# Study on customary rules of international humanitarian law: Purpose, coverage and methodology

In December 1995 the 26th International Conference of the Red Cross and Red Crescent endorsed the recommendations drawn up by the Intergovernmental Group of Experts for the Protection for War Victims which had met, at the invitation of the Swiss government, on 23-27 January 1995 in Geneva. Recommendation II of this Group proposed that:

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

At the time of writing, most of the research for this report had been carried out and consultations had been held with academic and governmental experts. The ICRC is in the process of drawing up the final report to be ready in spring of the year 2000.

The purpose of this article is to explain the purpose of the study, the areas of international humanitarian law covered and the methodology. An examination of the substantive content of the report as such is beyond the scope of this article given that the report is not yet finalised. However, a few observations concerning substantive issues will be made at the end of this comment.

## Purpose of the study

Treaty law and customary international law are the main sources of international law. In the area of international humanitarian law, treaty law is well developed in general (see, for instance, the four Geneva Conventions of 1949 and their two Additional Protocols of 1977). However, there are few treaty rules regulating non-international conflicts. In fact, in situations not

1 Meeting of the Intergovernmental Group of Experts for the Protection for War Victims (Geneva, 23-27 January 1995), Recommendation II, *IRRC*, No. 310, January-February 1996, p. 84, and International humanitarian law: From law to action. Report on the follow-up to the International Conference for the Protection of War Victims, Resolution 1 of the 26th International Conference of the Red Cross and Red Crescent (Geneva, 1995), *ibid.*, p. 58.

covered by Additional Protocol II, there is only one general article covering non-international armed conflict, namely Article 3 common to the four Geneva Conventions of 1949. While Article 3 is extremely useful, it is far from complete. For example, it is virtually silent on questions relating to the conduct of hostilities. Additional treaty law could not easily fill this gap because it would be extremely difficult and time-consuming to have States adopt a new treaty on non-international conflicts which would still need States' ratification to enter into force. The idea therefore arose to look into the other source of international law, namely customary international law, which has the additional advantage that as such it binds all States. While many States had wished the ICRC to concentrate its efforts on research into rules of customary international law concerning non-international armed conflict, in the end it was mandated to study these rules with respect to both international and non-international armed conflict.

The study may be useful for many purposes. Below are a few examples of its possible uses:

1. Rules of customary international law apply to all States. As a result, the rules that have been identified as customary international law have to be respected by every State. This will be particularly useful in cases where States have not ratified the 1977 Additional Protocols or in the event of non-international armed conflict, an area where few treaty rules exist, as explained above.

2. The study can also be used to convince governments to ratify certain treaties. If it is shown that certain rules are already customary international law, States should be less hesitant to ratify treaties containing those rules.

3. The study can serve as a dissemination tool. Customary international law takes into account the practice and legal opinion of States around the world and is therefore culturally neutral, so to speak.

4. The study could serve as a basis for the drafting of other documents, such as a revised document on the essential rules of international humanitarian law.

5. The study can be useful for the military. Military manuals should not fall below the standards set by customary international law. Military training should be based at least on these same standards.

6. International (criminal) tribunals which have to apply customary international law could use the study. National courts could also use

it because customary international law is a source of law in many domestic legal systems. Counsel appearing before these courts could also rely on the study.

7. The study will also serve to indicate areas of international humanitarian where there is no agreement and areas where the situation is unclear. These areas may be identified as deserving particular attention from the international community in the coming years.

### Areas of international humanitarian law covered by the study

For research purposes the study was divided into six parts:

- principle of distinction
- methods of warfare
- use of weapons
- specific protection regimes
- treatment of persons and human rights law applicable in armed conflict
- accountability and implementation.

The part on the principle of distinction deals not only with the distinction between combatants and civilians and between military objectives and civilian objects but also with the notions of proportionality in attack, precautions in attack, precautions against the effects of attacks, and the protection of undefended areas and works and installations containing dangerous forces. The second part, on methods of warfare, deals with issues such as the duty to give quarter, prohibition of pillage, perfidy, improper use of emblems and uniforms, protection of medical and religious personnel and belligerent reprisals. The third part, on the use of weapons, looks at the general concepts of the prohibition of weapons of a nature to cause unnecessary suffering or superfluous injury and of weapons that are by nature indiscriminate as well as at specific prohibitions of and restrictions on the use of certain weapons. The fourth part, on certain specific protection regimes, deals with the protection of the civilian population against starvation and the corollary protection of relief personnel and objects. In addition, it examines the protection of cultural and religious objects and the environment. The fifth part covers the treatment of wounded, sick and dead persons, missing persons, persons in detention and displaced persons. It also contains a section on human rights law practice relating to the treatment of persons in armed conflict.

Finally, the sixth part, on accountability and implementation, covers aspects of both State and individual responsibility for violations of international humanitarian law. It also includes a section on education for armed forces and civilians on humanitarian law.

