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Article

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Introduction

In 2005, the International Committee of the Red Cross (ICRC) published its two-volume Study of customary international humanitarian law (IHL).[1] The first volume contains a list of 161 succinct rules, each one followed by a commentary containing copious cross-references to supporting practice contained in the (two-part) second volume. The Study was the result of an almost ten-year long process, mandated by the International Conference of the Red Cross and Red Crescent, which required an imposing amount of work by ICRC lawyers and outside experts.[2] In the years since, the Study has migrated online, becoming a user-friendly database.[3] And the Study project has not actually ended, with a team of lawyers based in Cambridge continuously updating the practice section of the database (but not the rules) of the Study.

While upon its publication it was greeted both with acclaim and with criticism (which will be explored further below), today the Study has become a standard reference work for practitioners and academics alike – indeed, as far as the academia is concerned, it is probably the single most cited work on IHL.[4] But how authoritative has the Study really been in practice? This is the question that we hope to answer in this article. That question can be framed and approached from many different angles. We have chosen an empirical one, by collecting and analysing citations to the Study in documents containing expressions of State positions, in the judgments of international and domestic courts and tribunals and in the outputs of other influential actors. Our analysis establishes that the Study is increasingly seen as a highly

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[1] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* and *Volume II: Practice*, Cambridge University Press, 2005 (hereinafter Study)
[2] See Jean-Marie Henckaerts, "*Customary International Humanitarian Law*: a response to US comments," *International Review of the Red Cross*, Vol. 89, 2007, pp. 473, 473-474.
[3] Available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/home.
[4] As of 25 July 2021, the Study had 1876 total citations (per Google Scholar). By way of comparison, the Sandoz Commentary on the two Additional Protocols had 891 cites (same source). This is of course just one database, but it is a broadly representative one.

authoritative instrument, such that a particular proposition will be found to reflect customary international law simply on the basis that the Study says so. In the absence of any concerted pushback, particularly by States – and no such pushback appears to be evident today, even if initially that was not the case and there remains some discontent – the Study's authority will only increase over time, if nothing else then through repetition and force of habit. To be clear, we are not arguing that the Study has attracted some kind of universal acceptance, but that the lack of repeated and consistent opposition, coupled with the Study's usefulness and embrace by numerous influential actors, have created an upwards trajectory of authority.

The article proceeds as follows: we will first provide a theoretical framework for our analysis. We will then explain the design of our empirical analysis and go on to discuss our findings.

Theoretical framework

Methodology of establishing custom

The standard definition of customary international law sees it as arising from the confluence of two elements, State practice and *opinio juris* – or, in the words of Article 38(1)(b) of the Statute of the International Court of Justice (ICJ), "evidence of a general practice accepted as law." The existence and correctness of various methodologies for establishing custom has been a perennial topic in legal scholarship, from many different viewpoints, e.g. those challenging or defending positivist orthodoxy, or those engaging in normative theories as to what courts and other actors *should be* doing as opposed to descriptive theories as to what they actually *are* doing. That bastion of orthodoxy, the International Law Commission (ILC), has had a notable recent foray into this set of issues,[5] but again academics have discussed them endlessly.

On the descriptive front, which is of greater interest to us here, Stefan Talmon's analysis of the jurisprudence of the ICJ is instructive, showing that the Court takes three different approaches to the identification of a rule of customary international law: an inductive approach,

[5] ILC, Draft conclusions on identification of customary international law, with commentaries, UN Doc. A/73/10 (2018).

a deductive approach, and assertion.[6] But these differing approaches are by no means limited to the ICJ.

The inductive approach refers to a process in which "a general custom is derived from specific instances of State practice" with *opinio juris* being a secondary consideration.[7] It is a process which goes "from the specific to the general."[8] The inductive approach arguably fits best with the Article 38(1)(b) reference to "general practice accepted as law". However, only rarely is the practice and *opinio juris* of all States, or almost all States, considered. Instead, a rule of customary international law is usually identified from the practice of a small group of States.

At other times, a rule of custom is not established through an inductive process but through a deductive one. The deductive approach refers to a "process that begins with general statements of rules rather than particular instances of practice."[9] In this way, deduction "is a process of going from the general to the specific."[10] The ICJ, for example, has described the "rule of state immunity" as "deriv[ing] from the principle of sovereign equality of States".[11]

But, as Talmon has argued, "[t]he main method employed by the Court is not induction or deduction but assertion. In the large majority of cases, the Court does not offer any (inductive or deductive) reasoning but simply asserts the law as it sees fit."[12] Although Talmon makes the point with reference to the ICJ, this again is true also of other bodies, judicial or not.

The key issue for our purposes, however, is in the nature of the assertion – is it bare, or is it supported by citation to authority? A bare assertion, with no citation to some other source, can be made either with regard to a legal proposition that is so uncontroversial that no further discussion is really necessary (e.g. "treaties are binding only on their parties"), or to a more controversial proposition that the decision-maker seeks to establish by virtue solely of its own authority. A supported assertion, by contrast, seeks to both amplify the normativity of the claim being made by invoking the authority of some other source, and spare the decision-maker of the need to do the inductive or deductive work of establishing custom independently.

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[6] See S Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion' (2015) 26 EJIL 417.
[7] AE Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 AJIL 757, 758.
[8] Talmon, above note 6, at 420.
[9] Roberts, above note 7, at 758.
[10] Talmon, above note 6, at 420.
[11] *Jurisdictional Immunities of the State (Germany v Italy; Greece intervening)*, Judgment, ICJ Reports 2012, 99, 123 para. 57.
[12] Talmon, above note 6, at 434.

Thus, for example, when scholars or courts say that "it is a rule of customary international law that the conduct of state organs is attributable to a state," they will normally not do any independent inductive or deductive analysis themselves. Instead, they will simply cite Article 4 of the ILC Articles on State Responsibility (ASR), relying on the ILC's authority for that proposition and effectively outsourcing the work of establishing custom to the ILC.

Or, to give a more elaborate example, consider the jurisprudence that determined that Article 3 common to the four Geneva Conventions of 1949 reflected customary international law. In *Nicaragua*, the ICJ found that Common Article 3 reflected customary international law and was applicable in international armed conflicts and non-international armed conflicts alike.[13] The ICJ's holding on this matter consisted of a bare assertion – it set out no inductive or deductive examination, and cited no other authority.

In subsequent judgments, other international courts and tribunals have taken a similar position. But instead of undertaking their own analysis of whether the rules in Common Article 3 reflect customary international law, or whether the scope of the customary rule extends to international armed conflicts, they have chosen to rely on the ICJ's finding in *Nicaragua* or on subsequent cases that themselves relied on *Nicaragua*. In the *Tadić* Decision on Interlocutory Appeal on Jurisdiction, the International Criminal Tribunal for the former Yugoslavia (ICTY) Appeals Chamber relied on *Nicaragua* for the proposition that Common Article 3 has passed into customary international law.[14] The Trial Chamber in *Tadić* then relied on the holding of the Appeals Chamber.[15] The International Criminal Tribunal for Rwanda (ICTR) Appeals Chamber in the *Akayesu* case relied on the *Tadić* Decision on Interlocutory Appeal and the *Tadić* Trial Judgment to reach the same conclusion.[16] The Special Court for Sierra Leone (SCSL) relied on the decisions in *Tadić* and *Akayesu* as well as the ICTY Appeals Chamber judgment in the *Delalic* case.[17] All of these were assertions of the customary status and scope of the rule supported by citations to authority, ultimately leading down a chain of citations to *Nicaragua*.

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[13] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* [1986] ICJ Rep 14, 114 para. 218 ('they are rules which, in the Court's opinion, reflect what the Court in 1949 called "elementary considerations of humanity"').

[14] *Prosecutor v Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 98 ('some treaty rules have gradually become part of customary law. This holds true for common Article 3 of the 1949 Geneva Conventions, as was authoritatively held by the International Court of Justice (Nicaragua Case, at para. 218)').

[15] *Prosecutor v Tadić*, Opinion and Judgment, IT-94-1-T, 7 May 1997, para. 609. The reliance is understandable also for internal institutional reasons.

[16] *Prosecutor v Akayesu*, Judgment, ICTR-96-4-T, 2 September 1998, para. 608. Combined with assertion.

[17] *Prosecutor v Fofana*, Decision on Preliminary Motion on lack of Jurisdiction Materiae: Nature of the Armed Conflict, SCSL-2004-14-AR72, 25 May 2004, paras 20-3.

There is nothing particularly objectionable about such reliance (at least if the cited authority actually stands for the proposition for which it is being cited). Indeed, it would be more surprising if each court undertook its own analysis from scratch rather than utilising the holdings of its peers. This reliance on authority to establish custom might be total, i.e. without any additional investigation on the part of the court or tribunal in question, or partial, that is to say accompanied by some further investigation. Either way, the reliance on authority reflects considerations of both judicial economy and judicial comity. Judge Peter Tomka, then President of the ICJ, observed that

> the Court has never abandoned its view, firmly rooted in the wording of the Statute, that customary international law is "general practice accepted as law"—that is, in the words of a recent case, that "the existence of a rule of customary international law requires that there be a 'settled practice' together with *opinio juris*". However, in practice, the Court has never found it necessary to undertake such an inquiry for every rule claimed to be customary in a particular case and instead has made use of the best and most expedient evidence available to determine whether a customary rule of this sort exists. Sometimes this entails a direct review of the material elements of custom on their own, while more often it will be sufficient to look to the considered views expressed by States and bodies like the International Law Commission as to whether a rule of customary law exists and what its content is, or at least to use rules that are clearly formulated in a written expression as a focal point to frame and guide an inquiry into the material elements of custom.'[18]

We are particularly interested in precisely *which* bodies are relied upon for their holdings of customary international law. Judge Tomka refers to "States and bodies like the International Law Commission". The ICJ has historically tended to cite other international courts less frequently than other international courts have cited the ICJ, preferring instead to rely on its own authority. This is probably partly due to the ICJ's self-regard as the apex court of the international system, partly to avoid criticisms that its sources are selective or biased, and partly due to tradition and institutional inertia.

The example we discussed above relating to Common Article 3 concerns findings of international courts. In this article, we will explore how the ICRC's Study has been used by States, international and domestic courts and tribunals, and other relevant actors, i.e. how the Study is regarded by other influential actors within the system for the purpose of establishing a rule of customary IHL. In doing so we are not making any kind of normative claim that no other actors possess such influence, nor that the influence of all of these actors is equal – far from it. The sample of the real-world reliance on the Study that we have produced is inevitably

[18] P Tomka, 'Custom and the International Court of Justice' (2013) 12 LPICT 195, 197.

limited. That said, our sense is that the sample is sufficiently representative of how the various actors in the international legal system perceive and use the Study so that we can draw reliable conclusions.

Degrees and kinds of authority

There are different senses to the word "authority".[19] It can, for example, convey the general notion that a person can oblige others to do something, regardless of whether that course of action is right or wrong, i.e. the obligation exists independently of its content – the key question there being whether such a claim to authority can ever be legitimate and justified. It can also refer to an essential quality of any legal system, as most notably in the work of Joseph Raz, to the power of law to direct behaviour to the exclusion of other reasons.[20] And it can convey the idea that some persons are epistemic or theoretical authorities, in the sense that they should be trusted with certain matters because they possess knowledge and expertise about them which others do not – for example, that an electrician should be trusted on repairing a refrigerator.[21]

To lawyers trained in the common law tradition, the word "authority" can also have the more mundane meaning of the sources which they rely on (and cite) in their briefs, judgments and other instruments. Law is an argumentative practice, but also an authoritative one, in which there is more reliance than in most other fields on the nature of the source of a proposition or an argument than on its content or correctness, which makes sense as to why common lawyers refer to their cited sources as "authorities."[22] A standard distinction in that regard is between authorities that are binding (as the decision of a higher court would be for a lower court in a precedent-based jurisdiction) and those that are merely persuasive (such as the judgments of hierarchically equal courts or the work of academics). As Schauer explains, however, the notion of a "persuasive authority" is oxymoronic. If the *reasons* given by the source are persuasive, then authority has nothing to do with the process of persuasion. If the reasons given

[19] See more Scott J. Shapiro, 'Authority', in Jules L. Coleman, Kenneth Einar Himma, and Scott J. Shapiro (eds.), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, Oxford, 2004), p. 382.
[20] See more Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press, Oxford, 2011) (arguing that law is genuinely authoritative only if it is in service of its subjects, helping them do what they otherwise ought to do).
[21] For an extensive discussion, see Linda Trinkaus Zagzebski, *Epistemic Authority: A Theory of Trust, Authority, and Autonomy in Belief* (Oxford University Press, Oxford, 2012).
[22] See Frederick Schauer, 'Authority and Authorities,' *Virginia Law Review*, Dec., 2008, Vol. 94, No. 8 (Dec., 2008), pp. 1931-1961, at 1934.

are *not* persuasive, however, yet the source is still relied on, even despite any substantive disagreement with its views, then it is content-independent authority and not persuasion that does all the work.[23]

Schauer thus correctly observes that the notion of "persuasive" authority really refers to the fact that reliance on that type of authority is entirely optional – the courts (or whoever else) can choose whom to cite and rely on.[24] And they can exercise this discretion for several purposes.[25] First, for genuine persuasion, where the source is cited because of the rigour and correctness of its reasoning. Thus, if a court conducted its own independent examination of whether a particular rule formed part of customary IHL, cited the ICRC Study in support, and in doing so looked in detail at the practice on which the Study based its conclusion about the specific rule, we could say that the court was genuinely persuaded by the Study. Second, for deference to authority. If a court simply asserted that a rule was one of customary IHL and cited the Study to that effect, without actually independently verifying that the Study's conclusion was correct, that court would be deferring to the expertise, status and mandate of the ICRC, i.e. it would be treating it (and the Study as its product) as an *authority*. This is essentially no different than say the two of us, as lawyers by training, choosing to believe in the existence of anthropogenic climate change by *trusting* the conclusions of climate scientists on this point, which we as non-experts have no way of independently verifying. Third, as a reflection of the law's inherent conservativism, a denial of novelty, a signal that the court did not just make its conclusions up.[26] While the first and second reasons for reliance on authority exclude each other, the third can co-exist with them in parallel.

