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**Customary Law as an Instrument
for the Protection of Human Rights**

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CUSTOMARY LAW AS AN INSTRUMENT FOR THE PROTECTION OF HUMAN RIGHTS

Vojin Dimitrijevic

1. Custom as Source of International Law Today

Before one proceeds from the assumption that international custom is a recognised source of international law one should pause to determine whether this expression still has the meaning commonly accepted by most jurists at the time they were students – and never questioned thereafter. We are sometimes warned that customary norms in the international sphere are not anymore what they used to be, and that the formation of customary law has undergone important changes.

There is considerable disagreement amongst international lawyers as to the scope and formation (and even existence) of customary international law. While no question of law is undisputed and while international law is especially notorious in this respect, debates on customary international law have been marked with a high degree of latitude in the “solutions” proposed by scholars and judges.

Sometimes the law cannot be concretized in a sufficient manner to make it “work” in practice. This “inoperationalizability” of certain formulae which scholars happen to generally agree on can be seen clearly in the case of the quantity of state practice needed to constitute a behavioural regularity sufficient to constitute the material element¹.

In the Statute of the International Court of Justice, «international custom as evidence of a general practice accepted as law» is quoted among the sources of international law to be applied by that Court in its capacity of the main judicial organ of the United Nations². Disagreements as to other recognised or potential sources of public international law do not generally affect the understanding and the rank of custom as a primary source of international law. In fact, international law cannot be conceived without its customary component. This branch of law has developed as customary law: some of its fundamental rules are customary. It is hard to imagine the validity and binding force of written international law without relying on the principles of *pacta sunt servanda* and *bona fides*, which are customary³.

¹ J. KAMMERHOFER, *Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems*, in «European Journal of International Law», 15, 2004, 3, p. 523.

² *Statute of the International Court of Justice*, art. 38.b.

³ We shall not dwell more here with all complex questions of the nature of customary law, but only with those related to the theme of human rights.

Custom as source of law is usually defined as a consistent pattern of state behaviour (practice) accompanied by an elusive psychological element, most frequently covered by the Latin expression *opinio juris sive necessitatis*. The best approximation of the requirements for the existence of *opinio juris* is that states, as the principal subjects of international law (international persons), have not only acted uniformly in certain situations, but that their actions have been accompanied by the conviction that they as subjects of international law were bound by law to act that way and that such conduct was believed to be good and necessary. In the modern jargon of some writers, states have always tended to satisfy general expectations of mankind and have been inspired by the latter⁴.

The most authoritative (for jurists) judicial interpretation of the preconditions for the existence of the rule of international customary law is to be found in the judgement of the International Court of Justice (ICJ) in the *North Sea Continental Shelf* case:

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

Not only must the acts concerned amount to settled practice, but they must also be such or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The states concerned must therefore feel that they are conforming to what amounts to their legal obligation. The frequency or even habitual character of the acts is not in itself enough⁵.

International customary law has been often equated with “general international law”. In fact, it is the fundamental source of public international law because international treaties, which are supposedly a more solid and reliable source of international law, repose, as already noted, on the foundation provided for by a set of rules of general international law, which are customary in essence.

Whereas the provisions of conventional law, i.e. the norms set down in international treaties, are accessible in a fairly comprehensive way and are easy precisely to determine as a written text agreed on by the contracting parties, international customary rules are more difficult to grasp. To put it to the extreme, a customary rule, as soon as it is written down, ceases to have its full richness as a source of international law; it represents only an indication of what the source might be in the opinion of the writer. Proving the existence of a customary rule of

⁴ See e.g. L.B. SOHN, *The New International Law: Protection of the Rights of Individuals Rather than States*, in «American University Law Review», 32, 1982, 1, p.17; M.S. McDOUGAL *et al.*, *Human Rights and World Public Order*, New Haven and London, 1980, p. 272.

⁵ ICJ, *North Sea Continental Shelf*, ICJ Reports, 1969, para. 74 and 77.

international law is not easy: it involves what, according to the postmodernist “constructivist” approaches to, and interpretations of, international law, is a considerable amount of a rhetoric that is characteristic to lawyers’ discourse⁶. «Customary law is not written and has no “authoritative” text, which has an inherent “thereness” and whose meaning need only be “extracted”»⁷.

In the words of, Customary rules of international law are derived from the study of many “sources”, facts, written documents, symbolic actions, records and... absence of deeds. Ian Brownlie quotes among them:

[D]iplomatic correspondence, policy statements, press releases, the opinions of official legal advisers, official manuals on legal questions, executive decisions and practices, comments by governments on drafts produced by the International Law Commission, state legislation, international and national judicial decisions, recitals in treaties and other international instruments, a pattern of treaties in the same form, the practice of international organs, and resolutions relating to legal questions in the United Nations General Assembly⁸.

Much simpler, but equally true and intriguing, are the words of Michael Akehurst: «State practice means any act or statement by a State from which views about customary law can be inferred»⁹.

The extensive and long-lasting general debate on international custom as a source of international law can be generally summed up by determining the proportion of the influence on the existence of the customary rule of consistent practice, or of *opinio juris*, respectively. The general evolution of thinking in that respect has been in the direction of reducing the amount of time necessary for the formation of uniform practice and the increase of the influence of *opinio juris*. In other words, since customary rules are determined mostly by persons interpreting law, especially those acting as judges and teachers of law, their opinion on whether states have acted in the belief that they were bound to act in a certain fashion is of enormous importance. This is also obvious in the understanding of the role of «judicial decisions and the teachings of the most highly qualified publicists of the various nations as subsidiary means for the determination of rules of law» referred to in the Statute of the International Court of Justice¹⁰. To quote Koskeniemi:

[W]e cannot automatically infer anything about State wills or beliefs — the presence or absence of custom by looking at the State's external behaviour. The

⁶ M. KOSKENIEMI, *From Apology to Utopia*, Helsinki, 1989, pp. 264 ff.

⁷ J. KAMMERHOFER, *Uncertainty in the Formal Sources of International Law*, cit., p. 524.

⁸ I. BROWNLIE, *Principles of Public International Law*, Oxford, 1990⁴, p. 5

⁹ M. AKEHURST, *Custom as Source of International Law*, in «British Year Book of International Law», 47, 1977, p. 1.

¹⁰ *Statute of the International Court of Justice*, art. 38.1.d. In the tongue-in-cheek opinion of Louis Sohn, it is the professors of law who create customary rules of law, because both governments and courts regularly turn to the former for information and advice. See L.B. SOHN, *Sources of International Law*, in «Georgia Journal of International and Comparative Law», 25, 1995-1996, 1, p. 399 ff.

normative sense of behaviour can be determined only once we first know the “internal aspect” — that is, how the State itself understands its conduct. [...] [D]octrine about customary law is indeterminate because circular. It assumes behaviour to be evidence of the *opinio juris* and the latter to be evidence of which behaviour is relevant as custom¹¹.

The important feature of customary international law is believed to be its ability to bind states which have not consented to its rules. While an international treaty is binding only on its parties, who have expressed a clear will to be bound by its provisions, a rule of customary law does not need such a consent and binds all states without distinction, including those who have just emerged on the international scene. This question is, to be sure, related to a rather philosophical debate. Namely, is a rule of customary law binding on all states because they have tacitly consented to it by applying it, tolerating it and not protesting against it or is the theory of tacit agreement too artificial and too presumptuous? Or, will human will and the determination with which it is expressed play the crucial role also in the realm of the creation of customary rules? In the latter case, *opinio juris* is in fact the preponderant element in the creation of a norm where the most important and decisive ingredient is consensus that a rule should be generally binding because of its desirability, moral value, adherence to some general principles, reflection of modern times and social changes (*Zeitgeist*) – and not expressed only by state bureaucrats.

