Modern Considerations in the Identification of Customary International Law: Reflections on the ILC' Reports (2013-2018) & Some International Judicial Decisions

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Abstract

International courts and tribunals, including the International Court of Justice (ICJ), have always played a crucial role in the process of identifying rules of customary international law (CIL). In this area, especially in recent decades, the approach that is employed as international jurisprudence has been modified because the principles of humanity and humanitarian law have evolved. Unlike the traditional approach that relies initially on the practice of states, this newly-emerged approach – which was also supported by the Special Rapporteur of the International Law Commission (ILC) in its fifth report in 2018 – seeks to identify *opinio juris* in the first place. What we have discussed in the present article is the necessity of the introduction of a new approach to the identification of customary rules in international law. For this purpose, we attempted to collect and analyze the concurring opinions and arguments that exist in judicial jurisprudence of various international tribunals such as the ICJ, as well as those of the ILC as ubiquitous evidence to establish a change in the process of the identification of custom.

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Introduction

International custom,[1] as a substantive, principal source of international law, has constantly played an important role in the formation of arguments around international judicial entities such as the ICJ. The concept of customary international law and the identification of its elements in the judicial jurisprudence have been undoubtedly the basis of the doctrine about custom[2]; over the years this doctrine has proved that custom qualifies as the principal source of international law in a decentralized system. Based on the well-established method of jurisprudence that conforms to Article 38, Paragraph 2 of the ICJ Statute, the identification of international custom requires "evidence of a general practice accepted as law". The ICJ and other judicial entities

[1] Most international law jurists consider the Statute of the ICJ as a basis for arguments about customary international law, although the international community had recognized custom as one of the principal sources of international law a very long time ago. Article 38, paragraph 1 of the same statute does not contain any strict definition about custom, but it only suffices to introduce custom as 'evidence of a general practice accepted as law' and despite the existence of textual errors, it has been a basic criterion for suggesting definitions in legal teachings and international judicial jurisprudence. For more information, refer to: Antonio TANCA, "Dionisio Anzilotti", in Karol WOLFKE, eds., Custom in Present International Law, (Boston: Brill, Nijhoff, 1993), at 6, Julian MAKOWSKI, "Podręcznik prawa międzynarodowego", in Karol WOLFKE, eds., Custom in Present International Law, (Boston: Brill, Nijhoff, 1993), at 6. However, authors and international judicial jurisprudence hold the view that it is unequivocally a manifestation of both elements: "practice" or "material element" and "recognition as law". The latest is often used by the ICJ as "Opinio juris Sive Necessitaies" of which a simplified term is introduced as "opinio juris" (ICJ Reports, 1986, para. 183; ICJ Reports, 1985, para. 27; ICJ Reports. 1969, para. 77)

[2]Already decades ago a commentator noted that "the borderlines between an interpretation of existing law and the making of the new law are inevitably fluid." Wolfgang FRIEDMANN, "The North Sea Continental Shelf Cases _ A Critique", (1970), 64 American Journal of International Law, Vol. 64 (2), at 235.

had determined this concept while identifying legal rules in different legal areas such as the law of the sea, international humanitarian law, use of force, diplomatic and consular law and international responsibility. However, the traditional approach does not seem to be effective enough, because the concepts of human rights and humanitarian law have been developed in the international community; this has encouraged scholars to adopt a new approach. This is consistent with the view endorsed at the outset of the International Law Commission's work on the topic, namely that "the Commission should aim to describe the current state of international law on the formation and evidence of rules of customary international law, without prejudice to developments that might occur in the future".[3] It is also worth noting that most states that commented on the draft emphasized that the draft conclusions did accurately reflect the existing position of the international system on custom.[4] In this case, the traditional procedure cannot be relied upon since, in most cases, neither a practice exists *ab initio* nor the existing practice is void of contradictions. It is against this background that the ICJ needs to apply a modern approach when identifying the relevant rules of international humanitarian law that is not in conflict with Article 38 of its Statute and the custom's two-element approach. Also, as judicial entities have taken different procedures for the purpose of identification and set forth various arguments, it is necessary to delve into the issue of international custom in the detail undertaken in this article.

The main purpose of this article is to review and analyze modern (non-traditional) approaches in the process of the identification of customary international law to understand if there is any agreement on

[3] See: Report of the Special Rapporteur on the Identification of customary international law (Michael Wood), A/CN.4/663, 2013, para. 16.

