LEX LATA OR *LEX FERENDA*? RULE 45 OF THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW

Major J. Jeremy Marsh[*]

The Study is a still photograph of reality, taken with great concern for absolute honesty, that is without trying to make the law say what one wishes it would say. I am convinced that this is what lends the study international credibility.[1]

I. Introduction

In 2005, the International Committee of the Red Cross (ICRC)[2] issued its 5000-page study, *Customary International Humanitarian Law*[3]

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[*] Judge Advocate, U.S. Air Force. Presently assigned as an Associate Professor in the Int'l & Operational Law Dep't, The Judge Advocate General's Legal Ctr. & Sch. (TJAGLCS), U.S. Army, Charlottesville, Va. LL.M. 2008, TJAGLCS, Charlottesville, Va.; J.D. 2002, Saint Louis University; M.P.M. 1997, University of Maryland School of Public Policy; B.S. 1995, U.S. Air Force Academy. Previous assignments include Legal Advisor, Air Force Doctrine Ctr., Maxwell Air Force Base, Ala., 2005–2007; Chief of Military Justice and Area Defense Counsel, Beale Air Force Base, Cal., 2004–2005; Chief of Claims and International Law, Incirlik Air Base, Turk., 2002–2003. Member of the bar of Nebraska. This article was submitted in partial completion of the Master of Laws requirements of the 56th Judge Advocate Officer Graduate Course. The author would like to thank Lieutenant Colonel Ian Corey, U.S. Army, for his invaluable assistance with this article. In addition, the author would like to thank his wife, Rebekah, for her constant love and support.

[1] Yves Sandos, *Introduction* to JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW VOL. I: RULES xvii (2005) [hereinafter RULES].

[2] The ICRC's unique and important role in promoting the development, implementation, and dissemination of international humanitarian law is well-documented. *See, e.g.*, Prosecutor v. Tadic, Case No. IT-94-1-l, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 109 (Oct. 2, 1995).

[3] The Study is divided into two volumes. The first volume is an articulation of the Study's 161 rules, the second is a two-part and roughly 4000-page discussion of the practice that supports the rules. The Study's two leaders, Jean-Marie Henckaerts, the current legal advisor for the ICRC, and Louise Doswald-Beck, former head of the ICRC's legal division, are listed as authors of the first volume and editors of the second volume. RULES, *supra* note 1; CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOL II: PRACTICE (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter PRACTICE]. For a thorough summary of the Study and its rules, see Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INT'L REV. RED

(the Study), examining what the U.S. military refers to as the law of war or law of armed conflict.[4] The ICRC's press release accompanying the Study states that the organization took the process very seriously, spending more than eight years to research and consult with experts, and touts the project as "the most comprehensive and thorough study of its kind to date."[5] Unfortunately, one need not spend much time reading the Study before concluding that there are serious flaws in its authors' method of determining what is and what is not customary international law (CIL).[6] These methodological flaws led its authors to declare as rules of CIL what can only be described as *lex ferenda* (what the law should be) as opposed to *lex lata* (what the law is), diluting the credibility of the final product. This is unfortunate, as international and operational law practitioners certainly could have benefitted from an authoritative reference on customary international humanitarian law. The Study, however, fails to deliver because too many of its rules represent *lex ferenda* rules with insufficient evidence of state practice or *opinio juris*,[7] the two requirements for the formation of CIL.[8] Much of

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CROSS 175, 178 (2005) [hereinafter Henckaerts, *Study on Customary International Humanitarian Law*].

[4] The U.S. Department of Defense (DoD) defines the law of war as "[t]hat part of international law that regulates the conduct of armed hostilities. It is often called the 'law of armed conflict.'" U.S. DEP'T OF DEFENSE, DIR. 2311.01E, DOD LAW OF WAR PROGRAM para. 3.1 (9 May 2006). The ICRC defines international humanitarian law as "a set of international rules, established by treaty or custom, which are specifically intended to solve humanitarian problems directly arising from international or non-international armed conflicts." Advisory Serv. on Int'l Humanitarian Law, Int'l Comm. of the Red Cross, *International Humanitarian Law and International Human Rights Law: Similarities and Differences* (Jan. 2003), http://www.ehl.icrc.org/images/resources/pdf/ihl_and_ihrl.pdf. By contrast, the ICRC defines international human rights law as "a set of international rules, established by treaty or custom, on the basis of which individuals and groups can expect and/or claim certain behavior or benefits from governments." *Id.*

[5] Press Release, Int'l Comm. of the Red Cross, Customary International Humanitarian Law: Questions and Answers (Aug. 15, 2005) [hereinafter ICRC Press Release], *available at* http://www.icrc.org/web/eng/siteeng0.nsf/html/6BPK3X.

[6] "Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (c)(2) (1987) [hereinafter RESTATEMENT]. See *infra* text accompanying notes 21–31 for a more complete discussion of the nature of CIL.

[7] "For a practice of states to become a rule of customary international law it must appear that the states follow the practice from a sense of legal obligation (*opinio juris sive necessitatis*); a practice that is generally followed but which states feel legally free to disregard does not contribute to customary law." RESTATEMENT, *supra* note 6, § 102(c)(2) cmt. c. For more discussion of the *opinio juris* requirement of CIL, see *infra* text accompanying notes 36–48.

[8] RESTATEMENT, *supra* note 6, § 102(c)(2).

the Study, therefore, is not an accurate still photograph of reality, but rather, represents the ICRC's idealistic notion of what states should consider customary international humanitarian law.

Rule 45 of the ICRC Study, the main subject of this article, is a *lex ferenda* rule. This article will consider Rule 45 because it well illustrates the *lex ferenda* nature of the Study and is a good means by which to highlight the Study's main flaws. Rule 45 states that "[t]he use of methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment is prohibited. Destruction of the natural environment may not be used as a weapon."[9] The first part of this rule is taken from Articles 35(3) and 55(1) of Additional Protocol I to the Geneva Conventions (AP I).[10] The Study recognizes the United States, France, and the United Kingdom as "persistent objectors"[11] with respect to all or

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[9] RULES, *supra* note 1, at 151.

[10] Protocol I on the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1978) [hereinafter Protocol I]. Article 35(3) states, "It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term, and severe damage to the natural environment." *Id.* art. 35, para. 3. Article 55(1) states,

> Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.

Id. art. 55, para. 1. One might ask why the drafters felt the need for two articles addressing protection of the natural environment in armed conflict. According to the ICRC Commentary on Protocol I, while "Article 35(3) broaches the problem from the point of view of methods of warfare, Article 55 concentrates on the survival of the population, so that even though the two provisions overlap to some extent, and their tenor is similar, they do not duplicate each other." COMMENTARY TO THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 663 (Yves Sandoz, Christophe Swinarski & Bruno Zimmerman eds., 1987) [hereinafter COMMENTARY TO THE ADDITIONAL PROTOCOLS]. Based on this description, Michael Schmitt has characterized Article 35(3) as "Hague law" and Article 55(1) as "Geneva law," Hague law being that which regulates means and methods of war and Geneva law being that which protects victims of war. Michael N. Schmitt, *Humanitarian Law and the Environment*, 28 DENV. J. INT'L. L. & POL'Y 265, 275 (2000).

[11] "Although customary law may be built by the acquiescence as well as by the actions of states . . . and become generally binding on all states, in principle a state that indicates its dissent from a practice while the law is still in the process of development is not bound

part of this rule.[12] Based on their unorthodox analysis of state practice and *opinio juris*, the Study's authors nevertheless determined that the rule has ripened into CIL not only in international armed conflict,[13] but also, arguably, in non-international armed conflict.[14]

Rule 45 is a paradigmatic example of the ways the Study's authors failed in this monumental and otherwise laudable project. Rule 45 showcases the Study's modern approach to CIL by elevating aspiration over empirical proof of actual state practice.[15] The ICRC's discussion of the state practice that forms the basis for this rule is symptomatic of its faulty methodological approach to achieve a *lex ferenda* result. As Rule 45 demonstrates, the Study's authors assigned inordinate weight to verbal "practice" such as military manuals and resolutions of the U.N. General Assembly.[16] In addition, Rule 45 demonstrates the Study's skewed understanding of the role of *opinio juris*. Its authors seem to conclude that if there is enough mention of the "rule" in military manuals and other questionable sources of verbal practice, then the *opinio juris* prong of CIL is also met.[17] Finally, Rule 45 illustrates that the Study

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by that rule even after it matures." RESTATEMENT, *supra* note 6, § 102 cmt. d; see *infra* text accompanying notes 220–35 for a discussion of persistent objection.

[12] RULES, *supra* note 1, at 151.

[13] "Any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war." JEAN S. PICTET, COMMENTARY, GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 32 (1952) (commenting on Article 2 common to the four Geneva Conventions, which states the international armed conflict trigger for the application of the conventions).

[14] RULES, *supra* note 1, at 156–57. The Commentary to the Additional Protocols describes non-international armed conflict as follows: "non-international armed conflict is distinct from an international armed conflict because of the legal status of the entities opposing each other: the parties to the conflict are not sovereign States, but the government of a single State in conflict with one or more armed factions within its territory." COMMENTARY TO THE ADDITIONAL PROTOCOLS, *supra* note 10, at 1319.

[15] For a discussion of the traditional and modern approaches to CIL, see generally Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AMER. J. OF INT'L L. 757 (2001).

[16] Verbal practice, which is derived from statements or claims, can be distinguished from physical practice, which is derived from the actual, physical actions of states on the battlefield. ANTHONY A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 88 (1971) (arguing that a claim is not an act and though it may articulate a legal norm, it cannot constitute the material element of custom). See *infra* text accompanying notes 31–34 for a discussion of the state practice prong of CIL.

[17] See *infra* text accompanying notes 73–78 for a discussion of the Study authors' approach to *opinio juris*.

paid insufficient heed to two important CIL doctrines, specially affected states[18] and persistent objection, in developing its rules of customary international humanitarian law.

Because a comprehensive analysis of the methodology used by the Study's authors could easily fill a book,[19] this article will focus on Rule 45 as a lens through which one may assess the methodological approach employed by the Study. The article begins with a brief discussion of CIL. It is impossible for one to critically analyze the Study without some discussion of what CIL is, how it is formed, and why it is both important and controversial. After discussing CIL, the article will discuss the Study as a whole, particularly how the authors described their methodology. Then it will consider the authors' application of their stated approach to Rule 45, discussing first their description of the rule and second the evidence they provided in its defense. The article will conclude by analyzing the three principal flaws inherent in the authors' methodological approach to Rule 45: (1) marginalizing traditional CIL doctrines, (2) overemphasizing verbal practice of unclear and dubious weight, and (3) promoting *lex ferenda*. This analysis will demonstrate that not only Rule 45 but perhaps the rest of the Study's 161 rules should be viewed with suspicion by anyone seeking an authoritative statement of customary international humanitarian law.[20]

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[18] The ICJ acknowledged the importance of specially affected states in the *North Sea Continental Shelf Cases*:

> [A]n indispensable requirement would be that within the period in question, short though it may be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked—and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.

North Sea Continental Shelf Cases (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 43 (Feb. 20). The Restatement uses the terms "particularly involved" and "important" states to capture the same idea. RESTATEMENT, *supra* note 6, § 102 cmt. b. See also *infra* text accompanying notes 67–69 and 229–42 for a discussion of the specially affected states doctrine.

[19] *See, e.g.*, PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (Elizabeth Wilmshurst & Susan Breau eds., 2007) [hereinafter PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW].

[20] Unfortunately, there are few good alternatives for anyone seeking an authoritative statement of CIL, as by definition, it is unwritten law. The lack of good alternatives to the Study has caused one commentator to conclude that the Study is bound to become the

II. Customary International Law (CIL) and the ICRC Study

A. Customary International Law

No single definition of CIL exists. Article 38 of the Statute of the International Court of Justice (ICJ) lists custom as a source of international law, describing it as "evidence of a general practice accepted as law."[21] The Restatement (Third) of Foreign Relations Law of the United States describes it as "resulting from a general and consistent practice of States followed by them from a sense of legal obligation."[22] Both of these descriptions contain what the international community recognizes as the two elements of CIL: the "objective" or "material" element of state practice, and the "subjective" or "psychological" element of *opinio juris.*[23]

There is little disagreement over the basic description of CIL as stated above; there is a great deal of disagreement, however, over exactly how to characterize and consider its two elements.[24] As one of the Study's authors, Jean-Marie Henckaerts, acknowledged, "the exact meaning and content of these two elements have been the subject of much academic writing."[25] At the heart of debates over the elements of

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authoritative source on customary international humanitarian law over time as judges and lawyers find it too hard to resist the temptation to cite it authoritatively in their practice. *See* Leah M. Nicholls, *The Humanitarian Monarchy Legislates: The International Committee of the Red Cross and Its 161 Rules of Customary International Humanitarian Law*, 17 DUKE J. COMP. & INT'L L. 223, 247–48 (2006–07).

[21] Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, 1060 (1945) (recognizing that the International Court of Justice can use "evidence of a general practice accepted as law" to decide disputes that come before it). Two notable commentators have characterized CIL as "the collection of international behavioral regularities that nations over time come to view as binding as a matter of law." Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1116 (1999). Karol Wolfke wrote "[a]n international custom comes into being when a certain practice becomes sufficiently ripe to justify at least a presumption that it has been accepted by other interested states as an expression of law." KAROL WOLFKE, CUSTOM IN PRESENT INTERNATIONAL LAW 53 (2d ed. 1993)

[22] RESTATEMENT, *supra* note 6, § 102(2).