2. *International Customary Law of Human Rights*

It is important in this paper to descend at some juncture from the more abstract and rarefied area of the legal nature and general validity of customary rules in international law. Maybe it is advisable to do it now and to leave the general theme of customary rules as sources of international law in order to enter the narrower field of the role of customary law in norm-setting and protection of human rights. It has already been noted that in the field of human rights some adaptations and accommodations have to be made to accommodate the nature of the topic, i.e. the segment of social life that is affected and regulated by the cluster of rules, competences and social roles relevant to the effort to support and protect the idea that all human beings have certain inherent rights because they are human beings. It should be noted immediately that human rights in the modern sense (roughly as formulated in the famous proclamations in France and the United States in late 18th century) have been a newcomer in the political and constitutional life and mentality of even many “advanced” and “liberal” states, and that at the time of the drafting of the first United Nations human rights declarations and instruments the content of those documents was revolutionary in comparison with the constitutions and practice of many original member states.

¹¹ *Ibidem*, p. 388.

Unlike in the process of creation of customary rules in other areas, where they mostly affect the conduct of states and of their agencies, the customary existence or non-existence of certain human rights, and of procedures to protect them, has generally not been a matter covered and determined by interstate practice. In the words of Oscar Schachter,

Whether human rights obligations have become customary law cannot readily be answered on the basis of the usual proof of customary formation. States do not usually make claims on other States or protest violations that do not affect their nationals. In that sense, one can find scant State practice accompanied by *opinio juris*. Arbitral awards and international judicial decisions are also rare except in tribunals based on treaties such as the European and Inter-American courts of human rights. The arguments advanced in support of a finding that rights are a part of customary law rely on different kinds of evidence¹².

The debate on the existence of customary norms relating to human rights resembles in a way the ancient philosophical discussion accompanying the first attempts to enumerate sets of human rights in domestic legislation or political declarations. Namely, for those who subscribed to liberal political ideas and to various forms of natural law it was fairly easy to believe and prove that every human being, having the quality of a human being, possessed inherent rights. However, it was difficult to reach agreement on which rights exactly did every human being have and could claim. Having an exact and precisely defined catalogue of human rights has been and remains of great practical importance because the every day business of promoting and protecting human rights is done by “ordinary” officials and judges who are not prone to philosophical contemplation. A normal situation at the domestic level is to have a number of constitutional guaranties of human rights, developed and implemented by ordinary law and judicial decisions. Claims that some human rights are based on international customary law have become quite frequently submitted before international and domestic courts.

As a rule, human rights are claimed, defended and implemented within states, generally in relations between individual human beings and the organs of the state having jurisdiction over the former. As noted by Christian Tomuschat, there are millions of contacts of this nature, and they are not easily registered, interpreted and understood by the traditional means of assessing state practice¹³. A survey of the developments following the historical juncture after which human rights had definitely become an international concern, that is, after the end of the World War II, will show that when the UN Charter was adopted, including its references to human rights in its Preamble and articles 1.3 and 55.c, there was not much substance in the commitments taken if one could not rely on some sources of non-conventional law. The only precise indication in the United Nations Charter itself

¹² O. SCHACHTER, *International Law in Theory and Practice*, in «Recueil des cours», 178, 1982, 5, p. 334.

¹³ C. TOMUSCHAT, *Human Rights. Between Idealism and Realism*, Oxford, 2003, pp. 34 ff.

was that «human rights and fundamental freedoms for all» should be «without distinctions as to race, sex, language, or religion»¹⁴. There was no universal international treaty defining human rights.

At the time, the plan to put to life these abstract provisions of the Charter was fairly clear. The United Nations was determined to work on the adoption of an international Bill of Human Rights, consisting of the Universal Declaration of Human Rights and an International Covenant on Human Rights, together with the necessary measures of implementation. The execution of the first leg of the plan, i.e. the adoption in the UN General Assembly of the Universal Declaration of Human Rights, followed quickly in 1948, but the next steps were long in coming. The plan to draft a single International Covenant on Human Rights was implemented only 18 years later in the form of two covenants, one on civil and political rights and the other on economic, social and cultural rights. The covenants entered into force ten years thereafter.

The Universal Declaration of Human Rights was a solemn resolution of the UN General Assembly. This UN organ cannot adopt binding decisions, and the Declaration was intended to be an inspiration for a binding international treaty, as many times later declarations of the General Assembly have prepared the way to international human rights treaties. The initiative for a Human Rights Covenant remained without the expected sequel for nearly two decades, until the two Covenants were signed in 1966 and came into force in 1979.

3. The Role of the Universal Declaration of Human Rights

From the very beginning, the international public opinion imposed on the United Nations a concern for human rights. This was understandable after the massive violations of fundamental human values in World War II. However, reference to relevant international norms on human rights could at that time mainly be found in the Universal Declaration. It is no wonder then that the first authority and guide to the rules on fundamental human rights was the Universal Declaration, and that its status gradually advanced to universal acceptance. There came to exist a widely held belief that the whole Declaration, or some provisions thereof, had become customary international law. Twenty years after the adoption of the Declaration two important international gatherings, the Assembly for Human Rights in Montreal and the Teheran International Conference on Human Rights, adopted statements and proclamations to the effect that they believed that the Universal Declaration had become a part of customary international law.

One can view the Universal Declaration of Human Rights, together with some other important resolutions of the UN General Assembly, as a contribution to the formation of *opinio juris*, as an indispensable contributing element to the creation

¹⁴ *United Nations Charter*, art. 55.c.

of customary law. This is how the role of solemn declarations in general was seen by the International Court of Justice in the *Nicaragua* case:

The Court has ... to be satisfied that there exists in customary international law an *opinio juris* as to the binding character of such abstention ... This *opinio juris* may, though with all due caution, be deduced from, *inter alia*, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions ... The effect of consent to the text of such resolutions cannot be understood as merely that of a reiteration or elucidation of the treaty commitment undertaken in the Charter. On the contrary, *it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves*¹⁵.

In the *Hostages* case (US v. Iran) the International Court of Justice referred directly to the Universal Declaration of Human Rights and found in its “principles” proof of the existence of universal human rights:

Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights¹⁶.

The references to the Universal Declaration continued to support the claims that at least some rights had attained the quality of customary rules in other forms. One of them was the invocation of the Declaration in the United Nations and other international fora and the references to the Declaration in constitutions, internal legislation of states and decisions of the national courts¹⁷. The Universal Declaration was even quoted as containing rules of *jus cogens*¹⁸.

It is important to determine which rights enumerated in the Universal Declaration have certainly become parts of international customary law. Being merely quoted in that important document does obviously not suffice for a right to be recognized as guaranteed by international custom. What is the test one should apply? The process is doubtlessly a fall-back to the classical reasoning on practice plus *opinio juris*, with the assumption that the presence of a right in the Universal Declaration is a strong argument that there is *opinio juris*, but that it is not sufficient without some other support. In the words of Jonathan Charney, «[r]ather than state practice and *opinio juris*, multilateral forums often play a central role in the creation and shaping of contemporary international law»¹⁹.

¹⁵ ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)*. Merits, ICJ Reports, 1986, para. 99-100. Italics supplied.

¹⁶ ICJ, *United States v. Iran*, ICJ Reports, 1980, para. 42.

