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The ICRC Customary International Humanitarian Law Study

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The Study

The publication in 2005 of an impressive Study of Customary International Humanitarian Law (IHL) by the International Committee of the Red Cross (ICRC) (hereinafter the Study)¹ is undoubtedly an important landmark. The Study—done in two parts (Rules and Practice)—is bound to be scrutinized, cited and debated for a long time to come. It will leave its imprints in the future both in the case law and in the legal literature, and, whatever one's view is of the overall success of the enterprise, no scholar or practitioner can afford to ignore it.

The mandate for the preparation of the Study came exactly ten years prior to its publication (1995), from the 26th International Conference of the Red Cross and Red Crescent. For an entire decade, the ICRC spared no effort to put the Study together. The project was based, *inter alia*, on extensive consultations with academic and government experts; nearly fifty reports of individual States' practice, submitted by national research teams; research on the practice of international organizations produced by several additional teams; and further archival research pursued by the ICRC itself. The resulting two volumes (for reasons of sheer size, Volume II (Practice) is published in two separately bound parts) comprise more than 5,000 printed

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pages (621 covering Rules and commentary thereon; and 4,411 encompassing Practice and appendices). The final product represents the largest scholarly undertaking (on any theme) ever undertaken in the long history of the ICRC.

Since this article is an unadorned critique of the Study, I would like to emphasize two important personal points. First, I was marginally involved in the enterprise: I am responsible for the Israeli country report; I have participated in subsequent consultations convened by the ICRC; and I have been given ample opportunity—which I liberally used—to express reservations about earlier drafts of Volume I (although I had not seen Volume II prior to publication). Secondly, and even more significantly, I feel that the initiative was absolutely right, even if I do not approve of some of the results. Indeed, I take credit for being probably the first to have put on record the idea of launching a project with a view to examining the text of Additional Protocol I² of 1977 against the background of customary international law. I first raised the proposal publicly in 1987, in a conference convened in Geneva on the 10th anniversary of the conclusion of the two Additional Protocols of 1977, where I said:

I happen to believe that it is very important to try to pinpoint those provisions of Protocol I, which are either reflective of existing customary international law or at least are non-controversial to such an extent that there is every reason to believe that they will crystallize as customary international law in the near future.

A year later, in another International Colloquium held at Bad Homburg in 1988 (the proceedings of which have been published), I reiterated the argument:

The insertion of clauses like Article 44 in the Protocol is lamentable. All the same, these clauses should not overshadow other provisions reflecting customary *lex lata* or widely supported *lex ferenda*. To my mind, an attempt ought to be made to identify in an authoritative way those sections of the Protocol which are declaratory or non-controversial (I should hasten to add that, in my assessment, the great majority of the norms of the Protocol – perhaps as many as 85% – qualify as declaratory or non-controversial). Such an evaluation of the Protocol’s text could be undertaken by informal meetings of experts like the present one, and it will prove invaluable not only to Israel but also to other countries – primarily, the United States – which are not expected to become contracting parties in the foreseeable future.

I have broached this idea before, but have failed to persuade the ICRC representatives that it has much merit.³

In other words, my main concern was to bridge over what I like to call the “Great Schism,”⁴ dividing Contracting from Non-Contracting Parties of Additional

Protocol I because of the 15% or so of the text (such as Article 44, which will be adverted to below) thoroughly rejected by the latter States. The ICRC in the late 1980s was unenthusiastic; its apprehension being that such an exercise might undermine the authority of Additional Protocol I as a treaty.