[23] Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT'L. L. 115, 123 (Fall 2005); Maurice Mendelson, *The Subjective Element in Customary International Law*, 66 BRIT. Y.B. INT'L L. 177, 177 (1995).

[24] Guzman, *supra* note 23, at 123.

[25] Henckaerts, *Study on Customary International Humanitarian Law*, *supra* note 3, at 178; *see also* Samuel Estreicher, *Rethinking the Binding Effect of Customary International Law*, 44 VA. J. INT'L L. 5, 6–7 (2003) ("The literature on CIL is a daunting one that could fill many Alexandrian libraries.").

CIL is what has been described as their inherent circularity.[26] This quality becomes evident when considering that CIL is only law if the *opinio juris* element is met, meaning states *believe* it is the law.[27] But why would a state believe something is the law unless the law already contained the required sense of legal obligation?[28] "So it appears that *opinio juris* is necessary for there to be a rule of law, and a rule of law is necessary for there to be *opinio juris*."[29]

Another controversial issue associated with CIL formation is one of proof. What suffices as evidence of state practice? How do we determine what states recognize as *opinio juris*? As will be seen, the Study's answer to these questions is to consider a wide variety of sources, including both physical and verbal acts of states, when analyzing state practice and *opinio juris*. The approach the Study's authors used, however, tends to conflate the two elements; if there are enough sources of physical and especially verbal "practice"—the sources cataloged in Volume II of the Study—then a state is deemed to believe that the "custom" is in fact legally obligatory.[30] To follow this approach is to stray from CIL orthodoxy, which requires a separate showing of general and consistent state practice and *opinio juris*.[31]

The state practice element of CIL requires generality and consistency of practice between states and is the element upon which CIL traditionalists tend to focus. [32] The traditional approach to CIL

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[26] RESTATEMENT, *supra* note 6, § 102 Reporters Notes 2 ("[H]ow, it is asked, can there be a sense of legal obligation before the law from which the legal obligation derives has matured?"). For a discussion of the circularity inherent in determining CIL, see also D'AMATO, *supra* note 16, at 55, 66.

[27] Guzman, *supra* note 23, at 124.

[28] *Id.*

[29] *Id.*

[30] In their introduction, Henckaerts and Doswald-Beck state, "When there is sufficiently dense practice, an *opinio juris* is generally contained within that practice and, as a result, it is not usually necessary to demonstrate separately the existence of an *opinio juris*." RULES, *supra* note 1, at xl.

[31] RESTATEMENT, *supra* note 6, § 102 cmts. b, c. The Restatement addresses each element in separate paragraphs, beginning with state practice. It should be noted that the Restatement says "*opinio juris* may be inferred from acts or omissions." *Id.*

[32] *Id.* § 102. The commentary to the Restatement states:

> A practice can be general even if it is not universally followed; there is no precise formula to indicate how widespread a practice must be, but it should reflect wide acceptance among the states particularly involved in the relevant activity. Failure of a significant number of

emphasizes empirical, objective proof of state practice over normative statements, which may or may not establish what states collectively believe the law is or should be.[33] This approach is empirical, objective, and inductive: custom is derived from specific instances of state conduct.[34] What is interesting about the ICRC Study is that it labels its evidence, almost all of which is statement-based rather than physical, as state practice.[35] It almost seems as if the Study's authors are cloaking their statement-based, modern approach to CIL in the language of tradition, perhaps to be seen as being more traditional in their approach to CIL formation than they actually are.

Rooted in the notion of state consent,[36] the *opinio juris* element of CIL requires states to accept the practice as a positive legal duty for it to

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> important states to adopt a practice can prevent a principle from becoming general customary law.

Id. § 102 cmt. b. Because practice implies physical action, a focus on physical practice is sometimes referred to as the traditional approach to CIL formation. Roberts, *supra* note 15, at 758.

[33] Roberts, *supra* note 15, at 758; *see also* Guzman, *supra* note 23, at 149. This "traditional" approach can be contrasted with the more modern approach identified by Michael Akehurst, who described state practice as follows:

> State practice means any act or statement by a State from which views about customary law can be inferred; in includes physical acts, claims, declarations *in abstracto* (such as General Assembly resolutions), national laws, national judgments and omissions. Customary international law can also be created by the practice of international organizations and (in theory, at least) by the practice of individuals.

Michael Akehurst, *Custom as a Source of International Law*, 47 BRIT Y.B. INT'L L. 1, 53 (1974–75). As will be seen below, the Study's authors are clearly proponents of Akehurst's expansive view of state practice.

[34] Roberts, *supra* note 15, at 758.

[35] *See generally* PRACTICE, *supra* note 3.

[36] The notion of state consent is at the heart of international law. Guzman, *supra* note 23, at 141–42. If one holds to consent as a touchstone of international law, then *opinio juris* requires that there be both general acceptance of a rule as well as acceptance by affected states. *Id.* The idea that consent is at the heart of international law stems from Grotian view that CIL encompasses voluntary law, as opposed to natural law, and rests on the tacit agreement or consent of nations. J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449, 509 (2000). That a state must accept the rule to be bound by it is the basis for the doctrine of persistent objection, which holds that a state may in essence opt out of being bound by a rule by objecting to it at its formation and persistently when confronted with it later. See *supra* note 11 for the Restatement's definition of persistent objection.

become CIL,[37] and is the element upon which modernists tend to focus. The modern approach to CIL formation—the one actually employed by the Study's authors—focuses on normative statements, not acts.[38] As such, the modern approach is viewed as emphasizing *opinio juris* over state practice.[39] Under this approach, rules may be deduced from statements of rules, such as treaties[40] or the declarations of international forums, rather than deduced from specific instances of state conduct.[41] The modern approach is therefore the one that gets criticized for being a statement of *lex ferenda*, what its proponents wish the law would be, as opposed to *lex lata*, what the law actually is.[42] Its concern is substantive normativity rather than descriptive accuracy, which is the concern of traditionalists.[43]

Identifying proof of *opinio juris* is problematic because determining when a state subjectively believes it is obligated to follow a rule of law is difficult if not impossible.[44] Therefore, one must attempt to cull belief from the actions and statements of states.[45] While state actions are likely better indicators of belief, at least when it is unclear what the state believes regarding the customariness of the norm, unfortunately, they are seldom on point.[46] For example, with Rule 45, does the lack of any examples of "severe, widespread, and long-term" destruction of the natural environment mean that states refrain from such action out of a sense of legal obligation?[47] Probably not. Hence, with Rule 45 and

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[37] The Restatement says, "[I]t must appear that the states follow the practice from a sense of legal obligation." RESTATEMENT, *supra* note 6, cmt. c.
[38] Roberts, *supra* note 15, at 763.
[39] *Id.*
[40] It should be noted that treaties are *lex lata* for states who are parties to the treaty. *See id.*
[41] *Id.* Michael Akehurst wrote that State practice, in order to create a customary rule, "must be accompanied by (or consist of) statements that certain conduct is permitted, required, or forbidden by international law . . . ." Akehurst, *supra* note 33, at 53.
[42] Roberts, *supra* note 15, at 763.
[43] *Id.* at 762–63.
[44] Guzman, *supra* note 23, at 146.
[45] *Id.*
[46] *Id.*
[47] Using the lack of examples of "severe, widespread, and long-term" destruction of the environment during armed conflict to demonstrate state practice is like trying to prove a negative. Just because States have not engaged in such conduct does not mean that they believe they cannot as a matter of law or custom. As Maurice Mendelson noted, the problem with omissions is that they are ambiguous. Absent evidence of *opinio juris*, there is no way of knowing the reasons why a state is refraining from certain conduct. Mendelson, *supra* note 23, at 199.

many other rules, one must rely on statements about such acts to establish what a state believes it is obligated (or not obligated) to do. Though there are numerous problems associated with giving so much weight to statements, many would agree with the Study's authors who believed that doing so was necessary to determine the *opinio juris* of states.[48]

B. The ICRC Study

The ICRC began its study of customary international humanitarian law at the behest of the participants of the 26th International Conference of the Red Cross and Red Crescent, who met in December of 1995.[49] The Conference requested the ICRC carry out the Study to identify and facilitate the application of existing rules of customary international humanitarian law in international armed conflict and non-international armed conflict.[50] As such, the Study's authors claimed that the end product does not create new rules of international humanitarian law, but rather "seeks to provide the most accurate snapshot of existing rules of international humanitarian law."[51]

In an article summarizing the Study, one of its two authors, Jean Marie Henckaerts, said that its purpose was "to overcome some of the problems related to the application of international humanitarian treaty law."[52] In particular, he singled out AP I. According to Henckaerts, despite ratification by more than 160 states,[53] AP I is of limited efficacy because many states that have been involved in international armed conflict since its creation in 1977 are not parties.[54] The Study's "first

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[48] *See* Guzman, *supra* note 23, at 146 ("Though there are myriad problems with using statements as evidence of a state's beliefs, the majority view is that they may be used in this way."). *See generally* Akehurst, *supra* note 33.

[49] ICRC Press Release, *supra* note 5.

[50] Henckaerts, *Study on Customary International Humanitarian Law*, *supra* note 3, at 176.

[51] ICRC Press Release, *supra* note 5.

[52] Henckaerts, *Study on Customary International Humanitarian Law*, *supra* note 3, at 177.

[53] As of 11 March 2008, there are 167 states party to AP I. *States Party to the Following International Humanitarian Law and Other Related Treaties as of 11-Jul-2008* (July 11, 2008) [hereinafter *States Party*], http://www.icrc.org/eng/party_ccw.

[54] RULES, *supra* note 1, at xxviii. The following twenty-eight states are not parties to AP I: Afghanistan, Andorra, Azerbaijan, Bhutan, Eritrea, Fiji, India, Indonesia, Iran, Iraq, Israel, Kiribati, Malaysia, The Marshall Islands, Morocco, Myanmar, Nepal, Niue,

purpose" was therefore to determine which rules of international humanitarian law now apply to all parties to a conflict regardless of whether they have ratified the treaties from which these rules originate.[55]

Secondly, the Study's authors aimed to plug the gap that they believe exists between international armed conflict and non-international armed conflict.[56] According to the Study, there is insufficient treaty law regulating the latter type of armed conflict, the type that exists most often today.[57] Thus, for each of the 161 rules of customary international humanitarian law in the Study, the authors stated whether the rule also applies in non-international armed conflict. In the case of Rule 45, they concluded that the rule "arguably" applies in non-international armed conflict, a conclusion they also reached with 146 of the Study's 160 other rules.[58]

1. Authors' Description of Their Methodology

The Study's authors identified their methodological approach in the Study's introduction.[59] The description is noteworthy for its brevity and its adherence to tradition.[60] The problem, as will be seen, is one of application. The authors began their discussion of methodology by positing that state practice must be considered from two angles: selection of state practice and assessment of the selected practice.[61] Regarding selection, they claim both physical and verbal acts can

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Pakistan, Papua New Guinea, Philippines, Singapore, Somalia, Sri Lanka, Thailand, Turkey, Tuvalu, and the United States. *States Party*, *supra* note 53.

[55] Henckaerts, *Study on Customary International Humanitarian Law*, *supra* note 3, at 177.

[56] RULES, *supra* note 1, at xxviii.

[57] *Id.* From 1997–2006, only three conflicts were fought between states: Eritrea-Ethiopia, India-Pakistan, and Iraq-United States and coalition forces. The other thirty-one major armed conflicts (defined as a conflict including at least one state resulting in at least 1,000 battle deaths in one year) recorded for this period were fought within states and concerned either governmental power or territory. Lotta Harbom & Peter Wallensteen, *Patterns of Major Armed Conflicts, 1997–2006*, *in* STOCKHOLM INT'L PEACE RES. INST. YEARBOOK 2007: ARMAMENTS, DISARMAMENT, AND INTERNATIONAL SECURITY (2007), *available at* http://www.sipri.org/contents/conflict/YB07%20079%2002Asm.pdf.

[58] *See* RULES, *supra* note 1, at 156–57; *see also* Henckaerts, *Study on Customary International Humanitarian Law*, *supra* note 3, at 198–212.

[59] RULES, *supra* note 1, at xxxi–xlv.

[60] See *supra* text accompanying notes 32–35 for a discussion of the traditional approach to CIL formation.