¹⁷ A very rich survey is provided by H. HANNUM, *The Status of the Universal Declaration of Human Rights in National and International Law*, in «Georgia Journal of International and Comparative Law», 25, 1995-1996, 1, pp. 287 ff.

¹⁸ M.S. McDOUGAL *et al.*, *Human Rights and World Public Order*, cit., p. 272.

¹⁹ J.I. CHARNEY, *Universal International Law*, in «American Journal of International Law», 87, 1993, 3, p. 543.

Similarly, at the international level an effort of this nature has to be made, and various tests have to be defined, to determine which rights mentioned in the Universal Declaration and elsewhere have become customary norms and have been applied as such.

One of them is to compare the text of the Universal Declaration of Human rights with subsequent international covenants and other universal treaties on human rights, to find which rights quoted in the Universal Declaration do not appear in treaties and to disqualify them accordingly as rules of customary law. This applies, for instance to the right to own property (art. 17) and the right to asylum (art. 14).

Ten years ago, in a valiant effort, Hurst Hannum surveyed the provisions of the Universal Declaration and tested their validity as customary norms by the measure of their acceptance in practice. He found that even the principle of equality, enunciated in the UN Charter and reiterated in the Declaration, did not stand without exception, since many distinctions which would amount to discrimination were legitimate in legal systems and tolerated in practice, so that that the only unquestionable customary prohibition was that of racial discrimination. As many others, he found ample evidence that the prohibition of torture had undoubtedly become a customary rule²⁰.

4. Non-derogable Human Rights

Another approach was to look up the provisions in the international human rights covenants which prohibit the derogation of certain rights even in time of public emergency. The most interesting and convincing statements in that respect have been made by the UN Human Rights Committee, a body of independent experts monitoring the implementation of the International Covenant on Civil and Political Rights (ICCPR)²¹.

In its General Comment No. 29 on States of Emergency²², the Committee noted that article 4, para. 2 of the ICCPR prohibits any derogation from article 6 (right to life), article 7 (prohibition of torture or cruel, inhuman or degrading punishment, or of medical or scientific experimentation without consent), article 8, paras. 1 and 2 (prohibition of slavery, slave-trade and servitude), article 11 (prohibition of imprisonment because of inability to fulfil a contractual

²⁰ H. HANNUM, *The Status of the Universal Declaration of Human Rights in National and International Law*, cit., pp. 355 ff.

²¹ In the context of our topic it is very important to note that ICCPR is a universal instrument and that the Human Rights Committee is composed of independent experts coming from all parts of the world. This adds significant weight to all findings made by the Committee relating to the existence of rules of international customary law.

²² UN HUMAN RIGHTS COMMITTEE, *General Comment No. 29*, UN Doc. CCPR/C/21/Rev. 1/Add. 11, 2001.

obligation), article 15 (the principle of legality in the field of criminal law – *nullum crimen, nulla poena sine lege*), article 16 (the recognition of everyone as a person before the law), and article 18 (freedom of thought, conscience and religion). The same applies, in relation to States that are parties to the Second Optional Protocol to the Covenant, aiming at the abolition of the death penalty, as prescribed in article 6 of that Protocol. One of the conditions for the justifiability of any derogation from the Covenant is that the measures taken do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. Even though article 26 or the other Covenant provisions related to non-discrimination (articles 2, 3, 14.1, 23.4, 24.1, and 25) have not been listed among the non-derogable provisions in article 4, para. 2, there are elements or dimensions of the right to non-discrimination that cannot be derogated from in any circumstances. In particular, this provision of article 4, para. 1, must be complied with if any distinctions between persons are made when resorting to measures that derogate from the Covenant.

The Human Rights Committee believes that «The fact that some of the provisions of the Covenant have been listed in article 4 (paragraph 2), as not being subject to derogation does not mean that other articles in the Covenant may be subjected to derogations at will, even where a threat to the life of the nation exists». The relevant article 4 requires that no measure derogating from the provisions of the ICCPR may be «inconsistent with the State party's other obligations under international law, particularly the rules of international humanitarian law». The Human Rights Committee therefore believes that «it cannot be read as justification for derogation from the Covenant if such derogation would entail a breach of the State's other international obligations, whether based on treaty or *general international law*»²³. This is reflected also in article 5, para. 2, of the Covenant, according to which there shall be no restriction upon, or derogation from any fundamental rights recognized in other instruments on the pretext that the ICCPR does not recognize such rights or that it recognizes them to a lesser extent.

In its earlier General Comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant²⁴, the Human Rights Committee expressed its conviction that reservations that offend peremptory norms would not be compatible with the object and purpose of ICCPR. In the words of the Committee,

[a]lthough treaties that are mere exchanges of obligations between States allow them to reserve *inter se* application of rules of general international law, it is *otherwise in human rights treaties*, which are for the benefit of

²³ *Ibidem*, para. 9. Italics supplied.

²⁴ UN HUMAN RIGHTS COMMITTEE, *General Comment No. 24 (52)*, UN Doc. CCPR/C/21/Rev. 1/Add. 6, 1994.

persons within their jurisdiction. Accordingly, provisions in the Covenant that represent *customary international law* (and a fortiori when they have the character of *peremptory norms*) may not be the subject of reservations. Accordingly, a State may not reserve the right *to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he proves his innocence, to execute pregnant women or children, to permit the advocacy of national, racial or religious hatred, to deny to persons of marriageable age the right to marry, or to deny to minorities the right to enjoy their own culture, profess their own religion, or use their own language. And while reservations to particular clauses of Article 14 may be acceptable, a general reservation to the right to a fair trial would not be*²⁵.

Two conclusions can be inferred from the statements made by the Human Rights Committee. One is that at least some of the non-derogable rights quoted in article 4 of the ICCPR were considered by its drafters a part of international customary law or have reached that status after the ICCPR entered into force in 1979. However, the excerpts just quoted from the general comment on reservations indicate that the Committee has gone further and that it does believe that international customary law guarantees some fundamental human rights not included in the list of non-derogable rights provided in that article.

5. Jurisprudence of International and National Courts

The existence of customary norms of international law protecting human rights can be determined without the help of the Universal Declaration and reference to treaties, in an “old fashioned” manner, which in the decisions of highest judicial bodies mean that the judges assume the existence of practice and of *opinio juris sive necessitatis*. Thus in its famous judgment in the Barcelona Traction case the International Court of Justice held:

Such obligations (obligations *erga omnes*) derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the *basic rights of the human person*, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of *general international law* ... others are conferred by international instruments of a universal or quasi-universal character²⁶.

²⁵ *Ibidem*, para. 8. Italics supplied.

²⁶ ICJ, *Case concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*. Judgment of 5th February 1970, ICJ Reports, 1970, para. 34. Italics supplied.

It will be noted that in 1970 the Court recognised that at least some of the rights of the protection of the human person had become general international law, which in the opinion of many authors is synonymous with customary international law²⁷.

In the same decision the Court referred to its 1951 advisory opinion on the reservations to the Convention on the Prevention and Punishment of Genocide²⁸, which was in fact one of its first efforts to determine customary law related to basic human rights.