In making these choices about citations, courts potentially enhance the persuasiveness and authority of their own decisions, as assessed by their primary audiences. But through citation they also equally reaffirm the authority of the sources they approvingly rely on. Authority is reinforced through habit and repetition, through *practice*, in an "informal, evolving, and scalar process by which some sources become progressively more and more authoritative as they are increasingly used and accepted."[27] Thus, the more that international and domestic courts, and other various influential actors in the global legal system, treat an instrument such as the ICRC Study as authoritative, the greater its authority becomes, and the

[23] Ibid., at 1940-1944.
[24] Ibid., at 1945-1947.
[25] Ibid., at 1947-1950.
[26] Ibid., at 1950.
[27] Ibid., at 1956-1957.

more likely it is for others to start regarding it as authoritative and cite it in their own decisions.[28]

Perhaps the best contemporary example of such a positive feedback loop is the ILC's Articles on State Responsibility. Upon their adoption in 2001, David Caron famously and correctly predicted a paradox between their form and authority.[29] Despite the fact that the Articles are not in any way formally binding, and have by the ILC's own admission included a measure of progressive development, they have been cited and relied on by all international courts, including the ICJ.[30] They are one of the ILC's most successful codification projects, and have succeeded in transforming how international lawyers think – and are trained to think – about concepts of State responsibility.[31] The success of the Articles is due to many factors, including the substantive need for such a product in this particular area, the nature of the ILC's codification process, the fact that the ILC is a State-empowered entity and that States had substantial input in their making.[32] Judge Tomka thus explained the ICJ's reliance on the ILC as follows:

> the codifications produced by the International Law Commission have proven most valuable, primarily due to the thoroughness of the procedures utilized by the ILC. Its texts and instruments are produced at a pedantic pace, entailing numerous reports of one or more (successive) Special Rapporteurs, discussions among ILC members in plenary session, debates over precise wording in the drafting committee, as well as dialogue with States in the Sixth Committee and the submission of States' written comments and observations prior to the final adoption of a text. Additionally, a number of the ILC's final draft articles have been considered and adopted as conventions at codification conferences, where participating States expressed their views concerning the proposed rules. Throughout this process, the topics under consideration also attract the attention of scholars and practitioners, who also voice their opinions. Such procedures provide for a much more comprehensive examination of a rule of customary law than is possible by the Court in the context of a judicial proceeding.[33]

[28] See Sandesh Sivakumaran, 'Beyond States and Non-State Actors: The Role of State-Empowered Entities in the Making and Shaping of International Law' (2017) 55 Columbia Journal of Transnational Law 342. We leave aside here the issue of whether (and when) cited authorities actually influence the decision that the court reaches, or whether (as legal realists would argue) judges reach decisions on the basis of their own priors and then seek to justify them by citations to authority.

[29] See David Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority' (2002) 96 AJIL 866.

[30] See Responsibility of States for Internationally Wrongful Acts, Compilation of Decisions of International Courts, Tribunals and Other Bodies, Report of the Secretary-General, A/62/62 (1 February 2007) and subsequent compilations A/65/76, A/68/72, A/71/80, A/74/83.

[31] For an extensive discussion, see Fernando Lusa Bordin, "Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law," (2014) 63 International and Comparative Law Quarterly 535.

[32] See Sivakumaran, above note 28; Bordin, above note 31, at 549-

[33] Tomka, above note 18, at 202-3.

Not all ILC products have, however, been able or will be able to trigger a positive feedback loop of authority.[34] The question for us here is whether the ICRC's Study has been able or will be able to do so, bearing in mind that many of the same considerations that warranted the acceptance of the ILC's authority are relevant for the Study as well.

Success or failure in building authority

For the Study to successfully build authority in the international system, it needs to be useful within the parameters of that system. And this is precisely what the Study sought to do, by filling gaps which as a purely pragmatic matter needed to be filled in contemporary IHL. Simply put, a codification project, i.e. one that is meant to restate existing law without precluding developments in that law, is more likely to succeed if influential actors within the system believe such a project to be necessary. How does the Study achieve this? First, by reducing largely unwritten custom to text, to rules that are more certain in their content, that can be interpreted and applied in the same way that a treaty rule can be. In doing so the Study inevitably contains a measure of progressive development (the progressiveness of which may well be contested), and reasonable people might disagree about how any given rule is drafted – this is just par for the course. In other words, when reducing customary rules to text, and doing so comprehensively in a sub-field of international law, it is impossible to completely keep separate the codification of existing rules from their development. Second, by making these rules universally applicable on account of their customary character, thus transcending the difficulties that some treaties that have universal or near-universal acceptance (such as the Geneva Conventions) do not comprehensively cover all of IHL (e.g. do not deal with the conduct of hostilities), whereas other treaties (such as the Additional Protocols) for various reasons have major gaps in their ratification – what Yoram Dinstein has called the "Great Schism."[35] Finally, the deepest of all gaps that the Study fills is the regulation of non-international armed conflicts, by identifying the vast majority of its rules as applicable to both

[34] See also Bordin, above note 31.
[35] Yoram Dinstein, "The ICRC Customary International Humanitarian Law Study", *International Law Studies*, Vol. 82, pp. 99, 100. See also Michael Bothe, "Customary International Humanitarian Law: Some Reflections on the ICRC Study," *Yearbook of International Humanitarian Law* Vol. 8 (2005): 143–178, at 145-146 (main ambition of the Study to fix loopholes).

types of armed conflict, even if many of them under treaty law apply only to international armed conflicts.[36]

But in order to make these contributions – to truly succeed as a codification project – the Study's status must become elevated from that of a mere academic work to a higher degree of authority. And that claim to authority is multifaceted. First, in a system, such as the international one, in which States are regarded as the primary lawmakers, the Study's authority is enhanced by its link to States. That link exists at a number of levels, including regarding the Study's inception. States have empowered the ICRC as an institution with authority regarding IHL generally. This is apparent from the Geneva Conventions as well as the Statutes of the Red Cross and Red Crescent.[37] States also mandated the ICRC to conduct the Study project specifically. Recall that in 1995, the International Conference of the Red Cross and Red Crescent recommended that:

> the ICRC be invited to prepare, with the assistance of experts in IHL representing various geographical regions and different legal systems, and in consultation with experts from governments and international organizations, a report on customary rules of IHL applicable in international and non-international armed conflicts, and to circulate the report to States and competent international bodies.[38]

The recommendation was originally made by the Intergovernmental Group of Experts for the Protection of War Victims, which had met earlier that year.[39] That Group, which consisted of "experts, representing 107 States and 28 governmental and non-governmental organizations", had prepared a series of recommendations on enhancing respect for the law.[40]

The Study's second claim to authority is epistemic. It is authoritative because it is the ICRC, with its 150 plus years of expertise in IHL, that stands behind it. The Study's claim to authority is based not only on the expertise of the ICRC itself, but also on the participation of many independent experts in the Study's process of preparation and review and on the

[36] See Theodor Meron, "Revival of Customary Humanitarian Law", (2005) 99 AJIL 817, at 833. The gap has also been filled through the jurisprudence of the international criminal tribunals and the Rome Statute of the ICC.
[37] The ICRC has various prerogatives under IHL treaties eg Third Geneva Convention, Articles 3, 9 and 125; Statutes of the International Red Cross and Red Crescent Movement (1986, amended 1995 and 2006), Article 5(2).
[38] International Conference of the Red Cross and Red Crescent, *Resolutions of the 26th International Conference of the Red Cross and Red Crescent* (7 December 1995), Resolution 1, available at https://www.icrc.org/eng/resources/documents/resolution/26-international-conference-resolution-1-1995.htm.
[39] 'Meeting of intergovernmental group of experts for the Protection of War Victims (Geneva, 23 - 27 January 1995): Recommendations' (1995) 304 IRRC 33, 34.
[40] 'Meeting of intergovernmental group of experts for the Protection of War Victims (Geneva, 23 - 27 January 1995)' (1995) 304 IRRC 4, 5.

exhaustiveness and rigour of that process. The ICRC also engaged in consultations with academic and governmental experts.[41]

The Study's claim to epistemic authority is linked to persuasion. Through clear commentaries to the rules and the massive, simply unprecedented amount of practice assembled, the Study seeks to convince its readers that its conclusions are verifiable, and thus correct.[42] This is enhanced by the rigorous way in which the Study was carried out. The volume on practice, here both an exercise in legal rigour and a conscious effort to prospectively enhance the authority of the Study, is tangible evidence of its authors' expertise and the amount of effort invested. The practice part of the Study is thus not only performative in the "we didn't make this up" sense; it is also a signal that the ICRC's expertise in this domain has few rivals. Indeed, had the rules part of the Study been published with the exact same content but without the practice part, the Study would inevitably have been greatly diminished in authority. This is true *even if* it turned out that few people today read the practice database and verify that the ICRC's conclusions are correct – its mere existence enhances the Study's authority.

Finally, the Study's authority rests on its subsequent approval by the influential actors of the international system, principal amongst which are States.[43] How the Study is received can greatly affect its authority. It can enhance it or diminish it. The more the approval builds up, the more authoritative the Study becomes, and the more likely it becomes that others will see it as authoritative in turn. It is precisely these reactions to the Study that we wish to measure.

Empirical analysis design

The Study's claim to authority has been and will get tested repeatedly and dynamically, the key test being how the Study has been received by what one of us has called the community

[41] Following the resolution of the International Conference, the ICRC convened a steering committee made up of leading academics and research on customary international humanitarian law commenced in October 1996. Research was undertaken in national sources, international sources, and the ICRC archives. National researchers cooperated in the research of national sources of 50 countries. ICRC delegations and the ICRC Advisory Service on International Humanitarian Law collected and analysed legislation and military manuals of other states. The research and consultations took nearly 10 years to complete and involved more than 150 experts. See J-M Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (CUP, 2005) li-lv; J-M Henckaerts, '*Customary International Humanitarian Law*: A Response to US Comments' (2007) 89 IRRC 473, 474.

[42] See Bothe, above note 35, at 155 ("The conclusions are verifiable. The reader does not have to trust the authors; he or she can scrutinise the way by which the authors arrive at their conclusions. This is part of the persuasive character of the Study.")

[43] Sivakumaran, above note 28.

of international humanitarian lawyers.[44] No matter the gap to be filled, the mass of practice accumulated, or the expertise of the ICRC and associated experts, if the Study had been roundly rejected by key actors following its publication, its claim to authority would have been seriously dented.

The reaction of States is of particular importance. They remain the most influential actor in the international system. We searched for governmental reactions to the Study, including formal statements invoking or disagreeing with the Study that governments have made for external audiences, such as other governments or international organisations. Relevant State reactions can be made in such diverse contexts that there is no feasible way of ensuring comprehensiveness of coverage. We have, however, attempted to make that coverage reasonably representative, including by conducting a keyword search of the ODS database of UN documents, as well as by examining military manuals that have been published since the finalization of the Study.[45] The easier such reactions are to be found, the more likely they are to influence the authority of the Study. The internal daily practices of States' legal advisors are also of importance but are inaccessible to us; the compendia of practice sometimes published by national journals cannot really capture how the Study is used in, for example, the confidential internal advice produced by government lawyers for their ministers, or that military lawyers give to their commanders.

Also of importance is how the Study has been received by other influential actors, including international and domestic courts, the ILC, the special procedures of the UN Human Rights Council, commissions of inquiry of the UN, and academics. Again, to be clear, we are not saying that the practice of these actors is directly relevant for assessing the status of any particular customary rule – this is simply not the object of our inquiry. We are interested in these actors because their own status in the systems means that citations by them of the Study would gradually enhance the Study's authority.

We have paid particular attention to judicial decisions. Although judicial decisions are only a small part of the practice of international law, they are particularly relevant owing to the centrality of authority in judicial reasoning, the fact that litigation is the most formal type of lawyering as an argumentative practice, and the fact that affirmative judicial decisions may convey further authority on the Study beyond the courtroom, as these decisions then get cited

[44] Sandesh Sivakumaran, 'Making and Shaping the Law of Armed Conflict' (2018) 71 Current Legal Problems 119.

[45] Our search parameters varied depending on the context; with databases we normally searched for terms such as 'customary international humanitarian law', Henckaerts, 'ICRC Study' and variations thereof, depending on the capabilities and coverage of each database.

and invoked by various other actors. Judicial citations to specific rules in the Study are thus a useful proxy for measuring the authoritativeness of the Study as a whole, while citations trends can help us predict whether the Study's authority is growing or diminishing.

Our analysis covers the following international courts and tribunals – the ICTY, ICTR, MICT, ICC, SCSL, ECCC, STL, KSC, ICJ, ITLOS, ECtHR, IACtHR, AfCtHPR, and EECC.[46] Criminal courts can be expected to apply IHL with the greatest frequency, and therefore engage with the Study in detail, because much of their subject-matter jurisdiction (war crimes) is directly linked with rules of IHL. We could reasonably expect these courts to rely on the Study heavily.[47] Other bodies, such as ITLOS, will only deal with IHL issues very exceptionally if at all. For feasibility reasons we have decided to confine our search to judgments (including at trial and appeals levels in the criminal context) and arbitral awards, but to exclude various types of interlocutory decisions of which there are a great number but which tend to be lower in importance.[48] We have also examined any separate opinions in such cases. Data collection was conducted by using the various institutional databases (eg HUDOC) for some tribunals and searching through their cases manually for others, as appropriate.[49]

As for domestic courts, we searched a variety of databases of domestic jurisprudence (Westlaw, International Law in Domestic Courts, worldlii, and the ICRC's national implementation database) and also directly searched the case law of States in which matters of IHL are widely litigated (Colombia, Israel, the UK, and the US).[50] Our coverage of domestic courts is inevitably partial; there was no practical way of obtaining a genuinely representative sample of domestic judgments without assembling multiple research teams with relevant linguistic and legal abilities, and this we could not do. The sample obtained may be selective, but it is nonetheless instructive.

