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CUSTOMARY INTERNATIONAL HUMANITARIAN LAW AND MULTINATIONAL MILITARY OPERATIONS IN MALAYSIA

Drew R. Atkins[†]

Abstract: The International Committee of the Red Cross published a study in 2005 identifying rules of customary international law applicable to armed conflict and theoretically binding on all nations. This study found that customary state practice has come to encompass and in some cases exceed protections contained in the Additional Protocols of 1977 to the Geneva Conventions of 1949, regardless of their applicability to a given conflict. These findings may impact the domestic law enforcement practices of states not parties to Additional Protocol II, which regulates non-international armed conflict. Furthermore, the study may have indirect effects on military cooperation and legal reform worldwide. By strengthening the legal criticism of domestic laws not compliant with international humanitarian law, the study directly challenges non-party states seeking to obtain unqualified military assistance during internal conflicts. However, this same effect will lend support to increased observance of international humanitarian law as intervening states' militaries apply pressure to realize compliance with customary international law. This comment identifies these implications by considering a hypothetical future counter-insurgency in Malaysia in which the United States offers military assistance to the Malaysian government.

I. INTRODUCTION

The 2003 arrest of the Malaysian terrorist Hambali reflects the increasing worldwide reliance on multinational military and police operations to combat emerging internal security threats.¹ This operation, targeting one of the masterminds of the Jemaah Islamiyah bombings in Bali and Jakarta,² involved law enforcement and intelligence personnel from several countries rather than a unilateral operation against an isolated enemy.³ The combination of a continuing threat from transnational extremist groups in Southeast Asia⁴ and the increasingly multinational military response to this threat makes sources of international law governing

[†] The author thanks Professor Clark Lombardi, University of Washington School of Law; Major Sean Watts, United States Army; and the Pacific Rim Law and Policy Journal Editorial Board.

¹ See Tony Emmanuel & Leslie Andres, *Hambali for Camp Delta*, New Straits Times (Malaysia), August 17, 2003, at 1; Bilveer Singh, ASEAN, Australia and the Management of the *Jemaah Islamiyah* Threat 41 (2003).

² See SINGH, *supra* note 1, at 41.

³ See Emmanuel, *supra* note 1.

⁴ See UNITED STATES DEPARTMENT OF STATE, CONSULAR INFORMATION SHEET, MALAYSIA (December 30, 2005), available at http://travel.state.gov/travel/cis_pa_tw/cis/cis_960.html (explaining that the State Department continues to consider both the Abu Sayyaf and Jemaah Islamiyah terrorist organizations as active threats for Americans traveling overland in Malaysia).

the use of force more relevant as a regulatory scheme for the region's response.

It is against this backdrop that the International Committee of the Red Cross ("ICRC") culminated a ten-year effort to identify rules of customary international humanitarian law ("IHL") applicable to armed conflict.⁵ In addition to customary rules applicable to the conduct of hostilities between states, the ICRC study also identifies customary rules of international law regulating armed conflicts in which a state combats insurgents within its borders.⁶ Since IHL governing these internal armed conflicts requires states to meet minimum standards for the treatment and judicial procedural rights of detainees,⁷ changes in the IHL regime can have great implications for the legality of domestic laws with respect to international law.

Prior to addressing the import of the ICRC study, it is necessary to understand general principles of IHL and customary law. International humanitarian law is the body of customary and formal law that regulates the conduct of hostilities between belligerents⁸ in order "to mitigate some of the more horrific aspects of organized violence."⁹ Also known as the law of armed conflict and the law of war,¹⁰ IHL governs the use of force during hostilities¹¹ and establishes protections for civilians.¹² It is a distinct body of law from human rights law, although many of the general principles

⁵ JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT'L COMM. OF THE RED CROSS [hereinafter ICRC], *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW* (2005). See also Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, INT'L REV. OF THE RED CROSS, March 2005, at 175, 177 (summarizing the study's findings).

⁶ See Henckaerts, *supra* note 5, at 197.

⁷ See Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Dec. 12, 1977, art. 4-6, 1125 U.N.T.S. 609 (entered into force Dec. 7, 1978) [Commonly known as Additional Protocol II; hereinafter APII].

⁸ It is important to note that while IHL regulates the conduct of hostilities, it is a distinct body of law from human rights law. Human rights law does not regulate the conduct of belligerents vis-à-vis each other, but instead is "intended to protect individuals from the arbitrary or cruel treatment of their government at all times." Therefore, while the existence of a conflict triggers the application of IHL, human rights law requires no such trigger. UNITED STATES ARMY CENTER FOR LAW AND MILITARY OPERATIONS, *2005 LAW OF WAR HANDBOOK* 30 (2005) [hereinafter *LOW HANDBOOK*].

⁹ JEFFREY L. DUNOFF, STEVEN R. RATNER & DAVID WIPPMAN, *INTERNATIONAL LAW: NORMS, ACTORS, AND PROCESSES* 501 (2005).

¹⁰ *LOW HANDBOOK*, *supra* note 8, at 2.

¹¹ DUNOFF ET AL., *supra* note 9, at 501 (The law of war refers to "the law governing the conduct of war once initiated", or *jus in bello*, apart from the law governing "when a state may legitimately use armed force in international affairs", or *jus in bello*... International humanitarian law now applies to states, insurgent groups, and individuals engaged in armed conflict.)

¹² DUNOFF ET AL., *supra* note 9, at 502.

informing human rights law are also central to IHL.¹³ The Geneva Conventions of 1949¹⁴ are one of the major codifications of IHL. Together with their 1977 Additional Protocols, they provide a comprehensive body of law for regulating both international and internal armed conflict.¹⁵

Even where the Geneva Conventions do not apply to a conflict, customary international law nevertheless regulates the conduct of hostilities.¹⁶ Unlike a convention, customary law informally evolves from the consistent practices of most states and reflects their perception of their legal obligations.¹⁷ While a convention binds a state through the state's act of ratification, customary international law binds all states who have not persistently objected to a rule both during and subsequent to its formation.¹⁸ Due to the default applicability of customary law to armed conflict, the evolution of rules of customary IHL can have broad implications for all states, regardless of the type or intensity of conflict involved.¹⁹

The ICRC has defined customary IHL in a way that may become problematic for non-party states seeking international military cooperation in combating internal resistance movements. By arguing that a rule is customary international law, the ICRC both intrudes on the sovereign sphere of signatories to international humanitarian law treaties such as the Geneva Conventions and challenges non-signatories to bring their domestic laws into compliance with international standards. This conflict with customary

¹³ Much of IHL is analogous to fundamental principles of human rights law, such as the respect for the life and dignity of all people. See Silvia Borelli, *Casting Light on the Legal Black Hole: International Law and Detentions Abroad in the "War on Terror"*, INT'L REV. OF THE RED CROSS, March 2005, 39, 54.

¹⁴ Geneva Convention [I] for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention [II] for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention [III] Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention [IV] Relative to the Protection of Civilian Person in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter the Geneva Conventions].

¹⁵ Henckaerts, *supra* note 5, at 178.

¹⁶ LOW HANDBOOK, *supra* note 8, at 20; Henckaerts, *supra* note 5, at 177.

¹⁷ See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987); DUNOFF ET AL., *supra* note 9, at 32. The ICRC study defines customary international law "a general practice accepted as law," where evidence indicates both State practice and a State "belief that such practice is required, prohibited, or allowed... as a matter of law." HENCKAERTS & DOSWALD-BECK, *supra* note 5, at xxxi-xxxii, *citing* International Court of Justice Statute, Article 38(1)(b).

¹⁸ LOW HANDBOOK, *supra* note 8, at 20. See also DUNOFF ET AL., *supra* note 9, at 74 ("...international law permits states to opt out of an emerging customary international law rule by objecting to the rule as it develops Moreover, a rule once formed is binding on states that did not object, even if they did not have the opportunity to object.").

¹⁹ See *infra* Part II, Section B. See also Henckaerts, *supra* note 5, at 189 ("Indeed [state] practice has created a substantial numbers of customary rules that are more detailed than the often rudimentary provisions in Additional Protocol II and has thus filled important gaps in the regulation of internal conflicts.").

international law may simultaneously impair a state's ability to obtain military assistance for internal conflicts, and may strengthen the IHL regime as intervening states apply pressure for legal reform as a condition of providing assistance.²⁰

The ICRC's findings are of great importance to international law because of the unique role of the ICRC as a respected and preeminent authority on IHL. The ICRC is a critical player in the maintenance of the IHL regime, having a broad international mandate to develop, interpret, and enforce IHL through the Geneva Conventions.²¹ The study's findings thus warrant careful international consideration during any armed conflict.

