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An Australian Perspective on the ICRC Customary International Humanitarian Law Study

Timothy L. H. McCormack*

Introduction

It is a pleasure for me to be here to participate in this panel discussion on the International Committee of the Red Cross’s (ICRC’s) *Customary International Humanitarian Law* study (hereinafter the Study) for several reasons. I have great respect for the Naval War College and its important contributions to the development of the law of armed conflict (LOAC) over many years. This is the first opportunity I have had to travel to Newport to participate in the annual International Law Conference and I am indebted to the Stockton Professor Charles Garraway and to Professor Dennis Mandsager for their invitation to me to make the trip from Down Under. I have also had a long association with the ICRC customary law study and have been looking forward to the opportunity to engage with others in response to the Study in a public forum such as this.

I also confess that Newport, Rhode Island has a reverential aura about it in the hearts of Aussies like me. It was in this place in 1983 that *Australia II* with its infamous winged keel came from three races down to wrest the “Auld Mug” from the

* Professor McCormack is the Foundation Australian Red Cross Professor of International Humanitarian Law and also the Foundation Director of the Asia-Pacific Centre for Military Law, University of Melbourne, Melbourne, Australia.

The opinions shared in this paper are those of the author and do not necessarily reflect the views and opinions of the U.S. Naval War College, the Dept. of the Navy, or Dept. of Defense.
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New York Yacht Club—the fiercely competitive custodians of the America’s Cup. The Cup had never left American hands since it was won by America (hence the Cup’s name in honor of its inaugural winner) in the inaugural race against the Royal Yacht Squadron around the Isle of Wight in 1851, until, after 132 years and multiple unsuccessful challenges, the Aussies finally broke the US stranglehold. It is fair, although nationally unpalatable, to concede that we were unable to match anything like the US ability to successfully defend the Cup against successive challenges (24 in total). In 1987 Dennis Connor regained the Cup and returned it to the United States—this time to the San Diego Yacht Club—before it was won by the Kiwis and now the Swiss. The Aussies have never come close to retrieving it since. All this to say that it is special to be here in Newport and I do not take the opportunity for granted.

My intention is to briefly explain the nature of my involvement with the customary law study before I move to more substantive observations. I want to offer some thoughts on positive benefits of the Study—some potential and others already manifest—as a way of congratulating the ICRC on the publication of the Study. Then I will add some of my own thoughts on reasons why the ICRC ought not be surprised by the level of criticism of the Study which has already emerged and which, in my view, will continue largely unabated.

Personal Involvement with the Study

As the incumbent of the Australian Red Cross Chair of International Humanitarian Law, it is sometimes wrongly assumed that I am an official apologist for not only the Australian Red Cross but also for the entire Red Cross Movement including the ICRC. The assumption is wrong because my appointment is to the University of Melbourne and not to the Australian Red Cross. It was agreed at the time the Chair was established that the incumbent would exercise academic freedom as an employee of the University and would not necessarily act as a spokesperson for the Australian Red Cross. On many occasions I have participated in the Australian public debate on international humanitarian law related issues on behalf of the Australian Red Cross but it is also true that on other occasions I have had to distance myself somewhat—either because I disagree with the position of the national society or, more commonly, because the decision to speak out publicly about certain issues conflicts with one or more of the Fundamental Principles of the Red Cross Movement. I accept that the “wearing of different hats” invites confusion and can be a recipe for misunderstanding but I am learning to live with those negatives. I am a firm believer in the Red Cross Movement and not because of the Chair I occupy. That belief does not translate automatically into support for every
position the ICRC takes. When it comes to the customary law study I would characterize myself as cautiously supportive and I intend to explain what I mean by that general characterization in due course.