[4] See: Written comments of the Republic of Korea, para. 1, Report of the Special Rapporteur on the Identification of customary international law (Michael Wood), A/CN.4/717, 2018.

the necessity of adopting a new approach. To this end, we sought, in the first instance, to consider the jurisprudence of the most important international tribunals such as the ICJ, ICTY and ICTR. Meanwhile we have examined the latest approaches adopted by the International Law Commission which will be discussed in line with the general direction of the thoughts reflected in the present article.

I. Rhetorical and Theoretical Verification

Despite pre-definitions and their reliance on the two-element approach of custom, it is notable that formation and identification of CIL have not been assessed in a coherent, precise manner. In fact, judicial entities, while identifying the customary rules, have adopted the method used in the two-element approach considering conditions accompanied by a judicial policy under the effects of order, justice and common interests; this may vary in different cases, regardless of the pre-existing considerations of the system. The logic behind this is to be found in custom's fluid nature which makes it become adaptable promptly to the evolutions of the international community.

As will be discussed in the following pages, unlike the traditional theory that identifies *opinio juris* through preliminary formation of practice, what is called "*Revision in the traditional approach to the identification of customary international law*" reasonably establishes this element of international custom in the first place. That is, the modification in the new approach is related to the order of establishing the constituent elements of custom; although it might initially seem to be in conflict with the context of Article 38, paragraph 2 of the Statute of the ICJ, it is clear that it does not contradict the main concept.

In the modern approach, the way in which customary rules are identified is changed in compliance with the evolutions of the international community in the field of human rights as well as the developments of humanitarian concepts. Seemingly, the origin of this

evolution of judicial jurisprudence has its roots in the function of the ICJ dealing with the Common Article 3 of Geneva Conventions in Nicaragua Case. Having examined how this article was identified, it is evident that the ICJ has viewed *opinio juris* as a substantial, predominant element *prima facie* which later became a template for other international judicial entities in the process of the identification of customary rules.

It is also worth recalling that in the context of the new approach, *opinio juris* is not derived from state practice, but from the principles of humanity and dictates of the public conscience. Simply put, it is not a belief to be found in the context of states' volitions or national interests; indeed, it is found in predominant idealistic and virtual principles of natural law. In this sense, the identification of *opinio juris* is not relied upon the existence of precedent practices and former experiences, but is based on humanity principles and dictates of public conscience for the purpose of establishing a rule as "binding".

Relatively, the United States accurately emphasized that "a deductive approach must be used with caution to avoid identifying purported rules as customary international law that do not result from a general and consistent practice of States followed by them out of a sense of legal obligation".[5] This position has been accepted by the community of states. The ICJ, however, shall satisfy itself that the existence of a rule in the *opinio juris* of states is confirmed afterward by their very practice.[6] The new approach to identification has received some degree of approval from international law scholars. For example, Meron, Lilich and Brown have characterized *modern custom* as an important legal

[5] See: Written comments of the United States, at 9 (also suggesting that the phrase "indivisible regime" should be deleted), Report of the Special Rapporteur on the Identification of customary international law (Michael Wood), A/CN.4/717, 2018.
[6] ICJ, Military and Paramilitary Activities in and against Nicaragua Case, (Nicaragua v. United States of America), Judgment, [1986], I.C.J, Rep. 70, para. 184.

source for human rights' obligation,[7] while Henkin has described this evolution as a "transition from the state-oriented toward a human-oriented and a state-liberalistic toward a good-oriented legal system".[8]

In addition, the modern theory in CIL, which has been called a "normative or moral approach", rests primarily on what must be practice, and not on what must exist.[9] In other words, the law is in need of approving moral, idealistic standards rather than describing existing functions, because states' practice in this theory is less important.[10] We can take account of torture, for example, through which a "moral aversion" is more reminded rather than a real description of states' practice.[11] Moreover, despite common traditional process in which an existing rule can be simply changed into another as the result of comprehensive breaches and formation of new contrary practices, in the modern process including human considerations and virtues like the prohibition of torture, the existing rules (despite being comprehensive) are never changed or modified when violations take place.

The existence of any contradiction in states' practice may disorder practice-based law, but this is not the case when it comes to human and moral-based laws in that contrary practices will never jeopardize their authority. It can be deemed a positive characteristic in the new approach in which recognized rules enjoy an immortal character.

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[7] Theodor MERON, Human Rights and Humanitarian Norms as Customary Law, (Oxford: Clarendon Press, 1989), at 35-44.

[8] Louis HENKIN, "Human Rights and State Sovereignty", (1995-96), Georgia Journal of International and Comparative Law, Vol. 25(1), at 34-35.

[9] Elizabeth ROBERTS, "Traditional and Modern Approaches to Customary International Law: A Reconciliation", (2001), 95 American Journal of International Law, Vol. 9, at 761-764.