To demonstrate the effects of the study, this comment will identify the inconsistencies between the ICRC's identified customary rules and Malaysia's widely criticized Internal Security Act ("ISA")²² prosecutions in the case of a future internal armed conflict in Malaysia.²³ Malaysia provides a useful example of the study's effects because it has been a hotbed of violent extremism in recent years²⁴ and because it has used controversial means such as the ISA to address insurgent violence.²⁵ This comment will consider Malaysia's practices in light of the involvement of the United States in a future conflict, given the United States' aggressive posture toward combating terrorism and the U.S. military's stated adherence to rules of customary IHL.²⁶ Due to the conflicts between the study's customary law

²⁰ See *infra* Part IV, Part A.2.

²¹ Int'l Comm. of the Red Cross, *The ICRC's Status: In a Class By Its Own*, February 17, 2004, <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList74/522C6628D83A019741256E3D003FC85F>. See also DUNOFF ET AL., *supra* note 9, at 510; INGRID DETTER, *THE LAW OF WAR* 154 (2000) (explaining that the international community considers the ICRC to be "a highly important organization" due to its role in wartime situations, its "strict observance of confidentiality" in providing battlefield care, and its contribution to the development of humanitarian law).

²² Internal Security Act, Act 82 (1960) (Malay.) [hereinafter ISA].

²³ Since 2001, Malaysia has used the ISA to detain and prosecute persons allegedly involved in "militant Islamic activities" of the Jemaah Islamiyah terrorist organization and the Kumpulan Militan Malaysia insurgent organization. Malaysia has received widespread criticism for its law enforcement practices under the ISA in combating these groups, including the abuse of detainees and the lack of meaningful criminal procedure guarantees. See Nicole Fritz & Martin Flaherty, *Unjust Order: Malaysia's Internal Security Act*, 26 *FORDHAM INT'L L.J.* 1345, 1346-48 (2003); HUMAN RIGHTS WATCH, *DETAINED WITHOUT TRIAL: ABUSE OF INTERNAL SECURITY DETAINEES IN MALAYSIA* 7, available at <http://hrw.org/reports/2005/malaysia0905/3.htm>.

²⁴ See United States Department of State, Consular Information Sheet, Malaysia, *supra* note 4.

²⁵ See Fritz & Flaherty, *supra* note 23, at 1347.

²⁶ See BRIAN J. BILL, ED., *LAW OF WAR WORKSHOP DESKBOOK* 32 (2000) (explaining that the U.S. considers most of APII to be customary international law). Additionally, the U.S. military considers customary international law binding on U.S. forces operating worldwide. DoD Directive 5100.77, DoD Law of War Program, December 9, 1998, available at www.hqda.army.mil/ogc/EXEC%20AGENTS%20REF%20LIBRARY/19%20d510077p.pdf, § 3.1. See *infra* Part IV.2 (regarding the questionable legality of U.S. conduct in "the War on Terror").

findings and Malaysian practices, the study could hinder the United States' ability to fully support Malaysian counterinsurgency operations.

Although the study's findings are controversial,²⁷ this comment does not address its methodology or conclusions, rather accepting the findings in light of the ICRC's well-respected international status. Part II of this comment will discuss the regulation of internal armed conflict. Part III will identify the conflicts between Malaysia's counterinsurgency practices and its customary IHL obligations in the context of a future internal armed conflict. Part IV will discuss the ramifications of this inconsistency in the context of coalition military operations in Malaysia and conclude by identifying the broader international ramifications of the study.

II. THE RED CROSS STUDY IMPACTS THE INTERNATIONAL REGULATION OF INTERNAL ARMED CONFLICT

Unlike the Geneva Conventions of 1949, which regulate conflict between states, IHL governing internal armed conflicts regulates a sovereign state's internal efforts to suppress insurgencies.²⁸ Changes in the system of rules of customary international law governing internal strife thus invade the state's internal sphere because customary law can apply regardless of the applicability of Geneva Convention provisions.²⁹ This Part will identify the source of this interplay and discuss the ICRC customary law study's general effect on state domestic law.

A. *States Have Opposed the Regulation of Internal Armed Conflicts as an Invasion of Sovereign Authority*

International humanitarian law regulating internal armed conflict, such as the Second Protocol Additional to the Geneva Conventions ("APII"),³⁰ recognizes the sovereign authority of a state to put down insurrection as an internal matter.³¹ Instead of prohibiting the prosecution of

²⁷ See W. Hays Parks, *The ICRC Customary Law Study: A Preliminary Assessment*, Presentation offered at 99th Annual Meeting of the American Society of International Law, Washington, D.C., April 1, 2005 (criticizing the basis for the ICRC study's findings of customary prohibitions of incendiary weapons, exploding bullets and blinding laser weapons).

²⁸ Richard C. Schneider, Jr., *Geneva Conventions, Protocol II: The Confrontation of Sovereignty and International Law*, *The Amer. Soc. Of Int'l L. Newsletter*, Nov. 1995.

²⁹ See *infra* Part II, Section B.

³⁰ APII, *supra* note 7.

³¹ See INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 1332 [hereinafter APII Commentary] (Combatant status for insurgents "would be incompatible, first, with respect for the principle of sovereignty of States, and secondly, with national legislation which makes rebellion a crime.").

insurgents, this body of law establishes minimum protections for insurgents facing criminal prosecution.³² As a result, states have long opposed this interference with affairs they perceive to be wholly of domestic concern.

Prior to the enactment of the Additional Protocols in 1977, Common Article Three was the sole provision of the 1949 Geneva Conventions addressing non-international, or internal armed conflict.³³ In essence, it provided a “mini-convention” applicable to internal armed conflict and established minimum protections and prohibitions.³⁴ Many countries have continuously resisted the application of Common Article Three to internal conflicts, arguing that extending IHL to internal conflicts lends unjustified legitimacy to insurgent groups and interferes with sovereign authority.³⁵ Especially in the face of such criticism, the ICRC recognized that Common Article Three inadequately regulated internal armed conflict. This is largely due to the Article’s ambiguity, incomplete protections, and general lack of strong use and enforcement.³⁶

The prevalence of internal conflicts in place of international ones since 1945 made more apparent the need for an adequate body of law governing such conflicts. In 1974 the ICRC convened a diplomatic convention to develop additional, more detailed rules for internal and international armed conflict.³⁷ The resultant APII, however, did not receive as widespread support as the Geneva Conventions of 1949.³⁸ Like Common Article Three, many developing states opposed the Additional Protocols

³² *Id.* at 1325. See also Int’l Comm. of the Red Cross, *The Relevance of IHL in the Context of Terrorism*, <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList74/8C4F3170C0C25CDDC1257045002CD4A2> (“In non-international armed conflict combatant status does not exist. Prisoner of war or civilian protected status under the Third and Fourth Geneva Conventions, respectively, do not apply. Members of organized armed groups are entitled to no special status under the laws of non-international armed conflict and may be prosecuted under domestic criminal law if they have taken part in hostilities.”).

³³ Article 3 common to the Geneva Conventions, *supra* note 14.

³⁴ See *id.*

³⁵ LINDSAY MOIR, *THE LAW OF INTERNAL ARMED CONFLICT* 1 (2002). See also Aslan Abashidze, *The Relevance from the Perspective of Actors in Non-International Armed Conflicts*, Address Before the Euro-Atlantic Partnership Council-Partnership for Peace Workshop on Customary International Humanitarian Law (March 9-10, 2006), available at <http://pforum.isn.ethz.ch/events/index.cfm?action=detail&eventID=258> (“The inclusion of the Art 3 in all the four Geneva Conventions of 1949 was the decisive move towards the legal intrusion of international humanitarian law into the traditional sphere of internal affairs of sovereign states. . .”).

³⁶ Schneider, *supra* note 28.

³⁷ See MOIR, *supra* note 35, at 89.

³⁸ One hundred and ninety-two countries are parties to the Conventions of 1949, but only 162 and 159 states are parties to Additional Protocols I and II, respectively. INT’L COMM. OF THE RED CROSS, *STATES PARTY TO THE GENEVA CONVENTIONS AND THEIR ADDITIONAL PROTOCOLS*, (Apr. 12, 2005), available at <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList492/77EA1BDEE20B4CCDC1256B6600595596>.

because of a view that they “granted too much legal legitimacy to non-state belligerents and to the use of guerilla warfare.”³⁹

Additional Protocol II and rules of customary law derived from it such as those of the ICRC study regulate internal armed conflict in much greater detail than does Common Article Three. For example, Common Article Three prohibits “outrages upon personal dignity, in particular humiliating and degrading treatment.”⁴⁰ In contrast, APII contains a full article titled “humane treatment” which sets out specific prohibitions, such as “(e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault; ... (h) threats to commit any of the foregoing acts.”⁴¹ Similarly, each of APII’s 28 articles establishes specific and detailed guarantees and prohibitions to which a state must adhere when fighting an internal armed conflict within the Protocol’s scope. As a result, the evolution of customary law derived from APII can have great effect on non-party states. As will be shown below, these customary rules may apply whether or not an insurgent group meets the threshold conditions to trigger the protections of APII.

