

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

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I. Introduction¹

In 2005 the International Committee of the Red Cross (ICRC)² completed a ten-year

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." I 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 Wilmschurst & 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 (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).

⁴ ICRC STUDY, *supra* note 2, Vol. I: Rules, at xlv, xlvii, xlix (2005). *Cf. id.* at xlvi (noting that “ICRC delegations around the world” augmented the 47 reports on State practice). *See, e.g. id.* at 396-405, Vol. II: Practice, at 2590-654 §§ 1-550 (discussing the State practice of one hundred States vis-à-vis the proposed rules regarding the wounded, sick and shipwrecked).

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 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,⁶ there have been relatively few scholarly articles written about it,⁷ and only one State has officially responded to the ICRC: the United

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 (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); 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, 1224 (2005) (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, 14 (2006) (same). *See infra* note 173 and accompanying text (discussing the role of consent in international law).

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> (last visited Dec. 16, 2007). Yoram Dinstein, who was responsible for the Israeli country report for the ICRC Study, described Volume II’s “size is not just daunting: it is overwhelming.” Yoram Dinstein, *The ICRC Customary International Humanitarian Law Study*, 36 ISR. Y.B. HUM. RTS. 1, 3 ¶ 5 (2006). *See also id.* at 1 ¶ 2 (noting that “[t]he [ICRC Study] represents the largest scholarly undertaking (on any theme) ever undertaken in the long history of the ICRC.”); Ryszard Piotrowicz, *Customary International Humanitarian Law*, 25 AUSTL. Y.B. INT’L L. 348, 348 (2006) (book review) (commenting “I have not read the whole book and have not the slightest intention of doing so. Life is too short. ... I use it as a reference book, which is what you should be doing with it, although it is heavy enough to use in self-defence if you have to.”).

⁷ Much of the scholarship on the ICRC Study was contained in a symposium edition of Oxford University’s *Journal of Conflict & Security Law* published in the Summer of 2006. Peter Rowe, *The Effect on National Law of the Customary International Humanitarian Law Study*, 11 J. CONFLICT & SECURITY L. 165 (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 (2006); David Turns, *Weapons in the ICRC Study on Customary International Humanitarian Law*, 11 J. CONFLICT & SECURITY L. 201 (2006); 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 (2006); 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 (2006). *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 (2007); 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 (2006); Yoram Dinstein, *The ICRC Customary International Humanitarian Law Study*, 36 ISR. Y.B. HUM. RTS. 1 (2006); 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 (2006); 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 (2005); Theodor Meron, *Revival of Customary Humanitarian Law*, 99 AM. J. INT’L L. 817 (2005); W. Hays Parks, *The ICRC Customary Law Study: A Preliminary Assessment*, 99 AM. SOC’Y INT’L L. PROC. 208 (2005). There has also been a complementary (and generally complimentary) book recently published about the ICRC Study. 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. *Opinio 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

Kenneth Anderson's Law of War and Just War Theory Blog, <http://kennethandersonlawofwar.blogspot.com/>.

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/Jun1305ICRCDF.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.").

⁹ ICRC, *ICRC in Action* 3, available at <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/p0728?opendocument> (last visited Dec. 16, 2007).

monumental work¹⁰ compiling a surfeit of State practice.¹¹ Nevertheless, the ICRC Study on customary international humanitarian law articulates “rules”¹² that are not sustainable under the traditional theory of customary international law formation,¹³ as may be seen by analyzing even the three seemingly uncontroversial¹⁴ rules proposed by the ICRC Study for

¹⁰ See PERSPECTIVES ON THE ICRC STUDY, *supra* note 2, at vii, ix, 3, 13 and 409 (singing the praises of the ICRC Study as “a valuable work of great service to international humanitarian law” that “has considerably advanced our understanding of the law”); Dino Kritsiotis, *Customary International Humanitarian Law*, 101 AM. J. INT’L L. 692, 692 (2007) (book review) (commenting that the ICRC Study “is an undeniable embarrassment of empirical riches”); *id.* at 695 (calling the ICRC Study “a phenomenal resource for information on state and institutional practice in the humanitarian field.”); Peter Rowe, *The Effect on National Law of the Customary International Humanitarian Law Study*, 11 J. CONFLICT & SECURITY L. 165, 165 (2006) (stating that the ICRC Study is a milestone in the development of international humanitarian law); Yoram Dinstein, *The ICRC Customary International Humanitarian Law Study*, 36 ISR. Y.B. HUM. RTS. 1, 1 ¶ 1 (2006) (admitting that the ICRC Study is “undoubtedly an important landmark”); 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) (admiring the ICRC Study as “a stunning piece of work”); Ryszard Piotrowicz, *Customary International Humanitarian Law*, 25 AUSTL. Y.B. INT’L L. 348, 349, 350 (2006) (book review) (arguing that the ICRC Study is “a massive contribution to elucidating IHL”); 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, 1217 (2005) (admiring the ICRC Study as “undeniably a remarkable feat and a significant contribution to scholarship and debate in this area of international law.”).

¹¹ Dino Kritsiotis, *Customary International Humanitarian Law*, 101 AM. J. INT’L L. 692, 692 (2007) (book review) (commenting that the ICRC Study “is an undeniable embarrassment of empirical riches”); 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, 523-24 (2006) (arguing that “the vast collection of backup material in Volume II is irreplaceable”); Theodor Meron, *Revival of Customary Humanitarian Law*, 99 AM. J. INT’L L. 817, 833 (2005) (noting that “[n]o restatement of international law has eve[r] tried to amass such a rich collection of empirical data.”).

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.¹⁵ Thus, this article seeks to add to the discussion¹⁶ 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).¹⁷

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 law¹⁸ and an overview of the ICRC Study itself.¹⁹ Section III discusses the principal issues associated with the traditional theory of customary international law formation,²⁰ 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.").

¹⁷ See *infra* notes 241-497 and accompanying text. The ICRC Study espouses Rules 109-111 regarding the wounded, sick and shipwrecked in Chapter 34. ICRC STUDY, *supra* note 2, Vol. I: Rules, at 396-405.

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.

materials.”²¹ 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

²¹ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES 19 (1987) [hereinafter RESTATEMENT OF FOREIGN RELATIONS]. See also *id.* at § 111 reporters’ notes p. 48 (noting “[t]he non-formal character of customary law, and the uncertainties in determining whether and when it has come into effect and what is its content”); ICRC STUDY, *supra* note 2, Vol. I: Rules, at xii (noting that “[c]ustomary international law ... [is] notorious for its imprecision”); 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, 121 (2007) (noting that “customary law is inherently vague because it is not the product of deliberate processes but rather is the sum of many parts.”); Christiana Ochoa, *The Individual and Customary International Law*, 48 VA. J. INT’L L. 119, 185 (2007) (noting that “the very nature of CIL determinations is indeterminate.”); 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) (noting “the foggy world of customary IHL.”); David Turns, *Weapons in the ICRC Study on Customary International Humanitarian Law*, 11 J. CONFLICT & SECURITY L. 201, 202 (2006) (same); 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) (calling customary international law “esoteric”); MICHAEL BYERS, CUSTOM, POWER AND THE POWER OF RULES: INTERNATIONAL RELATIONS AND CUSTOMARY INTERNATIONAL LAW 3 (1999) [hereinafter CUSTOM, POWER AND THE POWER OF RULES] (contrasting the formality of treaty law formation with “rules of customary international law [which] arise out of frequently ambiguous combinations of behavioural regularity and expressed or inferred acknowledgments of legality.”).

²² See *infra* notes 498-535 and accompanying text.

²³ ICRC STUDY, *supra* note 2, Vol. I: Rules, at xxvi.

²⁴ Gabor Rona, *The Humanitarians: The International Committee of the Red Cross*, 101 AM. J. INT’L L. 259, 259 (2007) (reviewing David Forsythe (2005)); 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. 6 (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, 195 (2006); 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); ICRC, *ICRC in Action 2*, available at <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/p0728?opendocument> (last visited Dec. 16, 2007); 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.”). See also Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 49, Aug. 12, 1949, 6

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[ying] 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

U.S.T. 3115, 75 U.N.T.S. 31 [hereinafter Geneva Convention I] at arts. 3, 9-11, 23; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 50, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II] at arts. 3, 9-11; Geneva Convention Relative to the Treatment of Prisoners of War art. 129, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III] at arts. 3, 9-11, 56, 72, 73, 75, 79, 81, 123, 125, 126, Annex II arts. 2, 3, 5, 8, 11, Annex III art. 9; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 146, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV] at arts. 3, 10-12, 14, 30, 59, 61, 76, 96, 102, 104, 108, 109, 111, 140, 142, 143, Annex II art. 8; 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 Additional Protocol I], at arts. 5(3) & (4), 6(3), 33(3), 78(3), 81(1), 97(1), 98(1) & (2); 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 Additional Protocol II], at arts. 18(1), 24(1); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem, 8 Dec. 2005 [hereinafter Additional Protocol III], at arts. 3(1)(b), 4, 13(1).

²⁵ ICRC, *Discover the ICRC* 6, available at [http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0790/\\$File/ICRC_002_0790.PDF!Open](http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0790/$File/ICRC_002_0790.PDF!Open) (last visited Dec. 16, 2007). See generally HENRI DUNANT, A MEMORY OF SOLFERINO (ICRC, 1986) (1862).

²⁶ Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Aug. 22, 1864, 22 Stat. 940, available at <http://www.yale.edu/lawweb/avalon/lawofwar/geneva04.htm>.

²⁷ ICRC STUDY, *supra* note 2, Vol. I: Rules, at ix. See also ICRC, *The Geneva Conventions: the core of international humanitarian law*, available at <http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/genevaconventions> (last visited Dec. 16, 2007).

²⁸ Geneva Convention for the Amelioration of the Condition of the Wounded of the Armies in the Field, July 6, 1906, 35 Stat. 1885.

²⁹ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, July 27, 1929, 47 Stat. 2074.

³⁰ Geneva Convention I, *supra* note 24; Geneva Convention II, *supra* note 24; Geneva Convention III, *supra* note 24; Geneva Convention IV, *supra* note 24.

³¹ ICRC STUDY, *supra* note 2, Vol. I: Rules, at ix. 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. 6 (2006); 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). See also Geneva Convention I, *supra* note 24, at arts. 3, 9-11, 23; Geneva

either ratified or acceded to the four Geneva Conventions of 1949,³² they “constitute the foundation of international humanitarian law in force today.”³³ 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.”³⁴ 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.³⁵

Convention II, *supra* note 24, at arts. 3, 9-11; Geneva Convention III, *supra* note 24, at arts. 3, 9-11, 56, 72, 73, 75, 79, 81, 123, 125, 126, Annex II arts. 2, 3, 5, 8, 11, Annex III art. 9; Geneva Convention IV, *supra* note 24, at arts. 3, 10-12, 14, 30, 59, 61, 76, 96, 102, 104, 108, 109, 111, 140, 142, 143, Annex II art. 8.

³² See generally ICRC, *State Parties to Geneva Conventions*, available at <http://www.cicr.org/ihl.nsf/CONVPRES?OpenView> (last visited Dec. 16, 2007); Jean-Marie Henckaerts, *Customary International Humanitarian Law – A Rejoinder to Judge Aldrich*, 76 BRIT. Y.B. INT’L L. 525, 526 (2006). The last State to accede to the four Geneva Conventions of 1949 was Montenegro on August 2, 2006. *Id.*; PERSPECTIVES ON THE ICRC STUDY, *supra* note 2, at 32. The United States ratified all four Geneva Conventions on August 2, 1955. DOCUMENTS ON THE LAWS OF WAR 361, 368 (Adam Roberts and Richard Guelff eds., Oxford University Press 3rd ed. 2000).

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 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 (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

³⁶ ICRC STUDY, *supra* note 2, Vol. I: Rules, at xxvii.

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,⁴⁰ who had recently completed her service as the editor of a similar restatement,⁴¹ the San Remo Manual on International Law Applicable to Armed Conflicts at Sea,⁴² and Dr. Jean-Marie Henckaerts.⁴³ 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

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).

⁴¹ PERSPECTIVES ON THE ICRC STUDY, *supra* note 2, at 15-16 (comparing the ICRC Study to the Harvard Drafts of the 1920s and 1930s, the U.S. Restatement of Foreign Relations Law, and the San Remo Manual); 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, 198 (2006) (arguing that “the great value of the ICRC Study [is] as a prominent restatement of current customary international humanitarian 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, 225 & n. 12 (2006) (noting that the ICRC Study “closely resembles an American-style restatement’s articulation of common law-based rules.”).

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.⁴⁴

(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.⁴⁵ Each of the six research teams focused on a separate part of the study.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),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

⁴⁴ ICRC STUDY, *supra* note 2, Vol. I: Rules, at xlv, xix-xxii.

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).

⁴⁶ ICRC STUDY, *supra* note 2, Vol. I: Rules, at xlv, xlvii. *See infra* note 60 and accompanying text (discussing the six parts of the Study).

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.⁴⁸

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

⁴⁸ ICRC STUDY, *supra* note 2, Vol. I: Rules, at xxxii, xlv-xlvi. See also PERSPECTIVES ON THE ICRC STUDY, *supra* note 2, at 24-25; DUNOFF, RATNER & WIPPMAN, INTERNATIONAL LAW NORMS, ACTORS, PROCESS—A PROBLEM-ORIENTED APPROACH 74-75 (2002).

⁴⁹ See, e.g., DOS/DoD Letter to ICRC, *supra* note 3, at 2 (criticizing the ICRC Study for placing too much emphasis on written materials); *id.* at 3 (noting that “States often include guidance in their military manuals for policy, rather than legal, reasons.”); *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.”); *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, *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, *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, CONDUCT OF HOSTILITIES, *supra* note 3, at 5 (noting that “[s]pecial importance in the context of LOIAC [Law of International Armed Conflict] is attached to military manuals and operational handbooks.”); Yoram Dinstein, *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.”). See, e.g., ICRC STUDY, *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). See, e.g., ICRC STUDY, *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. 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.” See,

e.g., ICRC STUDY, *supra* note 2, Vol. II: Practice, at 2592-98, 2605-06, 2617-21, 2625, 2634 §§ 23, 25, 29, 34, 38, 43, 49, 74, 128, 130, 134, 216, 219, 224, 228, 231, 243, 248, 280, 356, 358. *See also infra* note 394 (noting that Australia's 1994 Defence Force Manual and New Zealand's 1992 Military Manual conflict with their treaty obligations under the Additional Protocols, and thus probably are not good evidence of their respective State's practice). The cornerstone of democracy is civilian control of the government, hence the hesitance on the part of the military in a democratic State to set national policy. For that reason alone, military manuals should not be dispositive as evidence of State practice. Moreover, State practice "includes diplomatic acts and instructions 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 neither 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 Balamwalla, *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.⁵⁰ In addition, the authors augmented the collection of State practice by reviewing the ICRC archives for materials related to forty recent armed conflicts.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”⁵² specific States, which the ICRC consolidated into the two parts (i.e. books) of Volume II: Practice of the ICRC Study.⁵³ The authors then went through an iterative process of summarizing this State

based on a policy of including a certain rule, rather than a sense that the rule flows from a legal obligation.”).

