THE GENEVA CONVENTIONS AS CUSTOMARY LAW

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I. INTRODUCTION

At first glance, the question of the customary character of the Geneva Conventions of August 12, 1949 for the Protection of Victims of War[1] might appear academic. After all, the question arises infrequently in view of the universal acceptance of the Conventions as treaties (they are binding on even more states than the Charter of the United Nations).[2] That the matter may have practical importance, however, was recently brought home by its consideration by the International Court of Justice (ICJ) in the merits phase of *Military and Paramilitary Activities in and against Nicaragua*.[3] Moreover, in numerous countries where customary law is treated as the law of the land but an act of the legislature is required to transform treaties into internal law, the question assumes importance if no such law has been enacted.[4] Failure to enact the necessary legislation cannot affect the interna-

* Of the Board of Editors.

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

[2] There are 164 states parties to the Geneva Conventions. International Committee of the Red Cross, Dissemination No. 5, August 1986. There are 159 member states of the United Nations. MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL: STATUS AS AT 31 DECEMBER 1985, at 3–6, UN Doc. ST/LEG/SER.E/4 (1986).

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

[4] For a discussion of legislation implementing the Geneva Conventions, see Bothe, *The Role of National Law in the Implementation of International Humanitarian Law*, in STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES IN HONOUR OF JEAN PICTET 300, 305–06 (C. Swinarski ed. 1984). Many states parties to the Geneva Conventions have not adopted such legislation. Levasseur & Merle, *L'Etat des législations internes au regard des obligations contenues dans les conventions internationales de droit humanitaires*, in DROIT HUMANITAIRE ET CONFLITS ARMÉS 219, 225, 228, 249 (Université Libre de Bruxelles, 1976).

Only 49 governments answered an ICRC inquiry about legislative action taken to repress violations of the Geneva Conventions. This group included some governments that reported having taken no such action, e.g., Indonesia, Iraq, Lebanon, South Africa and Syria. INTERNATIONAL COMMITTEE OF THE RED CROSS, RESPECT OF THE GENEVA CONVENTIONS: MEASURES TAKEN TO REPRESS VIOLATIONS (Reports submitted by the International Committee of the Red Cross to the XXth and XXIst International Conferences of the Red Cross) (1971); TWENTY-

tional obligations of these countries to implement the Geneva Conventions; but invoking a certain norm as customary rather than conventional in such situations may be crucial for ensuring protection of the individuals concerned.

Apart from its consequences for the internal law of some countries, the transformation of the norms of the Geneva Conventions into customary law may have certain additional effects. One such effect, already reflected in common Article 63/62/142/158, which concerns denunciation of the Geneva Conventions,[5] and in Article 43 of the Vienna Convention on the Law of Treaties, is that parties could not terminate their customary law obligations by withdrawal. Another is that reservations to the Conventions may not affect the obligations of the parties under provisions reflecting customary law to which they would be subject independently of the Conventions.[6] Finally, as customary law, the norms expressed in the Conventions might be subject to a process of interpretation different from that which applies to treaties.

Those who doubt the significance of the question might point out that treaties such as the Geneva Conventions that are accepted by virtually the entire international community through formal and solemn acts have as

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FIFTH INTERNATIONAL CONFERENCE OF THE RED CROSS, RESPECT FOR INTERNATIONAL HUMANITARIAN LAW: NATIONAL MEASURES TO IMPLEMENT THE GENEVA CONVENTIONS AND THEIR ADDITIONAL PROTOCOLS IN PEACETIME 4 (Doc. C1/2.4/2 1986). *See also id.* at 13.

The Israeli Supreme Court has refused to review the acts of the military Government on the West Bank in light of Geneva Convention No. IV on the ground that the law of the Convention is wholly conventional rather than declaratory of customary law and has not been transformed into the law of the land by legislation. *See* Cohen, *Justice for Occupied Territory? The Israeli High Court of Justice Paradigm*, 24 COLUM. J. TRANSNAT'L L. 471, 484–89 (1986); Roberts, *What Is a Military Occupation?*, 54 BRIT. Y.B. INT'L L. 249, 253 (1984); Meron, *Applicability of Multilateral Conventions to Occupied Territories*, 72 AJIL 542, 543, 548–50 (1978).

For views suggesting that some provisions of Convention No. IV are declaratory of customary law, see Dissenting Opinion of Justice H. Cohn in Kawasme v. Minister of Defence, 35(1) Piskei Din 617, *summarized in* 11 ISR. Y.B. HUM. RTS. 349, 352–54 (1981); Dinstein, *Expulsion of Mayors from Judea*, 8 TEL AVIV U.L. REV. 158 (Hebrew, 1981); Meron, *West Bank and Gaza: Human Rights and Humanitarian Law in the Period of Transition*, 9 ISR. Y.B. HUM. RTS. 106, 111–12 (1979).

[5] *See infra* note 13.

[6] Judge Morelli has emphasized that "the power to make reservations affects only the contractual obligation flowing from the convention," adding that "[i]t goes without saying that a reservation has nothing to do with the customary rule as such. If that rule exists, it exists also for the State which formulated the reservation, in the same way as it exists for those States which have not ratified." North Sea Continental Shelf Cases (FRG/Den.; FRG/Neth.), 1969 ICJ REP. 3, 198 (Judgment of Feb. 20) (Morelli, J., dissenting). *See also* Judgment, *id.* at 38–40. Although the Judgment suggests that no reservations to conventional provisions that are declaratory of customary law are permissible, will the effect of such reservations not be (except as regards rules of *jus cogens*), as between the reserving state and the state accepting the reservation, similar to that produced by a treaty establishing a conventional rule, which displaces, *inter partes*, a rule of customary law? L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, INTERNATIONAL LAW: CASES AND MATERIALS 86–87 (2d ed. 1987).

On reservations made by parties to the Geneva Conventions, see Pilloud, *Reservations to the Geneva Conventions of 1949* (pt. 1), INT'L REV. RED CROSS, No. 180, March 1976, at 107 (Pilloud observes that customary law must be applied to determine the "extent" of the reservations made, *id.* at 108); and (pt. 2), INT'L REV. RED CROSS, No. 181, April 1976, at 163.

strong a legal claim to observance as customary law, which by and large rests on the practice of a limited number of states. They might also argue that when a treaty embodies strongly felt humanitarian ideals, it has a moral as well as a legal claim to observance and that transposing its norms into customary law will not necessarily add to its moral claim.

Nevertheless, consensus that the Geneva Conventions are declaratory of customary international law would strengthen the moral claim of the international community for their observance because it would emphasize their humanitarian underpinnings and deep roots in tradition and community values. It may also represent a step in the process that begins with the crystallization of a mere contractual norm into a principle of customary law and culminates in its elevation to *jus cogens* status[7] (a norm of *jus cogens* can mature also through other processes). The development of the hierarchical concept of *jus cogens* reflects the quest of the international community for a normative order in which higher rights are invoked as a particularly compelling moral and legal barrier to derogations from and violations of human rights. To be sure, the Geneva Conventions already contain some norms that can be regarded as *jus cogens*.[8]

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

Obviously, the invocation of a norm as both conventional and customary adds at least rhetorical strength to the moral claim for its observance and affects its interpretation. Thus, to underline the gravity of certain violations, the ICJ observed in the Iranian *Hostages* case that the obligations in question were not merely "contractual . . . but also obligations under general international law."[9]

In the *Nicaragua* case, the question under discussion arose in an unusual context: the multilateral treaty reservation of the United States appeared to preclude the ICJ from applying the Geneva Conventions as treaties. Hence the importance of the Conventions as declaratory of customary law. In its treatment of this issue, the Court refrained from mentioning the two Additional Protocols of 1977 and from considering the way that they confirm, supplement or modify provisions of the Conventions themselves. (While the extent to which the Protocols are declaratory of customary law has begun

[7] *See* T. MERON, HUMAN RIGHTS LAW-MAKING IN INTERNATIONAL LAW: A CRITIQUE OF INSTRUMENTS AND PROCESS 194 (1986).