B. The Red Cross Study Sought to Identify the Effects of Customary Law on the International Regulation of Armed Conflict

The interplay of domestic law and APII illuminate the invasive ramifications of the ICRC study. The ICRC, because of its international mandate to promulgate IHL, clarifies and increases the legal obligations of states through interpretive tools such as the 2005 customary law study. By arguing that a rule derived from conventions such as APII is customary law, the ICRC challenges non-party states such as Malaysia to bring their domestic laws into compliance in the face of alleged international consensus.

Several problems with APII led the ICRC to complete a study identifying rules of customary international law that are binding on non-party states and universally applicable regardless of whether APII would apply to the conflict.⁴² The Geneva Conventions and their Additional Protocols may or may not apply to a given conflict based on the type and magnitude of the conflict, and based on whether the combatant parties are

³⁹ Nathan A. Canestaro, “Small Wars” and the Law: Options for Prosecuting the Insurgents in Iraq, 43 COLUM. J. TRANSNAT’L L. 73, 90-91 (2004). See also DETTER, *supra* note 21, at 202-04.

⁴⁰ Article 3 common to the Geneva Conventions, *supra* note 14.

⁴¹ APII, *supra* note 7, art. 4.

⁴² See HENCKAERTS & DOSWALD-BECK, *supra* note 5, at xxvii. See also MOIR, *supra* note 35, at 109 (writing in 2002 that, “It is doubtful whether much of APII represents even customary international law, let alone *jus cogens*. . .”).

signatories to the conventions.⁴³ The ICRC study thus had two central purposes. First, the study identified rules of customary international law applicable to armed conflict, regardless of whether a particular state has ratified a treaty or convention governing armed conflict.⁴⁴ Second, the study determined whether and to what extent customary law has come to exceed the protections of APII and other sources of IHL.⁴⁵

The study found that state practice worldwide has “expanded the rules applicable to non-international armed conflicts” beyond the limits of APII, and that state practice has caused several provisions of APII to become customary international law.⁴⁶ Examples of such expanded rules include the principle of distinction, the prohibition on indiscriminate attacks, a proportionality provision, and obligations to protect and respect the fundamental rights of civilians and enemies who have laid down their arms.⁴⁷

The expansion and elaboration of the IHL regime through customary international law impacts states not parties to treaties and conventions such as the Geneva Conventions. Arguing that a rule is customary international law carries with it the implied assertion that the applicability of treaty law such as APII to the given conflict is irrelevant. This effect is readily

⁴³ For example, the Geneva Conventions apply only “to all cases of declared war or of any other armed conflict which may arise between two or more High Contracting Parties.” Geneva Conventions, *supra* note 14, common art. 2. Similarly, APII has several restrictive limiting conditions that prevent it from applying to mere uprisings and requires “the most intense and large scale [internal] conflicts.” MOIR, *supra* note 35, at 101, *discussing* APII, *supra* note 7, art. 1. *See also* Henckaerts, *supra* note 5, at 177-78 (“The first purpose of the study was therefore to determine which rules of international humanitarian law are part of customary international law and therefore applicable to all parties of a conflict, regardless of whether or not they have ratified the treaties containing the same or similar rules.”).

⁴⁴ Henckaerts, *supra* note 5, at 177.

⁴⁵ *Id.* at 178.

⁴⁶ HENCKAERTS & DOSWALD-BECK, *supra* note 5, at xxix; *Id.* at 189.

⁴⁷ *Id.* at 187-88. The following are several of the relevant customary law rules the study identifies: “(1) Fundamental Guarantees: Rule 87. Civilians and persons hors de combat must be treated humanely. Rule 90. Torture, cruel or inhuman treatment and outrages upon personal dignity, in particular humiliating and degrading treatment, are prohibited . . . Rule 99. Arbitrary deprivation of liberty is prohibited. Rule 100. No one may be convicted or sentenced, except pursuant to a fair trial affording all essential judicial guarantees . . . Rule 102. No one may be convicted of an offence except on the basis of individual criminal responsibility. Rule 103. Collective punishments are prohibited . . . (2) Persons Deprived of Their Liberty: Rule 118. Persons deprived of their liberty must be provided with adequate food, water, clothing, shelter and medical attention . . . Rule 125. Persons deprived of their liberty must be allowed to correspond with their families, subject to reasonable conditions relating to frequency and the need for censorship by the authorities. Rule 126. Civilian internees and persons deprived of their liberty in connection with a non-international armed conflict must be allowed to receive visitors, especially near relatives, to the degree practicable. Rule 127. The personal convictions and religious practices of persons deprived of their liberty must be respected . . . Rule 128(C). Persons deprived of their liberty in relation to a non-international armed conflict must be released as soon as the reasons for the deprivation of their liberty cease to exist. The persons referred to may continue to be deprived of their liberty if penal proceedings are pending against them or if they are serving a sentence lawfully imposed.” Henckaerts, *supra* note 5, at 206-09.

explored through considering one state's law enforcement practices in light of the study's findings.

The magnitude of an insurgency required to trigger the application of the customary rules is unclear from the study. APII contains very strict threshold criteria an insurgent force must meet in order to obtain its protections;⁴⁸ for example, an unorganized mob would not invoke APII. The ICRC study has found that the rules of customary law have exceeded APII's regulation of IAC,⁴⁹ but the study is silent on whether those rules still require – as customary law – the meeting of APII's threshold conditions.

Since the study does not explicitly incorporate these trigger conditions, this comment assumes that these rules would protect any insurgent qualifying for the protections of Common Article Three. The text of Common Article Three is silent on its triggering conditions, but its commentary provides a list of suggested criteria derived from the amendments discussed during the 1949 drafting convention.⁵⁰ Generalized criteria that could qualify an organized insurgency in Malaysia in the future require that, to invoke the protections of the Article:

“the Party in revolt against the *de jure* Government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention.”⁵¹

Such an assumption is reasonable when considering how the rules could affect coalition operations in non-party states such as Malaysia. First, Malaysia has experienced powerful insurgencies as recently as the several years since 2001.⁵² Second, should a coalition partner consider the insurgents protected due to that country's interpretation of ICRC study, the ICRC's omission would be irrelevant. Consequently, this comment will assume for the purposes of its analysis that a future insurgent group would meet any conditions required to invoke the ICRC study's customary rules.

⁴⁸ Article I of APII requires the “dissident armed forces or other organized groups” to be “under responsible command” and to “exercise such control over a part of [the state's] territory as to enable [the insurgents] to carry out sustained and concerted military operations.” APII, *supra* note 7, art. 1.

⁴⁹ Henckaerts, *supra* note 5, at 189.

⁵⁰ See Int'l Comm. of the Red Cross, Commentary on the Geneva Conventions of 1949 49-50, available at <http://www.icrc.org/ihl.nsf/COM/365-570006?OpenDocument>.

⁵¹ See *id.* at 49.

⁵² See *infra* Part IV.A.1.

III. MALAYSIA'S INTERNAL SECURITY ACT LAW ENFORCEMENT PRACTICES VIOLATE THE STUDY'S RULES OF CUSTOMARY INTERNATIONAL LAW

Malaysia's much-utilized Internal Security Act is a likely legal tool with which Malaysia would detain and prosecute future insurgents and terrorists.⁵³ However, the language and application of the ISA are inconsistent with the ICRC study's rules of customary international law. Other commentators have addressed the illegality of the ISA from the perspective of human rights law.⁵⁴ Given the numerous similarities between human rights law and IHL,⁵⁵ many of the same concerns arise when evaluating the ISA against IHL obligations.

A. *Malaysia Continues to Use the Internal Security Act to Target Internal Opposition*

Malaysia enacted the ISA in 1960 as an emergency power, but it has become an everyday law enforcement measure. Use of the ISA has steadily increased since 2001 to target alleged militant Islamic groups,⁵⁶ and both the language of the ISA and Malaysia's practices in enforcing it are sources of controversy. First, the language of the ISA diminishes a person's freedom from arbitrary detention, revokes his or her criminal procedural protections, and destroys the presumption of innocence and the right to a trial.⁵⁷ Additionally, in practice, the Royal Malaysian Police has physically and psychologically abused ISA detainees and maintained poor conditions of detention.⁵⁸

In 1960, following twelve years of British struggle against communist insurgents during the "Malayan Emergency," the newly independent

⁵³ See Fritz, *supra* note 23, at 1346.

⁵⁴ See *id.* at 1346-47.

⁵⁵ See Borelli, *supra* note 13, at 66, citing Inter-American Commission on Human Rights, *Precautionary Measures in Guantánamo Bay*, 12 May 2002, ILM, Vol. 41 (2002), 532 ("It is well-recognized that international human rights law applies at all times, in peacetime and in situations of armed conflict. [I]n situations of armed conflict, the protections under international human rights and humanitarian law may complement and reinforce one another . . . sharing as they do a common nucleus of non-derogable rights and a common purpose of promoting human life and dignity.").

⁵⁶ Fritz, *supra* note 23, at 1347.

