

# Custom in international humanitarian law

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The purpose of this study is to analyse the normative character of custom in international humanitarian law (IHL), on the basis of the theory and jurisprudence of public international law, in order to arrive at a better understanding of the conduct of States in conflict situations. In so doing, an attempt will be made to determine the possibilities for developing custom in IHL, especially in view of the increasing concern shown by international public opinion for the plight of victims of armed conflicts. The paper will begin with a review of the questions raised by custom as an independent source of humanitarian law (point 1) and go on to take a closer look at the constituent elements of custom in humanitarian law (point 2). It will end with a comparative study of the two approaches to custom in IHL, concentrating on the consequences that the development of custom may have in the future (point 3).

## **1. Custom as an independent source of humanitarian law**

Researchers and theorists in humanitarian law have recently been taking growing interest in the phenomenon of custom in IHL. This special attention may appear puzzling after more than a century of codification, but can be explained by a number of events. Among recent factors are the difficulties encountered in the drafting and ratification by the States of the Additional Protocols of 1977, the position of the US government in refusing to ratify Protocol I,<sup>1</sup> and the reservations expressed by some States, limiting the application of the Proto-

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<sup>1</sup> On this subject, see Meron, Theodor, *Human rights and humanitarian norms as customary law*, Clarendon Press, Oxford, 1989, p. 62

cols to the use of conventional weapons.<sup>2</sup> What should be emphasized first and foremost, however, is the grave erosion in recent years of the protection afforded to victims of armed conflicts, something that represents a real challenge to those promoting humanitarian law. The factors mentioned constitute a serious obstacle to the development of humanitarian treaties.

Nevertheless, new avenues have opened to legal experts since the International Court of Justice (ICJ), in its judgment of 1986 in the *Case concerning Military and Paramilitary Activities in and against Nicaragua*, recognized customary humanitarian law as being of equal standing with treaty law. According to Article 38, para. 1b, of the Court's Statute, custom is a system of norms based on general State practice and accepted as law.<sup>3</sup> This independent source of legal rules, now recognized as such by the Court in IHL, opens up new prospects for the development of humanitarian law. Thus, any practice conforming to the general principles of humanitarian law and encouraged and supported by the promoters of that law, namely, international public opinion and the humanitarian organizations, may acquire the status of a rule of customary law and consequently be binding on all States in all circumstances. This demonstrates the importance of the Court's decision for those whose business it is to promote humanitarian law. Customary IHL therefore represents an alternative to treaty law, complementing or even replacing it in spheres where no adequate rules have been established by treaty; it takes advantage of the support of international public opinion and of the humanitarian agencies to broaden and consolidate the humanitarian objectives of IHL. Without calling into question the normative value of the provisions of treaty law, customary humanitarian law demonstrates the influence of international public opinion on the practice of States in conflict. However, there is a corollary to this approach. The study of customary law can

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<sup>2</sup> A number of States expressed this reservation, known as the "NATO reservation", among them Italy, Belgium and the Netherlands. France, in its declaration accompanying its instrument of accession to Protocol II, notified its intention of not acceding to Protocol I because of "the lack of consensus among the States signatory to Protocol I with regard to the precise extent of the obligations incurred by them in the matter of deterrence". See *Protocols of 8 June 1977 additional to the Geneva Conventions of 12 August 1949—Reservations, declarations and communications made at the time of or in reference to ratification or accession, as at 30 June 1990*. ICRC, Geneva (DDM/JUR 90/802—PRV 4), duplicated. It should be noted, however, that the Soviet Union, when it ratified Protocols I and II on 29 September 1989, made no reservations (see *International Review of the Red Cross*, No. 273, November-December 1989, pp. 591-592).

<sup>3</sup> *Charter of the United Nations and Statute of the International Court of Justice*, United Nations, New York, 1979, p. 76.

obviously lead to the enlargement of the field of application, both personal and material, of treaty law, for example by making a treaty obligation binding on States not party to the legal instruments, or by extending the application of such an obligation to situations not covered by the treaties. Yet the quest for customary rules may involve the danger that questionable practices in the humanitarian context, for example in areas not covered by the humanitarian treaties, may be recognized as customary law because they fulfil the conditions for recognition as laid down in public international law. However, the plight of victims of armed conflicts today is such that legal experts are duty bound to make every effort to find ways of increasing respect for the principles of humanitarian law, even if in so doing they are obliged to take a stand concerning the practice of States in conflict.