The timeframe of our examination is from 2005, the year the Study was published, up to 31 July 2021. The results of our research are compiled in three spreadsheets annexed to this article.[51] To clarify, we did not review citations to the Study in the party briefs submitted to the domestic and international courts surveyed. Although we are aware that such citations can also influence the citation practice in the relevant court's decision in a given case, party briefs are not as easily accessible and searchable in the way the judicial decisions are.

[46] We are treating the KSC and ECCC as international courts for these purposes.
[47] See Meron, above note 35, at 833 (Study "will be a significant aid to international criminal tribunals").
[48] There are exceptions eg *Prosecutor v Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995.
[49] For the keyword searches used, see above note 45.
[50] For the keyword searches used, see above note 45. The terms were translated as appropriate.
[51] Available at [repository links to be inserted; available on request from the authors].

We were most interested in *how* the Study was cited, because this can tell us much about how the relevant actor (e.g. a court) perceived its authority. First, was the Study merely mentioned in some way, or was it used to support an assertion that a specific rule was or was not one of customary IHL? Second, did the actor agree or disagree with the Study, or in any other way express its approval or disapproval? Third, was the Study the sole or primary authority for the assertion that a rule was customary, or was it one among many? Fourth, did the actor cite to the rules part of the Study, or to the practice part/database, or both, and if the practice part was cited were any of the collected materials actually discussed? Fifth, was there any independent examination that a particular rule was, in fact, customary, or did the actor simply accept the customary status of the rule because the Study (or other authorities) said so? Key to all these questions is the nature of the Study's authority – does it persuade (or not) the relevant actor by the rigour of its reasoning and the density of the practice it assembled and analysed, or is rather the actor treating the Study as an epistemic authority, deferring to the expertise of the ICRC and its authors?

Findings

State reactions

The critical time point for the Study's authority was immediately upon its publication, but as we have seen authority builds up in an iterative process of long duration.[52] Had the Study immediately been met with a concerted negative response, its authority would have been nipped in the bud. Indeed, as the Study came out, it attracted criticism from a number of academics and government and military lawyers, mainly from powerful Western States, either writing officially or, more frequently, in an individual capacity. The criticisms of the Study tended to involve a mix of two types of arguments: first, that the ICRC's methodology was insufficiently rigorous; and second, that the ICRC got specific rules wrong.[53] The most notable

[52] See Bothe, above note 35, at 176-178.

[53] See, e.g., George H Aldrich, "Customary International Humanitarian Law — An Interpretation on behalf of the International Committee of the Red Cross", *British Yearbook of International Law*, Vol. 76, Issue 1, 2005, pp. 503–524 (while accepting that most conclusions of the Study are clearly correct, criticising the drafting of a great many rules in a rather peremptory fashion); Dinstein, above note 35 (arguing that the practice assembled by the ICRC contains too many instances that have no normative value; with regard to specific rules objecting to the Study's rejection of the concept of unlawful combatancy and its approach the status of civilians taking a direct part in hostilities (Rules 5 & 6); and to some aspects of Rules 35, 45, 55, 77; his final assessment of the Study was pessimistic (although coloured somewhat by the authors' rejection of his own suggestions) to the

example – and a potentially mortal one for the Study's authority – was an official letter sent to the ICRC by John B. Bellinger, III and William J. Haynes II, then the top lawyers in the US State Department and Defense Department respectively, in which they conveyed the US government's "initial reactions" to the Study, accompanied by an extensive annex analysing four specific rules in detail.[54]

The US letter was respectful in tone but harsh in content. It reads like a very bad review, as if the Study was brimming with methodological and substantive flaws. The Study is criticised for frequently failing to rigorously assess State practice; for relying on inappropriate

effect that it will prove unable to bridge the gap between the parties and non-parties to Additional Protocol I – ibid., at 110); Bothe, above note 35, at 163-178 (Study methodologically sound and generally correct in its conclusions; takes issue with formulations of Rules 106, 147 and on some of the expansion of the various rules to non-international armed conflicts, but generally defends the Study); David Turns, "Weapons in the ICRC Study on Customary International Humanitarian Law", *Journal of Conflict and Security Law*, Volume 11, Issue 2, Summer 2006, pp. 201–237 (criticising the Study's methodology, and especially lack of rigour with respect to some of the Study's rules on weapons (Rules 72-86) and their extension to non-international conflicts); Robert Cryer, "Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study", *Journal of Conflict and Security Law*, Volume 11, Issue 2, Summer 2006, pp. 239–263 (a broadly positive assessment of the Study, but criticising some of its engagement with international criminal law cases and instruments, specifically as to Rules 146, 153, 155, 156); Daniel Bethlehem, "The methodological framework of the Study", in Elizabeth Wilmshurst & Susan C. Breau (eds.), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge, Cambridge University Press, 2007), pp. 3-14 (criticising the Study's methodology and its tendency to use assertion ("encyclical") as a way of formulating customary rules; specifically questioning the customary status of Rule 6); Iain Scobbie, "The approach to customary international law in the Study", in Wilmshurst & Breau, ibid., pp. 15-49 (a generally positive evaluation with a mainly methodological critique); Karen Hulme, "Natural environment", in Wilmshurst & Breau, ibid., pp. 204-237 (generally positive but doubting the customary status of Rule 45); Steven Haines, "Weapons, means and methods of warfare," in Wilmshurst & Breau, ibid., pp. 258-281 (doubting the customary status of specific rules on weapons that were derived from treaties, similarly to Turns above); David Turns, "Implementation and compliance," in Wilmshurst & Breau, ibid., pp. 354-376 (arguing that the Study in some cases conflates custom with other types of rules, such as general principles of law, and specifically doubting the customary status of Rules 139-143); W. Hays Parks, 'The ICRC Customary Study: A Preliminary Assessment', (2005) 99 *Proceedings of the American Society of International Law* 208 (considering Rules 78 and 85 to be more 'ICRC agenda items' than statements of customary international law and criticising the focus on and lack of context of statements included in the Study). Needless to say, the genre of initial academic analyses of the Study lent itself to critique – just saying that the Study is great does not make for an interesting read. For generally positive evaluations of the Study with few if any substantive criticisms that the Study went beyond customary law (but sometimes with other criticisms, such as that the Study did not go far enough, that its drafting could have been improved or that it failed to bring clarity to important issues), see the contributions by Pemmaraju Srinivasa Rao, Djamchid Momtaz and Philippe Kirsch, in Larry Maybee & Benarji Chakka, *Custom as a Source of International Humanitarian Law* (ICRC, New Delhi, 2006); Dieter Fleck, "International Accountability for Violations of the *Ius in Bello*: The Impact of the ICRC Study on Customary International Humanitarian Law," *Journal of Conflict and Security Law*, Volume 11, Issue 2, Summer 2006, pp. 179–199; Anthony Rogers, "Combatant status", in Wilmshurst & Breau, ibid., pp. 101-127; Michael N. Schmitt, "The law of targeting", in Wilmshurst & Breau, ibid., pp. 131-168; Susan C. Breau, "Protected persons and objects", in Wilmshurst & Breau, ibid., pp. 169-203; William J. Fenrick, "Specific methods of warfare", in Wilmshurst & Breau, ibid., pp. 238-257; Françoise Hampson, "Fundamental guarantees", in Wilmshurst & Breau, ibid., pp. 282-301; Agnieszka Jachec-Neale, "Status and treatment of prisoners of war and other persons deprived of their liberty", in Wilmshurst & Breau, ibid., pp. 302-336; Ryszard Piotrowicz, "Displacement and displaced persons", in Wilmshurst & Breau, ibid., pp. 337-353; Charles Garraway, "War crimes", in Wilmshurst & Breau, ibid., pp. 377-398.

[54] Initial response of U.S. to ICRC study on Customary International Humanitarian Law with Illustrative Comments (November 3, 2006), at https://2009-2017.state.gov/s/l/2006/98860.htm.

practice and generally giving excessive weight to the practice of non-state entities; for failing to pay due regard to the views of specially affected States (which the US sees itself as being across the board on account of being involved in a great number of armed conflicts); for inappropriately conflating practice and *opinio juris*; and for oversimplifying "rules that are complex and nuanced." Therefore, the US considered that "the Study's methodological flaws undermine the ability of States to rely, without further independent analysis, on the rules the Study proposes."[55]

This was, in a word, a total denial of the Study's authority. Curiously, however, the critique in the illustrative annex to the US letter, which addresses four rules in detail, is often reasonable but hardly devastating. Nor were the rules that the US chose as examples (and in particular its disagreements with the Study's authors) genuinely pivotal to the structure of customary IHL as set out in the Study.[56] They do not, for example, challenge the Study's main contributions, such as the generalizability of the conduct of hostilities rules or the applicability of most rules to non-international conflicts. The response also served as a placeholder, with the letter promising a follow-up by saying that its response was "initial" and that the US will continue its review and "expect to provide additional comments or otherwise make our views known in due course."

The authors of the Study of course felt a need to respond to the methodological criticism, themselves dealing with the four controversial rules in the annex only summarily.[57] The promised US follow-up never came – at least not publicly – although the US continues to critique the Study.[58] Nor did other States, including the closest allies of the United States, make remotely similar comments in public, after the Study's publication or since. For example, an unnamed legal adviser of the UK Foreign and Commonwealth Office criticised aspects of the Study's methodology, and pointed to Rules 4 and 45 as examples of rules over which there

[55] Ibid.

[56] These were Rules 31, 45, 78, 157. The annex states that these rules were selected "from various sections of the Study, in an attempt to review a fair cross-section of the Study and its commentary. Although these rules obviously are of interest to the United States, this selection should not be taken to indicate that these are the rules of greatest import to the United States or that an in-depth consideration of many other rules will not reveal additional concerns."

[57] J-M Henckaerts, '*Customary International Humanitarian Law*: A Response to US Comments' (2007) 89 IRRC 473.

[58] See ILC, Protection of the environment in relation to armed conflicts, Comments and observations received from Governments, international organizations and others, A/CN.4/749 (17 January 2022) 29 and 79; ILC, Subsequent agreements and subsequent practice in relation to the interpretation of treaties: Comments and observations received from Governments, A/CN.4/712 (21 February 2018) 17; ILC, Identification of customary international law, Comments and observations received from Governments, A/CN.4/716 (14 February 2018) 22, 29 and 42-3; US Department of Defense Law of War Manual (2015, updated 2016).

were doubts. However, the reservations were a little over one page in length and rather general in nature. The statement concluded by noting that:

> the Study is an impressive piece of research, and will be a very useful quarry for the future. But we at least will treat the Rules with some degree of reservation. Overall, we feel that they represent too much of what States should do, rather than what they actually do, ie they state not what the law is but what it should be.[59]

This was not, either in content or tone, the total attack on the Study's authority as in the US letter.[60] For its part, Israel has been more critical of the Study, stating that, '[l]ike other States, Israel has serious reservations regarding the methodology applied in the ICRC study on customary humanitarian law, and consequently, regarding many of its conclusions. This methodology is inconsistent in many respects with the [International Law] Commission's own conclusions on the identification of customary international law. More specifically, the ICRC proposition in rule 45 of its study lacks adequate substantiation.'[61] Nonetheless, there has not been an accumulation of similarly adverse reactions by other States.

On the contrary, certain other States responded to the Study positively. Malaysia noted that '[p]raise was … due to ICRC for the publication of the study entitled Customary International Humanitarian Law.'[62] Sweden, on behalf of the Nordic countries, 'welcomed the ICRC study and hoped that States would disseminate it as widely as possible.'[63] Australia, on behalf of the CANZ group, noted that the Study 'was already proving to be an important resource for States'.[64] France opined that '[t]he comprehensive study by ICRC of customary

[59] Statement of FCO Legal Adviser at the Meeting of National Committees on International Humanitarian Law of Commonwealth States, 20 July 2005, reproduced at (2005) 76 BYIL 694, 695.
[60] Reservations on the part of the UK, expressed a few years later, were along similar lines: The UK government 'had reservations about volume I of the study. In particular, some of the examples provided were not, in its view, properly to be regarded as State practice for the purpose of the rules relating to the formation of customary international law. Furthermore, the study sometimes jumped too quickly to the conclusion that a rule had entered into the corpus of that law without sufficient evidence of State practice. On the other hand, volume 2 of the study was a valuable research tool which brought together a large amount of material that would otherwise be difficult to locate. She welcomed the update of that volume being conducted at the Lauterpacht Centre for International Law, in the University of Cambridge, with funding from the British Red Cross.' Sixth Committee of the United Nations General Assembly, Summary record of the 13th meeting, A/C.6/63/SR.13 (7 November 2008) para. 61.
[61] ILC, Protection of the environment in relation to armed conflicts, Comments and observations received from Governments, international organizations and others, A/CN.4/749 (17 January 2022) 102 (internal citations omitted).
[62] Sixth Committee of the United Nations General Assembly, Summary record of the 8th meeting, A/C.6/61/SR.8 (15 November 2006) para. 63.
[63] A/C.6/61/SR.8 (15 November 2006) para. 34. See also A/C.6/63/SR.13 (7 November 2008) para. 32 ('While views clearly differed on the study on customary international humanitarian law conducted by ICRC, it would on the whole be very useful to States.').
[64] A/C.6/61/SR.8 (15 November 2006) para. 29 (Australia speaking on behalf of Canada, Australia and New Zealand).

international humanitarian law deserved careful study by Member States,'[65] although on a later occasion it noted cautiously that while 'the study constitutes a useful doctrinal work, it could not be used as such against States.'[66] More neutrally, Tunisia indicated that it 'was following with interest the debate inspired by the 2005 publication of the ICRC study'.[67] And so, in the aftermath of the Study's publication the pushback against it, such as it was, does not seem to have continued, except sporadically and by a small number of states.[68]