⁵⁷ See *id.* at 1349-50. This comment's analysis of the ISA will not compare the ISA to ordinary criminal procedure rights in Malaysia. Instead, this comment considers the ISA solely in light of customary international humanitarian law. Nevertheless, it is necessary to note that the ISA abrogates many otherwise available rights of an accused criminal, including the right to be informed of the grounds for one's arrest, the right to consult an attorney, and the presumption of innocence. See Lawyerment.com.my, Criminal Law – Arrest, <http://www.lawyerment.com.my/library/doc/crmn/arrest/> (providing general information on criminal procedure in Malaysia) (last visited Oct. 12, 2006).

⁵⁸ Amnesty Int'l, *Malaysia: Towards Human Rights-Based Policing*, AI Index ASA 28/001/2005, April 7, 2005, available at <http://origin2.amnesty.org/library/eng-mys/index>.

Malaysian government incorporated many British emergency powers into the ISA as a temporary tool to combat communist insurgents.⁵⁹ Over time, however, the ISA has become a government tool to “delegitimize generations of political opposition and silence those considered ‘deviant’ or ‘subversive.’”⁶⁰

The ISA has also become a law enforcement tool in the struggle against trans-national Islamic extremists. Since 2001, the Malaysian government has increasingly used the ISA to arrest and detain individuals for alleged involvement in militant Islamic activities.⁶¹ Given this shift in the targets of the ISA, Malaysia would likely continue to use it as a law enforcement tool against future militant Islamic insurgents.

Human rights groups have long opposed the ISA,⁶² finding the lack of police accountability, objectionable police methods, and politically-motivated detentions associated with its enforcement to violate widely-accepted international human rights norms.⁶³ While previous criticism has considered the ISA in light of human rights obligations, many of the same concerns arise in a humanitarian law context. Because many of the same fundamental rights inform IHL and human rights law,⁶⁴ many violations of human rights law also violate IHL rules.

These customary law violations, combined with the problematic conditions of detention discussed above, demonstrate the central underlying problem with the ISA: its inherent vagueness as a discretionary, “emergency” measure.⁶⁵ The ICRC has identified “emergency powers” as a

⁵⁹ Fritz, *supra* note 23, at 1376.

⁶⁰ *Id.* at 1346, 1376. Malaysian courts have rejected arguments that the ISA narrowly applies only to communist insurgencies; in a 2002 case, the Malaysian Federal Court held that “the purpose of the ISA is for all forms of subversion...” *Mohamad Ezam bin Mohd Noor v. Ketua Polis Negara & Other Appeals*, 2002-4 M.L.J. 449 (Malay.).

⁶¹ Fritz, *supra* note 23, at 1346; *see also* Amnesty Int’l, *Malaysia: Towards Human Rights-Based Policing*, *supra* note 58 (“Since 2001 hundreds of alleged Islamist ‘extremists’ have been arrested, accused of links to domestic or regional ‘terrorist’ networks. Over 80 of those arrested have been issued two year detention orders and these orders are routinely extended without explanation”).

⁶² Fritz, *supra* note 23, at 1346.

⁶³ The Fritz study, utilizing interviews and research, found five areas of concern regarding the ISA’s modern use: “(1) the emergency framework of preventive detention laws; (2) reasonable suspicion or probable cause triggering arrest and detention; (3) legal defense and access to counsel; (4) forms of review; and (5) conditions of detention.” *Id.* at 1349.

⁶⁴ *See* Borelli, *supra* note 13, at 66.

⁶⁵ Since the ISA’s roots and purpose lie in emergency situations, political pressure since 1960 has favored strengthening the ISA, not moderating it to bring it in line with international concerns. Amnesty International notes that “successive states of emergency [have] led to the imposition of incrementally tighter restrictions on fundamental rights and liberties. . . .” Amnesty Int’l, *Malaysia: Towards Human Rights-Based Policing*, *supra* note 58.

source of many of the world's IHL abuses, and Malaysia's ISA provides further examples of the possible IHL violations such powers can cause.⁶⁶

B. The Application of the Internal Security Act Is Inconsistent with Customary International Humanitarian Law

The language of the ISA and Malaysia's enforcement practices are inconsistent with Malaysia's customary law obligations as identified by the ICRC study. Specific violations of Malaysia's customary law obligations include arbitrary and lengthy detention without trial, charge, or hearing; the abuse of detainees and poor conditions of detention; and the denial of minimal criminal procedural guarantees.⁶⁷ The ICRC customary law findings prohibit some textual provisions of the ISA and many of Malaysia's ISA enforcement procedures and practices.

1. Malaysia's Treatment of Internal Security Act Detainees Violates Its Customary International Humanitarian Law Obligations

Malaysian treatment of ISA detainees indicates violations of customary law that correlate to protections contained in Article 4 of APII.⁶⁸ Although the ICRC study vaguely defines its rules, several aspects of the conditions of ISA detentions violate the study's customary law obligations.

a. Internal Security Act detainees receive inhumane treatment

Rule 87 of the study requires the humane treatment of civilians and insurgent combatants who have laid down their arms.⁶⁹ This rule is almost identical to Article 4 of APII, which states that detainees "shall in all circumstances be treated humanely."⁷⁰ The study does not precisely define

⁶⁶ Editorial, INT'L REV. OF THE RED CROSS, March 2005, at 5, 5-7 ("For the 'survival of the State' or the 'imperatives of security,' almost any measure is authorized to back up the goal of protecting society: the call for strong and decisive action sets the social context for torture. What begins as a programme centred on a limited number of suspects usually expands over time to encompass an ill-defined group or category of people.").

⁶⁷ See Fritz, *supra* note 23, at 1349-50. Additionally, the Fritz study found that 1) detention conditions did not meet HRL obligations, 2) detainees were subject to physical and psychological abuse during interrogation, and 3) detainees were denied contact with their families during the initial sixty-day detention. The study concluded that "the dire conditions of detention, the psychological abuse inflicted during interrogation, and the denial of access to detainees' families remain standard procedure, and ensure that the experience of detention under the ISA is almost intolerable." *Id.* at 1417.

⁶⁸ APII, *supra* note 7, art. 4.

⁶⁹ HENCKAERTS & DOSWALD-BECK, *supra* note 5, at 306.

⁷⁰ APII, *supra* note 7, art. 4.

“humane treatment,”⁷¹ instead relying on “the detailed rules found in international humanitarian law and human rights law [that] give expression to the meaning of ‘humane treatment.’”⁷² The study notes the prevalence in many international legal instruments of guarantees for a person’s “dignity” and prohibitions on “ill treatment.”⁷³ Similarly, the APII Commentary states that humane treatment “should be understood in its broadest sense as applying to all the conditions of man’s existence.”⁷⁴

Similarly, Rule 118 states that “persons deprived of their liberty must be provided with adequate food, water, clothing, shelter, and medical attention.”⁷⁵ This provision does not mirror specific language of Article 4 of APII, but instead further elaborates on the term “humane treatment.” The study interprets this rule to require that a state provide detainees with basic needs of subsistence that meet the conditions for subsistence of the local population, such that not providing adequate basic provisions “amounts to inhuman treatment.”⁷⁶

Several aspects of the conditions of the ISA detainees’ imprisonment violate these customary law requirements. These conditions include lengthy solitary confinement in brightly-lit cells; filthy cells lacking beds; and the denial of reading material, adequate nutrition, and clothing.⁷⁷ Additionally, as will be discussed below, studies have identified instances of physical and psychological abuse of detainees that may amount to torture.

⁷¹ “The term ‘treat humanely’ is based on the [1907] Hague Regulations [Respecting the Laws and Customs of War on Land]. . . . The word ‘treatment’ should be understood in its broadest sense as applying to all the conditions of man’s existence.” APII Commentary, *supra* note 31, at 1370.

⁷² HENCKAERTS & DOSWALD-BECK, *supra* note 5, at 307-08 (The study looks at numerous sources to inform this Rule, such as the International Covenant on Civil and Political Rights.).

⁷³ *Id.* at 307.

⁷⁴ See APII Commentary, *supra* note 31, at 1370.

⁷⁵ HENCKAERTS & DOSWALD-BECK, *supra* note 5, at 428.

⁷⁶ *Id.* at 430, *citing* APII, art. 5(1)(b). The general requirement of humane treatment may also demand compliance with Rule 127 as well as Rules 87 and 118. Rule 127 states that “[t]he personal convictions and religious practices of persons deprived of their liberty must be respected.” This provision requires a state to permit detainees to practice their religion subject to the disciplinary requirements of detention. See HENCKAERTS & DOSWALD-BECK, *supra* note 5, at 449. This requirement is analogous to Article 4, paragraph 1 of APII, which states that detainees “are entitled to respect for their person, honour, and convictions and religious practices.” As the Commentary to Article 4 states, this requirement “is an element of humane treatment.” APII Commentary, *supra* note 31, at 1370.