We know that custom is the widespread repetition, in a uniform way and over a long period, of a specific type of conduct (*repetitio facti*), in the belief that such conduct is obligatory (*opinio juris sive necessitatis*). It is a series of successive acts which gradually become common practice, observed in good faith and finally respected by all.<sup>4</sup> In the law of armed conflict it preceded, sometimes by thousands of years, the written rules, as in cases such as parley and truce. However, owing to its imprecise nature and spontaneous origin, it puzzles legal experts, trained in the discipline of written law. If the law is defined as an organized method of producing normative acts, then international customary law appears as a norm without an act, difficult to grasp, emerging continually from social circumstances within the community of States, at times even in apparent contradiction to the legal order established by treaties. It has a positive quality, since it is recognized by those in a position to endow it with a certain force of application. Emanating as it does from society, customary law is completely dependent on society for the definition of its compulsory nature. It is, in fact, impossible to embody in a written standard the normative character of a customary rule, so that no one is able to determine exactly the material content of customary IHL. Customary law has no authoritative basis in a formal document of international scope, such as the humanitarian conventions: its compulsory character is anchored deep in the decision-making processes of the State, in the feeling that “humanitarian” practice is consistent with the law. Definition of the material content of customary rules therefore depends on the way in which States

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<sup>4</sup> Verri, Pietro, *Dictionnaire du droit international des conflits armés*, ICRC, Geneva, 1988, p. 39.

interpret their practices, this interpretation being shaped by international public opinion and the views of bodies such as the ICRC.

The distinction between customary law and treaty law has long been accepted in IHL. The “Martens clause”, contained in the preamble to The Hague Conventions of 1907, inspired the provisions of the article common to all four 1949 Geneva Conventions which relates to denunciation of the Conventions (Articles 63, 62, 142 and 158 of the First, Second, Third and Fourth Conventions respectively):

*“[Denunciation] 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”*.<sup>5</sup>

In these instruments, customary law retains a subsidiary character in comparison with treaty law. It appears that international legislators at the time found it difficult to accept that customary law could have the same status as treaty law. It was only as a last resort, in the hypothetical case of States deciding to denounce their treaty obligations, that other sources of humanitarian law could be considered.<sup>6</sup> Moreover, the States prohibited the conclusion of special agreements that would restrict the protection provided under the Conventions (Articles 6, 6, 6 and 7 of the four Geneva Conventions of 1949), with the specific purpose of maintaining the authority of multilateral conventions. In so doing, they wished to prevent States that no longer had full freedom of action from signing agreements making exceptions or reservations, which would soon erode the minimum guarantees afforded by the Conventions.<sup>7</sup> Since then, the perception of customary law has considerably evolved. The Additional Protocols of 1977 do not include the clause relating to denunciation, the High Contracting Parties being

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<sup>5</sup> The Geneva Conventions of 12 August 1949 (reprint), ICRC, Geneva, 1986.

<sup>6</sup> *The Geneva Conventions of August 12, 1949 - Commentary*, published under the general editorship of Jean S. Pictet; I (First Convention), ICRC, Geneva, 1952, p. 413. Pictet points out that a State that denounces one of the Conventions nevertheless remains bound by the principles contained in it insofar as they are the expression of customary international law.

<sup>7</sup> According to Pictet, this prohibition is of paramount importance for the application of the provisions contained in the Conventions. This limitation of the contractual freedom of the States, which conflicts with the idea of the sovereignty of States, is consistent with the deepest nature of the Conventions, even if, as the British delegation pointed out at the Conference of Governmental Experts in 1947, it entailed the risk of the Conventions being more frequently violated. Pictet, *op.cit.*, p. 72.

subject directly to the provisions of Article 43 of the Vienna Convention of 1969 on the Law of Treaties:

“[Denunciation] shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it is subject under any other rule of international law”.<sup>8</sup>

In the *Case concerning Military and Paramilitary Activities in and against Nicaragua*, the ICJ indeed stressed the independent existence of the two sources of law and their distinct character, stating 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.... [They] are also distinguishable by reference to the methods of interpretation and application”.<sup>9</sup>

