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**COUNCIL OF DELEGATES
OF THE INTERNATIONAL RED CROSS
AND RED CRESCENT MOVEMENT**

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International Humanitarian Law

**BACKGROUND REPORT
(PART II – CUSTOMARY INTERNATIONAL HUMANITARIAN LAW)**

**Document prepared by the International Committee of the Red Cross
in consultation with the British Red Cross**

Geneva, September 2017

EXECUTIVE SUMMARY

This background report is submitted in support of a draft Council of Delegates resolution entitled “International humanitarian law”. The proposed resolution has two main parts: (I) an update on the work being undertaken to implement Resolution 1 (“Strengthening international humanitarian law protecting persons deprived of their liberty”) and Resolution 2 (“Strengthening compliance with international humanitarian law”) of the 32nd International Conference of the Red Cross and Red Crescent (International Conference); and (II) an update on the work being carried out on customary international humanitarian law (IHL).

Part II of this background report, on customary IHL, has been prepared by the International Committee of the Red Cross (ICRC) in consultation with the British Red Cross.

In 2005, based on a mandate given to the ICRC in 1995 by the 26th International Conference, the study on customary IHL was published. Volume I (“Rules”) of the study identified 161 rules of customary IHL, as applicable in international or non-international armed conflicts. Volume II (“Practice”) of the study made accessible the materials collected in preparation of the study.

Since new practice in the field of IHL emerges continuously, the ICRC decided to keep the study’s practice collection updated and, in 2007, entered into a partnership with the British Red Cross for that purpose. This year, 2017, marks ten years since the beginning of that joint work.

Other National Societies have also generously supported the practice update with collections of national practice over the last decade, thus making an important contribution to the range and quality of the practice available. Their contributions complement the national practice collected by ICRC delegations worldwide.

Since 2010, the full content of the 2005 study and regular practice updates have been available on the ICRC’s online [customary IHL database](#).

Customary international law, which – as described in Article 38(1)(b) of the Statute of the International Court of Justice – derives from “a general practice accepted as law”, is a primary source of international law, like treaty law. Customary IHL can fill gaps in IHL treaties that may arise, for example, when an IHL treaty is not applicable in a given armed conflict or when applicable treaty law does not address specific issues. Customary IHL is therefore a critical component in the regulation of contemporary armed conflicts and the protection of their victims.

The customary IHL study, which identified core rules of customary IHL and presented the practice underpinning them, and the customary IHL database, which provides easy access to the study as well as regular practice updates, facilitate the identification and application of customary IHL. They are widely used today in both national and international contexts. The study and database are also essential reference tools in the ICRC’s day-to-day work.

With regard to customary IHL, the proposed resolution therefore notes the continuing importance of customary IHL in the regulation of contemporary armed conflicts and the protection of victims, and thanks the components of the International Red Cross and Red Crescent Movement for their ongoing contributions to the work on customary IHL.

1) INTRODUCTION

Based on a mandate given to the International Committee of the Red Cross (ICRC) by the 26th International Conference of the Red Cross and Red Crescent (International Conference) in 1995, the study on customary international humanitarian law (IHL) was published in 2005. Since 2010, the full content of the study, as well as regular updates to its practice section, have been readily accessible on the online [customary IHL database](#).¹ Many components of the International Red Cross and Red Crescent Movement (Movement), notably numerous National Societies, are contributing to making this practice update possible.

Customary IHL is today as vital as ever to the regulation of contemporary armed conflicts and the protection of their victims. The study and database on customary IHL are key contributions to the discourse on customary IHL and on IHL more widely.

The proposed resolution on IHL recognizes this and expresses appreciation to all the components of the Movement involved for their contributions to the work on customary IHL.

2) BACKGROUND

The International Conference for the Protection of War Victims, held in Geneva in 1993, reaffirmed in its Final Declaration “the necessity to make the implementation of IHL 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”.² The Intergovernmental Group of Experts for the Protection of War Victims, convened accordingly in Geneva in January 1995, made the following recommendation, among others:

[T]he ICRC be invited to prepare, with the assistance of experts in IHL representing various geographical regions and different legal systems, and in consultation with experts from governments and international organizations, 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.³

In December 1995, the 26th International Conference endorsed the recommendations of the Intergovernmental Group of Experts and urged the ICRC to carry out the tasks entrusted to it by the recommendations, thus officially mandating it to prepare a “report on customary rules of IHL”.⁴

