guantánamo Bay were authentic and accurate. As a result, its

46. When confronted by a Serbian student questioning the ICRC's neutrality, an ICRC attorney, formerly head of the ICRC's field office in Nis, Serbia, described the Kosovo conflict as one in which both sides committed horrific atrocities. Joy Elyahou, Legal Advisor to ICRC's Operations Division, Presentation at the International Committee of the Red Cross: Introduction to International Humanitarian Law and its Application in Practice (July 19, 2005).

47. Boris Ryvkin, *Human Rights for Whom?*, REPUBLICAN VOICES, June 2005, http://www.republicanvoices.org/human_rights.html (last visited July 24, 2006).

48. The Red Crystal emblem is the outline of a red diamond shape and would be used where the Red Cross or Red Crescent emblems would otherwise be used. ICRC, About the Adoption of an Additional Emblem, *supra* note 16.

49. *Id.*

50. Charles Krauthammer, Op-Ed., *Red Cross Snub*, WASH. POST, Mar. 24, 2000, at A23; *MDA Exec: US Should Allow Money for Red Cross*, INT'L CHRISTIAN EMBASSY JERUSALEM NEWS, July 16, 2003, http://www.icej.org/article/mda_exec_us_should_allow_money_for_red_cross; Posting of Jeffrey Smith to 'New' Rules of Armed Conflict, <http://livejournal.com/users/maelorin/224437.html> (Dec. 12, 2005, 16:42 EST).

51. Anne Dousse, *La Politique Etrangere Qualiffee d'Antisemite!*, LE MATIN (Switz.), Nov. 29, 2005.

52. ICRC, About the Adoption of an Additional Emblem, *supra* note 16.

53. See, e.g., Ryvkin, *supra* note 47; Rivkin & Casey, *supra* note 1.

commitment to confidentiality was seriously questioned.⁵⁴ The ICRC certainly remains critical of America's continuing detention of alleged terrorists at Guantánamo Bay and in other locations, concluding that such detention in and of itself is a violation of IHL.⁵⁵ Though others have viewed such criticism as an indication that the ICRC is becoming ideological and stooping to less-than-neutral political tactics, the ICRC counters by saying that "it would be out of the question to adopt a neutral attitude toward violations of the Geneva Conventions."⁵⁶ Despite the official assertions of the ICRC, many commentators fear that the organization is in the process of sinking to the level of other politically-centered organizations and is losing its 'above the fray' status, thereby also losing its ability to convince states to increase IHL compliance.⁵⁷

Historically, the ICRC has been seen as a neutral and non-ideological body. Despite its frequent involvement in areas of conflict, the ICRC was not the subject of any armed attack until 2003, during operations in Iraq.⁵⁸ For the most part, the ICRC has been successful as a creator and promoter of IHL and has had a fair amount of success in ensuring better conditions for detainees.⁵⁹ The ICRC has gained access to detainees in most international and internal conflicts and has been most effective when it portrays itself, not as a body concerned with solving legal questions, but as an organization concerned primarily with helping individuals.⁶⁰ However, its recent release of *Customary International Humanitarian Law* may jeopardize the ICRC's privileged position in the international community.

54. Review & Outlook, *Red Double-Crossed Again: The ICRC Betrays America—and the Geneva Conventions*, WALL ST. J., Dec. 2, 2004, at A12 [hereinafter *Red Double-Crossed Again*].

55. ICRC, US Detention Related to the Events of 11 September 2001 and its Aftermath—the Role of the ICRC, *supra* note 25.

56. *Swiss Neutrality*, *supra* note 31.

57. See Kenneth Anderson's Law of War and Just War Theory Blog, Wall Street Journal Editorial on the ICRC, <http://kennethandersonlawofwar.blogspot.com/2005/05/wall-street-journal-editorial-on-icrc.html> (May 23, 2005, 16:32 EST); Kenneth Anderson's Law of War and Just War Theory Blog, Lee Casey and David Rivkin on the ICRC, <http://kennethandersonlawofwar.blogspot.com/2005/04/lee-casey-and-david-rivkin-on-icrc.html> (Apr. 11, 2005, 10:22 EST); Rivkin & Casey, *supra* note 1; *Red Double-Crossed Again*, *supra* note 54.

58. *Red Cross Cuts Operations*, BBC NEWS, Nov. 8, 2003, http://news.bbc.co.uk/go/pr/fr/-/2/hi/middle_east/3252723.stm.

59. This is based on the sheer numbers of detainees that the ICRC has been able to visit. ICRC, Strengthening Protection and Respect of Prisoners and Detainees, *supra* note 19.

60. Forsythe, *supra* note 23, at 271.

I. THE WORK ITSELF: AN EXAMINATION OF CUSTOMARY INTERNATIONAL HUMANITARIAN LAW

In March 2005, the ICRC published *Customary International Humanitarian Law*, a list of the 161 rules of customary international humanitarian law accompanied by explanation and justification. On the one hand, since the ICRC is one of the primary enforcers and creators of IHL, it seems appropriate that it be the organization to conduct an analysis of the foggy world of customary IHL. However, on the other hand, one could argue 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 and describes itself as the “guardian” of IHL.⁶¹ By promoting IHL through its activities, the ICRC actually contributes to what it can consider in its evaluation of what constitutes customary law.⁶² This engenders a situation where 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.

Traditionally, customary law is meant to reflect the world as it actually exists and is not intended to reflect aspirations or ideals.⁶³ Knowing that international and domestic judges are likely to treat this listing similarly to the way American judges treat restatements of common law (citing to these works as a shortcut for a detailed exploration of complex law, or otherwise generally treating them as accurately reflecting the law), the ICRC had an incentive to create rules favorable to its own activities. The extent to which the ICRC engaged in such bias is discussed below.

A. The Process and Methodology of *Customary International Humanitarian Law*

By the early 1990s, international humanitarian groups grew concerned over the suffering that resulted from failure to respect IHL. At the 1993 International Conference for the Protection of War Victims, a resolution was passed that called for a convention of

61. ICRC, *The Basics of International Humanitarian Law*, [http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0850/\\$File/ICRC_002_0850.PDF!Open](http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0850/$File/ICRC_002_0850.PDF!Open) (last visited July 24, 2006).

62. *Prosecutor v. Tadić*, Case No. IT-94-1-I, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 109 (Oct. 2, 1995); *ICRC and the Development of IHL*, *supra* note 13.