This promotion of customary law to the rank of a source of humanitarian law has raised numerous problems, as the quest for the constituent elements of custom in fact gives the States considerable leeway in interpretation. A great deal is at stake, since the definition of the constituent elements must be such as to give a definite meaning to custom as part of humanitarian law, yet without denying the legal and moral authority of treaty law. The undertaking is especially exacting in view of the discrepancy between the current usage of some States engaged in conflict and the treaty law in force. Unless it is carried out with great caution, one runs the risk of encouraging the development of customs that set rules aside and of preventing any remoulding of humanitarian law. The difficulty of defining the constituent elements of customary law, incidentally, very clearly confronted the ICJ in its judgment of 1986, quoted above. The Court was called on in that case to give judgment on the customary nature of certain provisions of the Geneva Conventions in the light of the reservation attached by the US government to its acceptance of the compulsory jurisdiction of the Court within the meaning of Article 36, para. 2, of the ICJ’s Statute.<sup>10</sup>

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<sup>8</sup> Rosenne, Shabtai, *The law of treaties. A guide to the legislative history of the Vienna Convention*, A.W. Sijthoff/Oceana Publications, Leyden/Dobbs Ferry, 1970, p. 254.

<sup>9</sup> International Court of Justice (ICJ), *Reports of judgments*, 1986, p. 95, para. 178.

<sup>10</sup> Article 36, para. 2, of the Statute of the ICJ establishes voluntary compulsory jurisdiction. This rule authorizes the Court to give judgment on all legal matters presented to it as long as the parties have declared that they recognize the Court’s compulsory jurisdiction. *Statute of the International Court of Justice, op.cit.*, p. 74.

The United States had reserved assent to the Court's jurisdiction in all cases arising from obligations contained in a multilateral treaty, unless all parties to the latter had stated that they accepted the compulsory jurisdiction of the ICJ. According to the US government, the reservation in question also had the effect of preventing the Court from applying any rule of customary international law of which the content was similar to the said treaty obligations.<sup>11</sup> In the case in point, the reservation applied to obligations under the humanitarian treaties. If the ICJ appeared not to be competent to give judgment on violations of humanitarian treaty law, it did not hesitate to affirm its jurisdiction over complaints relating to general (or customary) international law, even though the content of the latter might be identical to the norms of treaty law.<sup>12</sup> The Court stated:

*“Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character.... [T]hey are rules which, in the Court's opinion, reflect what the Court in 1949 called 'elementary considerations of humanity' .... The Court may therefore find them applicable to the present dispute, and is thus not required to decide what role the United States multilateral treaty reservation might otherwise play....”*<sup>13</sup>

Acknowledgement of the parallel existence of custom as an independent source of humanitarian law allowed the ICJ to bypass the American reservation but, offsetting this, obliged the Court to make a decision on the content of customary IHL. As in the *Corfu Channel Case*,<sup>14</sup> another occasion on which it had invoked “elementary considerations of humanity”, the Court, rather than examining the constituent elements of customs in force, went back to general principles of humanitarian law that would appear to be directly applicable. The Court considered that:

*“the conduct of the United States may be judged according to the fundamental principles of humanitarian law.... [T]he Geneva Conventions are in some respects a development, and in other respects no more than the expression, of such principles”*.<sup>15</sup>

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<sup>11</sup> ICJ, *Reports of judgments*, 1984, pp. 424, 425, para. 73.

<sup>12</sup> ICJ, *Reports of judgments*, 1986, p. 93, para. 173, and p. 96, para. 179.

<sup>13</sup> ICJ, *Reports of judgments*, 1986, p. 114, para. 218.

<sup>14</sup> ICJ, *Reports of judgments*, 1949, p. 22.

<sup>15</sup> ICJ, *Reports of judgments*, 1986, p. 113, para. 218.