[61] RULES, *supra* note 1, at xxxii.

contribute to the formation of CIL.[62] Physical acts include battlefield behavior and the use of certain weapons; verbal acts include military manuals, national legislation, national case-law, instructions to armed and security forces, diplomatic communiqués, opinions of official legal advisors, pleadings before international tribunals, statements in international forums, and government positions on resolutions adopted by international organizations.[63]

Once state practice is identified, "[it] has to be weighed to assess whether it is sufficiently 'dense' to create a rule of CIL."[64] Quoting from the *North Sea Continental Shelf Cases*, the authors stated that the practice must be "virtually uniform, extensive and representative."[65] Virtually uniform means that different States must not have engaged in substantially different conduct.[66] Furthermore, while it is not necessary that every state sign on or even that there be a certain percentage of states, acceptance of the norm must be of a certain quality to meet the "extensive and representative" test.[67] "[I]t is not simply a question of how many States participate in the practice, but also which States."[68] The Study's authors thus acknowledged that specially affected states carry extra weight in the equation used to assess State practice. "[I]f specially affected states do not accept the practice, it cannot mature into a rule of customary international law . . . ."[69] The Study is agnostic regarding the doctrine of persistent objection to CIL norms, taking no official view and noting that some doubt the concept's validity.[70] The authors concluded their introductory discussion of practice by stating that there is no time frame for establishment of a new CIL norm.[71] Rather, the accumulation of a practice of sufficient density, in terms of

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[62] *Id.*
[63] *Id.*
[64] *Id.* at xxxvi.
[65] *Id.* (quoting North Sea Continental Shelf Cases, *supra* note 18).
[66] *Id.* at xxxvi (quoting Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, 1986 I.C.J. 14 (Jun. 27).).
[67] *Id.* at xxxviii.
[68] *Id.*
[69] *Id.*
[70] *Id.* at xxxix. Henckaerts and Doswald-Beck cite Maurice Mendelson as the authority who questions the validity of the doctrine of persistent objection. Maurice H. Mendelson, *The Formation of Customary International Law*, *in* COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 227–44 (1998).
[71] RULES, *supra* note 1, at xxxix.

uniformity, extent and representativeness, is what determines whether it is customary.[72]

Though it is seldom separately examined in the Study in connection to its rules, the authors did discuss *opinio juris* separately when identifying their methodological approach.[73] *Opinio juris*, they wrote, "refers to the legal conviction that a particular practice is carried out 'as of right.'"[74] The form in which both the practice and this legal conviction are expressed may differ depending on the nature of the rule and whether it contains a prohibition, an obligation, or a right to behave in a certain manner.[75]

Regarding *opinio juris*, the Study's authors found it difficult to separate the elements of practice and legal conviction because, as they stated, the same act, be it verbal or physical, may reflect both practice and legal conviction.[76] Interestingly, in an article written in *The International Review of the Red Cross*, Henckaerts singled out military manuals, perhaps the evidence most relied on to establish the Study's 161 rules, as an example of this phenomenon. He argued that "verbal acts, such as military manuals, count as State practice and often reflect the legal conviction of the State involved at the same time."[77] Thus, he concluded, if the practice is dense enough, *opinio juris* is usually contained in the practice, making it unnecessary to separately establish that element.[78]

The final notable aspect of the authors' discussion of methodology concerns their consideration of multilateral treaties in determining whether a norm has reached customary status. Pointing to the *North Sea Continental Shelf Cases*, in which the International Court of Justice considered the degree of ratification of a treaty as relevant to the assessment of CIL,[79] the Study's authors defended the decision to include

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[72] *Id.*; *see also* RESTATEMENT, *supra* note 6, § 102 cmt. b.
[73] RULES, *supra* note 1, at xxxix–xlii.
[74] *Id.* at xxxix.
[75] *Id.*
[76] *Id.* at xl.
[77] Henckaerts, *Study on Customary International Humanitarian Law*, *supra* note 3, at 182.
[78] RULES, *supra* note 1, at xl. For more discussion of *opinio juris* and the Study's authors' failure to adequately consider it, see *infra* text accompanying notes 207–18.
[79] *Id.* at xliii. In the *North Sea Continental Shelf Cases*, the ICJ stated that "the number of ratifications and accessions so far secured [thirty-nine] is, though respectable, hardly sufficient," especially where practice outside the treaty contradicted that called for by the

the ratification, interpretation, and implementation of treaties in the Study.[80] They described the Study's approach to treaty analysis as "cautious," such that "widespread ratification is only an indication and has to be assessed in relation to other elements in practice, in particular the practice of States not party to the treaty in question."[81] The Study's authors believed, however, that to limit its consideration to the practice of non-party states would violate the requirement that CIL be based on widespread and representative practice.[82] Therefore, the assessment of state practice with respect to, for example, paragraphs Articles 35(3) and 55(1) of AP I, took into account that AP I had, at the time of writing, been ratified by 162 States.[83]

2. Initial Critiques of the Study, Its Methodology, and Rule 45

Comment on the Study has been relatively minimal to date, most likely due to its recent publication and extensive scope. A few notable commentators have written critiques,[84] however, and their criticism has been relatively uniform thus far. All the early commentators seem to agree that while the Study represents a laudable effort in nature and scope, it has a number of fatal flaws, chief among them being the proof upon which it relies in establishing its 161 rules.[85] In particular, these

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treaty. North Sea Continental Shelf Cases (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 42 (Feb. 20).

[80] RULES, *supra* note 1, at xlii–xliii.

[81] *Id.* at xliv.

[82] *Id.*

[83] *Id.* ("[T]he assessment of the existence of customary law takes into account the fact that, at the time of writing, Additional Protocol I has been ratified by 162 states . . . ."). There are currently 167 state parties to AP I. *See States Party*, *supra* note 53. See *infra* note 169 for a discussion of significant reservations to AP I.

[84] *See, e.g.*, PERSPECTIVES ON THE ICRC STUDY, *supra* note 19. Sixteen different international humanitarian law scholars contributed critiques to this work. *Id.*

[85] *See, e.g.*, Yoram Dinstein, *The ICRC Customary International Law Study*, *in* THE LAW OF WAR IN THE 21ST CENTURY: WEAPONRY AND THE USE OF FORCE (Anthony M. Helm ed., Naval War College 2006) [hereinafter Dinstein, *Customary International Law Study*]; Letter from John B. Bellinger III, Legal Advisor, U.S. Department of State, and William J. Haynes, II, General Counsel, U.S. Department of Defense, to Dr. Jakob Kellenberger, President, International Committee of the Red Cross (Nov. 3, 2006) [hereinafter Letter to Dr. Kellenberger] (on file with author), *reprinted in* John B. Bellinger III & William J. Haynes II, *A US Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law*, 89 INT'L REV. RED CROSS 443 (2007), *available at* http://www.icrc.org/Web/eng/siteeng0nsf.html all/review-866-p443/$File/irrc_866_Bellinger.pdf; Press Release, American Forces Press Service, DoD, State Department Criticize Red Cross Law of War Study (Mar. 28, 2007)

commentators are troubled by the Study's extensive reliance on military manuals, as well as on non-binding resolutions of international bodies such as the United Nations General Assembly and statements of non-governmental organizations such as the ICRC.[86]

For example, Israeli lawyer Yoram Dinstein wrote that the gamut of admissible statements considered by the Study's authors was too great.[87] American law of war scholar W. Hays Parks likened the authors' proof to the results of an Internet search with no analysis of the applicability or accuracy of the results.[88] Other flaws identified by these and other commentators include: the tendency to combine the state practice and *opinio juris* prongs of CIL under a "density of practice" approach;[89] over-reliance on verbal practice at the expense of examples of actual operational practice;[90] citing practice that stems from treaty obligations on the part of signatory states and not from a sense of legal obligation;[91] confusion regarding the doctrines of specially affected states and persistent objection;[92] the tendency to oversimplify complex and nuanced rules of international humanitarian law;[93] the apparent presumption that rules customary in international armed conflict are also customary in non-international armed conflict;[94] and the apparent presumption that most of the provisions of AP I and Additional Protocol II to the Geneva Conventions[95] (AP II) have crystallized into CIL.[96]

[hereinafter Press Release, DoD, State Department Criticize Red Cross Law of War Study], *available at* http://www.defenselink.mil/news/ newsarticle.aspx?id=3308.

[86] *See* Letter to Dr. Kellenberger, *supra* note 85, at 2.

[87] Dinstein, *Customary International Law Study*, *supra* note 85, at 103.

[88] *See* Press Release, DoD, State Departement Criticize Red Cross Law of War Study, *supra* note 85.

[89] Letter to Dr. Kellenberger, *supra* note 85, at 3.

[90] Dinstein, *Customary International Law Study*, *supra* note 85, at 101–02.

[91] *Id.*

[92] *Id.* at 108–09.

[93] Letter to Dr. Kellenberger, *supra* note 85, at 4.

[94] *Id.*

[95] When President Reagan transmitted the 1977 AP II to the United States Senate for advice and consent in January of 1987, he said the following regarding AP I in his letter of transmittal: "Protocol I is fundamentally and irreconcilably flawed. It contains provisions that would undermine humanitarian law and endanger civilians in war." President Reagan went on to say that the United States would work with its allies to incorporate the positive provisions of AP I into the rules that govern U.S. military operations, and as customary international law. PRESIDENT RONALD REAGAN, LETTER OF TRANSMITTAL, PROTOCOL ADDITIONAL TO THE 1949 GENEVA CONVENTIONS, AND RELATING TO THE PROTECTION OF VICTIMS OF NONINTERNATIONAL ARMED CONFLICTS, CONCLUDED AT GENEVA ON 10 JUNE 1977, S. TREATY DOC. NO. 2, 100th Cong., at 7 (1987), *reprinted in* 81 AM. J. INT'L L. 910, 910–12 (1987).

The only state that has officially commented on any portion of the Study thus far has been the United States. In a five-page letter (with a twenty-two page attachment) to the President of the ICRC, U.S. Department of State Legal Advisor John Bellinger and U.S. Department of Defense General Counsel William Haynes provided the U.S. government's "initial reactions" to the ICRC Study.[97] Echoing the criticism of other commentators, they wrote, "We are concerned about the methodology used to ascertain rules and about whether the authors have proffered sufficient facts and evidence to support those rules."[98] Therefore, they continued, "The United States is not in a position to accept without further analysis the Study's conclusions that particular rules related to the laws and customs of war in fact reflect customary international law."[99] The letter went on to list a number of the same criticisms noted above: that state practice listed was insufficiently dense; that the type of practice listed was questionable; that the authors did not adequately consider specially affected states; and that they overvalued

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[96] Letter to Dr. Kellenberger, *supra* note 85, at 4; *see also* Dinstein, *Customary International Law Study*, *supra* note 84, at 110. While it is undisputed that many provisions of AP I and II have crystallized into CIL (see *Remarks of Michael J. Matheson* 2 AM. U.J. INT'L. L. & POLICY 419 (1987) [hereinafter *Matheson Remarks*]), there remain controversial provisions which have kept the remaining twenty-eight states from becoming parties. Regarding this issue, Dinstein concluded:

> On the whole, as regards international armed conflicts, I am afraid that the Study clearly suffers from an unrealistic desire to show that controversial provisions of API are declaratory of customary international law (not to mention the occasional attempts to go even beyond API). By overreaching, I think that the Study has failed its primary mission. . . . [T]here is a need to persuade non-Contracting Parties that they must comply with a large portion of API: not because it is a treaty but because it is general custom. I do not think that non-Contracting Parties will be persuaded by the conclusions of the Study. Thus, the authors missed a golden opportunity to bring Contracting and non-Contracting Parties to API closer together.

Dinstein, *Customary International Law Study*, *supra* note 85, at 110.

[97] Letter to Dr. Kellenberger, *supra* note 85, at 1; Attachment to Letter from John B. Bellinger, III, Legal Advisor, U.S. Department of State, and William J. Haynes, General Counsel, U.S. Department of Defense, to Dr. Jakob Kellenberger, President, International Committee of the Red Cross, "Illustrative Comments on Specific Rules in the Customary International Humanitarian Law Study" (Nov. 3, 2006) (on file with author) [hereinafter Attachment to Letter to Dr. Kellenberger] *reprinted in* Bellinger & Haynes, *A US Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law*, *supra* note 85.

[98] Letter to Dr. Kellenberger, *supra* note 85, at 1.

[99] *Id.*

sources such as military manuals, which are not statements of *opinio juris* or state practice, but rather statements of policy and training guides.[100]

The attachment to the Bellinger-Haynes letter examines four of the rules contained in the Study.[101] Among those commented on is Rule 45. Bellinger and Haynes wrote that while Rule 45's prohibition against "widespread, long-term, and severe damage to the natural environment" is desirable as a matter of policy, "the Study fails to demonstrate that [R]ule 45, as stated, constitutes customary international law in international or non-international armed conflicts, either with regard to conventional weapons or nuclear weapons."[102]

Bellinger and Haynes gave several reasons for their conclusion that Rule 45 is not CIL. First, they claimed that the United States, France, and the United Kingdom are all specially affected states with respect to both conventional and nuclear weapons, not just nuclear weapons as the Study's authors contended.[103] This alone, they wrote, is enough to prevent formation of CIL.[104] Second, they argued that with respect to this rule, the Study's authors principally relied on the wrong sources: the U.S. Army's *Operational Law Handbook*[105] and the Air Force *Commander's Guide*.[106] What they should have relied on, according to Bellinger and Haynes, are the United States' and France's instruments of ratification to the 1980 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 (CCW),[107] which clearly articulate both states' objections to this exact rule. The authors should have also relied on the remarks of Michael J. Matheson,[108] which

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[100] *Id.* at 1–4.
[101] *See* Attachment to Letter to Dr. Kellenberger, *supra* note 97.
[102] *Id.* at 7.
[103] *Id.* at 7–8.
[104] *Id.* at 8–9; see *infra* text accompanying notes 229–40 for a discussion of the specially affected states doctrine.
[105] INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK (1993) [hereinafter OPERATIONAL LAW HANDBOOK].
[106] U.S. DEP'T OF AIR FORCE, PAM. 110-34, COMMANDER'S HANDBOOK ON THE LAW OF ARMED CONFLICT para. 1.14 (25 July 1980) [hereinafter AFP 110-34].
[107] 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, Oct. 10, 1980, 1324 U.N.T.S. 137, 19 I.L.M. 1523 [hereinafter CCW].
[108] *Matheson Remarks*, *supra* note 96.

similarly state the United States' objections.[109] Bellinger and Haynes faulted the Study authors' tendency to equate the verbal practice of states which are parties to AP I, many of whom have engaged in minimal armed conflict, to that of non-party states, many of whom have engaged in significant armed conflict since the Protocols came into existence.[110] Finally, they concluded by noting the complete lack of examples of any actual operational practice that would implicate Rule 45, demonstrating one of the unique aspects of this rule, and its complements, which we will now consider in greater depth.[111]

III. The Natural Environment: Rule 45 and its Complements

A. The Complements: Rules 43 and 44

Rule 45 is the third of three rules relating to the natural environment in a chapter dedicated to the topic. The first of the rules, Rule 43, states that the general principles on the conduct of hostilities—distinction, military necessity, and proportionality—apply to the natural environment.[112] There are three parts to the rule:

> A. No part of the natural environment may be attacked, unless it is a military objective.
> B. Destruction of any part of the natural environment is prohibited, unless required by imperative military necessity.
> C. Launching an attack against a military objective which may be expected to cause incidental damage to the environment which would be excessive in relation to the concrete and direct military advantage anticipated is prohibited.[113]

Rule 43 recognizes the civilian status of the environment and thus would appear to be uncontroversial, at least in the context of international armed conflict.[114] However, the Study's authors added language to this

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[109] Attachment to Letter to Dr. Kellenberger, *supra* note 97, at 7–8.
[110] *Id.* at 10.
[111] *Id.* at 11.
[112] RULES, *supra* note 1, at 143.
[113] *Id.*
[114] The civilian status of the environment is enshrined in Article 55 of AP I. Protocol I, *supra* note 10, art. 55. There were no reservations to this idea nor any negative treatment

rule that has given some commentators pause: the word "part."[115] Inclusion of this notion that every "part" of the environment is protected has no precedent in the law of war.[116] It is unclear why the Study's authors felt the need to include the term as they neither defined it nor defended its use.[117] While one can venture guesses as to why they would include it,[118] the authors would have been wise to stick with the language of established international law. By adding new, more protective language in Rule 43, the authors instead opened themselves up to a charge that can be made regarding several aspects of their three natural environment rules: that they overreached and stated the law as they wished it was, rather than as it is.