I was responsible for the preparation of the Australian national report constituting one of the forty-seven such national reports forming the primary source of evidence of State practice and expressions of *opinio juris* upon which the ICRC has reached its conclusions. The process of searching for and identifying evidence of Australian practice and national expressions of *opinio juris* in the areas of international humanitarian law covered by the Study was a novel one for Australia. I will say more of my observations of the benefits of undertaking this national study later. It is sufficient here to say that having worked hard to finalize the Australian report and then having handed it over to the ICRC early in 1998, I anticipated the publication of the Study much sooner than 2005. It is obvious from the sheer magnitude of the published Study just how massive an undertaking this project really was. Now I can see that I was entirely unrealistic to have expected to see the published version of the Study years earlier. Then though, as the years slipped by post-1998, I remember growing increasingly disappointed by the passage of time, particularly because of my acute awareness that so much more national Australian practice had occurred in the course of military operations in East Timor, in Afghanistan, in Iraq, in Bougainville and in the Solomon Islands, in inter-governmental fora around the world and in Canberra itself in the intervening period since the Australian report had been submitted to the ICRC.

The ICRC worked hard to cover developments in State practice up to the cut-off date of 2002 but I am convinced that their own staff could not have accessed the same documentation as had been possible during the preparation of the national reports. The authors of the Study make a concession to this effect in their “Introduction” when they acknowledge that “the purpose of the additional research was also to make sure that the study would be *as up-to-date as possible* and would, *to the extent possible*, take into account developments up to December 31, 2002” having earlier acknowledged that “national sources are more easily accessible from within a country.”

Consequently, when Yves Sandoz speaks of a “still photograph of reality,” it seems to me that the photo is from the late 1990s with some touching up in 2000–2002 and that there has already been a prodigious amount of State practice and many expressions of *opinio juris* since then which are not reflected in the Study. If I am correct in that assessment it will very soon be a decade since the still photograph was taken and questions will inevitably be raised about the currency of the Study.
Some Positive Observations

I do want to take this opportunity to congratulate the ICRC on the completion of this enormous project. The more than 5,000 pages of the Study in three separate volumes is so detailed and vast that there must have been many opportunities for the individuals involved in the Project, as well as for the ICRC as an institution, to seriously doubt whether the Study would ever be concluded and appear in print. The fact that it has been published at all is testament to the commitment of the ICRC, not only to grasp the initiative and to resource the project, but also to see it through to its completion. I offer the following observations about some of the positive contributions the Study has already made or is likely to make in the near future.

Providing a Significant Australian National Catalyst
Yves Sandoz proposes his own test for the success of the Study by suggesting that “this study will have achieved its goal only if it is considered not as an end of a process but as a beginning.”3 It is my observation that the beginning of the process of reflection, discussion and debate on both the content of customary international humanitarian law, as well as on its more effective implementation, commenced much earlier than at the moment of publication of the Study. In Australia’s case, the announcement by the ICRC of its decision to undertake the Study and the invitation to Australia to prepare a national report on evidence of State practice and expressions of opinio juris presented an unprecedented opportunity. There had never been a comprehensive audit of Australia’s approach to customary international humanitarian law and this particular exercise resulted in a unique collaboration between the key Australian Government Departments of Defence, Foreign Affairs and Trade and the Attorney-General.

The preparation of the Australian study exposed examples of inconsistency and inaccuracy on national approaches to aspects of international humanitarian law. Two examples will help illustrate my meaning. Rule 70 of the ICRC Study is the prohibition on the use of weapons which are of a nature to cause unnecessary suffering or superfluous injury.4 In Volume II of the Study the ICRC provides the substantiating State practice and opinio juris to support the articulation of the Rule in Volume I. In the assessment of national support for the existence of customary Rule 70 the editors of the Study cite, inter alia, the “Australian Military Manual,”5 which states in relevant part that “weapon use will be unlawful under LOAC when it breaches the principle of proportionality by causing unnecessary suffering or injury.”6 On one reading of this sentence there is clear confusion between the rule of proportionality and the rule on superfluous injury or unnecessary suffering. The
rule of proportionality is intended to protect the civilian population from the deleterious effects of armed conflict. The use of weapons violates the rule of proportionality when the expected loss of civilian life and/or damage to civilian property is excessive relative to the expected military advantage from an attack. In contrast, the rule on superfluous injury or unnecessary suffering is intended to benefit combatants by prohibiting the use of weapons of a nature to cause superfluous injury or unnecessary suffering to those combatants who might otherwise be subjected to attack from such weapons. It is also possible to read the offending sentence to mean superfluous injury or unnecessary suffering to the civilian population, e.g., that the expected loss of civilian life or damage to civilian property is excessive (superfluous or unnecessary) relative to the expected military advantage to be gained. On the first reading, the assertion is wrong in law and on the second reading, the choice of terminology is confusing and unhelpful. On either interpretation, the preparation of the Australian national report helped to flush out examples such as this which can now be rectified and improved.