This equating of general principles with custom is extremely unfortunate. It should be pointed out that the judges brought in the concept of “elementary considerations of humanity” solely in the sphere of law of armed conflicts. Yet there can be no misapprehension: the general principles of humanitarian law must underlie all rules of IHL, whether treaty law or customary law. If the Court found that it was unable to apply treaty law, the only valid course was to refer to the general principles of customary humanitarian law, i.e., indirectly to custom. The material content of the “elementary considerations” must be sought in customary humanitarian law if it is to acquire any legal value; and this the judges did not do. No doubt they wished to refer to the customary content of humanitarian law but, in the absence of principles and jurisprudence to guide their proceedings, they refrained from seeking its constituent elements for fear of entering into political and philosophical matters outside their mandate. They preferred to consider that acts that offended human dignity necessarily offended against a norm of customary international law, with no thought for the legal void that they were leaving behind them. The Court’s circumspection was greatly facilitated by the almost universal ratification of the 1949 Geneva Conventions. It therefore linked the treaty law of 1949 with custom on the basis of their common characteristic of universality, while avoiding examination of the specific material content of custom in humanitarian law. The Court was quite right not to consider in the same way the provisions of the Additional Protocols of 1977, which have not enjoyed the same reception from the community of States. Although creating an opening for research in the field of customary humanitarian law, the ICJ has caused some confusion in the approach to custom in IHL. Its failure to establish the presence of the constituent elements of custom has made it risky to define them and requires researchers henceforth to show the greatest rigour in analysing the phenomenon of custom in order to identify those constituent elements and to develop legal instruments with at least some legitimacy.

## **2. The constituent elements of custom in international humanitarian law**

### **(a) The general practice of States**

General practice is the material element of custom. It is composed of all actions of the subjects of international law. These actions correspond to legal acts, whether internal or international, performed or

ordered by States but also by international organizations, international jurisdictions or humanitarian institutions such as the International Committee of the Red Cross.<sup>16</sup> According to the ICJ, the practice of subjects of international law must be “constant and uniform”; the repetition of certain acts over a period of time establishes them as the “usage” of the international community.<sup>17</sup> The practice, moreover, must not be that of a single State, but must be sufficiently widespread within the international community. Article 38, para. 1b, of the Statute of the ICJ refers explicitly to the “general” practice of States, which does not mean “unanimous”. In the *North Sea Continental Shelf cases*, the ICJ gave as its opinion:

*“With respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law ... a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected”*.<sup>18</sup>

Qualitatively, the practice of the States need not be absolutely uniform. In its judgment in the *Case concerning Military and Paramilitary Activities in and against Nicaragua*, the ICJ did not consider that

*“for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule”*.<sup>19</sup>

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<sup>16</sup> Pellet, A., in Nguyen Quoc, D., Daillier, P. and Pellet, A., *Droit international public* (3rd ed.). Librairie générale de droit et de jurisprudence, Paris, 1987, p. 297, para. 213; the practice of the ICRC as a non-governmental organization may create a degree of custom in the rules governing the action taken by the Red Cross in the event of armed conflict. See also Gasser, Hans-Peter, on the normative function of the ICRC’s appeals in favour of civilians, in “Armed conflict within the territory of a State”, in *Festschrift für Dietrich Schindler*, Helbing and Lichtenhahn, Basel, 1989, p. 234. Concerning the legal status of the ICRC in international law, see Dominicé, Christian, “La personnalité juridique internationale du CICR”, in *Studies and essays on international humanitarian law and Red Cross principles, in honour of Jean Pictet*, Christophe Swinarski, ed., ICRC/Martinus Nijhoff Publishers, Geneva/The Hague, 1984, pp. 663-674.

<sup>17</sup> ICJ, *Reports of judgments* 1960, p. 40, *Case concerning Passage over Indian Territory*.

<sup>18</sup> ICJ, *Reports of judgments* 1969, p. 42.

<sup>19</sup> ICJ, *Reports of judgments* 1986, p. 98, para. 186.