Indeed, over the years, we have seen not a pushback but an embrace of the Study, at least on the part of several States. A number of States have cited the Study in a variety of public statements and documents. This includes Armenia,[69] Azerbaijan, Belgium,[70] the Democratic Republic of the Congo,[71] Germany,[72] Greece,[73] Malaysia, the Netherlands, Sweden,[74] and Switzerland.[75]

Azerbaijan has referred to the Study extensively over the years in various letters to the UN Secretary-General and describes the Study as 'authoritative'.[76] Malaysia and the

[65] Sixth Committee of the United Nations General Assembly, Summary record of the 13th meeting, A/C.6/63/SR.13 (7 November 2008) para. 27.
[66] Status of the Protocols Additional to the Geneva Conventions of 1949 and relating to the protection of victims of armed conflicts, Report of the Secretary-General, A/67/182/Add.1 (28 September 2012) 3.
[67] A/C.6/63/SR.13, para. 74.
[68] The Study was debated in the UN General Assembly in 2006 and later; the resolutions adoption only contain an anodyne reference to the Assembly "[w]elcoming the significant debate generated" by the Study – see, e.g., UN Doc. A/RES/61/30 (2006).
[69] Letter dated 21 October 2020 from the Permanent Representative of Armenia to the United Nations addressed to the Secretary-General, A/75/544–S/2020/1035 (26 October 2020).
[70] Case concerning Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Memorial of the Kingdom of Belgium, 1 July 2010, para. 4.74; Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal), Reply of the Kingdom of Belgium to the question put by Judge Greenwood.
[71] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, Verbatim Record, CR2005/13, 25 April 2005, 32.
[72] CCW Group of Experts on the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious, RESPONSES TO DOCUMENT CCW/GGE/X/WG.1/WP.2, ENTITLED IHL AND ERW, DATED 8 MARCH 2005, Response from the Federal Republic of Germany, CCW/GGE/XI/WG.1/WP.9 (29 July 2005).
[73] Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Written submission of Greece, 3 August 2011, para. 38; Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Verbatim Record, 14 September 2011, para. 78.
[74] Regeringens proposition 2016/17:109, Förstärkt skydd av kulturegendom vid väpnad konflikt och under ockupation, 16 February 2017, 19 and 24.
[75] CCW Group of Experts on the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Weapons Review Mechanisms, Submitted by the Netherlands and Switzerland, CCW/GGE.1/2017/WP.5 (7 November 17). See also Federal Department of Foreign Affairs, Humanitarian Access in Situations of Armed Conflict: Handbook on the Normative Framework, Version 1, 2011.
[76] Letter dated 10 April 2017 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General, A/71/880–S/2017/316 (26 April 2017) para. 128. See also Letter dated 30 April 2012 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General, A/66/787–S/2012/289 (3 May 2012); Letter dated 15 August 2016 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General, A/70/1016–S/2016/711 (16 August 2016); Letter dated 3 February 2020 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General, A/74/676–S/2020/90 (7 February 2020).

Netherlands cited the rules numerous times and both have treated the rules akin to a binding instrument.[77] Switzerland has stated that the Study, together with the Rome Statute, 'provide indications of the current state of international humanitarian law',[78] and that:

> Les autorités suisses se sont souvent appuyées sur la pratique du CICR pour attester du caractère coutumier d'une norme de droit international. Malgré son caractère contesté sur le plan international, l'étude du CICR en matière de droit international humanitaire coutumier a été citée à de nombreuses reprises par les autorités suisses. Ces dernières ont notamment souligné que l'étude contribue à clarifier le droit international coutumier dans le domaine humanitaire et à guider la pratique étatique y-relative.[79]

For its part, in one document Israel has taken a more cautious tone, observing that, '[l]ike many other States, Israel does not agree that all of the "rules" stated in the ICRC CIL Study reflect customary international law',[80] but Israel does refer to a few of the Study's rules and cites mainly the practice volume. Similarly, while the UK government expressed reservations about the Study, when it had to make formal submissions to the Baha Mousa Inquiry the lawyers representing the Ministry of Defence expressly noted that the government accepted that Rules 47, 87, 90, 91, 99, 118, 121, 122, 127, 128B, and 142 as articulated in the Study did reflect customary IHL and relied on the Study as the primary authority for those propositions.[81]

Other States, or parts thereof, refer to the Study in their military manuals. Colombia, Denmark, and New Zealand cite the Study extensively in their manuals; and Spain mentions

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[77] Letter dated 1 June 2015 from the Permanent Representative of Malaysia to the United Nations addressed to the Secretary-General, S/2015/402 (2 June 2015). Rather than the Study as such, Malaysia refers to the list of rules in 'J. Henckaerts, "Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict ", International Review of the Red Cross, vol. 17, no. 857 (International Committee of the Red Cross, March 2005)'. CCW Group of Experts on the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, RESPONSES TO DOCUMENT CCW/GGE/X/WG.1/WP.2, ENTITLED IHL AND ERW, DATED 8 MARCH 2005, Response from The Netherlands, CCW/GGE/XII/WG.1/WP.4 (7 November 2015).

[78] Le droit international humanitaire et les conflits armés contemporains, Rapport du Conseil fédéral En réponse au postulat 08.3445 de la Commission de politique extérieure du Conseil des Etats du 20 juin 2008, 4 ('Aujourd'hui, le Statut de Rome de 1998 et l'étude de 2005 du Comité international de la Croix-Rouge (CICR) sur le droit international coutumier fournissent des indications sur l'état actuel du droit international humanitaire.')

[79] La pratique suisse relative à la détermination du droit international coutumier, available at https://legal.un.org/ilc/sessions/68/pdfs/french/icil_switzerland.pdf.

[80] The State of Israel, The Operation in Gaza, 27 December 2008 – 18 January 2009: Factual and Legal Aspects (July 2009) fn 70.

[81] Ministry of Defence, Closing Submissions to the Baha Mousa Public Inquiry on Modules 1-3, 25 June 2010, pp. 28-33, archived online at https://web.archive.org/web/20120215220215/http://www.bahamousainquiry.org/linkedfiles/baha_mousa/hearings/oral_submission/sub000947.pdf.

the Study.[82] There are some 242 references to the Study in the New Zealand manual and, in places, the manual treats the Study akin to a legislative text. The manual explains its use of the Study as follows:

> Because customary law is derived from State practice, its exact content is sometimes hard to establish and may be controversial. In 2005, the International Committee of the Red Cross (ICRC) published Customary Rules of International Humanitarian Law. Although it has no legal status, this detailed study provides useful material on which an assessment can be made. Rules from the study are referred to in this manual where they [are] considered helpful. Omission of reference to a rule does not mean, however, that the NZDF does not accept the validity of that rule.[83]

Colombia also refers to the rules of the Study throughout but adds a disclaimer that citation does not constitute recognition of the customary rule.[84] Along similar lines, Denmark refers to the Study extensively – with some 227 substantive references – and likewise approaches it in places like a legislative text. It prefaces its use with a one-page discussion of the Study. The manual recalls that the ICRC 'worked for a decade to identify customary law in the field of IHL' (a reference to its rigour and epistemic authority), recounts the criticisms of the Study, and concludes its discussion by noting that '[t]his Manual refers to the SCIHL [the Study on Customary IHL] as an indication of the customary international law nature of rules while giving due consideration to and taking into account well-known objections to the validity of the individual rules. Footnote references to the SCIHL may be seen as an indication that the SCIHL has identified a rule of importance but should not be taken as a sign that the Manual necessarily reflects the obligation in the area.'[85]

Other manuals demonstrate greater reservations regarding the Study's authority. For Germany, at the time of publication of its military manual (2013), '[i]t remains yet to be seen whether it [the Study] will come to be regarded as a reliable compilation of customary international humanitarian law.'[86] The manual of Argentina, which was published after the publication of the Study, does not cite it. For its part, the US Department of Defense Law of War Manual does not cite the Study in its analysis of the various rules of the law of armed

[82] Orientaciones. El Derecho de los Conflictos Armados, Tomo 1, Publicación OR7–004, (Edición Segunda), Mando de Adiestramiento y Doctrina, Dirección de Doctrina, Orgánica y Materiales, 2 November 2007, 8-4
[83] New Zealand Defence Force, Manual of Armed Forces Law, Volume 4 Law of Armed Conflict (2017) para. 3.4.7 (internal citation omitted).
[84] Comando General de las Fuerzas Militares, Manual de derecho operacional, Manual FF.MM 3-41 Público (2009) 29 fn 25 ('El presente Manual cita a manera de referencia una serie de normas de derecho consuetudinario recogidas por el CICR, pero no constituye una manifestación de reconocimiento de su valor jurídico como costumbre internacional').
[85] Danish Ministry of Defence, Military Manual on International Law relevant to Danish Armed Forces in International Operations (September 2016) 5.4.1
[86] Joint Service Regulation (ZDv) 15/2 Law of Armed Conflict – Manual – May 2013, 19.

conflict, but cites it once at the very end of the Manual to reiterate US criticisms. It does, however, cite the US formal response to the Study at various other points in the Manual.[87] The absence of citations to the Study is clear evidence of disapproval, in light of the specific context. It expresses the view of the Department of Defense, but it is difficult to assess to what extent that disapproval carries across the many layers of the vast US bureaucracy and armed forces. (This comment is of course valid *mutatis mutandis* for all States and their expressions of approval or disapproval of the Study).

It is near-certain that the military and government lawyers of many more States use the Study in their day-to-day work behind closed doors. This has been our anecdotal experience from interacting regularly with such lawyers.

In sum, we can see that certain States have embraced the Study, treating it as an authoritative text and relying on it to a significant degree, others use it routinely in various contexts, while a few States are more ambivalent. The United States, or at least the Department of Defense, remains negatively disposed. It is clear, however, that there has not been any concerted pushback on the part of States generally – the Bellinger/Haynes letter did not generate a trend in that regard. While some States are not enthusiastic about the Study, there is no organised attempt to mobilise rejection of the Study among States. This inevitably leaves greater space for the reactions of other leading actors to affect the Study's authority. We turn first to international and then domestic courts.

International courts and tribunals

The Study has been cited by almost all major international and regional courts and tribunals. It has been cited in at least 50 judgments, 18 separate opinions, and one arbitral award. In many of these outputs, the Study was cited multiple times – the 69 decisions amount to 162 citation records in our spreadsheet.

As expected, the Study has been cited most frequently by the international criminal courts and tribunals. The ICTY has cited the Study in 16 judgments and four separate opinions, the ICTR in one judgment, the MICT in one judgment, the ICC in six judgments and two separate opinions, the ECCC in two judgments, and the SCSL in four judgments. If we were to go beyond judgments, we would find that the Study has been cited on many more occasions,

[87] US Department of Defense Law of War Manual (2015, updated 2016), at https://dod.defense.gov/Portals/1/Documents/pubs/DoD%20Law%20of%20War%20Manual%20-%20June%202015%20Updated%20Dec%202016.pdf?ver=2016-12-13-172036-190.

such as in decisions on interlocutory appeals[88] and the confirmation of charges,[89] including by the newest tribunal, the KSC.[90]

The Study has also been cited regularly by the regional human rights courts, except for the African Court which has simply not had the opportunity to pronounce on issues of customary IHL. It is cited in nine ECtHR judgments and seven separate opinions as well as in 11 IACtHR judgments and two separate opinions. The Study has thus been cited in more judgments of the ECtHR and IACtHR than the ICTR and ICC. Although perhaps surprising, the citation frequency can be explained by the number of cases involving an armed conflict that are brought before the regional human rights courts, in which they sometimes apply IHL while interpreting the human rights treaties over which they have jurisdiction, as well as the relatively few judgments (as distinct from decisions) delivered by the ICC. Insofar as the ICTR is concerned, relatively few instances of war crimes were adjudicated, the focus of that tribunal tending to be on genocide and crimes against humanity.

Moving beyond the international criminal tribunals and the regional human rights courts, the Study has been cited in three separate opinions to ICJ judgments, all by Judge Cançado Trindade, but not in any judgment of the Court itself.[91] It has been cited in one award of the Eritrea-Ethiopia Claims Commission. There were no citations in judgments of the STL, ITLOS, or the African Court of Human and Peoples' Rights. This can most likely be explained by the subject-matter and the small number of relevant judgments handed down by these bodies. We carefully considered such absences of citation to determine whether the relevant court is silently expressing disapproval of the Study by failing to cite it when such a citation could reasonably be expected, in particular when the court is relying on any rule of customary IHL. We could not find any such instances – for example, the ICJ cases in which Judge Cançado Trindade cited the Study, but the majority did not, were not really dealing with IHL in detail.

[88] Eg *Prosecutor v Hadžihasanović and Kubara*, Decision on Joint Defence Interlocutory Appeal of Trial Chamber Decision on Rule 98bis Motions for Acquittal, IT-01-47-AR73.3, 11 March 2005, fn 54.
[89] Eg *Prosecutor v Abu Garda*, Decision on the Confirmation of Charges, ICC-02/05-02/09, 8 February 2010, fns 111 and 130.
[90] *Prosecutor v Thaçi et al*, Basic Court Chamber, Public Redacted Version on the Confirmation of the Indictment against Hashum Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi, 26 October 2020, KSC-BC-2020-05-F00026-RED; *Prosecutor v Shala*, Basic Court Chamber, Public Redacted Version of the Decision on the Confirmation of the Indictment Against Pjetër Shala, 12 June 2020, KSC-BC-2020-04/F00007/RED/1.
[91] Judge Cançado Trindade also cited the Study when he sat as a judge of the Inter-American Court. See *Case of the Miguel Castro-Castro Prison v Peru*, Judgment (Merits, Reparations and Costs), Concurring Opinion of Judge Cançado Trindade, 25 November 2006, Series C No 160, para. 36.