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 against consideration of verbal acts). *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.”).

⁵¹ ICRC STUDY, *supra* note 2, Vol. I: Rules, at xlvii. *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 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 ICRC archives] would yield a trove of inaccessible State practice. In [any] event, the results have been quite disappointing.”).

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).

⁵³ ICRC STUDY, *supra* note 2, Vol. I: Rules, at xlvii-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.⁵⁴ 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.⁵⁵

accuracy.”).

⁵⁴ ICRC STUDY, *supra* note 2, Vol. I: Rules, at xlviii, l-li.

⁵⁵ 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 apply 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,⁵⁶ 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.”).

⁵⁶ 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.⁵⁷

However, the vast majority of the proposed rules assert that they apply equally to both international and non-international armed conflicts.⁵⁸ 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.

Id. Note that the International Review article on the ICRC Study has only had its bracketed explanation “[IAC/NIAC]” corrected, and not the rule itself. International Review of the Red Cross, Vol. 87, no. 857, 209 (2005), available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-857-p175/\\$File/irrc_857_Henckaerts.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-857-p175/$File/irrc_857_Henckaerts.pdf). Not surprisingly, Rule 126 continues to be miscited as only applying to 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, 1229 & n. 51 (2005).

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

RELATIONS, *supra* note 21, at § 103 cmt. a (noting that “[a] determination as to whether a customary rule has developed is likely to be influenced by assessment as to whether the rule will contribute to international order.”). Even more surprisingly, the ICRC Study does not present a rule for determining the existence of an armed conflict, or whether it is an international or non-international armed conflict. PERSPECTIVES ON THE ICRC STUDY, *supra* note 2, at ix, 408; 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 (2005) (criticizing the ICRC Study for not including a single rule on this topic); *id.* (citing a personal communication with Dr. Jean-Marie Henckaerts, one of the ICRC Study’s authors, as to such an endeavor “requir[ing] a study in and of itself.”); Dino Kritsiotis, *Customary International Humanitarian Law*, 101 AM. J. INT’L L. 692, 694 (2007) (book review) (expressing his surprise at the ICRC “[S]tudy’s failure to define international and noninternational armed conflicts ... [particularly] in view of the defining and operational significance that these concepts hold for all of the rules contained in the study.”). The Study also avoids taking a position on the legality or illegality of using nuclear weapons, purportedly due to deference to the International Court of Justice’s (ICJ’s) advisory opinion in the *Nuclear Weapons* case. ICRC STUDY, *supra* note 2, Vol. I: Rules, at 255. *See also* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 247 ¶ 52, 265-67 ¶ 105 (July 8). *Contra* David Turns, *Weapons in the ICRC Study on Customary International Humanitarian Law*, 11 J. CONFLICT & SECURITY L. 201, 34 (2006) (positing that “[i]t is inappropriate for the ICRC to defer to such a controversial decision, especially when it amounted to a non-finding”).

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.

⁶¹ *But cf.* Dino Kritsiotis, *Customary International Humanitarian Law*, 101 AM. J. INT’L L. 692, 694 (2007) (book review) (noting that Volume II of the ICRC Study fails to distinguish between State Practice supporting the particular rule in international versus non-international armed conflicts, unlike the commentary to the rules

to the sheer magnitude of the State practice,⁶² 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,⁶³ only the United States has officially responded to the ICRC Study,⁶⁴ in a letter co-signed by the Department of State Legal Adviser, and the Department of Defense General Counsel.⁶⁵ 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.”⁶⁶ However, the U.S. response envisions the United States “provid[ing] additional comments or otherwise mak[ing its] views known in due course.”⁶⁷

The U.S. response generally criticizes the ICRC Study’s unorthodox methodology,⁶⁸

in Volume I); *infra* note 332 and accompanying text (same).

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.*

⁶⁸ 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, 245 (2006). See *supra* note 55 and accompanying text (listing numerous criticisms of the ICRC Study’s methodology); *infra* notes 233-238 and accompanying text (same).

including both the State practice it considered, and its lack of proof of *opinio juris*.⁶⁹ 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.”⁷⁰

With regard to the subjective *opinio juris* element of customary international law,⁷¹ 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”;⁷² (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”;⁷³ (3) basing *opinio juris* “predominantly [on] military manuals” which either “implement treaty rules, are intended to

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

⁷⁰ DOS/DoD Letter to ICRC, *supra* note 3, at 2-3.

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,⁷⁴ 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.”⁷⁵

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;⁷⁶ (2) its overreliance on “non-binding recommendations in human rights instruments”;⁷⁷

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.”⁷⁸

“[T]o illustrate how these flaws call into question some of the Study’s conclusions,”⁷⁹ the U.S. response “review[s] a fair cross-section of the Study”⁸⁰ by examining four of the ICRC Study’s proposed rules: Rule 31 dealing with respecting and protecting humanitarian relief personnel;⁸¹ Rule 45, which involves protecting the environment from weapons that

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 Balamwalla, *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.”).

⁷⁸ DOS/DoD Letter to ICRC, *supra* note 3, at 4. *Contra* 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.”). *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.”).

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;⁸² Rule 78's prohibition against the anti-personnel use of exploding bullets;⁸³ and Rule 157's support for vesting domestic courts with universal jurisdiction over war crimes.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.⁸⁵ This “pars[ing of] every Rule in the Study,”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”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 *itself* represents the crystallization of these new norms.⁸⁸ If the ICRC Study is correct that it merely represents a “‘photograph’ of customary international humanitarian law as it [already] stands today,”⁸⁹ then arguably it is too late for the United States' objections to the pre-existing norms of customary

⁸² *Id.* at attachment pp. 7-12.

⁸³ *Id.* at attachment pp. 12-17.

⁸⁴ *Id.* at attachment pp. 17-22. See generally James P. Benoit, *The Evolution of Universal Jurisdiction Over War Crimes*, 53 NAVAL L. REV. 259, 264-310 (2006).

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, *supra* note 3, at attachment p. 22.

⁸⁶ Yoram Dinstein, *The ICRC Customary International Humanitarian Law Study*, 36 Isr. Y.B. Hum. Rts. 1, 11 ¶ 21 (2006).

⁸⁷ See *infra* notes 173-189 and accompanying text (discussing the theory of persistent objection).

⁸⁸ Theodor Meron, *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.”).

⁸⁹ ICRC STUDY, *supra* note 2, Vol. I: Rules, at xi (2005); Jean-Marie Henckaerts, *Customary International Humanitarian Law – A Rejoinder to Judge Aldrich*, 76 BRIT. Y.B. INT'L L. 525, 526 (2006).

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 Nations⁹² 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.").

⁹² Christiana Ochoa, *The Individual and Customary International Law*, 48 VA. J. INT'L L. 119, 129 (2007) (tracing the first usage of customary international law to Francisco Suarez' foundational international law text "*Tractatus de Legibus, Ac Deo Legislatore*," published in 1612). For example, the United States bases its continued reliance on anticipatory self-defense on the 1837 Caroline Case, as evidence of a norm of customary international law that the United States argues was not subsumed by article 51 of the U.N. Charter. See, e.g., Joseph E. Kastenberger, *The Use of Conventional International Law in Combating Terrorism: A Maginot Line for Modern Civilization Employing the Principles of Anticipatory Self-defense & Preemption*, 55 A.F. L. REV. 87, 107 (2004).

⁹³ See, e.g., Christiana Ochoa, *The Individual and Customary International Law*, 48 VA. J. INT'L L. 119, 122 (2007).

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

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 (positing 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.”).

⁹⁶ Custom is also said to *ripen*, *crystallize* or *harden* into customary international law. See, e.g. 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, 68 n. 127 (2006) (ripens); Vincy Fon & Francesco Parisi, *International Customary Law and Articulation Theories: An Economic Analysis*, 2 B.Y.U. INT’L L. & MGMT. REV. 201, 206 n. 5 (2006) (same); 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) (crystallizes); 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, 243 (2006) (same); Christiana Ochoa, *The Individual and Customary International Law*, 48 VA. J. INT’L L. 119, 148-49 (2007) (hardens); Anthea E. Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT’L L. 757, 784 (2001) (same).

obligation”⁹⁷ or *opinio juris sive necessitatis*.⁹⁸ 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.⁹⁹ Of course, this traditional formulation of customary international law begs for its terms to be defined.¹⁰⁰ 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).

⁹⁸ *See generally*, RESTATEMENT OF FOREIGN RELATIONS, *supra* note 21, at § 102, cmts. b & c; DUNOFF, RATNER & WIPPMAN, INTERNATIONAL LAW NORMS, ACTORS, PROCESS—A PROBLEM-ORIENTED APPROACH 75 (2002); ICRC STUDY, *supra* note 2, Vol. I: Rules, at xxxii; CUSTOM, POWER AND THE POWER OF RULES, *supra* note 21, at 130; North Sea Continental Shelf (F.R.G. v. Den. & Neth.), 1969 I.C.J. 3, 42-46 ¶¶ 73-81 (Feb. 20). *Contra* Christiana Ochoa, *The Individual and Customary International Law*, 48 VA. J. INT’L L. 119, 121 (2007) (describing the traditional view of customary international law formation as “state-centric” and “wrong, both factually and normatively.”).

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. l (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.”). PERSPECTIVES ON THE ICRC STUDY, *supra* note 2, at 49. *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”).

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 actors¹⁰¹ and treaty law¹⁰² 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.¹⁰³ One final issue¹⁰⁴ addressed by the present article is the continued relevance of customary international law in an area “of heavy regulation by treaty”¹⁰⁵—namely the law of war.¹⁰⁶

(A) Relevant State Practice

Of the two components required for the formation of customary international law, State practice is considered the objective element,¹⁰⁷ because at least theoretically it should be possible to weigh State practice on some sufficiency scale.¹⁰⁸ 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 (positing 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)).

¹⁰⁷ DINSTEIN, CONDUCT OF HOSTILITIES, *supra* note 3, at 5; Christiana Ochoa, *The Individual and Customary International Law*, 48 VA. J. INT’L L. 119, 132 (2007).

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

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).

¹¹³ Difference Relating to Immunity From Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, 1999 I.C.J. 62, 87 ¶ 62 (Apr. 29). Cf. W. Hays Parks, *The ICRC Customary Law Study: A Preliminary Assessment*, 99 AM. SOC'Y INT'L L. PROC. 208, 209 (2005) (criticizing the ICRC Study for "fail[ing] to include any frame of reference for government statements it offers.').

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)?¹¹⁵

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,¹¹⁶ or even the deputy legal advisors?¹¹⁷ 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.

Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 98 ¶ 186 (June 27).

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).

¹¹⁷ 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 “[f]our 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.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.¹¹⁹ The general view on this question is that:

[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.¹²⁰

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

¹¹⁸ See, e.g. Aug. 1 2002 Memo from Jay Bybee, Asst. Atty. Gen'l. to White House Counsel, *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.

¹¹⁹ 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 (2005). See generally ICRC, *State Parties to Geneva Conventions*, *available at* <http://www.cicr.org/ihl.nsf/CONVPRES?OpenView> (last visited Dec. 16, 2007) (listing 194 State parties to the Geneva Conventions, which constitutes universal adherence).

¹²⁰ RESTATEMENT OF FOREIGN RELATIONS, *supra* note 21, at § 102 cmt. b. See also *id.* at § 102 cmt. e.

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. *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, *Weapons in the ICRC Study on Customary International Humanitarian Law*, 11 J. CONFLICT & SECURITY L. 201, 202 (2006)

constitute a “general practice.”¹²² It especially must be practiced by “important States,”¹²³ and perhaps even more importantly, it must be practiced by those States which are specially affected.¹²⁴ 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

Customary International Humanitarian Law, 17 DUKE J. COMP. & INT'L L. 223, 240 (2006); 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, 1223 (2005). Of course, due to their broader interests and more frequent activities, "important States" are also more likely to be "specially affected" States. CUSTOM, POWER AND THE POWER OF RULES, *supra* note 21, at 38. At least two scholars claim that the United States is a "specially affected" State with regard to all of international humanitarian 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). Moreover, "[i]f several 'States whose interests are specially affected' object to the formation of a custom, no custom can emerge." Yoram Dinstein, *The ICRC Customary International Humanitarian Law Study*, 36 ISR. Y.B. HUM. RTS. 1, 13 ¶ 25 (2006). See also 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, 1232-33 (2005) (noting 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."). Thus, it is possible to argue not only that customary international law norms may not form *without* the consensus or acquiescence of specially affected States, but that it may form *with only* the support of specially affected States. Oscar Schachter, *New Custom: Power, Opinio Juris, and Contrary Practice*, THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY: ESSAYS IN HONOUR OF KRZYSZTOF SKUBISZEWSKI 531, 536-37 (Jerzy Makarczyk ed., 1996). Therefore, it is possible to argue that customary international law formation relies only on "the behavior of only the more important states." George Norman & Joel P. Trachtman, *The Customary International Law Game*, 99 AM. J. INT'L L. 541, 555 (2005). See also Wrap Up Discussion I, Posting of John Bellinger to *Opinio Juris*, <http://www.opiniojuris.org/posts/1169328256.shtml> (Jan. 20, 2007, 21:32) (noting that "[customary international] law develops largely from the practice of specially affected states, not from commentators, statements by non-governmental organizations, or the practice of states with little history of participation in the activities in question.").

¹²⁵ DINSTEIN, CONDUCT OF HOSTILITIES, *supra* note 3, at 5-6; Christiana Ochoa, *The Individual and Customary International Law*, 48 VA. J. INT'L L. 119, 132 (2007). See also THE LIMITS OF INTERNATIONAL LAW, *supra* note 94, at 23 (noting that *opinio juris* is also sometimes called "the 'psychological' element").

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: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.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.¹³⁰

The ICRC Study notes the difficulty of proving the subjective element of *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 *opinio juris* is generally contained within that practice and, as a result, it is not usually necessary to demonstrate separately the existence of an *opinio juris*. *Opinio juris* plays an important role, however, in certain situations where the practice is ambiguous,

supra note 94, at 23.