[8] The International Law Commission (ILC) has observed that "some of [the rules of humanitarian law] are, in the opinion of the Commission, rules which impose obligations of *jus cogens*." Report of the International Law Commission on the work of its thirty-second session, 35 UN GAOR Supp. (No. 10) at 98, UN Doc. A/35/10 (1980).

[9] United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 ICJ REP. 3, 31 (Judgment of May 24).

A case for a particular interpretation of conventional rules (e.g., Arts. 87 and 100 of Geneva Convention No. III) is strengthened by its concordance with "commonly accepted international law." Public Prosecutor v. Koi, [1968] 1 All E.R. 419, 425.

to attract scholarly attention, this important and difficult question could not be treated in the confines of this essay.)

I shall first consider certain aspects of the *Nicaragua* Judgment that implicate humanitarian law (while protecting the rights of states and governing their duties, humanitarian law also contains a prominent human rights component[10]). Then I will consider, in the context of the Geneva Conventions, the broader question of how customary law can develop alongside conventional law. While a rich literature has already been devoted to the relationship between custom and treaty in general, relatively little has been written on the Geneva Conventions as customary law.

II. THE *NICARAGUA* JUDGMENT

Because of the U.S. multilateral treaty reservation, the circumstances leading to the invocation of the Geneva Conventions as customary law in the *Nicaragua* case are unlikely to recur in future cases before the ICJ. The Court's method is nonetheless of general interest in determining the relationship between custom and treaty. It may also create some perplexity.

Although both Nicaragua and the United States are parties to the Geneva Conventions, Nicaragua refrained from invoking them in the proceedings, perhaps because of its reluctance either to acknowledge that the conflict constitutes an internal armed conflict, or to have its own acts measured by the yardstick of norms contained in common Article 3.[11] The Court itself,

[10] *See* Meron, *On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument*, 77 AJIL 589, 593 (1983) [hereinafter cited as *Inadequate Reach*]. On the relationship between human rights law and humanitarian law, see also T. MERON, HUMAN RIGHTS IN INTERNAL STRIFE: THEIR INTERNATIONAL PROTECTION 3–70 (1987). *See also* Kunz, *The Laws of War*, 50 AJIL 313, 316 (1956).

[11] *See generally* the following reports by AMERICAS WATCH COMMITTEE, VIOLATIONS OF THE LAWS OF WAR BY BOTH SIDES IN NICARAGUA 1981–1985 (1985); VIOLATIONS OF THE LAWS OF WAR BY BOTH SIDES IN NICARAGUA 1981–1985, FIRST SUPPLEMENT (June 1985); HUMAN RIGHTS IN NICARAGUA 1985–1986 (1986).

Common Article 3 reads as follows:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
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> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
>
> To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
> (b) taking of hostages;
> (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
> (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
>
> (2) The wounded and sick shall be collected and cared for . . . .

however, alluded to the relevance to the Geneva Conventions of the U.S. reservation. It did not find it necessary to take a position on the question because, in the Court's view, the conduct of the United States could be judged according to fundamental principles of humanitarian law. In fact, the Court took the U.S. reservation into account by applying certain provisions of the Geneva Conventions as customary rather than contractual obligations.

The Court began its analysis with the general and unchallengeable assessment that the Geneva Conventions represent "in some respects a development, and in other respects no more than the expression," of fundamental principles of humanitarian law.[12] In support of the proposition that certain provisions are declaratory of customary law, the Court mentioned as significant the common article on denunciation,[13] which emphasizes that, by denouncing the Conventions, no state can derogate from its obligations under international law and the laws of humanity.

The pitfalls of disentangling customary from conventional norms appeared, however, as soon as the Court moved from the general to the specific. The Court focused on two common articles of the Geneva Conventions as reflecting general principles of humanitarian law, or customary law, Articles 1 and 3. Article 1, one of the shortest provisions in the Conventions, provides that "[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances." The Court concluded:

> [T]here is an obligation on the United States Government, in the terms of Article 1 of the Geneva Conventions, to "respect" the Conventions and even "to ensure respect" for them "in all circumstances", since such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression. The United States is thus under an obligation not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3 common to the four 1949 Geneva Conventions . . . .[14]

Quaere. Does Article 1 give expression to a general principle of humanitarian law? To the extent that Article 3 states principles of customary law,

[12] 1986 ICJ REP. at 113, para. 218.

[13] Common Article 63/62/142/158 provides that the denunciation of one of the Conventions:

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

A state that denounces one of the Geneva Conventions "would nevertheless remain bound by the principles contained in it insofar as they are the expression of . . . customary international law." Pictet (ed.), *infra* note 15, at 413.

[14] 1986 ICJ REP. at 114, para. 220. Elsewhere in its Judgment the Court stated, in the same vein, "that general principles of humanitarian law include a particular prohibition [to refrain from encouraging persons or groups to commit violations of Article 3], accepted by States, and extending to activities which occur in the context of armed conflicts, whether international in character or not." *Id.* at 129, para. 255.

it is obvious that the United States has the duty to respect them, both directly and vicariously, even in the absence of the explicit obligation ("to respect") stated in Article 1. It is less clear whether there is an obligation deriving from the general principles of international law not to "encourage" violations by others ("to ensure respect") of the principles in Article 3.

While the Court's statement is ambiguous, it seems to suggest that when the Geneva Conventions were adopted, Article 1, as well as Article 3, was declaratory of humanitarian principles, by which the Court meant, in this context, customary law. There is no evidence, however, that at that time the negotiating states believed that they were codifying an existing principle of law. They appear to have chosen the words "and to ensure respect" deliberately "to emphasize and strengthen the *responsibility of the Contracting Parties.*"[15] Also, the language "and to ensure respect" was not used in earlier Geneva Conventions.[16] The repetition of such prior usage would have strengthened the claim that the phrase is declaratory of international law.[17] Although this was not the case here, the language "to ensure respect" was

[15] COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949: GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 26 (J. Pictet ed. 1952) (emphasis added). The *Commentary* adds that "in the event of a Power failing to fulfil its obligations, the other Contracting Parties . . . may, and should, endeavour to bring it back to an attitude of respect for the Convention." *Id.*

The 1958 *Commentary* on Geneva Convention No. IV went further, adding that "[t]he proper working of the system of protection provided by the Convention demands in fact that the Contracting Parties should not be content merely to apply its provisions themselves, but should do everything in their power to ensure that the humanitarian principles underlying the Conventions are applied universally." COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949: GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 16 (O. Uhler & H. Coursier eds. 1958). The 1958 *Commentary* states that the words "in all circumstances" (common Article 1) do not cover the case of civil war and apply to international armed conflicts only. *Id. See also* Pictet (ed.), *supra*, at 27.

[16] Thus, the (Geneva) Prisoners of War Convention, *opened for signature* July 27, 1929, 47 Stat. 2021, TS No. 846, provided only (Article 82) that "[t]he provisions of the present Convention must be respected by the High Contracting Parties under all circumstances." For an excellent discussion of Article 82, see Condorelli & Boisson de Chazournes, *Quelques Remarques à propos de l'obligation des Etats de "respecter et faire respecter" le droit international humanitaire "en toute circonstances,"* in Swinarski (ed.), *supra* note 4, at 17, 18–19.

The obligation "to ensure respect" is reiterated in Article 1(1) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *opened for signature* Dec. 12, 1977, 16 ILM 1391 (1977), but not in the Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *opened for signature*, Dec. 12, 1977, 16 ILM 1442 (1977).

[17] Baxter has observed that

> [t]he passage of humanitarian treaties into customary international law might . . . be justified on the ground that each new wave of such treaties builds upon the past conventions, so that each detailed rule of the Geneva Conventions for the Protection of War Victims is nothing more than an implementation of a more general standard already laid down in an earlier convention, such as the Regulations annexed to Convention No. IV of The Hague.

Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 41 BRIT. Y.B. INT'L L. 275, 286 (1965–66).

a conventional precursor to the *erga omnes* principle enunciated by the Court in *Barcelona Traction*,[18] to which we shall return later.