In 2003, the 28th International Conference, in operative paragraph 12 of Resolution 1 (“Adoption of the declaration and agenda for humanitarian action”) “*note[d] with appreciation* the efforts undertaken by the ICRC to conduct the study on customary international humanitarian law and *request[ed]* the ICRC to continue its work and to report to the International Conference in 2007”.⁵

¹ <https://ihl-databases.icrc.org/customary-ihl/eng/docs/home> (all web addresses accessed July 2017)

² <https://www.icrc.org/eng/resources/documents/misc/57jms8.htm>

³ <https://www.icrc.org/eng/resources/documents/article/other/57jmbm.htm>

⁴ See Resolution 1 of the 26th International Conference, operative paragraphs 4 and 8:

<https://www.icrc.org/eng/resources/documents/article/other/57jmvh.htm>

⁵ <https://www.icrc.org/eng/resources/documents/publication/p1103.htm>

In 2005, after extensive worldwide research and consultation, the study was published.⁶ It consists of two volumes. Volume I (“Rules”) lists the 161 rules of customary IHL identified by the study, with commentaries thereto. Volume II (“Practice”) makes accessible the material collected in preparation of the study.

The publication of the study was marked by Resolution 1 (“Customary international humanitarian law”) of the 2005 Council of Delegates,⁷ which, in its operative paragraphs:

- 1 *welcome[d]* the study on customary international humanitarian law published by the ICRC as an important contribution to the protection of war victims;
- 2 *recommend[ed]* the study to all components of the Movement as a basis for discussion, where relevant, with national authorities, armed forces, academic circles and parties to an armed conflict;
- 3 *invite[d]* National Societies, to the extent of their capacities, to disseminate the findings of the study as widely as possible.

In 2007, as requested by the 28th International Conference, the ICRC submitted a report entitled *Study on Customary International Humanitarian Law* to the 30th International Conference.⁸ The report covered the origin of the study, how the work was conducted, the study’s main conclusions, the promotion of the study and the initiation of a joint project with the British Red Cross to update the practice section of the study. The 30th International Conference, in operative paragraph 8 of Resolution 1 (“Together for humanity”),⁹ subsequently “*thank[ed]* the ICRC for its comprehensive work on the study on customary international humanitarian law and for initiating, with the British Red Cross, the updating of the ‘practice’ volume of the study”.

3) ANALYSIS / PROGRESS

3.1. Update of the study’s practice section

Since 2007, a joint British Red Cross–ICRC research team based at the Lauterpacht Centre for International Law in Cambridge, United Kingdom, has been working on the update of the practice section of the study. The British Red Cross has also continuously supported the practice update by contributing information regarding the United Kingdom’s national practice in the area of IHL.

In addition, other National Societies, including the Austrian, Belgian, Czech, Danish, Finnish, French, German, Hellenic, Hungarian, Irish, Italian, Netherlands, Norwegian, Polish, Romanian, Spanish, Swedish and Swiss Red Cross Societies, have supported the practice updates, sometimes in cooperation with their national IHL committees. They either research, collect and, as relevant, translate the national practice of their respective countries themselves,

⁶ Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Cambridge University Press, ICRC, 2005.

⁷ <https://www.icrc.org/eng/resources/documents/resolution/council-of-delegates-resolutions-181105.htm>

⁸ https://www.icrc.org/eng/assets/files/other/30ic_8-3_customaryihl_report_final_eng.pdf

⁹ <https://www.icrc.org/eng/resources/documents/resolution/30-international-conference-resolution-1-2007.htm>

or endorse the contributions of independent national researchers. Their generous support is an essential factor in ensuring the scope and quality of the practice updates.¹⁰

Any further such support in the future, including from other National Societies, would be warmly welcomed.

The contributions from National Societies complement the national practice collected by ICRC delegations worldwide, often in cooperation with national partners and experts. Overall, the ICRC currently aims to collect the national practice of 106 countries. These countries have been chosen to ensure a geographical representation that is as wide as possible, to represent different types of legal systems and to reflect various experience with matters of IHL and situations of armed conflict.

In addition to national practice (such as that set out in military manuals, national legislation, national case law, and other national practice such as official government reports or high-level statements), the updates to the customary IHL study's practice section since 2007 have included international materials, by analysing, for example, decisions of international courts and tribunals. A research team at the International Criminal and Humanitarian Law Clinic at Laval University in Canada has been contributing to the analysis of such materials since 2014.

