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Customary IHL: enhancing protection for victims of armed conflict

By Netta Goussac

> *A host of conflicts across the world… have highlighted as never before the extent to which civilians have become targets and the growing need to ensure the protection of the wounded, the sick, detainees and the civilian population... Clearly the first step in achieving the goal of universal respect for humanitarian rules must be the articulation of what the rules require...*
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> Dr Abdul G Koroma, former Judge at the International Court of Justice (1994-2012), forward to the Study on Customary IHL (2005)

It is an honour to contribute to this inaugural edition of ANZSIL *Perspective* – a red-letter moment that lends itself to contemplation of an earlier milestone. This year marks the 10th anniversary of the publication of the Study on Customary International Humanitarian Law(the Study) – a major work by the International Committee of the Red Cross (ICRC) that examined the practice of States relating to international humanitarian law (IHL) in order to identify customary rules. Ten years on from its release (and twenty years since the ICRC received the mandate to prepare the Study), what has been the Study's impact, and how has it fared over time?

While IHL is an extensively codified area of international law, customary law plays an important role in humanising warfare and enhancing the protection of victims of armed conflict. Custom complements the protection provided for victims by treaty law, and fills in certain gaps in the treaty framework resulting from lack of universal acceptance of treaties or from treaty law lacking detailed rules, particularly in the case of non-international armed conflict.

The 2005 Study indicated that the normative gap between the law on international and non-international armed conflicts had been significantly narrowed down. The main customary rules of war were found to apply in all types of armed conflict, though some differences continued to exist between the regulation of international and non-international armed conflicts. Of the 161 rules the Study identified, 12 apply to international armed conflicts only. These relate to what is considered as the 'reserved domain' of international armed conflicts, and include the definition of combatants and armed forces, conditions for prisoner of war status, the regulation of occupied territory, and the regulation of belligerent reprisals. On the other hand, two rules were found to apply to non-international armed conflicts only (relating to the prohibition of belligerent reprisals and the granting of amnesty at the end of active hostilities).

Practitioners and scholars from Australia and New Zealand made a significant contribution to the preparation of the Study, over the ten years of extensive research and wide consultations by the editors. Adopting an inductive approach, national researchers were engaged in 47 countries to produce a report of their respective country's practice. Australia was part of this initial

group, with Tim McCormack leading Australia's research team. Practice from New Zealand and Fiji would form part of the Study in its later form. The national research was supplemented by research from international resources and case-law. To complement this work, the ICRC looked into its own archives related to nearly 40 recent armed conflicts. Academics and government experts were invited to review the first drafts of the Study, including Australia's Geoff Skillen and New Zealand's Sir Kenneth Keith.

The Study had an immediate impact on the work of international tribunals. Within a month of its publication, Philippe Sands relied on the Study in his statement on behalf of the Democratic Republic of the Congo at the International Court of Justice in *Armed Activities on the Territory of the Congo*. Also that month, Judge Theodor Meron cited the Study in a decision in the course of the prosecution of *Hadzihasanovic* at the International Criminal Tribunal for the former Yugoslavia.

The direct impact of the Study on the behaviour of States was slower to emerge and has been harder to discern (notwithstanding memorable and public responses from John Bellinger and William Haynes on behalf of the United States, and by Yoram Dinstein reflecting on his involvement in the Study). However, since 2005, the Study has been used by national courts dealing with war crimes cases, United Nations organs, and non-governmental organizations advocating better respect for IHL or which monitor violations of the law. For example, in 2008, Israel's Supreme Court referred to the Study in a decision concerning the flow of fuel and electricity to Gaza (referring to rule 55). In addition, the reports of UN-led inquiries into conflicts in southern Lebanon (2006), Gaza (2009), Libya (2011) and Syria (2012) relied on the study to identify the customary rules of IHL applicable in those conflicts.

It may be said that the Study has also had an indirect and largely immeasurable impact, in prompting States to examine their own views on IHL and their implementation of it. As has been pointed out by Tim McCormack, Australia's contribution to the ICRC's initial assessment of State practice resulted in a 'unique collaboration' between key Australian government agencies, and 'exposed examples of inconsistency and inaccuracy on national approaches to aspects of international humanitarian law'. It is likely that this experience was shared by many countries. On the assumption that these inconsistencies and inaccuracies were somehow addressed by States, this must also be counted as a positive impact of the Study.

The Study's transparent approach to identifying customary rules did not immunise it from criticism – an inevitable consequence when an organisation mandated to promote and strengthen IHL makes a significant contribution to a contested subject. Critiques focused on both methodology and substance, with some rules (such as 31, 45, 78 and 157) attracting special attention, including with regards to their reliance on Australian and New Zealand practice. The editors of the Study responded diligently to these views (for example, here), providing detailed insight into their thinking and also highlighting that the Study should not be seen as the final word, but a contribution to the ongoing process of the formation of customary law. The rules identified in the Study continue to influence activities aimed at clarifying and developing IHL. Their impact can be seen in the updating of the

commentaries to the Geneva Conventions and Additional Protocols, the consultations on strengthening legal protection for victims of armed conflict, efforts to safeguard health care, and the ICRC's work in relation to weapons.

While articulation invites criticism, it can also encourage adherence. The vigour of the debate that ensued after the release of the Study must be seen as an indication of how seriously it is taken. Yoram Dinstein noted in 2006 that 'no scholar or practitioner can afford to ignore' the Study. Since then, the Study has evolved into an even more useful resource. The practice in the Study continues to be updated on the ICRC's freely accessible online Customary IHL Database, launched five years ago and already containing approximately 80 per cent more content than the original print edition. The ICRC strives to update the practice of over 100 States in order to be able to offer a collection of State and international practice that allows for an assessment of any evolution in the existence, scope and meaning of the rules of customary IHL identified in the 2005 Study. In this respect, the Study has simplified the work of practitioners and academics by creating a comprehensive (though not exhaustive) 'central repository' of State practice and identified customary IHL rules.

As Dr Yves Sandoz noted in his foreword to the Study, it must not be seen as the end, but rather the beginning of a new process aimed at improving understanding of, and agreement on the principles and rules of IHL. It is incontestable that articulation of existing rules can facilitate the rules' effectiveness. The Study has succeeded in achieving this goal, engendering a rich discussion and dialogue on the implementation, clarification and development of the law.

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