Rule 44 requires states to give "due regard" to the natural environment in the conduct of hostilities and is stated as follows:

> Methods and means of warfare must be employed with due regard to the protection and preservation of the natural environment. In the conduct of military operations, all feasible precautions must be taken to avoid, and in any event to minimize incidental damage to the environment. Lack of scientific certainty as to the effects on the environment of certain military operations does not absolve a party to the conflict from taking such precautions.[119]

This is, like Rule 43, a novel construction of a rule that finds its genesis in Article 55 of AP I.[120] Article 55(1), however, states the obligation as: "Care shall be taken in warfare to protect the natural environment against

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given to it in Matheson's remarks. *See Matheson Remarks*, *supra* note 96. The authors state that Rule 43 is a norm of CIL in non-international armed conflict as well. By contrast, Rules 44 and 45 are, according to the authors, "arguably" norms applicable in non-international armed conflict. RULES, *supra* note 1, at 143, 147, 151.

[115] Karen Hulme, *Natural Environment*, *in* PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 19, at 210.

[116] *Id.*

[117] *Id.*

[118] One example would be to demonstrate that the environment is not just one entity, but includes smaller entities, such as lakes, forests, and deserts. Hulme, *supra* note 115, at 210. This decision may also recognize the unique protections given under environmental law to certain parts of the environment, to include air, marine resources, flora and fauna. *Id.*

[119] RULES, *supra* note 1, at 147.

[120] Hulme, *supra* note 115, at 218.

widespread, long-term, and severe damage."[121] Why the authors felt the need to change the wording from "care" to "due regard," a term used primarily in naval contexts,[122] is unclear. In addition, Rule 44 requires not merely protection of the natural environment, but also "preservation," thus going beyond Article 55 of AP I.[123] As with the word "part" in Rule 43, use of the words "due regard" and "preservation" in Rule 44 is neither defined nor defended.[124] Here too, the authors would have been better off with language already enshrined in international humanitarian law: respect and protect.[125] Instead, they chose to stretch the limits, resulting in a questionable "rule" of customary international humanitarian law.

B. Rule 45: Volume I's Description of the Rule

Rule 45, the shortest but perhaps most complicated of the three rules in the natural environment chapter, is stated as: "The use of methods or means of warfare that are intended, or may be expected, to cause widespread, long-term, and severe damage to the natural environment is prohibited. Destruction of the natural environment may not be used as a weapon."[126] The authors identified Rule 45 as a norm of CIL in international armed conflict and, arguably, in non-international armed conflict.[127] Because Rule 45's first and second sentences contain

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[121] Protocol I, *supra* note 10, art. 55, para. 1.

[122] The formulation adopted in Rule 44 is similar to the one contained in paragraph 44 of the San Remo Manual, which reads: "Methods and means of warfare should be employed with due regard for the natural environment taking into account the relevant rules of international law. Damage to or destruction of the natural environment not justified by military necessity and carried out wantonly is prohibited." SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA (Louise Doswald-Beck ed., 1995) *available at* http://www.icrc.org/ihl.nsf/FULL/560?OpenDocument (last visited Dec. 2, 2008).

[123] *See, e.g.*, United Nations Convention on the Law of the Sea, pmbl., arts. 21, 56, 147, 235, Dec. 10, 1982, 1833 U.N.T.S. 397.

[124] Hulme, *supra* note 115, at 218–19.

[125] *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

[126] RULES, *supra* note 1, at 151.

[127] *Id.* The authors relied on military manuals and national legislation which do not separately discuss or distinguish international armed conflict and non-international armed conflict. They also relied on statements condemning acts destructive to the natural environment which were general in nature and which did not make distinguish international and non-international armed conflict. Recognizing the problems with announcing the customariness of this rule in non-international armed conflict, the authors concluded: "Even if it's not yet customary [in non-international armed conflict], present

different prohibitions, the authors considered them separately. This article will introduce Parts 1 and 2 of Rule 45, as described in Volume I of the Study, in the next two sections. A thorough review of the Study's evidence for Rule 45, as identified in Volume II, will follow.

1. Part 1: Widespread, Long-Term, and Severe Damage

Part 1 of Rule 45 states an absolute prohibition against means and methods intended or expected to cause widespread, long-term, and severe damage to the natural environment.[128] It is adapted almost verbatim from Article 35(3) and Article 55(1) of AP I, both of which the Study acknowledges were new when adopted in 1977.[129] In its summary of Rule 45, the Study also contains the following statement regarding persistent objection to the rule: "It appears that the United States is a 'persistent objector' to the first part of this rule. In addition, France, the United Kingdom and the United States are persistent objectors with regard to the application of the first part of this rule to nuclear weapons."[130]

Nevertheless, the authors claimed "significant practice" in support of their finding that this relatively short-lived and persistently objected-to rule has become customary.[131] The first "significant practice" cited by the authors is telling: military manuals.[132] They write, "This prohibition is set forth in many military manuals."[133] The authors go on to highlight the following other practice in support of their finding: that the offense of ecocide is an offense under the legislation of many states, to include

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trends mean . . . it's likely these will become customary in due course." *Id.* They argued that this is particularly true because major damage to the environment rarely respects international frontiers and because acts which cause widespread, long-term, and severe damage to the environment may violate other rules, where the application to non-international armed conflict is not in question. *Id.* at 157.

[128] *Id.* at 151.

[129] *Id.* at 152. The word "environment" had never been used in any treaty on the law of war prior to 1976 and 1977. Adam Roberts, *The Law of War and Environmental Damage*, *in* THE ENVIRONMENTAL CONSEQUENCES OF WAR 50 (Jay E. Austin & Carl E. Bruch eds., 2000).

[130] RULES, *supra* note 1, at 151.

[131] *Id.* at 152.

[132] *Id.*

[133] *Id.* The authors listed the relevant portions of several of these military manuals in Volume II of the Study. See *infra* notes 177 and 182 and accompanying text for a list and discussion of the military manuals that the authors cited in support of Rule 45.

non AP I party states;[134] that several state submissions to the International Court of Justice in the *Nuclear Weapons* case[135] indicated their belief that this provision of AP I is customary;[136] policy statements of Israel and the United States, both non-parties to AP I;[137] the almost universal condemnation of certain acts of destruction of the environment, such as Iraq's burning of oil fields in the first Gulf war;[138] the ICRC's published Guidelines on the Protection of the Environment in Times of Armed Conflict, broadly endorsed in a resolution by the United Nations General Assembly;[139] and the statute of the International Criminal Court (ICC), which criminalizes conduct referred to in Part I of Rule 45.[140]

The Study acknowledges that a certain amount of practice indicates doubt regarding the customary nature of this AP I rule. The authors pointed particularly to the submissions to and findings of the International Court of Justice in the *Nuclear Weapons* case.[141] Both the United Kingdom and the United States claimed in their submissions to the court that Articles 35(3) and 55(1) of AP I were not customary.[142] And, as the authors reluctantly acknowledged, the court "appeared" to agree, stating in its advisory opinion that these provisions only apply to "States having subscribed to [them]."[143] Finally, the authors admitted that both France and the United States made statements of interpretation upon ratification of the CCW indicating that neither believed Articles 35(3) or 55(1) of AP I, the substance of which were contained in the preamble of the CCW, were customary.[144]

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[134] *Id.*

[135] *Id.* The authors listed the oral pleadings and written statements of New Zealand, the Solomon Islands, Sweden, and Zimbabwe, and the written statements, comments or counter memorials of India, Lesotho, the Marshall Islands, and Samoa. The authors acknowledged that both the United Kingdom and the United States said in their written statements to the ICJ that Articles 35(3) and 55(1) of AP I are not customary. *Id.* at 153.

[136] RULES, *supra* note 1, at 152–53.

[137] *Id.* at 153.

[138] *Id.* See *infra* text accompanying notes 171–73, 196–200, and 284–87 for a discussion of the Guidelines.

[139] RULES, *supra* note 1, at 153.

[140] See *infra* note 169 and accompanying text for a discussion of how the Statute of the International Criminal Court criminalizes this conduct.

[141] RULES, *supra* note 1, at 153.

[142] *Id.*

[143] *Id.* at 153–54; *see also* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, para. 282 (July 8).

[144] RULES, *supra* note 1, at 153–54. The fourth paragraph of the preamble to the CCW states: "Also recalling that it is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to

The persistent objection of three states—France, the United Kingdom, and the United States, states that many would argue are specially affected for purposes of this rule[145]—is definitely a problem for the authors. The authors even acknowledged that the customary law nature of Rule 45 turns on the positions of these three states.[146] Henckaerts and Doswald-Beck tackled this problem by distinguishing conventional and nuclear weapons, a distinction not made by the objectors.[147] Only by concluding that each of the three states' practice with respect to conventional weapons indicated acceptance of the rule could the authors find that the rule is customary.[148] The Study concludes that because these three states are not specially affected states for purposes of conventional weapons, their "contrary practice is not enough to have prevented the emergence of this customary rule."[149] The Study's authors did, however, see these three states as specially affected with respect to nuclear weapons, based on their persistent objection over time and that none of the states' practice with respect to nuclear weapons contradicted their objections to the rule. Thus, they concluded: "[I]f the doctrine of 'persistent objection' is possible in the context of humanitarian rules, these three States are not bound by this specific rule

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the natural environment . . . ." CCW, *supra* note 107, pmbl. France made the following reservation upon ratification of the CCW: "[France] [c]onsiders that the fourth paragraph of the preamble to 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, which reproduces the provisions of article 35, paragraph 3, of Additional Protocol I, applies only to States parties to that Protocol." *Id.* at Declarations, Reservations and Objections. The United States stated a similar understanding:

> The United States considers that the fourth paragraph of the preamble to the Convention, which refers to the substance of provisions of article 35 (3) and article 55 (1) of additional Protocol I to the Geneva Conventions for the Protection of War Victims of August 12, 1949, applies only to States which have accepted those provisions.

Id.

[145] See *infra* text accompanying notes 224–35 for more discussion of the meaning of these three states' persistent objection to Rule 45.

[146] RULES, *supra* note 1, at 154.

[147] *Id.*

[148] *Id.*

[149] *Id.* The authors stated that the contrary practice of France, the United Kingdom, and the United States was not consistent. In particular, they said: "Their statements in some contexts that the rules are not customary contradict those made in other contexts (in particular military manuals) in which the rule is indicated as binding as long as it is not applied to nuclear weapons." *Id.*

as far as any use of nuclear weapons is concerned."[150] This would suggest that other states are bound by Rule 45 with respect to nuclear weapons, even though the relevant provisions of AP I were never meant to apply to such weapons.[151]

One of the main reasons why these distinctions are so important has to do with the absolute nature of both Parts 1 and 2 of Rule 45. Unlike most other rules that involve civilian objects, Rule 45 makes no allowance for military necessity or proportionality.[152] The Study's authors stated that the rule is designed as an absolute partly because of its high threshold.[153] One will note that to trigger the rule, damage to the natural environment must be widespread, long-term, *and* severe.[154] Moreover, it is important to point out that long-term was understood by those states involved in the conferences surrounding AP I, and is acknowledged in Volume I, to mean "decades."[155]

2. Part 2: Destruction of the Natural Environment as a Weapon

Part 2 of Rule 45 states simply, "Destruction of the natural environment may not be used as a weapon."[156] The authors began their discussion of this part of Rule 45 as follows: "There is extensive State practice prohibiting deliberate destruction of the natural environment as a form of weapon. ENMOD prohibits the deliberate modification of the environment in order to inflict widespread, long-lasting, or severe effects as a means of destruction, damage, or injury to another State party."[157] As the above sentence indicates, it is clear that the authors based this second part of Rule 45 on the United Nations Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD),[158] which they admitted may not yet

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[150] *Id.* at 155.
[151] *See, e.g.*, *infra* note 169.
[152] RULES, *supra* note 1, at 157; c*f. id.* at 127–42 (discussing Rules 38–42 of the Study).
[153] *Id.*
[154] *Id.* at 151.
[155] *Id.* at 157.
[156] *Id.* at 151.
[157] *Id.* at 155.
[158] United Nations Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, May 18, 1977, 31 U.S.T. 333 (entered into force Oct. 5, 1978) [hereinafter ENMOD]. Article 1, paragraph 1 of ENMOD states that parties to the convention undertake "not to engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting, or severe effects

be customary.[159] What is strange is that Rule 45 at best only hints at ENMOD by not using the same language. A plain reading of Part 2 of Rule 45 actually indicates a prohibition already contained in this chapter of the Study: destruction of the environment itself, the focus of the AP I provisions on the natural environment.[160] As commentator Karen Hulme wrote, "Although [Volume I] is relatively clear on this issue of environmental modification within ENMOD, the authors invite confusion simply by using ENMOD as evidence for a rule on environmental destruction . . . ."[161] This is so because the rule clearly appears to relate to destroying the environment, whereas ENMOD concerns using the environment as a means of destruction.[162] Thus, as Hulme concluded, it is unclear exactly how and why the Study's authors used ENMOD.[163] It almost seems as if, knowing that ENMOD cannot yet be considered customary, the authors tried to imply that it was customary by connecting it to the idea that destruction of the natural environment is prohibited. Whatever the case may be, by using ENMOD as their main proof for Part 2 of Rule 45, the authors cast a shadow of doubt on both their approach and their results. Further examination of the evidence cited in support of Rule 45 in Volume II unfortunately does nothing to quell this doubt.