The general practice of States can be subdivided into several types of conduct. Some selection is necessary to identify customs that will obviously be peculiar to each of these types of conduct. We may define three categories of conduct that make up the practice of humanitarian law; each category is associated with one area of a State's activities in the law of armed conflict. Military practice comprises all acts of subjects of international law in applying the rules of IHL under domestic law, ranging from the introduction into domestic law of suitable regulations (e.g., military manuals) to application of the rules in a specific situation (e.g., treatment of prisoners of war, prosecution of breaches of IHL). Diplomatic practice is, among other things, a response to the States' obligation to "respect and ensure respect for" the provisions of the 1949 Geneva Conventions and of Protocol I of 1977 (Article 1 common to the four Geneva Conventions, and Article 1, para. 1, of Protocol I). It includes all forms of pressure employed by States to induce other members of the international community to meet their obligations under humanitarian law. Finally, legislative practice consists in the overall conduct of States in their role as international legislators, whether in ratifying or acceding to an instrument of treaty law or, more occasionally, in drafting new provisions of IHL.

**(b) *Opinio juris sive necessitatis***

Practice as such is not sufficient to establish a customary rule: it must be accompanied by the State's belief that it is complying with an international obligation. This feeling on the part of the State constitutes the subjective element of custom, and distinguishes custom from usage and from international courtesy. Yet it is difficult to determine which element comes first. Must practice precede the State's belief, or should that belief give rise to practice? In an armed conflict, a humanitarian practice is unlikely to develop unilaterally, providing a basis for the States' belief that such a practice is obligatory. Nevertheless, international public opinion and bodies such as the ICRC can persuade States in conflict to develop a certain type of humanitarian practice which, in the medium term, will become obligatory in the view of all members of the international community. In the *North Sea Continental Shelf cases*, the ICJ stated:

*"Not 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 .... The States concerned must therefore feel that they are conforming to what amounts to a legal obligation*".<sup>20</sup>

The guarantee of respect for the obligatory nature of humanitarian law therefore no longer rests solely on the formal nature of treaty law, but is based also on the political character of the "humanitarian" conviction in the formation process of custom: the "crystallization" of custom is accomplished through the recognition of these humanitarian practices by humanitarian bodies and the media and by spreading knowledge of them among the States and in international public opinion.

### **3. Analysis of the phenomenon of custom in humanitarian law**

#### **(a) Statement of the problem**

Custom, as a legal phenomenon, embraces the legal, political and ethical aspects of today's international society. In our legal approach to custom, we have noted that it is not easy to place it within the system of international law. The same is true in other areas of international relations. From the political standpoint, custom is a challenge to the experts, who are unable to define the origin of the normative authority of customary rules accepted by the States. Custom appears to them as a system of principles underlying the very concept of international relations, and therefore outside the scope of study of international politics. On the moral and ethical plane, custom in IHL, by making compromises with military necessity, reveals the failure of our legal and political systems to fulfil their role of regulating the behaviour of States in exceptional situations. In erecting this complicated and ambiguous legal structure, the community of States has created a model of armed conflict that it regards as acceptable in humanitarian terms. Gustave Moynier wrote, after the first Geneva Convention was signed in 1864: "Civilized nations try to make war more humane, recognizing by so doing that not all acts of war are lawful".<sup>21</sup> However, it must be remembered

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<sup>20</sup> ICJ, *Reports of judgments* 1969, p. 44, para. 77.

<sup>21</sup> Boissier, Pierre, *History of the International Committee of the Red Cross: From Solferino to Tsushima*, Henry Dunant Institute, Geneva, p. 120.

that this legal structure of conventions, by giving the same weight to military necessity and to humanitarian considerations, has no real legitimacy except for the community of States at peace, i.e., those who created the law of Geneva: it does not directly serve the vital interests of the belligerents or those, no less vital, of the victims of armed conflicts who are inevitably the losers in this “humanitarian” compromise.

Custom, as a model of conduct, lies at the point of intersection of the various approaches, none of which, unless aided by other disciplines, is able to grasp the meaning of State conduct in a conflict. Custom, the *lex lata* of IHL, requires for an understanding of its operation a multidisciplinary approach that can apprehend and analyse the forces making up its background and consequently its obligatory nature. The source of obligatory custom, its incorporation into the international legal order and its moral value remain indissolubly associated in IHL. It must be admitted that research into custom testifies to the international community’s dissatisfaction with treaty norms in international law. It is an attempt to establish a new consensus of States that will be more flexible than heretofore, and that will strengthen the international legal system. Two different approaches to custom are currently in the process of establishing an extensive list of customary rules in IHL.<sup>22</sup> This research into custom takes on a political hue, according to whether treaty law is seen as a standard to be safeguarded or whether customary law is seen as a new standard to be recognized. The first, or “normative”, approach proceeds by extrapolating—or generalizing—the normative content of treaty law to cover custom, concentrating almost exclusively on the subjective nature of the latter (*opinio juris*). The second, or “systematic”, approach proceeds via systematic recognition of the general practice of the States before making any analysis of the subjective nature of custom.