¹²⁸ RESTATEMENT OF FOREIGN RELATIONS, *supra* note 21, at 23; THE LIMITS OF INTERNATIONAL LAW, *supra* note 94, at 23. *Contra* Christiana Ochoa, *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). *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* CUSTOM, POWER AND THE POWER OF RULES, *supra* note 21, at 88-105 (discussing the principle of reciprocity in customary international law). *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.").

¹²⁹ RESTATEMENT OF FOREIGN RELATIONS, *supra* note 21, at § 102 cmt. c.

¹³⁰ *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, *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.¹³¹

Thus, the ICRC Study largely ignores this essential element to the traditional formation of customary international law when it posits its 161 proposed rules.¹³² 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.¹³³ 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 xl. 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/CustomaryLaw.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.>").

¹³³ See generally PERSPECTIVES ON THE ICRC STUDY, *supra* note 2, at 34; CHRISTIAN REUS-SMIT, *THE POLITICS OF INTERNATIONAL LAW* 123 (2004); Ian Brownlie and C.J. Apperley, *Kosovo Crisis Inquiry: Memorandum on the International Law Aspects*, 49 INT'L & COMP. L.Q. 878, 894 (2000); BING BING JIA, *THE REGIME OF STRAITS IN INTERNATIONAL LAW* 205 (1998); Philip R. Trimble, *The Supreme Court and International Law: The Demise of Restatement Section 403*, 89 AM. J. INT'L L. 53, 55 (1995) (citing to the *Lotus* case for the basic proposition). Cf. 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, 243 (2006) (noting that "there is some evidence that in relation to humanitarian law, the standards of proof in relation to customary law have been relaxed when compared with other areas of law, particularly by tribunals dealing with the matter."); Theodor Meron, *Revival of Customary Humanitarian Law*, 99 AM. J. INT'L L. 817, 820 (2005) (same); David Turns, *Weapons in the ICRC Study on Customary International Humanitarian Law*, 11 J. CONFLICT & SECURITY L. 201, 202 (2006) (arguing that "asserting custom without necessarily meeting the standards for proving its existence" conflates the *lex lata* [what the law is] with the *lex ferenda* [what the law ought to be]); S.S. *Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 26, 31 (Sep. 7); Peter Rowe, *The Effect on National Law of the Customary International Humanitarian Law Study*, 11 J. CONFLICT & SECURITY L. 165, 168 (2006).

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

The principal actors in international law remain States,¹³⁴ although non-State actors (such as individuals and international organizations) are beginning to exert a great deal of influence,¹³⁵ to assert rights,¹³⁶ and to fulfill international obligations.¹³⁷ The relevant question in the present context is to what extent non-State actors play a role in the formation of customary international law.¹³⁸

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,¹³⁹ the role of non-State actors in the formation of customary international law would appear to be rather limited.¹⁴⁰ Certainly individuals play a role in the formation of customary

¹³⁴ THE LIMITS OF INTERNATIONAL LAW, *supra* note 94, at 13; RESTATEMENT OF FOREIGN RELATIONS, *supra* note 21, at 16-17, 70-71; 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, 243-44 (2006); Yoram Dinstein, *The ICRC Customary International Humanitarian Law Study*, 36 ISR. Y.B. HUM. RTS. 1, 4 ¶ 6 (2006). *See also infra* note 173 and accompanying text (discussing how international law is based on State sovereignty and consent). *Contra* Christiana Ochoa, *The Individual and Customary International Law*, 48 VA. J. INT'L L. 119, 121, 151-168 (2007).

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

¹³⁶ *Id.* at § 703; Christiana Ochoa, *The Individual and Customary International Law*, 48 VA. J. INT'L L. 119, 152-53 (2007).

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).

¹³⁹ 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, 1231 (2005). *See supra* notes 92-133 (explaining the traditional theory of how customary international law is formed).

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.”).

¹⁴³ 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, 194 (2006).

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.¹⁴⁶

However, these examples should only serve to re-emphasize the limited, *supporting or secondary* role that non-State actors play in the formation of customary international law.¹⁴⁷

The international legal system is still generally State-centric.¹⁴⁸ Less clear is the role of treaty law in the formation of customary international law.

(D) Role of Treaty Law in Formation of CIL

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

decisions, declarations, and resolutions of international organizations.”

¹⁴⁶ CUSTOM, POWER AND THE POWER OF RULES, *supra* note 21, at 42, 156-57, 170; 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 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). *Cf.* Christiana Ochoa, *The Individual and Customary International Law*, 48 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). *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 an *opinio juris*.”). However, this remains the practice of the *States* themselves, *not* the practice of the *international organization*. *See, e.g.* Jan Klabbbers, 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, 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.”).

¹⁴⁷ 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.”). *Contra* Christiana Ochoa, *The Individual and Customary International Law*, 48 VA. J. INT’L L. 119, 121 (2007); ICRC STUDY, *supra* note 2, Vol. II: Practice, at 400 § 419 (citing to an Amnesty International report).

¹⁴⁸ CUSTOM, POWER AND THE POWER OF RULES, *supra* note 21, at 86; 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, 243-44 (2006). *Contra* Christiana Ochoa, *The Individual and Customary International Law*, 48 VA. J. INT’L L. 119, 151 (2007) (criticizing the “Westphalian notions of state sovereignty” that underpin traditional customary international law doctrine); *id.* at 169 (arguing that “individuals *ought* to be included in the process of CIL formation”) (emphasis added).

international law,¹⁴⁹ they are interrelated (or entangled)¹⁵⁰ in a number of ways.¹⁵¹ 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),¹⁵² customary international law potentially fills the gaps.¹⁵³ 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.").

¹⁵⁰ 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 & n. 20 (2006).

¹⁵¹ See generally ILA Report on CIL, *supra* note 132, at 42-54 §§ 20-27; DINSTEIN, CONDUCT OF HOSTILITIES, *supra* note 3, at 7-9.

¹⁵² Vienna Convention on the Law of Treaties art. 38, May 23, 1969, 1155 U.N.T.S. 331.

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 Ius 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,¹⁵⁴ with the treaty law “inevitably sharpen[ing] the image” or lending “higher resolution” to the pre-existing customary international law.¹⁵⁵ 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.”¹⁵⁶ 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.”¹⁵⁷ 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.¹⁵⁸

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 *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

establish – rather too easily.”); *id.* at 206 (same).

¹⁵⁹ *Continental Shelf (Libya v. Malta)*, 1985 I.C.J. 13, 29-30 ¶ 27 (June 3). See also *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 97 ¶ 183 (June 27); *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). But cf. CUSTOM, POWER AND THE POWER OF RULES, *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.”); THE LIMITS OF INTERNATIONAL LAW, *supra* note 94, at 23 (noting that treaties “are often used as evidence of customary international law, but in an inconsistent way.”); 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, 242-44 (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 *North Sea Continental Shelf Case* is generally considered to be a watershed event in the consideration of customary international law. See, e.g. *Gulf of Maine (Can. v. U.S.)*, 1984 I.C.J. 246, 293 ¶ 91 (Oct. 12).

¹⁶¹ *North Sea Continental Shelf (F.R.G. v. Den. & Neth.)*, 1969 I.C.J. 3, 41-42 ¶ 72 (Feb. 20).

¹⁶² *North Sea Continental Shelf (F.R.G. v. Den. & Neth.)*, 1969 I.C.J. 3, 42 ¶ 73 (Feb. 20). See *supra* note 124 (discussing the concept of specially affected States). See also David Turns, *Weapons in the ICRC Study on Customary International Humanitarian Law*, 11 J. CONFLICT & SECURITY L. 201, 206 (2006) (noting that “[t]he effect of the [ICJ’s] approach to this matter is to make it extremely difficult and exceptional for a rule of customary law to be created solely on the back of a treaty, without State practice and within a very short time of the treaty’s entry into force.”).

of a rule of customary international law¹⁶³

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.¹⁶⁴

A related question is whether customary international law can trump treaty law.¹⁶⁵ It is, of course, theoretically possible for subsequent customary international law to modify some existing treaty obligations,¹⁶⁶ although arguably customary international law cannot limit provisions of the Geneva Conventions which provide protections to specific groups of persons affected by war.¹⁶⁷ Moreover, the intention of a significant number of States to

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 Balmgawalla, *Review of Conference: The Reaffirmation of Custom as an Important Source of International Humanitarian Law*, 13 HUM. RTS. BR. 13, 14 (2006) (questioning “whether one can draw conclusions about customary humanitarian law from the practice of states, which is basically the implementation of a treaty obligation.”). See *infra* notes 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); note 333 (discussing Ireland’s and Norway’s domestic legislation, which was passed within a few months before they ratified the Additional Protocols).

¹⁶⁴ See *infra* notes 173-189 (discussing persistent objection).

¹⁶⁵ See *supra* note 99 and accompanying text (discussing the perceived hierarchy between treaty law and customary international law).

¹⁶⁶ See generally CUSTOM, POWER AND THE POWER OF RULES, *supra* note 21, at 172-80; *infra* note 213 and accompanying text.

¹⁶⁷ Burrus Carnahan, Principal Contributor to the Report on US practice for the ICRC Study, Roundtable Discussion at the North American launch of the ICRC Study at the American University Washington College of Law (Sep. 28, 2005), in Sabrina Balmgawalla, *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.”¹⁶⁸ State practice supporting this customary international law modification of treaty law would have to be sufficiently dense, and the concomitant *opinio juris sive necessitatis*¹⁶⁹ would have to be sufficiently clear.¹⁷⁰ Moreover, examples of customary international law modifying earlier treaty law are relatively rare.¹⁷¹ Another rarity is a State persistently objecting to a new norm of customary international law.¹⁷²

2005) (unpublished manuscript at 2-3, on file with author) (arguing that this result “appears to be contrary to the fundamental spirit of the Geneva Conventions, which are, according to Common Article 1, to be respected ‘in all circumstances,’ and which specifically prohibit special agreements among the parties limiting the personal rights granted by the Conventions.”). See also Geneva Convention I, *supra* note 24, at art. 6 (noting that “[n]o special agreement shall adversely affect the situation of [protected persons], as defined by the present Convention, not restrict the rights which it confers upon them.”); Geneva Convention II, *supra* note 24, at art. 6 (same); Geneva Convention III, *supra* note 24, at art. 6 (same); Geneva Convention IV, *supra* note 21, at art. 7 (same).

¹⁶⁸ RESTATEMENT OF FOREIGN RELATIONS, *supra* note 21, at § 102 cmt. j; PERSPECTIVES ON THE ICRC STUDY, *supra* note 2, at 7.

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. *opinio juris*). See, e.g. RESTATEMENT OF FOREIGN RELATIONS, *supra* note 21, at § 102; DUNOFF, RATNER & WIPPMAN, INTERNATIONAL LAW NORMS, ACTORS, PROCESS—A PROBLEM-ORIENTED APPROACH 75 (2002).

¹⁷⁰ See, e.g. RESTATEMENT OF FOREIGN RELATIONS, *supra* note 21, at § 102.

¹⁷¹ CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW—CASES AND MATERIALS (2003), at xxiv; Daniel Rice & John Dehn, *Armed Humanitarian Intervention and International Law: A Primer for Military Professionals*, 2007 MIL. REV. 38, 44 (Nov.-Dec. 2007). The clearest example is the customary international law recognizing 200 nautical mile exclusive economic zones (based on the 1984 U.N. Convention on the Law of the Sea). See United Nations Convention on the Law of the Seas arts. 55-58, Dec. 10, 1982, S. Treaty Doc. No. 103-39, 1833 U.N.T.S. 397 [hereinafter UNCLOS]; U.S. Department of State Bureau of Oceans and International Environmental and Scientific Affairs, *Limits in the Seas*, No. 112, United States Responses to Excessive National Maritime Claims, Mar. 9, 1992, pp. 6-7. The 1984 U.N. Convention on the Law of the Sea modified the earlier 1958 Law of the Sea Conventions, which did not recognize these zones. RESTATEMENT OF FOREIGN RELATIONS, *supra* note 21, at § 102 cmt. j, reporters’ notes p. 33 & Introductory Note to Part V. See also CUSTOM, POWER AND THE POWER OF RULES, *supra* note 21, at 172-74 (discussing this and a few other possible examples of customary international law modifying earlier treaty law).

¹⁷² See *infra* notes 173-189 (discussing persistent objection).

(E) 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.¹⁷³ Therefore, “[a] principle of customary law is not binding on a state that declares its dissent from the principle during its development,”¹⁷⁴ and continues to object to the new norm.¹⁷⁵ However, “[h]istorically, such [persistent objection] and consequent

¹⁷³ Vienna Convention on the Law of Treaties art. 34, May 23, 1969, 1155 U.N.T.S. 331; PERSPECTIVES ON THE ICRC STUDY, *supra* note 2, at 10; THE LIMITS OF INTERNATIONAL LAW, *supra* note 94, at 189; CUSTOM, POWER AND THE POWER OF RULES, *supra* note 21, at 7-8, 14, 88, 106, 142-43, 187-88; CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW—CASES AND MATERIALS xxiii-xxiv (2003); DINSTEIN, CONDUCT OF HOSTILITIES, *supra* note 3, at 8; Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 133 ¶ 263 (June 27); S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sep. 7); 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). 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 Balmgawalla, *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.”).

¹⁷⁴ RESTATEMENT OF FOREIGN RELATIONS, *supra* note 21, at § 102 cmt. b. See also *id.* at 18, § 102 cmt. d; THE LIMITS OF INTERNATIONAL LAW, *supra* note 94, at 25; Yoram Dinstein, *The ICRC Customary International Humanitarian Law Study*, 36 ISR. Y.B. HUM. RTS. 1, 13 ¶ 24 (2006). This general rule of a State’s ability to opt out of a new norm of customary international law does not apply to *jus cogens* or peremptory norms, from which no derogation is permitted (e.g. genocide, slavery, torture, apartheid, and the U.N. Charter’s prohibition on the use of force). See generally Vienna Convention on the Law of Treaties arts. 53 & 64, May 23, 1969, 1155 U.N.T.S. 331 (1969); CUSTOM, POWER AND THE POWER OF RULES, *supra* note 21, at 12-13, 183-203; CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW—CASES AND MATERIALS xxiv (2003); RESTATEMENT OF FOREIGN RELATIONS, *supra* note 21, at § 102 cmts. h and k, reporters’ notes pp. 33-34; Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 100-01 ¶ 190 (June 27); North Sea Continental Shelf (F.R.G. v. Den. & Neth.), 1969 I.C.J. 3, 41-42 ¶ 72 (Feb. 20).

¹⁷⁵ ICRC STUDY, *supra* note 2, Vol. I: Rules, at xxxix; CUSTOM, POWER AND THE POWER OF RULES, *supra* note 21, at 103, 143, 180-83; 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.