Admittedly, the Study goes in several different directions, compared to my own idea. A critical segment of the Study relates to non-international armed conflicts and Additional Protocol II⁵ (something that did not occur to me in the 1980s but I find most useful today). There are also sections dealing with law of armed conflict norms contained in treaties other than Additional Protocols I and II, particularly those dealing with prohibited weapons (an addition which has merit, although it has certainly complicated the process). Conversely, not every clause of Additional Protocol I is dealt with (an omission that I find puzzling) and not much attention is given to *lex ferenda* stipulations that seem to be non-controversial (for instance, those provisions dealing with civil defense).⁶ From the subjective angle of my original idea, the entire project is upside down. Instead of systematically examining Protocol I article by article, what is presented in the Study is a set of independent Rules with only the commentary indicating the relationship (if any) to provisions of Protocol I. Still, much as I may have wished the Study to be differently structured, the three volumes have to be taken as they are.

The Methodology

Let me start with some comments about Volume II (Practice). This is the methodological underpinning of the Rules plus commentary, and its size is not just daunting; it is overwhelming. However, when one tries to get into the thicket of literally tens of thousands of cites, one begins to get underwhelmed for reasons that will become apparent in the ensuing text of the present article. Indeed, to my mind, Volume II is proof positive of the adage that sometimes more is less.

The preliminary question that must be addressed is: what is customary international law? The classical definition of international custom is encapsulated in the well-known formula of Article 38(1)(b) of the Statute of the International Court of Justice: “international custom, as evidence of a general practice accepted as law.”⁷ The *font et origo* of customary international law is, in essence, the general practice of States. States are the main actors in the international arena, and it is their general practice that constitutes the core of custom. Without State practice there is no general customary international law.

What does State practice consist of? There is much scholarly debate over the question of whether conduct constitutes the sole expression of custom-making practice, and whether statements—at times referred to as mere “claims”⁸ or as

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“verbal (as distinct from “physical”) acts”⁹—count. I share the view of the authors of the Study that “[b]oth physical and verbal acts of States constitute practice that contributes to the creation of customary international law.”¹⁰ Nevertheless, not every statement counts: it all depends on who is making the statement, when, where and in what circumstances. The Study has attached an import to statements in a most comprehensive generic fashion. I strongly believe that this is going way too far: the gamut of admissible statements—as grist to the mill of State practice—must be much more focused and filtered.

The Study includes much State practice but a lot besides. One cannot cavil that the Study incorporates the practice of inter-governmental international organizations (IGOs). To some extent, this is due to the fact that IGOs may have an international legal personality of their own,¹¹ but additionally it must not be forgotten that IGOs are comprised of States. Member States of an IGO may therefore contribute to State practice through their conduct and statements within the fold of the organization. As pronounced by the International Court of Justice in its Advisory Opinion on *Nuclear Weapons*, UN General Assembly resolutions (not binding as such) “can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*.”¹²

In contradistinction to IGOs, the role of non-governmental organizations (NGOs) in international law-making is confined to a consultative status,¹³ not to mention lobbying and other behind-the-scenes activities vis-à-vis States. NGOs, whatever their standing, can never contribute directly through their own practice to the creation of customary norms. This is true even of the most important—and unique—NGO, the ICRC. Admittedly, the ICRC is assigned by IHL important functions to carry out.¹⁴ But that fact does not turn the ICRC into a State-like entity. It is therefore surprising (and inappropriate) that the authors of the Study give a lot of attention to the practice of the ICRC itself¹⁵ (and occasionally even to that of other NGOs, such as Amnesty International¹⁶). ICRC reports, communications, press releases, statements and the like—recapitulated at some length in Volume II of the Study—are simply not germane to customary international law, unless and until they actually impact on State practice. It is true that “the official reactions which ICRC statements elicit are State practice.”¹⁷ However, this is not ICRC practice: this is State practice and it should be subsumed under the right heading. The ICRC plays in such circumstances the role of a catalyst for the evolution of State practice, but no more. One problem with the erroneous designation of such practice is that when ICRC appeals exhorting States to action are registered as ICRC practice, the gaze shifts from the actor to the catalyst. If the ICRC is successful in eliciting a positive response from States,¹⁸ no real harm is done. But what happens when the ICRC’s appeal evokes no response?¹⁹ At best, the ICRC action

proved itself to be irrelevant. At worst, it is an indication *a contrario* that States are not willing to accept the position of the ICRC.

