

DR. OPINIO JURIS AND MR. STATE PRACTICE: THE STRANGE CASE OF CUSTOMARY INTERNATIONAL HUMANITARIAN LAW

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Introduction

The concept of international customary law is one of the most debated issues of international law. There is controversy regarding its constituent elements, the process of its formation, indeed, some authors even debate its very existence as a separate source of international law.¹

On the other hand, as it was famously quipped by Hersch Lauterpacht „...if international law, in some ways, at the vanishing point of law, the law of war, perhaps even more conspicuously, at the vanishing point of international law.”²

Putting together these constituent elements they form a potentially explosive mix – customary international humanitarian law. This paper attempts to decipher some of its riddles relying on a formalist methodology of the formation of customary international law.³ It first examines the major problems of customary international law – the problems of State practice and opinio juris and the weight that should be accorded to them and their relationship with treaties – then gives a brief overview of the practice of international judicial bodies. Finally, it analyses some parts of the recently published Customary International Humanitarian Law Study of the International Committee of the Red Cross.⁴

¹ See e.g. Robert Y. Jennings, *The Identification of International Law*, in Bin Cheng (ed.) *International Law: Teaching and Practice*, London, 1982, p. 3.

² Hersch Lauterpacht, *The Problem of Revision of the Law of War*, *British Year Book of International Law*, Vol. 29, 1952-53, p. 382.

³ Jason Beckett, PhD Dissertation, Chapter 5. (on file with author, April 2006 version).

⁴ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol. 1. Rules, Vol. 2. Practice, Cambridge University Press, 2005. (hereinafter ICRC study)

The constituent elements of customary international law: State practice and *opinio juris*

The standard point of departure for the examination of customary law is Article 38 (b) of the Statute of the International Court of Justice that accepts custom as a formal source of law for application of the Court as „evidence of a general practice accepted as law.” This definition contains two elements. First, the element of State practice (also referred to as objective or material element) and its acceptance as law, called *opinio juris sive necessitatis* (also known as subjective or psychological element).

There is no unanimity over what can be accepted as evidence of State practice. Physical acts are without doubt falling into this category, while the reliability of claims and other statements have been questioned.⁵ Nonetheless, the majority view seems to be that the source of State practice can be any public act emanating from a competent State organ or attributable to it.⁶ Omissions can also be deemed as State practice if the non-action by a State comes unambiguously from the „conscious[ness] of having a duty to abstain.”⁷ The length of time necessary for the creation of new custom cannot be defined in abstract terms, it can only be determined in a case-by-case evaluation. It seems certain that some time must elapse for State practice to become custom if it is both uniform and virtually extensive, including those States whose interests are specially affected.⁸

⁵ D'Amato submits that only physical acts are reliable sources of State practice as statements and claims are not consistent. Anthony D'Amato, *The Concept of Custom in International Law*, Ithaca, 1971, p. 88. However he seems to be quite isolated in this view and strikes as odd to make a distinction between what the State does and what it says. Michael Akehurst, *Custom as a Source of International Law*, *British Year Book of International Law*, Vol. 47, 1974-1975, p. 3.

⁶ The International Law Association's Final Report examining the formation of customary law mentioned diplomatic statements (including protests), policy statements, press releases, official manuals, instructions to armed forces, comments by governments on draft treaties, legislation, decision of national courts and executive authorities, pleadings before international tribunals, statements in international organizations and the resolutions adopted by these treaties as verbal acts and arrests of people and seizure of property as physical acts remarking that the former is much more common. International Law Association London Conference (2000), *Final Report of the Committee on Formation of Customary (General) International Law, Statements Applicable to the Formation of General Customary International Law*, p. 14.

⁷ *Lotus Case (France v. Turkey)*, PCIJ, Series A, No. 10, p. 28.

⁸ „Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the

Opinio juris is an indispensable element of custom. As Thirlway poetically explained „[T]he psychological element in the formation of custom, the philosophers’ stone which transmutes the inert mass of accumulated usage into the gold of binding legal rules,”⁹ or in other words „[O]pinio juris is precisely what separates the wheat from the chaff.”¹⁰ However, the nature of the requirement of *opinio juris* is subject to great controversy. To explain why States should be legally bound to follow a certain conduct some authors – the voluntarists – found the explanation in consent, viewing custom as an analogy of treaty being a tacit, informal manifestation of States’ will.¹¹ Others consider that States are bound by custom because they act under the sense of a legal obligation.¹² However, both theories are susceptible to criticism.

Consent theory requires each State to give consent to be legally bound. But then, if *opinio* is reduced to the consent of individual states to be bound by the law, then that consent may be withdrawn with the same ease with which it was given.¹³ Taken to extremes, this simply robs customary international law of normativity. Any state wishing to act contrary to the rules of the legal system, can withdraw its consent, act – as it cannot be a breach the rule no longer binding that State – and simply move on.¹⁴ Alternatively, if *opinio juris* is defined as a belief in legality then changing existing customary rules becomes impossible.¹⁵ Thirlway noted that this view „[N]ecessarily implies a vicious circle in the logical analysis of the creation of custom. As a usage appears and develops, States may come to consider the practice to be required by law before

provision invoked...” North Sea Continental Shelf Cases (Denmark and the Netherlands v. Germany), ICJ Reports 1969, p. 43, para. 74. The requirement of the inclusion of specially affected States at first glance seems to violate the principle of sovereign equality but that only accepts the reality that some States have more influence on the formation of custom. As de Visscher said, likening the formation of custom to the gradual wearing of a path, “Among the users are always some who mark the soil more deeply with their footprints than others, either because of their weight ... or because their interests bring them more frequently this way.” Charles de Visscher, *Theory and Reality in Public International Law*, Princeton, 1968, p. 155.

⁹ Hugh Thirlway, *International Customary Law and Codification*, Leyden, 1972, p. 47.

¹⁰ Bin Cheng: *Opinio juris: a key concept in international law that is much misunderstood*, in: *International Law in the Post-Cold War World – Essays in memory of Li Haopei*, Routledge, 2001, p. 66.