[10] MERON, supra note 7, at 766, Oscar SCHACHTER, International Law in Theory and Practice, 178 Recueil Des Cours 9, (Oxford: Brill and Nijhoff, 1982), at 133-134.

[11] The American Law Institute, "Restatement (Third) Foreign Relations Law of the United States", (1987), Vol. I, para. 702.

The new approach is sometimes compared with interpretations posed by Hart and Koskenniemi; these are described as "Prescriptive" and "Utopian" theories[12], respectively. According to the first theory, the law is not formed by describing facts since they imply what exists (existing practice). Thus, under this interpretation, legal rules are always prescriptive and are based on what *must* exist. According to the latter, the law is based on principles irrelevant to the interests or volition of states; they are complete moral principles that are unrelated to the present realities existing in the international community.[13]

It is worth noting that such interpretations have considered law irrespective of existing realities, states' practice and their role in law making in general, although they possess the characteristics similar to those employed in modern custom-making process given that they suggest a prescriptive and virtual identity. Accordingly, in the absence of any logical insight in the field of customary rule-making process in international law, these two theories cannot be admitted in the present paper as well.

Nonetheless, the modern approach to the identification of CIL has attracted criticism, with some scholars contending that the modern custom is more likely to represent ideals rather than realistic, moral standards.[14]

It has also been argued that regulatory bases of the so-called modern custom suffer from instability, as it seems to contain merely a corpus of idealistic objects rather than realistic obligations for states' behavior. For instance, in the context of Tunisia Declaration of 1992 (approved

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[12] See: Frederick Schauer, "The Social Construction of the Concept of Law: A Reply to Julie Dickson", (2005), Oxford Journal of Legal Studies, Vol. 25, No. 3.

[13] Ibid.

[14] Daniel BODANSKY, "Customary (and Not So Customary) International Environmental Law", (1995), 3 Indian Journal of Global Legal Studies, Vol. 3(1), at 141.

by 42 African states) and Bangkok Declaration of 1993 (accepted by Asian states), most non-western countries have shared the view that new customs of human rights, while not enjoying a binding character, represent only a consolidation of idealistic recommendations.[15]

Furthermore, modern custom is also termed as "soft law"; it is not considered "law" in its real term.[16]Another critique is that the concept of modern custom is prone to abuse both politically and legally, while no legitimacy exists because of the lack of states' consent.[17]According to Professor D'Amato, custom is overstepped in the modern approach due to a traditional superiority dedicated to practice rather than *opinio juris*.[18] Sir Robert Jennings likewise pointed out that what is mostly stressed upon in the modern CIL is neither custom nor something similar. Terms such as "new", "modern", "contemporary" and "accelerated formation" of custom, Jennings noted, are inherently paradoxical and challenge the foundations of law.[19] Finally, Simma and Aleston, believe that the adaption of this modern approach results in the emergence of an identity crisis. Thus, according to these two scholars, it is preferred to take note of its rules in the realm of general principles of international law and not in custom.[20]

As noted, the opponents of the modern approach have maintained that it is underestimating the role of state practice (according to which

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[15] ROBERTS, supra note 9, at 770.

[16] Prosper WEIL, "Towards Relative Normativity in International law?", (1983), 77 American Journal of International Law, Vol. 77(3), at 415.

[17] David FIDLER, "Challenging the Classical Concept of Custom", (1996), German Yearbook of International Law, Vol. 92 (1), at 216-231.

[18] Anthony D'AMATO, "Trashing Customary International Law", (1987), 81 American journal of International Law, Vol. 81(1), at 210.

[19] Jennings, R," The Recognition of International Law**"**, Indian Journal of International Law, at 3-5.

[20] Bruno SIMMA and Philip ALESTON, "The sources of Human Rights Law: Custom, Jus Cogens, and General Principles", (1988-89), Australian Yearbook of International Law, Vol. 12(1), at 82.

professor Hoffmann, despite being consistent with justice, calls a collapse in international legal system by destabilizing it).[21] However, as will be demonstrated in the following pages, the modern approach truthfully enjoys a solid foundation, and has been admitted by the ICJ through its jurisprudence as a new method in the rule-making process. This makes sense, given that the present traditional system cannot afford all needs and necessities of the international community in any situation.[22] Although in the modern approach, states' volition is grossly equilibrated, this does not mean that their role is underestimated. According to the Special Rapporteur, an inquiry into the *opinio juris* that may accompany instances of the relevant practice should be complemented by a search for the *opinio juris* of other States, so as to verify whether states are generally in agreement or are divided as to the binding nature of a certain practice.[23] As the ICJ has stated:

> [e]ither the States taking such action or other States in a position to react to it, must have behaved so that their conduct is 'evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.[24]

In the advisory opinion on the Legality of the Threat or Use of Nuclear Weapons, for example, the Court "[did] not consider itself able to find that there is an *opinio juris*" regarding the existence of a rule of customary international law because "the members of the international

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[21] Tamas HOFFMANN, "Dr. Opinio Juris and Mr. State Practice: The Strange Case of Customary International Humanitarian Law", (2006), Annales Universitatis Scientiarium Budapestinensis de Rolando Eötvös Nominatae Sectio Iuridica, Vol. 46, at 15.