The ICRC practice at least deserves that designation, albeit it does not qualify in the context of the term of art “practice” employed in the definition of customary international law. But, in a manner bordering on the bizarre, the Study goes far beyond anything remotely resembling practice. How can one refer to resolutions of the *Institut de Droit International*—weighty as they indisputably are—as “other practice”?²⁰ Whose practice? The same question arises, in an even starker way, when the Restatement prepared under the aegis of the American Law Institute is cited as “other practice,”²¹ and most egregiously when scholarly books (however prestigious) get a similar classification.²² When everything is categorized as practice, the reader cannot be blamed for a modicum of skepticism.

There is much reliance in the Study on a host of military manuals, especially where it really counts, *viz.* in Volume I (Rules). Indeed, it appears that the authors themselves—sharing perhaps some of the skepticism re the plethora of items collated in Volume II (Practice)—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. This editorial decision should be commended. Irrefutably, legislative codes and military manuals (i.e., binding instructions to the armed forces) are invaluable sources of genuine State practice. However, are all the documents called manuals in the Study authentic manuals?

From personal knowledge, I can attest that the so-called Israeli Manual on the Laws of War of 1998²³—cited quite often throughout the Study—is not a genuine manual. As I tried on several occasions to point out to the authors of the Study prior to its publication—to no avail—this is merely a tool used to facilitate instruction and training, and it has no binding or even authoritative standing. The insistence on regarding the text as a manual has led the authors of the Study to a number of errors. Thus, in the context of Rule 65 (whereby “[k]illing, injuring or capturing an adversary by resort to perfidy is prohibited”),²⁴ I alerted them to the fact that Israel does not accept the words “or capturing” as a reflection of customary international law. They refused to accept this, and, in the commentary on Rule 65, even singled out the so-called Israeli Manual as the “exception” among non-Contracting Parties to Additional Protocol I: other manuals of these countries do not mention “capturing”; the Israeli Manual does.²⁵ As it turns out, the cite given in a footnote does not refer to the so-called manual at all, but to another booklet.²⁶ When one checks out the matching material in the Practice volume, it turns out that (a) the paragraph cited does quote the “Manual” (rather than the booklet) but there is no mention of “capturing” at all; (b) a previous paragraph (not the one cited) refers to capture, but the quote is from that other booklet (rather than the

“Manual”), and, for that matter, it is based on a secondary source!²⁷ Thus, in deciding that the “Manual” trumps any and all disclaimers, they went completely astray. Since nobody can afford the time to go through every cite in a Study comprising thousands of pages, I can only express the hope that this wild goose chase is the exception rather than the rule.

But is the Israeli “Manual” the only non-manual? I wonder. It should be mentioned that there are many references to a UK manual of 1981 on the Law of Armed Conflict (listed separately and independently of the 1958 British Military Manual).²⁸ In reality, there have been only three UK manuals on the subject of the law of armed conflict. The first one (written jointly by L. Oppenheim and Colonel JE Edmonds) was a chapter of the Army Manual of Military Law published in 1914 and revised in 1936. The second (written by Hersch Lauterpacht with the assistance of Colonel Gerald Draper), again a part of the Army Manual of Military Law, came out in 1958. The third (written jointly by several authors), a completely new and separate Manual of the Law of Armed Conflict, was issued by the Ministry of Defence in 2004, not in time for inclusion in the Study. It is not clear what the 1981 text represents.