This structure was selected solely for research purposes, in order to achieve a reasonable and even distribution of work, rather than for reasons of strict logic. The final report will not necessarily follow the same order.

(a) International and non-international armed conflict

In the report, each issue will be analysed in order to establish which specific rules are customary law applicable in international armed conflict and whether they are also recognised in non-international armed conflict. At this moment it appears that some rules will only relate to non-international armed conflict.

The rules of the 1949 Geneva Conventions on international armed conflict were not researched because they can be assumed to represent customary international law. In any event, with 188 States Parties such a study would be both difficult and less important. In addition, the 1907 Hague Conventions were not researched with respect to international armed conflict either, as the Nuremberg Tribunal specifically stated that they are customary international law.

(b) Naval warfare

Naval warfare was not included in the study because this area of law was recently the subject of a major restatement, namely the San Remo Manual on International Law Applicable to Armed Conflicts at Sea.[2] A reference to the Manual and its commentary were deemed sufficient by the Steering Committee.

(c) International human rights law

Although the mandate given to the ICRC mentioned only international humanitarian law, behaviour in armed conflict is often analysed in human rights fora which sometimes refer directly to "international humanitarian law", while others do not. Such practice was included in the research as it can provide supporting evidence when the customary status of humanitarian law rules is uncertain or the rules are ill-defined. For example, human rights practice can help to clarify concepts which are only vaguely defined under international humanitarian law, such as the concept of torture. The

2 *Ibid.*

objective in this case is not to establish independent principles of customary international law but to identify norms of human rights law and evidence of human rights practice which support, strengthen and clarify analogous humanitarian law principles.

In addition, it was decided by the Steering Committee, and widely supported by the governmental experts, that it would be appropriate to include in the report a separate section on human rights practice because, in situations of armed conflict, human rights law may apply independently of humanitarian law,. Although human rights treaties recognise that States may be faced with situations in which they will be unable to fulfil all their obligations and therefore permit derogation from certain rights, human rights law does not cease to apply during armed conflict. Moreover, there are certain rights which are so fundamental that they may never be restricted or derogated from. The study will seek to identify these so-called "non-derogable" rights in customary international law.

## Methodology

To determine the best way of fulfilling the task entrusted to it, the ICRC consulted a group of academic experts in international humanitarian law who formed the Steering Committee of the study.[3]

Unlike treaty law, customary international law is not written. To prove that a certain rule is customary one has to show that it is reflected in State practice and that there exists a conviction in the international community that such practice is required as a matter of law. In this context, "practice" relates to official State practice and therefore includes formal statements by States. A contrary practice by some States is possible as long as this contrary practice is condemned by other States or denied by the government itself. Through such condemnation or denial the original rule is actually confirmed. State practice in this context does not mean age-old practice. In gen-

3 The members of the Steering Committee are Georges Abi-Saab, Graduate Institute of International Studies, Geneva; Salah El-Din Amer, Faculty of Law, Cairo University; Ove Bring, Faculty of Law, University of Stockholm; Éric David, Centre de droit international, Université Libre de Bruxelles; John Dugard, Faculty of Law, University of Leiden; Florentino Feliciano, Appelate Body, World Trade Organization, Geneva; Horst Fischer, Institute for International Peacekeeping Law and Humanitarian Law, Ruhr-University, Bochum; Françoise Hampson, Department of Law, University of Essex, Colchester (U.K.); Theodor Meron, School of Law, New York University; Djamchid Momtaz, Faculty of Law, Tehran University; Milan Sahovic, Center for Human Rights, Belgrade; Raúl Emilio Vinuesa, Faculty of Law, University of Buenos Aires.

eral, research for the study has focused on State practice during the last twenty years. Customary international law can emerge in an even shorter period of time.

*Opinio juris* and State practice were examined in relation to certain themes rather than taking treaty rules one by one to establish whether they represent customary law. This is likely to lead to a report which will indicate not only general principles of customary law but also detailed rules that can be shown to be customary. A more detailed explanation will be provided in the introduction to the study of the exact method and criteria used to determine whether a rule is part of customary international law or not. In general, it can be said that the Steering Committee and the ICRC opted for a classic approach as set out, in large part, by the International Court of Justice in the North Sea Continental Shelf Cases.[4]

The research was conducted using both national and international sources reflecting State practice (*usus*) and/or legal opinion (*opinio juris*). The measure of access to these various sources largely explains the research method adopted.

(a) Research into national sources

Since national sources are more easily accessible within a country, it was decided to seek the cooperation of national researchers who would prepare national practice reports. The national reports cover all areas of humanitarian law included in the study and are drawn up according to a structure that was established for research purposes.

The sources of State practice and legal opinion collected by the national researchers include diplomatic correspondence, policy statements (both to national and to international bodies), opinions of official legal advisers, police manuals, military manuals, orders to armed and security forces, military communiqués during war, executive decisions and practices, legislation, judicial decisions, government responses and comments when making reservations to treaties or when refusing to adopt, sign, or ratify a treaty, official government responses to NGO allegations and to international organisations, and, if necessary, press releases. Indeed, press releases were only used as a barometer of public opinion (see the Martens Clause) in relation

4 North Sea Continental Shelf Cases (Fed. Rep. Germany v. Denmark, Fed. Rep. Germany v. Netherlands), I.C.J. Reports 1969, p. 3.

to certain serious and important events, not as a source for the determination of customary rules of international law.