My second example also relates to the Rule of Proportionality—incorporated in Rule 14 of the ICRC Study. Again in the assessment of State practice to substantiate the existence of the customary law rule the authors cite, inter alia, the “Australian Military Manual” that states in relevant part that:

Collateral damage may be the result of military attacks. This fact is recognised by LOAC and, accordingly, it is not unlawful to cause such injury and damage. The principle of proportionality dictates that the results of such action must not be excessive in light of the military advantage anticipated from the attack.

There is no ambiguity here. This particular articulation of the rule of proportionality wrongly asserts that the test for proportionality is whether the actual loss of civilian life and/or damage to civilian property is excessive in relation to the anticipated military advantage. Articles 51(5)(b) and 57(2)(b) of Additional Protocol I both explicitly speak of the expected loss of civilian life and/or damage to civilian property weighed against the anticipated concrete military advantage. The Australian military has not suddenly altered its legal position on the test for proportionality in attack. The official position of the Government is that the test at treaty law (pursuant to the above-mentioned provisions of Additional Protocol I) and at customary international law (as encapsulated in the ICRC’s Rule 14) is indeed the expected loss of civilian life weighed against the anticipated military advantage and certainly not the actual loss of civilian life weighed against the anticipated military advantage. The preparation of the Australian national report
helped to expose this inaccuracy in the Australian military publication on the law of armed conflict.

The preparation of the Australian national report involved the identification of literally hundreds of government documents—many of them classified and requiring official approval for release. As representatives from different government departments poured over the documents identified by research teams, it became increasingly obvious that many of the documents had never been retrieved from files once those files had been stored. This process proved to be cathartic for those involved as we read through statements of Australian Government positions taken in various multilateral fora in the past. Now that the ICRC Study has been published, Australia has the opportunity to revisit the preparation of its national report and to measure the ICRC’s articulation of customary rules against more recent Australian State practice not covered by the Australian national report. This opportunity would not exist but for the ICRC initiative and, in my view, acknowledgement ought to be made and gratitude expressed to the ICRC for it. I would be surprised if at least some of the other 46 States which also prepared national reports for the ICRC Study have not had similar experiences to the Australian one I have described.

Creating a Rich Source of Comparative Primary Material

The prodigious effort of the ICRC and the Study’s editors to complete the project has resulted in over 4,400 pages (in the two volumes of the so-called “Practice” section of the Study) of references to national (and, in some cases international) legislation, case law, military manuals and statements of national government representatives in relevant inter-governmental conferences. There is simply no resource like this in the field of international humanitarian law. The Yearbook of International Humanitarian Law provides a helpful and detailed annual survey of State practice which effectively supplements the ICRC Study. The Yearbook material takes the form of “Country Reports” on State practice and developments around the world in national approaches to international humanitarian law. However, this annual report obviously only covers national developments within the calendar year of each volume of the Yearbook and is sorted by country name in English alphabetical order—certainly not by ICRC rule in the customary law study. I am not suggesting that the Yearbook obviates the need for the ICRC to update its own Study. Rather, I am suggesting that apart from the “Country Reports” section of the Yearbook I know of no other attempt to gather primary source material from States and that reality places the ICRC Study in a unique position.

It is not difficult to conceive circumstances in which the comparative material on State practice in the Study will be extremely useful. In my capacity as amicus
curiae on international law issues in the trial of Slobodan Milošević, for example, I can imagine that the Study’s two Practice volumes could provide an invaluable source of references to a range of case law, legislation and military manuals on national approaches to the criminalization and prosecution of the war crimes of murder, willful killing, torture, willfully causing grave suffering, cruel treatment, wanton destruction of villages and plunder of public and private property. I am not suggesting that the two Practice volumes would be the sole source of investigation, but the fact that they exist and are structured on the basis of topic—corresponding with the articulation of the customary law rules in Volume I of the Study—ensures that these volumes will be consulted regularly.