The contemporaneous understanding of the drafters, however, is not necessarily dispositive of the issue; subsequent developments may be relevant. Since 1949 certain third states and the International Committee of the Red Cross (ICRC) have made a practice of issuing appeals to certain governments to respect the Geneva Conventions. Moreover, the ICRC and other international bodies have made general appeals to all states to ensure respect for the Conventions. Despite the salutary efforts of the ICRC to stimulate this practice further, it does not appear to be uniform;[19] and, because of the confidential character of some of the appeals, it is often difficult to ascertain. This confidentiality also suggests that it may be unwise to insist on extensive evidence of practice.

While practically all states are parties to the Geneva Conventions, the practice of states parties may merely indicate that certain states are complying with their treaty obligation "to ensure respect" for the Conventions. As the ICJ observed in the *North Sea Continental Shelf Cases*, little support for the customary law nature of the norms implicated may be found in the conduct of parties that are "acting actually or potentially in the application of [a] Convention."[20] Because of the universal acceptance of the Geneva Conventions as treaties, a special difficulty, to be considered in section IV below, is how to refer to state practice apart from these Conventions.

Notwithstanding the Court's rather curious assessment of Article 1 as customary law, as a matter of conventional obligations, the Court's conclusion that the United States may not encourage persons or groups engaged in the Nicaraguan conflict to act in violation of common Article 3 is indisputably correct. The principles of good faith and *pacta sunt servanda*,[21] which have

[18] Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain) (New Application), 1970 ICJ REP. 4, 32 (Judgment of Feb. 5). *See also* COMITÉ INTERNATIONAL DE LA CROIX-ROUGE, COMMENTAIRE DES PROTOCOLES ADDITIONNELS 36–37 (Y. Sandoz, C. Swinarski & B. Zimmermann eds. 1986).

[19] Condorelli & Boisson de Chazournes, *supra* note 16, at 27. For a discussion of practice, see *id.* at 26–29.

[20] North Sea Continental Shelf Cases, 1969 ICJ REP. at 43. Baxter has observed that the Court "quite properly looked exclusively to the conduct of non-parties in attempting to determine whether the treaty, in its law-creating aspect, was binding on all nations." Baxter, *Treaties and Custom*, 129 RECUEIL DES COURS 27, 64 (1970 I). *See also* Bos, *The Identification of Custom in International Law*, 25 GER. Y.B. INT'L L. 9, 27–28 (1982).

On treaties and custom, see generally A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 103–08, 160–64 (1971); H. THIRLWAY, INTERNATIONAL CUSTOMARY LAW AND CODIFICATION 80–84 (1972); Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT'L L. 1 (1974–75); Sohn, *The Law of the Sea: Customary International Law Developments*, 34 AM. U.L. REV. 271 (1985). For a reply to Sohn, see Charney, *International Agreements and the Development of International Law*, *id.* at 971. *See also* Sohn, *Unratified Treaties as a Source of Customary International Law*, in REALISM IN LAW-MAKING: ESSAYS ON INTERNATIONAL LAW IN HONOR OF WILLEM RIPHAGEN 231 (A. Bos & H. Siblesz eds. 1986); Sohn, *"Generally Accepted" International Rules*, 61 WASH. L. REV. 1073 (1986).

[21] *See* Article 26 of the Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, UNTS Regis. No. 18,232, UN Doc. A/CONF.39/27 (1969), *reprinted in* 63 AJIL 875 (1969), 8 ILM 679 (1969).

deep historical and jurisprudential roots in international law, impose on the United States not only a duty to perform its own obligations as a party to the Conventions (the duty "to respect" in the language of Article 1), but also a duty not to encourage others to violate common Article 3. Beyond this negative duty, the fundamental obligation implies that each state must exert efforts to ensure that no violations of the applicable provisions of humanitarian law ("to ensure respect") are committed, at the very least by third parties controlled by that state.

The duty not to encourage violations finds strong additional support in the *erga omnes* character of the humanitarian norms implicated. Undeniably, the Geneva Conventions, and especially common Article 3, state a great number of basic rights of the human person, some that may have attained the status of *jus cogens*.[22] Whether such rights are peremptory or not, under *Barcelona Traction*, "all States can be held to have a legal interest in [their] protection; they are obligations *erga omnes*."[23] This is true, the *Barcelona* Court appeared to suggest, both of norms accepted into the corpus of general international law and of those incorporated into instruments of a universal or quasi-universal character (the Geneva Conventions, of course, fall into this category). The *erga omnes* character of many of the norms in these Conventions implies that third states have not only the right to make appropriate representations urging respect for these norms to states allegedly involved in violating them, but also a duty not to encourage others to violate the norms, and, perhaps, even to discourage others from violating them. Insofar as the norms whose observance is urged are obligations *erga omnes*, the words "to ensure respect" (common Article 1) may indeed reflect a principle of customary law.[24]

In considering common Article 3, which, according to both its language and its legislative history applies to noninternational armed conflicts but not to international armed conflicts, the Court briefly referred to the problem

[22] *See* Meron, *On a Hierarchy of International Human Rights*, 80 AJIL 1, 15 (1986). Condorelli and Boisson de Chazournes, *supra* note 16, at 33, appear to suggest that the whole of humanitarian law constitutes *jus cogens*.

[23] 1970 ICJ REP. at 32.

[24] Judge Schwebel, while questioning whether the delict of "encouragement" exists in customary law, agreed that such encouragement may constitute a violation of the treaty obligation to "ensure respect" for the Geneva Conventions. 1986 ICJ REP. at 388–89 (Schwebel, J., dissenting). Judge Schwebel's observations on customary law find support in the commentary adopted by the ILC in 1978 on Article 27 of its draft articles on state reponsibility (pt. 1). The ILC stated that "[i]n the international legal order . . . it is more than doubtful that mere incitement by a State of another State to commit a wrongful act is in itself an internationally wrongful act." Report of the International Law Commission on the work of its thirtieth session, 33 UN GAOR Supp. (No. 10) at 187, 244, UN Doc. A/33/10 (1978). It is less clear, however, whether the ILC intended to address humanitarian norms, which are norms *erga omnes* and sometimes even *jus cogens*. Indeed, in its commentary on Article 33 of its draft articles on state responsibility (pt. 1), adopted in 1980, the ILC indicated that state of (military) necessity cannot excuse noncompliance with rules of humanitarian law even with regard to those obligations which are not obligations *jus cogens*. Report of the International Law Commission on the work of its thirty-second session, *supra* note 8, at 98. The ILC added that a state of necessity cannot be invoked if that is expressly or implicitly prohibited by a conventional instrument, as in the case of humanitarian instruments. *Id.* at 99, 108. Such instruments are obviously nonderogable.

of how the Nicaraguan conflict should be characterized. The Court determined that the conflict between the contras and the Government of Nicaragua was an armed conflict not of an international character and that the acts of the contras against that Government were governed by the law applicable to such conflicts,[25] but that "the actions of the United States in and against Nicaragua fall under the legal rules relating to international conflicts."[26] The Court went on to state that

> Article 3 . . . defines certain rules to be applied in the armed conflicts of a non-international character. . . . [I]n the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; . . . they . . . reflect what the Court in 1949 called "elementary considerations of humanity" (*Corfu Channel* . . .).
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> . . . Because the minimum rules applicable to international and to non-international conflicts are identical, there is no need to address the question whether those actions must be looked at in the context of the rules which operate for the one or for the other category of conflict. The relevant principles are to be looked for in the provisions of Article 3 of each of the four Conventions of 12 August 1949, the text of which, identical in each Convention, expressly refers to conflicts not having an international character.[27]

The Court thus viewed the core norms governing noninternational armed conflicts as substantially the same as those that apply to international armed conflicts and found in Article 3, perceived as the "minimum common denominator," a justification for not deciding whether those actions must be examined by the yardstick applicable to international or to noninternational conflicts. The Court's approach gives rise to some questions.