¹¹ See e.g. Gregori Danilenko, *The Theory of Customary International Law*, German Yearbook of International Law, Vol. 31, 1989, p. 9.

¹² See e.g. Olufemi Elias, *The Nature of the Subjective Element in Customary International Law*, *International and Comparative Law Quarterly*, Vol. 44, 1995, p. 501.

¹³ Maurice Mendelson, *The Subjective Element in Customary International Law*, Vol. 44, *British Year Book of International Law*, Vol. 44, 1995, pp. 184-194.

¹⁴ Jason Beckett, PhD Dissertation, Chapter 4. (on file with author, April 2006 version), p. 23.

¹⁵ Jörg Kammerhofer, *Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems*, *European Journal of International Law*, Vol. 15, 2004, p. 536.

this is in fact the case; but if the practice cannot become law until States follow it in the *correct* belief that it is required by law, no practice can ever become law, because this is an impossible condition."¹⁶

Even if there was consensus on what State practice and *opinio juris* exactly meant, there would remain the question the proportion of constituting elements. The so-called traditional approach held that *opinio juris* has to be accompanied by a very extensive and almost uniform State practice. However, two scholars theorised that the existence of only one of these constituent element could be enough to explain the formation of custom. In his early scholarship, Kelsen offered the view that state practice was the only necessary element in the formation of customary law.¹⁷ As Kammerhofer pointed out, this theory was in contravention with Kelsen's own theory of law. "This was a particularly strange error for Kelsen to make, because: [the] breach of the duality of Is and Ought [is] a legal theoretical 'crime' [and, moreover,] it was Kelsen's work which made this violation a theoretical 'crime.'"¹⁸ In general, this view is untenable as "[T]he reason why the subjective element, formulated as *opinio juris*, is considered necessary is first to determine between 'mere' usage and customary *norms*, and second to delimit between customary *law* and other normative orders."¹⁹

A precise mirror image of Kelsen's single element theory was developed by Bin Cheng.²⁰ Cheng submitted that State practice has no normative relevance in the establishment of custom, it is simply the evidence of *opinio juris*.²¹ If it is so, in certain very limited circumstances General Assembly resolutions might give rise to customary law. While this theory seems to be the logical corollary of voluntarism, it fails to give explanation how to differentiate between norm-creating and other – especially political – statements.

In reaction to the emergence of new branches of international law – especially international human rights law and international environmental law – a 'modern' approach to custom appeared. Its proponents – relying in particular on the International Court of Justice (ICJ)'s judgment in the *Nicaragua case* – argued that a strong showing of *opinio juris* can substitute for the scarcity of State

¹⁶ Supra note 9, p. 47.

¹⁷ Hans Kelsen, *Théorie du Droit International Coutumier*, *Revue International de la Théorie du Droit*, Vol.1, 1939, pp. 253-274.

¹⁸ Supra note 15, p. 546.

¹⁹ *Ibid.*, p. 535.

²⁰ Bin Cheng, *United Nations Resolutions on Outer Space: „Instant” international customary law?*, *Indian Journal of International Law*, Vol. 5, 1965, pp. 23-48.

²¹ *Ibid.*, p. 36.

practice and vice versa.²² Nevertheless, both traditional and modern concepts are vulnerable to Koskenniemi's criticism.²³ He claims that international law is either apologetic, i.e. only describes what States actually do and attempts to justify these acts retroactively or utopian, which means that it tries to impose an arbitrary set of moral rules on the world that is completely separate from reality. As international legal arguments seek to avoid either extreme they necessarily oscillate between Apology and Utopia leading to indeterminacy of the content of legal norms.²⁴

This critique can be answered by the application of the formalist methodological framework constructed by Jason Beckett. He submits that as States are the primary actors in international law non-state conducts should be denied relevance. In the absence of central law-making and adjudicating institutions with compulsory jurisdiction, the international community as a whole creates international custom. As it is impossible to ascertain objectively *a priori* moral rules, morality should be dispensed with during the examination of the process of creation of custom.²⁵ *Opinio juris* and State practice are inextricably intertwined in this framework. *Opinio juris* is understood as a combination of the normative intent of the acting state, and the reaction to those actions by the remainder of the international community, while State practice is the conduct of a State carried out with the normative intent or in reaction of the international community.²⁶ This way, customary norm is value-oriented at the moment of its creation but has to be applied in a value-neutral way which avoids oscillation between Apology and Utopia.

The relationship between treaties and customary law

It is undisputed that a treaty can be evidence of customary law or the so-called historic or material source of custom, which is an inspiration for the formation of new custom.²⁷ Much less evident is the notion of treaties having provisions

²² For an overview see Bruno Simma, Philip Alston, The Sources of Human Rights Law: Custom, *jus cogens* and general principles, Australian Year Book of International Law, Vol. 12, 1989-1990, p. 82.

²³ Martti Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument, Oxford, 1989.

²⁴ For a synopsis of this thesis from the same author, see Martti Koskenniemi, The Politics of International Law, European Journal of International Law, Vol. 1, 1990, p. 4.

²⁵ That does not mean that perceived morality of a legal rule – such as its legitimacy – cannot be inspirational for States to accept it as a rule of customary law, thus accelerating the transformation of a norm to customary rule. But this is just a sociological, not legal, phenomenon. See Thomas Franck, The Power of Legitimacy among Nations, Oxford, 1990.

²⁶ *Supra* note 3.

