**Customary international humanitarian law: questions & answers**

**15-08-2005**

**International Committee of the Red Cross**

**https://www.icrc.org/eng/resources/documents/misc/customary-law-q-and-a-150805.htm#a6**

**Based on extensive research, a 5000-page study by the ICRC has identified 161 rules which were found to be customary today. The ICRC was mandated by States to undertake this study in order to contribute to the clarification of the content of customary humanitarian law, by definition a body of unwritten rules.**

The organisation took this task very seriously and spent 8 years on research and expert consultations in order to produce this study. It seeks to provide a snapshot of custom today that is as accurate as possible. It is the result of the most comprehensive and thorough study of its kind to date. The study should not be seen, however, as the final word on custom because it is not exhaustive and the formation of customary law is an ongoing process. Nonetheless, the study constitutes an important tool for anyone involved with humanitarian law.

This text is for general information purposes only. For a more detailed analysis of the study and its implications, see the [article](https://www.icrc.org/eng/resources/documents/article/review/review-857-p175.jsp) in the International Review by Jean-Marie Henckaerts.

Questions

  [1.What is customary international law?](https://www.icrc.org/eng/resources/documents/misc/customary-law-q-and-a-150805.htm#a1)

  [2.Why was the study on customary international humanitarian law carried out?](https://www.icrc.org/eng/resources/documents/misc/customary-law-q-and-a-150805.htm#a2)

  [3.What does customary international humanitarian law add to existing treaty law?](https://www.icrc.org/eng/resources/documents/misc/customary-law-q-and-a-150805.htm#a3)

  [4.What difference does the study on customary international humanitarian law make for victims?](https://www.icrc.org/eng/resources/documents/misc/customary-law-q-and-a-150805.htm#a4)

  [5.Why is customary international law binding?](https://www.icrc.org/eng/resources/documents/misc/customary-law-q-and-a-150805.htm#a5)

  [6.Who is bound by customary international humanitarian law?](https://www.icrc.org/eng/resources/documents/misc/customary-law-q-and-a-150805.htm#a6)

  [7. If a rule is repeatedly broken can it still be considered part of customary law?](https://www.icrc.org/eng/resources/documents/misc/customary-law-q-and-a-150805.htm#a7)

  [8.How is customary international law enforced?](https://www.icrc.org/eng/resources/documents/misc/customary-law-q-and-a-150805.htm#a8)

  [9.How has the study been organized?](https://www.icrc.org/eng/resources/documents/misc/customary-law-q-and-a-150805.htm#a9)

  [10. How has the assessment of the practice been carried out?](https://www.icrc.org/eng/resources/documents/misc/customary-law-q-and-a-150805.htm#a10)

  [11. By whom can the study be used?](https://www.icrc.org/eng/resources/documents/misc/customary-law-q-and-a-150805.htm#a11)

  [12. How does the ICRC intend to use this study?](https://www.icrc.org/eng/resources/documents/misc/customary-law-q-and-a-150805.htm#a12)

 **1. What is customary international law?**

Both treaty law and customary international law are sources of international law. Treaties, such as the four Geneva Conventions of 1949, are written conventions in which States formally establish certain rules. Treaties bind only those States which have expressed their consent to be bound by them, usually through ratification.

Customary international law, on the other hand, derives from " a general practice accepted as law " . Such practice can be found in official accounts of military operations but is also reflected in a variety of other official documents, including military manuals, national legislation and case law. The requirement that this practice be " accepted as law " is often referred to as " opinio juris " . This characteristic sets practices required by law apart from practices followed as a matter of policy, for example.



 **2. Why was the study on customary international humanitarian law carried out?**

Rules of customary international law are unwritten and research into State practice is required to determine their existence. For this reason, the 26th International Conference of the Red Cross and Red Crescent, held in December 1995, requested the ICRC to carry out a study in order to identify, and consequently facilitate the application, of existing rules of customary international humanitarian law.

Therefore, the study does not create new rules of international humanitarian law but rather seeks to provide the most accurate snapshot of existing rules of customary international humanitarian law.