C. Evidence Cited by Volume II in Support of Rule 45

Volume II of the Study is subtitled "Practice." More than 4000 pages long, it catalogs all the examples that may, under the Study's broad definition of practice, be considered such. For each rule in the Study, the cited practice is broken up into the following subcategories: treaties and other instruments, national practice, practice of international organizations and conferences, practice of international judicial and

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as the means of destruction, damage or injury to any other State party." *Id.* at 336. There are currently seventy-three states party to ENMOD. *States Party*, *supra* note 53.

[159] RULES, *supra* note 1, at 155.

[160] *Id.* Part 1 of Rule 45 as well as Rules 43 and 44 all prohibit destruction of the natural environment. *Id.*; *see also* Roman Reyhani, *Protection of the Environment During Armed Conflict*, 14 MO. ENVTL. L. & POL'Y REV. 323, 330 (2007) ("ENMOD and Additional Protocol I have different applications, purposes, and thresholds, with no substantive overlap. Additional Protocol I focuses on the natural environment regardless of the weapon used. On the other hand, the ENMOD Convention aims to prevent hostile use of environmental modification techniques.").

[161] Hulme, *supra* note 115, at 237.

[162] *Id.* at 237–38.

[163] *Id.* at 238.

quasi-judicial bodies, practice of the International Red Cross and Red Crescent movement, and other practice.[164] The section on practice supporting Rule 45 is thirty-six pages long, the bulk of which is devoted to national practice, specifically military manuals.[165] Unfortunately, as has been alleged, the practice reads much like an Internet search.[166] There is no interpretive guidance or comment on the weight to be accorded each item, and the further down one goes, the less relevant the "search results" become. That said, this article will now highlight the main elements of practice listed by the Study in support of Rule 45, Parts 1 and 2, beginning with treaty law.

1. Treaty Law and Other Instruments

The treaty law section of Volume II is relatively straightforward, as it is simply a list of the treaty provisions discussed in Volume I.[167] Thus, for Part 1 of the Rule, the authors list Articles 35(3) and 55(1) of AP I, the preamble to the CCW, and the Rome Statute of the ICC criminalizing acts prohibited by Articles 35(3) and 55(1) of AP I.[168] The authors also reference the understandings of France, Ireland, and the United Kingdom to AP I,[169] and those of France and the United States to the CCW.[170] One

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[164] *See, e.g.*, PRACTICE, *supra* note 3, at 876–912.
[165] *See id.*
[166] Press Release, DoD, State Departement Criticize Red Cross Law of War Study, *supra* note 85.
[167] *See* PRACTICE, *supra* note 3, at 876–78, 903–04; *cf.* RULES, *supra* note 1, at 151–52, 155.
[168] PRACTICE, *supra* note 3, at 876–78; see *supra* note 144 for the text of the preamble to the CCW. Article 8.2(b)(iv) of the Rome Statute of the International Criminal Court (ICC) makes the following a war crime:

> Intentionally launching an attack in the knowledge that such an attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct military advantage anticipated.

Rome Statute of the International Criminal Court, July 17, 1998, art. 8.2(b)(iv), U.N. Doc. A/CONF.183/9, *reprinted in* 37 I.L.M. 999 (1998).
[169] PRACTICE, *supra* note 3, at 877. Upon ratification, France stated that "the risk of damaging the natural environment which results from the use of certain means or methods of warfare . . . shall be examined objectively on the basis of information available at the time of its assessment." Upon its ratification, Ireland declared "that nuclear weapons, even if not directly governed by [AP I], remain subject to existing rules of international law . . . ." Finally, upon its ratification, the United Kingdom stated that

noteworthy "other instrument" listed in this section is the 1994 Guidelines on the Protection of the Environment in Times of Armed Conflict,[171] an instrument which was promulgated by the ICRC and endorsed in a non-binding resolution by the United Nations General Assembly.[172] The Guidelines are the only instrument besides ENMOD listed under the treaties and other instruments section of Rule 45, Part 2. Hence, Volume II affirms that the authors viewed Part 2 of Rule 45 solely as a reflection of ENMOD, a treaty containing language it does not mirror.[173]

2. National Practice[174]

The national practice portion of Volume II for Rule 45 is dominated by a list of several states' military manuals containing out-of-context references to the rule in question.[175] The military manuals section is not only the longest but the first aspect of national practice listed, suggesting it is of primary importance.[176] For Part 1 of Rule 45, the authors identifed the manuals of twenty states, nineteen of which are parties to AP I.[177] One is therefore not surprised to see references in those manuals to the rules as stated in AP I and mirrored in Part 1 of Rule 45. The

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"the risk of environmental damage falling within the scope of [Articles 35(3) and 55(1)] arising from such means and methods of warfare is to be assessed objectively on the basis of information available at the time." Protocol I, *supra* note 10, Declarations, Reservations and Objections.

[170] PRACTICE, *supra* note 3, at 878; see *supra* note 144 for the text of the applicable reservations and understandings to the CCW.

[171] *Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict*, 311 INT'L REV. RED CROSS 230 (2005) [hereinafter *Guidelines*], *available at* http://www.icrc.org/Web/Eng/siteeng0.nsf/html/57JN38.

[172] G.A. Res. 49/50, ¶ 11 U.N. Doc. A/RES/49/50 (Dec. 9, 1994). To read an excerpt from the UN Resolution urging states to incorporate the Guidelines into their military manuals, see *infra* text accompanying note 197.

[173] PRACTICE, *supra* note 3, at 903–04.

[174] National practice is the term used by the Study's authors to discuss a particular form of state practice. The national practice section examines military manuals, national legislation, and what is termed "other national practice." *See id.* at 879–98.

[175] *See* PRACTICE, *supra* note 3, at 879–83, 904–07.

[176] *Id.* at 879.

[177] *Id.* at 879–83. The Study references the military manuals of the following twenty states: Argentina, Australia, Belgium, Benin, Canada, Columbia, France, Germany, Italy, Kenya, the Netherlands, New Zealand, Russia, Spain, Sweden, Switzerland, Togo, the United Kingdom, and the United States. *Id.* The United States is the only one of these states that is not a party to AP I. *See States Party*, *supra* note 53.

authors identified the military manuals of only one state that is not a party to AP I: the United States.[178] The manuals identified to show U.S. acceptance of Part 1 of this rule were the 1993 Army *Operational Law Handbook*,[179] produced by The Judge Advocate General's Legal Center and School, and the Air Force *Commander's Handbook* on the Law of Armed Conflict, produced in 1980 for Air Force commanders by the Air Force Judge Advocate General's Department.[180] While both manuals reference the "new" rule against widespread, long-term, and severe damage to the natural environment contained in AP I, neither manual claims that the United States recognizes this requirement as CIL.[181]

For Part 2 of Rule 45, the authors identified the manuals of ten states, seven of whom are parties to ENMOD.[182] The text of these manuals shows that the authors chose them to demonstrate state practice in support of the ENMOD prohibition against modifying the environment as a means of destruction.[183] Interestingly, there is no explicit mention of the kind of behavior actually contemplated by Part 2 of Rule 45: destruction of the natural environment as a weapon. The manuals of the

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[178] PRACTICE, *supra* note 3, at 882–83.

[179] OPERATIONAL LAW HANDBOOK, *supra* note 105, at Q-182. Referring to the Operational Law Handbook, the Study contains the following quote: "[T]he following measures are expressly prohibited by the law of war and are not excusable on the basis of military necessity . . . (i) using weapons which cause . . . prolonged damage to the natural environment." PRACTICE, *supra* note 3, at 883.

[180] AFP 110-34, *supra* note 106, at para 6-2. Referring to this handbook, the Study contains the following quote:

> Weapons that may be expected to cause widespread, long-term, and severe damage to the natural environment are prohibited. This is a new principle, established by [AP I]. Its exact scope is not yet clear, though the United States does not regard it as applying to nuclear weapons. It is not believed that any presently employed conventional weapon would violate this rule.

Id.

[181] *See* OPERATIONAL LAW HANDBOOK, *supra* note 105, at Q-182, AFP 110-34, *supra* note 106, para. 6-2.

[182] PRACTICE, *supra* note 3, at 904–07. The Study references the military manuals of the following ten states: Australia, Canada, France, Germany, Indonesia, Israel, South Korea, New Zealand, Russia, and Spain. *Id.*

[183] For example, the 1994 Australia Defence Force Manual cited by the Study states: "Australia, as a signatory to [ENMOD], has undertaken not to engage in any military or hostile use environmental modification techniques which would have widespread, long lasting, or severe effects as the means of destruction, damage, or injury to any other state which is a party to the Convention." PRACTICE, *supra* note 3, at 905.

seven ENMOD party states and the three non-party states, France, Indonesia, and Israel, indicate each state's support for the rule against modifying the environment as a means of warfare.[184]

The next item of national practice listed is legislation. For Part 1 of Rule 45, the authors list, Internet search-style in alphabetical order, the legislation of thirty-three states which variously criminalize either intentional acts that create widespread, long-term, and severe damage to the natural environment or "ecocide."[185] All but one of these states, Azerbaijan, are parties to AP I, making it quite predictable that they would have such legislation on their books.[186] While noteworthy, Azerbaijan's law making the "widespread, long-term, and severe damage to the natural environment"[187] a war crime is, on its own, quite neglible proof of a customary norm of international law. There is no legislation listed for Part 2 of Rule 45 and no domestic case law listed for either Part 1 or Part 2 of the Rule.[188]

Under the heading "other practice," the authors list a variety of other sources, to include: letters exchanged between states or between states and international organizations regarding destruction of the natural environment;[189] statements condemning acts harmful to the natural environment such as Iraq's burning of Kuwaiti oil fields;[190] pleadings of states in the *Nuclear Weapons* case;[191] and the "Matheson remarks," providing the U.S. State Department view of various provisions of AP I to include Articles 35(3) and 55(1).[192] Though it comes last, this section is probably the most interesting and helpful under the heading "national practice" because such practice seems more likely to demonstrate what

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[184] *Id.* at 904–07.
[185] *Id.* at 883–87. The Study references the national legislation of the following thirty-three states: Argentina, Australia, Azerbaijan, Belarus, Bosnia and Herzegovina, Burundi, Canada, Columbia, Congo, Croatia, El Salvador, Estonia, Georgia, Germany, Ireland, Kazakhstan, Kyrgyszstan, Mali, Moldova, the Netherlands, New Zealand, Nicaragua, Norway, Russia, Slovenia, Spain, Tajikistan, Trinidad and Tobago, Ukraine, the United Kingdom, Vietnam, and the Federal Republic of Yugoslavia. *Id.*
[186] *See States Party*, *supra* note 53.
[187] PRACTICE, *supra* note 3, at 883.
[188] *Id.* at 887, 907.
[189] *Id.* at 887–98.
[190] *Id.* at 888–89.
[191] *Id.* at 887.
[192] *Id.* at 894–95; *see also Matheson Remarks*, *supra* note 96, at 424, 436 (stating that the prohibition contained in Articles 35(3) and 55(1) of AP I is "too broad and ambiguous and is not a part of customary law").

states actually believe about purported or emerging customs. This type of practice, however, may also be the most difficult to interpret or weigh, which is perhaps why the authors placed it last. The only notable "other practice" listed under Part 2 of Rule 45 concerns the Second ENMOD Review Conference.[193] At the conference, certain non-party states expressed disatisfaction with the vague terms of the ENMOD Convention, demonstrating some degree of support for the principles contained in ENMOD, but not for the wording.[194]

3. International Practice

Volume II lists a variety of international practice, starting with the practice of international organizations and conferences, progressing to the actions of international judicial and quasi-judicial bodies, and concluding with actions of the International Red Cross and Red Crescent Movement.[195] It would seem that this order is purposeful, but the authors do not confirm this anywhere in Volume I or II. For both Parts 1 and 2 of Rule 45, the international practice section begins with mention of a 1994 U.N. General Assembly Resolution in support of the 1994 Guidelines on the Protection of the Environment in Times of Armed Conflict.[196] In support of a Decade of International Law resolution and without a vote of its members, the General Assembly invited

> all States to disseminate widely the revised guidelines for military manuals and instructions on the protection of the environment in times of armed conflict received from the International Committee of the Red Cross and to give due consideration to the possibility of incorporating them into their military manuals and other instructions addressed to military personnel.[197]

[193] PRACTICE, *supra* note 3, at 907–08.
[194] *Id.* at 909–10.
[195] *Id.* at 898–903.
[196] *Id.* at 898, 910.
[197] *Id.* at 898; see *infra* note 279 and text accompanying notes 279–80 for a discussion of the binding effect of United Nations General Assembly resolutions.