⁷⁷ See Fritz, *supra* note 23, at 1421; HUMAN RIGHTS WATCH, DETAINED WITHOUT TRIAL: ABUSE OF INTERNAL SECURITY DETAINEES IN MALAYSIA, *supra* note 23, at 21.

b. *Malaysia's inhuman treatment of Internal Security Act detainees violates customary international law and may constitute torture*

At a minimum, Malaysia treats ISA detainees inhumanely, and its actions may constitute torture when there is a coercive motive behind police actions. Rule 90 prohibits “torture, cruel or inhuman treatment and outrages upon personal dignity, in particular humiliating and degrading treatment.”⁷⁸ This provision mirrors Article 4, paragraph 2(a) of APII, which prohibits “violence to the life, health, and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment.”⁷⁹ Aside from APII, several international conventions absolutely prohibit torture and underscore the illegality of Malaysia’s ISA practices. The Universal Declaration of Human Rights,⁸⁰ the United Nations Convention Against Torture,⁸¹ the International Covenant of Civil and Political Rights,⁸² and the Geneva Conventions⁸³ all prohibit torture, although they may rely on different definitions of torture.⁸⁴

The study defines torture as “the infliction of ‘severe physical or mental pain or suffering’ for purposes such as ‘obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind.’”⁸⁵ “Inhuman treatment” is similarly defined, absent the requirement of a purpose in its infliction.⁸⁶ Unfortunately, these definitions fail to specify with great detail what qualifies as “severe physical or mental pain or suffering.” Nonetheless, several studies have found detainee abuse patterns in Malaysia inconsistent with this generalized prohibition.

⁷⁸ HENCKAERTS & DOSWALD-BECK, *supra* note 5, at 315.

⁷⁹ APII, *supra* note 7, art. 4.

⁸⁰ Universal Declaration of Human Rights, G.A. Res. 217A, art. 5, U.N. Doc. A/810 (Dec. 10, 1948).

⁸¹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, at 197, U.N. Doc. A/Res/39/51 (Dec. 10, 1984), (entered into force June 26, 1987).

⁸² See International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 7, U.N. Doc. A/6316 (Dec. 16, 1966) (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”).

⁸³ See Geneva Convention [I], *supra* note 14, art. 3, 12; Geneva Convention [III], *supra* note 14, art. 13.

⁸⁴ Amnesty International considers the absolute protection from torture to be “one of the fundamental rights from which no derogation is permitted, even in times of emergency or war,” especially given the fact that many conventions and treaties specifically prohibit torture “in times of emergency or war.” Amnesty Int’l, *Malaysia: Towards Human Rights-Based Policing*, *supra* note 58.

⁸⁵ HENCKAERTS & DOSWALD-BECK, *supra* note 5, at 317, citing Elements of Crimes for the ICC, Definition of Torture as a war crime (ICC Statute, Article 8(2)(a)(ii) and (c)(i)). The commentary to APII similarly defines torture. APII, *supra* note 7, art. 4(a); APII Commentary, *supra* note 31, at 1373.

⁸⁶ HENCKAERTS & DOSWALD-BECK, *supra* note 5, at 318.

Though physical abuse of detainees appears to have abated since its widespread use during the 1960s and 1970s, the Royal Malaysian Police continue to threaten physical violence, beat prisoners during interrogation, and inflict extreme psychological abuse.⁸⁷ Human Rights Watch found allegations of “physical and psychological torture, including allegations of physical assault, forced nudity, sleep deprivation, around-the-clock interrogation, death threats, threats of bodily harm to family members, including threats of rape and bodily harm to their children.”⁸⁸ Additionally, Human Rights Watch has chronicled ISA detention camp police practices that were replete with excessive violence and deliberate acts of humiliation.⁸⁹

Similar to the study’s definition of torture, the study’s circular definition of “outrages upon personal dignity” fails to adequately specify prohibited conduct. The ICRC study defines such outrages “as acts which humiliate, degrade, or otherwise violate the dignity of a person to such a degree as to be generally recognized as an outrage upon personal dignity.”⁹⁰ Amnesty International (“AI”) found similar allegations of physical and psychological abuse that constitutes outrages upon personal dignity.⁹¹ Despite the ICRC’s unclear definition of outrages upon personal dignity, Malaysian police actions included intentional humiliation.

AI chronicles one individual, Abdul Malek Hussein, who claims “his mouth was forced open and he was forced to drink urine... his genitals were hit with a hard object, and . . . cold water was poured over him while naked in an air conditioned room.”⁹² Amnesty International also chronicles other ISA detainees’ allegations of physical abuse, sexual humiliation, and psychological harassment.⁹³ In addition to the abuse of Mr. Hussein, AI found that Malaysia subjected ISA detainees to physical assault, solitary confinement, “prolonged aggressive interrogation,” and other actual and threatened physical and psychological abuse.⁹⁴ These accounts constitute

⁸⁷ Fritz, *supra* note 23, at 1423-24.

⁸⁸ Human Rights Watch, *Malaysia’s Internal Security Act and Suppression of Political Dissent*, <http://www.hrw.org/backgrounder/asia/malaysia-bck-0513.htm>; see also Human Rights Watch, *Malaysia: ISA Detainees Beaten and Humiliated*, <http://hrw.org/english/docs/2005/09/28/malays11788.htm> (One detainee stated, “I was continuously beaten and forced to strip naked, ordered to crawl while entering the room. . .”).

⁸⁹ HUMAN RIGHTS WATCH, *DETAINED WITHOUT TRIAL: ABUSE OF INTERNAL SECURITY DETAINEES IN MALAYSIA*, *supra* note 23, at 13-19.

⁹⁰ HENCKAERTS & DOSWALD-BECK, *supra* note 5, at 319.

⁹¹ See Amnesty Int’l, *Malaysia: Towards Human Rights-Based Policing*, *supra* note 58.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

humiliating outrages upon the dignity of the victims and violate Malaysia's customary obligations.

The illegal treatment of detainees is only one area in which Malaysian actions have violated customary IHL. As discussed in the following section, the ISA and Malaysia's enforcement practices also fail to safeguard detainees' fundamental rights of criminal procedure.

2. *Malaysia's Failure to Provide Adequate Judicial Guarantees for Internal Security Act Defendants Violates Its Customary Law Obligations*

Several aspects of the ISA also implicate the judicial guarantees of Article 6 of APII and many of the specific rules found to be customary IHL in the ICRC study. Specifically, evidence indicates that ISA practices violate Rules 99, 100, 102, 103, and 128, all of which correlate to guarantees found in Article 6 of APII.⁹⁵

a. *Internal Security Act detentions are arbitrary and lack judicial review*

Rule 99 prohibits the "arbitrary deprivation of liberty."⁹⁶ The ICRC study states that security concerns must be the basis for detention, and calls for continued detention upon a showing that such concerns are legitimate.⁹⁷ This rule elaborates on Article 6 of APII, which requires states to respect judicial guarantees of persons during "preliminary investigation and trial".⁹⁸

The ICRC's basis for this finding of customary practice rests on State legislation prohibiting practices ranging "from unlawful/illegal confinement and unlawful/illegal detention to arbitrary or unnecessary detention."⁹⁹ The study relies largely on customary human rights law, which "establishes (i) an obligation to inform a person who is arrested of the reasons for arrest, (ii) an obligation to bring a person arrested on a criminal charge promptly before a judge, and (iii) an obligation to provide a person deprived of liberty with an opportunity to challenge the lawfulness of detention."¹⁰⁰

Similarly, Rule 102 prohibits conviction "except on the basis of individual criminal responsibility,"¹⁰¹ and Rule 103 implements this by

⁹⁵ APII, *supra* note 7, art. 6.

⁹⁶ HENCKAERTS & DOSWALD-BECK, *supra* note 5, at 344.

⁹⁷ *Id.* at 348.

⁹⁸ APII Commentary, *supra* note 31, at 1396.

⁹⁹ HENCKAERTS & DOSWALD-BECK, *supra* note 5, at 347.

¹⁰⁰ *Id.* at 349.

¹⁰¹ *Id.* at 372.

prohibiting collective punishments.¹⁰² These provisions require that the accused only face punishment for acts in which he or she personally took part.¹⁰³

The ISA's text contradicts these rules of customary international law by granting the police largely unchecked discretion in detaining persons. For example, Section 73 of the ISA permits the police to detain a person for 60 days without a warrant, trial, or access to legal counsel on suspicion that "he has acted or is about to act or is likely to act in any manner prejudicial to the security of Malaysia."¹⁰⁴ Section 73 only requires police to have reason to believe a person has violated the ill-defined ISA,¹⁰⁵ and Malaysian law enforcement practices include summary detentions for no reason other than the detainee's political opposition.¹⁰⁶

Since the ISA permits preemptive, preventative detentions on suspicion that a person may be about to act in an undefined, prohibited manner, it essentially provides for arbitrary arrest by which "a detainee is, therefore, presumed guilty without trial."¹⁰⁷ One cabinet minister told Human Rights Watch that ISA detainees "have not committed any crime because ISA is preventive. You cannot, therefore, go to court. The government has information that something will happen. We can't wait till it happens. . . . So before it happens we detain them."¹⁰⁸

Malaysia's 2001 persecution of the National Justice Party, an opposition political party, contradicts these rules. In April 2001, the police arrested ten individuals associated with the National Justice Party, which is better known as Keadilan. While the government alleged that those arrested sought to obtain bomb-making materials, their interrogations were devoid of any mention of violence and instead focused on their political activity, sources of funding, and even their extra-marital affairs.¹⁰⁹ Especially since there may have been no probable cause to arrest these persons,¹¹⁰ the political nature of their interrogations indicates that the detentions were arbitrary.