I am surely not alone in this view. Others practicing in the area of international criminal law—judges, prosecutors, defense lawyers and registry staff—are all regularly referring to national case law and/or legislation to flesh out the substance of this ever-emerging body of international law. It is undoubtedly the case that as the international jurisprudence proliferates there is increasing reliance on international sources. But, it is also the reality that practitioners in this field of international law are often required to resort to national legislation and jurisprudence to supplement international sources. The natural tendency has been to rely upon the practitioner’s own national sources because they are more familiar and accessible and for want of entrée into other national sources. I suspect that the ICRC Study will provide a welcome starting point for comparative criminal law research.

Of course it is far too simplistic to suggest that only international criminal lawyers will rely on the comparative material in the Study. Copies of this Study will be routinely pulled off the shelves of government legal advisers in foreign ministries, in defense establishments and in justice ministries. The sheer size of the Study will ensure that the advice of those government lawyers who do take the time to familiarize themselves with the contents of the Study will be eagerly sought.

Sparking a Global Discussion
The publication of the long-awaited Study has already spawned a succession of conferences and seminars focused on the results of the Study and reactions to it. Our own panel discussion here follows on from sessions at Chatham House, at the Annual Meeting of the American Society of International Law, in The Hague and precedes planned events in Bangkok, Brussels, Montreal, New Delhi, San Remo and Warsaw. The rush to discuss, to analyze, to question and to criticize on every continent in the world is all indicative of the intensity of anticipation of the final tabling of the Study and, perhaps more importantly for most observers, a keen desire for clarification as to how the Study might be utilized, how it will be received and the regard it will come to have in the future. It is in this sense that I entirely agree
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with Yves Sandoz’s view that the publication of the Study is not the end but the beginning of a process and the ICRC is right to ask for as much feedback, debate and testing of its findings as it can receive.

The arrival of the Study also seems to have spawned a new debate on customary international law itself—what it is, how it is formed, what sources should be relied upon to determine its content, the identification of the precise relationship between treaty law and the development of custom. This debate is redolent, even if smaller in scale, of the debate following the decision of the International Court of Justice (ICJ) in the *Nicaragua* case. Now, of course, almost 20 years after that decision, there is a new generation of international lawyers involved in the debate. That is surely a healthy development and one for which the ICRC should be congratulated.

*The Inevitability of Criticism for Articulating Customary International Law Rules*

Despite the many ways in which the Study will be utilized and relied upon, the ICRC ought not be surprised either by the intensity of, or by the specific details of, the criticism directed against the Study. The “notorious imprecision” of customary international law acknowledged by Judge Koroma of the International Court of Justice in his “Foreword” to the Study is a double-edged sword for the ICRC. The Study represents a laudable attempt to clarify some of the inherent imprecision but the reality of that imprecision emboldens others to challenge the ICRC’s attempts at clarification. The applicability of the adage “we know it when we see it but cannot quite pin it down” to customary international humanitarian law may leave many academic international lawyers dissatisfied while simultaneously providing a sense of confidence to national government legal advisers. I am not suggesting that such advisers can tell their governments that the content of customary international law on a specific issue is whatever the government wants it be. Rather, one attraction of the “notorious imprecision” is the slight ambiguity, the elasticity at the edges of the specific detail of a rule. Any attempt to introduce precision and certainty in the articulation of the specifics of the law will inevitably draw criticism as interested parties, particularly States, will simply not agree with some of what has been included and also with some of what has been omitted.

**Irrespective of the Authority of the Articulating Organization**

All those involved in the study and practice of international law in the latter half of the 1980s are unlikely to forget the deluge of academic articles following the delivery of the Court’s judgment in the *Nicaragua* case. It was as if the Judgment
breached a dam wall unleashing a torrent of criticism and condemnation—some of it focused on the Court’s decision on jurisdiction and some of it on the merits, but much of it directed at the Court’s reasoning in relation to the formation of customary international law and on the process of identifying the content of customary rules on the use of force by States. Just the titles of some of the articles are descriptive enough: “Icy Day at the ICJ”; “Between a Rock and a Hard Place: The United States, The International Court and the *Nicaragua* case”; “*Nicaragua* and International Law: The ‘Academic’ and the ‘Real’”; and “The International Court of Justice at the Crossroads.”

