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CUSTOMARY INTERNATIONAL HUMANITARIAN LAW

**Report prepared by
The International Committee of the Red Cross**

INTRODUCTION

Treaty law and customary law are the main sources of international law. In the area of international humanitarian law, treaty law is well developed but its application is limited to States who have ratified the treaties in question, and to armed opposition groups within those States. The content of customary rules of international humanitarian law, on the other hand, is less clear because those rules are nowhere written down as such. Customary international law is created by a widespread, representative and uniform practice of States. Its content, as a result, must be determined on the basis of extensive research into State practice.

The study on customary international humanitarian law which the ICRC is currently finalizing is unique because such a study was never undertaken before. The Study has taken several years because of the extensive research involved but its outcome will be more than worth the wait. The study will provide the world with a common code of rules applicable to armed conflict, binding on all parties to armed conflicts.

This report is divided into three sections:

- I. Origin of the Study
- II. Organization of the Study
- III. Purpose of the Study

I. ORIGIN OF THE STUDY

More than 50 years have now passed since the Geneva Conventions of 1949 were adopted and 25 years since the adoption of their Additional Protocols. These years have, unfortunately, been marked by a proliferation of armed conflicts affecting every continent. Throughout these conflicts, the Geneva Conventions – and in particular Article 3 common to the four Conventions, applicable in non-international armed conflicts – together with their Additional Protocols, have provided legal protection to victims of war and limited the permissible means and methods of warfare. Nevertheless, there have been countless violations of these treaties and of basic humanitarian principles, resulting in suffering and death that might have been avoided had international humanitarian law been respected.

The general opinion is that violations of international humanitarian law are not due to the inadequacy of its rules. Rather, such violations stem from a lack of willingness to respect the rules, to a lack of means to enforce them, to uncertainty as to their application in some circumstances, and also to ignorance of the rules themselves on the part of political leaders, commanders, combatants and the general public.

The International Conference for the Protection of War Victims, convened in Geneva from 30 August to 1 September 1993, discussed ways and means of addressing violations of international humanitarian law but did not propose the adoption of new treaty provisions. Instead, in its Final Declaration, adopted by consensus, the Conference reaffirmed “the necessity to make the implementation of humanitarian law more effective” and called upon the Swiss government “to convene an open-ended intergovernmental group of experts to study practical means of promoting full respect for and compliance with that law, and to prepare a report for submission to the States and to the next session of the International Conference of the Red Cross and Red Crescent”.

To this end, the Intergovernmental Group of Experts for the Protection of War Victims met in Geneva in January 1995 and made a series of recommendations aimed at enhancing respect for international humanitarian law, in particular by means of preventive measures that would ensure better knowledge and more effective implementation of the law. Recommendation II of the Intergovernmental Group of Experts proposed that:

The ICRC be invited to prepare, with the assistance of experts in [international humanitarian law] representing various geographical regions and different legal systems, and in consultation with experts from governments and international organizations, a report on customary rules of [international humanitarian law] applicable in international and non-international armed conflicts, and to circulate the report to States and competent international bodies.¹

In December 1995, the 26th International Conference of the Red Cross and Red Crescent endorsed this recommendation and officially mandated the ICRC to prepare a report on customary rules of international humanitarian law applicable in international and non-international armed conflicts.²

II. ORGANIZATION OF THE STUDY

To determine the best way of fulfilling the mandate entrusted to it, the ICRC consulted a group of academic experts on international humanitarian law, who formed the Steering Committee of the study (see Annex). The Steering Committee adopted a Plan of Action in June 1996 and research started in October 1996. Pursuant to the Plan of Action, research was conducted using both national and international sources that reflected State practice.

Research into national sources

Since national sources are more easily accessible from within a country, it was decided to seek the cooperation of national researchers. To this end, nearly 50 countries were selected from all continents and in each a researcher or group of researchers was identified to report on State practice (see Annex). The Steering Committee selected the countries on the basis of geographic representation, as well as recent experience of different kinds of armed conflict in which a variety of methods of warfare had been used. The result was a series of reports on State practice.