[22] FIDLER, supra note 16, at 216-231.

[23] See: Wood, supra note 3, para. 64 and the references therein.

[24] ICJ, supra note 6, at 14, at 109, para. 207 (citation omitted; indicating also 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" (emphasis added)).

community [were] profoundly divided on the matter of whether non-recourse [by a certain number of States] to nuclear weapons … constitute[d] the expression of an *opinio juris*".[25]

What is clear is that, in humanitarian cases, greater weight has been given to *opinio juris* than the practice of interested states. Simply put, in order to establish the existence of state practice, it will suffice to see whether there is any common belief (*opinio juris*) about that practice to be applied. As the ILC Special Rapporteur has put it, "[W]hat is generally regarded as required is the existence of an *opinio* as to the law, that the law is, or is becoming, such as to require or authorize a given action". [26] Practice motivated solely by considerations of economic or moral necessity can hardly contribute to the identification of a rule of customary international law.[27] Furthermore, as stated by the Chairperson of the Drafting Committee records, "[t]he Committee concluded that the phrase 'undertaken with' allowed for a better understanding of the close link between the two elements than the previous proposal 'accompanied by".[28] This formulation was looked upon with favor party because of its ability to indicate "that the practice in question does not have to be motivated solely by legal considerations to be relevant for the identification of rules of customary international law".[29]

When it comes to the modern custom, virtual and humanity principles of natural law have primarily superseded states' practice and play an important role. This has been influenced by developments in human and humanitarian law concepts within the context of the present

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[25] Legality of the Threat or Use of Nuclear Weapons Case, Advisory Opinion, [1996], I.C.J, Rep. 95, at 254, para. 67.

[26] See: Report of the Special Rapporteur on the Identification of customary international law (Michael Wood), A/CN.4/672, 2014, at 74-5, para. 65.

[27] See also: Wood, supra note 3, at 46–47, para. 61.

[28] Statement of the Chairman of the Drafting Committee (29 July 2015), at 7 (available at http://legal.un.org/ilc/).

[29] *Ibid*

international legal system, and is regarded as an international startling revolution in custom-making process. This must continue in favor of humanitarian aims, and to respect human dignity.

What is the origin of this revolution? In other words, how could we assure that the new approach to the identification of customary rules has been accepted in the ICJ jurisprudence? As mentioned earlier, under the modern approach, identification of a rule is preliminary based upon the establishment of *opinio juris* where it is derived from the principles of humanity and requirements of public conscience rather than the preliminary considerations.[30]

We take the view that the real origin is to be found in the codification and approval of Martens Clause in the international community, although the changes in the ICJ view have been affected by the expansion of humanity concept as well. The Martens Clause was a declaration upon which the international community has agreed to take note of natural law[31] principles and theories when creating a new rule. Its approval and promulgation were influenced by developments in human right principles *per se* during the 20th century as well as in the Common Article 3 of the Geneva Conventions that is typically the manifestation of the Clause and a valuable resource for the ICJ in

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[30] Principles are derived beyond state volition.

[31] Natural law contributes principles containing human being demanded perfection. Natural law bases lie in studying human instinct and nature and is a consolidation of stable, permanent and eternal rights which embodies all human beings of different race and color. These rights — being provided due to the nature features — cannot be lifted by any statutory rule to deprive a man. In the view of theorists believing in the same natural characteristics, natural rules of humanity are very fundamental so that they are to be considered the final end of every legal system and are based on public sophistication and human-virtual demands. Against this backdrop, a natural legal system is regarded beyond human volition and brings principles necessary for dignity and identity. (Hesam NAGHIBI MOFRAD, Good Governance in Light of globalization of human rights, [Persian], (Tehran: Shahre Danesh, 2000), at 60, See also: Mohammad Ali MOVAHED, In the Atmosphere of Rights and Justice from natural rights to human rights, [Persian], forth Edition, (Tehran: Karnameh, 2013), at 211-212.

regarding humanitarian considerations and public conscience. It can be interpreted as the direct influence of international law theories on the process of formation and developments of its sources in custom.