Of particular interest to us is *how* the Study has been used. In all but two instances, the tribunal that cited the Study either agreed with the Study or was neutral – to reiterate, of 162 total citations in 69 decisions there are only two instances of disagreement. In 75 citations, the Study is the primary or sole authority for the proposition for which it is cited (most often, but not always, the content of a customary rule). In 99 citations, the court is expressly relying on the Study to establish the existence and content of a customary rule or some broader normative proposition, without conducting any investigation of its own into the customary status of a rule, i.e. without independently evaluating state practice and *opinio juris* supporting that rule. These are the clearest cases of the Study being relied on as an *authority*. There are only 9 examples where the court is conducting some kind of independent assessment, but most often this examination is cursory and relies on the practice assembled in the Study as a source. Some patterns clearly emerge, notably that over time the Study is being regarded as more authoritative. But let us first address the two instances of disagreement with the Study's findings.

The first such instance is that of an award by the Eritrea-Ethiopia Claims Commission. The Commission found that 'the provisions of Article 54 [API] that prohibit attack against drinking water installations and supplies that are indispensable to the survival of the civilian population for the specific purpose of denying them for their sustenance value to the adverse Party had become part of customary international humanitarian law by 1999 …'.[92] In reaching this Conclusion, the Commission referred to the Study in a footnote:

> The Commission notes with appreciation the new, exhaustive study of customary law by the ICRC, JEANMARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (Cambridge University Press 2005). That study concludes that a broader prohibition than the one stated in Article 54(2) has become customary law. *The Commission need not, and does not, endorse the study's broader conclusion*.[93]

As can be seen, the Commission goes out of its way to commend the Study, perhaps owing to its disagreement. The Commission notes the Study 'with appreciation' and describes it as 'exhaustive'. At the same time, the Commission states that it 'need not, *and does not*, endorse the study's broader conclusion' on the issue in question. Whereas Rule 54 of the Study provides that '[a]ttacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population is prohibited', the Commission limits the customary

[92] Western Front, Aerial Bombardment and Related Claims, Eritrea's Claims 1, 3, 5, 9–13, 14, 21, 25 & 26, Partial Award, 19 December 2005, para. 105.
[93] Ibid, fn 23 (emphasis added).

prohibition to attacks 'for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party'. In other words, the Commission regards the customary rule to be narrower than as defined in the Study, limited by the requirement of a specific purpose.

Of note, this instance of disagreement took place in 2005, the very year the Study was published and thus before it could accrue any greater authority over time. The disagreement is expressed without any contrary analysis of State practice or *opinio juris*, by way of assertion. The 'does not' expression of disapproval is particularly curious when a 'need not' would have sufficed. One possible explanation for the Commission's rather firm disagreement – but hardly a conclusive one – is that one of its members was George Aldrich, who wrote a very critical review of the Study that same year in the *British Yearbook of International Law*, in which he did expressly deal with Rule 54 of the Study and its allegedly incorrect encapsulation of custom.[94]

The second instance of disagreement is that of the ICTY *Đorđević* Trial Judgment.[95] There the Trial Chamber 'recalls the principle of international humanitarian law that in case of doubt whether a person is a civilian, that person shall be presumed to be a civilian.' The footnote to that sentence reads:

> In international armed conflicts, the rule is codified in Additional Protocol I, Article 50(1). While Article 13 of Additional Protocol II does not contain the same text, the Chamber is of the view that the principle also applies in non-international armed conflicts. … While the ICRC's Customary International Humanitarian Law Study stopped short of finding this to be a customary rule of international humanitarian law given the lack of relevant State practice in regard to non-international armed conflicts, the Study noted that "the same balanced approach […] with respect to international armed conflicts seems justified in non-international armed conflicts". Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law, Vol. I (Cambridge, Cambridge University Press, 2009), p 24.

The Trial Chamber thus finds a rule of customary international humanitarian law that the Study did not endorse in either type of armed conflict, due to substantial controversy surrounding the presumption in Article 50(1) AP I. And the Chamber does so in a purely assertive mode. There is no detailed examination of literature, State practice or the actual extent of the difference between its approach and the Study – the Chamber simply preferred to say that the treaty provision codified custom, relying on the Study even while gently disagreeing with it.

[94] Aldrich, above note 53, at 516-517. We need not, and do not, express any view as to whether his critique is valid.
[95] *Prosecutor v Đorđević*, Trial Chamber II, Judgment, 23 February 2011, Case no IT-05-87/1-T, para. 2066.

If we move beyond instances of agreement or disagreement and dig deeper, we find that different entities have used the Study in different ways. Consider the ICTY. In the period immediately after the Study was published (2005-8), with some exceptions, the ICTY tended to cite the Study for its compilation of practice. It not infrequently referred to the military manuals and domestic legislation compiled in Volume II of the Study. For example:

> According to national practices, war booty includes enemy property or military equipment captured on the battlefield. Personal effects belonging to prisoners of war are an exception.[112]
>
> Fn 112: See Argentine, Law of War Manual (1969), para. 1020; Australia, Commanders' Guide (1994), paras. 712 and 967; Canada, LOAC Manual (1999), paras. 27 and 48; Germany, Military Manual (1992), paras. 706 and 707; Kenya LOAC Manual (1997), pp. 7 and 8; Netherlands, Military Manual (1993), p. IV-5; New Zealand, Military Manual (1992), paras. 526 and 527; US Field Manual (1956), para. 59; UK Military Manual (1958), para. 615. Cited in Customary International Humanitarian Law, ICRC, Volume II, pp. 992-998.[96]

The ICTY also cited the Study as an academic authority,[97] and alongside teachings of publicists.[98] Individual judges relied on the Study also for the methodology of determining customary international law.[99]

Over time, however, the approach of the ICTY to the Study changed. By 2011, the Study was being used in a more authoritative manner that transcends 'mere' academic authority or a collection of practice. The ICTY was citing the Study for a variety of statements and propositions.[100] And it relied on the Study as the sole authority for the customary status of particular rules without any independent assessment. For example, the *Popović* appeal judgment reads:

> The Appeals Chamber observes that according to customary international law applicable both in international and non-international armed conflicts "[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".[1746]

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[96] *Prosecutor v Hadžihasanović and Kubura*, Trial Chamber, Judgment, 15 March 2006, Case no IT-01-47-T, para. 51. See also *Prosecutor v Naletilić and Martinović*, Appeals Chamber, 3 May 2006, Case no IT-98-34-A, Separate and Partially Dissenting Opinion of Judge Schomburg, para. 15; *Prosecutor v Galić*, Appeals Chamber, Judgment, 30 November 2006, Case no IT-98-29-A, fns 285 and 299; *Prosecutor v Martić*, Trial Chamber I, 12 June 2007, Case no IT-95-11-T, fn 1256.

[97] *Prosecutor v Orić*, Appeals Chamber, Judgment, 3 July 2008, Case no IT-03-68-A, fn 44 (citing the introduction to the Study).

[98] *Prosecutor v Halilović*, Appeals Chamber, Judgment, 16 November 2005, Case no IT-01-48, fn 90.

[99] *Prosecutor v Galić*, Appeals Chamber, Judgment, 30 November 2006, Case no IT-98-29-A, Partially Separate and Dissenting Opinion of Judge Schomburg, para. 19; *Prosecutor v Milošević*, Appeals Chamber, Judgment, 12 November 2011, Case no IT-98-29/1-A, Partially Dissenting Opinion of Judge Liu Daqun, paras 6 and 10.

[100] Eg *Prosecutor v Gotovina et al*, Trial Chamber I, Judgment Volume II of II, 15 April 2011, Case no IT-06-90-T, para. 1779; *Prosecutor v Karadžić*, Trial Chamber III, Public Redacted Version of Judgment, 24 March 2016, Case no IT-95-5/18-T, fns 20404 and 20405.

> Fn 1746: Henckaerts and Doswald-Beck, Customary International Humanitarian Law, Vol. I, Rule 55, pp. 193-200. See also Article 23 of Geneva Convention IV; Article 70 of Additional Protocol I; Article 18 of Additional Protocol II.' [101]

As can be seen from the passage, the ICTY also cited the Study alongside treaty provisions, placing it at par with binding texts.

The evolution of the Tribunal's approach was not entirely linear. The ICTY did treat the Study with elevated authority even shortly after its publication. In the 2006 *Hadžihasanović* trial judgment, the Chamber observed that the Study was 'considered an authoritative source on the subject'[102] and in the 2007 *Martić* case, the Trial Chamber cited the Study alongside treaty provisions and judicial decisions.[103] Nonetheless, there is a noticeable shift in approach in the years immediately after the Study was published as compared with some years later.

For its part, the ICC has used the Study in different ways, sometimes in the course of the same judgment. At times, the Study is cited alongside treaty provisions,[104] indicating that it is on a par with formally binding instruments, or it is cited alongside judicial decisions.[105] Rules of the Study are also cited as accurate reflections of customary international law. For example, in the *Ntaganda* trial judgment, the Chamber stated that

> This definition [of military objectives], through customary international law, has also become applicable to non-international armed conflicts. See Rule 8 of the ICRC Study on Customary IHL, and the underlying State practice referred to in the study.[106]

Likewise, in the *Ntaganda* appeal judgment, the Appeals Chamber stated that 'A similar prohibition exists under customary law and is set out in rule 129(B) of the ICRC's compilation of customary rules of international humanitarian law'.[107]

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[101] Eg *Prosecutor v Popović et al*, Appeals Chamber, Judgment, 30 January 2015, Case no IT-05-88-A, para. 615.
[102] *Prosecutor v Hadžihasanović and Kubura*, Trial Chamber, Judgment, 15 March 2006, Case no IT-01-47-T, para. 253.
[103] *Prosecutor v Martić*, Trial Chamber I, 12 June 2007, Case no IT-95-11-T, fn 192.
[104] *Prosecutor v Ntaganda*, Appeals Chamber, Public redacted version of Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled 'Judgment', 30 March 2021, ICC-01/04-02/06/2666-Red, para 549 and fn 1073. Also noting that '[t]he relevant customary rule is set out in rule 129(A) of the ICRC study'. See also *Prosecutor v Bemba*, Trial Chamber III, Judgment pursuant to Article 74 of the Statute, 21 March 2016, ICC-01/05-01/08-3343, fns 342 and 353.
[105] *Prosecutor v Katanga*, Trial Chamber II, Judgment pursuant to Article 74 of the Statute, 01/04-01/07-3436-tENG, fn 2122.
[106] *Prosecutor v Ntaganda*, Trial Chamber VI, Judgment pursuant to Article 74 of the Statute, 8 July 2019, ICC-01/04-02/06-2359, fn 3156. See also *Prosecutor v Bemba*, Appeals Chamber, Judgment on the Appeal of Mr Jean-Peirre Bemba Gombo against Trial Chamber II's "Judgment pursuant to Article 74 of the Statute"', 8 June 2018, ICC-01/05-01/08-3636-Anx1-Red (Dissenting Opinion Judges Monageng and Hofmański) para. 559.
[107] *Prosecutor v Ntaganda*, Appeals Chamber, Public redacted version of Judgment on the appeals of Mr Bosco Ntaganda and the Prosecutor against the decision of Trial Chamber VI of 8 July 2019 entitled 'Judgment', 30 March 2021, ICC-01/04-02/06/2666-Red, para. 549.

On occasion, though, the Study is cited in a footnote alongside academic articles,[108] suggesting that the Study is being treated as akin to teachings of publicists. And the language used when describing the Study can be more tentative, suggesting a lesser degree of authority. Thus, in the *Ntaganda* trial judgment, the Chamber stated that '*It has also been considered as* a rule of customary IHL, applicable in both international and non-international [armed conflict] by the ICRC: see Rule 15 of the ICRC Study on Customary IHL, and underlying practice'.[109] Aside from these isolated instances, the Study is cited as authoritative and no independent analyses of its conclusions on customary international law are set out in the judgments.

The IACtHR uniformly affords the Study a high degree of authority. The way in which it is cited suggests that it is seen as comparable to a legislative text. For example, in the *Case of the Massacres of El Mozote and Nearby Places v El Salvador*, the Court stated:

> In analyzing and interpreting the scope of the provisions of the American Convention in the instant case, in which the facts occurred in the context of a non-international armed conflict, and in keeping with Article 29 of the American Convention, the Court finds it useful and appropriate, as it has on other occasions, to have recourse to … customary international humanitarian law,[166] as complementary instruments and in consideration of their specificity on this subject.
>
> 166 'Cf. International Committee of the Red Cross, Customary International Humanitarian Law, Vol. I, edited by Jean-Marie Henckaerts and Louise Doswald-Beck, 2007.'[110]

The Study is thus treated as an, even 'the', authoritative statement of customary international humanitarian law.

This approach is operationalized in the jurisprudence of the Inter-American Court. For example, throughout the judgment in the *Case of the Santo Domingo Massacre v Colombia*, the Court refers to the Study as the sole authority for a variety of propositions of customary international humanitarian law and does not undertake its own independent analysis.[111] The same is true of the *Case of Vásquez Durand et al v Ecuador*.[112] In the *Case of the Afro-descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v Colombia*, the Court states:

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[108] *Prosecutor v Lubanga*, Appeals Chamber, Public redacted Judgment on the Appeal of Thomas Lubanga Dyilo against his Conviction, 1 December 2014, ICC-01/04-01/06-3121-Red, fn 607 and Dissenting Opinion Judge Sang-Hyun Song, fn 12.

[109] *Prosecutor v Ntaganda*, Trial Chamber VI, Judgment pursuant to Article 74 of the Statute, 8 July 2019, ICC-01/04-02/06-2359, fn 2668 (emphasis added).

[110] *Case of the Massacres of El Mozote and Nearby Places v El Salvador*, Judgment (Merits, Reparations and Costs), 25 October 2012, Series C No 253, para. 141. See also *Rochac Heranández et al v El Salvador*, Judgment (Merits, Reparations and Costs), 14 October 2014, Series C No 285, para. 109. See further *Case of the Santo Domingo Massacre v Colombia*, Judgment (Preliminary Objections, Merits and Reparations), 30 November 2012, Series C No 259, para. 187.