The second international practice listed for Parts 1 and 2 of the rule is simply a reaffirmation of the first: in 1996, another U.N. General Assembly resolution, also adopted without a vote, reaffirmed the invitation made to states in 1994 to disseminate the ICRC's Guidelines and incorporate them into their military manuals.[198] Notably, these guidelines are cited more than once in Volume I as support for the notion that Rule 45 is a customary norm of international law.[199] This is interesting inasmuch as it demonstrates that the ICRC is driving the train here rather than states, whose consent is required in order for any rule to become customary.[200]

"Other" international practice described in the international practice section includes, for Part 1: statements of the Council of Europe;[201] a report of the working group that drafted Articles 35(3) and 55(1) of AP I;[202] the advisory opinion of the International Court of Justice in the *Nuclear Weapons* case, which said that Articles 35(3) and 55(1) of AP I were "powerful constraints for all the States having subscribed to these provisions";[203] the final report to The International Criminal Tribunal for Yugoslavia, which concluded that the rules expressed in these two AP I articles "may reflect" CIL;[204] and, finally, the fact that, "[t]o fulfill its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that 'it is prohibited to use weapons of a nature to cause . . . widespread, long-term and severe damage to the natural environment.'"[205] The only other international practice described in a rather short section dedicated to such practice for Part 2 of Rule 45 is a 1974 conference of government experts on weapons that may cause unnecessary suffering.[206] This conference discussed, among other things, geophysical warfare, and voiced concerns that were later validated by the ENMOD treaty.[207]

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[198] *Id.* at 898.
[199] *See, e.g.*, RULES, *supra* note 1, at 153, 155.
[200] See *supra* note 35 for a discussion of the role of consent in CIL formation.
[201] PRACTICE, *supra* note 3, at 899.
[202] *Id.* at 900.
[203] *Id.* at 900–01.
[204] *Id.* at 901.
[205] *Id.*
[206] *Id.* at 911.
[207] *Id.*

IV. Analysis: Flawed Methodology Produces a Flawed Rule

A. Flaw #1: The Marginalization of Traditional CIL Doctrines

The above discussion has revealed some of the flaws in methodology evident in the Study, and particularly Rule 45. This article will now address these flaws in greater depth, beginning with the Study's marginalization of three important CIL doctrines: *opinio juris*, persistent objection, and specially affected states.

The failure to separately consider *opinio juris* was one of the main flaws of the Study highlighted in the Bellinger-Haynes letter:

> A more rigorous approach to establishing *opinio juris* is required. It is critical to establish by positive evidence, beyond mere recitations of existing treaty obligations or statements that as easily may reflect policy considerations as legal considerations, that States consider themselves legally obligated to follow the courses of action reflected in the rules.[208]

Indeed, as Bellinger and Haynes recognized, the authors' actual approach to the *opinio juris* element of CIL was far from the "classic" or conservative approach to CIL formation described in the Study's introduction.[209] The text of the Study instead shows that the authors borrowed heavily from certain international law thinkers, such as

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[208] Letter to Dr. Kellenberger, *supra* note 85, at 4. Bellinger and Haynes concluded:

> In this regard, the practice volumes generally fall far short of identifying the level of positive evidence of *opinio juris* that would be necessary to justify concluding that the rules advanced by the Study are part of customary international law and would apply to States even in the absence of a treaty obligation.

Id.

[209] See *supra* text accompanying notes 59–83 for a discussion of the authors' stated approach to CIL formation. The degree to which the Study's authors strayed from their stated conservative approach caused one commentator to conclude: "From a legal perspective, the ICRC has upturned the basis upon which customary law rests and its methodology reflects a radical departure from canonical law." Nicholls, *supra* note 20, at 243.

Frederic Kirgis and M.H. Mendelson, whose approach to CIL formation could only be described as unorthodox.[210]

Frederic Kirgis developed what is known as the sliding scale formula for CIL.[211] The Kirgis formula evaluates *opinio juris* and state practice along a sliding scale and posits that it is acceptable to infer *opinio juris* from state practice, provided certain conditions are met.[212] M.H. Mendelson, who chaired the committee that wrote the International Law Association (ILA) *Statement on Principles Applicable to the Formation of General Customary International Law*,[213] believes that *opinio juris* need not always be shown for a norm to become CIL.[214] The ILA Statement, which concludes that the subjective element of *opinio juris* is only sometimes necessary for CIL to form, reflects Mendelson's belief.[215] Nevertheless, both Kirgis and the ILA Statement contain notable caveats to their ideas. Kirgis wrote, "On the sliding scale, very frequent, consistent state practice establishes a customary rule without much (or any) affirmative showing of an *opinio juris*, so long as it is not negated by evidence of non-normative intent."[216] The ILA Statement,

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[210] Iain Scobbie, *The Approach to Customary International Law in the Study*, *in* PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 19, at 24 [hereinafter Scobbie, *Approach to Study*]. Frederic Kirgis is known for his sliding scale formula for CIL (see *infra* text accompanying notes 210–11), and Maurice Mendelson is known for an approach to CIL formation that holds that *opinio juris* need only be shown in certain circumstances (see *infra* text accompanying notes 212–13).

[211] *See* Frederic L. Kirgis Jr., *Custom on a Sliding Scale*, 81 AM J. INT'L L. 146 (1987).

[212] *Id.* at 148–49.

[213] *Statement of Principles Applicable to the Formation of General Customary International Law*, *in* THE INTERNATIONAL LAW ASSOCIATION, REPORT OF THE SIXTY-NINTH CONFERENCE 737 (Professor A.H.A. Soons & Christopher Ward eds., 2000) [hereinafter *Statement of Principles*].

[214] Mendelson has written that *opinio juris sive necessitatis* is a "phrase of dubious provenance and uncertain meaning." For this reason, he argued that *opinio juris* need not be separately proven "in the standard type of case, where there is a constant, uniform, and unambiguous practice of sufficient generality, clearly taking place in a legal context and unaccompanied by disclaimers . . . ." Mendelson, *supra* note 23, at 208. By contrast, because it refers to the reason why a nation acts in accordance with a behavioral regularity, Goldsmith and Posner describe *opinio juris* as "the central concept of CIL." Goldsmith & Posner, *supra* note 21, at 1116.

[215] *Statement of Principles*, *supra* note 213, at 743–53.

[216] Kirgis, *supra* note 211, at 149. Kirgis concluded,

> [e]xactly how much state practice will substitute for an affirmative showing of an *opinio juris*, and how clear a showing will substitute for consistent behavior, depends on the activity in question and on the reasonableness of the asserted rule. It is instructive here to focus on

which acknowledges that the committee's view of *opinio juris* is "contrary to a substantial body of doctrine," also indicates that *opinio juris* must be examined if there is reason to believe that practice does not count towards the formation of CIL.[217] The Study's authors clearly adopted a Kirgis/Mendelson approach; however, they failed to apply it faithfully. As the authors acknowledged, there was ample reason to believe that the practice of the United States, France, and United Kingdom did not count toward the formation of Rule 45. Therefore, using their adopted approach, the authors were obliged to carefully and separately consider *opinio juris*, a task they simply chose not to do.

Jean-Marie Henckaerts responded directly to the Bellinger-Haynes letter in an article published in the *International Review of the Red Cross*.[218] Regarding their critique of the Study's analysis of *opinio juris*, or lack thereof, Henckaerts wrote:

> Although the commentaries on the rules in Volume I do not usually set out a separate analysis of practice and *opinio juris*, such an analysis did in fact take place for each and every rule to determine whether the practice attested to the existence of a rule of law or was inspired merely by non-legal considerations of convenience, comity, or policy.[219]

What Henckaerts seems to be saying is "trust me." If the goal of the Study is to set forth rules of CIL binding on all states, then "trust me" is an insufficient answer. Whatever analysis of practice and *opinio juris*

> rules that restrict governmental action. The more destablilizing or morally distasteful the activity—for example, the offensive use of force or the deprivation of fundamental human rights—the more readily international decision-makers will substitute one element for the other, provided that the asserted restricted rule seems reasonable.

Id.

[217] *Statement of Principles*, *supra* note 213, at 745. Elsewhere, Mendelson has written that the kind of case where *opinio juris* need not be shown is one where there is no evidence of opposition by "a group of states sufficiently important to have prevented a general rule from coming into existence at all." Mendelson, *supra* note 23, at 208.

[218] Jean-Marie Henckaerts, *Customary International Humanitarian Law: A Response to US Comments*, 89 INT'L REV. RED CROSS 473, 483 (2007), *available at* http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-866-p473/$File/irrc_866_Henckaerts.pdf.

[219] *Id.* at 483.

took place with respect to these "rules" of CIL needed to be completely transparent for this project to be a success.

Another CIL doctrine that the Study's authors chose to marginalize is that of persistent objection. Instead of acknowledging this important doctrine, the authors chose not to take a position on the possibility of being a persistent objector in the Study's introduction.[220] This expressed agnosticism was apparently in recognition of the doubts of some "authorities," such as Maurice Mendelson, regarding the doctrine's continued validity.[221] Interestingly, this view (or non-view) directly contradicts the view of persistent objection expressed by Dr. Abdul G. Koroma in the Study's foreword.[222] Dr. Koroma wrote: "it is widely accepted that general customary international law binds states that have not persistently and openly dissented in relation to a rule while that rule was in the process of formation."[223]

Not knowing what to expect after reading such mixed messages in the introduction, it is perhaps with surprise that one reads in the Study that the United States, France, and the United Kingdom are all persistent objectors to Rule 45 with respect to nuclear weapons, and that the United States "appears" to be a persistent objector with respect to conventional weapons.[224] The big difference between these three states with respect to this rule is that France and the United Kingdom are parties to AP I, albeit with significant reservations,[225] and the United States is not. All three states have made clear that they do not view the AP I provisions as applying to nuclear weapons.[226] Furthermore, none of them has explicitly acknowledged that the rule applies to conventional weapons. Desiring to prove otherwise, the Study's authors listed relevant portions of all three states' military manuals to show practice in support of the Rule's applicability to conventional weapons.[227] The authors were hesitant to conclude that U.S. practice showed support for the rule's applicability to conventional weapons—hence, the United States

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[220] RULES, *supra* note 1, at xxxix.
[221] *Id.*
[222] Abdul G. Koroma, *Foreword* to RULES, *supra* note 1, at xii.
[223] *Id.* at xii.
[224] *Id.* at 151.
[225] *See supra* note 169.
[226] *See* PRACTICE, *supra* note 3, at 882–83.
[227] *Id.* at 880, 882–83.

"appears to be" a persistent objector.[228] The authors, however, did not hesitate to conclude that the practice of France and the United Kingdom demonstrated the Rule's applicability to conventional weapons.

Finding consistent practice in support of Rule 45's inapplicability to nuclear weapons on the part of France, the United Kingdom, and the United States, the Study's authors identified all three states to be not only persistent objectors, but also specially affected states.[229] In making this unusual connection, the authors turned CIL doctrine on its head. If these three states are persistent objectors regarding the applicability of this rule to nuclear weapons, it means that the otherwise customary rule against using nuclear weapons to cause widespread, long-term, and severe destruction to the natural environment does not apply to them.[230] However, if they are specially affected states, it means, almost certainly, that this rule against using nuclear weapons to cause widespread, long-term, and severe destruction to the natural environment cannot even exist.[231] Which is it? According to Yoram Dinstein, the Study completely missed the mark in its application of these two doctrines to Rule 45:

> When three nuclear powers . . . have taken the position that Rule 45 does not reflect customary international law, there is no doubt that they act as "States whose interests are specially affected." By arriving at the conclusion that (at the most) the three Powers can only be viewed as "persistent objectors"—and that, therefore, they will not be bound by the custom which has emerged—the Study gets the law completely wrong. . . . Surely, as "States whose interests are specially affected," the three countries cannot be relegated to the status of persistent objection. By repudiating the putative custom protecting the environment from all means of warfare, the three nuclear States have not merely removed themselves from the reach of such a custom: they in fact

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[228] Scobbie, *Approach to Study*, *supra* note 210, at 35–36. It was apparently a close enough call with respect to the United States for the authors to conclude that "it appears" the United States is a persistent objector to this rule.
[229] RULES, *supra* note 3, at 154–55.
[230] Dinstein, *Customary International Law Study*, *supra* note 85, at 109; *see also* Hulme, *supra* note 115, at 234–35.
[231] Dinstein, *Customary International Law Study*, *supra* note 85, at 109; *see also* Hulme, *supra* note 115, at 234.