Was the catalog of protections set forth in common Article 3 ever meant to constitute the minimum core of protections applicable in international armed conflicts?[28] And while Article 3 may well express the quintessence of humanitarian rules found in other provisions of the Geneva Conventions that govern international armed conflicts, it is not certain that the rules of Article 3 and of those other provisions match each other perfectly, or that all of those humanitarian principles have necessarily attained the character of customary rules of international law.

Article 3 has no antecedents in earlier Geneva Conventions and was clearly viewed in 1949 as marking a "new step" in the development of humanitarian

[25] 1986 ICJ REP. at 114, para. 219.

[26] *Id.* On the characterization of conflicts in international humanitarian law, see Meron, *Inadequate Reach*, *supra* note 10, at 603; Schindler, *International Humanitarian Law and Internationalized Internal Armed Conflicts*, INT'L REV. RED CROSS, No. 230, September–October 1982, at 255, 258; Baxter, *Jus in Bello Interno: The Present and Future Law*, in LAW AND CIVIL WAR IN THE MODERN WORLD 518, 523–24 (J. Moore ed. 1974); Gasser, *Internationalized Non-international Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon*, 33 AM. U.L. REV. 145 (1983).

[27] 1986 ICJ REP. at 114, paras. 218–19.

[28] The ICRC *Commentary* on Geneva Convention No. I emphasizes that Article 3 applies to noninternational conflicts only. Pictet (ed.), *supra* note 15, at 48.

law.[29] The ICRC *Commentary* on Geneva Convention No. I states that Article 3 demands respect for rules "already recognized as essential in all civilized countries, and enacted in the municipal law of the States in question, long before the Convention was signed."[30] True, some of the provisions of Article 3 are rooted in national legal systems and, perhaps, could have been construed by the Court as constituting "general principles of law recognized by civilized nations," within the meaning of Article 38(1)(c) of its Statute. It is less clear, however, whether norms accepted by states in their national legal systems for normal situations apply equally to internal armed conflicts.

The norms specified in Article 3 have an indisputably humanitarian character, but elementary considerations of humanity have not necessarily attained the status of customary law. Elementary considerations of humanity reflect basic community values whether already crystallized as binding norms of international law or not. Professor Brownlie has observed that "[c]onsiderations of humanity may depend on the subjective appreciation of the judge, but, more objectively, they may be related to human values already protected by positive legal principles which, taken together, reveal certain criteria of public policy . . . ."[31]

As regards the norms in Article 3, a recent authoritative enumeration of customary human rights does not list due process of law, which is the subject of common Article 3(1)(d).[32] And an important study of Protocol II explains the deletion of a reference to the law of nations in the version of the Martens clause appearing in that Protocol as reflecting some hesitation about the reach of customary international law in internal conflicts.[33]

The Court's discussion of the Geneva Conventions is remarkable, indeed, for its total failure to inquire whether *opinio juris* and practice support the crystallization of Articles 1 and 3 into customary law. Doubts about the Court's position regarding Articles 1 and 3 were expressed by judges as

[29] *Id.* at 38, 41.

[30] *Id.* at 50.

[31] I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 29 (3d ed. 1979).

The fact that the content of a norm reflects important considerations of humanity should promote its acceptance as customary law. Thus, in explaining why the Geneva Conventions can be regarded as approaching "international legislation," Sir Hersch Lauterpacht stated, among other reasons, that "many of the provisions of these Conventions, following as they do from compelling considerations of humanity, are declaratory of universally binding international custom." 1 H. LAUTERPACHT, INTERNATIONAL LAW: COLLECTED PAPERS 115 (E. Lauterpacht ed. 1970).

[32] RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES (REVISED) §702 (Tent. Draft No. 6, vol. 1, 1985) [hereinafter cited as RESTATEMENT (REVISED)]. For the text of Article 3, see *supra* note 11.

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> This [deletion of a reference to the law of nations] is justified by the fact that the attempt to establish rules for a non-international conflict only goes back to 1949 and that the application of common Art. 3 in the practice of States has not developed in such a way that one could speak of "established custom" regarding non-international conflicts.

M. BOTHE, K. PARTSCH & W. SOLF, NEW RULES FOR VICTIMS OF ARMED CONFLICTS 620 (1982). *See also infra* note 52.

eminent as Sir Robert Jennings and Roberto Ago.[34] Moreover, the parties to the Geneva Conventions have built a poor record of compliance with the norms stated in Article 3[35] and evidence of practice by nonparties is lacking. Nevertheless, it is not so much the Court's attribution of customary law character to both Articles 1 and 3 of the Geneva Conventions that merits criticism; rather, the Court should be reproached for the virtual absence of discussion of the evidence and reasons supporting this conclusion.

Despite the Court's pronouncements on Articles 1 and 3, the status of the Geneva Conventions remains very much as it was before the Judgment: as in the past, the determination to which category—customary or conventional—a particular provision belongs will have to be made *in concreto*. Perhaps the Judgment will be invoked in support of claims to lighten the burden of proof necessary to establish the customary law character of a particular provision of the Conventions because of their humanitarian content (in this sense, the Court's Judgment promotes valuable ethical considerations mentioned in section I above, and contributes to the transformation of certain provisions into customary law); still, it cannot be said that the Court has succeeded in clarifying the status of the Geneva Conventions as customary law.

III. THE ANTECEDENTS

It would be wrong to single out the Court for criticism for its conclusory treatment of certain provisions of the Geneva Conventions as customary law, without discussing supporting evidence or the process by which the Conventions were supposed to be transformed into customary law. Military manuals of leading powers, such as the United States[36] and the United King-

[34] Judge Jennings stated that there must be at least very serious doubts whether the Geneva Conventions could be regarded as embodying customary law and that the Court's view of Article 3 "is not a matter free from difficulty." 1986 ICJ REP. at 537 (Jennings, J., dissenting). Judge Ago observed that he was

> most reluctant to be persuaded that any broad identity of content exists between the Geneva Conventions and certain "fundamental general principles of humanitarian law", which, according to the Court, were pre-existent in customary law, to which the Conventions "merely give expression" (para. 220) or of which they are at most "in some respects a development" (para. 218).

1986 ICJ REP. at 184, para. 8 (Ago, J., sep. op.).

[35] *See* T. MERON, *supra* note 10, at 43–44, 47. *See generally* Obradovic, *Que faire face aux violations du droit humanitaire?—quelques réflexions sur le rôle possible du CICR*, in Swinarski (ed.), *supra* note 4, at 483; Farer, *Humanitarian Law and Armed Conflicts: Toward the Definition of "International Armed Conflict,"* 71 COLUM. L. REV. 37, 52–61 (1971). *See also infra* note 78.

[36] The U.S. manual states that the Regulations Respecting the Laws and Customs of War on Land annexed to Hague Convention No. IV, 36 Stat. 2277, TS No. 539, 1 Bevans 631, and the "general principles" of the (Geneva) Prisoners of War Convention, *supra* note 16, "have been held to be declaratory of the customary law of war, to which all States are subject." The manual observes that provisions of lawmaking treaties regarding the conduct of warfare "are in large part but formal and specific applications of general principles of unwritten law." U.S. DEP'T OF THE ARMY, THE LAW OF LAND WARFARE 6 (Field Manual No. 27-10, 1956). *See also* 2 U.S. DEP'T OF THE ARMY, INTERNATIONAL LAW 249 (Pamphlet No. 27-161-2, 1962).

dom,[37] have not attempted to identify those provisions of the Geneva Conventions which are declaratory of customary international law, and the few international judicial decisions on international humanitarian law reveal little, if any, inquiry into the process by which particular instruments have been transformed into customary law.