63. *See supra* text accompanying notes 10-11 (discussing the definition of customary international law).

intergovernmental experts to study “practical means of promoting full respect for and compliance with [IHL].”⁶⁴ In January 1995, the group of experts designated in response to the resolution met and made several recommendations for increasing knowledge and effective implementation of IHL, including the recommendation that the ICRC, in conjunction with researchers from all over the world, put together a report outlining the customary rules of IHL in international and non-international armed conflicts.⁶⁵ The International Conference of the Red Cross and Red Crescent Movements adopted this recommendation and mandated that the ICRC carry it out.⁶⁶ The stated purpose of the project was not merely academic: it was actually meant to create a tool that would enable more effective implementation of IHL.⁶⁷ Since the purpose of the study was a progressive one, it provided another strong incentive for the ICRC to push for an expansive view of customary IHL.

There are a plethora of multilateral treaties which address the issue of IHL, but not all states are parties to every treaty and a majority of the treaties only pertain to international conflict.⁶⁸ One of the major projects of the ICRC was to determine which treaty provisions have become customary and therefore applicable to all states regardless of whether the state has signed the treaty, and to discover which provisions are also applicable to non-international conflicts.⁶⁹ The division between international and non-international conflict dates to the Geneva Conventions, some of the few treaties to which every state is a party.⁷⁰ The Geneva Conventions, with the

64. International Conference for the Protection of War Victims, Geneva, Switz, Aug. 30-Sept. 1, 1993, *Final Declaration*, art. II [hereinafter *Final Declaration*].

65. *Introduction to 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW*, *supra* note 1, at xxvii.

66. *Id.* The Red Cross and Red Crescent Movement is the umbrella organization for the ICRC and the national Red Cross and Red Crescent Societies. ICRC, International Red Cross and Red Crescent Movement, <http://www.icrc.org/Web/eng/siteeng0.nsf/html/movement> (last visited Oct. 27, 2006).

67. *Final Declaration*, *supra* note 64, art. II.

68. *E.g.*, Geneva Conventions I-IV, *supra* note 20; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

69. *See Introduction to 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW*, *supra* note 1, at xxviii-xxix.

70. Palestine attempted to become a party in 1989 and declared that it would adhere to the Geneva Conventions, but because the Swiss Federal Council was not in a position to determine that Palestine was a state, its application to join the Convention was denied. ICRC, States Party to the Geneva Conventions and their Additional Protocols, <http://www.cicr.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P> (last visited July 24, 2006).

exception of the very vague and general Common Article 3, only apply to international conflict.⁷¹

The ICRC considers the Geneva Conventions to be an excellent indicator of what is customary,⁷² but in order for a treaty, even a well-accepted treaty, to be customary, there must still be state practice and *opinio juris*.⁷³ As a future International Criminal Tribunal for Yugoslavia (ICTY) judge⁷⁴ and *Customary International Humanitarian Law* steering committee and research team member⁷⁵ Theodor Meron noted, humanitarian law is an area of law in which states more readily accept norms than carry them out; the treaty may be an indication of a norm, but is not necessarily an indicator of practice associated with it.⁷⁶

Not only is this distinction important in compiling a list of customary law, but it also has practical implications even though all states are parties to the Geneva Conventions. For example, the question of whether reservations to or withdrawals from the treaty have substantive meaning could arise.⁷⁷ Additionally, customary status could carry more moral weight and encourage compliance with a particular law. Most importantly, however, the Geneva Conventions may not be directly applicable under a certain set of circumstances. The issue of whether particular parts of the Geneva Conventions are customary was decided by the International Court of Justice (ICJ) in the *Nicaragua* case. There, a U.S. reservation in a bilateral treaty prevented the Geneva Conventions from being

71. Geneva Conventions I-IV, *supra* note 20, Common Art. 3. The definitions of international conflicts and “conflict not of an international character” are contentious, especially in present conflicts with terrorist organizations. One of the central disagreements is whether there are any conflicts that do not fall into either category and are thus not governed by the Geneva Conventions at all, or whether the two categories together encompass all types of conflict. For example, compare the majority and concurring court of appeals opinions in *Hamdan v. Rumsfeld*, 415 F.3d 33, 41-42, 44 (D.C. Cir. 2005).

72. See *Introduction to 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW*, *supra* note 1, at xxx.

73. See *supra* text accompanying notes 10-12 (discussing the definition of customary international law).

74. ICTY, Organs of the Tribunal, <http://www.un.org/icty/index.html> (follow “ICTY at a Glance” hyperlink; then follow “Organs of the Tribunal” hyperlink) (last visited July 24, 2006).

75. *Acknowledgements to 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW*, *supra* note 1, at xxi-xxii.

76. Theodor Meron, *The Geneva Conventions as Customary Law*, 81 AM. J. INT’L L. 348, 363, 367 (1987).

77. For example, if the entirety of the Geneva Conventions is customary law, a state’s legal obligations would not change even if they withdrew from the treaty or reserved a particular article.

directly applicable.⁷⁸ The ICJ determined that the provisions in question were indeed customary law without actually examining state practice. Meron criticizes this determination for its failure to consider state practice.⁷⁹

The 1977 Protocols, often cited in the ICRC study, present a separate difficulty. Approximately three-quarters of all states are parties to these Protocols, with the significant exception of the United States and other states with substantial and ongoing internal conflict, such as Afghanistan and Israel.⁸⁰ Protocol I applies to international conflicts, increasing the protections for military and civilian personnel and expanding those definitions to cover more individuals.⁸¹ The ICRC believes that some parts of this Protocol state customary law even though there is a lack of practice in conformity with the Protocol by states who are not parties.⁸² However, unlike the core Geneva Conventions, the ICRC did not consider the entirety of Protocol I to be customary law. For example, Article 44.3 of Protocol I allows for an exception from the distinction principle in situations where distinction is not practically possible, provided the combatant carries his or her arms openly.⁸³ If the exception is applicable, a captured combatant would be considered a Prisoner of War (POW) even though not wearing a distinctive uniform, assuming the other conditions are met. Practically, if this article were customary law, then the United States would not legally be able to deny POW status to captured individuals on the basis of their failure to be in uniform, provided the exception is applicable in the particular circumstances. However, the ICRC's Rule 106 of customary IHL requires a combatant to be in a distinctive uniform in order to receive POW

78. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶¶ 217-18 (June 27).

