PART 1

Setting the scene: Theoretical perspectives on international law in the ICRC Study

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The methodological framework of the Study

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1. Introduction

The Study on Customary International Humanitarian Law (the Study) took a decade to complete. By any standards, it is a significant contribution to the learning on, and the development of, international humanitarian law. Three volumes, 5,000 pages, 161 Rules and commentaries and supporting materials: it is a remarkable feat. All those associated with the preparation of the Study are to be congratulated. They have brought us closer to the heart of international humanitarian law – the actual practice of States.

In his foreword to the Study, Yves Sandoz observed as follows:

> The Study is a still photograph of reality, taken with great concern for absolute honesty, that is, without trying to make the law say what one wishes it would say. I am convinced that this is what lends the study international credibility. But though it represents the truest possible reflection of reality, the study makes no claim to be the final word. It is not all-encompassing – choices had to be made – and no-one is infallible. In the introduction to *De jure belli ac pacis*, Grotius says this to his readers: 'I beg and adjure all those into whose hands this work shall come, that they assume towards me the same liberty that I have assumed in passing upon the opinions and writings of others.' What better way to express the objectives of those who have carried out this study? May it be read, discussed and commented on. May it prompt renewed examination of international humanitarian law and the means of bringing about greater compliance and of developing the law. Perhaps it could even go beyond the subject of war and spur us to think about the value of the principles on which the law is based in order to build universal peace – the utopian imperative – in the century on which we have now embarked.[1]

* This chapter is a lightly edited version of a paper delivered at Chatham House in April 2005 in the author's then capacity as Director of the Lauterpacht Centre of International Law at the University of Cambridge. The views expressed are personal.

[1] Vol. I, xvii–xviii.

These are wise words, in every respect. The Study should indeed be a spur to further thinking about these issues.

Without detracting from this genuine appreciation, it is necessary and appropriate to draw attention to some important misgivings about the Study, as regards both methodology and the formulation of certain specific Rules. The purpose of doing so is not to detract from the utility of the Study, which is high. There is no doubt that the Study will be amongst the first texts consulted by both practitioners and academics confronted with issues of international humanitarian law. Rather, it is to place the Study in what the present author considers to be its appropriate analytical context. Had the Study been entitled 'State Practice and *Opinio Iuris* in the Interpretation and Application of International Humanitarian Law', many (although not all) of the difficulties identified below would be of lesser significance. The Study, however, is entitled simply 'Customary International Humanitarian Law'. And in this manner, as well as in its black-letter approach to the elucidation of Rules, which are almost invariably described as 'norms of customary international law', it has sought to take on the mantle of the Pictet commentaries to the Geneva Conventions, purporting implicitly to be a study of equivalent weight and authority in respect of customary international humanitarian law. In the author's view, this assessment is not warranted, for the reasons explained below.

2. The methodological framework

The framework for the comments that follow is not that of a military lawyer or a serviceman. There have been, and will no doubt be, many concerns expressed by military lawyers in the service of governments about this or that formulation of a rule. Where they are voiced seriously, such comments will have to be taken seriously, as customary international law reflects above all the practice of States and if a State challenges the assessment of practice that informs these volumes, that is a significant matter which will have to be met at the level of substance.

The focus of this chapter is different. It is that of a general international lawyer, engaged as a practitioner in cases before domestic and international tribunals which raise issues ranging from international humanitarian law and human rights law to State responsibility, treaty interpretation and the effect of treaty-based and customary international law rules within the municipal sphere. The focus is on legal method and the formulation of customary law rules, especially those which parallel equivalent rules found in treaties, and in the risks and advantages which

are both inherent in any such exercise and are also evident specifically in this particular exercise.

A similar, though much smaller, initiative of trying to elucidate custom from an extensive patchwork of multilateral treaties was undertaken by the UNHCR four years ago in respect of certain core principles of international refugee law. In that exercise, in a joint Opinion (now published),[2] Sir Eli Lauterpacht QC and the present author were asked to consider whether the principle of *non-refoulement*, found in Article 33 of the 1951 Refugee Convention and, in similar terms, in a host of other treaties and international instruments, was a principle of customary international law and, if so, what was the scope and content of the customary rule. This exercise addressed *one* principle, deeply embedded in general international law, in respect of which there was extensive State practice. The analysis ran to 100 pages. There was annexed supporting material. The Opinion concluded that the principle was indeed a principle of customary international law. The analysis and the conclusion were the subject of detailed consideration by governmental and non-governmental experts. While the conclusion of customary status was generally endorsed by an Expert Roundtable organised by the UNHCR,[3] a number of the participants were cautious about the exercise and one or two notable scholars and others have since challenged the assessment and expressed hesitation about coming to such a conclusion in the abstract, detached from a concrete case.[4]