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<sup>22</sup> For the customary content of the Fourth Geneva Convention of 1949 (Protection of civilian persons in time of war), see Meron, Theodor, *op.cit.*, pp. 46-50; also “The Geneva Conventions as customary law” by the same author, in *The American Journal of International Law*, 1987, pp. 348-370. For the customary content of Protocol I (humanitarian law applicable in international armed conflicts), see Penna, L.R., “Customary international law and Protocol I”, in *Studies and Essays... in honour of Jean Pictet*, *op.cit.*, pp. 201-225. For the customary content of Protocol II (humanitarian law applicable in non-international armed conflicts), see Gasser, *op.cit.*, pp. 225-240. For the customary law contained in Protocols I and II, see also Cassese, Antonio, “The Geneva Protocols of 1977 on the humanitarian law of armed conflict and customary international law”, in *UCLA Pacific Basin Law Journal*, Spring and Fall 1984, Vol. 3, Nos. 1 and 2, pp. 55-118.

## (b) The normative approach

Although treaty law may have lost some of its authority in comparison with customary norms, some consider it to have retained all its relevance for determining the ideal content of the rules of humanitarian law. It derives from the will of the States and, as such, represents the ultimate objective of the international community. This approach tends to conserve as much as possible of the treaty content of humanitarian law as it develops into custom. It proposes to perceive custom only through the material content of treaty law. Degan's view is that the four Geneva Conventions of 1949 and their two additional Protocols of 1977, which codified and progressively developed IHL, are "*the most important mode of intentional articulation and accelerating of customary process after the Second World War*".<sup>23</sup> The instruments of IHL thus have a double function: like other agreements, they impose obligations on the parties by virtue of a treaty; yet, because of their moral content and, in particular, because of the obligation contained in Article 1 of the four Geneva Conventions and of Protocol I, enjoining the States "to ensure respect" for the provisions in those instruments "in all circumstances", their main function would seem to be to influence the development of customary law.<sup>24</sup> Indeed, the basic provisions of the Conventions and of Protocol I are so worded as to confer rights and impose obligations on all States, whether or not they are party to the treaties in question. According to this school of thought, treaty law should serve as a support to research into custom, since it is the only form of law containing rules that can be defined and accepted by the States. It thus becomes the central element in research into custom, the basis for recognizing the practice of States. Such practice may have existed before the treaty which codifies or "crystallizes" a norm in the process of formation; it may also come into existence after the treaty, in which case the treaty is said to be the generator of custom. This extrapolation of the legislative will of the States to cover custom obviously neglects all the "extra-conventional" practices of States, as well as any customs that nullify treaty law. It limits the authority of custom to the formal treaty framework which

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<sup>23</sup> Degan, V.D., "Two modes of generating customary rules of general international law", in *Jugoslavenska Revija za medunarodno Praz.*, Belgrade, 1988. No. 1, p. 23.

<sup>24</sup> See especially Condorelli, Luigi and Boisson de Chazournes, Laurence, "Quelques remarques à propos de l'obligation des Etats à respecter et faire respecter le droit international humanitaire 'en toutes circonstances'", in "*Studies and Essays... in honour of Jean Pictet, op.cit.*", pp. 26, 27.

results from the legislative will of the States and which it cannot exceed or seek to modify. The texts codifying IHL act as the sole “material source” of customary rules.<sup>25</sup> In codifying a customary practice, the States express their intention of indicating the existence of a customary norm. Consequently, the interpreter is justified in basing his proof of customary law on this appreciation of the “codifiers”, presuming that State practice has been correctly established and defined within the framework of the process of codification and that there is no need to re-examine the interpretation given.<sup>26</sup> The same principle applies to custom generated by treaty law. The belief in the basically normative character of a treaty provision is expressed in the text of the convention. Once this has been ratified by a sufficient number of representative States it provides, according to Torriane, adequate grounds for demonstrating the existence of custom.<sup>27</sup> Those who favour this approach base their interpretation of practice as perceived by the codifying States on the entire history of codification of the law of armed conflict, including the 1907 Hague Conventions, and on the positions taken by States during conferences on codification. This supplies them with a wide range of convention-based norms from which may be deduced States’ belief regarding custom in force and to come.