79. *Id.*; Meron, *supra* note 76 at 348-49, 352, 357-58.

80. ICRC, States Party to the Geneva Conventions and their Additional Protocols, *supra* note 70. When "Protocols" is used, it is generally a reference only to Protocol I and Protocol II, the 1977 Protocols. Protocol III, signed December 8, 2005 is not relevant to the substance of *Customary International Humanitarian Law*.

81. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

82. 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 1, at 391-95 (discussing Rule 108, which denies mercenaries the right to POW status); Meron, *supra* note 76, at 350.

83. The distinction principle states that combatants must clearly distinguish themselves from civilians by the use of uniforms. Protocol I, *supra* note 81, art. 44.3.

status and does not allow for any exceptions.⁸⁴ The ICRC did deem some articles of Protocol I to be customary IHL, including Article 59, mirrored in Rule 37, which prohibits direct attacks against non-defended localities.⁸⁵ In that case, the ICRC justified its position by maintaining that Article 59 of Protocol I codified already-existing customary law when drafted.⁸⁶

The ICRC's treatment of Protocol II is more controversial. Protocol II provides numerous and specific protections for victims and holds individuals criminally liable if they violate IHL during non-international conflict.⁸⁷ Many of these protections mirror those afforded to victims of international conflicts in the Geneva Conventions.⁸⁸ As was the case for Protocol I, there is virtually no state practice of the provisions of Protocol II by non-signatories.⁸⁹ However, the ICRC appeals to "common sense" in deciding that most of its rules of customary IHL, particularly the parts stemming from the Geneva Conventions and Protocol II, apply evenly to all types of conflict.⁹⁰ This move is an important one in promulgating IHL because many states with ongoing internal conflicts are not party to Protocol II.⁹¹ However, the ICRC has been criticized for its unwarranted narrowing of the gap between the IHL governing international conflict and that governing non-international conflict; in this particular area, the ICRC efforts have especially been viewed more as making law than merely documenting it.⁹²

84. 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 1, at 384. This example is not meant to imply that the author considers U.S. denial of POW status on the basis of lack of uniform to be legally justifiable, but only that the United States is not bound by all provisions of Protocol I.

85. *Id.* at 122.

86. *Id.* at 122-26; Protocol I, *supra* note 81, art. 59.

87. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II].

88. Compare *id.* art. 5, with Geneva Convention III, *supra* note 20, Part III.

89. See Meron, *supra* note 76, at 350.

90. Introduction to 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 1, at xxix.

91. ICRC, States Party to the Geneva Conventions and their Additional Protocols, *supra* note 70. States with internal conflict are understandably hesitant to agree to international regulation of what they would regard as internal affairs between the government and its citizens.

92. See 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 (2005).

Though there are few treaties that address non-international conflict,⁹³ the ICRC has determined that there are 133 rules of customary IHL that govern both international and non-international conflict in an identical fashion; another nine that govern international conflict and that “arguably” also govern non-international conflict; and four rules which are similar, but not identical, in governing the two types of conflict.⁹⁴ Only twelve of the 161 rules promulgated by the ICRC apply exclusively to international conflict.⁹⁵ These numbers indicate that the ICRC’s assessment of what constitutes customary IHL in non-international conflict is far more expansive than mainstream opinion.

When the ICRC did consider actual state practice, it did so by calling on research teams from forty-seven states to submit reports concerning their states’ practice, as well as teams charged with researching international sources, such as treaties, international tribunal decisions, and international organization activities.⁹⁶ The states selected appear to reflect geographical and economic diversity, but tend toward military passivity, and the teams were primarily comprised of professors and lawyers.⁹⁷ Thus, like American-style restatements, the study is ostensibly an academic endeavor and not the product of direct observers of military conduct.⁹⁸

B. “State Practice” in *Customary International Humanitarian Law*

As discussed above, customary international law has two components: state practice and *opinio juris*.⁹⁹ Traditionally, the objective portion of customary law counted only state actions that complied with customary law.¹⁰⁰ *Opinio juris* is the subjective portion

93. *Introduction* to 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 1, at xxviii.

94. *See* Henckaerts, *Study on Customary International Humanitarian Law*, *supra* note 1, at 198-212.

95. That leaves three rules which are only applicable in non-international conflict. *See id.*

96. *Acknowledgements* to 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 1, at xix-xxii.

97. *See id.*

98. The research teams were made up of lawyers and professors, not military personnel. The exception is Colonel Mugo Geć of the Federation of Bosnia and Herzegovina. *Id.* at xix.

99. *See* Statute of the International Court of Justice, *supra* note 2, art. 38(c); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987).

100. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987).

and is commonly determined via verbal pronunciations of the state made in conjunction with the state's actions.¹⁰¹ In its study, the ICRC claims to be utilizing classical customary law analysis, but actually adopts a broader view of state practice.¹⁰² The ICRC includes verbal practice as part of state practice.¹⁰³ The organization cites profusely for this analytical decision, however, the sources cited take a more narrow view of what constitutes verbal practice than the ICRC, which includes statements made at the meetings of international organizations and conferences in its definition of state practice.¹⁰⁴ Common sense dictates that a state's declarations at such meetings tend to be more aspirational than practical because they are often tailored to meet a political goal. For example, no state admits that its policy involves torture—virtually every state will deny it.¹⁰⁵ Yet, many states, including the United States,¹⁰⁶ China, Pakistan, and Egypt, engage in some level of torture.¹⁰⁷ Certainly, verbal practice that more accurately reflects a state's actual practice, such as internal orders, military manuals, legislation, and domestic judicial rulings, are appropriately considered in conjunction with physical state practice, particularly when one acknowledges the difficulty of determining what occurs on the battlefield.¹⁰⁸

101. For an example of a justice painstakingly reviewing centuries of state practice under traditional customary law analysis, see *The Paquete Habana*, 175 U.S. 677, 686-712 (1900).