6. Scholarly Pronunciations

Lists of human rights guaranteed by customary law can be found in texts supported by the authority of their academic authors. One of them is the *Restatement (Third) of the Foreign Relations Law of the United States*²⁹, produced by the most eminent US jurists. It deserves additional importance because of the practical effects it has in the United States. Namely, the question whether a right is protected by customary law has arisen frequently before US courts after the famous decision in the *Filartiga* case³⁰ and the revival of a dormant 18th century US statute, the Alien Tort Statute, which provides that US courts «shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the *law of nations* or a treaty of the United States»³¹. At the time of the submission of this case against a Paraguayan police official alleged to have been involved in torture, the United States had not ratified any international treaty banning torture, including ICCPR, so that the claimant had to resort to the customary law of nations. The US Court of Appeals found that the prohibition against torture «has become part of customary international law»³². The *Filartiga* judgement has been followed by other decisions, where US courts found that customary international law also prohibits arbitrary detention, summary execution or murder, causing disappearances, cruel, inhuman or degrading treatment and genocide³³.

²⁷ Cfr. A. CASSESE, *Modern Constitutions and International Law*, in «Recueil des cours», 192, 1985, 3, p. 391.

²⁸ ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide. Advisory Opinion*, ICJ Reports, 1951, para. 23.

²⁹ AMERICAN LAW INSTITUTE, *Restatement (Third) of the Foreign Relations Law of the United States*, 1987.

³⁰ UNITED STATES COURT OF APPEALS OF THE SECOND CIRCUIT, *Filartiga v. Pena Irala*, 630 F 2d 876, 1980.

³¹ *Alien Tort Statute*, 28 USC, para. 1350. Italics supplied. The Alien Tort Statute (ATS), also known as the Alien Tort Claims Act, originally appeared in Section 9 of the first Judiciary Act passed in the First US Congress in 1789.

³² UNITED STATES COURT OF APPEALS OF THE SECOND CIRCUIT, *Filartiga v. Pena Irala*, cit., 630 F 2d 882. The ensuing part of the judgment expresses the belief of the court that customary norms are «evidenced and defined by the Universal Declaration of Human Rights».

³³ R. LILLICH, *The Growing Importance of Customary International Human Rights Law*, in

The reporters of the Restatement took that that practice accepted as building customary international human rights law consisted of:

[...] virtually universal adherence to the United Nations Charter and its human rights provisions, and virtually universal and frequently reiterated acceptance of the Universal Declaration of Human Rights even if only in principle; virtually universal participation of states in the preparation and adoption of international agreements recognizing human rights principles generally, or particular rights; the adoption of human rights principles by states in regional organizations in Europe, Latin America, and Africa [...]; general support by states for United Nations resolutions declaring, recognizing, invoking, and applying international human rights principles as international law; action by states to conform their national law or practice to standards or principles declared by international bodies, and the incorporation of human rights provisions, directly or by reference, in national constitutions and law; invocation of human rights principles in national policy, in diplomatic practice, in international organization activities and actions; and other diplomatic communications or action by states reflecting the view that certain practices violate international human rights law, including condemnation and other adverse state reactions to violations by other states³⁴.

This corresponds to the views of influential individual scholars:

Of course, the initial inquiry must aim at the determination whether, at a minimum, the definition of the core norm claiming customary law status and preferably the contours of the norm have been widely accepted. In this context my own preferred indicators evincing customary human rights are, first, the degree to which a statement of a particular right in one human rights instrument, especially a human rights treaty, has been repeated in other human rights instruments, and second, the confirmation of the right in national practice, primarily through the incorporation of the right in national laws [...]. It is, of course, to be expected that those rights which are most crucial to the protection of human dignity and of the universally accepted values of humanity, and whose violation triggers broad condemnation by the international community, will require a lesser amount of confirmatory evidence³⁵.

«Georgia Journal of International and Comparative Law», 25, 1995-1996, 1, p. 6. The modern application of the Alien Torts Statute may become another victim in the US “war on terrorism”. There are reports that the US business community will try to persuade the U.S. Supreme Court to eliminate tort liability under ATS. This has been accentuated after the attempts to reverse, in the *Sosa v. Alvarez-Machain* case, the court interpretation of the ATS. Recent cases under the statute have targeted large companies for allegedly participating in or committing human rights abuses in their business activities abroad. The Bush administration too is attacking the modern application of the statute, arguing that it interferes with foreign relations, creates separation of powers problems and threatens the war on terrorism. Cfr. M.C. HELMER – B.W. ESLER, *Litigating Claims Under the Alien Tort Statute After Sosa v. Alvarez-Machain*, 124 S. CT. 2739, 159 L. ED. 2d 718, 2004, <http://www.millernash.com/showarticle.aspx?Show=414>.

³⁴ AMERICAN LAW INSTITUTE, *Restatement (Third) of the Foreign Relations Law of the United States*, cit., para. 701, note 2.

³⁵ T. Meron, *Human Rights and Humanitarian Norms as Customary Law*, Oxford, 1989, p. 93.

Accordingly, the Restatement of Foreign Relations provides the following list of customary rules:

A state violates international law if, as a matter of state policy, it practices, encourages, or condones (a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman or degrading treatment or punishment, (e) prolonged arbitrary detention, (f) systematic racial discrimination, or (g) a consistent pattern of gross violations of internationally recognized human rights³⁶.

7. Rights Defined in Terms of Their Violation

It will be noted that in the Restatement as on many other occasions customary norms relating to human rights are defined in a “negative” way, i.e. as descriptions of their violations. This is also sometimes the case with international treaties on human rights, where the right is recognisable mostly through the prohibition and incrimination of its violation. The first sentence of the title-less article 7 of the ICCPR thus simply provides that «no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment». Similarly, article 8 prohibits slavery, slave trade, servitude and forced labour. The rights implicitly defined in these provisions are in fact the right to physical integrity and the right to physical freedom and dignity.

The massive effort of the International Committee of the Red Cross (ICRC) to systematise and “restate” customary international humanitarian law reveals a similar approach³⁷. Its perusal also presents an opportunity to observe, through concrete examples, how a learned group of authors, supported by a massive and devoted staff of international correspondents, did collect evidence in support of the existence of certain customary rules.

E.g. the authors of the collection consider the following to be a customary rule of international humanitarian law (their Rule 88):

Adverse distinction in the application of international humanitarian law based on race, colour, sex, language, religion or belief, political and other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria is prohibited.

They base their determination in the common article 3 of the 1949 Geneva Conventions, as well as in the Third and Fourth Geneva Conventions, in the 1977 Additional Protocols I and II, in «numerous military manuals» and claim to have support in «official statements and other practice»³⁸. “Adverse distinction” is in

³⁶ AMERICAN LAW INSTITUTE, *Restatement (Third) of the Foreign Relations Law of the United States*, cit., para. 702.

³⁷ INTERNATIONAL COMMITTEE OF THE RED CROSS, *Customary International Humanitarian Law, Vol. I, Rules*, Cambridge, 2005.

³⁸ *Ibidem*, pp. 308-309, especially notes 45 and 46.

fact discrimination, and its prohibition is probably the oldest and best supported tenet of international human rights law – be it conventional or customary. As already noted, prohibition of discrimination was contained in articles 1, para. 3 and article 55, para. c of the UN Charter, at the time when very few conventional norms relating to human rights had existed and when the drafters of the Charter had in mind something more than existing written law, which materialised in the Universal Declaration of Human Rights.

Again, the ban of discrimination is the reverse side of the positively defined right or principle of equality. The protected value is the equality of all human beings or the right of every human being to be treated equally with other human beings, irrespective of the differences between them. If we now compare the findings of the authors of the US Restatement and the authors of the ICRC text we shall conclude that the true human right behind these rules defined as prohibitions is the right to equality.