> managed to successfully bar its formation (as a minimum, with respect to the employment of nuclear weapons).[232]

Notably, in his response to the Bellinger-Haynes letter, and without acknowledging Dinstein's critique that the Study "got the law wrong," Henckaerts recognized that Rule 45 is not customary law with respect to nuclear weapons.[233] His concession is remarkable in view of how the rule is worded and defended both in the Study and elsewhere.[234] Henckaerts is now on record that Rule 45 as currently stated in the Study is incorrect.[235]

The cause of this embarrassing concession—an incorrect view of the specially affected states doctrine—shows how little the Study's authors value this important doctrine. Even though they acknowledged the existence of the doctrine in their introduction,[236] the authors appeared to do everything they could to minimize its impact in the development of these rules. Labeling specially affected states "persistent objectors" is a perfect example. Why might the authors be hesitant to apply this doctrine faithfully? First, doing so prevents the formation of new

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[232] Dinstein, *Customary International Law Study*, *supra* note 115, at 109.

[233] Henckaerts, *supra* note 218, at 482. His response was:

> [W]ith respect to Rule 45 . . . the Study notes that France, the United Kingdom, and the United States have persistently objected to the rule being applicable to nuclear weapons. As a result, we acknowledge that with respect to the employment of nuclear weapons, Rule 45 has not come into existence as customary law.

Id.

[234] At the "launch conference" which took place at George Washington University, Henckaerts said: "Since the adoption of Additional Protocol I, [Rule 45, Part I] has received such extensive support in state practice that it has crystallized into customary law, even though some states have persistently maintained that it does not apply to nuclear weapons." Jean-Marie Henckaerts, *Assessing the Laws and Customs of War: The Publication of Customary International Humanitarian Law*, 13 HUM. RTS. BRIEF, AM. UNIV. WASH. C.L., Winter 2006, at 8, 10.

[235] In view of this concession, Rule 45 should read: "The use of *conventional* methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment is prohibited. Destruction of the natural environment may not be used as a weapon." Such a rule might not be worth the effort of printing it, however, as most states, as well as Henckaerts, recognize the virtual impossibility of violating this rule with conventional weapons. *See*, *e.g.*, *supra* note 180; *see also infra* note 247.

[236] RULES, *supra* note 1, at xxxviii–xxxvix.

customary norms. Second, the specially affected states doctrine is undemocratic and tends to favor major powers.[237] While the ultimate determination of who merits specially affected state status depends on the circumstances, as the ILA Statement concluded, the major powers will often be specially affected by a practice or rule.[238] The ICRC seems to think this reality anathema and prefer a one state, one vote approach to CIL. The Bellinger-Haynes letter critiqued the Study for this very tendency: "[T]he Study tends to regard as equivalent the practice of States that have relatively little history of participation in armed conflict and the practice of States that have had a greater extent and depth of experience . . . ."[239] It simply makes no sense to assign the practice of Lesotho the same weight as that of France, or the United Kingdom, or the United States, which is what the Study appears to do in its discussion of Rule 45.[240] If the Study's authors did weigh these states differently, there is no clear indication.

Henckaerts did, as discussed, ultimately acknowledge the meaning of France's, the United States' and the United Kingdom's specially affected state status with respect to the applicability of Rule 45 to nuclear weapons: that no such rule could form.[241] In so doing, however, he conceded as little as possible:

> The Study did duly note the contribution of states that have had "a greater extent and depth of experience" and have "typically contributed a significantly greater quantity and quality of practice". . . . the United States, in particular, has contributed a significant amount of practice to the formation of customary international humanitarian law. . . . Hence, it is clear that there are states that have contributed more practice than others because they have been "specially affected" by armed conflict. Whether, as a result of this, their practice

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[237] *Statement of Principles*, *supra* note 213, at 737.
[238] *Id.* Karol Wolfke acknowledged what he called "the role of the great powers" in his book. With respect to law-creation in international society, he wrote that one must remember that "the share of states in the evolution of international law is not, and even cannot be, the same." He claimed that factors such as power, wealth, and sheer size play an important role in the evolution of international customs. WOLFKE, *supra* note 21, at 78.
[239] Letter to Dr. Kellenberger, *supra* note 85, at 2–3.
[240] *See* PRACTICE, *supra* note 3 at 891–95.
[241] *See supra* text accompanying notes 233–35.

> *counts more* than the practice of other states is a separate question. The statement of the International Court of Justice in respect to the need for the practice of "specially affected" states to be included was made in the context of the law of the sea—and in particular in order to determine whether a rule in a (not widely ratified) treaty had become part of customary international law. Given the specific nature of many rules of humanitarian law, it cannot be taken for granted that the same considerations should automatically apply. Unlike the law of the sea, where a state either has or does not have a coast, with respect to humanitarian law any state can potentially become involved in armed conflict and become "specially affected." Therefore, all states would seem to have a legitimate interest in the development of humanitarian law.[242]

While it is true that all states might have a legitimate interest in the development of humanitarian law, it is not true that all states are on an equal footing as it develops, at least in the CIL realm. This is so because states differ so widely in the degree to which they participate in, and are affected by, practice relevant to the formation of norms. As Karol Wolfke pointed out in *Custom in Present International Law*, "the share of states in the evolution of international law is not, and even cannot be, the same."[243] When forming CIL, one must therefore assign weight to states based on the quantity and quality of their practice and not on the mere fact of statehood. This is the essence of the doctrine of specially affected states. In his response to the Bellinger-Haynes Letter, Henckaerts tried to distinguish the specially affected states doctrine and, by so doing, marginalize it. He would be much better off, and the Study would be a better product, if he and his co-author simply applied it faithfully.

B. Flaw #2: Overemphasizing Verbal Practice of Unclear and Dubious Weight

Flaw #2 is in some ways a continuation of Flaw #1, in that it implicates another key doctrine of CIL: state practice. There are more

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[242] Henckaerts, *supra* note 218, at 481–82.
[243] WOLFKE, *supra* note 21, at 78; *see also supra* note 238.

than 4000 pages of content that the Study's authors label "Practice." And yet, despite its volume, commentators have greatly criticized this portion of the Study for its focus on verbal practice of unclear and dubious weight.[244] Professor Dinstein characterized the study as a good example of the adage that sometimes "more is less."[245] W. Hays Parks called it an unfiltered "compilation of statements" that lacks any sense of context or frame of reference.[246] He stated, "Although [the Study] acknowledges the importance of state practice, it focuses only on statements to the exclusion of acts and relies only on a government's words rather than deeds. Yet, war is the ultimate test of law. Government-authorized actions in war speak louder than peacetime government statements."[247]

Unfortunately, there is a paucity of government-authorized actions in wartime to draw from in determining norms of CIL, especially with respect to a rule like Rule 45 that is almost impossible to violate.[248] Hence, as the ILA Statement and the Restatement agree, some reliance on verbal statements is necessary.[249] The question is, which verbal statements are admissible as evidence of CIL and how much weight does each deserve? The Study, though its authors claim otherwise, seemed to employ the "any tendency" standard of the basic relevance rule[250] for admissibility without engaging in any analysis of how much weight to accord the verbal statements. Moreover, despite their protestations to the contrary, the authors appeared to accord a state's practice in support of a treaty obligation the same as if that state were not a party to the treaty.[251] As will be shown below, these are serious flaws.

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[244] *See, e.g.*, Dinstein, *Customary International Law Study*, *supra* note 85, at 101–02; W. Hays Parks, *The ICRC Customary Law Study: A Preliminary Assessment*, 99 AM. SOC'Y INT'L L. PROC. 208–10 (2005); Letter to Dr. Kellenberger, *supra* note 85, at 2.
[245] Dinstein, *Customary International Law Study*, *supra* note 85, at 101.
[246] Parks, *supra* note 244, at 208, 212.
[247] *Id.* at 210.
[248] Henckaerts, *supra* note 218, at 482 ("[W]ith regard to conventional weapons . . . the rule may not actually have much meaning as the threshold of the cumulative conditions . . . is very high.").
[249] *Statement of Principles*, *supra* note 213, at 725–26 ("Verbal acts, and not only physical acts, of States count as state practice"); RESTATEMENT, *supra* note 6, at Reporters Notes 2 ("[P]ractice . . . takes many forms.").
[250] "'Relevant evidence' means evidence having any tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 401 (2005).
[251] *See, e.g.*, PRACTICE, *supra* note 3, at 879–98.

The ILA explained in its statement that conduct which is wholly referable to a state's treaty obligations does not count as state practice.[252] Specifically it stated, "What states do in pursuance of their treaty obligations is prima facie referable only to the treaty itself and therefore does not count for the formation of a customary rule."[253] This notion is based on the ICJ's holding in the *North Sea Continental Shelf Cases*.[254] In these cases, the ICJ ruled that the practice of contracting parties in support of a treaty rule, the customariness of which is at issue, must be set aside and the focus must be placed on non-contracting states.[255] If evidence of practice in pursuit of a treaty obligation is in fact inadmissible evidence, as the ILA Statement and *North Sea Continental Shelf Cases* appear to require, then most of the national practice section of Rule 45 should be deleted. Or, if not deleted, the authors should at least state that less weight should be accorded to the statements of nineteen of the twenty military manuals listed in that section.

In his response to the Bellinger-Haynes letter, Henckaerts acknowledged that using the practice of Contracting parties to establish a customary law is "difficult."[256] Nevertheless, this did not prevent Henckaerts and Doswald-Beck from trying to do so using what they described in the Study's introduction as a "cautious approach."[257] The approach they actually used, however, is neither cautious nor conservative. It is the approach used by the ICJ in the much-criticized *Nicaragua* case vice the more cautious approach described by the ICJ (and followed by the ILA Statement authors) in the *North Sea Continental Shelf Cases*.[258] If the authors truly desired to take a cautious approach to CIL formation, they would have stuck to the stringent requirements of the *North Sea Continental Shelf Cases*.[259] Had they done so, however, it is far less likely that Rule 45, and perhaps many other rules, would have made the cut on the final list of rules. By considering practice in support of treaty obligations in this manner, the authors instead appear to be trying to circumvent the requirements of express

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[252] *Statement of Principles*, *supra* note 213, at 757.
[253] *Id.* at 759.
[254] *Id.* at 757–59; *see also* North Sea Continental Shelf Cases, *supra* note 18, at 43–44.
[255] *Id.*
[256] Henckaerts, *supra* note 218, at 480.
[257] *Id.*; *see also* RULES, *supra* note 1, at xliv.
[258] Scobbie, *Approach to Study*, *supra* note 210, at 29.
[259] *Id.*

consent for a state to be bound to a treaty.[260] Their argument that they must consider the practice of Party states based on the requirement that customary law be widespread and uniform is, as one commentator concluded, "circular, masking an assumption that customary norms should conform to the provisions of the Protocols, and thus privileging the views of State parties who are, in any case, bound conventionally."[261]

The "national practice" section of the Rule 45 discussion in Volume II is not only dominated by the verbal practice of treaty parties, but specifically by the military manuals and national legislation of treaty parties. Were these two sources of practice to be removed, the authors would have almost no "national practice" left to list.[262] The problem with military manuals is not so much their admissibility as much as their weight. Yoram Dinstein commended the authors for relying on military manuals in their explication of rules in Volume I; however, he also stated that their reliance was excessive and that they failed to consider whether the manuals upon which they were relying were "authentic."[263] For example, he said the Israeli manual upon which they relied and with which he is very familiar, is not an "authentic" manual but rather "merely a tool used to facilitate instruction and training, and has no binding or even authoritative standing."[264] He informed the authors of this fact before publication but was ignored.[265] Bellinger and Haynes also faulted the authors for excessive reliance on military manuals:

> We are troubled by the Study's heavy reliance on military manuals. We do not agree that *opinio juris* has been established when the evidence of a State's sense of legal obligation consists predominately of military manuals. Rather than indicating a position expressed out of a sense of customary legal obligation, in the sense pertinent to customary international law, a State's military manual often (properly) will recite requirements applicable to that State under treaties to which it is a party. . . . Moreover, States often include guidance in

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[260] Daniel Bethlehem, *The Methodological Framework of the Study*, *in* PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 19, at 8 [hereinafter, Bethlehem, *Framework*].
[261] Scobbie, *Approach to Study*, *supra* note 210, at 29.
[262] *See supra* text accompanying notes 175–94.
[263] Dinstein, *Customary International Law Study*, *supra* note 85, at 103.
[264] *Id.*
[265] *Id.*

> their military manuals for policy, rather than legal, reasons.[266]

In particular, Bellinger and Haynes complained that the Study accorded more weight to two narrowly-focused U.S. military instructional manuals, the Army *Operational Law Handbook* and the Air Force *Commander's Guide on the Laws of Armed Conflict*, than to other forms of "verbal practice" such as the U.S statement in its instrument of ratification to the CCW and Secretary Matheson's remarks.[267]

One of the problems with using these two military manuals to defend Rule 45 is that they were not written with an international audience in mind. The 1995 Army *Operational Law Handbook* is prefaced with the following statement: "[This] is a 'how to' guide for Judge Advocates practicing operational law."[268] The Air Force *Commander's Handbook* is also clearly intended for instructional purposes only.[269] Such products are more akin to the internal memoranda discussed in the ILA Statement in that they lack the elements of "claim and response" necessary for the formation of CIL.[270] In other words, neither manual is intentionally responding to a claim of CIL or even to an emerging customary norm. That said, this does not mean that such a manual cannot be considered as evidence of a state's subjective attitude towards an emerging norm.[271]

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[266] Letter to Dr. Kellenberger, *supra* note 85, at 3.

[267] Attachment to Letter to Dr. Kellenberger, *supra* note 97, at 8.

[268] The first paragraph of the preface to the 1995 edition of the Operational Law Handbook reads as follows: "The Operational Law Handbook is a "how to" guide for Judge Advocates practicing operational law. It provides references, and describes tactics and techniques for the conduct of the operational law practice. . . . The Operational Law Handbook is not a substitute for official references. . . ." INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK at iii (1995). The 1995 edition is used here because the 1993 edition that the Study's authors used was unavailable.