[111] Para. 212, referring to Rule 1; para. 214, referring to Rule 14; para. 216, referring to Rule 15; para. 234, referring to Rule 12; para. 271, referring to Rules 8-11; para. 272, referring to Rule 52.

[112] Judgment (Preliminary Objections, Merits, Reparations and Costs) 15 February 2017, Series C No 332.

> According to Rule 7 of Customary International Humanitarian Law, "[t]he parties to the conflict must at all times distinguish between civilian objects and military objectives. Attacks may only be directed against military objectives. Attacks must not be directed against civilian objects." Also, Rule 133 stipulates that "[t]he property rights of displaced persons must be respected."[113]

The 'Rules' identified in the Study are treated as if they are rules of international law akin to treaty provisions.[114]

The approach of the ECtHR is somewhat closer to that of the ICTY. In recent years, the ECtHR has treated the Study as highly authoritative. However, this was not always the case. In the period shortly after the Study was published, the Study was cited in a tentative manner. In the 2008 case of *Korbely v Hungary*, the Grand Chamber noted that '*In the view of the International Committee of the Red Cross (ICRC)*, the rule that any person hors de combat cannot be made the object of attack has become a customary rule applicable to both international and non-international armed conflicts.'[115] In the same paragraph, the Chamber notes that 'the ICRC's study on customary international humanitarian law (2005) *proposes* the following rule …'.[116] The way in which the Study is cited suggests that the views are those of the ICRC and the Grand Chamber does not (necessarily) adopt them. In the 2010 *Van Anraat v Netherlands* case, the Court cited the Study for its practice set out in Volume II.[117]

By 2013, after some years had passed and there was time for the Study to become embedded, the ECtHR started to treat the Study in a more authoritative manner. In *Janowiec and Others v Russia*, the Grand Chamber recounted that "[u]nder customary international humanitarian law, States have an obligation 'to investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects''[118] and refers to the Study, the four Geneva Conventions, and various General Assembly resolutions in a footnote in support of that proposition.[119] In the 2015 *Chiragov* and *Sargsyan* cases, the Grand Chamber referred to Rule 132 of the Study as the sole authority in support of the proposition that 'the right of displaced persons "to voluntary return in safety to

[113] Judgment (Preliminary Objections, Merits, Reparations and Costs), 20 November 2013, Series C No 270, para. 349 (internal citations omitted).
[114] See also *Case of the Santo Domingo Massacre v Colombia*, Judgment (Preliminary Objections, Merits and Reparations), 30 November 2012, Series C No 259, para. 271.
[115] *Case of Korbely v Hungary*, App no 9174/02, Judgment (Merits and Just Satisfaction), Grand Chamber, 19 September 2008, para. 51 (emphasis added).
[116] Emphasis added. See also para. 90, referring to 'the proposed Rule 47'.
[117] *Case of Van Anraat v Netherlands*, App no 65389/09, Decision on Admissibility, Third Section, 6 July 2010, para. 40.
[118] Application Nos 55508/07 and 29520/09, Judgment (Merits and Just Satisfaction), Grand Chamber, 21 October 2013, para. 27.
[119] Fn 8.

their homes or places of habitual residence as soon as the reasons for their displacement cease to exist" is regarded as a rule of customary international law (see Rule 132 in Customary International Humanitarian Law by the International Committee of the Red Cross (ICRC)) that applies to any kind of territory.'[120] The Rule is mentioned in brackets in the main text. In neither of those cases is there an independent assessment of the customary status of the rule.

By 2017, and similarly to the approach taken by the Inter-American Court, the Study was being cited as if it were a legislative text. For example, in the 2017 *Tagayeva* case, the Court observed:

> Volume I of the updated version of the International Committee of the Red Cross (ICRC) "Study on Customary International Humanitarian Law" (2005) contains Rule 11, which provides: "Indiscriminate attacks are prohibited". Rule 12, which is entitled "Definition of Indiscriminate Attacks", reproduces the definition contained in Article 51 § 4 of Protocol I to the Geneva Convention (cited above). Rule 84, which is entitled "The Protection of Civilians and Civilian Objects from the Effects of Incendiary Weapons", reads: "If incendiary weapons are used, particular care must be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects." The ICRC comment summary to each of those Rules indicates that "State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts".[121]

This approach was subsequently followed in key Grand Chamber cases such as *Georgia v Russia (II)* and *Hanan v Germany*.[122] As before, the Study is the sole authority for the customary status of particular propositions and at no time is independent analysis set out in the judgment.

Domestic courts

Turning to domestic courts,[123] the Study has been cited in at least 141 judgments. These are nine judgments from courts in the UK, including two from the Supreme Court; seven US judgments, including one from the Supreme Court, as well as one concurring opinion; and

[120] *Case of Chiragov and Others v Armenia*, App no 13216/05, Judgment (Merits), Grand Chamber, 16 June 2015, para. 97 (internal citation omitted). See also *Case of Sargsyan v Azerbaijan*, App No, 40167/06, Judgment (Merits), Grand Chamber, 16 June 2015, para. 95.
[121] *Case of Tagayeva v Russia*, App nos 26562/07, 49380/08, 21294/11, 37096/11, 49339/08 and 51313/08, Judgment, Court (First Section), 13 April 2017, para. 471.
[122] *Georgia v Russia (II)*, App No 38263/08, Judgment (Merits), Grand Chamber, 21 January 2021, paras 290 and 324; *Hanan v Germany*, App No 4871/16, Judgment (Merits and Just Satisfaction), Grand Chamber, 16 February 2021, para. 80.
[123] Judgments of domestic courts can be taken as the practice of states as well as subsidiary means for determining rules of law. On the dual role of domestic courts, see Anthea Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (2011) 60 ICLQ 57.

seven Israeli Supreme Court judgments and one from the Military Court of Appeals. It has been cited in one Peruvian judgment, three Swedish judgments, three Dutch judgments, and six German judgments, including one from the Federal Court of Justice and two from the Federal Constitutional Court. It has been cited in at least 26 judgments of the Court of Bosnia and Herzegovina; and in 78 Colombian judgments, including eight judgments of the Colombian Constitutional Court and 69 judgments of the Jurisdiction for Peace of which 38 were in separate opinions of Sandra Gamboa Rubiano. The sample is far from comprehensive and is heavily skewed towards those decisions contained in the databases we consulted. A substantial number of other citations would almost certainly be uncovered by a sufficiently large research team with appropriate legal and linguistic expertise.

There are no cases that we could find of outright disagreement with the Study. In one instance, a court expressed some doubt as to the customary status of Rule 99 of the Study, but did so only by way of assertion without examining any practice or *opinio juris*, and indicated that it did not need to decide the point.[124]

The courts in different domestic systems take different approaches to the authority of the Study. Judgments of the courts of England and Wales tend to treat the Study as a 'mere' academic authority. For example, in the Court of Appeal judgment in the *Serdar Mohammed* case, the Study is discussed under the heading 'Academic commentaries',[125] it is cited in part for the 'dominant approach in the international humanitarian law literature',[126] and the introduction to the Study by President Jakob Kellenberger is quoted for the proposition that 'state practice concerning non-international armed conflicts: "goes beyond what those same states have accepted at diplomatic conferences, since most of them agree that the essence of customary rules on the conduct of hostilities applies to all armed conflicts, international and non-international."'[127] The *Serdar Mohammed* litigation, in which most of these citations appear, is however a peculiar example because it examined the question whether IHL expressly authorized detention in non-international armed conflicts which is not, as such, directly dealt with in the Study but was the subject of academic inquiry.

The position of US courts is mixed. In *Hamdan,* the Supreme Court used the Study to interpret the phrase 'regularly constituted court' in Common Article 3,[128] an approach that was

[124] *Mohammed v Ministry of Defence* [2014] EWHC 1369 (QB), paras 260-1.
[125] *Mohammed (Serdar) v Ministry of Defence* [2016] 2 WLR 247, paras 183 and 235.
[126] Para. 183.
[127] Para. 188.
[128] *Hamdan v Rumsfeld* 126 S. Ct 2749, 2796-7 (29 June 2006) Stevens J opinion for the Court. See also at 2803 for concurrence of Kennedy J.

followed by the Fourth Circuit Court of Appeals in *Hamidullin*.[129] Indeed, in the latter case, the Court of Appeals noted that '[a]lthough non-binding, the ICRC's interpretation of the Geneva Conventions has been treated as persuasive by the Supreme Court.'[130] The mainstreaming of the Study by the Supreme Court in *Hamdan* clearly enabled further citations by the lower courts. In US district courts, the Study has been used as sole authority for the customary status of particular rules.[131] The US Court of Military Commissions Review has used the Study in an explanatory sense, for example, as authority for the proposition that the conventional law of non-international armed conflict is rudimentary.[132]

By contrast, Israeli courts consistently treat the Study with greater authority. In *Ahmed v Prime Minister*, the Israeli Supreme Court notes that, 'under the rules of customary international humanitarian law, each party to a conflict is obliged to refrain from disrupting the passage of basic humanitarian relief to populations in need of such relief in areas under its control (J. Henckaerts & L. Doswald-Beck, Customary International Humanitarian Law (ICRC, vol. 1, 2005), at pp. 197, 199).'[133] The Study is treated as an authoritative statement of customary international law on point. And in *Public Committee against Torture in Israel v Government of Israel et al*, the Study is cited numerous times and at length.[134] Again, the way in which it is cited is instructive. For example, the Court notes that 'civilians may not be attacked indiscriminately, i.e., an attack that, inter alia, is not directed at a specific military target (see art. 51(4) of the First Protocol, which constitutes customary international law: see Henckaerts and Doswald-Beck, Customary International Humanitarian Law, supra, at p. 37)'.[135] Some UN commissions of inquiry (discussed further below), when citing the Study, refer to the favourable citation of the Study on the part of the High Court of Justice.[136] This is evidence of the snowballing effect we discussed above.

[129] US v Hamidullin 888 F 3d 62, 67-8 (18 April 2018).
[130] Fn 3.
[131] Almog v Arab Bank PLC 471 F Supp 2d 257, 278 (29 January 2007); Gherebi v Obama 609 F Supp 2d 43, 66-7 (22 April 2009).
[132] US v Al Bahlul 820 F Supp 2d 1141, 1165 (9 September 2011), quoting 'Jean–Marie Henckaerts, 1 Customary International Humanitarian Law xxxiv-xxxv (Cambridge U. Press 2009)'.
[133] Ahmed v Prime Minister (2008) HCJ9132/07 (30 January 2008), para. 14.
[134] Public Committee against Torture in Israel v Government of Israel et al (2006) HCJ 769/02 (14 December 2006), paras 23, 29, 33, 34, 40, 41, 42, 46.
[135] Para. 29.
[136] Report of the detailed findings of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1, A/HRC/29/CRP.4 (24 June 2015), fn 24; Report of the detailed findings of the independent international Commission of inquiry on the protests in the Occupied Palestinian Territory, A/HRC/40/CRP.2 (18 March 2019) fn 56.

Along similar lines, the State Court of Bosnia and Herzegovina treats the Study as highly authoritative.[137] So do certain Swedish cases. It is worth quoting from *Public Prosecutor (on behalf of Behram (Hussein) and ors) v Arklöf (Jackie)* at length. The Court observes:

> It should stand clear that all of the rules indicated here are for all intents and purposes covered by customary law and are thus applicable to the circumstances in the case regardless of whether the parties can be considered contractually bound. In support thereof, we may refer to the list of fundamental international humanitarian rules with customary law status prepared by the International Red Cross Committee (ICRC). The list was drawn up with the collaboration of legal scientists from a large number of countries and expresses their collective understanding. It was published in Customary International Law, Volume 1, ICRC, Cambridge 2005, and in the main takes up the rules referenced above by the Court.[138]

As is evident from the passage, the rules are seen as a reflection of customary international law. The Court also refers to the collaboration with legal experts and to the Study's epistemic authority.

In sum, there is no doubt that the domestic courts we have surveyed treat the Study as an authoritative instrument, but they do so variably. None of them engage in any real independent evaluation of custom, but then again few of the domestic cases actually dealt with the customary status of a specific rule. Many of the citations of the Study are tangential or generally about what IHL requires. Citations of specific rules tend to be to those with which few, if any, would disagree.

UN commissions of inquiry

Citation of the Study is by no means limited to decisions of courts and tribunals. The Study has been cited by a variety of UN commissions of inquiry, a term we use to include commissions, panels of experts, and fact-finding missions. The Study has been cited by *inter alia* the Panel of Experts on Yemen, the International Commission of Inquiry on the Central African Republic, the Commission on Human Rights in South Sudan, the Independent International Commission of Inquiry on the Syrian Arab Republic, the Independent International Commission of Inquiry on the Protests in the Occupied Palestinian Territory, the Independent International Fact-Finding Mission on Myanmar, the Independent Commission of

[137] Prosecutor's Office v Anić, Preliminary Hearing, S1 1 K 005596 11 Kro, ILDC 1907 (BA 2011), 31st May 2011, paras. 44, . 47; Court of Bosnia and Herzegovina, Panel, Section I for War Crimes, Case No. X-KR-07/442, Judgment of 30 October 2009, para. 414..

[138] Public Prosecutor (on behalf of Behram (Hussein) and ors) v Arklöf (Jackie), Judgment, Case No B 4084-04, ILDC 633 (SE 2006), 18th December 2006, para. 138 (translation of ILDC).

Inquiry established pursuant to Human Rights Council resolution S-21/1, the International Commission of Inquiry on Libya, the Fact-Finding Mission on the Gaza Conflict, the Commission of Inquiry on Lebanon, the Panel of Experts on Accountability in Sri Lanka, the Panel of Experts on Yemen, and the Panel of Experts on Sudan.