The full content of the 2005 study and the updates to its practice section have been freely available on the ICRC's customary IHL database since 2010. The database is easy to navigate and search, using a strong search engine that is linked to the ICRC's other IHL databases. It is intended to make the rules of customary IHL identified in the 2005 study and the related – regularly updated – practice as readily accessible as possible. A particular effort is being made to reduce the time between the emergence of relevant practice and its integration in the customary IHL database.

3.2. How the customary IHL study and database have been used and received

Since the publication of the customary IHL study in 2005 and the creation of the database in 2010, they have not only become an essential reference in the daily work of the ICRC, but have also been used by a wide range of other actors, including, for example, armed forces,¹¹ national and international courts,¹² and United Nations panels of experts.¹³ Both the rules

¹⁰ National Societies also, for example, made an important contribution to the translations of the summary of the study (including the list of rules), which first appeared in the *International Review of the Red Cross* in March 2005: <https://www.icrc.org/en/document/customary-international-humanitarian-law-rules-all-language>

¹¹ See e.g. Colombia's *Manual de Derecho Operacional (Manual on Operational Law)*, issued by the Comando General de las Fuerzas Militares (General Command of the Armed Forces), Republic of Colombia, 2009, pp. 37–40, 42–47 and 52–56.

¹² See e.g. Israel, The Supreme Court sitting as the High Court of Justice, *The Public Committee against Torture in Israel and Others v. The Government of Israel and Others*, HCJ 769/ 02, 13 December 2006, paras 23, 29–30 and 41–42; and ICTY, Trial Chamber, *Prosecutor v. Gotovina and others*, Judgement of 15 April 2011, para. 1779.

¹³ See e.g. the *Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka*, 31 March 2011, paras 183, 194, 196, 200–201, 203–204, 207, 211, 215–218, 237, 239–241, 246 and 268. For a detailed overview of references to the study and database, see Jean-Marie Henckaerts and Els Debuf, "The ICRC and the clarification of customary international humanitarian law", in Brian D. Lepard (ed.), *Reexamining Customary International Law*, Cambridge University Press, 2017, pp. 168–178.

identified in the 2005 study (Volume I) and the practice section, updated and available on the database, are being relied upon.¹⁴

The statistics on the use of the customary IHL database – of both the rules section and the updated practice section – is further evidence of the critical importance of customary IHL. Since the database went online in 2010, there has been a 542% increase in views of the database, with the number of views in 2016 reaching 727,968.¹⁵ The statistics also show that the database is accessed worldwide, including from countries with various links to situations of armed conflict. The information most accessed reflects issues that are at the core of IHL and current debate, such as the definition of war crimes, collective punishment, the principle of distinction, the definition of combatants and the principle of proportionality.

The recourse to and evident interest in customary IHL by various actors demonstrate that customary IHL remains a critical component in the legal regulation of contemporary armed conflicts and the protection of their victims. IHL is today extensively codified in treaties. The 1949 Geneva Conventions have been universally ratified or acceded to, and significant numbers of States are party to the 1977 Protocols I and II additional to the Geneva Conventions.¹⁶ Nevertheless, as a source of international law that derives from “general practice accepted as law”¹⁷ and does not depend on acts of ratification or accession for its binding force, customary law can fill gaps in treaty law. In the area of IHL, such gaps may arise, for example, when an IHL treaty is not applicable in a given armed conflict (because of a lack of ratification or accession, or in view of a treaty’s particular applicability conditions, as in the case of Additional Protocol II), or when applicable treaty law does not address specific issues. The latter is of particular importance in the case of non-international armed conflicts – the predominant type of armed conflict today. IHL treaty law governing non-international armed conflict does contain crucial provisions, notably in the form of Article 3 common to the 1949 Geneva Conventions, and Additional Protocol II. However, in comparison to IHL treaty law for international armed conflicts, it is much less detailed and comprehensive. Customary IHL therefore remains vital in governing contemporary armed conflicts.

The fact that, as evidenced above, the customary IHL study and database are widely relied on for information on customary IHL and practice in the field of IHL is a strong indication that, as hoped when the work on them was begun, they are regarded as useful references.¹⁸

¹⁴ See e.g. United Kingdom, Supreme Court, *Abd Ali Hameed Al-Waheed (Appellant) v. Ministry of Defence (Respondent)*, *Serdar Mohammed (Respondent) v. Ministry of Defence (Appellant)*, Judgment of 17 January 2017: Lord Reed (dissenting) (with whom Lord Kerr agrees), para. 311, referring to 2007 German national practice in the customary IHL database: <https://www.supremecourt.uk/cases/docs/uksc-2014-0219-judgment.pdf>

¹⁵ By way of comparison, the ICRC’s treaty database in English was accessed 1,115,291 times in 2016.