Emphasizing that it would be impossible to make a new rule of customary international law based on states' unified practice, the ICTY has stated that the Martens Clause "shows that principles of international humanitarian law may emerge through a customary process under the pressure of the demands of humanity or the dictates of public conscience, even where State practice is scant or inconsistent". It has also held that *opinio juris*, "crystallising as a result of the imperatives of humanity or public conscience, may turn out to be the decisive element heralding the emergence of a general rule or principle of humanitarian law". .[32] It is against this background that the former President of the ICTY, Theodor Meron, acknowledged that in the process of formation of CIL rules, the Martens Clause is reinforcing an approach upon which *opinio juris* is *prima facie* deemed a basis instead of states' practice[33], an argument that was similarly put forward by Professor Cassese in this field.[34]

But what is the Martens Clause? During The Hague Peace Conferences on the status of National Resistance Movements in occupied lands, this term was initially employed to settle the relevant disputes among member states. Some states in minority, believing that the residents of occupied lands who were fighting against occupant forces shall be considered "devotees" under the protection of law, were unable to reach the maximum concurring votes. Therefore, Article 1 and Article 2 of The Hague Regulations did not recognize the members

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[32] ICTY, Kupreskic Case, (The Prosecutor v. Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Drago Josipovic, Dragan Papic), Judgment, [2000] I.C.T.Y, IT-95-16-T, para. 527.

[33] MERON, supra note 7, at 88.

[34] Antonio CASSESE, "The Martens Clause: Half a Loaf or Simply Pie in the Sky?" (2000), European Journal of International Law, Vol. II (1), at 214.

of resistant movements as "devotees "who were entitled of specific privileges.

In addition, some other states interpreted the Martens Clause as a reminder that Articles 1 and 2 are not the only regulations for the purpose of determining the legal status of devotees On this basis, while excluding the term "movements" from the definition of "devotees" shall not be made merely through these two articles, it is nonetheless important to settle the dispute according to the principles enshrined in the Declaration. Today, with the endorsements in most legal instruments, the Martens Clause is applicable to all humanitarian legal fields.

The Martens Clause was first introduced to the preamble of 1988 and 1907 Hague Peace Conferences by Fyodor Fyodorovich Martens, a Livonian professor who represented formally Nicholas II of Russia during the Conferences. According to the Clause:

Until a more complete code of the laws is issued, High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.[35]

According to Professor Martens, the clause enjoying a historical background is derived from the theories posed in natural legal theories; this point is primarily the core of the present discourse and we already have expounded on it.[36] Today, the Declaration is regarded as the "Heritage of the Hague Peace Conferences" in the late 19th and early 20th centuries, although this does not mean that its foundations are

[35] Preamble of the Convention with Respect to the Laws and Customs of War by Land and its Annex: Regulations Respecting the Laws and Customs of War on Land (1899 Hague Convention II).

[36] MERON, supra note 7, at 79.

limited to specific topics of the period. The context and the foundation of the clause have been noticed since its codification and, as mentioned earlier, it is now applicable to all human and humanitarian legal fields. The Martens Clause has been accepted by the case law of international courts and tribunals such as the Nuremberg trials and the ICJ as well as the relevant decisions made by human rights organizations alongside the Geneva Conventions[37] of 1949 and the Additional Protocols[38] of 1977.

In the present international legal system, the Martens Clause is of no doubt an objective manifestation of developments generally in humanitarian concepts and human rights. Moreover, as noted earlier, it is a forwarding revolution in this area which, in our view, led to the changes in the process of formation and identification of international humanitarian rules. Part of the clause explicitly points to the possibility of the formation of international law based on the principles of humanity and requirements of the public conscience.

The "Principles of Humanity" and "Dictates of Public Conscience" in the clause now form the main bases of the system of human rights and are part of the universal common beliefs called *"Opinio Juris*" from which no derogation is accepted by states.[39] In other words, credence in the aforementioned principles now amount to fundamental and common beliefs of the international community members.[40]

It is against this background that the ICJ has modified the governing approach to the identification of relevant customary rules – from

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[37] Article 1 of the First, Article 62 of the Second, Article 142 of the Third and Article 158 of the Fourth Convention.

[38] Article 1(2) of the first and paragraph 4 of the Second Protocol.

[39] ICJ, supra note 24, at 490, See also: Theodor MERON, "The Martens Clause, Principles of Humanity, and Dictates of Public Conscience", (2000), American Journal of International Law, Vol. 94(1), at 79.