The leading case on the Hague Regulations of 1907 is the judgment of the International Military Tribunal (IMT) for the Trial of German Major War Criminals (Nuremberg, 1946). In response to the argument that Hague Convention No. IV did not apply because of the general participation, *si omnes*, clause (several of the belligerents were not parties to the Convention), the IMT appeared to acknowledge that at the time the Regulations were adopted, the participating states believed that they were making new law: "but by 1939 these rules laid down in the Convention were recognised by all civilised nations, and were regarded as being declaratory of the laws and customs of war."[38] The IMT did not even discuss the process by which the Hague Regulations had metamorphosed from conventional into customary law. The Tribunal's language ("regarded") suggests that the Tribunal may have looked primarily at the *opinio juris*, rather than at the actual practice of states. Similarly, but somewhat more cautiously, the International Military Tribunal for the Far East (1948) viewed Hague Convention No. IV "as good evidence of the customary law of nations, to be considered by the Tribunal along with all other available evidence in determining the customary law to be applied in any given situation."[39] This Tribunal, in contrast to the IMT, did not regard the Hague Regulations as necessarily an exact mirror of customary law.

The most interesting case on the relationship between custom and treaty, in the context of the Geneva Conventions, is *United States v. von Leeb* ("The High Command Case").[40] Unlike the IMT judgment, which focused on the significance of the *si omnes* clause in Hague Convention No. IV 32 years after its adoption, *von Leeb* principally concerned whether and to what extent the 1929 Geneva Prisoners of War Convention, to which the Soviet Union was not a party, could be binding on Nazi Germany vis-à-vis the Soviet Union regarding actions stemming from the Nazi invasion of the USSR only 12 years after the Convention was adopted.

In *von Leeb*, the Nuremberg Tribunal endorsed the principle applied by the IMT with regard to the Hague Regulations, extrapolating from it to reach the 1929 Convention. The Tribunal noted:

[37] WAR OFFICE, THE LAW OF WAR ON LAND BEING PART III OF THE MANUAL OF MILITARY LAW 1, 4 (1958). The manual regards the Hague Regulations as embodying rules of customary international law. *Id.* at 4. *See also* Report of the Secretary-General on Respect for Human Rights in Armed Conflicts, UN Doc. A/7720, at 22 (1969).

[38] TRIAL OF GERMAN MAJOR WAR CRIMINALS, 1946, CMD. 6964, MISC. NO. 12, at 65.

[39] In re Hirota, 15 Ann. Dig. 356, 366. The Tribunal stated that "acts of inhumanity to prisoners which are forbidden by the customary law of nations as well as by conventions are to be prevented by the Government having responsibility for the prisoners." *Id.*

[40] 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 462 (1948) [hereinafter cited as TRIALS OF WAR CRIMINALS].

> [I]t would appear that the IMT . . . followed the same lines of thought with regard to the Geneva Convention as with respect to the Hague Convention to the effect that they were binding insofar as they were in substance an expression of international law as accepted by the civilized nations of the world, and this Tribunal adopts this viewpoint.
>
> . . . .
>
> Most of the provisions of the Hague and Geneva Conventions, considered in substance, are clearly an expression of the accepted views of civilized nations and binding upon Germany and the defendants on trial before us in the conduct of the war against Russia.[41]

Although admitting that "certain detailed provisions pertaining to the care and treatment of prisoners of war" could be binding only as conventional law,[42] the Tribunal cited as customary law 5 provisions of the 1907 Hague Regulations and 19 provisions of the 1929 Geneva Convention, even including a provision (Article 9) requiring that "[p]risoners captured in unhealthful regions or where the climate is injurious for persons coming from temperate regions, shall be transported, as soon as possible, to a more favourable climate." Some of the provisions of the Geneva Convention listed by the Tribunal ranged far beyond the few short principles stated in the Hague Regulations. The Tribunal did not explain the process by which those provisions of the Geneva Convention that did not echo the provisions of the Hague Regulations had been transformed in just a few years into customary law. The Tribunal also did not mention the rationale for determining which provisions were part of customary law. Baxter observed that "[a] rough-and-ready distinction may be discerned between those safeguards that are essential to the survival of the prisoner, on the one hand, and those protections that are not basic or which give depth to or implement the essential principles";[43] but he acknowledged that that line is not rigorously adhered to. The Tribunal did refer to the Soviet Union's practice during the war of using German POWs to construct fortifications as "evidence given to the interpretation of what constituted accepted use of prisoners of war under international law."[44]

In another case, which involved the defense of superior orders and was thus unrelated to the Geneva Convention, the Tribunal noted that recog-

[41] *Id.* at 534–35. The Nuremberg Tribunal cited with approval Admiral Canaris's remarkable protest against the German regulations for the treatment of Soviet prisoners of war. His protest stated that the regulations were based on a "fundamentally different viewpoint" from that underlying the principles of international law: "Since the 18th century these have gradually been established along the lines that war captivity is neither revenge nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war." The admiral concluded that while the Geneva Convention was not, the principles of international law on the treatment of prisoners were binding on Germany vis-à-vis the Soviet Union. *Id.* at 533.

[42] *Id.* at 535.

[43] Baxter, *supra* note 17, at 282.

[44] *Von Leeb*, *supra* note 40, at 534. The Tribunal concluded that because of the "uncertainty of international law . . . orders providing for . . . use [of prisoners of war in the construction of fortifications outside of] dangerous areas, were not criminal upon their face." *Id.*

nition by states of such a defense in their manuals of military law was not a competent source of international law but might have evidentiary value.[45] This position appears to have been rooted in an understandable reluctance to accept the defense of superior orders from German officers. Generally, however, because of the difficulty of ascertaining significant state practice in periods of hostilities, manuals of military law and legislation of states providing for the implementation of humanitarian law norms as internal law should be considered as among the best types of evidence of such practice and, sometimes perhaps, as a statement of *opinio juris* as well. Of course, the practice of states is also reflected in the multilateral treaty, "which constitutes an expression of their attitude toward customary international law, to be weighed together with all other consistent and inconsistent evidence of the state of customary international law."[46]

IV. Future Directions

Only a few international judicial decisions discuss the customary law nature of international humanitarian law instruments. These decisions nevertheless point to certain trends in this area, including a tendency to ignore, for the most part, the availability of evidence of state practice (scant as it may have been) and to assume that noble humanitarian principles that deserve recognition as the positive law of the international community have in fact been recognized as such by states. The "ought" merges with the "is," the *lex ferenda* with the *lex lata*. The teleological desire to solidify the humanizing content of the humanitarian norms clearly affects the judicial attitudes underlying the "legislative" character of the judicial process. Given the scarcity of actual practice, it may well be that, in reality, tribunals have been guided, and are likely to continue to be guided, by the degree of offensiveness of certain acts to human dignity; the more heinous the act, the more the tribunal will assume that it violates not only a moral principle of humanity but also a positive norm of customary law.

Although the Court in the *Nicaragua* case did not discuss the formation of customary law in the direct context of the Geneva Conventions, its method cannot but influence future consideration of customary law in various fields

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> We point out that army regulations are not a competent source of international law. They are neither legislative nor judicial pronouncements. . . . [But] it is possible . . . that such regulations, as they bear upon a question of custom and practice in the conduct of war, might have evidentiary value, particularly if the applicable portions had been put into general practice. It will be observed that the determination, whether a custom or practice exists, is a question of fact.

United States v. List, 11 Trials of War Criminals, *supra* note 40, at 1230, 1237.

The U.S. field manual, *supra* note 36, at 3, states that its purpose "is to provide authoritative guidance to military personnel on the customary and treaty law applicable to the conduct of warfare on land and to relationships between belligerents and neutral States." I agree with Baxter that such manuals provide "telling evidence" of the practice of states. Baxter, *supra* note 17, at 283.

[46] Baxter, *supra* note 20, at 52. For other evidence of state practice, see also the U.S. field manual, *supra* note 36, at 6.

of international law, including the Geneva Conventions. Having posed all the traditional, correct questions regarding the existence of actual practice and the *opinio juris*, the Court made only perfunctory and conclusory references to the practice of states. Even though there is a wide range of reasons that impel states to adopt their positions in international forums, the Court found *opinio juris* in verbal statements of governmental representatives to international organizations, in the content of resolutions, declarations and other normative instruments adopted by such organizations, and in the consent of states to such instruments.[47] This approach by the Court, to be sure, is not without doctrinal support. A scholar as respected as Judge Baxter has argued that

> [t]he actual conduct of States in their relations with other nations is only a subsidiary means whereby the rules which guide the conduct of States are ascertained. The firm statement by the State of what it considers to be the rule is far better evidence of its position than what can be pieced together from the actions of that country at different times and in a variety of contexts.[48]

[47] 1986 ICJ REP. at 98–108, paras. 187–205. The Court's approach has significant antecedents in earlier cases. *See* Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 ICJ REP. 16, 31–32 (Advisory Opinion of June 21); Western Sahara, 1975 ICJ REP. 12, 30–37 (Advisory Opinion of Oct. 16).

