HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW

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Preface

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T.M.

All Souls College, Oxford
February 1989

Abbreviations

AJIL	American Journal of International Law
ASIL	American Society of International Law
CSCE	Conference on Security and Co-operation in Europe
ECOSOC	Economic and Social Council
ESC	Economic and Social Council
ESCOR	Economic and Social Council Official Records
GAOR	General Assembly Official Records
IACHR	Inter-American Commission on Human Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ILC	International Law Commission
ILM	International Legal Materials
ILO	International Labour Organisation
NGO	Non-governmental organization
OAS	Organisation of American States
OEA	Organizacion de los Estados Americanos
TIAS	Treaties and Other International Acts Series
TS	Treaty Series
UNTS	United Nations Treaty Series

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Introduction

There has been a rapid growth in the number and scope of international human rights instruments, in the establishment of judicial and non-judicial supervisory organs and procedures designed to secure respect for human rights, in the scholarly literature on human rights and humanitarian norms (i.e. rights and norms protecting human dignity in situations of peace or international or non-international armed conflicts), and in the interest shown by decision-makers, the media, and the public at large in the international protection of such rights. Nevertheless, inadequate attention has been paid to the place of human rights and humanitarian norms in the discipline of international law. The purpose of this book is to attempt to bridge that gap by clarifying the status of international human rights and humanitarian norms in public international law, and by examining the sources, evidence, and process of the creation of such rights. The first principal area of inquiry concerns the relationship of human rights and humanitarian norms with customary law, including the examination of the role of treaties in the development of customary human rights and humanitarian norms. The second area concerns the relationship of human rights and humanitarian norms with the law of state responsibility. I will examine how the contemporary human rights and humanitarian law meshes with the general principles of international law and particularly with the principles governing the international responsibility of states for acts and omissions of their officials and organs. By coupling human rights and humanitarian norms with the corpus of law governing state responsibility, the latter is mobilized to serve the former and to advance its effectiveness.

I shall address only such aspects of customary law, including state responsibility, as are significant for the effectiveness of human rights and humanitarian norms and important for assessing their place and role in public international law. I do not intend this study as a treatise either on customary law or on state responsibility, on both of which there is already abundant literature.

I

Humanitarian Instruments as Customary Law

I. THE IMPORTANCE OF A NORM'S CUSTOMARY CHARACTER

General practice of states which is accepted and observed as law, i.e. from a sense of legal obligation, builds norms of customary international law. Article 38(1)(b) of the Statute of the International Court of Justice describes international custom 'as evidence of a general practice accepted as law'. Because general practice demonstrates custom and not vice versa, § 102(2) of the Restatement Third, of the Foreign Relations Law of the United States of 1987, provides, more accurately, that customary international law 'results from a general and consistent practice of states which is followed by them from a sense of legal obligation'. In the highly codified humanitarian law context, the primary and the most obvious significance of a norm's customary character is that the norm binds states that are not parties to the instrument in which that norm is restated. It is, of course, not the treaty norm, but the customary norm with identical content, that binds such states. Additionally, because instruments of international humanitarian law do not address all of the relevant rules, the identification of the applicable customary rules is also important for states parties. As the following discussion of the Geneva Conventions of August 12, 1949 for the Protection of Victims of War[1] will demonstrate, this question has significance beyond these results.

At first glance, an inquiry into the customary character of the

[1] Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention No. I), Aug. 12, 1949, 6 UST 3114, TIAS No. 3362, 75 UNTS 31; Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea (Geneva Convention No. II), Aug. 12, 1949, 6 UST 3217, TIAS No. 3363, 75 UNTS 85; Convention Relative to the Treatment of Prisoners of War (Geneva Convention No. III), Aug. 12, 1949, 6 UST 3316, TIAS No. 3364, 75 UNTS 135; Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention No. IV), Aug. 12, 1949, 6 UST 3516, TIAS No. 3365, 75 UNTS 287.