When the ICRC decided to look into its own (otherwise closed) archives to research some 40 recent armed conflicts, the news was greeted with enthusiasm. Everybody hoped that the research would yield a trove of inaccessible State practice. In the event, the results have been quite disappointing. First off, although the conflicts are specified in a general list,²⁹ no identification of the State (or rebel group) concerned is made in context. This already diminishes considerably from the weight that one can attach to the practice concerned. Secondly, and even more significantly, the “practice” cited is often of no practical use. What value added to the law of armed conflict in non-international armed conflicts can be derived, for instance, from the following vignette: “The Head of Foreign Affairs of an armed opposition group told the ICRC in 1995 that his group was conscious of the necessity to respect and to spare the civilian population during an armed conflict”?³⁰ This, lamentably, is quite typical of the kind of statements that the Study distilled from the archives. Even when more specificity is added, the result can be the following: “In 1991, an official of a State rejected an ICRC request to protect the civilian population from pillage by government troops. He replied that as long as they provided a hiding place for rebels, the army would burn the fields if necessary. However, this behaviour was not representative of the general opinion of the military personnel met by the ICRC in this context.”³¹ If civilian fields are burnt, to deny a hiding place to rebels, why is this legally deemed “pillage”?³² And, whatever the juridical taxonomy, why does one statement by one unidentified organ of an unknown State—inconsistent with other statements by other organs of the same

State—shed any light on that State’s practice? We are not told what actually happened or what the circumstances were; nor are we informed about the relative ranks of the officials adverted to. And so it goes.

The Rules

Having focused so far on methodology, it is necessary to consider some of the Rules—constituting the backbone of the Study—and the commentary thereon. I do not take issue with many of the black-letter Rules and much of the commentary, as presented in Volume I of the Study. But I believe 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.

Rule 1 starts off with an unassailable statement that “[t]he parties to the conflict must at all times distinguish between civilians and combatants.”³³ But then, in Rule 5, the dichotomy changes from civilians/combatants to civilians/members of the armed forces: “[c]ivilians are persons who are not members of the armed forces.”³⁴ Is that so? Rule 3 rightly states that, in fact, not all members of the armed forces are combatants, since medical and religious personnel are excluded from that category.³⁵ By the same token, not every person who is not a member of the armed forces is a civilian. In particular, by directly (or actively) participating in hostilities, a person who claims to be a civilian loses that protective mantle and becomes a (perhaps unlawful) combatant.³⁶ Even Additional Protocol I, in its “Basic rule”—Article 48³⁷—distinguishes between the civilian population and combatants; and in its definition of civilians—Article 50(1)³⁸—prescribes that civilians are persons who do not belong to certain categories of persons, including the category referred to in Article 4A(2) of Geneva Convention (III) (covering irregular troops).³⁹ By switching the dichotomy from civilians/combatants to civilians/members of the armed forces, the Study lays the ground to loading the legal dice. If the antonym of civilians under customary international law is members of the armed forces, it follows (as the ICRC believes) that civilians who directly (or actively) participate in hostilities do not lose their classification as civilians. Conversely, if—as I think the right approach is—the antonym of civilians is combatants, civilians who directly (or actively) participate in hostilities may turn themselves into unlawful combatants.

One of the cardinal causes for the “Great Schism”—sharply dividing Contracting and non-Contracting Parties to Additional Protocol I—is the utter and unqualified rejection by the latter countries of those provisions of the Protocol that, to all intents and purposes, eliminate the status of unlawful combatants in all cases except spies and mercenaries.⁴⁰ The epicenter of the controversy lies in the

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combination of Articles 43 and 44.⁴¹ Rule 4 of the Study simply reiterates some of the language of Article 43 of Additional Protocol I: “The armed forces of a party to the conflict consist of all organized armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates.”⁴² The commentary treats this definition as customary international law, trying to create the impression that organization and discipline (rather than distinction from civilians) are the gist of the matter; and—whereas the commentary briefly refers to the other, cumulative, Hague and Geneva conditions of lawful combatancy (which non-Contracting Parties to Additional Protocol I continue to regard as of essence)—it makes short shrift of them and somehow manages to convey the message that even Article 44 of the Protocol (one of the key sources of the “Great Schism”) hardly presents a real problem.⁴³ This is plainly misleading.