 **3. What does customary international humanitarian law add to existing treaty law?**

While the four Geneva Conventions of 1949 have been ratified universally, other treaties of international humanitarian law have not. This is the case, for example, of the 1977 Additional Protocols to the Geneva Conventions. The study shows, however, that a number of rules and principles contained in these treaties also exist under customary law, such as a significant number of rules governing the conduct of hostilities and the treatment of persons not or no longer taking a direct part in hostilities. As part of customary international law, these rules and principles are applicable to all States regardless of their adherence to relevant treaties.

In addition, despite the fact that most contemporary armed conflicts are non-international in nature, treaty law covering such conflicts remains fairly limited (mainly common Article 3 of the four Geneva Conventions and Additional Protocol II). The study shows, however, that there exist an important number of customary rules of international humanitarian law that define in much greater detail than treaty law the obligations of parties to a non-international armed conflict. This is notably the case with rules on the conduct of hostilities. For example, while treaty law does not expressly prohibit attacks on civilian objects in non-international armed conflicts, such a prohibition has developed under customary international law.

The study also shows that a large number of customary rules of international humanitarian law are applicable to both international and non-international armed conflicts. As a result, for the application of these rules, the qualification of the conflict as international or non-international is not relevant. These rules apply in *any* armed conflict.

Finally, customary international humanitarian law can also be useful in the case of coalition warfare. Contemporary armed conflicts often involve a coalition of States. When the States composing such a coalition do not have the same treaty based obligations because they have not ratified the same treaties, customary international humanitarian law represents those rules that are common to all members of the coalition. These rules can be relied upon as a minimum standard for drafting common rules of engagement or for adopting targeting policies. It should be borne in mind, however, that these customary rules cannot weaken the applicable treaty obligations of individual coalition members



 **4. What difference does the study on customary international humanitarian law make for victims?**

Customary international humanitarian law fills in certain gaps in protection provided to victims of armed conflict by treaty law. These gaps result either from the lack of ratification of relevant treaties or from the lack of detailed rules on non-international armed conflicts in treaty law. The advantage of customary law is that it is not necessary for a State to formally accept a rule in order to be bound by it, as long as the overall State practice on which the rule is based is “widespread, representative and virtually uniform” and accepted as law.

As it identifies the rules of customary international humanitarian law, the study helps to ensure better knowledge of the applicable rules. Awareness of these rules by those who are required to apply them ensures greater respect for the law. The combined effect of knowledge of the law and the existence of possible sanctions, in particular those applied by national and international courts, allows international humanitarian law to ensure the protection of persons affected by armed conflict.



 **5. Why is customary international law binding?**

States recognize that treaties and customary international law are sources of international law and, as such, are binding. This is set forth, for example, in the Statute of the International Court of Justice.

One illustration of the binding nature of customary international law is its application by national and international courts and tribunals.



 **6. Who is bound by customary international humanitarian law?**

Generally, the purpose of international law is to regulate the relationship between States and, therefo re, it is binding upon States. This is also true for international humanitarian law, whether treaty or customary, as it regulates armed conflicts arising between States.

However, a particular feature of international humanitarian law is that some of its rules regulate armed conflicts occurring between a State and an armed opposition group or between such groups. The rules that regulate such conflicts are applicable to all parties, whether a State or an armed opposition group. The analysis of State practice shows that many rules of customary international humanitarian law applicable in non-international armed conflicts bind States as well as armed opposition groups.



 **7. If a rule is repeatedly broken can it still be considered part of customary law?**

As with all legal norms, whether domestic or international, they can be violated. This does not mean that the norm is obsolete. When a rule of customary international humanitarian law is violated but such violation is generally condemned by other States or denied by the State concerned, this practice tends to reinforce the existence of the rule rather than to weaken it. For example, although attacks on civilians occur, these are usually criticised and the party accused of such attacks will, for example, either deny the facts or argue that the attacks were unintentional. Such condemnation and justification implicitly recognizes the prohibition to attack civilians.

The internationa l attention that is often devoted to these violations should not, however, detract from the countless instances of compliance with the law that continue to underpin the existence of rules of customary international humanitarian law.



 **8. How is customary international law enforced?**

In principle, there is no difference in the enforcement of treaty law and customary international law, as both are sources of the same body of law.