Hilary Charlesworth’s criticisms are particularly pertinent to our present discussion and I reproduce some of them in detail. Charlesworth claimed that:

Generally, in *Nicaragua*, the Court appears to expand the category of activities that can constitute state practice. Its analysis is not easy to follow for the discussion of state practice and *opinio juris* is often elided and it is sometimes uncertain whether the Court regards a particular action as state practice, *opinio juris*, or as doing service to both. The Court relies upon the acceptance of treaty obligations as state practice. While this is a generally accepted source of state practice, the Court places special emphasis on the fact that both Nicaragua and the United States have accepted particular treaty obligations as evidence that they at least are firmly bound by such norms. Unlike jurists such as D’Amato, who regard only actions which have physical consequences as state practice, the Court accepts General Assembly resolutions and resolutions of other international organisations, particularly those in which Nicaragua and the United States participated, as forms of state practice. This approach accords with that of many jurists. The Court, however, does not appear to discriminate between international fora, nor does it discriminate between resolutions based on *lex lata* and *lex ferenda*. The Court places considerable reliance on the Declaration on Friendly Relations which is couched in legislative language. But it also relies on other resolutions and agreements whose language is not mandatory.

Even if the Court in *Nicaragua* had been more precise about its delimitation between evidence of State practice and expressions of *opinio juris*, it is likely that the judgment would have been criticized by those who disagreed with the judges’ assessment of the material falling into either category. The criticism has been exacerbated in substantial part by the Court’s lack of clarity as to categorization, as well as by its apparent failure to accord appropriate weight on the basis of a more nuanced and discerning approach to the material it considered.

The key point here is that in its attempt to bring precision to the “notoriously imprecise” customary international law, the ICJ was subjected to a barrage of criticism. If the ICJ was subjected to such a formidable assault, the ICRC ought not
expect to be immune from a similar intensity of opposition in relation to its methodology, the material it seeks to rely upon and the conclusions it has reached.

Another example of criticism of a body articulating customary international law on a particular topic involved the drafting and subsequent adoption of the Statute for the International Criminal Tribunal for the Former Yugoslavia (ICTY). The UN Security Council had called for a report from the UN Secretary-General with a Statute for the proposed Tribunal to be attached.\textsuperscript{19} The Office of the Legal Adviser to the UN prepared the Draft Statute on the basis of customary international law explaining that:

The international tribunal should apply rules of International Humanitarian Law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise. This would appear to be particularly important in the context of an international tribunal prosecuting persons responsible for serious violations of International Humanitarian Law.\textsuperscript{20}

That stated rationale for the adopted approach could hardly be disputed. If the jurisdiction \textit{ratione persona} of the ICTY was to extend to all persons allegedly responsible for violations of the Statute on the physical territory of the Former Yugoslavia, it was essential that members of paramilitary organizations and other non-State entities be covered. In any case, even for those members of State militaries and police forces, State succession issues at the time of the dissolution of the Former Federal Republic of Yugoslavia ensured some uncertainties as to the precise treaty obligations of the newly independent former Federal republics.

Understandably, the UN Office of the Legal Adviser took a cautious approach to the definition of the crimes within the ICTY Statute. The principal criticism leveled against the Draft Statute (which was, perhaps surprisingly, adopted without amendment by the UN Security Council\textsuperscript{21}) has been that it was too conservative in its approach. The Appeals Chamber of the ICTY is the source of the best-known criticism of the drafting of the Statute. In the course of the trial of Dusko Tadić the Appeals Chamber had to decide whether or not to accept the challenge of the accused to the Tribunal’s exercise of jurisdiction over him. In relation to Article 5 of the ICTY Statute defining Crimes Against Humanity, the Appeals Chamber stated that:

It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed, as the Prosecutor points out, customary international law may not require a connection between crimes against humanity and any conflict at all. Thus, by requiring that crimes against humanity be committed in either internal or international armed conflict, the Security

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Council may have defined the crime in Article 5 more narrowly than necessary under customary international law.\textsuperscript{22}