¹⁰² *Id.* at 374.

¹⁰³ *Id.* at 373.

¹⁰⁴ Internal Security Act, Act 82, sec. 73(1), (1960) (Malay.), discussed in Human Rights Watch, *Malaysia's Internal Security Act and Suppression of Political Dissent*, *supra* note 88.

¹⁰⁵ Internal Security Act, Act 82, sec. 73, (1960) (Malay.).

¹⁰⁶ Fritz, *supra* note 23, at 1379.

¹⁰⁷ Human Rights Watch, *Malaysia's Internal Security Act and Suppression of Political Dissent*, *supra* note 88.

¹⁰⁸ Human Rights Watch, *Malaysia: ISA Detainees Beaten and Humiliated*, *supra* note 88.

¹⁰⁹ Fritz, *supra* note 23, at 1386.

¹¹⁰ *Id.* at 1386.

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Additionally, the ISA does not allow for judicial review of initial detentions. It originally did permit such review, but amendments have removed that avenue such that “absolute power is given to the Minister of Home Affairs to arbitrarily detain anyone, without reference to the courts.”¹¹¹ Two-year detentions have been indefinitely renewed without ever charging the detainee or bringing him to trial.¹¹² The ISA’s grant of arbitrary and indefinite power to the government violates Malaysia’s customary IHL obligations and obliterates the targeted defendant’s rights from the outset of his or her detention.

b. Malaysia has not provided fair trials to Internal Security Act detainees

The ICRC study’s findings of criminal procedural guarantees also exceed APII’s protections, adding more detailed customary rules to the IHL regime. Rule 100 states that “[n]o one may be convicted or sentenced, except pursuant to a fair trial affording all essential judicial guarantees.”¹¹³ Drawing on the language of both the Geneva Conventions and their Additional Protocols, this provision requires “that courts be independent,¹¹⁴ impartial¹¹⁵ and regularly constituted;”¹¹⁶ questions the legality of suspending these requirements during states of emergency;¹¹⁷ and mandates the maintenance of the presumption of innocence.¹¹⁸ Similarly, Rule 128(C) requires that detainees in an internal armed conflict “be released as soon as the reasons for the deprivation of their liberty cease to exist,” but permits

¹¹¹ Human Rights Watch, *Malaysia’s Internal Security Act and Suppression of Political Dissent*, *supra* note 88. See also Internal Security Act, Act 82, sec. 8(B) (“(1) There shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with this Act, save in regard to any question on compliance with any procedural requirement in this Act governing such act or decision.”)

¹¹² Amnesty International, *Malaysia: Towards Human Rights-Based Policing*, *supra* note 58.

¹¹³ HENCKAERTS & DOSWALD-BECK, *supra* note 5, at 352.

¹¹⁴ An independent tribunal “must be able to perform its functions independently of any other branch of the government, especially the executive.” *Id.* at 355-57 (citation omitted).

¹¹⁵ An impartial tribunal consists of judges who neither “harbour preconceptions about the matter before them, nor act in a way that promotes the interests of one side,” and must have adequate “guarantees to exclude any legitimate doubt about its impartiality.” *Id.* at 356.

¹¹⁶ “A court is regularly constituted if it has been established and organised in accordance with the laws and procedures already in force in a country.” *Id.* at 355.

¹¹⁷ *Id.* at 355.

¹¹⁸ “The presumption of innocence means that any person subject to penal proceedings must be presumed to be not guilty... until proven otherwise. This means that the burden of proof lies on the prosecution, while the defendant has the benefit of the doubt. It also means that guilt must be proven according to a determined standard” (e.g. “beyond a reasonable doubt” (in common law countries)). *Id.* at 357 (footnotes omitted).

continued detention “if penal proceedings are pending against them or if they are serving a sentence lawfully imposed.”¹¹⁹

Rule 100 also includes several procedural guarantees owed to an insurgent defendant. The accused must be provided with “information on the nature and cause of the accusation” against him or her, receive “necessary rights and means of defense,” receive “trial without undue delay,” be able to examine witnesses against him or her, have the assistance of an interpreter if necessary, have the right to be present at trial, not be compelled to testify against him or herself or to confess guilt, not be subjected to public proceedings, and “not be punished more than once for the same act or on the same charge.”¹²⁰ The ICRC bases these requirements on international law, military manuals, and state domestic law.¹²¹

ISA-based detentions violate these rules because they lack effective means of judicial review of these detentions. For example, the ISA permits the government to not “disclose facts or to produce documents which [it] considers to be against the national interest to disclose or produce.”¹²² This provision enables the government to withhold “the very facts that purportedly support the necessity of the individual’s arrest and detention,” and thus significantly limits the courts’ ability to review ISA detentions.¹²³

Following the initial sixty-day detention, the Minister of Home Affairs can indefinitely order two-year extensions to detention.¹²⁴ These orders are not subject to judicial scrutiny and require no vetting or justification.¹²⁵ The government has used this extension option,¹²⁶ and it enables the government

¹¹⁹ *Id.* at 451-52.

¹²⁰ *Id.* at 358-370.

¹²¹ *Id.* at 354-370 (The study often cites the International Covenant on Civil and Political Rights, the statements of international tribunals, the Geneva Conventions, and other texts.)

¹²² See Internal Security Act, Act 82, sec. 16 (1960) (Malay.) (“Nothing in this Chapter or in any rules made thereunder shall require the Minister or any member of an Advisory Board or any public servant to disclose facts or to produce documents which he considers it to be against the national interest to disclose or produce.”).

¹²³ Fritz, *supra* note 23, at 1407. See also HUMAN RIGHTS WATCH, DETAINED WITHOUT TRIAL: ABUSE OF INTERNAL SECURITY ACT DETAINEES IN MALAYSIA, *supra* note 23, at 24-26 (noting the unwillingness of the Malaysian Federal Court to intervene in the face of well-supported *habeas corpus* petitions).

¹²⁴ See Internal Security Act, Act 82, sec. 8(1) (1960) (Malay.) (“If the Minister is satisfied that the detention of any person is necessary with a view to preventing him from acting in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof, he may make an order (hereinafter referred to as a detention order) directing that that person be detained for any period not exceeding two years.”).

¹²⁵ Human Rights Watch, *Malaysia’s Internal Security Act and Suppression of Political Dissent*, *supra* note 88.

¹²⁶ *Detention of nine under ISA extended*, NEW STRAITS TIMES (Malay.), Sept. 24, 2003.

to prolong detentions without judicial review and without having to provide a trial for the detainee.

In fact, courts have also shown an unwillingness to intervene even in acknowledged unlawful detentions. The Malaysian Federal Court, responding to the appeal of the Keadilan ISA detainees, found that their detentions were in fact unlawful, but declined to review detentions undertaken by authority of Section 8 of the ISA.¹²⁷

IV. THE ICRC CUSTOMARY LAW STUDY IMPACTS MULTINATIONAL COUNTER-TERRORISM OPERATIONS

By identifying several rules contained within Additional Protocols I and II that are customary international law, the ICRC has issued a challenge to the world to address the deficient practices of non-party states. While this comment identifies the domestic practices of one state in conflict with customary international law, the study has broader ramifications for all states seeking security assistance during conflicts, both internal and international. These states will face the criticism of potential military coalition partners who heed the study's findings and demand compliance as a condition of participation. This conflict has two effects: while it could obstruct the efforts of troubled states to obtain unqualified security assistance, it also could lead to legal reform in noncompliant states as they change their ways in order to form partnerships with foreign militaries.

A. *The Conflict Between Malaysia's Obligations and Practices Illustrates the Ramifications of the Red Cross Study on Multinational Operations in Failing States*

The incongruence of state laws and the study's customary IHL obligations may impact multinational coalition military operations in states fighting insurgencies, especially insurgencies of a transnational, terrorism-based nature. First, states not parties to APII face the articulated position of the well-respected ICRC and emerging international consensus in choosing whether to conform their counter-insurgency behavior and laws to its customary law findings.¹²⁸ Second, while non-party states may or may not

¹²⁷ Fritz, *supra* note 23, at 1411 (discussing Mohamad Ezam Bin Mohd Nor & Others v. Ketua Polis Negara, Judgment of Steve L.K. Shim, CJSS, 2002-4 M.L.J. 449 (Malay.)).