In a written comment to the ICRC on an earlier (but not much different) version of Rule 4, I stated:

Rule 4. The text and commentary are highly objectionable. Israel utterly and unreservedly rejects Articles 43–44 of Additional Protocol I as a source of customary international law. Israel adheres to the original texts of the Hague Regulations and the Geneva Conventions and does not accept any and all changes that Articles 43–44 of the Protocol purport to introduce. Allow me to add that the objections to Articles 43–44 lie at the root of the refusal to ratify the Protocol. Should the ICRC attempt to gloss over the fundamental differences of opinion re this crucial issue, the whole study will be irretrievably flawed.

The authors of the Study did not heed these cautioning words, nor did they choose to allude to them in the commentary’s footnotes. Instead, the commentary—in trying to establish the case for the customary nature of Rule 4 and in attempting to create the false impression that the customary definition is mainly concerned with the discipline and organization of the armed forces—purports to rely even on the practice of non-Contracting Parties to Additional Protocol I: a footnote relies specifically on the practice of the United States.⁴⁴ The US text cited (appearing in *The Commander’s Handbook on the Law of Naval Operations*) is quoted in the Practice volume, but lo and behold: it does not confine itself to discipline and organization; it explicitly speaks about members of forces “who are under responsible command and subject to internal military discipline, carry their arms openly, and otherwise distinguish themselves clearly from the civilian population.”⁴⁵ These last Hague/Geneva conditions are of course the crux of the issue. And, in the Annotated Supplement to *The Commander’s Handbook*, the text is followed by a footnote which mentions expressly the construct of unlawful combatants.⁴⁶

It must be added that when the emergence of customary international law subsequent to a treaty (in this instance, Additional Protocol I) is examined, it is the practice of non-Contracting Parties that carries the day. In the 1969 *North Sea Continental Shelf* cases, the International Court of Justice made it amply clear that—in analyzing the post-treaty practice of States, with a view to establishing whether a new custom has been created in the wake of the treaty—it is required to leave aside (and not to consider as a reliable guide) not only the practice of Contracting Parties among themselves but even the practice among States that shortly would become Contracting Parties, since they were all “acting actually or potentially in the application of the Convention.”⁴⁷ The Court held that “[f]rom their action no inference could legitimately be drawn as to the existence of a rule of customary international law” generated by the treaty.⁴⁸ The Court therefore concentrated on the practice of “those States . . . which were not, and have not become parties to the Convention,” the goal being to find whether an “inference could justifiably be drawn that they believed themselves to be applying a mandatory rule of customary international law.”⁴⁹ The authors of the Study are fully aware of this ruling of the Court, although they made a deliberate decision not to confine the Study to the practice of non-Contracting Parties to Additional Protocol I.⁵⁰ On the central issue of unlawful combatancy, that decision led them to an overt misreading of customary international law.

There are manifold other issues. For instance, Rule 6 states, as a matter of customary international law, that “[c]ivilians are protected against attack unless and for such time as they take a direct part in hostilities.”⁵¹ Nobody would challenge most of the sentence. However, the words “and for such time”—which are based on Article 51(3) of Additional Protocol I⁵²—are contested. The Study relies on practice, including that of the United States, but when one takes a look at *The Commander’s Handbook*, which is explicitly cited more than once,⁵³ it is striking that the text omits the words “and for such time”!⁵⁴ Moreover, although in my written comments to the ICRC, I had observed: “Rule 6. Israel does not accept the qualifying phrase ‘for such time’, which—incidentally—has been removed from Article 8 of the Rome Statute . . .,” no account was taken in the Study’s commentary either of the remark itself or of the deletion of the words “and for such time” from Article 8(2)(b)(i) of the 1998 Rome Statute of the International Criminal Court.⁵⁵

It is not proposed here to parse every Rule in the Study. However, it is noteworthy that Rule 35 sets forth that “[d]irecting an attack against a zone established to shelter the wounded, the sick and civilians from the effects of hostilities is prohibited.”⁵⁶ As the commentary mentions, the idea is based on the provisions of Article 23 of Geneva Convention (I)⁵⁷ and Articles 14–15 of Geneva Convention (IV)⁵⁸ (dealing with hospital zones, safety zones and neutralized zones). But, as the ICRC

Commentary on Geneva Convention (I) states categorically, “[t]he zones will not, strictly speaking, have any legal existence, or enjoy protection under the Convention, until such time as they have been recognized by the adverse Party.”⁵⁹ The same observation appears in the Commentary on Geneva Convention (IV).⁶⁰ Where does the text of Rule 35 even imply that the establishment of a protected zone cannot be effected without the prior consent of the other side?