The sources of State practice collected by the national researchers include official statements at the national and international levels, diplomatic protests, press releases, opinions of official legal advisers, police manuals, military manuals, instructions to armed and security forces, military communiqués during war, comments by governments on draft treaties, legislation, decisions of national courts and executive authorities, pleadings before international tribunals, statements in international organizations and at international conferences and government positions taken with respect to resolutions of international organizations.

Military manuals and national legislation of countries not covered by the reports on State practice were also researched and collected. The network of ICRC delegations around the world and the extensive collection of national legislation gathered by the ICRC Advisory Service on

¹ Meeting of the Intergovernmental Group of Experts for the Protection of War Victims, Geneva, 23–27 January 1995, Recommendation II, *International Review of the Red Cross*, No. 310, 1996, p. 84.

² 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, Resolution 1, International humanitarian law: From law to action; Report on the follow-up to the International Conference for the Protection of War Victims, *International Review of the Red Cross*, No. 310, 1996, p. 58.

International Humanitarian Law facilitated this work. The purpose of the additional research was also to make sure that the study would be as up-to-date as possible and would, to the extent possible, take into account developments up to 31 December 2001. In some cases, it has been possible to include more recent practice.

Research into international sources

State practice gleaned from international sources was collected by six teams, each of which concentrated on one part of the study (see Annex). These teams researched practice in the framework of the United Nations and of other international organizations, in particular the African Union (formerly the Organization of African Unity), Council of Europe, Gulf Cooperation Council, European Union, League of Arab States, Organization of American States, Organization of the Islamic Conference and Organization for Security and Cooperation in Europe. They also studied the practice of the Commonwealth of Independent States, Inter-Parliamentary Union and Non-Aligned Movement. Access to the practice of these organizations was facilitated by the ICRC delegations that maintain contacts with them.

State practice at the international level is reflected in a variety of sources, including resolutions adopted in the framework of the United Nations, in particular by the Security Council, General Assembly and Commission on Human Rights, ad hoc investigations conducted by the United Nations, the work of the International Law Commission and comments it elicited from governments, the work of the committees of the UN General Assembly, reports of the UN Secretary-General, thematic and country-specific procedures of the UN Commission on Human Rights, reporting procedures before the Human Rights Committee under the International Covenant on Civil and Political Rights, *travaux préparatoires* of treaties, and State submissions to international and regional courts.

International judicial decisions were also collected, where they provided evidence of the existence of rules of customary international law.

Research into ICRC archives

To complement the research into national and international sources, the ICRC looked into its own archives relating to nearly 40 recent armed conflicts, some 20 of which occurred in Africa, 8 in Asia, 8 in Europe and 2 in Latin America. In general, these conflicts were selected so that countries and conflicts not yet dealt with by a report on State practice would also be covered.

The result of this three-pronged approach, using national, international and ICRC sources, is that the Study cites practice from all parts of the world. In the nature of things, however, it cannot purport to be complete. Research for the study focused in particular on practice from the last 30 years to ensure that it would result in a restatement of contemporary customary international law, but the Study does cite older practice where still relevant.

Consolidation of research results

Upon completion of the research, all practice gathered was summarized and consolidated into separate chapters covering the different areas of the study. The six international research teams carried out this work, each team summarizing and consolidating the part for which it had been responsible. These consolidated practice chapters were subsequently edited, supplemented and updated by a group of ICRC researchers, and will be published in Volume II, "Practice". The reason for publishing such voluminous chapters is twofold. First, those consulting the study should be able to see for themselves on what basis it was decided that a certain rule of

customary international law exists. Each rule in Volume I refers to the chapter and section in Volume II where the practice can be found on which that rule is based. Secondly, it was considered useful to publish the wealth of information that has been compiled. Many practitioners and scholars will thus be able to use the practice gathered for their own professional purposes.