[40] For more information, see: Millennium Declaration, United Nations, A/55/l.2, 2000, Robin COUPLAND, "Humanity: What is it and How does it Influence International Law?" (2001), 83 International Review of the Red Cross (IRRC), Vol. 83(1).

preliminary identification of practice to superior, substantial identification of *opinio juris* – which some other judicial entities have adopted in their rulings. Therefore, in order to clarify whether there is any similarity with the latter decisions for the identification of custom in the light of the new approach, the following section will discuss a limited aspect of the rulings of other judicial entities as well as those of the ICJ.

II. Function of the International Judicial Jurisprudence

In the previous section, modern custom and its identification process were discussed in the international judicial jurisprudence. Today, the major approach is of no doubt the primary identification of *opinio juris* rather than state's practice; this approach has been affected by developments and changes in accordance with humanitarian concepts. Now, it is necessary to evaluate the function of some authoritative international judicial tribunals and theoretical bases which were discussed earlier. It is worth emphasizing that, in relation to the identification of a rule of customary international law, the question of a burden of proof has already been raised within the Commission.[41] Whether such a burden of proof exists at the national level – and, if so, upon whom it lies – depends on the national legal system and, as the Commission has explained in the commentary, the conclusions "do not address the position of customary international law within national legal systems".[42] At the international level, identifying a rule of customary international law would usually be a matter of legal analysis rather than overcoming a burden proof by one of the parties.[43] It is

[41] A/CN.4/SR.3227: provisional summary record of the Commission's 3227th meeting (18 July 2014), at 6.
[42] See: A/71/10, para. 63, para. (5) of the commentary to draft conclusion 1.
[43] With regard to the International Court of Justice but possibly also beyond, see: ICJ, supra note 6, at 14, 24–25, para. 29.

axiomatic that only a selection of the most prominent judicial rulings could be assessed upon tribunals' functions in this short paper.

a) The International Court of Justice

As discussed earlier, the reference by the ICJ to Common Article 3 of the Geneva Conventions of 1949 in Nicaragua Case was a milestone in the adoption of the new approach. According to Article 3 of the same instrument:

> 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, color, 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:
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> (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.
>
> An impartial humanitarian body, such as the International Committee of the Red Cross (ICRC), may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavor to bring into force, by means of special agreements,

all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.[44]

The content of Common Article 3 is indeed the consequence of a burdensome accord during the 1949 Conference which was aimed at making reformations and accomplishment of the international humanitarian law due to the experiences of the Second World War. During the conference, the ICRC put a common article forward upon which, in the case of all conflicts not of an international character – specifically in internal conflicts that take place in the territory of one or more contracting states – each party to a conflict is obliged to implement the arrangements, as provided in the Convention. It was obvious that such a comprehensive approach which allows the whole conventions to be implemented in internal conflicts would be opposed by states.

Eventually, after a long discussion, it was agreed that a common article be included in all Four Conventions containing similar wording, in order to provide a tinge of humanitarian legal rules that were supposed to be implemented by all belligerent states. This article, known as Common Article 3, received considerable attention from the delegates of the participating states.[45] Codification of the Article should indeed be assumed as a fundamental change in favor of humanity when such conflicts break out.[46] Despite being so limited in arrangements, the article was an unprecedented pierce into the robust corpse of states' exclusive jurisdiction. For this reason, it is not meaningless to term

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[44] Common Article 3 of the Geneva Conventions of 1949.

[45] G.I.A.D.DRAPER, "The Geneva Convention of 1949", (1965), RCADI, Vol. 114, George ALDRICH, "The Law of War on Land", (2000), American Journal of International Law, Vol. 94 (1), at 82.

[46] René-Jean. Wilhelm, "Problems relatifs a la protection de la personne humainne par le droit international dans les conflits armes ne presentant pas un caractere international", (1972), RCDI, Vol. 137, at 332.

Article 3 as "Revolutionary Change"[47] or, better to say, a "True Legal Revolution".[48]

Given that states have accepted the empire of international law to be carried out when people disobey the ruling government in the conflict, what facilitated the penetration of humanitarian law into national legal systems resulting in a deep slip into the corpse of the government was indeed Article 3.[49]

Apart from all these interpretations, identifying and exclaiming Article 3 as a part of the body of public CIL might be a complementary section of all considerations which later, in 1986 and through the judgment of the ICJ in Nicaragua Case, led to the emergence of modern methods in the identification of legal rules. In this case, subject to the U.S reservation, the ICJ was not able to settle the disputes upon the Geneva Conventions but the Court, stating no necessity for declaring its position in the case, considered the content of the Conventions, specifically, Article 3 on its own initiative in the light of CIL. The Court holds that in order to evaluate the U.S reaction to the public rules of humanitarian law as set forth in the Geneva Conventions, Common Article 3 forms at least a tinge of humanitarian legal rules which, in the present case, must be implemented, regardless of the U.S reservation or Nicaragua's unwillingness to invoke the conventions.[50] Thus, the ICJ concedes that humanitarian principles independent from the law of treaties exist and are manifested in Common Article 3 which consist of

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[47] ALDRICH, supra note 43, at 59.