²⁷ Maurice H. Mendelson, The Formation of Customary International Law, Vol. 272, 1998, pp. 295-317.

of a „fundamentally norm-creating character” introduced by the International Court of Justice in the *North Sea Continental Shelf cases*.²⁸ The Court seemed to suggest that this concept is connected with the ratification of the treaty concerned.²⁹

The notion of a provision of a ‘fundamentally norm-creating character’ is very difficult to explain under any theoretical framework. As Mendelson affirmed „[I]f a State enters into a treaty, all that it is doing is entering into a treaty. Full stop. ... Entering into treaty ... is a practice directed to the *conventional obligation*, not to general law. And the same is true to the *implementation* of the treaty. Of course this is „State practice” in the literal sense of the words – it is State behaviour; but it is directed to the performance of the treaty obligation.”³⁰ The Court’s suggestion might have roots in early notions of international law. In the era of classical international law, there was no clear-cut distinction between the conclusion of a treaty and the process of formation of international law. This could be partially due to the fact that the primacy of natural law was accepted by some authors and also because in more overtly hierarchical times (especially in the nineteenth century) the great powers were prone to regard what they agreed to as *ipso facto* part of general law.³¹

Mendelson thinks that in exceptional and appropriate cases, treaties might be regarded as giving rise to, or helping to form, customary rules „of their own impact” depending on looking at them as a kind of communication. If States decide to constitute a general legal regime binding upon all – such as the United Nations Charter – and the number of the parties is large and they are representative, it will constitute a „loud” message. Even though ideally non-parties should also subscribe to this expectation but „at the end of the day, there seems to be no more reason for denying normative effect to a treaty clearly intended to have such an effect, just because there are some who do not participate, than there is to deny normative effect to a general practice accepted as law, in the traditional sense.”³² Nonetheless, he adds that „if a large number of States have indicated their unwillingness to accept the treaty’s provisions, it becomes impossible to say that there is widespread acceptance of its content (without the addition of other Practice *outside* the treaty),” and suggests that in cases where widespread acceptance of a treaty as a source of customary law is dubious the onus should be on those who seek to use a treaty that way.³³ Even so, „if the international community *as a whole* evinces a clear desire to change

²⁸ Supra note 8, p. 42, para. 72.

²⁹ Ibid, p. 25, para. 27.

³⁰ Supra note 27, p. 324.

³¹ Ibid, p. 325.

³² Ibid, p. 328.

³³ Ibid.

customary law by means of a treaty, there seems to be no particular theoretical reason why this should be impossible."³⁴

Weil perceives this approach as threatening the sovereignty of States. He is concerned that „quasi-universal treaties” can give rise to „instant customary law” leading to the „relative normativity” of international law.³⁵ According to Weil „[T]he conventional norm has not been frontally assaulted but cunningly outflanked ... in reality, the conventional norm itself may now create obligations incumbent upon all states, including those not parties to the convention in question.”³⁶ This development could lead to the „tyranny of the majority” giving the opportunity to impose rules on the minority. Mendelson rebuts this argument by reminding that according to the ICJ there has to be „general recognition” that the rule in question is not merely conventional, but one of customary law and there has to be an extensive and representative participation in the treaty and in any case, a State can always claim that it is a persistent objector.³⁷ Still, Mendelson notes that it is disturbing if a „codifying” convention in the broad sense of the term is simply assumed, without more, to represent customary law and national tribunals are particularly prone to this dangerous attitude.³⁸

In conclusion, it seems clear that treaties cannot give rise to customary law on their own impact apart from inspiring new custom. States entering into a treaty accept to be bound by conventional norms, not norms of customary international law which is reflected to the reaction of States. Nonetheless, major international conferences of multi-lateral conventions can provide the impact for the birth of new customary rules.

The effect of General Assembly resolutions on customary norms

The General Assembly is a political organ where States representatives make political statements. Accordingly, ordinarily these statements are not meant to have a part in the formation of custom.

In the *Nicaragua case*, however, the ICJ declared that „[T]his opinio juris [about the binding legal obligation to refrain from the use of force contrary to the principles embodied in Article 2 (4) of the UN Charter] may, though with all due caution, be deduced from, inter alia, the attitude of the Parties and the

³⁴ Ibid, p. 344.

³⁵ Prosper Weil, Towards relative normativity in international law?, American Journal of International Law, Vol. 77, 1983, p. 413.

³⁶ Ibid, p. 438.

³⁷ Supra note 27, p. 334.

³⁸ Ibid, p. 339.

attitude of States towards certain General Assembly resolutions and particularly resolution 2625 (XXV)."³⁹ In the *Nuclear Weapons Advisory Opinion* the Court added that „General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule.”⁴⁰

These statements seem to suggest that General Assembly resolutions can in certain circumstances contribute to the development of custom, and a series of resolutions might establish the existence of *opinio juris*, even without the examination of the conduct of the parties during the time of their adoption. Still, the latter statement cannot be accepted. Even if General Assembly resolutions are couched in legal language, if it is not accepted by the parties concerned that they reflect their normative will then they are merely political statements, not legal ones. On the other hand, if it can be inferred from the conduct of States that they intended to undertake legal obligation by voting for the resolution, then that is an evidence of State practice.

Roberts: an attempted reconciliation of traditional and modern approaches

One of the most acknowledged recent endeavours to reconcile the traditional and modern approach was produced by Anthea Roberts.⁴¹ The author – drawing on the ‘sliding scale’ concept of Kirgis⁴² and on its rationalized version on the basis of Dworkin’s interpretative theory of law⁴³ – conceived a theory which attempted to balance moral content and descriptive accuracy without falling prey to Koskenniemi’s criticism by becoming either apologetic or utopian.⁴⁴ To fulfil this promise, Roberts evaluates state practice and *opinio juris* in two stages seeking to balance descriptive accuracy and normative appeal in a Rawlsian reflective equilibrium.

³⁹ Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States) (Merits), ICJ Reports, 1986, pp. 99-100, para. 188.

⁴⁰ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996, ICJ Reports, para. 77.

⁴¹ Anthea Elizabeth Roberts, Traditional and Modern Approaches to Customary International Law: A Reconciliation, *American Journal of International Law*, Vol. 95, 2001, p. 757.

⁴² Frederic L. Kirgis, Custom on a Sliding Scale, Vol. 81, 1987, p. 146.

⁴³ John Tasioulas, In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case, Vol. 16, 1996, *Oxford Journal of Legal Studies*, p. 85.

⁴⁴ *Supra* note 23.