Having seen this process of divining custom from treaties in respect of one largely uncontroversial principle, the present author finds it is impossible to escape the nagging sense, in respect of the Study, that there are too many steps in the process of the crystallisation and of the formulation of the black letter customary rules that are insufficiently clear, even by reference to the two accompanying volumes of practice. Too much certainty is expressed in the affirmation of the customary status of the Rules as formulated. The formulation of each Rule is followed by 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

[2] E. Lauterpacht and D. Bethlehem, 'The Scope and Content of the Principle of *non-refoulement*: Opinion', reproduced in E. Feller, U. Türk and F. Nicholson (eds.), *Refugee Protection in International Law* (Cambridge University Press, 2003), pp. 87 *et seq.*

[3] Feller, Türk and Nicholson (eds.), *ibid.*, pp. 178–179.

[4] See, for example, generally, J. Hathaway, *The Rights of Refugees Under International Law* (Cambridge University Press, 2005).

affirmation of customary status stands fast. François Bugnion, speaking at the Chatham House conference organised to mark the publication of the Study,[5] referred to the early development of customary international humanitarian law as 'reflecting the requirements of the divinity'. As one goes through the Study, and focuses on the methodology of divining and formulating the individual Rules, one cannot help but feel that the exercise has something of an encyclical about it. Yet above all in the context of the identification of customary international law, the credibility of the law dictates that we must be able to see inside the black box.

This aspect is addressed further below illustratively by reference to a number of the Rules. Before doing so, however, it is useful to take a broader look at the exercise of identifying custom.

International humanitarian law, perhaps more than any other area of international law, is heavily regulated by treaty. In his foreword to the Study,[6] ICRC President Jakob Kellenberger referred to the Geneva Convention for the amelioration of the wounded and sick of 1864, which was revised in 1906, 1929 and 1949. There are the Hague Conventions of 1899 and 1907, containing the Regulations respecting the laws and customs of war on land. There is the subsequent body of Hague law concerning weaponry and methods and means of warfare. There are the two 1977 Protocols additional to the 1949 Geneva Conventions. There is the Convention on Certain Conventional Weapons and its various protocols. There is the Ottawa anti-personnel mines convention. And the list goes on.

In these circumstances of heavy regulation by treaty, the question arises as to why it is useful and important to identify rules of customary international law, and what are the dangers of doing so.

Kellenberger notes three reasons why customary international law remains an important body of law despite the extensive reach of the treaties. First, he notes that, while the 1949 Geneva Conventions enjoy universal adherence today, the same is not yet the case for the other major treaties in this field, notably the Additional Protocols of 1977. While treaties bind only their parties, rules of customary international law bind all States. Customary international law is therefore a means for achieving the universal application of principles of international humanitarian law, and notably of those enshrined in the Additional Protocols.

In this context, it is useful to identify the States that are not parties to the Additional Protocols; they are the ones whose interests will be

[5] *The Law of Armed Conflict: Problems and Prospects*, Chatham House, 18–19 April 2005; texts available at: www.chathamhouse.org.uk/research/international_law/papers/view/_/id/282. [6] Vol. I, ix–xi.

especially affected by the crystallisation of custom. States not parties to Additional Protocol I include: Iran, Iraq, Pakistan, India, Myanmar, Nepal, and most of the south-east Asian States – Philippines, Indonesia, Thailand, Malaysia; the United States is not a party, nor are Israel, Somalia, Sudan, Sri Lanka, Eritrea and Morocco. This is a 'Who's Who' of many of the States that have been engaged in conflicts over the past 30 years.

The second reason for the importance of custom noted by Kellenberger is that treaty-based international humanitarian law applicable to non-international armed conflicts falls short of meeting the protection needs arising from those conflicts. State practice, however, he suggests, affirms that many customary rules apply to all conflicts, whether international or non-international.

Third, Kellenberger notes that customary international law can help in the interpretation of treaty law.