[48] Maurice TORRELI, "La developpementdu role du Conseil de securite", in Rene-Jean DUPUY, eds., La dimension humanitaire de la securite international, (Boston, Londres: Martinus Nijhoff Publishers, 1993), at 179.

[49] Rosemary ABI-SAAb, "Conflicts armes non internationaux", in UNESCO, eds., Les dismensions internationals du droit humanitaire, (Paris: Pedone, 1986), at 256.

[50] ICJ, supra note 6, paras. 217-220.

a minimum of regulations to be implemented in all conflicts of an internal or international character.[51]

The new approach to the identification of customary rules is followed in the same way in other rulings of the Court. In Nuclear Weapons Case, for example, the Court dealt with the question of whether recourse to nuclear weapons must be considered illegal in light of the principles and rules of international humanitarian law that are applicable in armed conflict.[52] It failed to identify a conventional rule of general scope at the same time that it was unable to find a customary rule specifically proscribing the threat or use of nuclear weapons *per se*.

To this end, the Court, mindful of exclusive features existing in the weapons, endorsed the view of the majority of states and theorists about the applicability of humanitarian rules and principles in armed conflicts to the threat or use of nuclear weapons. Underscoring principles such as discrimination and prohibition of severe pain or suffering, it also held that it is difficult, if not impossible, to assume a situation in which the use of nuclear weapons does not violate international humanitarian law.[53]

Additionally, the Court confirmed that the aforementioned principles enjoy a fundamental character that must be applied by all states whether or not they have approved the conventions given that they are symbolizing preliminary considerations of humanity known not to be violated in the CIL.[54]

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[51] Jamshid MOMTAZ and Amirhossein RANJBARIAN, international humanitarian law in internal armed conflicts [Persian], (Tehran [National Committee of humanitarian law], Mizan publisher, 2012), at 42.

[52] ICJ, supra note 24, para. 74.

[53] Ibid. paras. 75-57.

[54] Ibid. para. 79.

Furthermore, the ICJ has confirmed the customary character of the Fourth Hague Convention of 1907 and its annexed regulations, the Geneva Conventions of 1949[55] and the Convention on the Prevention and Punishment of the Crime of Genocide.[56] In this context, the Court invoked the Secretary-General's report based on Security Council resolution 808 (1993). According to the report, the comprehensive annexation of states to the conventions and the lack of any usage of "termination" or "exit" clause confirm the customary character of the instruments. The Court believed that the principles and regulations, as included in the conventions, have possessed a customary character that reflect the humanitarian principles of utmost importance, thus symbolizing the normal, expected behavior of states.[57] So, after the célèbre case of Nicaragua in 1986, we can also observe other dimensions of the new approach in the identification of CIL in the context of 1996 Nuclear Weapons Case. In the latter case, the process of the identification of rules and principles of humanitarian law does clearly attest to the penetration of the principles of humanity and public conscience.[58]

In a nutshell, we reiterate that in most cases, the function of the ICJ regarding the identification of customary rules of international law has been affected by humanitarian considerations alongside evolutions of concepts upon which some criminal tribunals have acted in the same way, as well. The repetitive reference to the arguments made by the ICJ, especially in Nicaragua Case (1986), regarding Common Article 3, is

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[55] Nuclear Weapons, 1996 ICJ REP, at 257, para. 79; at 259, para. 84.

[56] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia Montenegro), Judgment, I.C.J. Reports2007 (I), at110-111, para. 161.

[57] Ibid, paras. 80-83.

[58] See, e.g., the submission to the Court by the Solomon Islands. See also: the statement of Australia's Minister for Foreign Affairs to this effect, extracted in J. Burroughs, the (Il) legality of Threat or Use of Nuclear Weapons 100 (1997).

good evidence of how other entities and tribunals have identified custom in light of the new approach.

b) ICTY and ICTR

Two important events in the early and late 20th century had an impact on international criminal law. These events date back respectively to the punishment of criminals in Nuremberg and Tokyo after World War II had finished and when two international tribunals were established to hear a number of cases in relation to the crimes committed in Yugoslavia and Rwanda.