First, the interpretation has to pass the dimension of fit to see whether it accurately describes the raw data of practice. Alongside the dimension of fit, the interpretation has to be examined from the point of view of normative substance, which is the dimension of fit. In the second stage, the interpreter has to find a balance between the dimensions of fit and substance to provide the greatest consistency with both elements.⁴⁵ Traditional (in Roberts' words „facilitative“) customs will lean towards the descriptive (the dimension of fit) as they do not involve strong moral issues, while modern customs with strong moral content have to be examined in a more normative equilibrium. With this approach, strong substantive considerations may compensate for a relatively weak fit and vice versa.⁴⁶

The author mentions as an example the NATO intervention in the Federal Republic of Yugoslavia in 1999 as State practice contributing to the emergence of a possible right to humanitarian intervention in exceptional circumstances.⁴⁷ It is obvious that the author has failed to establish a theory that could objectively evaluate the formation of customary law. Apart from the fact that the separation of State practice and *opinio juris* is entirely artificial the differentiation between facilitative and modern custom and the dimension of substance injects such a large amount of subjectivity into the theoretical framework that the existence of a customary norm can be asserted with only minimal practice if it is viewed as having an exceptionally strong moral content. This becomes clear from the author's examination of the legality of the Kosovo intervention. While the intervening States did not affirm that the intervention was carried out in pursuance of a right to humanitarian intervention,⁴⁸ Roberts is still willing to deem it as State practice together with interventions of the United States, France, and Great Britain in Iraq in 1991 – that were also never alleged to have been humanitarian interventions – as establishing an emerging right because of the substantive moral issues involved. A theory that is so patently subjective in the evaluation of practice in case of moral issues gives way to relative normativity where the existence of a customary norm only depends on the interpreter.⁴⁹

⁴⁵ Supra note 41, pp. 761-764.

⁴⁶ Ibid, pp. 764-766. This seems to be similar to the view of Schachter who held that „patterns of conduct become State practice relevant to customary law when they concern matters generally within the domain of international law. In these cases explicit evidence of *opinio juris* may not be required.“ Oscar Schachter, *Entangled Treaty and Custom*, in Yoram Dinstein (ed.) *International Law at a Time of Perplexity*, Kluwer, 1989, p. 732.

⁴⁷ Ibid, pp. 785-788.

⁴⁸ The only exception being Belgium who asserted that right in front of the International Court of Justice. *Case Concerning the Legality of Use of Force (Yugoslavia v. Belgium)*, Public Sitting Held on Monday, 10 May 1999 at 3 p. m, Verbatim Record, CR 99/15.

⁴⁹ Prosper Weil, *Towards Relative Normativity in International Law?*, *American Journal of International Law*, Vol. 77, 1983, p. 413.

The second half of the paper will examine the questions of humanitarian customary law.

Martens Clause – The principle of humanity and the dictate of public conscience

The Martens Clause first appeared in the preamble to the 1899 Hague Convention (II) with respect to the laws and customs of war on land stating that:

„Until a more complete code of the laws of war has been issued, the High Contracting Parties think deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the laws of nations, as they result from the usages established among civilized nations, from the laws of humanity, and the dictates of the public conscience.”⁵⁰

This formulation was restated in the 1907 Hague Convention IV, a slightly modified version manifested in Additional Protocol I to the 1949 Geneva Conventions,⁵¹ and it was included in numerous other conventions.⁵² In its 1996 *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons (Nuclear Weapons Advisory Opinion)* the International Court of Justice affirmed the relevance of the Martens Clause „whose continuing existence and applicability is not to be doubted” and declared that „it has proved to be an effective means of addressing the rapid evolution of military technology.”⁵³

⁵⁰ Adam Roberts, Richards Guelff, Documents on the laws of war, Oxford, 2002 (Third ed.), p. 70.

⁵¹ Art. 1 (2) „In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.” Adam Roberts, Richards Guelff, supra note 50, p. 423.

⁵² See inter alia, the reference to „the role of public conscience in furthering the principles of humanity” in the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (Ottawa Convention), Adam Roberts, Richards Guelff, supra note 50, p. 648; or the affirmation that „the rules governing the protection of cultural property in the event of armed conflict should reflect developments in international law”, Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (1999), Adam Roberts, Richards Guelff, supra note 50, p. 700.

⁵³ Supra note 40, p. 257, paras. 87 and 78. This reference – together with para. 84 – was probably in part a reply to the extreme position submitted by Russia stating that „today the ‘Martens Clause’ may formally be considered inapplicable.” Cited by Cassese, Antonio Cassese, The Martens Clause: Half a Loaf or Simply Pie in the Sky? *European Journal of International Law*, Vol. 11, No. 1, 2000, p. 211.

The exact meaning of this provision is highly debated among scholars. Some authors state that it serves only as a reminder that customary law continues to apply after the adoption of a treaty norm, i.e. as a tool to exclude the *a contrario* argument that as certain matters are left unregulated by a treaty it could mean that the belligerents are left in complete liberty to act in that respect.⁵⁴ The drafting history of this provision seems to support this view. It seems that it was included in the 1899 Hague Convention (II) on the suggestion of Professor Fyodor Fyodorovich Martens, the Russian delegate, to resolve an *impasse* reached during the negotiations between smaller States (especially Belgium) and Great Powers. This deadlock resulted from the inability of the delegates to agree on the issue of which persons not belonging to the armed forces of the occupied country might be regarded as lawful combatants on occupied territory. The inclusion of this Clause seemingly pleased both sides but in reality it served to accomplish the intentions of the Great Powers, denying the right to revolt against the occupant in exchange for a few polished words.⁵⁵

Other scholars argue that the Martens Clause is a general interpretative guideline according to which when doubts arise concerning the application of international humanitarian law the demands of humanity and public conscience have to be taken into account in the interpretation of these norms.⁵⁶ The last group of publicists radically assert that the clause has expanded the sources of humanitarian law. In their view it created one – or even two – new sources: the laws of humanity and the dictates of public conscience.⁵⁷

⁵⁴ Christopher Greenwood, *Historical Development and Legal Basis*, in: Dieter Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford, 1995, p. 28. (para. 129.) Green draws attention to the all-participation clauses (*si omnes*) of the 1907 Hague Conventions that rendered the application of the Conventions null and void if any of the belligerents in a conflict were not a party to them. In these circumstances a reminder to the continuing applicability of customary norms had even greater significance. Leslie C. Green, *The contemporary law of armed conflicts*, Manchester, 2000 (Second ed.) p. 34.