However, research into custom via treaty law draws a subtle distinction between treaty rules that are reflected in custom and those that are not. This raises the problem of the legal validity of treaty law. In wishing to avoid examination of the basis of custom, for fear of giving State practice a normative character of its own, the normative approach indirectly calls into question the validity of the whole body of treaty law. Consequently, it is doubtful whether such a distinction is relevant in humanitarian law. As we have seen, the very structure and purpose of the humanitarian conventions destine their content for general recognition. The legal nature of the norms of humanitarian law is therefore derived as much from the agreement of the States as from their generally applicable content. The normative approach thus makes a large part of treaty law obsolete, since it is regarded as having failed in its mission of becoming general international law. This approach is unable to solve the problem of defining custom without descending to the subjectivity of the political will of the codifying States, which do

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<sup>25</sup> Torriane, H., *Influence des conventions de codification sur la coutume en droit international public*, Editions universitaires de Fribourg, Fribourg, 1989, p. 77.

<sup>26</sup> *Ibid.*, p. 301.

<sup>27</sup> *Ibid.*, p. 302.

not hesitate subsequently to question the normative character of a standard that they have themselves decreed.

Moreover, by concentrating on treaty law to determine the content of customary law, this approach conceals one of the most dynamic aspects of custom: its ability to abrogate laws and to create new ones. Dupuy<sup>28</sup> considers that custom has two principal functions. Its first function is to create new law. It spreads in a homogeneous society and confers on it a degree of public order. In this aspect it expresses a system of ethics that is common to all or simply transcends formal consensus. Its second function is to review existing law. Recognition of custom is a way of abolishing norms that have become obsolete and thus making clear what is positive law in the whole body of rules in force. This author states that the law of armed conflict is the favoured area for creating and abolishing rules by virtue of custom.<sup>29</sup> Practice contrary to treaty provisions obviously poses a problem for experts in humanitarian law, especially if, from the normative viewpoint, such provisions are candidates for the status of customary humanitarian law. Logically, under treaty law, a practice that is contrary to the norm does not affect the latter's legal force, which derives solely from the formal process of drafting and adoption by the members of the international community. Nevertheless, in the general theory of law, the actual practice of States, in all its aspects, lies at the heart of the process of forming custom, the *opinio juris* establishing the practice in question as a source of law. If a State considers that the acts of another State are encroaching in some way on its rights, it may make a protest in order to prevent such acts from eventually having legal consequences. In so doing, it manifests its refusal to regard this practice as being law.<sup>30</sup> According to the ICJ,<sup>31</sup> any protest by States following the violation of a rule of law must, to be valid, be repeated and followed by decisive acts, ranging from appeal to an international organization and a hearing in an international court to the breaking off of trade or even diplomatic relations. While the protest has the result

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<sup>28</sup> Dupuy, E.J., "Coutume sage et coutume sauvage", in *Mélanges Rousseau*. Pédone, Paris, 1974, pp. 75-87.

<sup>29</sup> *Ibid.*, pp. 81, 82.

<sup>30</sup> Cahin, P., "Le comportement des Etats comme source de droit et d'obligations", in *Recueil d'études de droit international en hommage à Paul Guggenheim*, Faculty of Law, University of Geneva/Graduate Institute of International Studies, Geneva, 1968, p. 250.

<sup>31</sup> ICJ, *Reports of judgments* 1953, pp. 106, 107, *The Minquiers and Ecrchos case*.

of blocking the claims of the State responsible for the breach, it must be admitted on the other hand that, if the States whose interests have been infringed fail to take action, after a time they may be held responsible for the existing situation, which their conduct has helped create. Hence the importance of the pressure exerted by international public opinion and by the humanitarian agencies on the States' interpretation in cases of breaches of the provisions of IHL.