It seems that the concept of consent is not an easy construct for the framers of the Study. Thus, Rule 55 states *tout court* that “[t]he parties to the conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control.”⁶¹ This obligation is based on Article 70 of Additional Protocol I, except that Article 70 adds the pivotal caveat (missing from Rule 55): “subject to the agreement of the Parties concerned in such relief actions.”⁶² Even the ICRC Commentary on Additional Protocol I does not claim more than that Article 70 may be construed as precluding refusal of agreement to allow relief for arbitrary or capricious reasons.⁶³ Surely, as I have argued elsewhere, “[i]t is impossible to assert, at the present point, that a general right to humanitarian assistance has actually crystallized in positive international law.”⁶⁴ This is a prime example that the Study—instead of looking for a compromise between Contracting and non-Contracting Parties to Additional Protocol I—actually transcends the Protocol (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). Curiously enough, in the commentary on Rule 55, the requirement of consent in Additional Protocol I and Additional Protocol II is explicitly mentioned, but there follows a vague statement that “[m]ost of the practice collected does not mention this requirement.”⁶⁵ Uncharacteristically, no footnote accompanies the proposition, and it is not spelled out whose practice this is in reference to.

Rule 45 of the Study⁶⁶ confirms the customary standing of the provisions of Articles 35(3) and 55(1) of Additional Protocol I, which prohibit the use of methods or means of warfare expected to cause widespread, long-term and severe damage to the natural environment.⁶⁷ The commentary on Rule 45 mentions objections by France, the United Kingdom and the United States, adding:

[T]hese three States are especially affected as far as possession of nuclear weapons is concerned, and their objection to the application of this specific rule to such weapons has been consistent since the adoption of this rule in treaty form in 1997. Therefore, if the doctrine of “persistent objector” is possible in the context of humanitarian rules, these three States are not bound by this specific rule as far as any use of nuclear weapons is concerned.⁶⁸

The extract reveals total confusion between two completely disparate concepts in the modern analysis of customary international law, namely, “persistent objector,” on the one hand, and “States whose interests are specially affected,” on the other.

The “persistent objector” doctrine (supported by most commentators) maintains that a State, which persistently and unequivocally objects from the outset to the emergence of a new customary rule, cannot be held bound by that rule.⁶⁹ A timely “persistent objector” cannot be caught in the net of the new custom, but otherwise that custom will bind the entire international community. In other words, the custom will consolidate—notwithstanding the opposition—although it will not affect the “persistent objector.”

The construct of “States whose interests are specially affected” was developed by the International Court of Justice, in the *North Sea Continental Shelf* cases.⁷⁰ These are States with priority in contributing to the creation of customary international law (the paradigmatic example being that of the chief maritime States where the law of the sea is concerned). If several “States whose interests are specially affected” object to the formation of a custom, no custom can emerge.

When three nuclear Powers—the United States, the United Kingdom and France—have taken the position that Rule 45 does not reflect customary international law, there is no doubt that they act as “States whose interests are specially affected” (as conceded by the commentary quoted above). By arriving at the conclusion that (at the most) the three Powers can only be viewed as “persistent objectors”—and that, therefore, they will not be bound by the custom which has emerged—the Study gets the law completely wrong. There is no question that, when adopted in 1977, Articles 35(3) and 55(1) were innovative in character.⁷¹ The question, consequently, is whether custom has developed thereafter, and it cannot be denied that three leading members of the small and select “nuclear club” have opposed it vocally since 1977. Surely, as “States whose interests are specially affected,” the three countries cannot be relegated to the status of persistent objection. By repudiating the putative custom protecting the environment from all means of warfare, the three nuclear States have not merely removed themselves from the reach of such a custom: they in fact managed to successfully bar its formation (as a minimum, with respect to the employment of nuclear weapons).