Geneva Conventions might appear academic. After all, the question arises infrequently given the universal acceptance of the Conventions as treaties (they are binding on even more states than the Charter of the United Nations).[2] That the matter may have a lasting practical importance, however, was recently brought home by the consideration of the problem by the International Court of Justice (ICJ) in the merits phase of *Military and Paramilitary Activities in and against Nicaragua*.[3] The Court's discussion of the relationship between treaty and custom further highlighted the question. The Court stated that

> even if two norms belonging to two sources of international law appear identical in content, and even if the States in question are bound by these rules both on the level of treaty-law and on that of customary international law, these norms retain a separate existence.[4]

In the numerous countries where customary law is treated as the law of the land but an act of the legislature is required to transform treaties into internal law, the question assumes importance if no

[2] In Feb. 1988, 165 states were parties to the Geneva Conventions. International Committee of the Red Cross, Dissemination No. 9, Aug. 1988. There are 159 states members of the United Nations. Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1987, at 3-6, UN Doc. ST/LEG/SER.E/6 (1988).

[3] *Military and Paramilitary Activities in and against Nicaragua* (*Nicar.* v. *US*) Merits, 1986 ICJ Rep. 14 (Judgment of 27 June).

Art. 38(1)(b) of the Statute of the International Court of Justice refers to 'international custom, as evidence of a general practice accepted as law'. An important statement of the constitutive elements of custom, general practice, and *opinio juris* is contained in the *Columbian-Peruvian Asylum Case*: 'The Party which relies on a [regional] custom . . . must prove that this custom is established in such a manner that it has become binding on the other Party. The Colombian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State. This follows from Article 38 of the Statute of the Court. . . .' 1950 ICJ Rep. 266, 276 (Judgment of 20 Nov.).

In the *North Sea Continental Shelf Cases* (*FRG/Den.; FRG/Neth.*), the Court emphasized that '[n]ot only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*.' 1969 ICJ Rep. 3, 44 (Judgment of 20 Feb.). In the *Nicaragua* case, ICJ stated that '[t]he Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice'. 1986 ICJ Rep. at 98.

[4] 1986 ICJ Rep. at 95.

such law has been enacted.[5] Certainly, the failure to enact the necessary legislation cannot affect the international obligations of these countries to implement the Geneva Conventions. Invoking a

[5] In the United States, the Geneva Conventions are, of course, the supreme law of the land. US Const. Art. VI, cl. 2. The US government is of the opinion that these Conventions 'were not intended to create private rights of action, and the provisions of the Conventions are generally deemed to be non-self-executing in the context of judicial proceedings. *See, e.g., Handel v. Artukovic*, 601 F. Supp. 1421, 1425 (C.D. Cal. 1985); *Tel-Oren v. Libyan Arab Republic*, 726 F. 2d 774, 809 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985). . . . However, the provisions of the Hague and Geneva Conventions can generally be implemented by the armed forces.' Affidavit of Kerri L. Martin, *United States* v. *Shakur*, 82 Cr. 312, Exhibit A, at 18 (SDNY, 23 Mar. 1988). It may be noted that the Geneva Conventions contain provisions requiring implementation through municipal law.

In the Federal Republic of Germany, the fact that many provisions of the Geneva Conventions embody customary law gives them a preferential place in the hierarchy of national laws. A recent study thus observes: 'Article 25 of the Basic Law provides that the general rules of public international law shall be directly applicable internally and take precedence over all Acts. Consequently, as far as the provisions of the four Geneva Conventions constitute rules, which are "general rules of public international law" within the meaning of this constitutional provision, i.e. as far as they are part of the universally applicable customary international law, under national law in the Federal Republic of Germany they take priority over all ordinary Acts. Today a considerable part of the provisions of the four Geneva Conventions and the Protocols additional thereto must be considered part of customary international law. This does not apply, however, to each single provision.' International Society for Military Law and the Law of War, German National Section, Reports for Presentation to the XIth International Congress (Edinburgh, Sept. 1988) at 4 (1988).

For a discussion of legislation implementing the Geneva Conventions, see Bothe, *The Role of National Law in the Implementation of International Humanitarian Law*, in Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet 301, 305–6 (C. Swinarski ed. 1984). Many states parties to the Geneva Conventions have not adopted such legislation. Levasseur and Merle, *L'Etat des législations internes au regard des obligations contenues dans les conventions internationales de droit humanitaire*, in Droit humanitaire et conflits armés 219, 225, 228, 249 (Université Libre de Bruxelles, 1976).