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

1217, 1224 (2005). *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 Balamwalla, *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.”).

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 Balamwalla, *Review of Conference: The Reaffirmation of Custom as an Important Source of International Humanitarian Law*, 13 HUM. RTS. BR. 13, 15 (2006) (declaring that “neither the United States, nor any other major military power, can effectively protect its interests or advance international law generally by confining itself to the role of a perpetual dissenter.”).

¹⁷⁸ ICRC STUDY, *supra* note 2, Vol. I: Rules, at xxxix. *See* David Turns, *Weapons in the ICRC Study on Customary International Humanitarian Law*, 11 J. CONFLICT & SECURITY L. 201, 207 (2006) (arguing that the ICRC’s position on persistent objection “damages its credibility”).

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.”¹⁸¹

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.¹⁸² Although the ICRC is presumptively a Swiss non-governmental organization (NGO),¹⁸³ the ICRC Study may have a substantial impact on the formation of customary international law,¹⁸⁴ especially if its rules

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.¹⁸⁵ If so, is the sole U.S. response¹⁸⁶ 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?¹⁸⁷ 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?¹⁸⁸

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.¹⁸⁹

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”).

¹⁸⁹ Gregory P. Noone, *The History and Evolution of the Law of War Prior to World War II*, 47 NAVAL L. REV. 176, 177 (2000). See generally James P. Benoit, *The Evolution of Universal Jurisdiction Over War Crimes*, 53 NAVAL L. REV. 259, 264-310 (2006).

(F) Continued Relevance of CIL in the Area of the Law of War

The law of armed conflict¹⁹⁰ is an area of international law that is particularly well-regulated by treaty.¹⁹¹ Yet customary international law retains its utility¹⁹² for at least six reasons.

First, not all treaties enjoy universal adherence, such as the Geneva Conventions,¹⁹³ and customary international law binds all States, even non-parties,¹⁹⁴ with the possible exception¹⁹⁵ of States which have persistently objected.¹⁹⁶ “Customary international law is therefore a means for achieving the universal application of principles of international

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).

¹⁹⁴ ICRC STUDY, *supra* note 2, Vol. I: Rules, at x; PERSPECTIVES ON THE ICRC STUDY, *supra* note 2, at 6-7; CUSTOM, POWER AND THE POWER OF RULES, *supra* note 21, at 4; THE LIMITS OF INTERNATIONAL LAW, *supra* note 94, at 21; 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 (2005).

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).

¹⁹⁸ See *infra* note 201 (listing the non-parties to the Additional Protocols); 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).

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.²⁰³ Yet the ICRC claims that State practice (i.e. the objective element of customary international law)²⁰⁴ 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.²⁰⁵ 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

²⁰³ ICRC STUDY, *supra* note 2, Vol. I: Rules, at x; PERSPECTIVES ON THE ICRC STUDY, *supra* note 2, at 7; 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, 1221 (2005). Cf. 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, 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.”).

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.²⁰⁶

The third and final reason for the continued relevance of customary international law offered by ICRC President Jakob Kellenberger²⁰⁷ in his introduction to the ICRC Study, is that customary international law can aid in the interpretation of treaty law.²⁰⁸ Thus, presumably customary international law either helps fill in the interstices in treaty law,²⁰⁹ or perhaps adds a gloss on treaty provisions over time.

The recently published book “*Perspectives on the ICRC Study on Customary International Humanitarian Law*”²¹⁰ 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

²⁰⁶ 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 (noting that the ICRC Study rules rely heavily on the treaty provisions of Additional Protocol I). *Contra* 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.... 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.”).

²⁰⁷ ICRC, *About the ICRC, Structure*, available at <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/icrc-presidency-article-010106?opendocument> (last visited Dec. 16, 2007).

²⁰⁸ ICRC STUDY, *supra* note 2, Vol. I: Rules, at x; PERSPECTIVES ON THE ICRC STUDY, *supra* note 2, at 7; CUSTOM, POWER AND THE POWER OF RULES, *supra* note 21, at 4; THE LIMITS OF INTERNATIONAL LAW, *supra* note 94, at 21.

²⁰⁹ David Turns, *Weapons in the ICRC Study on Customary International Humanitarian Law*, 11 *J. CONFLICT & SECURITY L.* 201, 235-36 (2006). See also *supra* note 153 and accompanying text.

²¹⁰ PERSPECTIVES ON THE ICRC STUDY, *supra* note 2.

that customary international law may be self-executing²¹¹ 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.

²¹⁶ PERSPECTIVES ON THE ICRC STUDY, *supra* note 2, at 8; 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). *See supra* notes 134-148 (discussing the role of non-State actors in the formation of customary international law). *Cf. Dieter Fleck, International*

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,²¹⁷ and for the present Article's consideration of the three ICRC Study rules pertaining to the treatment of the wounded, sick and shipwrecked.²¹⁸

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.²¹⁹

Thus, merely positing that a particular rule has become a norm of customary international law does not remove objections to provisions of particular treaties.²²⁰

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, 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:

conventional obligation?” PERSPECTIVES ON THE ICRC STUDY, *supra* note 2, at 34. See *supra* note 173 and accompanying text (discussing how 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); PERSPECTIVES ON THE ICRC STUDY, *supra* note 2, at 10 (noting that “custom, as in the case of treaties, requires the consent of States.”); notes 173-189 (discussing persistent objection); note 34 (discussing whether the real impetus for the ICRC Study was an effort to claim that provisions in the Additional Protocols had achieved the status of customary international law). *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 Balamwalla, *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.”).

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 xliv (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 th[is] 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 xlv (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.”).

²²⁵ 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, 235 & n. 82 (2006) (citing to Rule 108, which uses the Additional Protocol I definition of mercenaries, as revealing that “[t]he ICRC believes that some parts of [Additional] Protocol [I] state customary law even though there is a lack of practice in conformity with the Protocol by states who are not parties.”); Burrus Carnahan, Principal

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 imprecise²²⁷ 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

Contributor to the Report on US practice for the ICRC Study, 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) (criticizing the ICRC Study for elevating a regional sub-Saharan African policy that considers mercenaries as unlawful combatants “to the status of universal, customary law”); Burrus M. Carnahan, A “Restatement” of Customary Humanitarian Law?, (Sep. 28, 2005) (unpublished manuscript at 1-3, on file with author) (same). *But see* 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.”).

²²⁶ Yoram Dinstein, *The ICRC Customary International Humanitarian Law Study*, 36 Isr. Y.B. Hum. Rts. 1, 10-11 ¶ 19 (2006); *supra* note 163 and accompanying text. *See generally* *North Sea Continental Shelf* (F.R.G. v. Den. & Neth.), 1969 I.C.J. 3 (Feb. 20). *Cf.* Theodor Meron, *Revival of Customary Humanitarian Law*, 99 AM. J. INT’L L. 817, 833 (2005) (questioning the presence of “any alternative; consideration only of the practice of nonparties would be either meaningless or at least nonrepresentative of state practice generally.”).

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?²³²

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

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).

²³³ ICRC STUDY, *supra* note 2, Vol. I: Rules, at xxxi-xlv. See also PERSPECTIVES ON THE ICRC STUDY, *supra* note 2, at 24, 402. Cf. *id.* 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).

²³⁴ PERSPECTIVES ON THE ICRC STUDY, *supra* note 2, at 23.

²³⁵ See *supra* note 55 (listing numerous criticisms of the ICRC Study’s methodology).

²³⁶ PERSPECTIVES ON THE ICRC STUDY, *supra* note 2, at 27.

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,

[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.

Id. at 149. See also 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, 1223 (2005). Contra Rosalyn C. Higgins, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 21 (1994) (arguing that Dean Kirgis’ approach raises the issue of “higher normativity,” which must rely on a sort of individual ethnocentrism, as well as on natural law). Judge Rosalyn Higgins is presently the President of the ICJ. International Court of Justice, The Court, Presidency, available at <http://www.icj->

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

cij.org/court/index.php?p1=1&p2=3 (last visited Dec. 16, 2007). See also PERSPECTIVES ON THE ICRC STUDY, *supra* note 2, at 28-29 (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 Balamwalla, *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.").

²³⁸ PERSPECTIVES ON THE ICRC STUDY, *supra* note 2, at 29-36; *supra* notes 163, 221-222 and accompanying text. See also PERSPECTIVES ON THE ICRC STUDY, *supra* note 2, at 31 (noting that although "there is an increasing tendency by both governments and international lawyers to view multilateral treaty provisions as customary, the International Court [of Justice] has rejected the existence of a legal presumption to this effect."); *id.* at 34 (arguing that "[t]he approach adopted by the Study appears to reverse the burden of proof of customary law, making the [Additional] Protocols presumptively customary as opposed to merely conventional."). Cf. ICRC STUDY, *supra* note 2, 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*]"). Thus, the ICRC Study claims that every element of every provision of the Geneva Convention III has crystallized into customary international law—a bold statement indeed. See 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). But see *supra* note 205 and accompanying text (arguing that the Geneva Conventions represent customary international law *in toto*).

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).

international law is formed.²⁴⁰

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*²⁴¹ to search for, collect and evacuate the wounded, sick and shipwrecked. This includes permitting humanitarian organizations to assist in their search and collection.”²⁴² Thus the ICRC Study

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.²⁴³ The ICRC Study also professes that this is a customary international law norm “applicable to both international and non-international armed conflicts.”²⁴⁴

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

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*

²⁴³ Although this nod to military feasibility is *implicit* in the ICRC Study, it is *explicit* in the Geneva Conventions. See, e.g. Geneva Convention I, *supra* note 24, at art. 15; Geneva Convention II, *supra* note 24, at art. 18; Geneva Convention IV, *supra* note 24, at art. 16, ¶ 2. See also 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.”); PICTET GENEVA CONVENTION IV, *supra* note 5, at 136-37 ¶ 2.1.B (“Army or Navy Medical Services ... are bound to take military requirements into account.”).

²⁴⁴ ICRC STUDY, *supra* note 2, Vol. I: Rules, at 396.

²⁴⁵ See *infra* notes 250-283 and accompanying text.

²⁴⁶ See *infra* notes 284-340 and accompanying text.

²⁴⁷ See *infra* notes 341-359 and accompanying text.

²⁴⁸ See *infra* notes 360-363 and accompanying text.

²⁴⁹ See *infra* notes 364-368 and accompanying text.

wounded, sick and shipwrecked.²⁵⁰ The first Geneva Convention for the Amelioration of the Condition of the Wounded and Sick *in Armed Forces in the Field*²⁵¹ 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 *levee en masse* (i.e. combatants),²⁵² 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.”²⁵³

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]hat the 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*.²⁵⁴ Protections for *civilian* wounded and sick are provided by the fourth Geneva Convention Relative to the Protection of *Civilian Persons in Time of War*,²⁵⁵ 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:

- 1) Consider establishing “hospital and safety zones ... to protect from the effects of war, wounded, sick and aged persons, children under fifteen, expectant mothers and mothers of children under seven.” Geneva Convention IV, *supra* note 24, at art. 14.
- 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
Search For	“search for the ... wounded (GC IV, art. 16)		
Collect			“assist the shipwrecked” (GC IV, art. 16)
Evacuate	“remov[e] from besieged or encircled areas, of wounded” (GC IV, art. 17)	“remov[e] from besieged or encircled areas, of ... sick” (GC IV, art. 17)	

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

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.²⁶⁹

The commentary²⁷⁰ 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*.”²⁷¹ Yet, for example, the U.S. military manuals cited as supporting this proposition not only have the

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,²⁷² but they also make no mention that their rules apply to wounded or sick *civilians*.²⁷³ 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.²⁷⁴ 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.²⁷⁵

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).

²⁷³ ICRC STUDY, *supra* note 2, Vol. I: Rules, at 397 n. 5, Vol. II: Practice, at 2598 §§ 72-74, 2609 §§ 158-161, 4206-07. See also U.S. Army Field Manual (FM) 27-2, YOUR CONDUCT IN COMBAT UNDER THE LAW OF WAR (1984), p. 17; Army FM 27-10, THE LAW OF LAND WARFARE (1956), §§ 11, 216 and 219; USAF Pamphlet 110-31, JUDGE ADVOCATE, GENERAL ACTIVITIES, INTERNATIONAL LAW – THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS (1976) §§ 12-2 and 12-3. Cf. 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).

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

collected.”) (emphasis added). Yet these nine military manuals are all cited as supporting the commentary to Rule 109’s sweeping proposition that the cited military manuals “are phrased in general terms covering all wounded, sick and shipwrecked, whether military *or civilian*.” *Id.*, Vol. I: Rules, at 396 (emphasis added), 396-97 n. 5, 399 n. 25. *See also id.*, Vol. II: Practice, at 2595 § 50 (noting that while Madagascar’s Military Manual instructs its soldiers to collect “wounded enemy combatants,” it also instructs them to search for and collect “the wounded [and] shipwrecked,” which is ambiguous whether or not it is restricted to combatants), 2597 § 69 (same ambiguity under Togo’s Military Manual), 2598 § 75 (same ambiguity under “[t]he YPA Military Manual of the SFRY (FRY)”); PERSPECTIVES ON THE ICRC STUDY, *supra* note 2, at 40 (noting that “[a]t times it is clear that the [ICRC] Study demonstrates a lack of discernment in its assessment of [State] practice.”).

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).

²⁷⁷ ICRC STUDY, *supra* note 2, Vol. II: Practice, at 2595 § 48.

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?ReadForm&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?ReadForm&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,²⁸¹ particularly one that modifies earlier treaty law that is universally accepted.²⁸² 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.²⁸³

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 1949,²⁸⁴ there are general treaty law (versus customary international law)²⁸⁵ obligations under Common Article 3²⁸⁶ 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*²⁸⁷ to collect and care for the wounded, sick²⁸⁸ and shipwrecked,²⁸⁹ and to treat the wounded and sick humanely.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.²⁹¹

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, *supra* note 24, at art. 3; Geneva Convention III, *supra* note 24, at art. 3; Geneva Convention IV, *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, *supra* note 24, at art. 3.

²⁸⁷ See *supra* notes 205, 286 and accompanying text (discussing the relevance of Common Article 3). 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 Ius in Bello: The Impact of the ICRC Study on Customary International Humanitarian Law*, 11 J. CONFLICT & SECURITY L. 179, 179-180 (2006) (agreeing that the law of war applicable to non-international armed conflicts exceeds Common Article 3 and the few articles contained in Additional Protocol II).

²⁸⁸ 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 2590 § 3.