Consultations

In a first round of consultations, the ICRC invited the international research teams to produce an “executive summary” containing a preliminary assessment of which rules of customary international law were established by the practice collected. These executive summaries were discussed within the Steering Committee at three meetings in Geneva. On the basis of this first round of consultations, the “executive summaries” were updated, and during a second round of consultations, they were submitted to a group of academic and governmental experts from all geographic regions of the world, whom the ICRC invited to attend two meetings with the Steering Committee in their personal capacity (see Annex). During these two meetings in Geneva, the experts helped to evaluate the practice collected and indicated particular practice that had been missed.

Writing of the Study

The preliminary assessment by the Steering Committee, as reviewed by the group of academic and governmental experts, served as a basis for the writing of the Study. The authors, Louise Doswald-Beck and Jean-Marie Henckaerts, have re-examined practice, reassessed the existence of custom, reviewed the formulation and the order of the rules and drafted the commentaries. In so doing they have exercised due academic freedom. The final draft of the Study is currently submitted for a second reading to the Steering Committee and the group of academic and governmental experts and will be finalised on the basis of comments received during this second reading.

III. PURPOSE OF THE STUDY

The purpose of the study is to enhance respect for international humanitarian law and thus to offer greater protection to victims of war. A study on customary rules of international humanitarian law can contribute to this goal by completing the picture of rules of international humanitarian law that apply to armed conflicts.

One part of this picture, treaty law, is well defined, as it consists of written rules binding upon the States that have adhered to the treaties in question and, in the case of treaties applicable in non-international armed conflicts, are also binding upon armed opposition groups within those States. This part of international humanitarian law covers a wide variety of aspects of warfare, offering protection to victims of war and limiting the permissible means and methods of warfare.³

³ The four Geneva Conventions of 1949 and their Additional Protocols of 1977 provide an extensive regime for the protection of persons who are not or are no longer participating in armed conflict (the wounded, sick and shipwrecked, persons deprived of their freedom for reasons related to the conflict, and civilians). The regulation of the means and methods of warfare in treaty law goes back as far as the 1868 St Petersburg Declaration, the 1899 and 1907 Hague Conventions and the 1925 Geneva Gas Protocol, and has more recently been addressed in the 1972 Biological Weapons Convention, the 1977 Additional Protocols, the 1980 Convention on Certain Conventional Weapons and its four Protocols, the 1993 Chemical Weapons Convention and the 1997 Ottawa Convention banning anti-personnel landmines. The protection of cultural property in the event of armed conflict is regulated in detail in the 1954 Hague Convention and its two Protocols. The 1998 Statute of the International Criminal Court contains a list of war crimes

These treaties do not, however, bind States that have not ratified them. In the absence of such ratification, it is therefore very important to know which rules of customary IHL apply.

The wealth of treaty law that exists does not, however, regulate a large proportion of today's armed conflicts in sufficient detail. The primary reason is that the bulk of current armed conflicts are non-international, and hence subject to far fewer treaty rules than international conflicts, although the number of such rules is increasing.⁴ While common Article 3 of the 1949 Geneva Conventions is of fundamental importance, it only contains general principles, without adding much detail as to their meaning and implementation. Additional Protocol II usefully supplements common Article 3, but it is still less detailed than the rules governing international armed conflicts contained in Additional Protocol I. While the trend in recent years has been to make humanitarian law treaties applicable to both international and non-international armed conflicts, most of these treaties are not yet universally ratified and, as a result, it is important to know which rules of customary international humanitarian law exist, binding States not party to them.

Customary international law can thus fulfil a crucial role in bridging the gaps in the application of treaty law, gaps due to lack of ratification but also due to lack of substantive coverage.

Knowledge of the rules of customary international law will be of use to the many bodies involved in the application, dissemination and enforcement of international humanitarian law, such as governmental authorities, arms carriers, international organizations, members of the International Red Cross and Red Crescent Movement and non-governmental organizations. An authoritative study may also be helpful in reducing the uncertainties and the scope for argument inherent in the concept of customary international law.