102. *Introduction to 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW*, *supra* note 1, at xxii-xxxix. In characterizing its method as “classical,” the ICRC may have been using the development of customary international human rights law (more or less the peacetime version of IHL) as a point of comparison. Customary law in that area has historically been developed by academic declaration after mounting frustrations with states (especially the United States) unwilling to sign treaties or unwilling to fulfill their treaty obligations (creating a lack of state practice). Staking out aspirational customary laws may have been the only way to progress. For further discussion of this topic, see Richard B. Lillich, *The Growing Importance of Customary International Human Rights Law*, 25 GA. J. INT'L & COMP. L. 1 (1995); Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUSTL. Y.B. INT'L L. 82 (1989).

103. *Introduction to 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW*, *supra* note 1, at xxxii-xxxiii.

104. *Id.*

105. An exception was Afghanistan in 1990. 2 *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW*, *supra* note 1, at 2136.

106. Neil A. Lewis, *Red Cross Finds Detainee Abuse in Guantánamo*, N.Y. TIMES, Nov. 30, 2004, at A1.

107. Human Rights Watch, *Torture Worldwide*, <http://hrw.org/english/docs/2005/04/27/china10549.htm> (last visited July 24, 2006).

108. *Prosecutor v. Tadić*, Case No. IT-94-1-I, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 99 (Oct. 2, 1995) (stating that “it is difficult, if not impossible, to

An examination of the practice volume of *Customary International Humanitarian Law* indicates that the ICRC utilized traditional evidence of actual state policy (if not state practice), such as military manuals.¹⁰⁹ When treaties existed, the ICRC also relied heavily on those.¹¹⁰ But as discussed above, the ICRC's use of treaty membership as evidence of state practice is also controversial.¹¹¹ There are many exceptions to the authors' generally conservative approach toward cataloguing state policy, such as a citation to an interview between Chinese leader Mao Zedong and a British journalist in which Mao assured the interviewer of lenient treatment of captured Japanese,¹¹² and a citation to comment made by Myanmar officials denouncing the use of children as porters for soldiers before the Committee of the Rights of the Child.¹¹³

Commentators have criticized the ICRC in its review of state practices. Specifically, many are concerned that the ICRC did not weigh state practice according to whether the state actually engaged in military conflict: practice by New Zealand seems to be given the same consideration as practice by the United States.¹¹⁴ Some suggest that countries who do not engage in military operations promulgate and practice customary laws that severely constrain military activity—they need not balance the need for IHL against the costs of an effective military force.¹¹⁵ Continental Europe, for example, no longer engages in large-scale military defense operations and thus European nations do not have to concern themselves with figuring out the logistics of implementing IHL in real situations or with any

pinpoint the actual behavior of the troops in the field for the purposes of establishing whether they in fact comply with, or disregard, certain standards of behaviour”).

109. 2 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 1, *passim* (see, for example, the use of military manuals in the discussion of Rule 132 regarding the return of displaced persons on page 3011).

110. *Id. passim* (see, for example, the use of treaties in the discussion of Rule 149 regarding responsibility for violations of IHL on page 3507).

111. See discussion *supra* Part I.A.

112. 2 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 1, at 2136-37.

113. *Id.* at 2139.

114. This comment is meant to reflect the fact that the United States is engaged in far more military activity than New Zealand. Posting of Chris Borgen to *Opinio Juris*, Kenneth Anderson on Who's Writing the Laws of Armed Conflict, <http://lawofnations.blogspot.com/2005/04/kenneth-anderson-on-whos-writing-laws.html> (Apr. 11, 2005, 23:30 EST).

115. *Id.*; Kenneth Anderson's Law of War and Just War Theory Blog, *Another ICRC Issue—the New Customary Humanitarian Law Study*, <http://kennethandersonlawofwar.blogspot.com/2005/05/another-icrc-issue-new-customary.html> (last visited May 23, 2005, 16:57 EST) [hereinafter *Another ICRC Issue*].

negative consequences to military operations, and neither does an international organization such as the ICRC.¹¹⁶ This criticism has merit to the extent that it raises the issue of implementation: if countries engaged in conflict do not agree with the IHL or find IHL rules overly restrictive of military operations, then the law is not practiced by any relevant state and cannot reasonably be considered “customary.”

In cataloguing state practice, the ICRC frequently cites to its own activities and documents as well as those of other international organizations.¹¹⁷ The ICTY specifically encouraged the ICRC to count its successful campaigns pushing states to comply with IHL toward customary international law, saying

[T]he ICRC has made a remarkable contribution by appealing to the parties to armed conflicts to respect international humanitarian law The 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.¹¹⁸

This sanction by the ICTY, however, only explicitly covers those instances in which the ICRC’s activities resulted in changed state or non-state party practices.¹¹⁹ The ICTY’s point 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.¹²⁰ However, in citing itself, the ICRC includes its activities and statements regardless of whether states actually altered their practices as a result of ICRC pressure.¹²¹ For example, the Red Cross activities listed in support of Rule 47, the rule prohibiting attacks against persons *hors de combat* (non-combatants), consist almost entirely of appeals to warring parties and press

116. Because the ICRC operates in areas of conflict, it is arguably more sensitive to logistical considerations than many states. *Another ICRC Issue*, *supra* note 115.

117. 2 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 1, *passim* (see, for example, the use of ICRC activities and the activities of other non-governmental organizations in the discussion of the section of Rule 109 that refers to the evacuation of the wounded, sick, and shipwrecked on pages 2611-14).

118. Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 109 (Oct. 2, 1995).

119. *Id.*

120. *Id.*

121. *Id.*

releases, not altered state actions.¹²² Similarly, in other sections, the ICRC cites to its own commentary and training programs as evidence of state practice.¹²³ Thus, the ICRC is, to some extent, participating in an exercise of reaffirming its own actions as the guardian of IHL.

Beyond the above ICTY statement, other commentators have proposed that ICRC activities are useful to assess state practice because the ICRC acts as a proxy or advocate for the victims of war.¹²⁴ IHL was created “precisely to protect the least powerful actors from the most powerful. In the case of war, those are the individual civilians.”¹²⁵ The entire purpose of IHL is to provide protection for individuals victimized by states and other warring parties. Activists naturally find this argument appealing,¹²⁶ but ultimately it is legally unsupported and it raises significant state consent issues.