Similar analysis can be applied to the Rule 89 of the ICRC collection. It is very concise and states that «murder is prohibited by customary international humanitarian law». The supporting state practice is found in the fact that murder of civilians was included already in the Lieber Code, that it was defined as a war crime in the Charter of the Military Tribunal at Nuremberg, that it is to be found in the common article 3 of the 1949 Geneva Conventions, that “wilful killing” of protected persons is a grave breach of all 1949 Geneva Conventions and prohibited by both 1977 Additional Protocols, that it is specified as war crime under the Statute of the International Criminal Court and under the statutes of the international criminal tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR) and the Special Court for Sierra Leone.

In their effort to prove the existence of the customary rule the authors of the ICRC report proceed:

The prohibition on killing civilians and persons *hors de combat* is also set forth in numerous military manuals. It is also contained in the legislation of a large number of states. This prohibition has been held extensively in national and international case law. Furthermore, it is supported by official statement and other practice.

Alleged violations of this rule have consistently been condemned by States and international organisations, for example, by the UN Security Council, UN General Assembly and UN Commission on Human Rights with respect to the conflicts in Afghanistan, Burundi and the former Yugoslavia. Allegations of such violations have also been denied by the States concerned, for example, during the Iran-Iraq war.

The ICRC has on numerous occasions condemned the killing of civilians and persons *hors de combat*, stating that such behaviour is prohibited under international humanitarian law³⁹.

³⁹ *Ibidem*, pp. 312-313. Footnotes omitted.

It is interesting that the ICRC “restatement” then turns to international human rights law, where it finds a similar prohibition, couched in different terms. This rule is inferred from the prohibition in universal and regional international human rights treaties of «arbitrary deprivation of the right to life» and from the circumstance that this right is generally non-derogable. What is especially important when demonstrating the existence of a customary rule, many countries who at a given point were not parties to human rights treaties have stressed before international courts that the right to life was «elementary and non-derogable»⁴⁰.

It will be noted that at certain moments those who speak and write in terms of prohibitions and violations reveal the true positive term, which in this case is the *right to life*.

The preceding is a very good example of the specific “rhetoric” used to prove to an audience, or to convince a court, that there exists a rule of international customary law. It is hardly separable into the classical compartments of practice and *opinio juris*.

8. *Limitations to Rights – Human Rights Law v. Humanitarian Law*

The paradox of the right to life is that – contrary to logical expectations of many (*primum vivere, deinde philosophari*) – in modern law, national and international, the right to life is not an absolute right, allowing for no exception. If we compare it to the right to physical integrity, which is absolute and thus reflects the most recent advancements in civilisation⁴¹, we shall find that the right to life is qualified in human rights instruments. If the death penalty, which is only now being gradually banned by human rights instruments, is disregarded, there are other occasions when the taking of life is lawful and is not considered to be a violation of the right to life. Some of them are defined in article 2, para. 2 of the European Convention on Human Rights, according to which the right to life will not be violated if the deprivation of life results «from the use of force which is no more than absolutely necessary ... in defence of any person from unlawful violence ... in order to effect a lawful arrest or to prevent the escape of a person lawfully detained» and «in action lawfully taken for the purpose of quelling a riot or insurrection».

The last exception quoted brings us closer to international humanitarian law and probably explains why the reporters of the ICRC volume believe that the right to life is differently protected under human rights law and humanitarian law. Namely, in confrontations of a more massive nature («insurrections») life is

⁴⁰ *Ibidem*, p. 313. Statements are quoted by the representatives of Indonesia, Malaysia, Mexico, Nauru and Qatar before the International Court of Justice in the *Nuclear Weapons and the World Health Organization (WHO)* case.

⁴¹ Some forms of torture were lawful and practiced even by state authorities in Western European countries in middle 19th century.

already overshadowed by some superior concerns. In internal human rights law the state has the right to preserve order even at the risk of depriving persons of their life without a judicial decision. This is only more accentuated in international conflicts and in those non-international conflicts covered by the provisions of international law. Paradoxically, «laws and customs of war», now generally called international humanitarian law, have to solve the paradox of war being about the use of deadly force by combatants («privileged killers»). Since at least the 1868 St. Petersburg Declaration international law has tried to “humanise” warfare, i.e. to «alleviate as much as possible the calamities of war», to exclude weapons «which uselessly aggravate the sufferings of disabled men, or render their death inevitable», in accordance with the «laws of humanity».

The right to life protected under international customary law is therefore inherently defined by the limitations implied in the existing conventional rules and in practice. The scope of these limitations is only different in degree when it comes to distinctions between human rights law and humanitarian law, with the natural tendency to take that the right to life has a lesser scope in the latter than in the former. In its advisory opinion in the *Nuclear Weapons* case the International Court of Justice found that the legality of the weapons of mass destruction had to be judged according to the criteria of humanitarian law, which was *lex specialis* in relation to human rights law⁴².

9. Example: Dignity and Physical Integrity as Protected Values/Rights

It appears that there is a unanimous view that the protection of physical integrity and human dignity is absolute in customary international human rights and humanitarian law. In authoritative statements as to the existence of norms of customary law the internationally guaranteed right to physical integrity is formulated in a negative way – as the prohibition of torture, cruel, inhuman or degrading treatment or punishment. This can be inferred – as above – from many authoritative statements generally held to contribute to the formation of customary rules or to witness to the existence of the latter.

It is certain that article 5 of the Universal Declaration of Human Rights, stating that «[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment», belongs to those provisions of that document, discussed at the beginning of this paper, which have undoubtedly become customary law quickly after the adoption of the Declaration. It can be even claimed that the prohibition of torture, as well as some other rights, had already existed as a customary norm before they were included in the 1948 Declaration.

Prohibition of torture and other violations of human physical integrity and dignity have been reiterated in a number of universal and regional treaties guaranteeing

⁴² ICJ, *Advisory Opinion of 8 July 1996*, ICJ Reports, 1996.

and protecting human rights. Among them are, at the universal level, the International Covenant on Civil and Political Rights (ICCPR, art. 7), the Convention on the Rights of the Child (art. 37.a) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and, at the regional level, the European Convention on Human Rights (art. 3), the American Convention on Human Rights (art. 5.2), the African Charter on Human and Peoples' Rights (art. 5), the Inter-American Convention to Prevent and Punish Torture and the European Convention for the Prevention of Torture.

It is generally agreed that the constant repetition of a provision in multilateral treaties contributes to the establishment of a norm of customary international law, witnessing both to consistent practice and *opinio juris sive necessitatis*, irrespective of the manner in which the latter are understood and interpreted by different authors⁴³.

Torture has also been included as a punishable offence in the statutes of the *ad hoc* criminal tribunals for the Former Yugoslavia and Rwanda. According to the Statute of the former, «the International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population ... (f) torture» (art. 5)⁴⁴.

Torture is also one of the crimes against humanity within the jurisdiction of the International Criminal Court (art. 5.c and art. 7.1.f), if it is «committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack» (art. 7.1). Torture is defined as «the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions» (art. 7.2.e).

«Torture or inhuman treatment, including biological experiments» are also war crimes, if committed in the context of an armed conflict (art. 8.2.ii). Related to them is the war crime of «committing outrages upon personal dignity, in particular humiliating and degrading treatment» (art. 8.2.b.xxi).

The 1989 US Restatement considers the prohibition of «torture or other cruel, inhuman, or degrading treatment or punishment» as one of the customary norms of international law related to human rights (para. 702.d).