First and foremost, military commanders have the responsibility to ensure that their troops respect the law. In case of violation, international humanitarian law can be enforced through diplomatic means, including by international organizations, such as through measures adopted by the UN Security Council. Another means to enforce the law is its application by national and international courts and tribunals, for example the trial of an individual responsible for a violation.



 **9. How has the study been organized?**

The study encompasses research into State practice as reflected in national, as well as international sources. The 161 rules have been catalogued in 6 Parts:

Ÿ Principle of distinction

Ÿ Specifically protected persons and objects

Ÿ Specific methods of warfare

Ÿ Weapons

Ÿ Treatment of civilians and persons *hors de combat*

Ÿ Implementation

The publication is divided into two volumes:

 **Volume I. Rules** is a comprehensive analysis of the customary rules of international humanitarian law applicable in international and non-international armed conflicts. Of the 161 rules identified, 159 apply in international armed conflicts and 148 apply in non-international armed conflicts.

The rules are accompanied by a commentary which explains why the rule in question was found to be customary. Most commentaries also address issues such as the interpretation of the rule, the definition of keywords contained in the rule or examples of the application of the rule. It should be stressed, however, that only the black letter rules are meant to reflect customary law, not the additional elements contained in the commentaries.

 **Volume II. Practice** contains, for each aspect of international humanitarian law, a summary of relevant treaty law and of relevant State practice, including reports on the behaviour of parties to an armed conflict, military manuals, national legislation, national case-law and official statements, as well as practice of international organizations, international conferences and international judicial and quasi-judicial bodies.

Together, both volumes contain m ore than 5,000 pages. The study was edited by Jean-Marie Henckaerts of the ICRC Legal Division and Louise Doswald-Beck of the Graduate Institute of International Studies and the University Centre for International Humanitarian Law in Geneva. It is published by Cambridge University Press and is on sale as part of their catalogue.



 **10. How has the assessment of the practice been carried out?**

Three different types of research were conducted:

Individual experts or teams of experts researched State practice in nearly 50 countries (9 in Africa, 15 in Asia, 11 in Europe, 11 in the Americas, and 1 in Australasia) across the world. The Steering Committee of the study, composed of 12 eminent international law professors, selected the countries based on geographic representation, as well as recent experience of different kinds of armed conflict. The study drew also on the military manuals, national legislation, national case-law and official statements of additional States not yet covered by an individual expert.

In addition, six teams of experts researched international sources of practice focusing on the parts of the study listed above.

The research was complemented by an analysis of the ICRC archives relating to some 40 recent armed conflicts around the world. In general, these were selected so that countries not yet covered in the research on State practice could be included.

The research conducted was comprehensive, but in the nature of things it cannot claim to be exhaustive. It focused primarily on practice from the last 30 years to ensure that the study adequately reflects contemporary customary international humanitarian law.

The research results and successive drafts of the study were submitted to the Steering Committee and reviewed by a group of academic and governmental experts invited to comment in their personal capacity.



 **11. By whom can the study be used?**

The study can be used by anyone who has an interest in international humanitarian law. This includes academics, non-governmental organizations and international organizations. The study can, however, be particularly useful in the day to day work of judicial and governmental organs dealing with situations of armed conflict.

The study can assist international courts and tribunals in their work as they often have to examine State practice in order to determine whether a rule of customary international humanitarian law exists concerning the specific issue before them.

The study may also be useful for governments as it offers guidance when dealing with issues related to international humanitarian law.

Finally, the study may be useful for military lawyers. It can serve as background material when drafting military manuals or rules of engagement, and can also be useful in the da y-to-day analysis of the legality of specific military actions.



 **12. How does the ICRC intend to use this study?**

The ICRC intends to use the study in its work to protect and assist victims of armed conflict worldwide. Where relevant, it will remind parties to the conflict of their customary obligations to respect persons not or no longer taking a direct part in hostilities.

To enhance awareness of customary international humanitarian law, the ICRC will use the study as part of its regular efforts to familiarise States, armed forces, armed opposition groups and civil society with international humanitarian law. As a first step, the ICRC and partner institutions will organize a series of launch events across the world to present the study to legal experts and State representatives.