Customary International Humanitarian Law frequently cites the reports and activities of other international organizations, such as United Nations (UN) bodies, regional organizations such as the League of Arab States, and international tribunals as evidence.¹²⁷ The ICRC’s reliance on its own activities as well as those of non-state parties are, by definition, not actually state practice. However, the study seems to depend most heavily on the military manuals, which are a closer approximation of actual state practice.¹²⁸ In justifying a given rule, the study cites, in the following order: treaties, national practice (military manuals, national legislation, national case-law, and other national practice), practice of international organizations and conferences (UN, other international organizations, international conferences), practice of international judicial and quasi-judicial bodies, practice of the International Red Cross and Red Crescent Movement, and other practice.¹²⁹ Strictly speaking, only the category “other national practice” could contain the sort of state practice

122. 2 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 1, at 968-70.

123. *Id.* at 486.

124. Posting of Peggy McGuinness to *Opinio Juris*, *ICRC as Proxy in Customary International Humanitarian Law*, <http://lawofnations.blogspot.com/2005/04/icrc-as-proxy-in-customary.html> (Apr. 12, 2005, 12:47 EST).

125. *Id.*

126. *Id.*

127. 2 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 1, *passim* (see, for example, the use of UN, League of Arab States, and ICTY activities in the discussion of Rule 40 regarding respect for cultural property on pages 800-03).

128. *Id. passim* (see, for example, the relative use of military manuals in the discussion of the section of Rule 51 regarding private property in occupied territory on pages 1046-59).

129. *See, e.g., id.* at 1076-115 (practice relating to the rule against pillage).

envisioned by those taking a narrow view of what could be considered customary international law.¹³⁰

In fact, the “other national practice” cited to support Rule 52 (the prohibition of pillage), includes twenty public, verbal statements condemning and reporting pillage (mostly in the context of UN debate), two internal documents opposing pillage, one denial of pillage in response to accusations, one boasting of pillage, one order to refrain from pillage, one opinion of a military lawyer, and one actual instance of a state refraining from pillage.¹³¹ This shows a picture of states publicly denouncing pillage, but in many cases, actually participating in pillage. From this information alone, one may conclude that pillage is frequently practiced, so under a traditional analysis, a customary law prohibiting pillage could not exist.¹³²

Additionally, the ICRC cites unusual evidence that highlights the policies and practices of nations who never actually engage in warfare.¹³³ One commentator noted, “The premise seems to be that customary international law of war is established by he who writes the most and longest memos. What I have read thus far is a long, long way from the canonical notion that customary law is established by . . . what states actually do.”¹³⁴ In conclusion, the ICRC is not applying the ‘classic’ determination of what law is customary because of its heavy reliance on factors outside of actual state practice, including

130. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Symposium: Human Rights on the Eve of the Next Century: UN Human Rights Standards & US Law: The Current Illegitimacy of International Human Rights Litigation*, 66 *FORDHAM L. REV.* 319, 328 (1997) (“This new CIL [customary international law] does not reflect the actual practice of states. If the traditional state practice requirement were still a necessary prerequisite to the development of a CIL norm, there would be very little customary international human rights law, for ‘it is still customary for a depressingly large number of States to trample on the human rights of their nationals.’ The change in the way CIL is created, from the ‘accretion of practices’ to a more ‘purposive creation of custom’ through treaties and United Nations resolutions, marks a ‘radical innovation, and indeed reflects a radical conception.’”).

131. The state refraining from pillage was nineteenth-century Algeria, which did so out of respect for Islamic law. The ICRC carefully qualified an instance where a military official boasted of his troops’ pillaging, noting that that particular officer did not reflect the views of the rest of his military. 2 *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW*, *supra* note 1, at 1101-05.

132. National military manuals, statutes, and case-law indicate at least an attempt by states to eradicate pillage, although the numerous cases in which pillage was found could support the conclusion that pillage is not a rare occurrence. *Id.* at 1078-101.

133. Borgen, *supra* note 114.

134. *Another ICRC Issue*, *supra* note 115.

public verbal statements and the actions of organizations other than states.¹³⁵

Customary international law also requires that the acts be accompanied by *opinio juris*, the belief that one's actions are legally required.¹³⁶ This is normally determined by observing state compliance with the obligation or omission and any condemnation by the state of another state's failure to act in accordance with the rule.¹³⁷ Evidence of *opinio juris* frequently overlaps with evidence of state practice. This is particularly true of this study, since state practice is determined by verbal acts, and the study itself does not distinguish evidence of state practice from *opinio juris*.¹³⁸ As such, a separate analysis of the ICRC's treatment of *opinio juris* will not be attempted.

It is clear that the ICRC did not carry out this study in conformity with the traditional methods of assessing what state practice is customary. Whether the ICRC ought to have been more conservative in its approach is a different question. From a legal perspective, the ICRC has upturned the basis upon which customary law rests and its methodology reflects a radical departure from canonical law. However, if one considers that in many conflicts, even the basic protections of the Geneva Conventions are not honored, then a true statement of state practice would not enable one to articulate progressive customary rules of IHL, and thereby prevent enforcement of most IHL outside of the treaty system. If one's goal is to create a tool that increases compliance with humanitarian principles, as was the purpose of this study,¹³⁹ 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.

There are two reasons, however, why this radical approach may prove troublesome. First, positivist legal scholars believe that the international legal system is an expression of states acting in their

135. The ICRC report expressly states that it is using a traditional method for ascertaining customary law, however, a description of its methodology indicates otherwise. See *Introduction to 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW*, *supra* note 1, at xxxii.

136. See *supra* text accompanying notes 9-12 (discussing the definition of customary international law).

137. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. c (1987).

138. See *Introduction to 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW*, *supra* note 1, at xl (discussing the difficulty of distinguishing between elements of state practice and *opinio juris*).

139. *Id.* at xxvi.

own interests: any legitimate international law must begin with state consent because no state will be pushed further than its interests allow.¹⁴⁰ Otherwise, a law would not be enforceable. Whether the ICRC likes it or not, the international legal system fundamentally rests upon the building block of sovereign states and their willingness to govern their own actions.¹⁴¹ Perhaps the ICRC is a proxy for individual victims of war, but those individuals are not states and do not have a voice under the traditional international legal system.¹⁴² The international legal system is like an organization made up of practitioners vowing to raise standards, but once it is no longer beneficial for the practitioners to follow the mutually-agreed upon rules or the practitioner has enough political (or military, in the case of states) capital to avoid them, they need not conform to the system. Positivist theory leads to the conclusion that states generally only create international commitments when it is in their interest to do so.¹⁴³

Customary law can only be understood from a positivist perspective when the states reflect positivist ideals—when states determine that it is within their interests to practice the norm.¹⁴⁴ Thus, state practice, or lack of protest of other states' practice, is the consent that gives rise, under positivist analysis, to a legitimate rule of customary law. If a rule is not customary law until there is widespread *opinio juris*, then all states already believe themselves to be legally obligated and have no reason to object to an articulation of that law. However, when the ICRC relies on treaties that state has not signed; the organization's own practices and legal opinions; the practices of other international organizations; and international tribunals without jurisdiction over that state to justify the articulation of law, the state has not consented to being governed by that law, particularly if the state's practices are contrary to the law. If a state did not consent to be bound by the rules laid out by the ICRC, it will

140. See, e.g., JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 3 (2005) (arguing that international law is a product of states pursuing their own interests).