Knowledge of the rules of customary international law may also be of service in a number of situations where reliance on customary rules is required. This is especially relevant to the work of courts and international organizations. Indeed, courts are frequently required to apply customary international law. This is the case, for example, for the International Criminal Tribunal for the Former Yugoslavia, which, pursuant to Article 3 of its Statute, has jurisdiction over violations of the laws and customs of war. As a result, the Tribunal has had to determine whether certain violations of international humanitarian law were violations under customary international law over which the Tribunal has jurisdiction. In many countries, furthermore, customary international law is a source of domestic law and can be invoked before and adjudicated by national courts. Customary international law is also relevant to the work of international organizations, in that it represents the law binding upon all their members. This point has been especially relevant to the drafting of such instruments as the lists of crimes in the statutes of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda. Similarly, the Statute of the International Criminal Court was negotiated on the understanding that it would codify the rules of customary international law relating to international crimes.

The study has revealed the tremendous amount of practice in the area of international humanitarian law – from military manuals and national legislation to action by the United Nations and the International Red Cross and Red Crescent Movement. It has also confirmed the deep impact and overall acceptance of the rules of the Additional Protocols. The study has shown that 25 years after their adoption, the essential rules of the Protocols have become part of customary international law and bind all states and all parties to all armed conflicts.

subject to its jurisdiction. The recruitment of children in armed forces and their participation in hostilities is regulated by the 1989 Convention on the Rights of the Child and its Protocol on the involvement of children in armed conflict.

⁴ In fact, only a limited number of treaties apply to non-international armed conflicts, namely the Convention on Certain Conventional Weapons, as amended, the Statute of the International Criminal Court (in part), the Amended Protocol II to the Convention on Certain Conventional Weapons concerning anti-personnel mines, the Chemical Weapons Convention, the Hague Convention on the protection of cultural property (in part) and its Second Protocol, and last but not least, Additional Protocol II and Article 3 common to the four Geneva Conventions.

Perhaps the most striking result of the study has been the number of rules it identifies that are today customary in non-international armed conflict. This is particularly true of the rules on the conduct of hostilities. The study has confirmed that the principle of distinction, the definition of military objectives, the prohibition of indiscriminate attacks, the principle of proportionality and the duty to take precautions in attack are all part of customary international law, regardless of the type of armed conflict involved.

The study has not, however, been limited to the conduct of hostilities. Not unexpectedly, it has also shown, for example, that the duty to respect and protect medical and religious personnel and objects, together with impartial humanitarian relief personnel and objects used for humanitarian relief operations, are rules of customary international law binding in all types of armed conflict. The same is true as regards the duty to protect cultural property and the natural environment. The Study also specifies the rules of customary international law applicable to the treatment of persons deprived of their liberty and the judicial guarantees that must be observed with respect to persons subject to criminal charges.

For all the benefits that the Study will hopefully bring, there is no doubt that its publication will in certain respects constitute the beginning of a process rather than an end. The Study will need to be periodically updated if it is to preserve its value. Much more importantly, the Study should make it possible to start consolidating the achievements of international humanitarian law common to all of mankind.

ANNEX

Steering Committee

The Steering Committee consisted of Professors Georges Abi-Saab, Salah El-Din Amer, Ove Bring, Eric David, John Dugard, Florentino Feliciano, Horst Fischer, Françoise Hampson, Theodor Meron, Djamchid Momtaz, Milan Šahović and Raúl Emilio Vinuesa.

National Research Teams

The reports on State practice were prepared by the following teams:

Algeria:

Professor Ahmed Laraba

Angola:

Professor Maurice Kamto, with the assistance of Albert Hilaire Anoubon Momo and André Ndomikolayi

Argentina:

Professor Raúl Emilio Vinuesa, with the assistance of Silvia Sandra Gonzalez Napolitano and Marta María Pastor

Australia:

Professor Timothy McCormack, with the assistance of Gideon Boas, Malcolm Langford, Colin Andrew Hatcher, Virginia Newell and Shahyar Rousha

Belgium:

Professor Eric David, with the assistance of Isabelle Kuntziger, Garlone Egels and Robert Remacle

Bosnia and Herzegovina:

Colonel Mugo Geć and Professor Liljana Mijović, with the assistance of Nedeljko Milijević

Botswana:

Professor Oagile Key Dingake

Brazil:

Professor Antônio Augusto Cançado Trindade

Canada:

Professor Katia Boustany, with the assistance of Maria Molina

Chile:

Professor Hernán Salinas Burgos, with the assistance of Daniela Kravetz

China:

Professor Tieya Wang, with the assistance of Professor Yong Zhang

Colombia:

Fabrizio López Sacconi, with the assistance of Raúl Hernández, Magaly Ramos, Sonia Torres and Mauricio Reyes

Croatia:

Professor Maja Seršić, with the assistance of Professor Ksenija Turković, Davorin Lapas and Ivica Kinder

Cuba:

Dr María de los Angeles de Varona Hernández

Egypt:

Professor Ahmed Abou El Wafa

El Salvador:

Professor Antônio Augusto Cançado Trindade, with the assistance of Cristina Zeledon

Ethiopia:

Professor Andreas Eshete, with the assistance of Alemu Brook

France:

Professor Paul Tavernier, with the assistance of Eloi Fillion, Claire Servoin, Karine Mollard-Bannelier, Davide Ferrarini, Dr Béatrice Maurer, Karine Christakis, Isabelle Capette, François Darribehaude, Sonia Parayre and Marianne Saracco

Germany:

Professor Horst Fischer, with the assistance of Dr Gregor Schotten and Dr Heike Spieker

India:

Professor Nripendra Lal Mitra, with the assistance of Dr Umesh Veeresh Kadam (research coordinator), Dr M. K. Nawaz, Dr S.V. Joga Rao, Dr V. Vijaya Kumar, M. K. Balachandran, T. S. Matilal and Rekha Chaturvedi

Indonesia:

Professor GPH. Haryomataram, with the assistance of Fadillah Agus, Kushartoyo Budisantoso, Aji Wibowo, Andrey Sujatmoko and Arlina Permanasari

Iran:

Professor Djamchid Momtaz, with the assistance of Farah Rahmani

Iraq:

Professor Mohammed Abdallah Ad-Douri, with the assistance of Dr Janan Sukker

Israel:

Professor Yoram Dinstein, with the assistance of Dr Fania Domb

Italy:

Professor Gabriella Venturini and Professor Paolo Benvenuti, with the assistance of Dr Enrico Casalini and Dr Marco Graziani

Japan:

Professor Hisakazu Fujita, with the assistance of Professor Akira Mayama, Yukiko Takashiba and Hiromi Yoshino

Jordan:

Professor Mohamed Yousef Olwan, with the assistance of Lieutenant-Colonel Muhannad Hijazi and Dr Ghazi ar-Rashdan

South Korea:

Professor Jae-Ho Sung, with the assistance of Dr Min-Hyo Lee

Kuwait:

Professor Eisa Al-Enezi

Lebanon:

Professor Hassan Kassem Jouni, with the assistance of George Khalil Saad and Abdelrahman Makki

Malaysia:

Professor Nurhalida binti Mohamed Khalil, with the assistance of Zalina binti Abdul Halim

Netherlands:

Anna Nuiten, under the supervision of Dr Gerard Tanja, Professor Frits Kalshoven, Hans Boddens Hosang, Katrien Coppens, Dr Liesbeth Lijnzaad and Hanneke van Sambeek

Nicaragua:

Professor Antônio Augusto Cançado Trindade, with the assistance of Cristina Zeledon

Nigeria:

Professor Amechi Uchegbu, with the assistance of Dr B. O. Okere and Muhammed T. Ladan.

Pakistan:

Ahmer Bilal Soofi, Esq.

Peru:

Professor Raúl Emilio Vinuesa, with the assistance of Silvina Sandra Gonzalez Napolitano, Marta María Pastor and Yesenia J. Cabezas Anicama

Philippines:

Professor Alberto T. Muyot, with the assistance of Joel P. Raquedan and Vincent Pepito F. Yambao, Jr.