Only 49 governments answered an ICRC inquiry about legislative action taken to repress violations of the Geneva Conventions. This group included some governments that reported having taken no such action, e.g. Indonesia, Iraq, Lebanon, South Africa, and Syria. International Committee of the Red Cross, Respect of the Geneva Conventions: Measures Taken to Repress Violations (Reports submitted by the International Committee of the Red Cross to the XXth and XXIth International Conferences of the Red Cross) (1971); Twenty-Fifth International Conference of the Red Cross, Respect for International Humanitarian Law: National Measures to Implement the Geneva Conventions and their Additional Protocols in Peacetime 4 (Doc. CI/2.4/2, 1986). See also ibid. at 13. For recent efforts to encourage states to fulfil their obligation to adopt the national legislation necessary for the effective application of the Geneva Conventions and, as the case may be, of the Additional Protocols, see Resolution V of the Twenty-Fifth International Conference of the Red Cross (1980), reprinted in Int'l Rev. Red Cross, No. 263, Mar.–Apr. 1988, at 127. See also ibid. at 121–40.

certain norm as customary rather than conventional in such situations may be crucial for ensuring protection of the individuals concerned, however.

The transformation of the norms of the Geneva Conventions into customary law may have certain additional effects beyond its consequences for the internal law of some countries. One such effect, already reflected in common Article 63/62/142/158 concerning denunciation of the Geneva Conventions, as pointed out by the *Nicaragua* Court,[6] is that parties could not terminate their customary law obligations by withdrawal. Common Article 63/62/142/158 provides that the denunciation of one of the Conventions:

> shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience.

This principle is also reflected in Article 43 of the Vienna Convention on the Law of Treaties, which states that the denunciation of a treaty 'shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty'.

The existence of a denunciation clause in a treaty should not weaken a claim that some of its provisions are declaratory of customary law. Similarly, the absence of comment in a denunciation clause upon the effects of the denunciation on customary law (e.g. Article 99 of Additional Protocol I, Article 25 of Additional

The Israeli Supreme Court has refused to review the acts of the military government on the West Bank in light of Geneva Convention No. IV on the ground that the law of the Convention is conventional rather than declaratory of customary law and has not been transformed into the law of the land by legislation. See Cohen, *Justice for Occupied Territory? The Israeli High Court of Justice Paradigm*, 24 Colum. J. Transnat'l L. 471, 484-9 (1986); Roberts, *What Is a Military Occupation?*, 55 Brit. YB Int'l L. 249, 283 (1984).

For views suggesting that some provisions of Convention No. IV are declaratory of customary law, see dissenting opinion of Justice H. Cohn in *Kawasme* v. *Minister of Defence*, 35(1) Piskei Din 617, summarized in 11 Isr. YB Hum. Rts. 349, 352-4 (1981); Dinstein, *Expulsion of Mayors from Judea*, 8 Tel Aviv U. L. Rev. 158 (Hebrew, 1981); Meron, *West Bank and Gaza: Human Rights and Humanitarian Law in the Period of Transition*, 9 Isr. YB Hum. Rts. 106, 111-12 (1979). For further discussion of Geneva Convention No. IV and the territories occupied by Israel, see below n. 131 and text accompanying nn. 147-9. See also below n. 167 and Meron, *Applicability of Multilateral Conventions to Occupied Territories*, 72 AJIL 542, 543, 548-50 (1978).

[6] 1086 ICJ Rep. at 113-14. See also below n. 76 and accompanying text.

Protocol II, and Article 14 of the Convention on the Prevention and Punishment of the Crime of Genocide) does not constitute good evidence that the treaty rules are solely conventional. Such clauses may have been drafted for a variety of reasons (e.g. past practice, implementation, or settlement of disputes) which are wholly unrelated to the question of whether or not the treaty is declaratory of customary law. The effects of the denunciation must still be assessed in light of the general international law reflected in Article 43 of the Vienna Convention. Nevertheless, as suggested by the ICJ in the *Nicaragua* case, the explicit reference to customary law in the Geneva Conventions' common Article on denunciation strengthens the Conventions' claim to embody customary law.