Some commissions utilize the Study extensively.[139] Commissions have variously described the Study as 'authoritative',[140] '[o]ne repository of the principles of customary IHL',[141] and 'as indicative of the existence of customary norms'.[142] They treat the Study in a similar manner to the Inter-American Court. Particular rules of the Study are cited alongside treaty provisions,[143] suggesting that they are at par with binding instruments; as sole authority for the statement that a particular proposition reflects customary international law;[144] and the volumes as a whole are cited as reflective of customary international humanitarian law.[145]

Only rarely is there comment on the status of the Study. The Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka is exceptional in this regard. The report notes that:

> In order to determine the content and meaning of customary international law, the Panel relies upon various sources, including the ICRC's study, Customary International Humanitarian Law (2005), which comprehensively analyses state practice and attitudes as well as international and national judicial decisions, and the statute and jurisprudence of international criminal tribunals. While the Panel recognizes some disagreement among States over the customary law status and the scope of some restrictions on the conduct of parties involved in non-international armed conflicts, the rules on which the Panel relies below are all, in its view, beyond dispute as rules of customary international humanitarian law.'[146]

International Law Commission

[139] Eg Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, A/HRC/39/CRP.2 (17 September 2018); Report of the detailed findings of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1, A/HRC/29/CRP.4 (24 June 2015).
[140] The International Commission of Inquiry on the Central African Republic, Final Report, S/2014/928, para 601.
[141] Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, A/HRC/21/50 (16 August 2012) fn 10.
[142] Report of the detailed findings of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1, A/HRC/29/CRP.4 (24 June 2015), para. 33.
[143] Eg Letter dated 22 January 2021 from the Panel of Experts on Yemen addressed to the President of the Security Council, S/2021/79, fn 72.
[144] Eg Report of the Commission on Human Rights in South Sudan, A/HRC/43/56, para 25.
[145] Eg The International Commission of Inquiry on the Central African Republic, Final Report, S/2014/928, fn 57; Report of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya, A/HRC/17/44 (12 January 2012) para 64.
[146] Para. 183.

Engagement with the Study on the part of the ILC is mixed. The ILC does not refer to the Study as such in its commentaries to the draft conclusions on identification of customary international law.[147] It does, however, refer to the Study in its commentaries to the Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, the Draft articles on Prevention and Punishment of Crimes Against Humanity and the Draft principles on protection of the environment in relation to armed conflicts (the latter adopted on first reading).

In the commentaries to the draft conclusions on subsequent agreements and subsequent practice, the Study is used for its commentary to one rule and its compilation of practice.[148] In the commentaries to the Draft articles on crimes against humanity, the ILC refers to a rule of the Study for a reflection of customary international law on a particular issue.[149] In the commentaries to the Draft articles on protection of the environment, as adopted on first reading, the ILC refers to the Study extensively and uses it in a myriad of ways. Part of one draft article is said to be 'based on the first paragraph of rule 43 of the ICRC Study'[150] and, at times, the Study is used as the sole authority for the proposition that a particular rule is of customary status.[151] The Study is also used as an academic authority;[152] and for the practice it assembled.[153] Overall, the Study is used circumspectly, with the ILC noting in numerous places that '[t]he ICRC study on customary law considers that this constitutes a rule under customary international law',[154] rather than 'this is a rule of customary international law' with reference to the Study in a footnote. States at the Sixth Committee had also drawn attention to the Study when discussing the topic.[155]

[147] There is perhaps an oblique reference: 'Official statements of the International Committee of the Red Cross (ICRC), such as appeals for and memorandums on respect for international humanitarian law, may likewise play an important role in shaping the practice of States reacting to such statements; and *publications of the ICRC may assist in identifying relevant practice*. Such activities may thus contribute to the development and determination of customary international law, but they are not practice as such' (emphasis added).
Draft conclusions on identification of customary international law, A/73/10, Conclusion 4, commentary, para. 9.
[148] Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, A/73/10, Conclusion 6, Commentary, paras 15-18; and fn 280.
[149] Draft articles on Prevention and Punishment of Crimes Against Humanity, A/74/10, Article 11, Commentary, para. 7.
[150] Principle 13, Commentary, para. 12.
[151] A/74/10, fn 979.
[152] Fn 1224.
[153] Fn 1235.
[154] Fn 995.
[155] Report of the International Law Commission on the work of its sixty-seventh session (2015): Topical summary of the discussion held in the Sixth Committee of the General Assembly during its seventieth session, prepared by the Secretariat, A/CN.4/689, para. 53.

The Study also features in reports of individual special rapporteurs;[156] the approach they take to the Study is also mixed. The Special Rapporteur on formation and evidence of customary international law, Michael Wood, discusses the Study in his first report, but does so in neutral terms, whilst noting also the US and UK reactions to the Study.[157] By contrast the first Special Rapporteur on the protection of the environment in relation to armed conflicts, Marie G. Jacobsson, discusses the Study in more positive terms. She notes:

> A challenge lies in which method to use in identifying applicable customary law rules. The International Committee of the Red Cross (ICRC) has made an impressive effort in this respect. Its momentous study on customary international humanitarian law (ICRC customary law study) was published in 2005 following some 10 years of compilation of material and analytical work. The ICRC customary law study has no precedent. With its three volumes, 5,000 pages and 161 rules and commentaries and supporting material, it is, to quote one author, "a remarkable feat". Yet it has been criticized for shortcomings in methodology and reliability. In addition, it should be underlined that the study is, in and of itself, a snapshot of the applicable law at a given time. To mitigate the latter temporal shortcoming, additional material is continuously placed on the ICRC customary law web page. In the view of the Special Rapporteur, the work by ICRC is far too valuable to neglect or even downplay. It is the most comprehensive compilation of legislative and regulatory measures, along with expressions of opinio juris, available in this field. To the extent that reference is made to the ICRC customary law study it is done on the basis of the aforementioned premises.'[158]

When the Special Rapporteur cites the Study for particular propositions, she too notes somewhat cautiously that the 'ICRC considers that State practice establishes this rule as a norm of customary international law'.[159]

Other UN bodies

[156] Eg Seventh report on immunity of State officials from foreign criminal jurisdiction, by Concepción Escobar Hernández, Special Rapporteur, A/CN.4/729, para 161; First report on protection of the environment in relation to armed conflicts by Marja Lehto, Special Rapporteur, A/CN.4/720, fn 37; Third report on crimes against humanity By Sean D. Murphy, Special Rapporteur, A/CN.4/704, para 287; Third report on the protection of the environment in relation to armed conflicts Submitted by Marie G. Jacobsson, Special Rapporteur, A/C.4/700, para 253;

[157] First report on formation and evidence of customary international law, by Sir Michael Wood, Special Rapporteur, A/CN.4/663, paras 52 and 92.

[158] Second report on the protection of the environment in relation to armed conflicts Submitted by Marie G. Jacobsson, Special Rapporteur, A/CN.4/685, 28 May 2015, para. 7 (internal citations omitted). See also para 166 and fn 168.

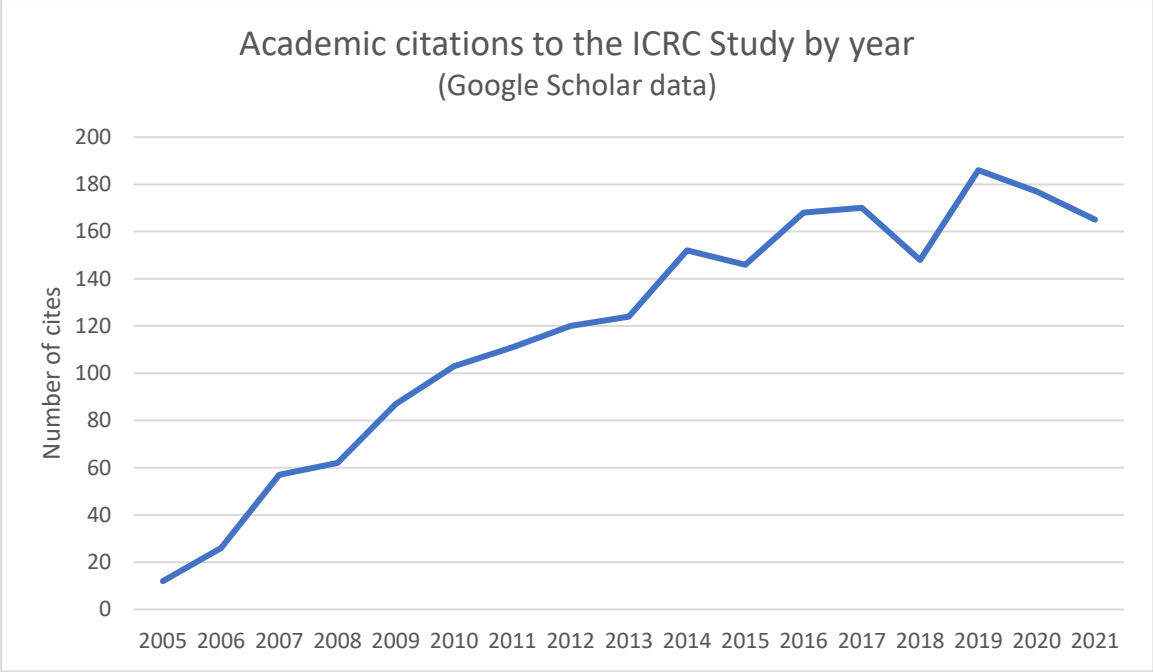
[159] Para 175.

A variety of other UN bodies also cite the Study. These include the UN Secretary-General,[160] special representatives of the UN Secretary-General,[161] special procedures of the UN Human Rights Council,[162] the Human Rights Council Advisory Committee,[163] and the OHCHR.[164] Almost without exception, they treat the Study as akin to legislative texts. They frequently cite the rules of the Study as sole authority for the customary status of a particular proposition, and they do not carry out any independent analysis. Of particular note, the UN Secretary-General has observed that the Study has 'made a significant contribution to the process of identifying fundamental standards of humanity by clarifying, in particular, international humanitarian law rules applicable in non-international armed conflict.'[165]

Academics

We did not wish to conduct an extensive analysis of how the Study is being used by academics – our focus was on actors that are themselves regarded as more authoritative than 'mere' scholars. But the same pattern we have observed for other actors holds here too. The Study is frequently relied on by academics as the sole or primary authority for propositions of customary IHL, most often without independent analysis of state practice and *opinio juris*. And while in the years immediately following the Study's publication scholarship citing the Study did so mainly for the purpose of providing critical evaluations thereof,[166] few people have done so in the years since. Today the Study is simply being used routinely, as *the* standard reference work for the content of customary IHL. Academic use of the Study is on a general upward trend, as seen from the graph below, peaking at 186 annual citations in 2019: [167]

[160] eg Fundamental standards of humanity, Report of the Secretary-General, E/CN.4/2006/87 (3 March 2006); Situation of human rights in the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine: Report of the Secretary-General, A/HRC/47/58 (27 May 2021).
[161] Eg Report of the Special Representative of the Secretary-General for Children and Armed Conflict, A/72/276 (2 August 2017).
[162] Eg Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions, Mass graves, highlighting the multitude of sites of mass killings and unlawful deaths across history and the world, A/75/384 (12 October 2020).
[163] Eg Human rights and issues related to terrorist hostage-taking, Report of the Human Rights Council Advisory Committee, A/HRC/24/47 (4 July 2013).
[164] Eg Comprehensive report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka, A/HRC/30/61 (28 September 2015).
[165] Fundamental standards of humanity, Report of the Secretary-General, E/CN.4/2006/87 (3 March 2006), 2.
[166] See the works cited in above note 53.
[167] At https://scholar.google.com/scholar?cites=4141991227391108598&as_sdt=2005&sciodt=0,5&hl=en, custom range search for each calendar year. Search conducted on 19 June 2022.



Textbooks published in recent years also discuss and utilise the Study throughout their pages.[168] The approach of textbooks is particularly important owing to their role in the education of future generations of international humanitarian lawyers. If future lawyers learn when studying the subject that the Study is authoritative or that it reflects customary IHL, they are more likely to adopt that same position when in practice.