### (c) Systematic approach

Despite appearances to the contrary, attributable to the highly visible nature of violations, most of the fundamental rules of humanitarian law are respected in the States' military practice.<sup>32</sup> If this were not so, there would be no point in studying the legal aspects of humanitarian treaty law or customary law. Every time a military unit spares the life of a civilian in the course of its operations, the obligation to protect the civilian population has been met. For obvious reasons, it is difficult to assemble a sufficient body of proof that such conduct conforming to humanitarian law is motivated by belief in the law rather than in "morality". The systematic approach to custom differs radically from the previous approach in its attitude toward the legislative will of the States. According to Malenovsky,<sup>33</sup> any State that plays a part in shaping customary practice should be seen as having its own motives and special aims connected with the actual context of armed conflict, which is fundamentally different from all other situations. The acts of States correspond to specific interests that are far more pressing than most objectives of their legislative policy. The weakness of the normative approach to custom lies in the fact that it analyses the content of custom solely from the viewpoint of the codifying State. Cheng<sup>34</sup> points out that the legal framework in which the rules of international law are formulated is completely different depending on whether they derive from custom or from treaty law. This author does not consider that treaty law is capable of simply being "generalized", since the States, when complying with a treaty obligation, do not have the feeling that they are creating general law,

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<sup>32</sup> Gasser, *op.cit.*, p. 232.

<sup>33</sup> Malenovsky, J., "Are necessary changes of methods of ascertaining customary rules in international law?", in *Acta Universitatis Wratislaviensis*, Note 983, Wrocław, 1988, p. 208.

<sup>34</sup> Cheng, B., "Custom: the future of general State practice in a divided world", in *The structure and process of international law* (Macdonald, R. St. J. and Johnston, Douglas M., eds.), Martinus Nijhoff Publishers, Dordrecht, 1986, p. 530.

only that they are observing treaty law. The voluntarist component inherent in treaty law should not therefore be transposed to customary law, to avoid making grave mistakes in determining the true content of custom. In IHL this position implies that treaty provisions cannot directly establish the existence of a customary rule. Consideration of the circumstances that gave birth to the customary rule is essential for understanding what determines a State's subjection to a general obligation. The source of the obligation is to be found more in the circumstances of the State, which it is necessary to scrutinize, than in the will of the State as fixed in treaty provisions dating sometimes from over a century before. For this approach, research into custom through treaty law is too static to apprehend the essentials.

#### 4. Conclusion

The interpenetration of law and politics in international law appears very clearly in this context, and custom in humanitarian law serves as a cogent reminder. It lies at the meeting-point of social forces and political theory.<sup>35</sup> The question obviously arises as to whether the conduct of States should be interpreted from the standpoint of customary law, derived from the practice of States in conflict, or from the standpoint of treaty law, the product of the "humanitarian" compromise made by States at peace. Yet these two sources of law should not be regarded as competing. It is possible to steer the development of customary law in the direction of treaty law, simply by working to strengthen its provisions. The legal expert is consequently faced with a choice: he may either leave it to the States of the world community to legislate for the protection of victims of armed conflicts in accordance with their own interests, or he may "take the side" of the victims and militate in favour of strengthening humanitarian law through the development of customary law. The development of customary humanitarian law will depend on a profound change in the power structure of the international community regarding the protection of the basic rights of the individual. The study of its content postulates a thorough knowledge of the political, social and economic interests surrounding the matter. In this context, international public opinion and humanitarian institutions such as the ICRC have a major role to play. On the one hand, they must be capable of exerting

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<sup>35</sup> Dupuy, *op.cit.*, p. 85.

constant pressure on States in exceptional situations to respect the fundamental rights of victims of armed conflicts, while spreading knowledge of the practice thus established among the other members of the international community and the general public. Meron<sup>36</sup> says: “Public opinion abhorring the excesses ... may act as a catalyst for determinations by third States that such practices are not only immoral, but also illegal.... [This] will aid in the formation of *opinio juris* and customary rules for the humanization of such wars”. The humanitarian agencies and public opinion should respond to the invitation thus proffered to them. Custom has become much more than a system of norms governing the conduct of States in conflict: it provides a unique opportunity for all concerned to take an active part in the development of humanitarian law.

### Claude Bruderlein

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<sup>36</sup> Meron, *op.cit.*, p. 74.