Elements of these observations by Kellenberger are echoed in the Foreword by Judge Koroma,[7] of the International Court of Justice, and also in the Introduction by the authors of the Study.[8]

These are all important reasons in favour of identifying custom, but they carry with them a cautionary injunction, namely, 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.

To Kellenberger's three reasons pointing to the importance of custom, three more may be added:

(a) customary international law may be self-executing and apply directly in the municipal sphere, whereas treaties may not;
(b) customary international law may supervene and prevail over an inconsistent rule in a treaty.[9] There is no hierarchy of sources of

[7] Vol. I, pp. xii–xiii. [8] Vol. I, pp. xxv–li.

[9] The relationship between treaties and custom is complex, not simply for their interaction at the level of the derivation of customary rules – on which see further below p. 8 – but also when it comes to the interpretation of treaties. For example, Article 31(3)(c) of the Vienna Convention on the Law of Treaties 1969 provides, for certain purposes, that there shall be taken into account 'any relevant rules of international law applicable between the parties'. This principle is commonly relied upon to contend that a treaty rule must be interpreted and developed in the light of a subsequent rule of customary international law.

international law and, in principle, a recently formed rule of custom may prevail over an older, inconsistent treaty rule; and

(c) custom may be opposable beyond States, not only to armed opposition groups but also to other non-State actors and individuals.

There are, therefore, good reasons for engaging in a study of rules of customary international law in an area which is heavily marked by the imprint of treaties. But there are also dangers in doing so, and broader methodological concerns, and these need to be weighed in the balance. These dangers and concerns include at least the following.

(a) As regards methodology, there is the view, as expressed by Judge Sir Robert Jennings, dissenting in the *Nicaragua* case,[10] that it is difficult, if not impossible, to identify State practice relative to a rule of customary international law by a State party to a treaty of parallel application as all the relevant practice is in reality practice in the exercise of the treaty, not the customary rule.

(b) This leads to a wider issue, that of the greying of – the propensity towards a lack of clarity in – the process of rule formulation in international law. Traditionally, there are treaties and there is custom. Some interaction between the two is evident, as the Study points out,[11] but traditionally the areas of this interaction have been limited and usually achieved through the imprimatur of courts, as in the *North Sea Continental Shelf* cases[12] and the *Nicaragua* case. Outside of a judicial process, however, the exercise of deriving custom in an area heavily regulated by treaties, and by heavy reliance on these treaties, runs certain risks, for example, as regards legal certainty, the likely acceptance by States standing outside the treaty regime, compliance and enforcement by those States, and individual criminal responsibility.

(c) Particularly 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.

(d) This may raise wider questions about treaty ratification in the future. Why should a State that is not now a party to the 1977 Additional Protocols ratify these treaties if the relevant principles therein

[10] *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, *ICJ Rep.* 1986, 14.

[11] Vol. I, Introduction, at xlii–xlv.

[12] *North Sea Continental Shelf, Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands*, Judgment of 20 February 1969, *ICJ Rep.* 1969, 3.

operate at the level of customary international law? Perversely, the articulation of customary rules which parallel those set out in a treaty may weaken rather than strengthen the potential for the universal application of the treaty.

(e) As customary international law is, in Judge Koroma's words (in his foreword to the Study), 'notoriously imprecise', we may find, particularly in the area of complex rules such as these, that the content of a customary rule may turn on the treaty-based formulation of the rule. This may be all well and good when the articulation of the customary rule mirrors the treaty-based formulation. If it does not, however, this may give rise to difficulties as regards interpretation and application.

(f) Finally, customary law, because of its imprecise nature, may be ill-suited to interpretation and application by municipal courts and as a foundation for individual criminal responsibility. This is one of the reasons why the establishment of the International Criminal Court was accompanied by a detailed articulation of written rules rather than simply by a *renvoi* to customary international law. It is also one of the reasons why the United Kingdom legislated for the prosecution of those accused for war crimes during the Second World War. Customary international law will not always be a sufficiently steady foundation from which to address individual criminal responsibility.

These points should not be over-stated. The issue is essentially simple. There are both advantages and disadvantages to the derivation of customary rules in an area which is heavily regulated by treaty. While, in the main, the exercise in which the ICRC was engaged in the Study maximises the advantages and minimises the risks associated with such an exercise, there are elements of the Study which give rise to a number of concerns.