¹⁶ For an overview of the States party to the main treaties: http://ihl-databases.icrc.org/applic/ihl/ihl.nsf/xsp/.ibmmodres/domino/OpenAttachment/applic/ihl/ihl.nsf/4B377401045736E0C12580A300505F5B/%24File/IHL_and_other_related_Treaties.pdf?Open

¹⁷ Statute of the International Court of Justice, Article 38(1)(b).

¹⁸ This is notwithstanding concerns expressed with regard to the study, which provided an opportunity for important and welcome exchanges, see e.g. John B. Bellinger III and William J. Haynes II, “A US government response to the International Committee of the Red Cross study *Customary International Humanitarian Law*”, *International Review of the Red Cross*, Vol. 89, No. 866, June 2007, p. 443–471: <https://www.icrc.org/en/international-review/article/us-government-response-international-committee-red-cross-study>; and Jean-Marie Henckaerts, “*Customary International Humanitarian Law: a response to US comments*”, *International Review of the Red Cross*, Vol. 89, No. 866, June 2007, pp. 473–488: <https://www.icrc.org/en/international-review/article/customary-international-humanitarian-law-response-us-comments>

The value of the customary IHL database was also recognized when, in 2015, it was unanimously chosen by the American Society of International Law's International Legal Research Interest Group to receive the inaugural Jus Gentium Research Award.¹⁹ Moreover, in 2016, the United Nations General Assembly, in its biennial resolution entitled "Status of the Protocols Additional to the Geneva Conventions and relating to the protection of victims of armed conflict", included a reference welcoming the efforts to regularly update the customary IHL database.²⁰

Customary international law more generally is, at present, widely discussed. In mid 2016, the International Law Commission adopted, at first reading, its draft conclusions on the identification of customary international law, with commentaries thereto.²¹ In doing so, it faced many of the same methodological questions that the customary IHL study had also had to address. The approach taken by the study – starting more than 20 years ago – closely corresponds to the approach now adopted by the International Law Commission.²²

4) CONCLUSION

More than twenty years have passed since, in 1995, the 26th International Conference mandated the ICRC to prepare 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". More than ten years have passed since the publication of the study on customary IHL in 2005. The customary IHL database has been online since 2010.

Customary IHL and the customary IHL tools that are available to the international community thanks to the work of the components of the Movement are as relevant as ever. As underlined in Dr Yves Sandoz's foreword to the study in 2005:

The study is a still photograph of reality, taken with great concern for absolute honesty, that is, without trying to make the law say what one wishes it would say. I am convinced that this is what lends the study international credibility. But though it represents the truest possible reflection of reality, the study makes no claim to be the final word. (...) May it be read, discussed and commented on. May it prompt renewed examination of international humanitarian law and of the means of bringing about greater compliance and of developing the law. (...) The study on customary international humanitarian law is more than the record of a worthy project – it is above all a challenge for the future.

It is against this backdrop that the part of the proposed resolution on IHL that relates to customary IHL notes the continuing importance of customary IHL to the regulation of contemporary armed conflicts, emphasizes the customary IHL study as an important contribution to the protection of victims of armed conflict, recommends the study and database to the components of the Movement as a basis for discussion, and expresses appreciation to all components of the Movement involved in the ongoing update of the study's practice section.

¹⁹ <http://intercrossblog.icrc.org/blog/icrc-customary-law-database-wins-first-ever-jus-gentium-award?rq=jus%20gentium>

²⁰ http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/71/144

²¹ See *Report of the International Law Commission*, Sixty-eighth session (2 May–10 June and 4 July–12 August 2016), General Assembly, Official Records, Seventy-first session, Supplement No. 10 (A/71/10), United Nations, New York, 2016, "Chapter V. Identification of customary international law", pp. 74–117: <http://legal.un.org/ilc/reports/2016/>

²² See e.g. the International Law Commission's draft conclusion 6 ("Forms of practice"), noting that practice "may take a wide range of forms", that it "includes both physical and verbal acts", and that there "is no predetermined hierarchy among the various forms of practice"; the commentary thereto notes further that "it is now generally accepted that verbal conduct (whether written or oral) may count as practice".