\textit{Prima facie} this criticism is tempered and relatively benign. Coming as it does, though, from an international judicial body, the criticism was taken very seriously indeed. At the negotiations for the Statute of the International Criminal Court in Rome, for example, reference was made to both the text of the Statute of the International Criminal Tribunal for Rwanda, which omits a requisite nexus with armed conflict in the definition of crimes against humanity, as well as the ICTY Appeals Chamber decision in \textit{Tadić} as bases for departing from the approach in Article 5 of the ICTY Statute.\textsuperscript{23}

The drafting of the Statute for the ICTY and the criticism leveled against it was clearly on a significantly smaller scale than the response to the ICJ decision in the \textit{Nicaragua} case. That is at least partly explicable on the basis that the ICJ made general declarations on the nature of customary international law and how it is formed—with significant implications for future cases before the Court as well as more generally. In the case of the Statute of the ICTY, that instrument established an important precedent for future international criminal tribunals but the customary international law implications were limited to the subject matter of international criminal law.

The fact remains, however, that both the ICJ and the Office of the Legal Adviser found themselves the subject of criticism in response to respective efforts to articulate the content of customary international law in a particular area and, in the ICJ’s case, in response to the Court’s articulation of the process for the development of customary international law rules. Given that highly regarded institutions such as these have been subjected to intense scrutiny and criticism, the ICRC should not expect to be immune.

It is possible that my analysis is flawed. I have suggested that criticism is inevitable regardless of the authority of the articulating organization. Perhaps that is incorrect. An organization no one takes seriously might purport to articulate the content of customary law on a particular issue and receive no critical feedback precisely because of the lack of respect for the articulating institution. That is surely not the case in relation to the ICRC. The publication of the customary law study under the imprimatur of the ICRC ensures that the Study will be taken very seriously indeed—precisely because of the international standing of the institution. Had the Study been prepared by an academic institution, for example, or by a non-governmental organization (quite apart from the obvious question of how any such institution would have gathered the material from States as effectively as the ICRC), it is much less likely that the Study would have attracted anything like the
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scrutiny it is receiving. But, since it is the ICRC that has published the Study, States cannot act as the proverbial ostrich with their heads in the sand, simply ignoring the Study in the pretense that it will have no effect or in the hope that it will conveniently disappear.

Irrespective of the Rigor of the Process Leading to the Articulation

Criticism of the Study is also inevitable despite the attempt by the ICRC to be as rigorous as possible in its approach to the identification and compilation of relevant State material and to its assessment and articulation of the content of customary international humanitarian law. The editors of the Study explain in some detail the steps in the process of preparing the Study—the establishment and oversight of the Study at all stages by the Steering Committee, the undertaking of 47 national studies, the additional collection of material from relevant international organizations (including from the ICRC’s own archives), the supplementary collection of material from the countries the subject of national reports as well as from other States not the subject of national reports and the establishment and work of the Academic and Governmental Expert Advisory Group. I am sure that many will appreciate the efforts of the ICRC to undertake the Study on the basis of a clear, transparent and defensible approach. Those efforts will undoubtedly translate into greater weight and authority extended to the Study. But, those efforts, while admirable, will not eliminate criticism of the Study.

Many examples of State practice are, in fact, the acts of individual advisers within national delegations in the context of multilateral fora—with the blessing of their national governments of course. Individual members of delegations regularly act on the basis of agreed broad national parameters. National statements are usually carefully checked through an interagency process in national capitals but the reality is that individual members of national delegations—particularly senior members of delegations—have broad discretion in the pursuit of national priorities. In particular, individuals within national delegations become involved in the minutiae of multilateral negotiations and develop specialist knowledge about the nuances of a negotiated text. In circumstances where such individuals become the national experts in relation to particular issues in sustained multilateral negotiations, those individuals often also assume the mantle of national institutional memory. Those individuals know exactly what was meant by a particular intervention, how an intervention was received by other States, the differences between some States’ articulated positions and their true intentions (or the failure to reveal true intentions). The authors of the ICRC Study have had to make decisions about the wording of some customary rules derived in part from treaty provisions. Some individuals involved in the specific treaty negotiations have criticized the ICRC for
misunderstanding the context of negotiations and for misrepresenting specific national acts to support the ICRC version of the customary rule.