⁴³ A.J. D'AMATO, *Human Rights as Part of Customary International Law: A Plea for Change of Paradigms*, in «Georgia Journal of International and Comparative Law», 25, 1995-1996, 1, pp. 97-98.

⁴⁴ According to article 3 of its Statute, «The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds: ... (f) torture».

The authors of the CPRC compilation of rules of customary international humanitarian law believe that the following is one of those rules:

Torture, cruel or inhuman treatment and outrages upon personal dignity, in particular humiliating and degrading treatment, are prohibited⁴⁵.

Let us use this example to examine the ways used to determine what is meant by this customary rule. It is also an occasion to consider whether the definition of a right, or rather the description of its punishable violation, differs in customary law from the known definitions in conventional law, and how repeated conventional norms interface with the emerging customary rule.

According to article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Neither this instrument does define cruel, inhuman or degrading treatment and punishment. International courts and human rights bodies have tended to interpret these terms as standards deriving their meaning from internal law, practice and culture⁴⁶.

In the light of modern international criminal law, i.e. according to the Statute of the International Criminal Court (ICC), torture can be viewed both as a war crime and as a crime against humanity.

The elements of the «war crime of torture» are:

1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.
2. The perpetrator inflicted the pain or suffering for such purposes as: obtaining information or a confession, punishment, intimidation or coercion, or for any reason based on discrimination of any kind.
3. Such person or persons were protected under one or more of the Geneva Conventions of 1949.

⁴⁵ INTERNATIONAL COMMITTEE OF THE RED CROSS, *Customary International Humanitarian Law*, cit., Rule 90, p. 315.

⁴⁶ See e.g. the judgment of the European Court of Human Rights in *Tyrer v. The United Kingdom*, Application no. 5856/72 and the views of the Human Rights Committee in *Portorreal v. Dominican Republic*, Communication No. 188/1984.

4. The perpetrator was aware of the factual circumstances that established that protected status.
5. The conduct took place in the context of and was associated with an international armed conflict.
6. The perpetrator was aware of factual circumstances that established the existence of an armed conflict⁴⁷.

The elements of the «crime against humanity of torture» are accompanied by the note that «it is understood that no specific purpose need be proved for this crime»⁴⁸:

1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.
2. Such person or persons were in the custody or under the control of the perpetrator.
3. Such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions.
4. The conduct was committed as a part of a widespread or systematic attack directed against a civilian population.
5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population⁴⁹.

As already mentioned, the Statute of the International Criminal Court includes war crimes of inhuman treatment and outrage upon personal dignity. This is due to the different origins of the rules on the basis of which war crimes have been brought under the jurisdiction of the Court. In this context there is, in the Elements of Crimes, a closer description of inhuman treatment, which can also be helpful in the interpretation of the customary rule protecting human physical integrity and dignity:

1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.
2. Such person or persons were protected under one or more of the Geneva Conventions of 1949.
3. The perpetrator was aware of the factual circumstances that established that protected status.
4. The conduct took place in the context of and was associated with an international armed conflict.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict⁵⁰.

⁴⁷ *Report of the Preparatory Commission for the International Criminal Court, Addendum, Part II. Finalized draft text of the Elements of Crimes*, article 8 (2) (a) (II) – I.

⁴⁸ *Ibidem*, note 14.

⁴⁹ *Ibidem*, article 7 (I) (f)

⁵⁰ *Ibidem*, article 8 (2) (a) (11) – I.

The elements of the war crime of outrage upon personal dignity, in particular humiliating and degrading treatment, are according to the ICC documents the following:

1. The perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons.
2. The severity of the humiliation, degradation or other violation was of such a degree as to be generally recognised as an outrage upon personal dignity.
3. The conduct took place in the context of and was associated with an international armed conflict.
- 4 The perpetrator was aware of factual circumstances that established the existence of an armed conflict⁵¹.

The complexity that accompanies the conviction that there is a rule of customary international law, in this case the prohibition of torture and cruel, inhuman or degrading treatment and punishment, shows that customary norms of any law cannot be grasped only from the traces left on paper by those who believe in their existence and try to describe them and implement them as judges or members of national and international bodies who play a role in the protection of human rights. One of the reasons for that is their contextual character: a customary rule will regularly appear in a very concrete way as a statement or behavioural act of persons who argue a given case or have to pronounce on a concrete case. The implementation of the customary rule prohibiting torture by international tribunals has borne witness to that. In some of its first cases the International Tribunal for the Former Yugoslavia took the definition in article 1 of the Convention against Torture to be part of general customary law and that it was universally applicable, even in humanitarian law contexts (presence of armed conflict)⁵². Later on, the judges changed their view, expressing the belief that the customary law rule was different and wider, and that it did not require that pain or suffering be «inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity». The Tribunal proceeded then to describe torture according to customary law as «intentional infliction, by act or omission, of severe pain or suffering, whether physical or mental, in order to obtain information or confession, or to punish, intimidate or coerce the victim or a third person, or to discriminate on any ground, against the victim or a third person»⁵³.

Generally, “inhuman treatment”, which as indicated is only defined in the ICC Elements of Crimes, has in the interpretation of courts differed from torture in not

⁵¹ *Ibidem*, article 8 (2) (b) (XXI). According to note 49, for this crime “persons” can include dead persons. It is understood that the victim need not personally be aware of the existence of the humiliation or degradation or other violation. This element takes into account relevant aspects of the cultural background of the victim.

⁵² ICTY APPEALS CHAMBER, *Delalic and others. Judgment*, 20th February 2001, and *Idem, Furundzija. Judgment*, 21st July 2000.

⁵³ ICTY TRIAL CHAMBER III, *Kunarac and others. Judgment*, 22nd February 2001.

demanding the presence of any specific purpose of the torturer. The ICTY proceeded to describe inhuman treatment as action which «causes serious mental or physical suffering or injury or constitutes a serious *attack on human dignity*»⁵⁴. International human rights bodies have also found that inhuman treatment existed also in the absence of active ill-treatment but also in cases of very poor conditions of detention and in cases of solitary confinement⁵⁵.

There are no reported judgments on this war crime in the humanitarian law context. There have however been cases before international human rights courts which found that in some instances there has been inhuman and degrading treatment, without defining the term, except in the *Greek* case before the European Commission of Human rights, which defined degrading treatment as treatment or punishment that «grossly humiliates the victim before others or drives the detainee to act against his/her will or conscience»⁵⁶.

The example of the undoubtedly existing customary prohibition of torture and cruel, inhuman or degrading treatment and punishment shows that the application of any customary rule will have to depend on the proper understanding of many elements on which this rule has been constructed.

10. *The Hierarchy of Customary Human Rights Norms*

Another important question related to the customary norms on human rights is the hierarchy of human rights in general, and within this hierarchy the position of customary norms as a sub-group and the relationships within the subgroup itself.

The usual question is whether human rights norms, or some of them, are on the higher pedestal of *jus cogens*, i.e. belong to the peremptory norms of international law, and whether they represent obligations that states have *erga omnes*.

While scholars and human rights activists have demonstrated a tendency to use the above described methods to enhance the prestige of norms of human rights and humanitarian law, national and international tribunals have demonstrated less enthusiasm. States have nevertheless underlined the cardinal importance of some rules either by proclaiming them non-derogable or by treating their violations as criminal offences.

International crimes are as a rule defined and established by treaty. Not all the obligations *erga omnes* have been designated as international crimes. *Jus cogens*

⁵⁴ ICTY TRIAL CHAMBER II, *Delalic and others. Judgment*, 16th November 1998, and ICTY TRIAL CHAMBER III, *Kordic and Cerkez, Judgment*, 26th February 2001. Italics supplied.