The distinction between a customary and a conventional rule is particularly important in disputes beween two states in which one of them exercises the right, under Article 60 of the Vienna Convention on the Law of Treaties, to terminate or suspend the operation of a treaty on the ground that the other party has violated an essential provision of that treaty. It should, however, be noted that Article 60(5) of the Vienna Convention establishes a rule of *lex specialis* for provisions relating to the protection of the human person contained in treaties of a humanitarian character, even where such provisions have not matured into customary law. In the *Nicaragua* case, the Court asserted that 'if the two rules in question also exist as rules of customary international law, the failure of the one State to apply the one rule does not justify the other State in declining to apply the other rule'.[7] Because subject to certain conditions state A may respond to a violation of a customary rule by state B through a proportional violation of another customary rule, this comment by the Court is, perhaps, overbroad. Of course, a conventional rule which parallels a customary rule may be subject to different treatment as regards organs competent to verify their implementation.[8]

Another effect of this distinction is that reservations to the Conventions cannot affect the obligations of the parties under provisions reflecting customary law to which they would be subject independently of the Conventions.[9] This question, to be addressed

[7] 1986 ICJ Rep. 95 (Judgment of 27 June).

[8] Ibid.

[9] See generally Imbert, *Reservations and Human Rights Conventions*, 6 Hum. Rts. Rev. 28 (1981). On reservations made by parties to the Geneva Conventions, see Pilloud, *Reservations to the Geneva Conventions of 1949* (pt. 1), Int'l Rev. Red

further in Section II, below, is particularly relevant to humanitarian and human rights conventions since reservations to these instruments are frequently made. Many of these reservations reflect conflicts between the instruments and the internal law of the reserving states.

Finally, turning from the question of application to that of interpretation, if treated as customary law, the norms expressed in the Conventions might be subject to a process of interpretation different from that which applies to treaties. This possibility was suggested by the *Nicaragua* Judgment, where the Court stated that '[r]ules which are identical in treaty law and in customary international law are also distinguishable by reference to the methods of interpretation and application.'[10] While it is obvious that the Vienna Convention's rules of treaty interpretation do not apply to customary norms outside of the treaty context, the Court's cryptic reference to interpretation (the Court elaborated somewhat only on the difference in application) leaves many questions unanswered.

Those who doubt the significance of determining the question might point out that treaties, such as the Geneva Conventions, which virtually the entire international community has accepted through formal and solemn acts, have as strong a legal claim to observance as customary law. After all, customary law rests largely on the practice of a limited number of states. They might also argue that a treaty which embodies strongly felt humanitarian ideals has a moral as well as a legal claim to observance. In such circumstances, transposing the treaty's norms into customary law will not necessarily add to its moral claim.

Nevertheless, consensus that the Geneva Conventions are declaratory of customary international law would strengthen the moral claim of the international community for their observance by emphasizing their humanitarian underpinnings and deep roots in tradition and community values. Such consensus might also represent a step in a process that begins with the crystallization of

Cross, No. 180, Mar. 1976, at 107 (Pilloud observes that customary law must be applied to determine the validity and 'extent' of the reservations made, ibid. at 108), and (pt. 2), Int'l Rev. Red Cross, No. 181, Apr. 1976, at 163.

[10] 1986 ICJ Rep. 95 (Judgment of 27 June). A case for a particular interpretation of conventional rules (e.g. Arts. 87 and 100 of Geneva Convention No. III) is strengthened by its concordance with 'commonly accepted international law'. *Public Prosecutor* v. *Koi*, [1968] 1 All ER 419, 425 (PC).

a contractual norm into a principle of customary law and culminates in its elevation to *jus cogens* status.[11] The development of the hierarchical concept of *jus cogens* reflects the quest of the international community for a normative order in which higher rights are invoked as particularly compelling moral and legal barriers to derogations from and violations of human rights. To be sure, the Geneva Conventions already contain some norms that can be regarded as *jus cogens*.[12]

This discussion of the relationship between the Geneva Conventions and customary law may also be instructive as regards other multilateral conventions with fewer parties than the Geneva Conventions, such as the two 1977 Additional Protocols, in situations where there has been little significant practice by non-parties.