¹²⁸ See Charles Garraway, The Relevance of Customary International Humanitarian Law from the Perspective of the Armed Forces, Address Before the Euro-Atlantic Partnership Council-Partnership for Peace Workshop on Customary International Humanitarian Law (March 9, 2006), available at <http://pforum.isn.ethz.ch/events/index.cfm?action=detail&eventID=258> ("Even where one disagrees with [the ICRC customary law study] . . . it will carry authority and is already being cited around the world.

choose to reform their laws and practices, foreign forces adhering to the ICRC's findings will likely limit their cooperation in joint military operations with these non-party states in order to meet their perceived international law obligations.¹²⁹ In light of the illegality of Malaysia's ISA practices with respect to the ICRC's customary international law findings, and the possibility that the United States would offer its assistance to combat a terrorism-focused insurgency in Malaysia,¹³⁰ it is useful to consider the effects of the study, and Malaysia's behavior, on U.S. forces operating in Malaysia in the future.

1. *There Remains a Present Threat of Terrorism-Focused Insurgencies in Southeast Asia*

Analyzing the ICRC study's ramifications in the context of a Southeast Asian conflict is relevant at this time because of the likelihood of future and increasing terrorist threats originating in the region. As one of the world's most heavily Muslim regions,¹³¹ and given the abundance of militant Islamic activities in the region since 2001,¹³² it is likely that future insurgencies will arise and will call for the application and enforcement of IHL.

The Jemaah Islamiyah ("JI") terrorist organization, like Al Qaeda and the Abu Sayyaf Group, presents a new type of militant Islamic threat with supra-national ideology and goals.¹³³ While the regional governments have made significant progress in combating and weakening JI,¹³⁴ the same confluence of factors that led to its ascension continue to exist.

Some scholars consider the international diffusion of trained radicals following the Soviet conflict in Afghanistan in the 1980s to be very

Certainly, judges at international courts are likely to take its reasoning into account in formulating their own views.").

¹²⁹ See *infra* Part IV.2.

¹³⁰ For example, at various times since 2001, the United States has had military personnel in Thailand, Malaysia, Indonesia, and Singapore, and has been assisting in counter-terrorism operations in the Philippines. UNITED STATES DEPARTMENT OF DEFENSE, ACTIVE DUTY MILITARY PERSONNEL STRENGTHS BY REGIONAL AREA AND BY COUNTRY (309A), September 30, 2003, available at <http://www.dior.whs.mil/mmid/M05/hst0309.pdf>. See also ROBERT D. KAPLAN, IMPERIAL GRUNTS: THE AMERICAN MILITARY ON THE GROUND 146-47 (2005).

¹³¹ Indonesia, for example, is the most populous Muslim nation, with 87% of its population, or 195 million persons, observing Islam; Similarly, Malaysia is 60.4% Muslim. U.S. DEPARTMENT OF STATE, COUNTRIES AND OTHER AREAS, available at <http://www.state.gov/r/pa/ei/bgn/2777.htm>. See also KAPLAN, *supra* note 130, at 133 (2005).

¹³² See Singh, *supra* note 1, at xiv-xvii.

¹³³ *Id.* at 1.

¹³⁴ *Id.* at 61.

instructive in predicting future militant Islamic activities today.¹³⁵ Notorious examples of veterans of that war include Osama Bin Laden; several of the participants in the 1993 World Trade Center bombing; JI's mastermind, Hambali; and Ali Gufron, a planner of the 2002 Bali bombing.¹³⁶ These examples may be predictive of future militant Islamic activity worldwide, especially in populous Muslim regions such as Southeast Asia.

2. *The Study Has Implications Both for a Malaysian Conflict and for Multinational Operations Worldwide*

In the context of a Malaysian internal armed conflict, possible coalition partners might limit or qualify their participation in military operations in Malaysia due to its objectionable ISA practices. The United States, a likely partner given its global focus on combating terrorism, provides an example in evaluating the potential impact of the ICRC study. U.S. domestic and international law obligations could lead to limited support for coalition operations in Malaysia.

It is possible Malaysia could seek international assistance in fighting transnational terrorists within its borders in the future. Since 2001, Association of Southeast Asian Nations ("ASEAN") member states have increasingly cooperated in efforts to combat terrorism.¹³⁷ This multinational focus is the result of international recognition that a transnational terrorist organization introduces a need for international counterterrorism prevention and operations.¹³⁸ In the future, the region's response to Islamic terror is very likely to continue to be multinational given the 2001 and 2002 ASEAN anti-terror pacts calling for mutual assistance, intelligence-sharing, and cooperation, and given recent multinational operations against those responsible for the Bali bombings.¹³⁹

U.S. military policies indicate that the ICRC study will impact the U.S. military's conduct in an internal conflict. While conducting operations in a foreign "host nation," the host nation's laws limit the actions of U.S. military personnel. Specifically, U.S. military policies require forces to

¹³⁵ Following the Soviet-Afghani war, hundreds of fighters from the U.S.-backed Mujahideen returned to their home states and formed threatening terrorism organizations. Peter Bergen & Alec Reynolds, *Blowback Revisited*, FOREIGN AFFAIRS, Nov.-Dec. 2005, at 2-3.

¹³⁶ Bergen, *supra* note 135, at 2-4.

¹³⁷ Gregory Rose & Diana Nestorovska, *Towards an ASEAN Counter-Terrorism Treaty*, 9 Sing. Year Book Int'l L. 157, 185 (2005).

¹³⁸ See SINGH, *supra* note 1, at 57. See also *id.* at 188 (2005) ("Due to the transnational nature of much terrorist activity in the ASEAN region, prevention cooperation and mutual assistance in enforcement measures at the international level are essential.").

¹³⁹ SINGH, *supra* note 1, at 58-59; see also Emmanuel, *supra* note 1.

observe the host nation's law unless it violates international law.¹⁴⁰ Where the host nation's law does not meet the U.S. forces' obligations under U.S. domestic law or international law recognized by the U.S., the U.S. military will limit its conduct to that which the U.S. considers legal.¹⁴¹ These policies "encompass[] all international law for the conduct of hostilities binding on the United States . . . including treaties and international agreements to which the United States is a party, and applicable customary international law."¹⁴²

While members of the Administration of U.S. President George W. Bush have argued that the Geneva Conventions do not apply to conflicts with terrorist forces, the U.S. Supreme Court has affirmed the applicability of IHL, including the Geneva Conventions, to these conflicts. In 2002, U.S. Attorney General Alberto Gonzalez wrote that the "war against terrorism . . . renders obsolete Geneva's strict limitations on questioning of enemy prisoners and renders quaint some of its provisions."¹⁴³ In 2006, the U.S. Supreme Court repudiated this argument, holding in *Hamdan v. Rumsfeld* that the military commission established to try Hamdan, Osama Bin Laden's alleged driver, was illegal in part because it ran afoul of Common Article Three's requirements for basic judicial guarantees.¹⁴⁴ The U.S. Congress, in establishing rules for Courts Martial, conditioned the authority to establish military commissions to try combatants on "compliance with the law of war," e.g. the Geneva Conventions.¹⁴⁵ Granted, Justice John Paul Stevens's opinion does not carry a majority when he states that customary international law informs the minimum guarantees required under Common Article Three.¹⁴⁶ However, the *Hamdan* decision affirms the authority of IHL as a

¹⁴⁰ See BILL, *supra* note 26, at 232 (Host nation laws "must be observed so long as [they do not] ... conflict with binding international law obligations...").

¹⁴¹ See LOW HANDBOOK, *supra* note 8, at 244 ("As a matter of Public International Law, host nation law normally governs the conduct of the visiting armed force during [multinational operations involving an uncoerced invitation to the intervening military].").

¹⁴² DoD Directive 5100.77, *supra* note 26. See also Chairman of the Joint Chiefs of Staff Instruction 5810.01B (Current as of 28 March 2005), available at http://www.dtic.mil/cjcs_directives/cdata/unlimit/5810_01.pdf [hereinafter CJCS Instruction].

¹⁴³ John Barry et al., *The Roots of Torture*, NEWSWEEK: INTERNATIONAL EDITIONS, May 24, 2004, available at <http://www.msnbc.msn.com/id/4989481>.

¹⁴⁴ *Hamdan v. Rumsfeld*, 548 U.S. ___, 126 S. Ct. 2749, 2798 (2006) ("Common Article 3 obviously tolerates a great degree of flexibility in trying individuals captured during armed conflict; its requirements are general ones, crafted to accommodate a wide variety of legal systems. But *requirements* they are nonetheless." (emphasis in original)).

¹⁴⁵ *Id.* at 2794.

¹⁴⁶ *Id.* at 2797.

source of law and requires U.S. conduct to be in compliance with IHL so long as the U.S. Congress invokes IHL in regulating military conduct.¹⁴⁷

Given the ICRC's position that several APII provisions are customary international law, the study's findings provide additional detail to the undefined terminology of APII against which military lawyers will compare proposed military operations. The United States military, as a matter of policy, already considers almost all of APII to be customary international law.¹⁴⁸ The United States Army also already considers the detainee protections of APII to be a "minimum standard" for all internal conflicts,¹⁴⁹ with which it will comply whenever feasible given military operational requirements.¹⁵⁰ It is the ICRC's elaboration on the rules of APII, and the findings of customary rules exceeding APII's protections, that will enhance the regulation of internal armed conflict, and consequently the U.S. military's conduct.