It is practically impossible to carry out research into the national sources of each and every country in the world. A selection was therefore made of some 50 countries whose national source material was researched thoroughly by one or more national researchers at the invitation of the ICRC. These 50 countries were selected by the Steering Committee on the basis of geographic representation as well as on the basis of recent experience with armed conflict. In the end, national reports were prepared concerning nine countries in Africa, eleven in the Americas, nine in Asia, twelve in Europe, and nine in the Middle East. Significant practice of other countries was identified through research into international sources and ICRC archives.

(b) Research into international sources

International practice is reflected in a variety of sources: resolutions adopted in the framework of the United Nations (in particular the Security Council, the General Assembly, and the Commission on Human Rights), United Nations ad hoc investigations, the work of the International Law Commission and comments it elicited from governments, the work of the Sixth Committee of the UN General Assembly, reports of the 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, the practice of international organisations, the findings of specialised institutes, State submissions to international and regional courts, international court decisions, and press releases and NGO statements if needed.

A special effort was made to record the practice of regional organisations, including regional international courts. These organisations include the Organization of American States, the Organization of African Unity, the League of Arab States, the Organization of the Islamic Conference, the Gulf Cooperation Council, the Council of Europe, the European Union, the Organization for Security and Cooperation in Europe, and the Commonwealth of Independent States. The practice of the Non-Aligned Movement was also taken into account. Research into these international sources was conducted by six teams, each of which concentrated on one of the six parts of the study.

(c) Research into ICRC archives

To complement the investigation of national and international sources, two ICRC researchers collected material from the ICRC archives relating to nearly forty recent armed conflicts, some twenty of which occurred in Africa, six in Asia, eight in Europe, two in Latin America and two in the Middle East. In general, these conflicts were selected to complement national research so that other countries and conflicts could also be covered.

(d) Consolidation of the research

Upon the completion of their research, the six teams consolidated the results. This means, for example, that with respect to the chapter on the principle of distinction all national, international and ICRC archive material was summarised and consolidated in one document. So far, this has resulted in six consolidated reports containing a structured summary of State practice, together with six executive summaries giving a preliminary assessment by the Steering Committee as to what appears to be customary law, followed by brief explanations. The executive summaries are based on the consolidated reports and follow the same structure. The Steering Committee discussed these six draft reports and executive summaries during three meetings which took place in 1998.

(e) Consultation with government experts

In 1999 two meetings of some 50 governmental and academic experts were held to discuss the preliminary assessment of the Steering Committee contained in the executive summaries. Both meetings were fruitful and constructive, and in general the study was well received. The methodology was largely approved and the Steering Committee's evaluation was generally confirmed. The tendency was to extend the application of the customary rules to non-international conflict rather than to limit their applicability to international conflicts.

**Publication**

The ICRC will now draft the final report and inform the 27th International Conference of the Red Cross and Red Crescent (31 October - 6 November 1999) of the progress made. The report, together with a summary of the collected State practice, will be published in early 2000.

The report itself will contain three elements: (1) a description of the methodology including an explanation of how the customary law status of rules was established; (2) the rules of international humanitarian law

which were found to be customary together with a commentary, including an explanation as to why this conclusion was reached; and (3), as recommended by the experts consulted, an indication of trends in the development of customary international law where uncertainty exists whether a certain rule has already crystallised into customary international law.

It was also decided that the compilation of State practice, as contained in the consolidated reports, should be published, as an annex to the report. The reason for this is twofold. First, anyone consulting the study should be able to see on what grounds it was decided that a certain rule is of a customary character. For each rule, reference will be made to the practice on which the decision is based. Secondly, for practical reasons it was considered useful to publish the wealth of information that has been compiled rather than just to file it. Many researchers, for example, will thus be able to use the practice gathered for their own purposes. As a result, the report should be published in one large volume together with the consolidated reports of State practice. An off-print should also be made available containing only the study as such, without the consolidated reports of State practice.

### Some initial results

Although it goes beyond the scope of this short comment, some mention should be made of the content of the final report. The first conclusion is that there are more rules of customary international law relating to non-international armed conflict than originally expected. Given the particular characteristics of non-international armed conflicts, there are even such rules which apply specifically thereto. Secondly, there are some areas where practice is unclear or too varied to find a rule of customary international law. This was especially the case for some detailed rules which interpret the principle of distinction. Finally, a further remarkable fact is the increasing influence of other areas of international law on humanitarian law, such as international human rights law and international environmental law. Governmental experts, in particular, urged the ICRC not too loose sight of these other branches of international law.

JEAN-MARIE HENCKAERTS
ICRC Legal Division