In discussing the Court's view (in the *Nicaragua* case) that "voting for a norm-declaring resolution is an exercise in *opinio juris*," Professor Franck warns:

> The effect of this enlarged concept of the lawmaking force of General Assembly resolutions may well be to caution states to vote against "aspirational" instruments if they do not intend to embrace them totally and at once, regardless of circumstance. That would be unfortunate. Aspirational resolutions have long occupied, however uncomfortably, a twilight zone between "hard" treaty law and the normative void.

Franck, *Some Observations on the ICJ's Procedural and Substantive Innovations*, 81 AJIL 116, 119 (1987).

A tendency similar to that of the ICJ can be found also in decisions of national courts on the customary law of human rights: e.g., in the emphasis by Judge Kaufman on international and domestic normative instruments prohibiting torture, on government statements and on scholarly opinion, in Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980); in the focus on normative instruments to determine the prohibition in international customary law of arbitrary detention, Rodriguez-Fernandez v. Wilkinson, 505 F.Supp. 787, 796–800 (D. Kan. 1980), *aff'd on other grounds*, 654 F.2d 1382 (1981); and in the recognition of the principle of diplomatic immunity (in the case of Raoul Wallenberg), Von Dardel v. Union of Soviet Socialist Republics, 623 F.Supp. 246, 261 (D.D.C. 1985). Compare Schachter's list of types of evidence adduced to support a finding that a particular human right is a part of customary law, *International Law in Theory and Practice*, 178 RECUEIL DES COURS 11, 334–35 (1982 V). *See also* Schrader, *Custom and General Principles as Sources of International Law in American Federal Courts*, 82 CAL. L. REV. 751, 762–68 (1982). On practice creating customary human rights, see also RESTATEMENT (REVISED), *supra* note 32, §701 Reporters' Note 2. *See also* Gerstel & Segall, *Conference Report: Human Rights in American Courts*, 1 AM. U.J. INT'L L. & POL. 137, 162 & nn.79–80 (1986). For a critique of *Filartiga* and *Rodriguez-Fernandez*, see Oliver, *Problems of Cognition and Interpretation in Applying Norms of Customary International Law of Human Rights in United States Courts*, 4 HOUS. J. INT'L L. 59, 60 (1981).

[48] Baxter, *supra* note 17, at 300.

Despite perplexity over the reasoning and, at times, the conclusions of a tribunal, states and scholarly opinion in general will probably accept judicial decisions confirming the customary law character of some of the provisions of the Geneva Conventions as statements of the law. Eventually, the focus of attention will shift from the inquiry into whether certain provisions reflect customary law to the judicial decisions establishing that status.

As far as lawmaking is concerned, the starting point is, of course, the practice of states. Yet in concluding noncodifying multilateral treaties even outside the humanitarian law field, norms and values are commonly asserted that differ from the actual practice of states. When it comes to human rights or humanitarian conventions—i.e., conventions whose object is to humanize the behavior of states, groups and persons—the gap between the norms stated and actual practice tends to be especially wide.

The lawmaking process does not merely "photograph" or declare the current state of international practice. Far from it. Rather, the lawmaking process attempts to articulate and emphasize norms and values that, in the judgment of some states, deserve promotion and acceptance by all states, so as to establish a code for the better conduct of nations.[49] This applies in particular to instruments designed to humanize the behavior of states in armed conflict, which is characterized by violence and violations, by the necessity to commit acts frequently not preceded by careful deliberation, by exceptional conditions, by limited third-party access to the theater of operations, and by the parties' conflicting factual and legal justifications for their conduct. Because of these circumstances, humanitarian conventions may have lesser prospects for actual compliance than other multilateral treaties, even though they enjoy stronger moral support. Consequently, in the violent situations dealt with by the humanitarian conventions, the gulf between the more enlightened norms and the actual practice of states may, to some extent, be expected to continue.

Far from codifying the actual behavior of states or the mores of the international community, lawmaking conferences try to adopt more protective rules of conduct,[50] stretching the consensus of the negotiating states as widely as possible. As a mixture of actual and desired practice, humanitarian instruments may thus reflect deliberate ambiguity, designed to encourage broader compliance with the stated norms and to promote the greatest possible acceptance of the norms as the general law of the international com-

[49] *See generally* Meron, *The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination*, 79 AJIL 283, 317–18 (1985).

[50] The Preamble to Hague Convention No. IV, *supra* note 36, expresses this approach with rare candor:

> Animated by the desire to serve, even in this extreme case, the interests of humanity and the ever progressive needs of civilization;
>
> Thinking it important, with this object, to revise the general laws and customs of war . . . confining them within such limits as would contain their severity as far as possible;
>
> . . . inspired by the desire to diminish the evils of war, as far as military requirements permit . . . .

munity. In the creation of international humanitarian law, the teleological component of *lex ferenda* is especially important, though often deliberately downplayed. The sound judgment of the "legislators" and the distance between the "is" and the "ought to be" determine whether a particular instrument will raise the expectations of the international community, will be accepted in practice as the living, binding general law of the international community, or will become marginal or even fall eventually into desuetude.

In discussing the customary law character of the Geneva Conventions, two questions merit consideration. The first pertains to the status of the Conventions at the time of their adoption as declaratory of customary law, the second to the subsequent passage into customary law of norms stated in the Conventions.

As regards the first question, a further distinction is perhaps called for. Many provisions of Conventions Nos. I, II and III are based on earlier Geneva Conventions, and thus have a claim to customary law status. Geneva Convention No. IV, in contrast, was the first Geneva Convention ever to be addressed to the protection of civilian persons. A result of the universal condemnation of the Nazis' treatment of civilians in occupied Europe during the Second World War, the Convention is rooted only in the few provisions on the treatment of civilians in combat zones and occupied territories found in Articles 23, 25, 27, 28 and 42–56 of the Hague Regulations. The ICRC *Commentary* on Convention No. IV attempts to demonstrate that the Convention repeats the bulk of the Hague Regulations relating to the protection of civilian persons.[51] But in their range and depth, most of the provisions in the Convention retain only a tenuous link with the brief and fairly primitive Hague Regulations; those involving procedures and implementation have no such antecedents.

Nevertheless, because some provisions of Conventions Nos. I–III formed new conventional law, and some provisions of Convention No. IV reflected customary law (e.g., the principle of protection of the physical and mental integrity of civilians, and of sick and wounded), the difference between the former Conventions and Convention No. IV is quantitative, not qualitative. All of the Conventions contain a core of principles (e.g., the Martens clause)[52]

[51] O. Uhler & H. Coursier (eds.), *supra* note 15, at 620. Regarding the antecedents of Geneva Conventions Nos. I–II, see Dinstein, *Human Rights in Armed Conflict*, in 2 HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 345, 346 (T. Meron ed. 1984).

However, as regards protection of private property, the Hague Regulations provide the basic principles, while Geneva Convention No. IV states a number of supplementary rules.

[52] *See* Strebel, *Martens' Clause*, [Instalment] 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 252 (R. Bernhardt ed. 1982). The Martens clause reads as follows:

> Until a more complete code of the laws of war has been issued, the High Contracting Parties 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 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.

The Martens clause appears also, in modified form, in the common article on the denunciation of the Geneva Conventions (63/62/142/158); in Article 1(2) of Protocol I, *supra* note 16; in the Preamble to Protocol II, *supra* note 16; and in the Preamble to the Convention on Prohi-

that express customary law. Of course, the identification of the various provisions as customary or conventional law presents the greatest difficulties.