Barring a change in U.S. policy, military judge advocates may advise commanders to act within the limits of the ICRC study, which could impact coalition operations intended to facilitate ISA detentions. The U.S. Department of Defense places judge advocate legal advisors at every level of the military command structure to advise military commanders on how to comply with IHL obligations before, during, and after military operations.¹⁵¹ Additionally, judge advocates must review all operations, plans, rules of engagement, and orders for compliance with IHL.¹⁵² The events of Abu Ghraib, the controversy surrounding Guantanamo Bay, and other controversial U.S. military detentions raised questions about the legality of U.S. forces' conduct under international law. At the time, senior military and

¹⁴⁷ The U.S. Congress has since passed legislation granting the President authority to detain "unlawful enemy combatants" and to try such persons by military commission. See Military Commissions Act of 2006, S. 3930, 109th Cong. (2006). Critics argue that this grant of authority will not withstand legal challenge in the face of international humanitarian law. See R. Jeffrey Smith, *Many Rights in U.S. Legal System Absent in New Bill*, WASHINGTON POST, Sept. 29, 2006, at A13; Kate Zernike, *Senate Approves Broad New Rules to Try Detainees*, THE NEW YORK TIMES, Sept. 29, 2006, available at http://www.nytimes.com/2006/09/29/washington/29detain.html?_r=1&n=Top%2fReference%2fTimes%20Topics%2fPeople%2fZ%2fZernike%2c%20Kate&oref=login.

¹⁴⁸ LOW HANDBOOK, *supra* note 8, at 29 ("The U.S. has stated that it considers many provisions of Protocol I, and almost all of Protocol II (all except for the limited scope of application in article 1), to be customary international law.").

¹⁴⁹ *Id.* at 85.

¹⁵⁰ *Id.* at 30.

¹⁵¹ DoD Directive 5100.77, *supra* note 26. See also CJCS Instruction, *supra* note 142, at 2 ("Advice on law of war compliance will address not only legal constraints on operations but also legal rights to employ force.").

¹⁵² See CJCS Instruction, *supra* note 142, at 3. These instructions also establish reporting responsibilities for US forces to report all incidents not in compliance with the law of war, including those caused by forces serving alongside US forces.

civilian attorneys in the U.S. military perceived and raised these questions.¹⁵³ The ICRC study may provide strength for civilian counsels and military judge advocate attorneys to argue that international law prohibits the full participation of U.S. forces in a given counterinsurgency operation.¹⁵⁴ Limitations could include a prohibition on participation in ISA-related operations, or even advising against participating in any operations in Malaysia absent reform in the country's practices.

The conflicts between Malaysia's obligations under the ICRC's customary law study and its ISA detention practices could make it difficult for Malaysia to obtain unqualified support from other states' armies. The limitations on United States military operations could be shared by all coalition forces objecting to the ISA and Malaysian law enforcement practices. Should Malaysia seek to obtain coalition support for a future conflict, many of the same objections human rights organizations raise to the ISA detentions would arise in the context of an internal armed conflict subject to APII.

This problem is universally applicable to other conflicts in other states not party to APII. Many of these states may find themselves seeking international military assistance to combat future internal threats. Since states seeking international assistance are often failed or failing states,¹⁵⁵ many of them not parties to APII, the ICRC may have made it more difficult for these countries to garner international support when needed.

B. The Red Cross Study Has Broader Ramifications for the Advancement of International Humanitarian Law

While the ICRC study may have directly limited some states' access to unqualified military support, it may also indirectly increase international pressure for legal reform in these states. As discussed, the study has raised the bar for all states to meet IHL obligations. As preeminent states such as

¹⁵³ See Josh White, *Military Lawyers Fought Policy on Interrogations; JAGs Recount Objections to Definition of Torture*, THE WASHINGTON POST, July 15, 2005, at A01. See also Jane Mayer, *The Memo: How an internal effort to ban the abuse and torture of detainees was thwarted*, THE NEW YORKER, Feb. 27, 2006, at 32.

¹⁵⁴ Additionally, the 2000 and 2005 Law of War Deskbooks for U.S. Army Judge Advocates stated that "[t]he U.S. has stated it considers many provisions of Protocol I, and all of Protocol II, to be binding customary international law." While the conduct of the United States military abroad since 2001 calls into question its commitment to customary international law, its previous position, combined with the ICRC stance, lends support to the possibility that Judge Advocates will advise commanders to adhere to the study's guidelines. See BILL, *supra* note 26, at 32; LOW HANDBOOK, *supra* note 8, at 29.

¹⁵⁵ States not parties to APII include Afghanistan, Angola, Azerbaijan, Haiti, Indonesia, Iraq, Malaysia, Singapore, and Thailand, among others. See INT'L COMM. OF THE RED CROSS, STATES PARTY TO THE GENEVA CONVENTIONS AND THEIR ADDITIONAL PROTOCOLS, *supra* note 38.

the U.S. embrace the study, the ICRC will find available in multinational military cooperation a new avenue to realize legal reform in non-party states.

The study's findings introduce an avenue by which states observing customary law may bring pressure to bear on noncompliant states. When a foreign military prepares for or conducts operations with a non-party state, the ICRC study will provide additional justification upon which a foreign commander can refuse to cooperate in an illegal action. Additionally, that commander will have legal justification to seek to bring the non-party state's conduct into line with customary international law.

The study thus counterbalances its burdensome effect on non-party states by opening up a new avenue for international pressure to change the behavior of noncompliant states: military cooperation.¹⁵⁶ For example, the United States conducts multinational military training programs to further national security goals while subtly working to bring about change in foreign military or law enforcement practices. Notable examples of this avenue for reform include the Philippines and Colombia, where the United States military has for many years offered training assistance to national forces.¹⁵⁷ This training is replete with military skills instruction, but it also includes significant amounts of human rights and IHL instruction at all levels of command, from the foot soldier to the general.¹⁵⁸ It is through military security assistance such as coalition operations and these long-term training missions that the international community can emphasize the importance of adhering to customary rules of international law. The examples of Colombia and the Philippines are ripe for repetition in several potentially violent states not parties to APII, such as Malaysia.

The complexities of applying APII as customary law to a non-party state's internal conflict not only make the ICRC's case for acceptance of APII a more difficult argument, but they also provide an opportunity for the international community to join the ICRC in calling for widespread acceptance of increased regulation of internal armed conflicts. This worldwide acceptance of an enhanced customary IHL regime could lead to reforms in non-party states and considerably strengthen the humanitarian protections afforded both civilians and combatants in internal armed conflicts.

¹⁵⁶ See KAPLAN, *supra* note 130, at 61-62 ("Still, third world military men were more likely to listen to American officers who briefed them about human rights as a tool of counterinsurgency than to civilians who talked abstractly about universal principles of justice.").

¹⁵⁷ See *generally id.* (describing U.S. Special Forces operations training and assisting militaries in several countries' counter-insurgencies).

¹⁵⁸ See *id.* at 56-57, 61-62.

V. CONCLUSION

Since the ICRC study may have a significant impact on states not party to Additional Protocol II, the ICRC has issued a challenge to the world to more strictly regulate internal armed conflict. While the study may have made it more difficult for a troubled state to obtain full-fledged coalition support from other countries, it also may have strengthened the ICRC's hand in realizing universal acceptance of the international regulation of internal armed conflicts because of its effects on individual states who currently object to the regulation of their internal conflicts.

While Malaysia provides a sound test case to consider the study's ramifications, the conflicts between the ICRC study's findings and the ISA practices are instructive of the possible effects of the study worldwide. Other countries with similar, questionably-legal practices may find themselves answering to a chorus of both military and political objections should they seek assistance in their future conflicts.

Finally, an underlying purpose of the ICRC in promulgating rules of customary IHL may be to preempt the further erosion of the IHL regime in the face of the post-September 11th world response to terrorism. It is the new global terrorism battlefield, in which states appeal to national security and emergency situations as bases to abrogate people's rights, that both makes IHL vulnerable and makes customary law important.¹⁵⁹ While states such as the United States have shown willingness to issue and apply controversial interpretations of applicable IHL in the face of terrorism,¹⁶⁰ customary law continues to inform baseline requirements for situations to which conventions and treaties may not apply. By issuing its customary law study and encouraging dialogue within each state as well as internationally, the ICRC has preemptively strengthened the IHL regime in the face of some states' willingness to exhibit flexibility and push the boundaries of what is legal in such unclear situations.

¹⁵⁹ See Editorial, INT'L REV. OF THE RED CROSS, *supra* note 66 ("For the 'survival of the State' or the 'imperatives of security,' almost any measure is authorized to back up the goal of protecting society: the call for strong and decisive action sets the social context for torture.").

¹⁶⁰ See Mayer, *supra* note 153.