⁵⁵ For examples see ICRC, *Customary International Humanitarian Law*, cit., p. 318, n. 103 and 104.

⁵⁶ EUROPEAN COMMISSION OF HUMAN RIGHTS, *Greek Case (Denmark, Norway, Sweden and The Netherlands v. Greece)*. Report, Applications nos. 3321/67;3322/67;3323/67;3344/67, 1970.

or peremptory norms can be viewed either as a new and non-consensual source of legal obligation or as the promotion of certain norms of existing law to a normative status higher than others, while obligations *erga omnes* gain that quality by custom.

Article 53 of the 1969 Vienna Convention on the Law of Treaties defines a *jus cogens* norm as one «accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm having the same character». No clear agreement was reached during the negotiations at the Vienna conference, nor has one emerged since then about the content of *jus cogens*. We are thus in the presence of a situation that resembles the early historical days of the advent of human rights as an idea. There is agreement that human beings have rights, the idea of inherent human rights is accepted, but there is no consensus on the catalogue of such rights.

It is still not clear whether international *jus cogens* fully corresponds to the peremptory (imperative) norms in national systems which absolutely limit the right of legal persons to agree on differently. It is also not clear whether the effect of the existence of a peremptory norm is only to declare null and void an agreement to the contrary or also to make such a violation of the *ordre public* criminally punishable. International legal instruments and doctrine now often refer to the «common interest of humanity» or «common concern of mankind» to underline concerns that could form part of an international *ordre public*. References are also more frequent to «the international community» as an entity or authority of collective action.

Some human rights instruments provide that human rights do not derive from the will of states, but are “inalienable” or “inherent”. The American Convention on Human Rights proclaims that «the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality»⁵⁷.

Human rights bodies have until recently avoided pronouncing on *jus cogens*⁵⁸.

The Inter-American Court appears clearly to regard *jus cogens* as a source of obligation:

All persons have attributes inherent to their human dignity that may not be harmed; these attributes make them possessors of fundamental rights that may not be disregarded and which are, consequently, superior to the power of the State, whatever its political structure.

⁵⁷ *Pact of San Jose. Preamble*, para. 2.

⁵⁸ D. SHELTON, *Are There Differentiations among Human Rights? Jus Cogens, Core Human Rights, Obligations Erga Omnes and Non-Derogability*, in *The Status of International Treaties on Human Rights*, Venice Commission, 2006, p. 166.

The Court cited nineteen treaties and fourteen soft law instruments on the principle of non-discrimination, finding that taken together they evidence a universal obligation to respect and guarantee human rights without discrimination. On whether this principle amounts to *jus cogens*, the Court moved beyond the Vienna Convention, asserting that «by its definition» and its development *jus cogens* is not limited to treaty law. The Court summarily concluded that non-discrimination is *jus cogens*, being «intrinsically related to the right to equal protection before the law, which, in turn, derives directly from the oneness of the human family and is linked to the essential dignity of the individual». The Court added that the principle belongs to *jus cogens* because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws. The effect of this declaration, according to the Court, is that all states are bound by the norm *erga omnes*⁵⁹.

The Inter-American Commission on Human Rights, like the Inter-American Court, has at times suggested that *jus cogens* derives from an additional, non-consensual source of international legal obligation. The Commission has declared the right to life, for example, to be a norm *jus cogens*: derived from a higher order of norms established in ancient times and which cannot be contravened by the laws of men or nations. The norms of *jus cogens* have been described by public law specialists as those which encompass public international order «accepted... as necessary to protect the public interest of the society of nations or to maintain levels of public morality recognized by them»⁶⁰. This naturalist approach is wider than expected and shared, for instance, by Louis Henkin, according to whom general principles of law common to legal systems «often reflect natural law principles that underlie international law»⁶¹. The relevant parts of the Preamble of the UN Charter have also a definite naturalistic flavour: «to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small» (para. 2). As already noted, the Charter does not contain a catalogue of rights but repeatedly refers to the principle of non-discrimination.

The ICTY, the first tribunal to discuss *jus cogens*, declared the prohibition of torture as one such norm: «Because of the importance of the values it protects, [the prohibition against torture] has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even “ordinary” customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by states through international treaties or local or special customs or even

⁵⁹ INTER-AMERICAN COURT, *Juridical Condition and Rights of the Undocumented Migrants*, *Advisory Opinion*, OC-18/03 Ser A, No 18, 2003.

⁶⁰ D. SHELTON, *Are There Differentiations among Human Rights?*, cit., p.164

⁶¹ L. HENKIN, *International Law: Politics, Values and Functions: General Course in Public International Law*, in «Recueil des cours», 216, 1989, 4, pp. 61-62.

general customary rules not endowed with the same normative force»⁶². Clearly, the *jus cogens* nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community.

In a recent article, Dinah Shelton has, after thorough study, some of which has been paraphrased above, established the following list of relevant human rights norms denominated *jus cogens*: the right to life, the right to a fair trial, the right to racial equality, the right to be free from torture, the right not to be arbitrarily deprived of liberty, and the right to the fundamental protections of humanitarian law during armed conflict (presumably the guarantees of common article 3 of the 1949 Geneva Conventions). According to her:

[T]he rationale that emerges from the literature and the cases is one of necessity: the international community cannot afford a consensual regime to address many modern international problems. Thus, *jus cogens* is a necessary development in international law, required because the modern independence of States demands an international *ordre public* containing rules that require strict compliance [...]. The urgent need to act that is suggested fundamentally challenges the consensual framework of the international system by seeking to impose on dissenting States obligations that the "international community" deems fundamental. State practice has yet to catch up fully with this plea of necessity and it should be recalled that States legally bound by human rights treaties and custom may not plead internal law as a defence to breach of their obligations. Even if a particular human rights treaty permits denunciation, the *denouncing state will remain bound by customary international law and by other human rights agreements that permit no denunciation*. Member States of the United Nations have human rights obligations even if they do not ratify or accept any of the existing global or regional human rights treaties, because of the duties that flow from membership in the United Nations⁶³.

The category of *erga omnes* is undoubtedly important for enforcement. Namely, *erga omnes* could be regarded only as a procedural tool, designed to protect the international community interest where every state or no other state is injured, such as guarantees of human rights. In this respect, this category could be seen as deriving from the principle of effectiveness because violations of the law could not be challenged without the broadening of standing. It may be connected with the doctrine of *jus cogens*, because if every state has an interest in compliance with *erga omnes* obligations, a practical effect in favour of human rights can arise from *erga omnes*. It allows any state to raise or contest an alleged violation, in contrast to the law of diplomatic protection, which limits standing to bring claims on behalf of an injured person to the state of nationality.

⁶² ICTY TRIAL CHAMBER II, *Furundzija. Judgment*, 10th Decembbber 1998.

⁶³ D. SHELTON, *Are There Differentiations among Human Rights?*, cit., p. 174.

11. From “Negative” to “Positive” Definitions

It has been demonstrated that the one who wants to discern whether there are human rights guaranteed by customary international law has to reverse negative prohibition into positive statements on existing rights. Our exercise with torture and related acts was also meant to prove that there was a customary human right to physical integrity and dignity. The same method was in a summary fashion used to prove that there was a customary right to life and equality. This has been implied in many statements and restatements of international customary law on human rights. The same method can be used in the future.