Discussion of the second question, the development of the law of the Geneva Conventions since their adoption in 1949, should begin by noting their unparalleled success, as manifested by their acceptance as treaties by the entire international community. Because practically all the potential participants in creating customary law have become parties, little evidence is available to demonstrate that nonparties behave in accordance with the Conventions and are thus creating concordant customary law. The "Baxter paradox" (Judge Baxter himself coined the term "paradox" in this context) is in full blossom:

> [A]s the number of parties to a treaty increases, it becomes more difficult to demonstrate what is the state of customary international law dehors the treaty. . . . As the express acceptance of the treaty increases, the number of States not parties whose practice is relevant diminishes. There will be less scope for the development of international law dehors the treaty . . . .[53]

In Baxter's opinion this fate has befallen the Geneva Conventions:

> Now that an extremely large number of States have become parties to the Geneva Conventions . . . who can say what the legal obligations of combatants would be in the absence of the treaties? And if little or no customary international practice is generated by the non-parties, it becomes virtually impossible to determine whether the treaty has indeed passed into customary international law.[54]

But does this suggest that the door is now closed to further creation of customary law regarding matters governed by the Geneva Conventions? In tackling this question, I should mention that Baxter's approach is rooted principally in the Judgment in the *North Sea Continental Shelf Cases*. The Court's denial that the practice of parties to a convention has evidentiary weight in the creation of customary law is striking in its brevity and categorical nature:

> [O]ver half the States concerned, whether acting unilaterally or conjointly, were or shortly became parties to the Geneva Convention [on the Continental Shelf], and were therefore presumably . . . acting actually or potentially in the application of the Convention. From their action no inference could legitimately be drawn as to the existence of

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bitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, *opened for signature* Apr. 10, 1981, UN Doc. A/CONF.95/15 (1980), *reprinted in* 19 ILM 1524 (1980).

[53] Baxter, *supra* note 20, at 64, 73. Charney points out:

> In cases where . . . widespread adherence to the agreement exists, substantial evidence of state actions taken in circumstances where the agreement is not directly applicable may be hard to obtain. As a consequence, support for new rules of customary law will have to be found in the agreement and in secondary evidence derived from writers, and perhaps in self-serving official state policy statements.

Charney, *supra* note 20, at 990.

[54] Baxter, *supra* note 20, at 96.

> a rule of customary international law in favour of the equidistance principle.[55]

It is far from certain that the Court intended, in this context, to refer to universally accepted conventions, especially those of a humanitarian character whose object is not so much the reciprocal exchange of rights and obligations among a limited number of states as the protection of the human rights of individuals.[56] Significantly, the Court did allude cryptically to the possibility of transforming widely accepted conventions into general law:

> 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, it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected.[57]

Sinclair observed that "the Court has in terms recognised the possibility that customary international law may be generated by treaty. But it has carefully qualified this recognition by establishing a series of conditions which, in the instant case, it was found had not been fulfilled."[58] Moreover, in the above statement,[59] the Court did not address the question of practice by nonparties. In a trenchant dissenting opinion, Judge Lachs pointedly referred to the practice of states that were "both parties and not parties to the Convention"[60] (in delimiting continental shelf on the basis of the equidistance rule). However, even the Court's statement "that no inference could legit-

[55] 1969 ICJ REP. at 43.

[56] *See* Effect of Reservations on the Entry into Force of the American Convention (Arts. 74 and 75), Advisory Opinion No. OC-2/82 of Sept. 24, 1982, Inter-American Court of Human Rights, ser. A: Judgments and Opinions, No. 2 (1982); Ireland v. United Kingdom, 25 Publications of the Eur. Ct. Human Rights, ser. A: Judgments and Decisions, para. 239 (1978); Reservations to the Convention on Genocide, 1959 ICJ REP. 15, 23 (Advisory Opinion of May 28); T. MERON, *supra* note 7, at 146–47.

[57] 1969 ICJ REP. at 42. More recently, the Court stated that

> [i]t is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them. . . . [I]t cannot be denied that the 1982 Convention [United Nations Convention on the Law of the Sea] is of major importance, having been adopted by an overwhelming majority of States; hence it is clearly the duty of the Court, even independently of the references made to the Convention by the Parties, to consider in what degree any of its relevant provisions are binding upon the Parties as a rule of customary international law.

Continental Shelf (Libyan Arab Jamahiriya/Malta), 1985 ICJ REP. 13, 29–30 (Judgment of June 3). The Court's verbal protestation of the importance of practice and *opinio juris* for the establishment of customary law is not necessarily followed by the Court's truly seeking to identify the relevant practice. Charney thus observes that the Court fails to identify "the actual evidence of state practice upon which [it] purport[s] to rely." Charney, *supra* note 20, at 995. On the ICJ's diminishing investigation of the existence of practice and *opinio juris* in the formation of customary law, see Haggenmacher, *La Doctrine des deux éléments du droit coutumier dans la pratique de la Cour Internationale*, 90 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 5, 111–14 (1986).

[58] I. SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 23 (2d ed. 1984) (referring, primarily, to the statement by the Court to be found in 1969 ICJ REP. at 41).

[59] *See supra* text accompanying note 57.

[60] 1969 ICJ REP. at 228 (Lachs, J., dissenting).

imately be drawn" from the action of states parties to a convention does not necessarily suggest a priori that such action can *never* be taken into account for the formation of customary international law. Acts concordant with the treaty obviously are indistinguishable from acts "in the application of the Convention." But if it could be demonstrated that in acting in a particular way parties to a convention believed and recognized that their duty to conform to a particular norm was required not only by their contractual obligations but by customary or general international law as well (or, in the case of the Geneva Conventions, by binding and compelling principles of humanity), such an *opinio juris* might and should be given probative weight for the formation of customary law.

Opinio juris is thus critical for the transformation of treaties into general law.[61] To be sure, it is difficult to demonstrate such *opinio juris*,[62] but this poses a question of proof rather than of principle. The possibility that a party to the Geneva Conventions may be motivated by the belief that a particular course of conduct is required not only contractually but by the underlying principles of humanity is not farfetched.

In any event, the "real issue," as Sinclair stated in his discussion of D'Amato, appears

> to be whether treaties, considered as elements of State practice . . . need to be accompanied by *opinio juris* in the traditional sense in order to be regarded as being expressive of or as generating rules of customary international law; and, if so, how this requirement of *opinio juris* can be satisfied.[63]

How does one assess the weight of such *opinio juris*, which is not accompanied by practice of nonparties, vis-à-vis nonparties? In the absence of practice extrinsic to the treaty, nonparties are unlikely to accept being bound by what the parties may consider to be custom grafted onto the treaty. The question may thus turn on the proof of acquiescence by nonparties in the norm stated in the treaty.[64] For the Geneva Conventions, however, to which all the potential actors are already parties, this question is academic.

In the *Nicaragua* case, the Court held that the Charter does not subsume

[61] 1969 ICJ REP. at 41.

[62] Professor D'Amato alludes to this difficulty in *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110, 1141 (1982).

The distinction between an *opinio juris generalis* and an *opinio obligationis conventionalis* has already been made by Professor Cheng. Cheng, *Custom: The Future of General State Practice in a Divided World*, in THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW 513, 532–33 (R. Macdonald & D. Johnston eds. 1983). In a different context (concerning the adoption of a treaty at an international conference), Professor Sohn speaks of *opinio juris* in the sense that the provisions of a convention "are generally acceptable." Sohn, *"Generally Accepted" International Rules*, *supra* note 20, at 1078. He considers a multilateral convention "not only as a treaty among the parties to it, but as a record of the consensus of experts as to what the law is or should be." Sohn, *Unratified Treaties as a Source of Customary International Law*, *supra* note 20, at 239.

[63] I. SINCLAIR, *supra* note 58, at 256.