One of the best examples, to my knowledge, of this phenomenon is the intervention by Hays Parks at the Annual Meeting of the American Society of International Law in April 2005. Parks was on a panel to discuss the ICRC Study and, having only received his personal copy a few days before, undertook what he characterized as a “biopsy” on some of the conventional weapons issues he had been extensively involved with for almost two and half decades as a member of the US delegation to the Certain Conventional Weapons Convention25 (CCW) negotiations in Geneva. Parks looked first at incendiary weapons and expressed surprise to see that the Study quotes a USSR Statement to the effect that Moscow was “in favour of the prohibition of means of warfare which were particularly cruel, because their use was incompatible with the norms of international law. One such means was napalm.”26 Parks asserts that the Study, at least on this issue, lacks a sense of context in relying as it does upon the Soviet Statement as if that represented a statement of State policy. The United States had changed its position late in the conference process and announced that it would support a protocol regulating the use of incendiary weapons. Parks explains that that change of US policy threw the Soviet delegation into disarray. The Soviet Ambassador, Victor Israelyen, conceded subsequently to Parks that the very statement which the ICRC Study relies upon in part to support the emergence of a customary rule on incendiary weapons was in fact a smokescreen. The Soviets assumed that the United States would not compromise and accept a protocol on incendiary weapons and so were hiding behind the original US position. The change of US policy exposed the real Soviet position and Parks claims that “the Soviet Union had no intention of accepting a prohibition on incendiary weapons, as the Warsaw Pact had huge stocks it fully intended to employ.”

Whether or not the Soviet Statement tips the balance one way or the other in terms of the ICRC claiming the existence of the customary rule is hardly the critical point here. What is at stake is the nature of the material the ICRC has relied upon in order to assert the formulation of customary rules. The explicit reliance upon a statement that, in fact, did not reflect either State practice or opinio juris to support a customary rule will inevitably increase skepticism about what other materials may have been relied upon in the Study. Parks claims that statements seem to take priority over the actual practice of States in armed conflict. He questions why the Study fails to refer to and discuss the North Vietnamese use of flamethrowers in its 1968 Tet offensive, for example, or the Soviet use of incendiaries in Afghanistan and the Russian use of incendiaries in Chechnya.27 Parks makes similar claims about exploding bullets. The ICRC is uncomfortable about the widespread use of the Raufoss 12.7 mm multipurpose round, which the institution claims can
explode on impact with the human body. Parks, and other government lawyers, dispute this finding. Parks asserts that the Study fails to mention that more than two dozen States include the Raufs 12.7 mm multipurpose round in their inventories and that at least some of those States have communicated to the ICRC that they have undertaken legal reviews of the round and believe that the continued use of the round is compatible with existing legal obligations.\textsuperscript{28}

These are serious criticisms and, in my view, more of them are likely to flow. As those individuals, like Parks, who have been intimately involved in the development of the law take the time to read the detail of the Study—not only the articulation of the rules themselves but also the supporting material—the ICRC will increasingly be subjected to criticism that it has overlooked, misinterpreted or misrepresented the material it claims supports the assertion that “State practice establishes this rule as a norm of customary international law.”

**Particularly When Rules Are Articulated in Absolute Terms**

I have referred a number of times to Yves Sandoz’s claim that:

\[ \text{[T]he study will have achieved its goal only if it is considered not as the end of a process but as a beginning. It reveals what has been accomplished but also what remains unclear and what remains to be done. . . . [T]he study makes no claim to be the final word.}\textsuperscript{29} \]

There is a welcome self-effacing here and no doubt Sandoz is absolutely genuine in his request that the Study be read, be discussed and be commented upon. However, it seems to me that there is a measure of incongruity in the claim that the Study reveals what is unclear and what remains to be done—that it does not represent the last word on customary international humanitarian law—and the manner in which the 161 Rules themselves are worded. All of them are written in absolute terms followed by a summary statement which invariably includes an absolute finding that State practice establishes this rule as a norm of customary international law (either in international or non-international armed conflicts or in both). Occasionally there is a reference to an issue which is not covered by the Study. Rule 155 on obedience to superior orders is an example. The Study specifically mentions that other defenses, including the defense of duress, may apply but are not covered by the Study,\textsuperscript{30} demonstrating that the Study does not purport to be exhaustive. However, in relation to the issues which are covered by the Study, the language used is absolute.
Others have commented upon this aspect of the Study. Daniel Bethlehem, for example, notes the pro forma approach of following the formulation of the customary rule with a “summary”:

which, almost without exception, asserts ‘State practice establishes this rule as a norm of customary international law. . .’. There are occasions in which this affirmation is followed by a statement noting ambiguity or controversy in respect of some element of the rule, but the affirmation of customary status stands fast.31