Finally, Rule 77 states that “[t]he use of bullets which expand or flatten easily in the human body is prohibited.”⁷² I explicitly transmitted to the ICRC the official position of Israel re the use of expanding bullets, namely, that it is permissible for domestic law-enforcement purposes, as well as in the fight against terrorists and “suicide bombers” (when every split-second counts and there is a vital need to prevent the completion of their heinous attack). Once more, unfortunately, this is not reflected in the commentary.

Conclusion

In order not to further complicate the discussion, I did not get into specific issues of non-international armed conflicts in this paper. This is not to suggest that the Study is unassailable where such conflicts are concerned. But an examination of the Study's provisions thereon raises different issues and deserves a separate paper.

On the whole, as regards international armed conflicts, I am afraid that the Study clearly suffers from an unrealistic desire 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. After all, there is no practical need to persuade Contracting Parties to API that it is declaratory of customary international law. Whether or not such is the case, Contracting Parties are bound by API by virtue of their consent to ratify or accede to it. But there is a need to persuade non-Contracting Parties that they must comply with a large portion of API: not because it is a treaty but because it is general custom. I do not think that non-Contracting Parties will be persuaded by the conclusions of the Study. Thus, the authors missed a golden opportunity to bring Contracting and non-Contracting Parties to API closer together. Indeed, at least on some central points, far from bridging over the present abyss, the Study will only drive the two sides of the "Great Schism" farther away from each other.

Notes

1. JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW* (2005) (2 volumes: Volume I, Rules; Volume II, Practice (2 Parts)).
2. Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977 [hereinafter Additional Protocol I], *reprinted in* DOCUMENTS ON THE LAWS OF WAR 422 (Adam Roberts & Richard Guelff eds., 3d ed. 2000).
3. Yoram Dinstein, *The Application of Customary International Law Concerning Armed Conflicts in the National Legal Order*, in NATIONAL IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW: PROCEEDINGS OF AN INTERNATIONAL COLLOQUIUM HELD AT BAD HOMBURG, JUNE 17–19, 1988, at 29, 34 (Michael Bothe ed., 1990).
4. See Yoram Dinstein, *International Humanitarian Law and Modern Warfare*, in INTERNATIONAL EXPERT CONFERENCE ON COMPUTER NETWORK ATTACKS AND THE APPLICABILITY OF INTERNATIONAL HUMANITARIAN LAW 17, 18–19 (Karin Byström ed., 2004).
5. Protocol Additional (II) 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], *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 2, at 483.
6. Additional Protocol I, *supra* note 2, arts. 61–67, at 456–461.