141. The principle of state consent to abide by the rules of IHL raises an interesting question with regard to multinational non-state actors. They operate entirely outside of this system, so the consent theory of international law simply does not apply. However, it is generally thought that they are bound by the portions of customary IHL that govern individual behavior. Jan Arno Hessbruegge, *Human Rights Violations Arising from Conduct of Non-State Actors*, 11 *BUFF. HUM. RTS. L. REV.* 21, 27-29 (2005).

142. See *supra* notes 124-25 and accompanying text.

143. See GOLDSMITH & POSNER, *supra* note 140, at 3.

144. See *id.*

not follow them (assuming that other international bodies the state feels bound to comply with do not adopt the ICRC's version of customary IHL) and therefore, the ICRC's project fails in its goal of increasing humanitarianism through international law.

This leads to a second issue regarding the ICRC's unorthodox approach. If states reject the ICRC's list of customary rules, then the ICRC's image will be tarnished and its ability to carry out its work will be diminished. As discussed above, the ICRC depends largely upon a perception of neutrality and integrity to obtain state consent to access detainees and other victims of war.¹⁴⁵ If the ICRC is too radical in its conclusions, states will begin to disregard IHL. The ICRC's goal of increasing humanitarian practice during war would not be achieved and the organization would be the ideologue its critics fear it is becoming.¹⁴⁶

Despite the criticism of the ICRC's untraditional methodology, none of its rules are particularly surprising because they reflect the ICRC's previously-stated impression of the law (which is of course a major methodological problem). In the international community, there is an acceptance of the fact that in the area of IHL, there is a significant gap between what states (and non-state parties to conflicts) actually do and what they should do.¹⁴⁷ Such a gap is reflected in the difference between state practice and treaty requirements.¹⁴⁸ However, not all states are parties to all IHL treaties, even though they may agree with the treaty's basic tenets—often the refusal to join a treaty regime is due to disagreement over one or two clauses or over the enforcement mechanism.¹⁴⁹ In other words, for the most part, states generally agree on the basic tenets of IHL, even on those portions that are not reflected in the Geneva Conventions.

The ICRC list of customary IHL rules could be seen as reflecting those broad agreements. The study depended heavily upon states'

145. *Swiss Neutrality*, *supra* note 31.

146. *See, e.g., supra* text accompanying notes 53-57.

147. Meron, *supra* note 76, at 363.

148. *See id.* at 363 n.47.

149. For example, though the United States generally supports the propositions in Protocol I and considers many of them to be customary law, including the medical care provisions, it did not agree with the exception that allowed belligerent groups who were unable to distinguish themselves to get POW status even though fixed distinction is normally a requirement for POW status. It also did not agree with the decision to raise conflicts in which non-state parties were fighting a colonist or racist regime to international conflict status. Theodor Meron, Comment, *The Time Has Come for the United States to Ratify Geneva Protocol I*, 88 AM. J. INT'L L. 678, 679, 681 (1994).

policies as reflected in their military manuals and in condemnations of actions not in compliance with the rule, which are good indicators of what states believe their practice should be.¹⁵⁰ Additionally, in most cases, the rule was supported by at least one treaty, usually the Geneva Conventions, the Protocols to the Geneva Conventions, the 1954 Hague Convention, or another broadly supported treaty such as the International Convent of Civil and Political Rights or the Convention on the Rights of the Child, indicating that most states were already willing to be bound by some version of that rule.¹⁵¹ Thus *Customary International Humanitarian Law* is probably an accurate reflection of the broad consensus (with exceptions) of what states proclaim IHL should be. However, this is not the accepted definition of customary international law.

The ICRC focuses on what states believe rules should be instead of what states actually practice. But this is not unique in the arenas of IHL and international human rights law, where activists, and even judges in international tribunals, are quick to accept aspirational goals as customary law in order to allow the law to progress without the challenges created by relying on treaties.¹⁵² This shortcut is not new:

150. 2 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 1, *passim* (see, for example, the relative use of military manuals and condemnations in the discussion of the section of Rule 53 that refers to sieges that cause starvation on pages 1139-41).

151. One hundred ninety-four “states” are party to the Geneva Conventions, 163 states are party to Protocol I, 159 are party to Protocol II, 114 are party to the 1954 Hague Convention, 147 are party to the ICCPR, and 191 are party to the Convention on the Rights of the Child. There are approximately 193 states in the world, including the Vatican, but not including Taiwan or the Cook Islands, the latter of which is party to numerous conventions, including the Geneva Conventions and its Protocols, but is a free association with New Zealand and has the right to declare independence at any time. ICRC, States Party to the Geneva Conventions and Their Protocols, *supra* note 70; Jean-Philippe Lavoyer, *A Milestone for International Humanitarian Law*, ICRC, Sept. 22, 2006, <http://www.icrc.org/web/eng/siteeng0.nsf/html/geneva-conventions-statement-220906?opendocument>; ICRC, Treaties & Documents by Topic, <http://www.icrc.org/ihl.nsf/TOPICS?OpenView> (last visited Jan. 16, 2006); European Parliament, Conventions of the United Nations and of the Council of Europe on Human Rights, http://www.europarl.eu.int/comparl/libe/elsj/charter/un_legislation_en.htm (last visited July 24, 2006); CIA, The World Factbook: Cook Islands, <https://www.cia.gov/cia/publications/factbook/geos/cw.html> (last visited July 24, 2006).