Sassòli discusses the Study in a section on 'customary law'. He notes that '[t]he ICRC Customary Law Study greatly facilitates the identification of official State practice and the resulting customary rules'[169] and the Study is referenced in footnotes throughout the work. The Study is also discussed at length in educational works published by the ICRC - Sassòli, Bouvier, Quintin and Grignon, as is the US response to the Study;[170] Melzer notes that '[t]he ICRC's extensive study on customary IHL is also a widely recognized source of reference in this respect.'[171] Melzer also notes that 'the ICRC's study as such is not binding. However, it carries the authority of an organization specifically mandated by the international community "to work for the understanding and dissemination of knowledge of international humanitarian law"',[172] a reference to the epistemic authority of the Study. Kolb and Hyde note that guidance

[168] It is not always clear whether a book is in fact a textbook. We have referred to books that we know to be used in teaching. We have also confined ourselves only to textbooks in English, which inevitably provides only a partial picture.
[169] Sassòli, *International Humanitarian Law* (Elgar, 2019) 46.
[170] Sassòli, Bouvier, Quintin, and Grignon, *How Does Law Protect in War*. The work is published by the ICRC.
[171] Melzer, *International Humanitarian Law* (ICRC, 2019) 22. The work is published by the ICRC.
[172] Ibid, 23.

on the content of customary IHL 'has to be sought' from the Study, because it 'provides a thorough examination of the subject and sets out the norms, outside the universally accepted Geneva Convention of 1949, that can be considered to be part of custom,' and rely on the Study throughout their work.[173]The Fleck volume includes 'CIHL' in its list of abbreviations as shorthand for the Study and the section on sources contains a footnote which reads: '[s]ee generally on the subject of rules of international humanitarian law as customary international law, *CIHL*'.[174] The Study is cited regularly throughout the work, for example, in the chapter on the law of non-international armed conflict. The Saul and Akande collection discusses the Study in the chapter on history and sources, which was written by one of the authors of the Study, Jean-Marie Henckaerts.[175] The Study is also cited regularly throughout the volume, often as a reflection of the state of customary international law.[176]

Crawford and Pert are more cautious in their use of the Study. In their textbook, they discuss the Study in the section on custom, mention the critiques of the Study, and conclude that '[t]he approach taken in this text book is one of cautious acceptance of the ICRC CIHL Study. Where there is little controversy about the customary status of a particular principle … the ICRC position will be taken. However, in the case of more controversial positions … the ICRC position is noted with caution and additional supporting practice is sought.'[177] Similarly, Solis notes that the ICRC should be treated as a 'respected corporate publicist' and that its Study 'should not be overlooked', and does in fact proceed to repeatedly cite the Study in his textbook while generally treating it like an academic work.[178] For their part, Tsagourias and Morrison only cite the Study on two occasions, although they do so approvingly, without any discussion of its status.[179] Dinstein mentions the Study once in passing in the main text, while noting US disapproval, and otherwise uses it in footnotes like any other academic work.[180]

[173] Robert Kolb & Richard Hyde, *Introduction to the International Law of Armed Conflicts* (Oxford: Hart, 2008), p. 58.
[174] ME O'Connell, 'Historical Development and Legal Basis', in Fleck (ed), *The Handbook of International Humanitarian Law* (2021) 2.26 fn 146.
[175] J-M Henckaerts, 'History and Sources', in Saul and Akande (eds), *The Oxford Guide to International Humanitarian Law* (OUP, 2020) 17-18.
[176] See eg McLaughlin, 'Fundamental Guarantees', in ibid; Gaggioli and Melzer, 'Methods of Warfare', in ibid;
[177] Crawford and Pert, *International Humanitarian Law* (CUP, 2020) 41.
[178] See Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (CUP, 2010), pp. 19-20.
[179] See Nicholas Tsagourias & Alasdair Morrison, *International Humanitarian Law: Cases, Materials and Commentary* (CUP, 2018), pp. 38, 107,
[180] See Yoram Dinstein, The Conduct of Hostilities under the Law of International Armed Conflict (CUP, 3rd ed., 2016), pp. 8, 25.

Corn et al similarly note US disapproval of the Study, in a work focused primarily on US practitioners.[181]

Overall, there is clear acceptance of the value of the Study in the textbooks we surveyed, although the degree of authority attributed to the Study is variable. Some authors use the Study as if it were a binding instrument, similarly to the various courts we examined above; others clearly assign it weight over and above 'mere' academic scholarship, while a smaller group treats the Study purely as a reference work. All in all, the Study appears to be substantially embedded into the instruction of IHL, which is likely to further enhance its authority as time goes by.

Discussion: a gradual accretion of authority

Our analysis has shown that the Study has steadily gained in authority over time. There is simply no doubt that this accretion of authority has been happening in what Schauer has called an "informal, evolving, and scalar process by which some sources become progressively more and more authoritative as they are increasingly used and accepted."[182] That process has been happening across the board, involving all influential actors of the international legal system, including governments. It is evident, for example, in the way in which it is cited by Azerbaijan and the number of times it is cited in the military manuals of Denmark and New Zealand, even though there clearly are some powerful States that have not embraced the Study's authority. We have also seen how the Study has become a standard point of reference in reports of UN commissions of inquiry and in discussions of customary IHL in textbooks.

The Study's accretion of authority is most visible with regard to international courts and tribunals. Today they not only cite the Study routinely, but most often use the Study as the primary or sole source for the proposition for which it is being cited, at a level of authority that is clearly higher than academic works, and without any independent scrutiny. Some tribunals, like the Inter-American and European human rights courts, have essentially used the Study as if it was a legislative text. As we have seen, disagreements with the Study in the judgments of both international and domestic courts are exceptionally rare. And there are no cases of disapproval by omission – by failure to even cite the Study – in international or domestic

[181] Geoffrey S. Corn et al., The Law of Armed Conflict: An Operational Approach (Kluwer, 2012), p. 58.
[182] Schauer, above note 22, at 1956-1957.

decisions, to the extent that we could reliably tell from the sample we surveyed. In particular there are no such cases that analyse the content of customary IHL that do not refer to the Study.

That said, in most of the judgments that we have examined where the Study is cited affirmatively either as a general matter or with regard to its conclusion that a specific rule was customary, the citation would be routine and would not deal with a point central to the resolution of the case. There were few decisions in which the constituent elements of the customary rule were carefully laid out and applied by the court to the specific facts at hand. Even so, despite the shallowness of a great many of these judicial citations, they clearly contribute to the gradual accretion of the Study's authority and enable future reliance on it. And this process is set to continue in the absence of concerted governmental pushback and opposition, even if a handful of states remain less than enthusiastic about the Study. The Study may not (yet) have reached the authoritative level of the ILC Articles on State Responsibility, but few codificatory exercises do. The Study is generally perceived far more authoritatively than ordinary academic works, often on par with treaty texts and judicial decisions, in all sorts of contexts and by various influential actors.

That the Study is increasingly being regarded as highly authoritative is, we submit, undeniable. The more difficult question is *why* courts and other actors are so regarding of the Study, i.e. which of the Study's interconnected claims to authority that we examined above carries the greatest weight. Answering this question is difficult primarily because the Study's users rarely explain their reliance on it – but some conclusions can reasonably be drawn from the various citation patterns that emerge.

First, we can say that in most instances courts and tribunals (and likely other actors as well) do not rely on the Study primarily because they found its conclusions on any given point to have been *persuasive* on the basis of the practice and *opinio juris* surveyed. If persuasion and the rigour of the analysis in the Study's commentary were the primary drivers of reliance on the Study, we would have seen frequent examples of courts discussing the relevant practice in detail and performing some kind of independent analysis to verify and confirm the Study's conclusions. At the very least we would expect some deeper engagement with the practice compiled and commentary. But the examples of such independent analysis are exceptionally rare – far more often the existence of a customary rule is simply asserted and the Study is cited in support of that rule. It is possible that the judges did conduct some kind of independent assessment before deciding to endorse the Study's conclusions without spelling that analysis out in their decision, but that seems quite unlikely. Substantial work is rarely done by judges and their clerks only not to be mentioned. Thus, Judge Meron's hope that the Study should be

the starting point for judicial analysis but that a prudent court should evaluate the practice collected independently has not, in fact, materialized.[183] The Study mainly does its work through (content-independent) authority rather than through persuasion.

Second, we found only a handful of instances in which the Study's authority was expressly grounded in its link to states, and even there only superficially. In the ECtHR case of *Marguš v Croatia*, the First Section and later also the Grand Chamber noted that the Study had been "[m]andated by the States convened at the 26th International Conference of the Red Cross and Red Crescent".[184] The Colombian Constitutional Court observed that the Study was carried out by the ICRC 'at the invitation of the International Conference for the Protection of Victims of War'.[185] The Swiss Federal Department of Foreign Affairs noted that the ICRC undertook the Study "[a]t the request of the international community".[186] But on the whole reliance on the Study is not justified by reference to State imprimatur.

Third, references to the expertise of the Study's authors are somewhat more frequent. For example, in *Public Prosecutor (on behalf of Behram (Hussein) and ors) v Arklöf (Jackie)*, the court noted that the list of customary rules "was drawn up with the collaboration of legal scientists from a large number of countries and expresses their collective understanding."[187] And the Independent International Commission of Inquiry on the Protests in the Occupied Palestinian Territory referred to the "extensive, consultative process" that took place.[188]

There are, however, frequent references to the Study's overall rigour. Thus, the Eritrea-Ethiopia Claims Commission described the Study as "exhaustive",[189] although it went on to

[183] See Meron, above note, at 834.
[184] *Case of Marguš v Croatia*, App no 4455/10, Judgment, Court (First Section), 13 November 2012, para. 29; *Case of Marguš v Croatia*, App no 4455/10, Judgment (Merits and Just Satisfaction), Grand Chamber, 27 May 2014, para. 45. See also Fundamental standards of humanity, Report of the Secretary-General, E/CN.4/2006/87 (3 March 2006), 7; Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt; the Representative of the Secretary-General on human rights of internally displaced persons, Walter Kälin; and the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari, Mission to Lebanon and Israel, A/HRC/2/7 (2 October 2006), fn 22.
[185] Constitutional Court, Sentencia C-291/07, 25 April 2007 ('El estudio fue realizado en forma minuciosa por el CICR, a invitación de la Conferencia Internacional para la Protección de las Víctimas de la Guerra (Ginebra, 1993) …').
[186] Federal Department of Foreign Affairs, *Humanitarian Access in Situations of Armed Conflict, Handbook of the Normative Framework, Version 1.0*, 16
[187] *Public Prosecutor (on behalf of Behram (Hussein) and ors) v Arklöf (Jackie)*, Judgment, Case No B 4084-04, ILDC 633 (SE 2006), 18th December 2006.
[188] Report of the detailed findings of the independent international Commission of inquiry on the protests in the Occupied Palestinian Territory, A/HRC/40/CRP.2 (18 March 2019) para. 58.
[189] Western Front, Aerial Bombardment and Related Claims, Eritrea's Claims 1, 3, 5, 9–13, 14, 21, 25 & 26, Partial Award, 19 December 2005, fn 23.

the disagree with the scope of one of the Study's rules.[190] The UK Supreme Court described it as the "ICRC's major international study into State practice',[191] and the England and Wales Court of Appeal as "comprehensive",[192] while the Hague District Court and the US Court of Military Commissions Review both referred to it as "extensive".[193] The UN Secretary-General discussed the Study's methodology at length.[194] In making these observations about the Study's rigour actors will often mention its analysis of practice, but again they will rarely evaluate that practice independently.[195] In short, the *idea* that the Study's rules are supported by extensive practice matters more than the *reality* of whether or not the supportive practice is there.

The Study's authoritativeness is thus most likely a combination of various factors, including the epistemic authority of the ICRC as an institution, with its long and deep connection with IHL and over 150 years of work in the field, as well as the perceived rigour of the Study project. But, perhaps most importantly, the Study enables courts and other actors to outsource to the ICRC the hard work of establishing custom. It is much easier to assert the existence of a customary rule and to support this assertion with a citation to the Study than it would be to conduct an independent, labour-intensive analysis that could never replicate the amount of work invested in the Study, particularly bearing in mind the scarcity of time, expertise, linguistic ability, access to materials, and so forth. Especially in situations where little is at stake on the existence or the precise formulation of a customary rule, or there is no controversy as to its content, it would make no practical sense for a court, an investigative commission, an academic, or a government lawyer, to engage in inductive or deductive assessments of practice and *opinio juris*. The Study is there, just waiting to be cited. That citation is made much easier because the Study has a degree of state imprimatur (and in the absence of determined opposition), because of the ICRC's special mandate and epistemic authority, because of the rigour of the project, and because of the comforting availability of the practice database that allows for the ICRC's conclusions to be verified, even if this is rarely actually done. The lawyer citing the Study can not only say "I didn't make this up"; she can

[190] See above note 93 and accompanying text.
[191] *Mohammed (Serdar) v Ministry of Defence and another (No 2)* [2017] 2 WLR 327, para. 271.
[192] *Mohammed (Serdar) v Ministry of Defence* [2016] 2 WLR 247, para. 241.
[193] Hague District Court, Criminal Law Section, Mpambara case, Case No. 09/750009-06 and 09/750007-07, Landelijk Jurispr BK0520, Judgment of 23 March 2009; US v Mohammad 280 F Supp 3d 1305, 1325 (29 June 2017), quoting Klamberg.
[194] Fundamental standards of humanity, Report of the Secretary-General, E/CN.4/2006/87 (3 March 2006), 8.
[195] See, e.g., *Bemba* fn 387; *Prosecutor v Fofana and Kondewa* ('CDF Case'), Appeals Chamber, Judgment, 28 May 2008, Case no SCSL-04-14-A, para. 404; *Prosecutor v Sesay et al* ('RUF Case'), Trial Chamber I, Judgment, 2 March 2009, Case no SCSL-04-15-T, para. 216. See also Mission to Lebanon and Israel, above note 181, fn 22 ('This study … is based on an extensive analysis of State practice (e.g. military manuals) and documents expressing opinio iuris.')

also say that the ICRC didn't make it up either. And citation is made increasingly easier by the fact that various authoritative bodies – especially courts – have repeatedly cited the Study themselves, and have not suffered any criticism for doing so.

Conclusion

Our analysis has shown that in the 16 years since its publication the Study has gradually accumulated authority within the international legal system, moving to a level that clearly exceeds that of a purely scholarly work. In that regard the Study resembles many of the codification efforts of the ILC, even if its impact has not been as transformative as that of the Articles on State Responsibility. The Study's authority is particularly evident from our survey of the judgments of international courts and tribunals, but the accretion of authority is widespread and not confined to them only. The common tendency to cite the Study as a primary or sole authority for the existence of a customary rule, without any independent analysis and often as if it was a quasi-legislative text, is remarkable. And even relatively trivial but approving citations reinforce the feedback loop of authority.

The Study's authority rests not only on its rigour and the ICRC's special mandate and expertise, but also on purely pragmatic grounds. The Study fulfils a variety of otherwise unmet needs. Since its publication no rival project was even conceived of, let alone implemented, that could meet those needs. The Study is simply useful, either for genuinely fundamental purposes (such as regulating non-international conflicts) or for purely pedestrian ones (finding cites for non-controversial propositions). And because it will remain useful, and because so many international legal institutions have already treated it as authoritative, the process of accretion is highly likely to continue. That process could be disrupted by a concerted, sustained effort by several powerful States. But destructive opposition would be difficult to justify, especially in the absence of any better alternative. To be clear, we should not be taken as saying that the ICRC and international courts have somehow illegitimately wrested control over customary IHL from States – while some areas of substantial controversy will inevitably remain, the Study is exactly as authoritative as States have allowed it to be.