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

²⁹⁰ 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 *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, *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*”²⁹² Thus, unlike the proposed Rule 109 of the ICRC Study, Common Article 3 has no *temporal* component,²⁹³ no explicit obligation to *search* for the wounded, sick and shipwrecked, and no obligation to *evacuate* them.²⁹⁴ 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,²⁹⁶ 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”²⁹⁷ The official ICRC commentary to Article 8 of

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

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).

manuals,”³⁰⁴ and (3) domestic legislation.³⁰⁵ 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 an *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 Klabbbers, 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 commentary³⁰⁶ to Rule 109, Volume II provides a rare cite to five instances of “battlefield practice”³⁰⁷ in support of the proposed rule in non-international armed conflicts.³⁰⁸

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.”); 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.”).

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 ICRC 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. CARNAHAN, 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).³⁰⁹ The fourth is an agreement between the Government of the Republic of the Philippines and the National Democratic Front of the Philippines.³¹⁰ 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.”³¹¹ Even if these special agreements deviate significantly from the principles of Common Article 3, which they do not,³¹² it is difficult to argue that the special agreements of two States³¹³ is sufficiently dense State practice to justify

³⁰⁹ ICRC STUDY, *supra* note 2, Vol. I: Rules, at 397, Vol. II: Practice, at 2592, 2605 §§ 16-18, 123-125.

³¹⁰ *Id.*, Vol. I: Rules, at 397, Vol. II: Practice, at 2592, 2608 §§ 19, 149. *See also* 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, *available at* <http://www.philsol.nl/A03a/CARHRIHL-mar98.htm>; National Democratic Front of the Philippines, *available at* <http://home.casema.nl/ndf/> (last visited Dec. 16, 2007).

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 ha[r]m 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.³¹⁴

Besides these special agreements, the commentary to proposed Rule 109 of the ICRC Study also cites to “a number of military manuals which are applicable in or have been applied in non-international armed conflicts.”³¹⁵ Aside from the inherent weaknesses of overly relying on military manuals as expressions of State practice or policy,³¹⁶ Volume II of the ICRC Study admits that at least the Belgium, Kenyan, U.K.³¹⁷ and U.S. military manuals

<http://www.cicr.org/ihl.nsf/WebSign?ReadForm&id=475&ps=P> (last visited Dec. 16, 2007). Similarly, Bosnia and Herzegovina apparently signed the special agreement before it acceded to Additional Protocol II on December 31, 1992. Compare ICRC STUDY, *supra* note 2, Vol. II: Practice, at 2592 § 18 with 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). See also *supra* note 281 (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).

³¹⁴ 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. See generally RESTATEMENT OF FOREIGN RELATIONS, *supra* note 21, at § 102 cmt. b. See also DUNOFF, RATNER & WIPPMAN, INTERNATIONAL LAW NORMS, ACTORS, PROCESS—A PROBLEM-ORIENTED APPROACH 75 (2002); *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).

³¹⁵ ICRC STUDY, *supra* note 2, Vol. I: Rules, at 397.

³¹⁶ See *supra* notes 49, 114 and accompanying text; *infra* notes 317, 328, 394. 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.”).

³¹⁷ The Achilles' heel of the putative State practice cited by the ICRC Study is not only its reliance on military manuals, but its reliance on *out-of-date* military manuals, when more current manuals are readily available. See, e.g., ICRC STUDY, *supra* note 2, Vol. II: Practice, at 883 n. 175, 4207 (citing to the 1993 edition of the U.S. Army JAG School OPLAW Handbook, which is published annually); *id.* at 2597 §§ 70-71 (citing to the 1958 UK Military Manual and the 1981 UK LOAC Manual, at least the former of which was replaced by THE MANUAL OF THE LAW OF ARMED CONFLICT, UK MINISTRY OF DEFENCE (2004). Cf. Yoram Dinstein, *The ICRC Customary International Humanitarian Law Study*, 36 ISR. Y.B. HUM. RTS. 1, 7 ¶ 13 (2006) (noting that *there is no 1981 edition* of the UK LOAC Manual, but that the 2004 edition replaced the 1958 edition); THE MANUAL OF THE LAW OF ARMED CONFLICT, UK MINISTRY OF DEFENCE at vii (2004) (confirming that the 2004 edition of the UK LOAC Manual replaced the 1958 edition, with no mention of a 1981 edition). The 2004 UK LOAC

refer *expressly* to provisions in the four Geneva Conventions of 1949,³¹⁸ and *not* to the Additional Protocols, from which the proposed Rule 109 borrows its language.³¹⁹ 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.³²⁰ 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.³²¹ As difficult as it is to

Manual, in fact, refers to the Additional Protocols, for example by including *civilian* wounded and sick within its definition, citing to article 8(a) of Additional Protocol I. *Id.* at ¶¶ 7.2, 7.3.2. This makes sense, of course, since the UK ratified the Additional Protocols on January 28, 1998, after both of the UK military manuals erroneously cited by the ICRC Study. This fact would move the UK from the category of “merely refer[ring] to provisions in the four Geneva Conventions of 1949,” (see *infra* note 318 and accompanying text), to that of “merely consistent with their treaty obligations” (see *infra* note 321 and accompanying text). Another example might include Argentina’s 1969 Law of War Manual (Argentina acceded to the Additional Protocols in 1986, and hopefully updated its Law of War Manual subsequently), ICRC STUDY, *supra* note 2, Vol. II: Practice, at 2592, 2605 §§ 21, 127. *But see* U.S. Army FM 27-10, THE LAW OF LAND WARFARE (1956) (still authoritative, although under revision for a number of years); ICRC STUDY, *supra* note 2, Vol. I: Rules, at xlvi (noting that the ICRC Study strove to “be as up-to-date as possible and would, to the extent possible, take into account developments up to 31 December 2002.”); Jean-Marie Henckaerts, *Customary International Humanitarian Law – A Rejoinder to Judge Aldrich*, 76 BRIT. Y.B. INT’L L. 525, 531 (2006) (one of the ICRC Study’s authors citing to the 2004 version of the UK Manual of the Law of Armed Conflict). *But see* Dino Kritsiotis, *Customary International Humanitarian Law*, 101 AM. J. INT’L L. 692, 694 (2007) (book review) (questioning the ICRC Study’s timeliness, when it excluded any mention of President Bush’s February 7, 2002 announcement that detainees at Guantanamo Bay would be treated humanely from the State practice cited by Rule 87, humane treatment for civilians).

³¹⁸ ICRC STUDY, *supra* note 2, Vol. I: Rules, at 397, Vol. II: Practice, at 2592, 2595, 2597-98 §§ 24, 48, 70-74. *See also id.*, Vol. II: Practice, at 2605-06, 2609 §§ 123-124, 138, 158-159.

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 Protocols³²⁷ (except for Morocco, of course).³²⁸ Moreover, as

(New Zealand), §§ 58-60 (Nigeria), with 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). See also DOS/DoD Letter to ICRC, *supra* note 3, at attachment p. 10 (making a similar complaint about proposed Rule 45 of the ICRC Study). Two of the military manuals cited are ambiguous because they mix terms from both the 1949 Geneva Conventions, and the 1977 Additional Protocols. See, e.g. ICRC STUDY, *supra* note 2, Vol. I: Rules, at 397, Vol. II: Practice, at 2593, 2606 § 25 (Belgium), § 140 (India).

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.

³²⁴ Mali's Army Regulations apparently even refer to "the laws and customs of war." Mali, *Army Regulations* (1979), art. 36, cited in ICRC STUDY, *supra* note 2, Vol. II: Practice, at 2595 § 51.

³²⁵ Compare ICRC STUDY, *supra* note 2, Vol. I: Rules, at 397, Vol. II: Practice, at 2593-95 §§ 28-29, 37-40, 51 with 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).

³²⁶ See ICRC STUDY, *supra* note 2, Vol. I: Rules, at 397, Vol. II: Practice, at 2595 § 52. See generally 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).

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*,³²⁹ the rules for which are inherently more controversial.³³⁰

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.³³¹ The ICRC Study does not cite separately to domestic legislation that

international law (i.e. the requisite *opinio juris*), or whether they just happened to use language that deviated from the existing treaty law obligations, e.g. “whenever circumstances permit” instead of “after an engagement ... take all possible measures.” Compare Additional Protocol II, *supra* note 24, at art. 8 with Geneva Convention I, *supra* note 24, at art. 15. See generally *infra* Table 1, p. T-1.

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, failure to search or care for 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.³³² 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.³³³ Following the ICJ's reasoning

medical transports or medical establishments, etc.). Thus, unless domestic legislation goes well beyond penalizing “grave breaches” of the Conventions, or suppressing other violations, it is difficult to argue that it supports a new norm of customary international law, since it is merely effectuating treaty obligations under the four Geneva Conventions of 1949. *See supra* notes 163, 221-222 and accompanying text. The “for the suppression” of other violations of the Geneva Conventions language is sufficiently broad to cover a variety of domestic legislation, including that cited by the ICRC Study in support of its new proposed Rule 109. ICRC STUDY, *supra* note 2, Vol. I: Rules, at 397, Vol. II: Practice, at 2598-600, 2609-10 §§ 76-95, 163-167. Only two of the domestic laws cited by the ICRC Study (Ireland's' and Norway's) specifically criminalize behavior covered either by the proposed rule or by the Additional Protocols, and not just by the four Geneva Conventions of 1949. *Id.* at 2599-600 §§ 85, 89. *See infra* note 333 (discussing the timing of Ireland's and Norway's domestic legislation, which was passed ten and six months respectively *before* they ratified the Additional Protocols). Even more surprisingly, the ICRC Study cites to *draft* legislation from El Salvador and Nicaragua. ICRC STUDY, *supra* note 2, Vol. II: Practice, at 2599-600 §§ 83, 88. As tenuous as citing to domestic legislation is in this area, citing to *draft* legislation is sheer folly, because the draft legislation may have been introduced for political purposes, may undergo substantial revision, or may simply have no chance of ever passing into law. For example, draft legislation is regularly proposed before the U.S. Congress to reinstitute the military draft, even though its proponents realize that the legislation has little to no chance of ever passing a congressional vote. *See, e.g. Rangel promotes plan to reinstitute draft*, CNN.COM, Jan. 27, 2003, CNN.com, <http://www.cnn.com/2003/ALLPOLITICS/01/27/rangel.draft/>.

³³² ICRC STUDY, *supra* note 2, Vol. I: Rules, at 397, Vol. II: Practice, at 2598-600, 2609-10 §§ 76-95, 163-167. *See supra* note 61 (criticizing Volume II of the ICRC Study for failing to distinguish between State Practice supporting the particular rule in international versus non-international armed conflicts, unlike the commentary to the rules in Volume I).

³³³ Only two of the domestic laws cited by the ICRC Study (Ireland's and Norway's) specifically criminalize behavior covered either by the proposed rule or by the Additional Protocols, and not just by the four Geneva Conventions of 1949. ICRC STUDY, *supra* note 2, Vol. II: Practice, at 2599-600 §§ 85, 89. “Ireland's Geneva Conventions Act as amended” punishes minor breaches of the Geneva Conventions as well as of the Additional Protocols. Ireland, *Geneva Conventions (Amendment) Act as amended* (1998), §§ 4(1) & (4), available at <http://www.irishstatutebook.ie/1998/en/act/pub/0035/print.html>; ICRC STUDY, *supra* note 2, Vol. II: Practice, at 2599 § 85. Ireland signed the Additional Protocols on December 12, 1977. 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). Ireland revised its statutes to criminalize violations of the Additional Protocols on July 13, 1998. Ireland, *Geneva Conventions (Amendment) Act as amended* (1998), §§ 4(1) & (4), available at <http://www.irishstatutebook.ie/1998/en/act/pub/0035/print.html>. Ireland then ratified the Additional Protocols on May 19, 1999. 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*

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

Parties to Additional Protocol II, available at <http://www.cicr.org/ihl.nsf/WebSign?ReadForm&id=475&ps=P> (last visited Dec. 16, 2007). Although Ireland’s ratification of the Additional Protocols was subsequent to its criminalizing violations of them, the timing is such that it would appear that Ireland was merely complying with its treaty obligations to do so, albeit ten months prematurely. See Additional Protocol I, *supra* note 24, at art. 85(1). See also PERSPECTIVES ON THE ICRC STUDY, *supra* note 2, at 36 (making a similar argument that France’s military manual “was promulgated in the same year as it ratified Additional Protocol I: one might expect some caution in viewing this as anything other than the declaration of its obligations under the Additional Protocol.”); Yoram Dinstein, *The ICRC Customary International Humanitarian Law Study*, 36 Isr. Y.B. Hum. Rts. 1, 10-11 ¶ 19 (2006) (interpreting the ICJ’s opinion in the *North Sea Continental Shelf Case* as not considering relevant for customary international law formation purposes “not only the practice of Contracting Parties among themselves but even the practice among States that shortly would become Contracting Parties”); *supra* note 163 and accompanying text (citing the relevant language from the ICJ’s opinion in the *North Sea Continental Shelf Case*). “Norway’s Military Penal Code as amended” similarly includes criminal penalties for violations of the four Geneva Conventions of 1949, “[and in] the two additional protocols to these Conventions” (emphasis added). ICRC STUDY, *supra* note 2, Vol. II: Practice, at 2600 § 89; *Militær Straffelov* of 22 May 1902, No. 13, Art. 108(b) p. 17 (as incorporated by the law of 26 November 1954, No. 6, and amended by the law of 12 June 1981, No. 65), available at <http://www.fao.no/liabilities/Norway.pdf>. See also ICRC, *Individual Criminal Responsibility for Violations of International Humanitarian Law Committed in Non-International Armed Conflicts*, ICRC, Mar. 31, 1998, note 56, available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/57JP4L>. Norway signed the Additional Protocols on December 12, 1977. 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). Norway revised its military penal code to criminalize violations of the Additional Protocols on June 12, 1981. *Militær Straffelov* of 22 May 1902, No. 13, Art. 108(b) p.17 (as incorporated by the law of 26 November 1954, No. 6, and amended by the law of 12 June 1981, No. 65), available at <http://www.fao.no/liabilities/Norway.pdf>. See also ICRC, *Individual Criminal Responsibility for Violations of International Humanitarian Law Committed in Non-International Armed Conflicts*, ICRC, Mar. 31, 1998, note 56, available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/57JP4L>. Norway then ratified the Additional Protocols on December 14, 1981. 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). Like Ireland, Norway’s ratification of the Additional Protocols was subsequent to its criminalizing violations of them, but the timing is such that it would appear that Norway was merely complying with its treaty obligations to do so, albeit six months prematurely. See Additional Protocol I, *supra* note 24, at art. 85(1). Curiously, the ICRC Study eliminates the reference to criminalizing violations of the additional protocols when it cites the same Norwegian statute later in support of a duty to *evacuate* the wounded, sick and shipwrecked. ICRC STUDY, *supra* note 2, Vol. II: Practice, at 2610 § 167.