⁵⁵ See in detail *supra* note 53, pp. 193-198.

⁵⁶ *Ibid.*, p. 190.

⁵⁷ See e. g. B. V. A. Röling, *International Law in an Expanded World*, 1960, pp. 37-38. This concept might have been accepted in the jurisprudence of the United States Military Tribunal at Nuremberg in the Krupp case and by the International Criminal Tribunal for the Former Yugoslavia (ICTY). The United States Military Tribunal stated that the Martens Clause "is much more than a pious declaration. It is a general clause making the usages established among civilized nations, the laws of humanity and the dictates of the public conscience into the legal yardstick to be applied if and when the specific provisions of the Convention... do not cover specific cases. Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law. No. 10, Vol. 9, Part II, p. 1338. In the Martić case Trial Chamber I declared that the prohibition of attacks on civilians and the general principle limiting the means and methods of warfare "also derive from the Martens Clause." *Prosecutor v. Martić*, IT-95-11-R61, para. 13.

Following a thorough review of State practice and domestic and international case-law, Cassese correctly found that the clause did not envisage two autonomous sources of international law, distinct from the customary process.⁵⁸ He noted that the Martens Clause could be used as a general interpretative guideline, even though its content and scope of application is not completely clear and the Clause might have been the 'historical source' of the general principle of 'elementary considerations of humanity',⁵⁹ spelled out by the Court in the *Corfu Channel Case*,⁶⁰ the *Nicaragua Case*⁶¹ and the *Nuclear Weapons Advisory Opinion*.⁶² However, he follows by the assertion that even though the Martens Clause operates within the existing system of international sources but, in the limited area of humanitarian law, loosens the requirements prescribed for State practice, while at the same time elevating *opinio juris* to a rank higher than normally admitted. This supposed role should come from the need in the laws of armed conflict 'for humanitarian demands to efficaciously counterpoise compelling military requirements and their devastating impact on human beings, even before such humanitarian demands have been translated into actual practice.'⁶³ From the angle of legal interpretation, this conclusion could 'rest upon the need to take account of the ... fundamental principle, whereby legal clauses must be so construed to prove meaningful ... [and] the necessity to draw some legal sense from the widespread acclaim which the clause has attracted as a means of at least attenuating the most pernicious effects of modern warfare.'⁶⁴

This conclusion is a sheer exercise in utopia. Referring to policy arguments, Cassese intends to introduce a new source in the field of humanitarian law under the disguise of interpretation. He reveals that by setting forth that by referring to the need of existence of customary rules without actual practice, Cassese essentially applies a circular argument: first he states that the Martens Clause has legal sense only if it at least attenuates the most pernicious effects of modern warfare then concluding that as legal clauses have to be interpreted in a meaningful way the clause can give birth to customary rules with corresponding State practice. Finally, even if Cassese's proposition would be in fact restricted to what he states – i. e. that Martens Clause gives more weight to *opinio juris* to help the formation of new customary rules – it would be based on the fundamental misunderstanding on the definition of State practice and

⁵⁸ Cassese, *supra* note 53, p. 211.

⁵⁹ *Ibid.*, pp. 212-213.

⁶⁰ *Corfu Channel Case (United Kingdom v. Albania)*, ICJ Reports, 1949, p. 22.

⁶¹ *Supra* note 39, para. 218.

⁶² *Supra* note 40, p. 255, para. 79.

⁶³ Cassese, *supra* note 53, p. 214.

⁶⁴ *Ibid.*, p. 215.

opinio juris. As State practice and opinio juris are inextricably intertwined, opinio juris cannot have an independent existence from State practice.⁶⁵ Even accepting that Martens Clause is more than a simple reminder to the continuing applicability of customary law, in absence of the acceptance of the international community, it cannot be more than a principle that helps to achieve a more humane interpretation in case of possibly conflicting outcomes.

The methodology of international judicial bodies

After the Second World War, the four victorious powers – Great Britain, France, the Soviet Union, and the United States of America – established the International Military Tribunal in Nuremberg for the prosecution of the twenty-four major Nazi war criminals.⁶⁶ This tribunal was complemented by the establishment of military tribunals to try the remaining war criminals in the occupation zones under Control Council Law No. 10.⁶⁷ In Japan, the International Military Tribunal for the Far East was set up by the United States Supreme Commander-in-Chief and started its work on 3 May 1946.⁶⁸

The international military tribunals – especially the Nuremberg Tribunal – ascertained the customary status of numerous rules, in particular those contained in the Annex to Hague Convention IV on the Regulations Respecting the Laws and Customs of War on Land in spite of an all-participation clause and declared that their violation brings about individual criminal responsibility without examining the constitutive elements of State practice and opinio juris.⁶⁹ For instance, in the *High Command case*, the US Military Tribunal regarded the Geneva Prisoner of War Convention of 1929 largely as declaratory of custom by 1941.⁷⁰ This tradition of declaring that certain rules attained customary status without an adequate examination of State practice and opinio juris followed in the work of the ad hoc International Criminal Tribunals.⁷¹ Already in

⁶⁵ See supra p. 5.

⁶⁶ Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, 8 August 1945, UNTS Vol. 8, p. 279.

⁶⁷ International Law Reports, Vol. 36, p. 31.

⁶⁸ For a thorough description of the Tribunal's work see B. V. A. Röling, C. F. Rüter (eds.) *The Tokyo Judgment*, Amsterdam, 1977.

⁶⁹ For a particularly critical analysis of the work of the Tribunal see Hans Kelsen, *Will the Judgment in Nuremberg Constitute a Precedent in International Law?*, International Law Quarterly, Vol. 1, 1947, p. 11.