The problem that arises from there is that the obvious way of protecting a customary human right is through the prosecution and punishment of the violator. In modern criminal law however, prosecution and punishment are in the hands of public authorities – the prosecutors and the judiciary – and not in the hands of the victim. Protection of one’s human rights is normally achieved by claiming them in procedures provided for at the national and international level. If a justiciable right is denied, it should be secured by turning to competent courts and obtaining a decision to that effect. If the right is not justiciable, political or other action can be considered.

If a right is denied at the national level, protection can be sought internationally. “Internationally” means both “abroad” and at the international level, before international courts and other similar institutions.

Institutions are generally not established by customary rules. So, if a right has to be claimed and secured “abroad”, it is before an institution established in a foreign country. If it is a court, it will be competent to hear complaints about violations of human rights guaranteed by the internal law of that state and by international human rights treaties binding this country and giving jurisdiction to its courts. The question is whether apart from written national and international law, international customary law will be the basis of jurisdiction of the courts to hear complaints against the violation of human rights elsewhere, very often to decide whether a person alleged to have committed a crime against humanity (which in essence is denial of a fundamental human right) will be punished and how. The Preamble of the 1998 Rome Statute of the International Criminal Court recalls that «it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes». The existence of such a duty has been denied recently by such authoritative bodies as the *Institut de droit international*⁶⁴. States have been

⁶⁴ INSTITUT DE DROIT INTERNATIONAL, *Universal Criminal Jurisdiction With Respect to the Crime of Genocide, Crimes Against Humanity and War Crimes*, in «Annuaire», Vol. 71/I, Session de Cracovie, 2004, p. 233.

reluctant to use the opportunities supposedly given to them by the principle of universal jurisdiction⁶⁵.

International courts and human rights bodies can both determine the existence and violation of an internationally guaranteed human right and assist its holders to resume the enjoyment of a given right or to get redress. This is what is generally done by various human rights bodies at the universal level and by regional courts of human rights. On the other hand violators of human rights whose violations are declared as such can be prosecuted by international prosecutors and tried before international criminal courts and tribunals, universal or regional, permanent or *ad doc*.

Returning to customary international law, better guarantees for the victims of denial of human rights can be found before international than before national bodies. The former will be more qualified and inclined to consult general or customary international law, to recognise rights which do not apply in given cases because of the absence of treaty provisions and to tend to interpret the meaning of some provisions and terms according to the terms of international law.

According to article 21 of its Statute (Applicable Law), the International Criminal Court will have to rely, in addition to the Statute and international treaties, on «the principles and rules of international law» and «general principles of law derived by the Court from national laws of legal systems of the world».

Such provisions and practices have inspired Antonio Cassese to write:

one has frequently to rely upon customary rules or general principles either to clarify the content of treaty provisions or fill gaps in these provisions. Resort to customary law may also prove necessary for the purpose of pinpointing general principles of criminal law, whenever the application of such principles becomes necessary⁶⁶.

12. Customary Rules or General Principles?

This brings us to a hotly debated subject. Namely, is the whole effort to define customary rules on the existence and protection of human rights not a vain effort, where the proponents of customary human rights bypass the classical rules of custom formation in order to engage in wishful thinking.? A very hot debate was provoked by an article of Bruno Simma and Philip Alston, published almost twenty years ago⁶⁷.

⁶⁵ See R. MAISON, *Les premiers cas d'application des dispositions pénales des Conventions de Genève par des juridictions internes*, in «European Journal of International Law», 6, 1995, pp. 262 ff.

⁶⁶ A. CASSESE, *International Criminal Law*, Oxford, 2003, p. 28.

⁶⁷ B. SIMMA – P. ALSTON, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, in «Australian Year Book of International Law», 12, 1988-1999, pp. 82 ff.

These two authors start their critique by condemning the hasty recognition of some liberal “customary” guarantees of human rights in disregard of the classical and conservative rules on custom formation. They criticise the opinion, shared also by the International Court of Justice in the Nicaragua case, that in order for customary law to survive, it is sufficient that the conduct of States should be consistent with such rules in general and that instances of State conduct inconsistent with the rule should generally be treated as breaches of that rule, not as indications of the recognition of a new rule. In their view, «this is a statement valid in those cases in which state practice and *opinio juris* have had a chance to establish themselves solidly in an initial, formative stage [...]. It makes a big difference whether we are in the presence of a case where customary law has been gradually built through practice of the traditional material kind and subsequent instances of inconsistent conduct occur, or whether claims to the existence of a rule of customary law are voiced amidst – or against – a real world which all too often continues to behave as if it were totally unimpressed by such claims»⁶⁸. They believe that the world is now in a stage where customary human rights rules are slowly accepted and sporadically honoured, if the world is observed *in toto*.

However, their attitude is ultimately optimistic. The authors seem to believe that instead of hastily rushing through an unconvincing *opinio juris*, it would be better to rely on another recognised source of international law, contained in article 38 of the ICJ Statute, that is «the general principles of law recognized by civilized nations (para. 1.c)», which they tend to construe differently from the traditional understanding, not as a principle derived from internal practice, but as a principle developed through the consensus in international organisations and other fora.

This is in some ways *opinio juris* without long practice. Looking closely at the decisions of international courts not dealing primarily with human rights and being faced more frequently than specialised human rights courts and treaty bodies, with the necessity to look outside fixed human rights instruments, one can agree with Simma and Alston that in many these cases, say, the International Court of Justice does expressly place human rights in the field of customary international law:

Thus in the Corfu Channel case the Court spoke of «obligations ... based ... on certain general and well-recognized principles», among them «elementary considerations of humanity». In its advisory opinion on Reservations to the Genocide Convention the ICJ observed that «the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any consensual obligation». We are all familiar with the distinction drawn in the *Barcelona Traction* judgment between mere bilateral obligations and the obligations of a State towards the international community as

⁶⁸ *Ibidem*, p. 97.

a whole. Such obligations erga omnes were seen as deriving, *inter alia*, «from the principles and rules concerning the basic rights of the human person»⁶⁹.

It is submitted that there is not much difference in the results of the described theoretical approaches. A careful study of the law to be applied by the International Criminal Court, described in article 21 of its Rome Statute, shows that this Court will, in hierarchical order, apply the Statute and conventional law (para. 1.a), «principles and rules of international law» (para. 1.b), and «general principles of law derived by the Court from national laws of legal systems of the world» (para. 1.c). In expectation of ICC jurisprudence it can be assumed that the principles mentioned in 1.b are general principles of international law defined by international organizations and other international fora, that the rules in that subparagraph are customary rules of international law, and that the general principles of law from the subparagraph 1.c reflect the traditional interpretation «the general principles of law recognized by civilized nations», quoted in article 38.c of the Statute of the International Court of Justice, as first interpreted by the Permanent Court of International Justice in the *Chorzow* cases⁷⁰.

13. A Very Short Conclusion

A gnawing doubt remains, however: Are international customary human rights still at their very beginnings? Is there somewhere where national human rights started before the great proclamations and constitutions of the late 18th and early 19th century? Is it not still only saying that some conduct “is not right” or that some acts “are wrong” and punishing persons who offended these prohibitions and thereby only implying that their victims had their own personal rights, irrespective of the needs of the state, society and the international community? Is the true human rights statement not: “I (or another person) have the right”?

⁶⁹ *Ibidem*, p. 106.

⁷⁰ PERMANENT COURT OF INTERNATIONAL JUSTICE, *Chorzow Case. Judgments of 26th July 1927 and Judgement of 13th September 1928*, PCIJ, Series A, Nos. 9 and 17.