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,³³⁵ the military manuals of four States,³³⁶ and the domestic legislation of two additional States³³⁷ is not sufficiently dense State practice³³⁸ with sufficiently clear *opinio juris* upon which to base a new norm of customary international humanitarian law applicable to *non-international* armed conflicts,³³⁹ particularly one that deviates from the universally subscribed Geneva Conventions of 1949.³⁴⁰

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*”³⁴¹ For similar persons *at sea*,³⁴² all States have agreed to “[a]fter each engagement ...

with treaty obligations do not generally provide evidence of State practice in support of a related customary international law norm); *supra* note 333 (discussing Ireland’s and Norway’s domestic legislation, which was passed within a few months before they ratified the Additional Protocols).

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/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 *the shipwrecked, wounded and sick*³⁴³ Therefore, treaty law recognizes a *temporal distinction* between the obligation to search for and collect the wounded and sick *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 *at sea* (i.e. to do so only “[a]fter each engagement.”)³⁴⁴

Convention as protected persons “who are *at sea* and who are wounded, sick or shipwrecked”) (emphasis added) with Geneva Convention I, *supra* note 24, at art. 12, ¶ 1 (explaining coverage of the first Geneva Convention as protected persons “who are wounded or sick” with no mention of their physical location). However, it is clear that once protected persons are landed (i.e. put ashore), the provisions of Geneva Convention I apply. See, e.g., Geneva Convention II, *supra* note 24, at art. 20, ¶ 2 (explaining that once “dead persons are landed, the provisions of the [first] Geneva Convention ... shall be applicable.”); *id.* at art. 37, ¶ 3 (explaining that once retained personnel are landed, the provisions of the first Geneva Convention apply); PICTET GENEVA CONVENTION II, *supra* note 5, at 88 (“wounded, sick or shipwrecked persons on land are protected by the corresponding provisions in the First Convention”).

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

³⁴⁴ PICTET GENEVA CONVENTION II, *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). See also AP COMMENTARY, *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, *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). 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. See, e.g., PICTET GENEVA CONVENTION II, *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 *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). See also Geneva Convention II, *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, *supra* note 2, Vol. II: Practice, at 2591 § 8; PICTET GENEVA CONVENTION II, *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 soldiers³⁴⁵ 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,”³⁴⁶ perhaps during a lull in fighting),³⁴⁷ versus sailors, who are permitted to wait for the naval battle to have *ended* before doing so.³⁴⁸

The ICRC Study glosses over this temporal distinction³⁴⁹ 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); *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 wounded and sick on land. *See generally* Geneva Convention I, *supra* note 24, at art. 18; Additional Protocol I, *supra* note 24, at art. 17; Additional Protocol II, *supra* note 24, at art. 18(1); ICRC STUDY, *supra* note 2, Vol. II: Practice, at 2591. As the age-old adage goes, “the sea is a harsh mistress.”

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), *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, *available at* <http://www.navy.com/careers/enlisted/specialops/> (last visited Dec. 16, 2007)).

³⁴⁶ Geneva Convention I, *supra* note 24, at art. 15, ¶ 1.

³⁴⁷ Spain’s Law of Armed Conflict (LOAC) Manual adds the requirement to do so “during combat.” Spain, *LOAC Manual* (1996), Vol. I, § 7.5.a, *cited in* ICRC STUDY, *supra* note 2, Vol. II: Practice, at 2597 § 66. “Cameroon’s Instructors’ Manual provides that evacuation of wounded and sick can take place *during combat*, after combat or during a cease-fire.” ICRC STUDY, *supra* note 2, Vol. II: Practice, at 2606 § 134 (emphasis added).

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

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, *supra* note 2, Vol. II: Practice, at 2591 §§ 5, 7. *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. *See supra* notes 166-171 (discussing whether a subsequent norm of customary international law can modify earlier treaty language). *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.”); *id.* at 13, 406 (same); 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, 1225 (2005) (same); PERSPECTIVES ON THE ICRC STUDY, *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 109,³⁵⁰ applicable to all wounded and sick (whether on land or at sea), and to the shipwrecked.³⁵¹ 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

oversimplification³⁵² fails to recognize that within the law of armed conflict,³⁵³ the law of naval warfare is a particularly specialized *lex specialis*.³⁵⁴

article have the same meaning. Translating the legal language of Rule 109 of the ICRC Study into laymen's terms might be fairly characterized as: "do *what* you can *when* you can for the wounded and sick." These are obviously two different, albeit related concepts, since *what* you can do for the wounded and sick often depends on *when* you are trying to do it.

³⁵² See *supra* note 76 and accompanying text (criticizing the ICRC Study for oversimplifying complex and nuanced rules).

³⁵³ 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)).

³⁵⁴ The Latin maxim *lex specialis derogat lex generali* (or in the plural form *lex specialis derogat legi generali*, both usually abbreviated *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 "*generalia specialibus non derogant*", meaning, general things do not derogate from special. The other rule of interpretation meaning the same thing is – '*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%20v%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). *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, *Changes to the Department of Defense Law of War Program*, 2006 ARMY LAW. 23, 29 n. 39 (2006) (noting that the traditional view is that human rights law is preempted during armed conflict); 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 (2006) (same; see note following this string citation); Michael J. Dennis, *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, *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, 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, *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; INTERNATIONAL REVIEW OF THE RED CROSS, Vol. 87, no. 857, 186 n. 32 (2005). 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.”); DINSTEIN, 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."³⁵⁵ It simultaneously departs from the treaty law standard under the second Geneva Convention by raising the naval warfare standard of "[a]fter each engagement"³⁵⁶ to perhaps earlier in the engagement if "*circumstances permit*."³⁵⁷

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*.³⁵⁸ 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.³⁵⁹ Thus, the State practice cited by the ICRC Study does not support the new

³⁵⁵ 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. *Cf.* Geneva Convention I, *supra* note 24, at art. 15, ¶ 1 with ICRC STUDY, *supra* note 2, Vol. I: Rules, at 396. *See generally infra* Table 1, p. T-1.

³⁵⁶ Geneva Convention II, *supra* note 24, at art. 18, ¶ 1 (emphasis added). *See also* ICRC STUDY, *supra* note 2, Vol. II: Practice, at 2590 § 7.

³⁵⁷ 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." *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.

³⁵⁸ *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).

³⁵⁹ *See generally* ICRC STUDY, *supra* note 2, Vol. I: Rules, at 396-99, Vol. II: Practice, at 2590-614. *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

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

search for and rescue the shipwrecked.”).

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.

³⁶² *See* Theodor Meron, *Revival of Customary Humanitarian Law*, 99 AM. J. INT’L L. 817, 819 (2005) (noting

Conventions.³⁶³

Claimed dearth of “official contrary [State] practice.” The final substantive point to be made regarding the proposed Rule 109 of the ICRC Study is the Study’s reliance on a *lack* of “official contrary [State] practice” as being *supportive* of the proposed rule.³⁶⁴ Just as consistent State practice done out of a sense of legal obligation *supports* a new norm of customary international law,³⁶⁵ “[c]ontrary practice of States ... has been considered as important *negative* evidence [of a lack of customary international law].”³⁶⁶ However, the converse 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.³⁶⁷

that “the customary law character of ... practically [] the entire corpus of the Geneva Conventions, is now taken for granted and virtually never questioned.”).

³⁶³ 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*).

³⁶⁴ ICRC STUDY, *supra* note 2, Vol. I: Rules, at 398.

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 “[does] 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.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.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.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 agree 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.

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 ENVTL. L. REV. 273 (2005).

³⁶⁹ *See supra* notes 250-283 and accompanying text.

regarding *when* to search for and collect the wounded, sick and shipwrecked.³⁷¹

The State practice cited for the proposed new norm is either surprisingly thin,³⁷² or nonexistent.³⁷³ Nor can the absence of contrary State practice support a new norm of customary international law.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,³⁷⁵ and that *shipwrecked* civilians are entitled to the same protections as shipwrecked combatants.³⁷⁶ However, since the former obligation is required by the first and second Geneva Conventions of 1949, to which every State is a party,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.³⁷⁸

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.”).

³⁷¹ See *supra* notes 341-359 and accompanying text.

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.”).

³⁷³ See *supra* note 359 (discussing the complete lack of State practice addressing the temporal distinction).

³⁷⁴ See *supra* notes 364-368.

³⁷⁵ See *supra* notes 360-363 and accompanying text.

³⁷⁶ See *supra* note 268.

³⁷⁷ See *supra* note 32 and accompanying text.

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.”³⁷⁹ However, similarly to Rule 109, the ICRC Study recognizes that the obligation espoused by Rule 110 “is an obligation of means.”³⁸⁰ Similarly, whereas the obligation under Rule 109 is “to take *all possible measures*”³⁸¹ to search for, collect and evacuate the wounded, sick and shipwrecked,³⁸² the obligation under Rule 110 is to provide care “to the fullest extent practicable,”³⁸³ or in other words, “[e]ach party to the conflict must use its best efforts to provide ... care for the wounded, sick and shipwrecked.”³⁸⁴ This includes “permitting humanitarian organisations to provide for their protection and care.”³⁸⁵

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

³⁸⁰ ICRC STUDY, *supra* note 2, Vol. I: Rules, at 402.

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.

³⁸² ICRC STUDY, *supra* note 2, Vol. I: Rules, at 396.

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.³⁸⁶ The ICRC Study also again professes that this is a customary international law norm “applicable in both international and non-international armed conflicts.”³⁸⁷

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*;³⁸⁸ the obligations to care for the wounded, sick and shipwrecked in *non-international armed conflicts*;³⁸⁹ the treatment of wounded, sick and shipwrecked *without adverse distinction*;³⁹⁰ and the claimed *dearth of contrary State practice* as support for the proffered norm.³⁹¹ Each of these issues will be discussed in turn.

International Armed Conflicts—Combatants vs. Civilians. Unlike the proposed Rule 109, Rule 110 of the ICRC Study does not *expressly* include civilians within the duty to *care for the wounded, sick and shipwrecked*.³⁹² Nevertheless, the commentary³⁹³ to Rule 110

³⁸⁶ See *supra* note 243 and accompanying text (discussing the military feasibility implicit in Rule 109 of the ICRC Study).

³⁸⁷ ICRC STUDY, *supra* note 2, Vol. I: Rules, at 400. See also *id.* at 402.

³⁸⁸ See *infra* notes 392-429 and accompanying text.

³⁸⁹ See *infra* notes 430-440 and accompanying text.

³⁹⁰ See *infra* notes 441-445 and accompanying text.

³⁹¹ See *infra* notes 446-447 and accompanying text.

³⁹² Compare ICRC STUDY, *supra* note 2, Vol. I: Rules, at 396 with *id.* at 400.

³⁹³ 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

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.”).

³⁹⁴ ICRC STUDY, *supra* note 2, Vol. I: Rules, at 400 (emphasis added). *See supra* notes 273-275 (criticizing the ICRC Study for its overgeneralization and mischaracterization of U.S. and at least nine other military manuals, which, in fact, differentiate between the treatment owed to military and civilian wounded, sick and shipwrecked). *See also* ICRC STUDY, *supra* note 2, Vol. II: Practice, at 2634-35 §§ 357, 371 (noting that Australia’s 1994 Defence Force Manual and New Zealand’s 1992 Military Manual provide that “‘there is no absolute obligation to accept civilian wounded and sick,’ but that “‘once civilian patients have been accepted, discrimination against them, on any grounds other than medical, is not permissible’.”). Australia’s 1994 Defence Force Manual and New Zealand’s 1992 Military Manual would appear to be at odds with the provisions of the Additional Protocols to care for wounded, sick and shipwrecked combatants and civilians alike. Additional Protocol I, *supra* note 24, at art. 10(2) and Additional Protocol II, *supra* note 24, at art. 7(2). Yet Australia acceded to the Additional Protocols three years before it published its 1994 Defence Force Manual, and New Zealand acceded to them four years before it published its 1992 Military Manual! 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). This is an excellent example of why not to overly rely on military manuals as evidence of State practice.

shipwrecked” language,³⁹⁵ with these groups being defined earlier in Article 8 of Additional Protocol I as including “persons, *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 *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, *supra* note 24, at art. 10(1).

³⁹⁶ *Id.* at art. 8(1) & (2).

³⁹⁷ 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. See also AP COMMENTARY, *supra* note 242, at § 4639. See generally *infra* Table 1, p. T-1.

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

³⁹⁹ 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 vis-à-vis the four Geneva Conventions of 1949). See generally AP COMMENTARY, *supra* note 242; 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.”).

modify an earlier treaty-based obligation would have to show sufficiently dense State practice with sufficiently clear *opinio juris*.⁴⁰⁰ The materials cited by the ICRC Study in support of proposed Rule 110 do neither.⁴⁰¹

The commentary to proposed Rule 110 cites to military manuals and domestic legislation in support of the new norm of customary international law.⁴⁰² However, the vast majority of the military manuals⁴⁰³ cited by Rule 110 are consistent with existing treaty obligations under the Geneva Conventions (i.e. they do not extend their protections to civilians).⁴⁰⁴ 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

⁴⁰⁰ 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).

⁴⁰¹ The ICRC Study once again lists “*Practice of the International Red Cross and Red Crescent Movement*” in support of its proposed Rule 110. ICRC STUDY, *supra* note 2, Vol. II: Practice, at 2630-32, 2638-39 §§ 328-340, 396-400. See *supra* note 305 and accompanying text (criticizing the hubris of the ICRC for citing to itself, a Swiss NGO, as evidence of State Practice in support of a proposed norm of customary international law).

⁴⁰² ICRC STUDY, *supra* note 2, Vol. I: Rules, at 400.

⁴⁰³ See *supra* notes 49, 114, 317, 328, 394 and accompanying text (noting the weaknesses of citing to military manuals as evidence of State practice).