7. Statute of the International Court of Justice, June 26, 1945, 33 U.N.T.S. 993.
8. ANTHONY D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 88 (1971).
9. Karol Wolfke, *Some Persistent Controversies Regarding Customary International Law*, 24 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 1, 3 (1993).
10. HENCKAERTS & DOSWALD-BECK, *supra* note 1, Vol. I, at xxxii.
11. *Id.* at xxxv.
12. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 254–55 (July 8).
13. *See* I OPPENHEIM'S INTERNATIONAL LAW 21 (Robert Jennings & Arthur Watts eds., 9th ed. 1992).
14. *See especially* Additional Protocol I, *supra* note 2, art. 81(1), at 752.
15. This policy is rather briefly and unpersuasively defended in HENCKAERTS & DOSWALD-BECK, *supra* note 1, Vol. I, at xxxv.
16. *See id.*, Vol. II, Part 2, at 400.
17. *Id.*, Vol. I, at xxxv.
18. For an example, *see id.*, Vol. I, at 38 and Vol. II, Part 1, at 266 (regarding the prohibition of indiscriminate attacks).
19. For several instances of such apparently fruitless exhortations, *see id.*, Vol. II, Part 1, at 267–69.
20. *Id.* at 450.
21. *Id.*, Vol. II, Part 2, at 2105.
22. *Id.*, Vol. II, Part 1, at 232, 324–25.
23. *Id.*, Vol. II, Part 2, at 4201.
24. *Id.*, Vol. I, at 221.
25. *Id.* at 225.
26. *Id.* at n.152.
27. *Id.*, Vol. II, Part 1, at 1381.
28. *Id.*, Vol. II, Part 2, at 4206.
29. *Id.*, Vol. I, at xlix–l.
30. *Id.*, Vol. II, Part 1, at 161.
31. *Id.* at 1105.
32. For a definition of pillage emphasizing the private or personal use of the pillaged property, *see id.*, Vol. I, at 185.
33. *Id.* at 3.
34. *Id.* at 17.
35. *Id.* at 11.
36. On unlawful combatancy, *see* YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 27–54 (2004).
37. Additional Protocol I, *supra* note 2, at 447.
38. *Id.* at 448.
39. Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 2, at 244, 246.
40. *See* DINSTEIN, *supra* note 36, at 44–47.
41. Additional Protocol I, *supra* note 2, at 444–45.
42. HENCKAERTS & DOSWALD-BECK, *supra* note 1, Vol. I, at 14 *et seq.*
43. *Id.* at 14, 16.
44. *Id.* at 14, n.91.
45. *Id.*, Vol. II, Part 1, at 93.

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46. ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 296 (A. R. Thomas & James C. Duncan eds., 1999) (Vol. 73, US Naval War College International Law Studies).
47. North Sea Continental Shelf, (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J 3, 43 (Feb. 20).
48. *Id.*
49. *Id.* at 43–44.
50. HENCKAERTS & DOSWALD-BECK, *supra* note 1, Vol. I, at xliv.
51. *Id.*, at 19.
52. Additional Protocol I, *supra* note 2, at 448.
53. HENCKAERTS & DOSWALD-BECK, *supra* note 1, Vol. I, at 20, and Vol. II, Part 1, at 110, 117.
54. ANNOTATED SUPPLEMENT, *supra* note 46, at 484.
55. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90, *reprinted in* 37 INTERNATIONAL LEGAL MATERIALS 999, 1006.
56. HENCKAERTS & DOSWALD-BECK, *supra* note 1, Vol. I, at 119.
57. Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 2, at 197, 206.
58. Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287, *reprinted in id.* at 301, 306–07.
59. 1 COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 215 (Jean S. Pictet ed., 1952).
60. 4 COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 127 (Oscar M. Uhler & Henri Coursier eds., 1958).
61. HENCKAERTS & DOSWALD-BECK, *supra* note 1, Vol. I, at 193.
62. Additional Protocol I, *supra* note 2, at 462.
63. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 819 (Yves Sandoz, Christophe Swinarski, Bruno Zimmermann eds., 1987).
64. Yoram Dinstein, *The Right to Humanitarian Assistance*, 53 NAVAL WAR COLLEGE REVIEW 77 (2000).
65. HENCKAERTS & DOSWALD-BECK, *supra* note 1, Vol. I, at 196.
66. *Id.* at 151–52.
67. Additional Protocol I, *supra* note 2, at 442, 451.
68. HENCKAERTS & DOSWALD-BECK, *supra* note 1, Vol. I, at 154–55.
69. *See* Committee on Formation of Customary (General) International Law, Final Report, International Law Association, 69th Conference 712, 738–39 (2000).
70. North Sea Continental Shelf, *supra* note 47, at 43.
71. *See* HENCKAERTS & DOSWALD-BECK, *supra* note 1, Vol. I, at 152.
72. *Id.* at 268.