[269] The opening sentences of the Air Force Commander's Handbook on the Law of Armed Conflicts read: "This pamphlet informs commanders and staff members of their rights and duties under the law of armed conflict. It applies to all Air Force activities worldwide, and implements DoD Directive 5100.77, 10 July 1979." AFP 110-34, *supra* note 106.

[270] *Statement of Principles*, *supra* note 213 at 726 ("For a verbal act to count as State practice, it must be public . . . it must be communicated to at least one other State. . . . Internal memoranda are therefore not, as such, forms of State practice. . . . [A]n internal memoranda [*sic*] which is not communicated to others is not a claim or response.").

[271] *Id.* The instructors at The Judge Advocate General's Legal Center and School who author the *Operational Law Handbook* are therefore not immune from affecting the international community's perception of the United States' subjective attitude towards an emerging rule.

Using domestic legislation as a source of state practice invites many of the same. As with military manuals, there is no "claim and response." As with military manuals, much of the legislation simply mirrors what states are obligated to do by treaty. And, as with military manuals, the weight of such practice may be negligible and will depend on a variety of factors, all of which must be considered in the context of the entire writing. For example, as Bellinger and Haynes pointed out in their letter, ten of the examples of domestic legislation listed in the Study for Rule 45 exactly mirror the ICC Statute language prohibiting widespread, long-term, and severe damage to the natural environment.[272] The ICC Statute language, however, only prohibits such conduct when it is excessive in relation to the concrete and direct military advantage expected.[273] This is a big difference, but the authors failed to mention it.[274] Nor did the authors find it noteworthy that all but one of the thirty-three examples of domestic legislation they list pertaining to Rule 45 were those of states party to AP I.[275] Their failure to mention these important caveats leads to one conclusion regarding the weight of the military manuals and legislation listed: dubious.

The international practice the authors list for Rule 45 is also of unclear and dubious weight. Some of it, arguably, is not even worthy of admission as evidence of a customary rule. Yoram Dinstein, for example, stated that ICRC reports, communications, press releases and the like "are simply not germane to customary international law, unless and until they actually impact on state practice."[276] He concluded that at best, the ICRC "practice" quoted in the Study proved itself to be irrelevant.[277] Henckaerts responded to this criticism by pointing to the ICRC's international legal personality and its mandate from states to "work for the faithful application of international humanitarian law."[278] He affirmed that ICRC "practice" was never used as primary evidence but only to reinforce conclusions.[279]

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[272] Attachment to Letter to Dr. Kellenberger, *supra* note 97, at 10.
[273] *Id.*
[274] *See* PRACTICE, *supra* note 3, at 878, 883–87.
[275] *See id.*
[276] Dinstein, *Customary International Law Study*, *supra* note 85, at 102.
[277] *Id.* at 102–03.
[278] Henckaerts, *supra* note 218, at 478.
[279] *Id.*

Leaving aside the practice of the ICRC, a more debatable question concerns the admissibility and weight of resolutions of the U.N. General Assembly. In their letter, Bellinger and Haynes stated:

> We are also troubled by the extent to which the Study relies on non-binding resolutions of the General Assembly, given that States may lend their support to a particular resolution, or determine not to break consensus in regard to such a resolution, for reasons having nothing to do with a belief that the propositions in it reflect customary international law.[280]

Henckaerts responded to this critique as well, stating that the authors weighed each resolution according to its content and that the results of this weighing process were never used to "tip the balance" toward a finding of CIL.[281]

Neither the ILA Statement nor the Restatement denies that it was appropriate for the Study's authors to consider resolutions of the U.N. General Assembly.[282] The Restatement, however, points to a variety of factors that must enter into the analysis in determining what weight to give a resolution, many of which the Study apparently chose to ignore.[283] For example, in discussing both Parts 1 and 2 of Rule 45, the Study relies heavily on the *Guidelines for the Protection of the Environment in Times of Armed Conflict*.[284] Although the ICRC drafted the Guidelines, the Study includes them under the U.N. section, tying them to a Decade of International Law resolution urging states to consider including them in their military manuals.[285] What is not stated in the Study in reference to

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[280] Letter to Dr. Kellenberger, *supra* note 85, at 2. Karol Wolfke wrote that non-binding General Asssembly resolutions, "being merely verbal postulates, proposals, or declarations of principles, etc., do not constitute acts of conduct described in their content, nor, even multiplied, any conclusive evidence of any practice." WOLFKE, *supra* note 21, at 84.

[281] Henckaerts, *supra* note 218, at 478.

[282] *Statement of Principles*, *supra* note 213, at 765–76; RESTATEMENT, *supra* note 6, at Reporters Notes 2.

[283] These factors include "the subject of the resolution, whether it purports to reflect legal principles, how large a majority it commands and how numerous and important are the dissenting states, whether it is widely supported (including in particular the states principally affected), and whether it is later confirmed by other practice." RESTATEMENT, *supra* note 6, at Reporters Notes 2.

[284] *See* PRACTICE, *supra* note 3, at 898, 910.

[285] *Id.*

the Guidelines is that they were neither voted on nor formally approved by the United Nations.[286] None of the factors that the Restatement authors thought important—for example, formal approval, declaration of customary status, and unanimity—is present, and yet the authors do not hesitate to give substantial weight to the Guidelines, especially with respect to Part 2 of Rule 45.[287] Again, the only appropriate word to describe such "practice" is dubious.

C. Flaw #3: The Promotion of *Lex Ferenda*

The use of dubious practice to defend the Study's new, black-letter rules of customary international humanitarian law points to the last of the Study's three main flaws: the promotion of *lex ferenda*. The Study promotes *lex ferenda* instead of codifying *lex lata* by: (1) announcing formulations of rules which do not yet represent *lex lata*, thus creating uncertainy as to the state of CIL; and (2) failing to adequately defend the Study's formulations, thus eroding their credibility.

Part 2 of Rule 45 exemplifies how the promotion of *lex ferenda* creates uncertainty. This part of the Rule is anchored to the provisions of Articles I and II of ENMOD, yet the Rule's formulation in no way mirrors that of the treaty.[288] As stated earlier, the ENMOD treaty prohibits weaponization of the environment by its modification, whereas Part 2 of Rule 45 prohibits the weaponization of the environment by its destruction. This is an important difference, and prompts the question whether the Study's authors were creating a new rule or simply did not understand ENMOD very well. By fashioning new, independent rules, purposefully or not, the Study's authors not only engage in law creation—elevating *lex ferenda* to *lex lata*—they also cast into doubt the meaning of certain treaty provisions.[289] Instead of looking for a compromise between parties and non-parties to a multilateral treaty such as AP I or ENMOD, the authors transcend the treaties, which are *lex lata* for parties, and move into the realm of *lex ferenda* for both parties and non-parties.[290] This only creates confusion over the requirements of customary international humanitarian law, confusion that may

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[286] *See id.* at 4374.
[287] *Id.* at 910; *see also supra* text accompanying notes 195–200.
[288] *See* PRACTICE, *supra* note 3, at 903.
[289] Bethlehem, *Framework*, *supra* note 260, at 10, 13.
[290] Dinstein, *Customary International Law Study*, *supra* note 85, at 108.

compromise the protections afforded war victims.[291] One thing is certain: thanks to the Study's new formulations and its failure to properly explain and defend them, determining "the normative center"[292] of potential "rules" of CIL has become even more difficult.

The *lex ferenda* nature of the Study also damages its credibility. In his introduction to the Study, recognizing the link between honesty in process and credibility, Yves Sandoz wrote that the Study's "great concern for absolute honesty" is what lends it international credibility.[293] No doubt the Study's authors approached this monumental task with a concern for honesty; however, perhaps due to the project's enormous scope or its authors' ambitious intentions, the final product lacks the very credibility they claim. There are likely several reasons for this, one of which may be bound up in the project's charter. In his foreword, Dr. Kellenberger listed three reasons for the Study, the first of which was to achieve the universal application of principles of international humanitarian law, and notably those enshrined in AP I.[294] This purpose may have doomed the Study from its start. At the very least, the authors needed to be very cautious about doing this. Engaging in the crystallization of custom with the object of remedying the problem of non-participation of states in a treaty regime can easily look like an attempt to get around the non-application of the treaty to certain states.[295] Further, using different language to fashion such rules without explaining why does not avoid the problems associated with announcing that norms of treaties such as AP I or ENMOD are now customary rules.[296] This is especially true when considering the importance and experience of many states who are non-parties to AP I.[297] Yoram Dinstein initially praised the ICRC's effort to complete the Study as a perfect means to bridge

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[291] Bethlehem, *Framework*, *supra* note 260, at 10, 13 (arguing that the Study's new formulations may create uncertainty as to how one should read treaty rules "supplanted" by the new formulations).
[292] *Id.* at 12.
[293] Sandoz, *Introduction*, *supra* note 2, at xvii.
[294] Jakob Kellenberger, *Foreword* to RULES, *supra* note 1, at x; *see also* George Aldrich, *Customary International Humanitarian Law—An Interpretation on Behalf of the International Committee of the Red Cross*, 76 BRIT. Y.B. INT'L L. 503, 506 (2005) ("It is the failure of key States to become parties to Protocol I that justified this effort.").
[295] Bethlehem, *Framework*, *supra* note 260, at 7.
[296] *Id.* at 10.
[297] *Id.* at 7 (referring to states not party to AP I as a "Who's Who" of many of the states that have been involved in armed conflict during the past thirty years).

what he called "the great schism" between AP I parties and non-parties.[298] After reading the Study, however, he concluded:

> I am afraid the Study clearly suffers from an unrealistic desire to show that controversial provisions of [AP I] are declaratory of customary international law (not to mention the occasional attempt to go even beyond [AP I]). By overreaching, I think the Study has failed in its primary mission. After all, there is no practical need to persuade Contracting Parties to [AP I] that it is declaratory of customary international law.[299]

The lack of transparency inherent in *lex ferenda* also detracts from the Study's credibility. One commentator, Daniel Bethlehem, has likened the Study to an encyclical whereby rules emanate from a "black box" into which only the authors can see.[300] Bethlehem posited that the Study's authors would have been better off entitling their study, "State practice and *Opinio Juris* in the Interpretation and Application of International Humanitarian Law."[301] The affirmative approach they adopted, announcing black-letter rules in a commentary purporting to be of equivalent weight and authority as Pictet's commentary on the Geneva Conventions,[302] instead invites a great deal of skepticism and doubt.[303] Bethlehem concluded, "[T]here are too many steps in the process of the crystallization and formation of the black letter customary rules that are insufficiently clear, even by reference to the accompanying two volumes of practice."[304] Indeed, partly because customary law formation is controversial and contextual, its elucidation demands greater transparency and more thorough analysis than even this ten year effort could accomplish. Bethlehem said it well: "[A]bove all, in the context of the identification of customary international law, the credibility of the law dictates that we must be able to see inside the black box."[305] By promoting *lex ferenda* from their "black box," the authors compromised the Study's honesty and eroded its credibility.

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[298] Dinstein, *Customary International Law Study*, *supra* note 85, at 100.
[299] *Id.* at 110.
[300] Bethlehem, *Framework*, *supra* note 260, at 6.
[301] *Id.* at 4.
[302] *See, e.g.*, PICTET, *supra* note 13. Pictet's four volume commentary is viewed by practitioners as an authoritative source on the provisions of all four Geneva Conventions.
[303] Bethlehem, *Framework*, *supra* note 260, at 4.
[304] *Id.* at 5.
[305] *Id.* at 6.

V. Conclusion

This article has criticized the ICRC's Customary International Humanitarian Law Study and its authors for elevating a *lex ferenda* principle—absolute protection of the environment against widespread, long-term, and severe destruction—to a *lex lata* rule. Rule 45 is one of the most controversial and least understood of the 161 rules contained in the Study. Therefore, one should not assume that every rule in the Study is similarly flawed. It should be noted that most commentators agree that the Study was largely accurate and worthy of serious regard.[306]

The monumental project that culminated in the Study could have been more successful, though, had the authors stuck to their stated approach and faithfully applied traditional CIL doctrines. Instead, as Rule 45 makes clear, the authors failed to do so by assigning inordinate weight to verbal "practice" such as military manuals and resolutions of the United Nations General Assembly; by neglecting to meaningfully consider *opinio juris*, one of the two requirements for the formation of CIL; and by either ignoring or misapplying the CIL doctrine of specially affected states. This flawed methodology may not have doomed every rule in the Study, but, for a contested rule like Rule 45, it was fatal.

The Study's authors stated that their goal was an accurate "snapshot" of customary international humanitarian law.[307] One wonders whether accurate snapshots are possible considering the malleable and dynamic nature of CIL formation. It almost seems as if the lighting is too dim and the action too fast to get a sharp and accurate photograph. There are measures, however, that the photographer can take to remedy these problems: acquire a better lens, more light, and, when circumstances are really dire, compose a different shot altogether. With respect to Rule 45, the authors published a blurry snapshot, perhaps knowing that it was so, but believing that it was better than a less-exciting sharp one or none at all. This was a mistake. For all of the reasons explained in this article, the Rule 45 "snapshot" should have been left on the darkroom floor.

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[306] *See, e.g.*, Dinstein, *supra* note 85, at 99 (calling the Study an important landmark that no scholar or practitioner can afford to ignore); Bethlehem, *Framework*, *supra* note 260, at 3 ("[The Study] is a significant contribution to the learning on, and the development of, international humanitarian law.").

[307] ICRC Press Release, *supra* note 5.