⁴⁰⁴ ICRC STUDY, *supra* note 2, Vol. II: Practice, at 2617-25 §§ 216-217 (Australia), §§ 218-219 (Belgium), § 220 (Benin), § 221 (Bosnia and Herzegovina), § 222 (Burkina Faso), §§ 223-224 (Cameroon), §§ 227-229 (Colombia), § 230 (Congo), §§ 231-233 (Croatia), § 234 (Ecuador), §§ 236-238 (France), §§ 239-240 (Germany), § 241 (Hungary), § 244 (Indonesia), § 245 (Israel), § 246 (Italy), § 247 (Kenya), § 248 (Lebanon), § 249 (Madagascar), § 250 (Mali), § 251 (Morocco), § 255 (New Zealand), § 256 (Nicaragua), § 265 (Romania), § 266 (Russia), § 268 (Senegal), § 270 (Spain), § 273 (Switzerland), § 274 (Togo), §§ 276-277 (U.K.), §§ 278-281 (U.S.). Of course, the fact that these military manuals do not extend their protections to civilians also argues against the ICRC Study’s characterization of them as being in “general terms covering *all* wounded, sick and shipwrecked.” *Id.*, Vol. I: Rules, at 400 (emphasis added). See also *supra* notes 273-275 and accompanying text (discussing 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, 366 (noting that Hungary’s Military Manual “makes an explicit reference to GC I as being the regime applicable to the wounded and sick.”

cited.⁴⁰⁵ 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

⁴⁰⁵ Compare ICRC STUDY, *supra* note 2, Vol. I: Rules, at 400, Vol. II: Practice, at 2617-19, 2621-23 §§ 214-215 (Argentina), §§ 225-226 (Canada), §§ 252-254 (the Netherlands), §§ 261-264 (Philippines), § 267 (Rwanda), § 269 (South Africa), with 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). See also DOS/DoD Letter to ICRC, *supra* note 3, at attachment p. 10 (making a similar complaint about proposed Rule 45 of the ICRC Study); *supra* note 275 (making a similar complaint about proposed Rule 109 of the ICRC Study).

⁴⁰⁶ See *supra* notes 163, 221-222.

⁴⁰⁷ ICRC STUDY, *supra* note 2, Vol. II: Practice, at 2619 § 235 (El Salvador).

⁴⁰⁸ Compare ICRC STUDY, *supra* note 2, Vol. I: Rules, at 400, Vol. II: Practice, 2622, 2624 §§ 257-260 (Nigeria), §§ 271-272 (Sweden), § 275 (Uganda) with 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). “Sweden’s IHL Manual, in particular, identifies Article 10 of Additional Protocol I as a codification of customary international law. ICRC STUDY, *supra* note 2, Vol. I: Rules, at 400. This once again begs the question whether these five States’ compliance with an arguably new norm of customary international law was subsumed by their subsequent accession to the Additional Protocols (except for India, of course). See *supra* note 327 and accompanying text.

⁴⁰⁹ See ICRC STUDY, *supra* note 2, Vol. I: Rules, at 400, Vol. II: Practice, at 2620-21 §§ 242-243. 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).

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.⁴¹¹ As for Rule 109,⁴¹² Rule 110 cites to the domestic legislation of Ireland and Norway, which specifically criminalize violations of the Additional Protocols.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”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.⁴¹⁵ However, Colombia likewise was merely complying with its treaty obligations, since it had ratified the Additional Protocols in 1993 and 1995 respectively.⁴¹⁶

Study”); David Turns, *Weapons in the ICRC Study on Customary International Humanitarian Law*, 11 J. CONFLICT & SECURITY L. 201, 208 (2006) (noting “the paucity of the evidence cited in support of [the ICRC Study’s] contentions”).

⁴¹¹ ICRC STUDY, *supra* note 2, Vol. I: Rules, at 400, Vol. II: Practice, at 2625-26 §§ 282-298. Once again, the ICRC Study cites to *draft* legislation from Argentina and El Salvador. ICRC STUDY, *supra* note 2, Vol. I: Rules, at 401, Vol. II: Practice, at 2625-26 §§ 282, 289. As tenuous as citing to domestic legislation is in this area, citing to *draft* legislation is sheer folly. See *supra* note 331.

⁴¹² See *supra* note 333.

⁴¹³ ICRC STUDY, *supra* note 2, Vol. I: Rules, at 400, Vol. II: Practice, at 2626, 2637 §§ 291-292, 389-390.

⁴¹⁴ 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 with treaty obligations do not generally provide evidence of State practice in support of a related customary international law norm); *supra* note 333 (discussing Ireland’s and Norway’s domestic legislation, which was passed within a few months before they ratified the Additional Protocols).

⁴¹⁵ ICRC STUDY, *supra* note 2, Vol. I: Rules, at 400, Vol. II: Practice, at 2625 § 286; Colombian Law 599/2000 (New Penal Code), art. 135, available at [http://www.wihl.nl/finals/Colombia/CO.L-PC.Title%20II%20\(New%20Col.%20Penal%20Code\)%20Trans.pdf](http://www.wihl.nl/finals/Colombia/CO.L-PC.Title%20II%20(New%20Col.%20Penal%20Code)%20Trans.pdf).

⁴¹⁶ 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). See Additional Protocol I, *supra* note 24, at art. 85(1).

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 1995.⁴¹⁷ However, since the commentary to the ICRC Study did not mention this “battlefield” practice, it was presumably not considered in developing Rule 110.⁴¹⁸ 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.”⁴¹⁹ Once again we must question the propriety of citing to a working draft of the Study itself which is not generally available for examination.⁴²⁰

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.⁴²¹

⁴¹⁷ ICRC STUDY, *supra* note 2, Vol. II: Practice, at 2627 § 303.

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.”).

⁴²⁴ 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); 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.”); CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, FORGED IN THE FIRE: LEGAL LESSONS LEARNED DURING MILITARY OPERATIONS (1994-2006) 30 (2006) (noting that “[g]enerally, during combat operations non-coalition personnel were not entitled to full medical care by the U.S. military.”).

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 HN [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,⁴²⁶ and “only for injuries that threatened their *life, limbs, or eyesight*.”⁴²⁷ 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].”⁴²⁸ 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.⁴²⁹

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, sick⁴³⁰ and shipwrecked,⁴³¹ and to treat them humanely.⁴³²

⁴²⁶ CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, FORGED IN THE FIRE: LEGAL LESSONS LEARNED DURING MILITARY OPERATIONS (1994-2006) 200-01 (2006); Department of Defense Instruction 3020.41, Contractor Personnel Authorized to Accompany the U.S. Armed Forces 19 ¶ 6.3.8 (Oct. 3, 2005).

⁴²⁷ CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, FORGED IN THE FIRE: LEGAL LESSONS LEARNED DURING MILITARY OPERATIONS (1994-2006) 30, 31 (2006); Department of Defense Instruction 3020.41, Contractor Personnel Authorized to Accompany the U.S. Armed Forces 19 ¶ 6.3.8 (Oct. 3, 2005).

⁴²⁸ CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, FORGED IN THE FIRE: LEGAL LESSONS LEARNED DURING MILITARY OPERATIONS (1994-2006) 30 (2006).

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.”⁴³³ 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.”).

⁴³⁴ ICRC STUDY, *supra* note 2, Vol. I: Rules, at 400-01 nn. 28 & 33, Vol. II: Practice, at 2615-16 §§ 199, 201. *See generally* ICRC STUDY, *supra* note 2, Vol. I: Rules, at 400-03, Vol. II: Practice, at 2615-39. *See also* AP COMMENTARY, *supra* note 242, at §§ 451, 4645 (discussing the addition of this language to Article 10(2) of Additional Protocol I, and to Article 7(2) of Additional Protocol II, respectively).

⁴³⁵ ICRC STUDY, *supra* note 2, Vol. I: Rules, at 401, Vol. II: Practice, at 2626 § 299; Argentina, National Court of Appeals, *Military Junta case*, Judgement, 9 Dec. 1985.

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.⁴³⁷ 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.”⁴³⁸

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.⁴³⁹ 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).

⁴³⁷ 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).

⁴³⁸ 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”).

⁴³⁹ *See supra* note 32 (noting that all States are now party to the four Geneva Conventions of 1949).

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.⁴⁴⁰

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”⁴⁴¹ This principle is consistent with the Geneva Conventions,⁴⁴² which recognize that it is only permissible to make a *beneficial* distinction (e.g. treating the most urgent patients first).⁴⁴³ 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),⁴⁴⁴ or merely pursuant to their treaty obligations under the Geneva Conventions.⁴⁴⁵

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).

⁴⁴¹ ICRC STUDY, *supra* note 2, Vol. I: Rules, at 400, Vol. II: Practice, at 2632-39 §§ 344-402. See also commentary to Rule 88 of the ICRC STUDY, *supra* note 2, Vol. I: Rules, at 308-11, Vol. II: Practice, at 2024-61 (prohibition on adverse distinction); 1948 Universal Declaration of Human Rights, art. 2 (prohibiting adverse distinction for any fundamental human rights contained therein); *supra* notes 360-363 (analyzing the principle of no adverse distinction vis-à-vis Rule 109).

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.

⁴⁴⁴ See Theodor Meron, *Revival of Customary Humanitarian Law*, 99 AM. J. INT’L L. 817, 819 (2005) (noting

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.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.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.⁴⁴⁸ Second, it seeks to extend the obligations to care for wounded, sick and shipwrecked *in toto* to *non-international* armed conflicts.⁴⁴⁹

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

that “the customary law character of ... practically [] the entire corpus of the Geneva Conventions, is now taken for granted and virtually never questioned.”).

⁴⁴⁵ See *supra* notes 163, 221-222 and accompanying text (discussing the difficulty in separating State practice done out of a sense of legal obligation versus State practice done in accordance with existing treaty obligations). Cf. 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) (arguing that the ICRC Study overemphasizes the number of parties to a treaty, probably because of the controversial portions of Additional Protocol I). *Contra* ICRC STUDY, *supra* note 2, Vol. II: Practice, at 2628 § 316 (citing to the Report on the Practice of Zimbabwe: “Zimbabwe seems to regard as customary, the rules of international practice codified in the Geneva Conventions as regards the ... care of the wounded.”).

⁴⁴⁶ ICRC STUDY, *supra* note 2, Vol. I: Rules, at 401.

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).

⁴⁴⁸ See *supra* notes 392-429 and accompanying text.

⁴⁴⁹ See *supra* notes 430-440 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.”).

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). 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.⁴⁵¹ 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.⁴⁵² However, since this obligation is required by the first and second Geneva Conventions of 1949,⁴⁵³ to which every State is a party,⁴⁵⁴ 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.⁴⁵⁵

(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,⁴⁵⁶ but rather on the specific requirement to *protect* the wounded, sick and shipwrecked from the “hyena[s] of the battlefield.”⁴⁵⁷ Like

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,⁴⁵⁸ by limiting the duty to *protect* the wounded, sick and shipwrecked to merely “tak[ing] *all possible measures*.”⁴⁵⁹ The ICRC Study once again professes that this is a customary international law norm “applicable in both international and non-international armed conflicts.”⁴⁶⁰

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;⁴⁶¹ the obligations to so protect them in *non-international armed conflicts*;⁴⁶² and the claimed *dearth of contrary State practice* as support for the proffered norm.⁴⁶³ 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,⁴⁶⁴ Rule 111 *omits* any timing

24, at art. 16, ¶ 2. See generally *infra* Table 3, p. T-3.

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

⁴⁵⁹ ICRC STUDY, *supra* note 2, Vol. I: Rules, at 403. See *supra* 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 403 with Geneva Convention I, *supra* note 24, at art. 15, ¶ 1 and Geneva Convention II, *supra* note 24, at art. 18, ¶ 1.

⁴⁶⁰ ICRC STUDY, *supra* note 2, Vol. I: Rules, at 403.

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.

requirement whatsoever.⁴⁶⁵ Yet 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 protect [the wounded and sick] against pillage and ill-treatment”⁴⁶⁶ 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”⁴⁶⁷ 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.⁴⁶⁸

However, Rule 111 of the ICRC Study ignores this distinction in timing,⁴⁶⁹ and fails to adopt even the more lenient “*whenever circumstances permit*” standard of Additional Protocol II,⁴⁷⁰ as it did for Rule 109.⁴⁷¹ Instead, the proposed Rule 111 simply removes any suggestion that this duty may have a temporal component.⁴⁷² Neither the commentary⁴⁷³ to

⁴⁶⁵ ICRC STUDY, *supra* note 2, Vol. I: Rules, at 403.

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.

⁴⁷⁰ Additional Protocol II, *supra* note 24, at art. 8 (emphasis added). See also ICRC STUDY, *supra* note 2, Vol. I: Rules, at 403, Vol. II: Practice, at 2640 § 409.

⁴⁷¹ See *supra* note 350 and accompanying text.

⁴⁷² ICRC STUDY, *supra* note 2, Vol. I: Rules, at 403.

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

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). 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* 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); 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.”).

⁴⁷⁴ See generally ICRC STUDY, *supra* note 2, Vol. I: Rules, at 403-05, Vol. II: Practice, at 2640-54.

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).

show sufficiently dense State practice with sufficiently clear *opinio juris*.⁴⁷⁶ 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 111.⁴⁷⁷ The ICRC Study just oversimplified the temporal component out of existence.⁴⁷⁸

Non-international armed conflicts. Although Common Article 3 lists certain acts which are prohibited against “those placed hors de combat by sickness [or] wounds,”⁴⁷⁹ 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*.⁴⁸⁰ 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.⁴⁸¹

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).

⁴⁷⁷ See generally ICRC STUDY, *supra* note 2, Vol. I: Rules, at 403-05, Vol. II: Practice, at 2640-54. The ICRC Study cites to *draft* legislation from Argentina. *Id.*, Vol. II: Practice, at 2643 § 445. See *supra* note 331 and accompanying text (criticizing citations to draft legislation).

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.⁴⁸² 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.⁴⁸³

Of the four domestic laws⁴⁸⁴ 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.⁴⁸⁵ The three remaining domestic laws cited by the ICRC Study were passed by Azerbaijan (which is not a party to the Additional Protocols),⁴⁸⁶ Ireland and Norway,⁴⁸⁷ with the latter two being amended within months of their respective

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).

⁴⁸³ Compare ICRC STUDY, *supra* note 2, Vol. II: Practice, at 2641-42 § 419 (Canada), § 431 (Netherlands), § 432 (New Zealand) with 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). See also *supra* notes 49, 114, 317, 328, 394 and accompanying text (noting the weaknesses of citing to military manuals as evidence of State practice).

⁴⁸⁴ ICRC STUDY, *supra* note 2, Vol. II: Practice, at 2644, 2646, 2648, 2649 § 448 (Azerbaijan), § 475 (Ireland), § 493 (Norway), § 503 (Tajikistan).

⁴⁸⁵ Compare ICRC STUDY, *supra* note 2, Vol. II: Practice, at 2649 § 503 (Tajikistan) with *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).

⁴⁸⁶ 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).

⁴⁸⁷ ICRC STUDY, *supra* note 2, Vol. II: Practice, at 2646, 2648, 2652-53 §§ 475, 493, 537, 538.