[64] *See* Baxter, *supra* note 20, at 73. *See also* Sohn, *"Generally Accepted" International Rules*, *supra* note 20, at 1074–75.

or supervene customary international law and that "customary international law continues to exist and to apply, separately from international treaty law, even where the two categories of law have an identical content."[65] In contrast to the brevity and the high level of abstraction of the principles of the Charter, the provisions of the Geneva Conventions are characterized by their extensive detail. It is therefore even more difficult for a significant layer of customary law to be created alongside the Conventions, especially when they are applied only in rare and exceptional situations.[66]

Nevertheless, this possibility should not be discounted altogether, especially with regard to practice not adequately or explicitly regulated by the Conventions, e.g., in situations of prolonged belligerent occupation (where Geneva Convention No. IV leaves some questions unanswered) or internal strife falling short of noninternational armed conflict.[67] Such development of customary law in the interstices of a treaty, however, does not suggest that the treaty itself would necessarily become customary law.

A practice of states that modifies the original provisions of the Conventions may also spawn new rules of customary law. But it may prove difficult to distinguish such rules from additional layers of treaty law created by the parties through interpretation or modification as a result of practice.[68]

In addition, the emergence of customary law in other fields of international law may have an impact on the transformation of the parallel norms of the Geneva Conventions (those with an identical content) into customary norms. Consider, for instance, the developments in the human rights field that led to the recognition of the prohibitions of the arbitrary taking of life and of torture as norms of customary law.[69] The recognition as customary of norms rooted in international human rights instruments will probably affect through a sort of osmosis the interpretation, and eventually perhaps even the status, of the parallel norms in instruments of international humanitarian law, including the Geneva Conventions. Finally, as suggested by our comments on the *North Sea Continental Shelf Cases*, observance of the provisions of the Conventions, especially if accompanied by verbal affirmations supporting the binding, even *erga omnes*, character of the humanitarian principles stated in the Conventions, may constitute *opinio juris* facilitating the gradual metamorphosis of those conventional norms into customary law.

Perhaps because of the strong moral claim for the application and observance of the norms in instruments relating to international human rights and humanitarian law[70] (to which these comments are confined), and because

[65] 1986 ICJ REP. at 96, para. 179. *See also id.* at 93–95, paras. 174–77.

[66] Dinstein argues that because Geneva Convention No. IV had not been applied between its adoption in 1949 and the Six-Day War (1967), there was no practice that could have been relied upon for the transformation of the Convention's norms into customary law. Dinstein, *supra* note 4, at 167–68.

[67] *See* T. MERON, *supra* note 10, at 135–39; Meron, *Inadequate Reach*, *supra* note 10; Meron, *Towards a Humanitarian Declaration on Internal Strife*, 78 AJIL 859 (1984).

[68] *See* Vienna Convention on the Law of Treaties, *supra* note 21, Arts. 31 and 41. *See also* I. SINCLAIR, *supra* note 58, at 138.

[69] *See, e.g.*, RESTATEMENT (REVISED), *supra* note 32, §702. *Compare* Schachter, *supra* note 47, at 97–98.

[70] *See* Baxter, *supra* note 17.

of the different kinds of evidence of state practice involved,[71] both scholarly and judicial sources have shown reluctance to reject as candidates for customary law status, because of contrary practice, conventional norms whose content merits such status. A crucial distinction can be made between episodic breaches of a rule and such massive and grave violations as to amount to " 'State practice' that nullifies the legal force of [a] right."[72] Professor Schachter proposes as a yardstick the "intensity and depth of the attitudes of condemnation"[73] by third parties. This criterion has the advantage of turning on the reactions of others to a particular breach rather than on the self-serving statements of the actor state itself. It is thus preferable to the following criteria enunciated by the Court in the *Nicaragua* case:

> If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.[74]

Elsewhere, the Court elaborated by stating that "[r]eliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend towards a modification of customary international law."[75] Despite the helpful reference in the latter statement to third-party responses to a particular state's claim, there is some danger that the Court's standard as formulated in the earlier statement[76] may be misunderstood or even misused. After all, it is common practice for states bent on evading compliance with international law to resort to factual or legal exceptions or justifications contained in the rule itself and in the relationship of their particular case or situation to that rule. Obviously, states normally shield themselves with self-serving justifications, calculated to minimize international censure of their course of action. In some situations, which are infrequent, a state may want to challenge frontally the existence of a rule of law, but as Professor Charney observes, "States will rarely, if ever, admit that they have violated customary international law, even in order to change it. Rather, they will argue that their behavior is consistent with the traditional law, or that the law has already changed."[77] Why should they challenge the rule frontally, if less provocative conduct would serve them better?[78]

[71] *See* Schachter, *supra* note 47, at 334–35. Schachter observes that "value-judgments are always implicit in the recognition of practice as law." *Id.* at 96.

[72] *Id.* at 336.

See the exchange between Watson and Sohn on the significance of the discrepancy between human rights and the reality of state practice, Watson, *Legal Theory, Efficacy and Validity in the Development of Human Rights Norms in International Law*, 1979 U. ILL. L.F. 609, 626–35; Sohn, *The International Law of Human Rights: A Reply to Recent Criticisms*, 9 HOFSTRA L. REV. 347, 350–51 (1981).

[73] Schachter, *supra* note 47, at 336.

[74] 1986 ICJ REP. at 98, para. 186.

[75] *Id.* at 109, para. 207.

[76] *See supra* text accompanying note 74.

[77] Charney, *The Power of the Executive Branch of the United States Government to Violate Customary International Law*, 80 AJIL 913, 916 (1986).

[78] With some exceptions, e.g., Iran's claim that Iraqi POWs should be treated according to the dictates of the Koran, which claim implies the subordination to the Koran of Geneva Con-

If states fail to observe the provisions of the Geneva Conventions in conflicts in which they are involved or resort to numerous reservations[79] having a significant adverse impact on the actual observance of the norms in the Conventions, the claims of the Conventions to customary law status will naturally be weakened. Taken cumulatively, frequent evasions by states of those norms by reliance on the specific circumstances of particular situations (*sui generis* claims) can only erode the position of the Conventions as crucial instruments of humanitarian law and as claimants to customary and a fortiori to *jus cogens* status.

The decisive factor is whether states observe the Geneva Conventions or not. As with other widely ratified treaties, if states parties comply with the Geneva Conventions in actual practice, verbally affirm their vital normative value, and accept them in *opinio juris*, states and tribunals will be reluctant to make and to accept the argument that the law of Geneva is solely, or even primarily, conventional. Such observance by the parties will eventually lead, in the perception of governments and public opinion, to the blurring of the distinction between norms of the Conventions that are already recognized as customary law and other humanitarian provisions of the Conventions that have not yet achieved that status. In the last analysis, movement in this direction depends on whether states realize that, in the long run, bona fide compliance with the Geneva Conventions serves their best interests.

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vention No. III (*see* UN Doc. S/16962, at 38, 42 (1985)), states tend to avoid a frontal challenge to the Conventions, preferring instead to justify their discordant practices on differences between the conflicts presently encountered and those for which these instruments were originally adopted. Aldrich, *Human Rights and Armed Conflict: Conflicting Views*, 67 ASIL PROC. 141, 142 (1973); Roberts, *supra* note 4, at 279–83.

The recent resolution on Respect for International Humanitarian Law in Armed Conflicts and Action by the ICRC for Persons Protected by the Geneva Conventions highlighted violations of the Geneva Conventions and "a disturbing decline in the respect of international humanitarian law" and acknowledged that "disputes about the legal classification of conflicts too often hinder the implementation of international humanitarian law." 25th International Conference of the Red Cross, Doc. P.1/CI, Ann. 1 (1986).

Professor Henkin has cogently observed that to reduce the "cost" of violating the law, states will often highlight ambiguities about the facts and their proper characterization, as well as uncertainties about the applicable norm. *See* L. HENKIN, HOW NATIONS BEHAVE 70 (1968).

[79] I am addressing here the question of the number and the extent of the reservations actually made rather than the question whether a particular reservation is compatible with the purpose and object of the Convention or is prohibited. *See generally* Baxter, *supra* note 17, at 285; Baxter, *supra* note 20, at 48–52.