Obviously, the invocation of a norm as both conventional and customary adds at least rhetorical strength to the moral claim for its observance. Thus, to underline the gravity of certain violations, the ICJ observed in the Iranian *Hostages* case that the obligations in question were not 'merely contractual . . . but also obligations under general international law'.[13]

In the *Nicaragua* case, the question under discussion arose in an unusual context: the multilateral treaty reservation of the United States appeared to preclude the ICJ from applying the Geneva Conventions as treaties. Consequently, the status of the Conventions as declaratory of customary law presented a crucial issue. In its treatment of this issue, the Court refrained from mentioning the two Additional Protocols of 1977 and from considering the manner in which the Protocols confirm, supplement, or modify provisions of the Conventions themselves. The extent to which the Protocols are declaratory of customary law has begun to attract scholarly attention. This important and difficult question will be addressed in Section VI, below.

[11] See T. Meron, Human Rights Law-Making in the United Nations: A Critique of Instruments and Process 194 (1986). A norm of *jus cogens* can also mature through other processes. *Jus cogens* is discussed further in Chapter III, Section VIII.

[12] The International Law Commission (ILC) has observed that 'some of [the rules of humanitarian law] are, in the opinion of the Commission, rules which impose obligations of *jus cogens*. . . .' Report of the International Law Commission on the Work of its Thirty-Second Session, 35 UN GAOR Supp. (No. 10) at 98, UN Doc. A/35/10 (1980).

[13] *United States Diplomatic and Consular Staff in Tehran* (*US* v. *Iran*), 1980 ICJ Rep. 3, 31 (Judgment of 24 May).

I shall begin by considering some aspects of the question of reservations to humanitarian and human rights instruments and then consider certain aspects of the *Nicaragua* Judgment that implicate humanitarian law. It must be remembered that while protecting the rights of states and governing their duties, humanitarian law also contains a prominent human rights component.[14] Although humanitarian considerations are a powerful motivating force behind the law of armed conflict, these considerations blend with others, such as economic advantage, to create a counterforce to military necessity. Because humanitarian instruments state some reciprocal (state to state) obligations and many humanitarian/human rights protections, the disentangling of custom and treaty may require the use of different types of evidence and different burdens of proof for each of these two components of humanitarian instruments. I shall focus primarily on those humanitarian law rules which concern protection of victims of armed conflict ('law of Geneva'), rather than those that regulate combat ('law of the Hague'). I will next discuss the process through which customary law can develop alongside conventional law, with reference to the Geneva Conventions. Finally, I shall address the customary law character of the Additional Protocols.

II. RESERVATIONS TO HUMANITARIAN AND HUMAN RIGHTS INSTRUMENTS AND CUSTOMARY LAW

The advisory opinion of the ICJ on *Reservations to the Convention on Genocide* enunciated the principal statement of contemporary

[14] See Meron, *On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument*, 77 AJIL 589, 593 (1983) (hereinafter cited as *Inadequate Reach*). On the relationship between human rights law and humanitarian law, see also T. Meron, Human Rights in Internal Strife: Their International Protection 3-70 (1987). On humanitarian norms and reciprocity, see ibid. at 10-14. See also Partsch, *Human Rights and Humanitarian Law*, [Instalment] 8 Encyclopedia of Public International Law 292 (R. Bernhardt ed. 1985); Kunz, *The Laws of War*, 50 AJIL 313, 316 (1956).

Human rights are stated largely in human rights instruments adopted by the United Nations and their specialized agencies. See also Henkin, *Human Rights*, above 8 Encyclopedia at 268. Humanitarian rights are articulated largely in the Geneva Conventions and the Additional Protocols and in other instruments applicable in armed conflicts. Both human and humanitarian rights comprise conventional as well as customary law and 'contain rules for the treatment and protection of human beings based on considerations of humanity'. Partsch, above. Although human rights apply primarily in times of peace and humanitarian norms primarily in times of armed conflict, there is a growing overlap in their applicability