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”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,”⁴⁸⁹ and a rare instance of battlefield practice in Yugoslavia.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 practice⁴⁹¹ with sufficiently clear *opinio juris* upon which to base a new norm of customary international humanitarian law applicable to *non-international* armed conflicts,⁴⁹² particularly one that deviates from the universally subscribed Geneva Conventions of 1949.⁴⁹³

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

⁴⁸⁸ 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 with treaty obligations do not generally provide evidence of State practice in support of a related customary international law norm); *supra* note 333 (discussing Ireland’s and Norway’s domestic legislation, which was passed within a few months before they ratified the Additional Protocols).

⁴⁸⁹ ICRC STUDY, *supra* note 2, Vol. II: Practice, at 2650 § 518. See also CARNAHAN, REPORT ON U.S. PRACTICE, *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. *Id.* at Chapter 5, Annexes 8 and 9. 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).

⁴⁹⁰ ICRC STUDY, *supra* note 2, Vol. II: Practice, at 2650 § 519.

⁴⁹¹ 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).

⁴⁹² See also 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.”).

⁴⁹³ 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.⁴⁹⁴ 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,⁴⁹⁸ if only in terms of its compilation of a wealth of State practice.⁴⁹⁹ Moreover, some of the ICRC Study rules “undoubtedly [are]

⁴⁹⁴ ICRC STUDY, *supra* note 2, Vol. I: Rules, at 404.

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).

⁴⁹⁹ See PERSPECTIVES ON THE ICRC STUDY, *supra* note 2, at 411 (noting that the State practice in Volume II of the ICRC Study “will, perhaps, be quite as useful as the exact wording of the Rules themselves.”); Dino Kritsiotis, *Customary International Humanitarian Law*, 101 AM. J. INT’L L. 692, 692 (2007) (book review) (commenting that the ICRC Study “is an undeniable embarrassment of empirical riches”); 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, 523-24 (2006) (arguing that “the vast collection of backup material in Volume II is irreplaceable”); David Turns, *Weapons in the ICRC Study on Customary International Humanitarian Law*, 11 J. CONFLICT & SECURITY L. 201, 201 (2006) (noting that “[b]y any standards, it has to be regarded as a massive work of legal scholarship.”); Theodor Meron, *Revival of Customary Humanitarian Law*, 99 AM. J. INT’L L. 817, 833 (2005) (noting that “[n]o restatement of international law has eve[r] tried to amass such a rich collection of empirical data.”).

part of the corpus of customary international law.”⁵⁰⁰ However, some of the ICRC Study rules are unsustainable under the traditional theory of customary international law formation,⁵⁰¹ 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,⁵⁰³ 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.⁵⁰⁴ Moreover, its methodological approach is not rigorous but slipshod,⁵⁰⁵ not laser-accurate⁵⁰⁶

⁵⁰⁰ David Turns, *Weapons in the ICRC Study on Customary International Humanitarian Law*, 11 J. CONFLICT & SECURITY L. 201, 213. See *id.* at 211-19 (2006) (admitting that ICRC Study Rule 70 (prohibition on “means and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering”) and Rule 71 (prohibition on the use of inherently indiscriminate weapons) reflect customary international law); ICRC STUDY, *supra* note 2, Vol. I: Rules, at 237-50.

⁵⁰¹ 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, 252 (2006) (concluding that “[t]hrough the [ICRC Study] is the product of many years of extensive research, it does not reflect the customary IHL rules in the traditional sense of customary law.”).

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”).

⁵⁰⁴ See, e.g., 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.”); *supra* notes 281, 313, 329, 338, 359, 410, 421, 439, 491 (criticizing the ICRC Study for attempting to assert new norms of customary international law based on remarkably thin or nonexistent State practice).

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

⁵⁰⁶ See David Turns, *Weapons in the ICRC Study on Customary International Humanitarian Law*, 11 J. CONFLICT & SECURITY L. 201, 203 (2006) (comparing the ICRC Study to a blunderbuss); Yoram Dinstein, *The ICRC Customary International Humanitarian Law Study*, 36 Isr. Y.B. Hum. Rts. 1, 3 ¶ 4 (2006) (noting that the

but oversimplified,⁵⁰⁷ and not descriptive but aspirational.⁵⁰⁸ By striving for too much,⁵⁰⁹ the

ICRC Study should have “systematically examin[ed] AP I, Article by Article” rather than “go[ing] in several different directions.”).

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, *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).

⁵⁰⁸ PERSPECTIVES ON THE ICRC STUDY, *supra* note 2, at 406-07; 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, 116-17 (2007); 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, 223 (2006); David Turns, *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, *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 *lex lata* [what the law is] or wide supported *lex ferenda* [what the law ought to be].”); *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 *lex lata* for the former States) and moves into the realm of the *lex ferenda* (for both the former and the latter States).”); 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, 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.”). *Contra* ICRC STUDY, *supra* note 2, Vol. I: Rules, at xi, xiii, xviii. But see 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 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”); *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.”); *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).”); *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 [*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).

⁵⁰⁹ 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.”); *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 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.”).

ICRC Study perhaps achieves too little.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 *opinio juris*.⁵¹¹

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

⁵¹⁰ See, e.g., 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) (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, *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.]”; *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.”); CUSTOM, POWER AND THE POWER OF RULES, *supra* note 21, at 119 (noting that “international actors prefer stability and determinacy to instability and indeterminacy”).

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); *supra* notes 168-170 (requiring a clear manifestation that a significant number of States intend to deviate from existing treaty law).

⁵¹² PERSPECTIVES ON THE ICRC STUDY, *supra* note 2, at 47.

⁵¹³ Yoram Dinstein, *The ICRC Customary International Humanitarian Law Study*, 36 ISR. Y.B. HUM. RTS. 1, 1 ¶ 1 (2006) (noting that “whatever one’s view is of the overall success of the [ICRC Study], no scholar or practitioner can afford to ignore it.”); PERSPECTIVES ON THE ICRC STUDY, *supra* note 2, at 4. *Contra* 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.”).

⁵¹⁴ PERSPECTIVES ON THE ICRC STUDY, *supra* note 2, at 411. See also Ryszard Piotrowicz, *Customary International Humanitarian Law*, 25 AUSTL. Y.B. INT’L L. 348, 348 (2006) (book review) (same); Theodor Meron, *Revival of Customary Humanitarian Law*, 99 AM. J. INT’L L. 817, 834 (2005) (same).

⁵¹⁵ Malcolm MacLaren & Felix Schwendimann, *An Exercise in the Development of International Law: The*

imprimatur of the ICRC itself,⁵¹⁶ and the ease of referencing putative rules of customary international law that were hitherto difficult to discern.⁵¹⁷ The problem with this is that the ICRC Study will be and has been cited as final authority⁵¹⁸ by the uninitiated public,⁵¹⁹ by putative scholars who only read the rules without carefully analyzing either the commentary⁵²⁰ or supporting State practice, and by overburdened judges⁵²¹ or those

New ICRC Study on Customary International Humanitarian Law, 6 GERMAN L. J. 1217, 1240 (2005).

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.").

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).

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).

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).

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.⁵²² This concern is only partially obviated by the recent publication of the companion book “*Perspectives on the ICRC Study on Customary International Humanitarian Law*,”⁵²³ because it is one step removed from the Study itself, and because it does not carry the imprimatur of the ICRC.⁵²⁴

In publishing the study, the ICRC intended to start the conversation,⁵²⁵ 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.”).

⁵²² PERSPECTIVES ON THE ICRC STUDY, *supra* note 2, at 20 (noting that while States may hesitate to use the Study because they were not involved in its creation, “this consideration will not apply to non-governmental lawyers or, presumably, to domestic and international courts and tribunals.”); *id.* at 409 (noting that the Study’s “use, as a matter of course, by international and national courts and tribunals can be confidently expected.”); *id.* (noting that “[t]he Study has already had an impact in judicial decisions.”); 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, 250-51 (2006) (same); David Turns, *Weapons in the ICRC Study on Customary International Humanitarian Law*, 11 J. CONFLICT & SECURITY L. 201, 202, 236 (2006) (same); 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, 1231 (2005) (same); Theodor Meron, *Revival of Customary Humanitarian Law*, 99 AM. J. INT’L L. 817, 834 (2005) (same); Hamdan v. Rumsfeld, 126 S.Ct. 2749, 2797, 2803 (2006) (citing to commentary to Rule 100 regarding the definition of a “regularly constituted court” in Common Article 3); 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 n. 11 (2006) (citing to courts which have already relied on the ICRC Study).

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 “[That t]he 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.⁵²⁶ Although the ICRC Study was published in 2005, there has only been one State to officially comment on it, and then only cursorily.⁵²⁷ What is needed is for States and “the most highly qualified publicists”⁵²⁸ “to parse every Rule in the Study,”⁵²⁹ and then to provide their observations and objections.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

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.”).

⁵²⁶ See, e.g. PERSPECTIVES ON THE ICRC STUDY, *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, *An Exercise in the Development of International Law: The New ICRC Study on Customary International Humanitarian Law*, 6 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.”). Cf. David Turns, *Weapons in the ICRC Study on Customary International Humanitarian Law*, 11 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”). *Contra* 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) (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.”).

⁵²⁷ DOS/DoD Letter to ICRC, *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.”); *id.* at attachment (only analyzing Rules 31, 45, 78 and 157 in depth).

⁵²⁸ 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.

⁵²⁹ Yoram Dinstein, *The ICRC Customary International Humanitarian Law Study*, 36 Isr. Y.B. Hum. Rts. 1, 11 ¶ 21 (2006). See also Peter Rowe, *The Effect on National Law of the Customary International Humanitarian Law Study*, 11 J. CONFLICT & SECURITY L. 165, 165 (2006) (noting that the ICRC Study “is a work calling for detailed discussion by those with a serious interest in 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) (arguing that a close analysis is important if the point of the study is to be the beginning of discussions).

⁵³⁰ 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).

institutions sponsored regular conferences or symposia⁵³¹ 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.⁵³²

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

⁵³¹ Cf. 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).

⁵³² 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. PERSPECTIVES ON THE ICRC STUDY, *supra* note 2, at ix.

the perhaps less-than-candid⁵³³ rules of the ICRC Study itself.⁵³⁴ Once again the ICRC will have served as the *catalyst*⁵³⁵ for the development of international humanitarian law.

⁵³³ See David Turns, *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); *id.* at 202 (noting that “the more closely one reads the Study, the more certain flaws become apparent.”); 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) (using the metaphor that the ICRC Study is an impressionist painting—the closer you look, the less beautiful it seems); W. Hays Parks, *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.”).

⁵³⁴ This commentary could also be used to update the ICRC Study itself, which may be a useful enterprise. 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, *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. *Id.* Another potential rule could concern the legality or illegality of using nuclear weapons. See *supra* note 58 (discussing these *lacunae* in the ICRC Study).

⁵³⁵ Yoram Dinstein, *The ICRC Customary International Humanitarian Law Study*, 36 Isr. Y.B. Hum. Rts. 1, 5 ¶ 9 (2006). 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, 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.”)

Table 1

“Search For, Collect & Evacuate”	International Armed Conflicts (IAC)	Non-International Armed Conflicts (NIAC)
1949 Geneva Conventions	<u>Geneva—Wounded & Sick, Article 12:</u> • 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 <u>Geneva—Wounded & Sick, Article 15:</u> • 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 <u>Geneva—Wounded, Sick & Shipwrecked, Article 18:</u> • 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 <u>Geneva—Civilians, Article 16:</u> • 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 <u>Geneva—Civilians, Article 17:</u> • 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	<u>Common Article 3(2):</u> • The wounded, sick and shipwrecked • Shall be collected and cared for
1977 Additional Protocols	<u>Additional Protocol I, Article 10(1):</u> • All the [military or civilian] wounded, sick and shipwrecked ... • Shall be respected and protected	<u>Additional Protocol II, Article 8:</u> • 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
2005 ICRC Study on CIHL	<u>Rule 109:</u> • 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	

Table 2

“Care For”	International Armed Conflicts (IAC)	Non-International Armed Conflicts (NIAC)
1949 Geneva Conventions	<u>Geneva—Wounded & Sick, Article 12:</u> • 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 <u>Geneva—Wounded & Sick, Article 15:</u> • 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] <u>Geneva—Wounded, Sick & Shipwrecked, Article 12:</u> • 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 <u>Geneva—Wounded, Sick & Shipwrecked, Article 18:</u> • 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] <u>Geneva—Civilians, Article 16:</u> • The wounded and sick, as well as the infirm, and expectant mothers • Shall be the object of particular protection and respect	<u>Common Article 3(1):</u> • 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 <u>Common Article 3(2):</u> • The wounded, sick and shipwrecked • Shall be collected and cared for
1977 Additional Protocols	<u>Additional Protocol I, Article 10(2):</u> • [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	<u>Additional Protocol II, Article 7:</u> • 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 <u>Additional Protocol II, Article 8:</u> • 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]
2005 ICRC Study on CIHL	<u>Rule 110:</u> • 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 3

“Protect Against Pillage & Ill-treatment”	International Armed Conflicts (IAC)	Non-International Armed Conflicts (NIAC)
1949 Geneva Conventions	<u>Geneva—Wounded & Sick, Article 15:</u> • At all times, and particularly after an engagement • Parties to the conflict shall, without delay, take all possible measures • To protect [the wounded and sick] against pillage and ill-treatment <u>Geneva—Wounded, Sick & Shipwrecked, Article 18:</u> • After each engagement • Parties to the conflict shall, without delay, take all possible measures • To protect [the shipwrecked, wounded and sick] against pillage and ill-treatment <u>Geneva—Civilians, Article 16:</u> • As far as military considerations allow • Each Party to the conflict shall facilitate the steps taken • To protect [the killed, wounded, shipwrecked [civilians], and other persons exposed to grave danger] against pillage and ill-treatment	<u>Common Article 3(1):</u> • The following acts are and shall remain prohibited ... (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture (b) taking of hostages (c) outrages upon personal dignity, in particular humiliating and degrading treatment (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples
1977 Additional Protocols	<u>Additional Protocol I, Article 10(1):</u> • All the [military or civilian] wounded, sick and shipwrecked ... • Shall be respected and protected	<u>Additional Protocol II, Article 7:</u> • All the wounded, sick and shipwrecked ... • Shall be respected and protected <u>Additional Protocol II, Article 8:</u> • Whenever circumstances permit, and particularly after an engagement • All possible measure shall be taken, without delay • To protect [the wounded, sick and shipwrecked] • Against pillage and ill-treatment
2005 ICRC Study on CIHL	<u>Rule 111:</u> • 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	