I imagine that it would have been unpalatable for the ICRC to formulate rules of customary international humanitarian law other than in absolute terms. An equivocal approach to formulation may have undermined the purpose of the Study by creating a sense of uncertainty and ambiguity—something the ICRC as an institution is rightly committed to avoiding. But in the existing approach to formulation of the rules there seems little room for acknowledging dissent or opposition to the emergence of a particular rule. I am unable to shake the sense that the formulation of rules in the absolute terms that appear in the Study invites disagreement and criticism rather than discussion and constructive comment. I hope I am proved wrong.

Notes

3. Id.
5. This language is contentious as the Australian Government does not consider the cited document to constitute a military manual as such. The document cited is Australian Defence Force, Law of Armed Conflict, OPERATIONS PUBLICATIONS SERIES (1994) (hereinafter ADFP 37).
6. See HENCKAERTS & DOSWALD-BECK, supra note 1, Vol. II, Part 1, at 1510 citing paragraph 207 of ADFP37, supra note 5.
9. ADFP 37, supra note 5 at para. 535.
11. The Yearbook, produced by the Asser Institut in The Hague and published by Cambridge University Press, includes an extremely useful “Country Reports” section every year. That section is prepared by correspondents in-country around the world and is the only ongoing collection of evidence of State practice in International Humanitarian Law of which I am aware. The “Country Reports” section is not and does not purport to be exhaustive of all relevant State
practice. The preparation of the material is dependent on the work of volunteer correspondents and for many States no suitable correspondent has been found. The Assestitut does not purport to be supplementing the ICRC Study’s Practice volume. I am offering my own characterization of the effect of the Section.

12. Dr. Abdul G. Koroma, Foreword in HENCKAERTS & DOSWALD-BECK, supra note 1, at xii.
13. See, for example, the Symposium, Appraisals of the ICJ’s Decision: Nicaragua v. United States, 81 AMERICAN JOURNAL OF INTERNATIONAL LAW (1987). The following authors contributed to that issue: Keith Hight, at 1; Herbert W. Briggs, at 77; Anthony D’Amato, at 101; Michael J. Glennon, at 121; Edward Gordon, at 129; John Lawrence Hargrove, at 135; Frederic L. Kirgis Jr., at 146; John Norton Moore, at 151; Fred L. Morrison, at 160; W. Michael Reisman, at 166; Fernando R. Teson, at 173. Other articles, include those in the following footnotes, and for example, Abram Chayes, Nicaragua, the United States and the World Court, 79 COLUMBIA LAW REVIEW 1445 (1985); James P. Rowles, Nicaragua Versus the United States: Issues of Law and Policy, 20 THE INTERNATIONAL LAWYER 1245 (1986); Keith Hight, You Can Run But You Can’t Hide: Reflections on the United States Position in the Nicaragua Case, 27 VIRGINIA JOURNAL OF INTERNATIONAL LAW 551 (1987); Hilary Charlesworth, Customary International Law and the Nicaragua Case, 11 AUSTRALIAN YEARBOOK OF INTERNATIONAL LAW 1 (1984–87); Anthea Elizabeth Roberts, Traditional and Modern Approaches to Customary International Law: A Reconciliation, 95 AMERICAN JOURNAL OF INTERNATIONAL LAW 757 (2001).
15. Keith Hight, Between a Rock and a Hard Place – the U.S., the International Court and the Nicaragua Case, 21 THE INTERNATIONAL LAWYER 1083 (1987).
17. This was the title of Lori Fisher Damrosch’s book on the implications of the Nicaragua case published by Transnational Publishers in 1987.
27. Id. at 210.
28. Id. at 211.