The first concern is that, in key areas, the Study, in its formulation of the black-letter customary rules, is heavily contingent on the parallel treaty-based rules and notably on the provisions of Additional Protocol I. It is evident, of course, from the footnoted material accompanying the Rules, that the authors have looked at wider sources and the breadth of the exercise in which it engaged was both impressive and commendable. But there is no escaping the fact that, in very many critical areas, the customary formulation follows or draws heavily on the formulation in the Additional Protocol.

There are potential problems with this approach. In cases in which the customary formulation is simply that of the Additional Protocol – particularly when there are also questions about the weight of the other

source material relied upon – the risk is that the Study will be seen simply as an attempt to get around the non-application of the treaty to certain States. The difficulty is not avoided, however, if the customary formulation diverges from the treaty language without any apparent reason. In such cases, 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.

A second concern is that, although the statement of methodology set out in the Introduction to the Study is generally sound, the rigorous approach described therein is not always evident in the discussion and evaluation of State practice and *opinio iuris*. So, for example, notwithstanding the reference in the Introduction to the importance of assessing the 'density', that is, the weight, of relevant items of practice, there is often little or no evidence that this is done. For example, resolutions of the UN Commission for Human Rights seem to attract the same weight as the legislation or policy statements of specially affected States. Little account is taken of persistent objection, on the ground that some doubt is said to exist about the validity of the doctrine. But custom, as in the case of treaties, requires the consent of States. It is just that consent in the case of custom is assessed differently; through practice or acquiescence.

A third concern is that, in some cases, the evidential source material relied upon is 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.

Fourth, following on from these comments, it is sometimes unclear why the black-letter expression of the customary rule is formulated in the way that it is. In some cases, the customary formulation is identical to the treaty formulation. In other cases, there are what appear to be minor deviations in formulation, although the reasons for, and import of, the deviations are not explained. In yet other cases, the customary formulation departs significantly from the treaty formulation. Again, however, the reason for, and import of, the departure is not clear. In still other cases, there is a propensity for the Study to take different elements of a single treaty-based formulation and spread these across a number of customary rules and commentaries. The attendant uncertainty about how one should read both the customary rule and the 'supplanted' treaty rule is sometimes considerable, raising wider questions about standards of protection.

These general points of concern are illustrated by reference to a number of tangible examples, including some prosaic ones and one or two that may be more important.

Rules 23 and 24 address elements of the principle of distinction. Rule 23 states:[13] 'Each party to the conflict must, *to the extent feasible*, avoid locating military objectives within or near densely populated areas.'[14] Rule 24 then states:[15] 'Each party to the conflict must, *to the extent feasible*, remove civilian persons and objects under its control from the vicinity of military objectives.'[16] In support of these Rules, reference is made in the Commentary to Article 58(b) and 58(a), respectively, of Additional Protocol I as well as to provisions in Additional Protocol II, a large number of military manuals and official statements and reported practice. Reference to the national practice shows that different formulations are used, some of which track the language of Additional Protocol I and some of which do not. Reference to Article 58(a) and (b) of Additional Protocol I shows that the language of the customary formulation draws directly from the Additional Protocol language, although with one small difference. Article 58 of the Protocol requires the parties to a conflict to take precautions against the effects of attacks 'to the *maximum* extent feasible'.[17]

The reason for the omission of the word *maximum* from the customary formulation is unclear, as also is the significance, if any, of the omission. The omission might reflect the fact that some of the military manuals referred to also omit the word. The omission may not be significant; it is a relatively minor point. But, at least at first glance, it would seem that the customary formulation is weaker than the treaty formulation. Why? What are the implications for civilian protection? Which formulation is to be preferred?

Potentially more significant omissions are found in Rules 4 and 5, both also addressing the distinction between civilians and combatants.

Rule 4 states:[18] 'The armed forces of a party to the conflict consist of all organised armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates.' The Commentary refers notably to Article 43(1) of Additional Protocol I, as well as to military manuals and official statements and practice.

Reference to the national practice shows a range of different formulations. Article 43(1) of Additional Protocol I shows the antecedent of the customary rule formulation. It reads:

> The armed forces of a Party to a conflict consist of all organised armed forces, groups and units which are under a command responsible to that

[13] Vol. I, 71. [14] Emphasis added. [15] Vol. I, 74. [16] Emphasis added.
[17] Emphasis added. [18] Vol. I, 14.