⁷⁰ *United States v. Von Leeb (The High Command Case)*, in: *Trials of War Criminals before the Nuremberg Military Tribunals*, 1950, Vol. 10, pp. 1-1322, Vol. 11, pp. 3-756.

⁷¹ The International Criminal Tribunal for the Former Yugoslavia (ICTY) was set up by Security Council Resolution 827 of 25 May 1993. UN Doc. S/RES/827 (1993). The International Criminal Tribunal for Rwanda (ICTR) was established pursuant to Security Council Resolution 955 of 8 November 1994. UN Doc. S/RES/955 (1994).

its first case, the *Tadić jurisdiction decision* the ICTY held that there exists a large body of customary norms regulating non-international armed conflicts and their breach incurred individual criminal responsibility, even though it was a novelty for most experts.⁷²

The International Court of Justice did not fare much better in this respect. In the *Nicaragua case*, one striking feature of the decision was that the Court regarded Common Article 1 and 3 of the 1949 Geneva Conventions as customary law without any further inquiry of the process.⁷³ On the other hand, the *Nuclear Weapons Advisory Opinion* was markedly different in the very careful identification of the relevant principles of international humanitarian law.⁷⁴

The *Wall Advisory Opinion*⁷⁵ returns to the „light treatment of international humanitarian law.“⁷⁶ As Kretzmer remarked „[T]he opinion is especially weak on questions of international humanitarian law, which makes it extremely difficult to know what the Court actually decided on these questions.“⁷⁷ This was particularly conspicuous from the examination of the question whether the principle of military necessity could justify seemingly unlawful acts committed during the construction of the wall. Here the Court simply confused the concept of military necessity with the state of necessity⁷⁸ precluding the wrongfulness of an internationally wrongful act ignoring the fact that the International Law Commission itself noted that these are separate notions. In international humanitarian law, military necessity is an integral part of the law and does not override it.⁷⁹ While the state of necessity is a circumstance exceptionally precluding the wrongfulness of an act that otherwise would not be in conformity

⁷² Prosecutor v. Tadić, Decision of 2 October 1995 on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72. The judgment has been extensively criticised by many publicists. See inter alia Christopher Greenwood, *The Development of International Humanitarian Law by the International Criminal Tribunal for the Former Yugoslavia*, Max Planck Yearbook of United Nations Law, 1998, p. 97; Wolff Heintschel von Heinegg, *Criminal International Law and the Current Development of Public International Law*, in: Andreas Zimmermann (ed.) *International Criminal Law and the Current Development of Public International Law*, Berlin, 2003. For supporting the decision see Theodor Meron, *International Criminalization of Internal Atrocities*, *American Journal of International Law*, Vol. 89, 1995, p. 554.

⁷³ *Supra* note 39, paras. 217-220.

⁷⁴ *Supra* note 40, paras. 74-92. Indeed, some authors were disappointed that the ICJ had not applied a wider scope of humanitarian norms. See e. g. Timothy L. H. McCormick, *A non liquet on nuclear weapons – The ICJ avoids the application of general principles of international humanitarian law*, *International Review of the Red Cross*, No. 316, 1997, p. 76.

⁷⁵ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion of 9 July 2004*, ICJ Reports, 2004, p. 136.

⁷⁶ David Kretzmer, *The Advisory Opinion: The Light Treatment of International Humanitarian Law*, *American Journal of International Law*, Vol. 99, 2005, p. 88.

⁷⁷ *Ibid.*, p. 88.

⁷⁸ *Supra* note 75, para. 140.

⁷⁹ See Christopher Greenwood, *supra* note 54, p. 33.

with international law, in IHL only when military necessity is absent does the general law prohibiting an act apply. It seems that Judge Higgins justifiedly commented that „the Court’s findings of law are notably general in character, saying remarkably little as concerns the application of the Hague Rules or the Fourth Geneva Conventions along particular sections of the route of the wall.”⁸⁰

It seems that the ICJ is identifying and applying customary humanitarian norms acts in a fairly liberal way, frequently not citing evidence of State practice and opinio juris. It must be noted, however, that the Court never asserted that customary humanitarian norms would undergo a different formation than rules of general international law and never mentioned the possibility that the inherent humanitarian content of a humanitarian norm would accelerate its transformation into customary rule even in the absence of State practice and opinio juris.

The Customary Law Study of the International Committee of the Red Cross (ICRC)

In 1995, the 26th International Conference of the Red Cross and Red Crescent requested the International Committee of the Red Cross to prepare a report on the customary rules of international humanitarian law applicable in international and non-international armed conflicts,⁸¹ following a similar recommendation from an inter-governmental group of experts.⁸² Following almost 10 years of research, the study was finally published in March 2005 under the authorship of Jean-Marie Henckaerts and Louise Doswald-Beck.⁸³ The purpose of the study was to overcome some of the problems incurring from the application of international humanitarian law treaties by identifying the relevant rules of customary humanitarian law that bind parties and non-parties alike.

In their approach to identify customary humanitarian law the authors followed an inductive approach. Instead of analysing the customary status of humanitarian treaty provisions, they undertook an evaluation of State practice. Determining what State practice is for the purpose of customary law and what methodology to use to deduce custom from it they followed closely the approach used by the International Court of Justice in its evaluation of customary law, based primarily on the judgments rendered in the *North Sea Continental Shelf*

⁸⁰ Supra note 75, Judge Higgins Separate Opinion, para. 40.

⁸¹ Resolution I, adopted during the 26th Conference of the Red Cross and Red Crescent 3-7 December 1995.

⁸² Intergovernmental Group of Experts for the Protection of War Victims, 23-27 January 1995, Recommendation II.