152. See, e.g., *Filártiga v. Peña-Irala*, 630 F.2d 876, 881-85 (2d Cir. 1980) (citing to United Nations General Assembly (UNGA) resolutions, law review articles, treaties, and national legislation); *Kadić v. Karadžić*, 70 F.3d 232, 241-44 (2d Cir. 1995) (citing to UNGA resolutions, treaties, and American caselaw); JUDGMENT OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE TRIAL OF GERMAN MAJOR WAR CRIMINALS (WITH THE DISSENTING OPINION OF THE SOVIET MEMBER): NUREMBERG 30TH SEPTEMBER AND 1ST OCTOBER, 1946, 38-42 (1946) (arguing that the newly-minted military tribunal charter did not violate *ex post facto* principles because it reflected customary law) [hereinafter JUDGMENT OF THE INTERNATIONAL MILITARY TRIBUNAL].

it was used in the post-WWII Nuremberg trials and in American court cases involving the Alien Tort Statute (ATS).¹⁵³ Meron, later a judge himself, observed that,

Given the scarcity of actual practice . . . in reality, tribunals have been guided, and are likely to continue to be guided, by the degree of offensiveness of certain acts to human dignity; the more heinous the act, the more the tribunal will assume that it violates not only a moral principle of humanity but also a positive norm of customary law.¹⁵⁴

Even though the ICRC has bent the rules of assessing customary law, that fact is probably irrelevant outside of academic discussion because the definition of customary international law is changing, at least with regard to IHL and international human rights law. As Meron noted, the legitimacy of customary rules promulgated in this area is determined more by what states and judges think ought to be the rule (by what is morally offensive) than whether the rule reflects actual state practice.¹⁵⁵ In so doing, the ICRC is rejecting the theory of legal positivism and its traditional evaluation of customary law. If the international community regards these rules as being a reasonable articulation of what IHL ought to be, it will cite to them frequently, and over time, the ICRC's list will probably become law through precedent.¹⁵⁶

II. THE IMPACT OF CUSTOMARY INTERNATIONAL HUMANITARIAN LAW

The real importance of the work will be measured by how states, judges, and other international actors perceive the rules laid out by the ICRC. If enough institutions regard the ICRC's listing as being accurate, regardless of whether it is or not, gradually, the list will become the law in the area, just as restatements published by the American Law Institute become more authoritative the more judges and lawyers regard them as the law.¹⁵⁷ Ostensibly, the work was not

153. JUDGMENT OF THE INTERNATIONAL MILITARY TRIBUNAL, *supra* note 152, at 38-42.

154. Meron, *supra* note 76, at 361. See Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 769-70 (2001).

155. *Id.*

156. See *infra* Part II.B.

157. For example, the Restatement of the Foreign Relations Law of the United States was originally regarded as a work produced by academics wishing to push a particular agenda and not as an accurate reflection of law. See Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103, 1148-49 (1990). However,

intended to be the final word on what customary IHL encompasses.¹⁵⁸ However, it can be assumed that those involved in the process were aware that such articulation may be too easy a tool for judges and lawyers to resist.¹⁵⁹

A. State Reaction to *Customary International Humanitarian Law*

Thus far there has not been an outpouring of official state reaction to the study, so it is unclear exactly how states view it. However, the lack of an immediate protest signifies that states are unwilling to publicly denounce progressive IHL norms. The work is long and detailed, and it is also likely that states are either still reviewing it carefully before making a statement or are adopting a wait and see attitude.

Perhaps the most awaited response is that of the United States. The United States has the most expensive military in the world¹⁶⁰ and engages it often, so its response could have a significant impact on whether the 161 rules are actually implemented.¹⁶¹ Since the ICRC is viewed as anti-American,¹⁶² a positive response from the United States toward its study would be an important sign of its legitimacy. Though American bloggers on both sides of the issue are engaged in a lively debate over the study, there has not yet been an official statement from the government.¹⁶³ Certainly, the longer the United

because international law is vague and unclear, it began to be cited by judges and justices as the best approximation of the law. In 1993, Justice Scalia “rel[ie]d] on the Restatement (Third) for the relevant principles of international law,” and also noted that, “[w]hether the Restatement precisely reflects international law in every detail matters little here.” *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 818 (1993) (Scalia, J., dissenting). Later, a majority of the Supreme Court adopted Scalia’s methodology. *F. Hoffman-La Roche, Ltd. v. Empagran*, 542 U.S. 155, 164-65 (2004) (using the Restatement as an authoritative source of law).

158. Yves Sandoz, *Foreword to 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW*, *supra* note 1, at xvii.

159. See *Another ICRC Issue*, *supra* note 115.

160. See Petter Stalenheim et al., *Military Expenditure*, 2006 STOCKHOLM INT’L PEACE RES. INST. Y.B.: ARMAMENTS, DISARMAMENT & INT’L SEC., available at <http://yearbook2006.sipri.org/chap8>. Meanwhile, China probably the world’s largest military in terms of the number of active duty soldiers. ANTHONY H. CORDESMAN & MARTIN KLEIBER, CTR. FOR STRATEGIC & INT’L STUDIES, *ASIAN CONVENTIONAL MILITARY BALANCE IN 2006: OVERVIEW OF MAJOR ASIAN POWERS 24* (2006), available at http://www.csis.org/media/isis/pubs/060626_asia_balance_powers.pdf.

161. Because the United States is such a military powerhouse and engages in warfare so often, the decision as to whether to conform to the ICRC rules could have a significant affect on the way wars are fought.

162. See *supra* text accompanying notes 53-57.

163. See *supra* notes 114-15 and accompanying text.

States waits to make a statement, the more it will seem to have acquiesced to the study's conclusions.¹⁶⁴ Despite perceived clashes between the United States and ICRC, a recent U.S. Department of State attorney indicated that the general attitude within the government toward the ICRC was one of deference and credibility, and that the study would be given significant weight, though it would not be considered dispositive.¹⁶⁵ Though the United States will probably generally accept the study, it will not change its views in the areas where the United States and ICRC already disagreed, such as whether the Geneva Conventions contain any gaps in coverage and over the interpretation of Common Article 3.¹⁶⁶

B. Judicial Response to the Rules

The legal minds of the world are tempted to use articulations of vague areas of the law as law, though the articulations may contain inaccuracies. For example, in *Hartford Fire*, Justice Scalia cited to the American Restatement of Foreign Relations Law while acknowledging that it may not accurately reflect international law.¹⁶⁷ However, referencing works by individuals or organizations that have studied the issue in detail probably results in more accurate assessments of the law by adjudicators than if that resource were unavailable; a judge with a large caseload is unlikely to conduct a comprehensive study of the state practice behind a particular alleged customary law, especially when that study has already been undertaken by someone else.¹⁶⁸

It is likely that American judges and advocates will use the rules articulated by the ICRC to allow more IHL cases into American courts under the ATS, which gives U.S. federal courts jurisdiction over non-Americans suing for violations of U.S. treaties and customary international law.¹⁶⁹ The ICRC study provides American judges, some of whom may be unfamiliar with the intricacies of IHL, with a ready-made list of what the customary laws are. U.S. Supreme Court precedent supports these judges' reliance on academic treatises

164. See *Another ICRC Issue*, *supra* note 115.

165. Interview with Curtis A. Bradley, Professor, Duke University School of Law, in Durham, North Carolina (Dec. 1, 2005).