Russia:

Professor Igor Pavlovitch Blishchenko (deceased), with the assistance of Professor Aslan Abashidze

Rwanda:

Professor Félicité Karomba, with the assistance of Straton Nsengiyumva

South Africa:

Professor Michael Cowling

Spain:

Dr José Luis Rodríguez-Villasante y Prieto, with the assistance of Manuel Fernández Gómez, Professor Dr Julio Jorge Urbina, Juan Manuel García Labajo, Juan Carlos González Barral, Vicente Otero Solana, Dr Gonzalo Jar Couselo, David Suárez Leoz, Dr Francisco Alonso Pérez, Sonia Hernández Prada, Professor Dr Manuel Pérez González, Fernando Pignatelli Meca, Javier Guisández Gómez and Federico Bordas

Syria:

Professor Muhammad Aziz Shukri, with the assistance of Dr Amal Yaziji and Maan Mahasen

United Kingdom:

Professor Françoise Hampson, with the assistance of Dr Jenny Kuper

United States of America:

Burrus M. Carnahan, with the assistance of Michael H. Hoffman and Professor Theodor Meron

Uruguay:

Professor Raúl Emilio Vinuesa, with the assistance of Silvina Sandra Gonzalez Napolitano and Marta Maria Pastor

Yugoslavia:

Professor Milan Šahović, with the assistance of Dejan Šahović, Dr Miodrag Starčević and Dr Bosko Jakovljević

Zimbabwe:

Professor Joel Zowa, with the assistance of Dr Lovemore Madhuku

International Research Teams

Principle of distinction:

Rapporteur: Georges Abi-Saab

Researcher: Jean-François Quéguiner

Specifically protected persons and objects:

Rapporteur: Horst Fischer

Researchers: Gregor Schotten and Heike Spieker

Specific methods of warfare:

Rapporteur: Theodor Meron

Researcher: Richard Desgagné

Weapons:

Rapporteur: Ove Bring

Researcher: Gustaf Lind

Treatment of civilians and persons hors de combat:

Rapporteur: Françoise Hampson

Researcher: Camille Giffard

Implementation:

Rapporteur: Eric David

Researcher: Richard Desgagné

Academic and governmental experts

The ICRC invited the following academic and governmental experts to participate in consultations with the Steering Committee, in their personal capacity:

Abdallah Ad-Douri (Iraq)
Paul Berman (United Kingdom)
Sadi Çayci (Turkey)
Michael Cowling (South Africa)
Edward Cummings (United States of America)
Antonio de Icaza (Mexico)
Yoram Dinstein (Israel)
Jean-Michel Favre (France)
William Fenrick (Canada)
Dieter Fleck (Germany)
Juan Carlos Gómez Ramírez (Colombia)
Jamshed A. Hamid (Pakistan)
Arturo Hernández-Basave (Mexico)
Ato Ibrahim Idriss (Ethiopia)
Hassan Kassem Jouni (Lebanon)
Kenneth Keith (New Zealand)
Githu Mugai (Kenya)
Rein Müllerson (Estonia)
Bara Niang (Senegal)
Mohamed Olwan (Jordan)
Raul C. Pangalangan (Philippines)
Stelios Perrakis (Greece)
Paulo Sergio Pinheiro (Brazil)
Arpád Prandler (Hungary)
Pemmaraju Sreenivasa Rao (India)
Camilo Reyes Rodríguez (Colombia)
Itse E. Sagay (Nigeria)
Harold Sandoval (Colombia)
Somboon Sangianbut (Thailand)
Marat A. Sarsembayev (Kazakhstan)
Muhammad Aziz Shukri (Syria)
Parlaungan Sihombing (Indonesia)
Geoffrey James Skillen (Australia)
Guoshun Sun (China)
Bakhtyar Tuzmukhamedov (Russia)
Carol Wolfke (Poland)