⁸³ Supra note 4.

cases and the *Nicaragua case*. The authors also relied on the 2000 Final Report of the International Law Association on the Formation of Customary International Law⁸⁴ which was primarily based on Mendelson's Hague Lecture in the same subject.⁸⁵ A novel element in their approach appeared in the inclusion in some parts of the study of international human rights law to help establish the customary nature of some humanitarian law rules, particularly those relating to non-international armed conflicts.⁸⁶

Following the methodology of international tribunals, only practice of States emanating from official sources was evaluated that included both physical actions and verbal acts such as battlefield behaviour, use of weapons, legislation, military manuals and official statements. International judicial decisions were taken into account not as examples of State practice – as international judicial bodies are not State organs – but as persuasive evidence of law, but in case of clash between State practice and case-law, State practice prevailed. Moreover, the practice of international organisations and the ICRC was also included, but it was given very limited weight while reliance on legal scholarship was strictly limited to information gained on State practice and summaries of international jurisprudence. As regards the practice of armed opposition groups such as codes of conduct, the authors decided against taking them into account in their evaluation of State practice, even though some examples were mentioned.⁸⁷

During the evaluation of State practice and *opinio juris* the authors established the customary nature of certain rules on the basis of State practice that was virtually uniform, widespread and representative. Apart from certain special cases, as the use of particular weapons, no State was deemed „specially affected” as all States have a legal interest in the implementation of humanitarian law. „Treaty practice”, i. e. the number of ratifications and the content of reservations and statements of interpretation was also judged to be relevant. As to the evaluation of *opinio juris*, the determination of legal conviction became especially important in cases of abstentions. Since a substantial part of the conduct of States consists of omission, the nature of abstentions was determined relying on the circumstances.⁸⁸

⁸⁴ International Law Association London Conference (2000), Final Report of the Committee on Formation of Customary (General) International Law, Statements Applicable to the Formation of General Customary International Law.

⁸⁵ *Supra* note 27.

⁸⁶ Louise Doswald Beck, Developments in Customary International Law, *Schweizerische Zeitung für Internationales und Europäisches Recht*, 2005, p. 474.

⁸⁷ Jean-Marie Henckaerts, Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict, *International Review of the Red Cross*, No. 857, 2005, p. 179-180.

⁸⁸ For a detailed description of the methodology used to ascertain custom in the ICRC Study see Jean-Marie Henckaerts, *Ibid.*, p. 175; Louise Doswald Beck, *supra* note 86, p. 471.

In the following part I attempt to analyse some of the conclusions reached by the authors in a critical light.

Rule 42. Works and installations containing dangerous forces

Article 56 (1) of Additional Protocol I. provides that:

„Works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe lossess among the civilian population.”

This provision was generally regarded as codification of new law and was rejected by major military powers. During the Gulf conflict, coalition forces targeted and put out two Iraqi nuclear power stations.⁸⁹ The ICRC study consequently does not state that there is a general prohibition of attacks against installations containing dangerous forces. Drawing on statements made by inter alia France, the United Kingdom, the United States and Israel⁹⁰ it concludes, however, that there is a rule of customary international law requiring additional care during the targeting of installations containing dangerous forces and its scope is wider than the installations contained in Additional Protocol I. It is applicable to all installations containing such forces including e.g. chemical plants and petroleum refineries.⁹¹

Still, it is not entirely clear what the rationale of this rule as a separate customary norm would be. It stands to reason that targeting such installations involves a greater risk of injury to civilian objectives, consequently, during the targeting procedure the proportionality assessment will take this factor into account, so it is simply a corollary of the principle of proportionality.

Rule 159. The obligation to endeavour to grant the widest possible amnesty at the end of a non-international armed conflict

The ICRC Study declares that

„At the end of hostilities, the authorities in power must endeavour to grant the broadest possible amnesty to persons who have participated in a non-interna-

⁸⁹ Christopher Greenwood, Customary International Law and the First Geneva Protocol of 1977 in the Gulf Conflict, in: Peter Rowe (ed.) *The Gulf War 1990-91 in International and English Law*, Routledge, 1993, pp. 81-82.

⁹⁰ *Supra* note 4, p. 140.

⁹¹ *Ibid.*, pp. 141-142.

tional armed conflict, or those deprived of their liberty for reasons related to the armed conflict, with the exception of persons suspected of, accused of or sentenced for war crimes."⁹²

This rule is an almost verbatim restatement of Article 6 (5) of Additional Protocol II.⁹³

The Study attempted to prove the existence of this purported rule by reference to certain States granting amnesty and to General Assembly and Security Council resolutions encouraging States to grant amnesty.⁹⁴

Nonetheless, this argument is less than convincing. The cited examples do not prove the existence of a normative will from the States that would transform their conduct to State practice. All that can be concluded that there is a policy objective to grant amnesty at the end of non-international armed conflicts to promote reconciliation. Moreover, this provision is simply incapable of becoming a legal rule. Its phrasing is only hortatory, it does not contain any obligations on States which is a good indication of soft law.

Rule 160. Statutes of limitation may not apply to war crimes

The authors trace back the evolution of this rule to the 1968. UN Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes and the 1974 European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes. They attribute special significance to the fact that between 1969 and 1973 a string of General Assembly resolutions called on States to ratify the UN Convention and the votes incurred substantial abstentions and just few negative votes.⁹⁵ The study concludes that „[T]he recent trend to pursue war crimes more vigorously in national and international criminal courts and tribunals, as well as the growing body of legislation giving jurisdiction over war crimes without time-limits, has hardened the existing treaty rules prohibiting statutes of limitation for war crimes into customary law.”⁹⁶

⁹² Ibid, p. 610.

⁹³ „At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.” Adam Roberts, Richard Guelff, *supra* note 50, p. 488.

⁹⁴ *Supra* note 4, pp. 611-612.

⁹⁵ Ibid, p. 615. They apparently do not attribute much significance to the fact that the ratification of the Convention itself was not very substantial.

⁹⁶ Ibid, p. 615.

This conclusion seems to be borne out from some actual State practice, treaty practice and reaction to General Assembly resolutions. Apart from the fact that treaty practice is not a factor in determining custom and that the reaction to General Assembly resolutions does not seem to be motivated by normative intent, it is very difficult to see how a „trend” could transform a rule to customary norm in the absence of extensive and virtually uniform practice.