166. *Id.*

167. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 818 (1993) (Scalia, J., dissenting).

168. For an example of a justice attempting such a study, see *The Paquete Habana*, 175 U.S. 677, 686-712 (1900).

169. 28 U.S.C. § 1350 (2000).

by stating that when attempting to ascertain the state of customary international law,

[R]esort must be had to the works of jurists and commentators, who by years of labor, research, and experience, have made themselves particularly well acquainted with the subjects of which they treat . . . not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.¹⁷⁰

This excerpt stresses that the scholarly works the judge could rely on must reflect the law as it actually is; this would at first appear to be a stumbling block for the application of the ICRC study. However, to establish the parameters of customary law, more recent American justices and judges have been quick to use documents such as restatements, UN General Assembly resolutions, and treaty texts as proxies for a detailed examination of state practice.¹⁷¹

Lawyers and judges in the international courts will have an even more pronounced tendency to cite to the ICRC study because they both deal with the issues more frequently and tend to have a broader definition of what constitutes customary international law than their American counterparts. In fact, the study has already been cited at the international level: an expert arguing before the ICJ on behalf of the Democratic Republic of Congo cited the study generally, calling it “*un nouvel ouvrage de reference*” (a new work of reference).¹⁷² If the work is viewed as reference material by a large number of practitioners, its perceived legitimacy will continue to rise. Unfortunately for this particular expert, his country lost the case, and the judgment did not refer to the ICRC’s study.¹⁷³

However, an ICTY decision on an interlocutory appeal in *Hadžihasanović* cited to *Customary International Humanitarian Law* seven times, each time accepting the ICRC’s articulation of the rule

170. *The Paquete Habana*, 175 U.S. at 700.

171. See, e.g., *F. Hoffman-La Roche, Ltd. v. Empagran*, 542 U.S. 155, 165 (2004); *Hartford Fire*, 509 U.S. at 818 (Scalia, J., dissenting); *Kadić v. Karadžić*, 70 F.3d 232, 241-44 (2d Cir. 1995); *Filártiga v. Peña-Irala*, 630 F.2d 876, 881-85 (2d Cir. 1980).

172. *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)* (Oral Arguments of Apr. 25, 2005 at 15:00) at 32, available at http://www.icj-cij.org/icjwww/idocket/ico/ico_cr/ico_icr2005-13_translation_20050425.pdf (last visited July 24, 2006).

173. *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)* (Judgment of Dec. 19, 2005), available at http://www.icj-cij.org/icjwww/idocket/ico/ico_judgments/ico_judgment_20051219.pdf (last visited July 24, 2006).

as entirely accurate.¹⁷⁴ All citations were to the first volume, indicating that the judge was more interested in the parameters of the rule rather than the state practice justifying its articulation.¹⁷⁵ The decision was issued before the study was officially released, most likely because the decision's author, Theodor Meron, a member of the steering committee and research team for the ICRC's project, already had a copy.¹⁷⁶ Because the rules were cited so often and with such deference, this could be an indication that, at least in international tribunals, the ICRC's listing will be treated as authoritatively reflecting actual customary law. However, any lawyer generalizing the *Hadžihasanović* decision must do so cautiously given the personal connection between Meron and the ICRC's treatise. Nevertheless, Meron's practice of treating *Customary International Humanitarian Law* as the last word on customary IHL will surely spread.

Because the ICRC provides a shortcut for judges who apply customary IHL, it most likely will be cited often by judges in international tribunals and perhaps by judges in American courts. The more that lawyers and judges rely upon the work as a trustworthy reference, the more legitimate the study will become. Even if the rules articulated are not accurate reflections of customary IHL in the traditional sense, judges and advocates will make them the law through practice and precedent.

CONCLUSION

With the publication of *Customary International Humanitarian Law*, the ICRC is in keeping with its long history of participating in the development of law in this area. The ICRC's tradition of neutrality and integrity means that states will most likely rely on and use the 161 rules articulated in the treatise. Though many have questioned whether the ICRC can continue to avoid the political fray, this careful and scholarly work is a product of an organization more

174. Prosecutor v. Hadžihasanović, Case No. IT-01-47-AR73.3, Decision on Joint Defence Interlocutory Appeal of Trial Chamber Decision on Rule 98BIS Motions for Acquittal, ¶¶ 17, 29-30, 38, 45-46 (Mar. 11, 2005).

175. Volume 1 articulates each rule and provides a commentary explaining the rule's parameters and defining terms and phrases. Volume 2, not cited in this opinion, lists in detail the state practice (used loosely) justifying each rule.

176. Perhaps like the ICRC, Meron is a sort of monarch in the realm of IHL: he helps to create the laws, adjudicates in accordance with them, and otherwise comments on them. *Acknowledgements* to 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 1, at xxi-xxii.

interested in ensuring adequate treatment of the victims of war than in playing political games.

Though the work is the product of many years of extensive research, it does not reflect the customary IHL rules in the traditional sense of customary law. Rather, the treatise mirrors the reality of IHL: actual state practice does not reflect the aspirational goals that states generally agree upon. *Customary International Humanitarian Law* accurately states the goals that each state and each non-state belligerent party ought to set for themselves. Because of the ease of citing to the rules, judges in domestic and international courts will probably agree that they should dictate proper behavior during war. If the ICRC's goal in writing down 161 rules was to provide a tool that the world can use to promote the compliance and progression of IHL, then it has succeeded.