The prohibition of deception in non-international armed conflicts

The ICRC Study lists nine rules between Rule 57 and 65 concerning deception in non-international armed conflicts. A common feature of all these rules is the almost complete absence of State practice. Most of the rules were included in the draft of Additional Protocol II, but were deleted from the finalized version. The authors mention as example the Memorandum of Understanding on the Application of International Humanitarian Law between Croatia and the Socialist Federal Republic of Yugoslavia, which is only an evidence of contractual obligation between the warring parties, even though they find a few military manuals actually containing these prohibitions.⁹⁷

To somehow solidify their work, the authors recourse to policy arguments. To prove that the improper use of white flag of truce is prohibited in non-international armed conflicts (Rule 58), they state that „It can be concluded that the general abstention from improperly using the white flag of truce in practice is based on a legitimate expectation to that effect.”⁹⁸ Similarly, the prohibition of use of the flags or military emblems, insignia or uniforms of neutral⁹⁹ or other States not party to the conflict (Rule 63) is also contingent upon the „legitimate expectation that parties to a non-international armed conflict abide by this rule is part of customary international law.”¹⁰⁰

While from the point of view of humanizing warfare the customary status of these rules would be without any doubt advantageous, only State practice can give rise to customary law. In its absence these rules pertain to the empire of morality and of course to domestic criminal law.

⁹⁷ Ibid, p. 206, p. 209.

⁹⁸ Ibid, p. 207.

⁹⁹ The use of the term 'neutral' is very peculiar in the context of non-international armed conflicts, as neutrality is a category pertaining to inter-state armed affairs unless the insurgents are granted belligerent recognition.

¹⁰⁰ Supra note 4, p. 219.

Conclusion

Customary international humanitarian law – in spite of the contrary practice of international courts and tribunals and the claims made by authors and the ICRC Study – is not different from any other branches of customary international law. While it is understandable that many feel that the present situation where States are unwilling to give indication about the state of law in many respects is undesirable for humanitarian causes, this discontention cannot give rise to claims about the existence of customary rules without respecting practice. Even though it may temporarily satisfy our sense of justice, in the end these tendencies could be destructive for the international legal system by destabilizing it.

SUMMARY

Dr. Opinio Juris and Mr. State Practice: The Strange Case of Customary International Humanitarian Law

TAMÁS HOFFMANN

The essay offers a brief overview of issues in customary international humanitarian law.

First it introduces the main components of general customary international law, state practice and *opinio juris*. Then it outlines a formalistic method of inquiry that can be used to examine customary international law without contradictions.

Next the essay discusses the relationship of customary international law and the treaties, and that of the resolutions of the United Nations General Assembly and customary international law. Presenting a theory associated with the name of Anthea Roberts, the author explains why it is impossible to amalgamate traditional and modern theories of customary international law.

The second part of the treaties focuses on issues of customary international humanitarian law. By analysing the history and possible interpretations of the Martens Clause, it answers the question whether or not the principle of humanity has created a new instrument of law, which can only be found in customary international law. Then by presenting some legal cases in the practice of the Nuremberg Military Tribunal, the International Criminal Tribunal for the for-

mer Yugoslavia (ICTY) and the International Court of Justice (ICJ) in The Hague, the author offers a method for examining customary international humanitarian law.

Finally, the essay discusses a monograph issued by the International Red Cross on customary international humanitarian law. First the methods applied by the authors of the book are analysed, then some norms the authors of the book refer to as rules of customary law are given a critical analysis.

The essay draws the final conclusion that the characteristics of customary humanitarian law do not differ from the rules of general customary law.

RESÜMEE

Dr. Opinio Juris und Mr. Staatspraxis: Der besondere Fall des internationalen Gewohnheitsrechts

TAMÁS HOFFMANN

Die Studie versucht einen kurzen Überblick über die Fragen des humanitären internationalen Gewohnheitsrechts zu geben.

Zuerst stellt sie die wichtigsten Elemente des allgemeinen internationalen Gewohnheitsrechts, die Staatspraxis und die *opinio juris* vor und zeigt dann eine formalistische Untersuchungsmethode auf, mit deren Hilfe das internationale Gewohnheitsrecht ohne Widersprüche untersucht werden kann.

Danach untersucht die Arbeit die Beziehung zwischen dem internationalen Gewohnheitsrecht und den Verträgen, sowie zwischen den UNO-Versammlungsbeschlüssen und dem internationalen Gewohnheitsrecht. Im Anschluss daran legt sie über die Untersuchung der Theorie von Anthea Roberts dar, warum die traditionellen und die modernen Theorien bezüglich des internationalen Gewohnheitsrechts nicht miteinander gekreuzt werden können.

Der zweite Teil der Studie beschäftigt sich nunmehr spezifisch mit den Fragen des internationalen humanitären Gewohnheitsrechts. Zuerst beleuchtet die Arbeit mit Hilfe der Analyse der Geschichte und der möglichen Interpretation der Martens'schen Klausel, ob das Humanitätsprinzip eine neue, nur im humanitären Gewohnheitsrecht existierende Rechtsquelle geschaffen hat. Danach gibt sie mit Hilfe einiger ausgewählter Rechtsfälle einen Überblick über die Unter-

suchungsmethode des internationalen humanitären Gewohnheitsrechts der internationalen Richterorgane – Militärgerichtshof Nürnberg, Internationaler Strafgerichtshof für das ehemalige Jugoslawien und Internationales Gericht.

Die Studie endet schließlich mit der Analyse des Werkes über das internationale Gewohnheitsrecht, das unlängst vom Internationalen Roten Kreuz herausgegeben wurde. Im Anschluss an die Vorstellung der methodologischen Charakteristika werden einige Normen kritisch untersucht, die die Verfasser des Buches für Gewohnheitsrechtsregeln halten.

Die Schlussfolgerung der Arbeit ist, dass die Charakteristika des humanitären internationalen Gewohnheitsrechts von den allgemeinen Gewohnheitsrechtsregeln nicht abweichen.