These tribunals have opened a new chapter of modifications in international criminal law. Especially, concerning the new approaches, an appropriate basis existed to expand the province of international humanitarian law to non-international armed conflicts. In the meantime, the new approach helped to criminalize violations of internal humanitarian law and provide legal ground for individual criminal responsibility.

In this context, the function of the ICTY denotes that custom can be identified through extending the realm of rules governing international armed conflicts so that they can be implemented in internal conflicts as well. This makes it possible to ignore any demarcation between internal and international conflicts when the same regulations are to be implemented.

b-a) Individual Criminal Responsibility in the Realm of Internal Armed Conflicts

It is necessary to expand the realm of "gross violation" from international to internal armed conflicts; thus, we can criminalize any breach of rules governing non-international armed conflicts and recognize individual criminal responsibility, as well. During the Nuremberg and Tokyo tribunals and when the Fourth Geneva

Conventions were approved in 1949, the principle of individual criminal responsibility was recognized as serious violations of humanitarian rules and subsequently concepts including crime against peace, war crimes, and crimes against humanity. Yet, such modifications were advancements specified to international armed conflicts only.

Since the outbreak of civil wars in former Yugoslavia and Rwanda, the Security Council has confirmed in the context of the statute of the relevant tribunals[59] that actions violating international humanitarian rules in non-international conflicts have criminal character and perpetrators shall be prosecuted.[60]Thus, the Security Council facilitated the recognition of individual criminal responsibility in internal conflicts so that the Yugoslavia Tribunal in Tadic Case[61](*Interlocutory* Appeal, 2 October 1995) held that the violation of Common Article 3 and any other rules of international humanitarian law relevant to internal conflicts amounts to an "*international crime*". According to the Tribunal, Article 3 of its Statute is not limited to the violation of the rules set out in the Fourth Hague Convention, but is comprised of a general content that entails all humanitarian violations regardless of the

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[59] The Statute of Yugoslavia Tribunal is implied.

[62] Article 3 and 1 of the Statute of International Criminal Tribunal for Former Yugoslavia,www.un.org/ICT, Article 3 and 4 of the statute of the international criminal tribunal for Rwanda,www.un.org/ICTR.

[61] "Decisions of national courts may constitute forms of evidence of State practice or acceptance as law (*opinio juris*) for the purpose of determining the existence and content of a rule of customary international law under Article 38, paragraph 1 (*b*) of the Statute of the International Court of Justice. In the *Tadić* case for example, the Appeals Chamber of the International Tribunal for the Former Yugoslavia made a general reference to "national case law" as evidence of the formation of customary international law", International Law Commission, A/CN.4/691, 68th Session (2016), Recognition of Customary International Law, Memorandum by the Secretariat, para. 8,19.

character of the conflicts.[62] It is worth recalling that the same situation came up in Akayesu and some other cases in the ICTR.[63]

b-b) *The Principle of Discrimination*

As discussed above, the principle of discrimination in international armed conflicts is regarded as one of non-derogatory principles of CIL[64]; in the field of internal armed conflicts, this principle has been endorsed by the ICTY. The Tribunal observed that, based on various sources, there is a rule of customary international law protecting civilians in non-international conflicts, and banning any attack against [civil] population. Some of these sources are behavior of belligerent states, governments and rebellions, military annals, the ICRC functions, resolutions 2444 and 2675 of the General Assembly and various declarations of regional organizations.[65]

> What was confirmed in Martic Case- as if accepted as custom- was the same in that non-military and civil population cannot be targeted by armed groups and it was known as one of the principal rules of international humanitarian law applicable in all armed attacks.[66]

The ICTY in Blaskic Case also held that the special regulations provided in Common Article 3 of the Geneva Conventions of 1949 appropriately expand the prohibition of attack against population, as referred to in the first additional protocol to internal conflicts. Tribunal believed that the parties to such a conflict are obliged to take all

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[62] ICTY, Tadic Case, (Prosecutor v. Dusko Tadik a/k/a "DULE"), Interlocutory Appeal, [1995], I.C.T.Y, IT-94-1, para. 89.
[63] ICTR, Akayesu Case, (The Prosecutor v. Jean-Paul Akayesu), Judgment, [1998], I.C.T.R- 96-4-T, para. 24.
[64] ICJ, supra note 24, paras. 78-79.
[65] ICTY, supra note 57, paras. 100-127.
[66] ICTY, Martic Case, (Prosecutor v. Milan Martic), Review of the Indictment, [1996], I.C.T.Y, IT-95-11, paras. 10-14.

measures necessary, in order to discriminate between military and non-military objects, assets and people, while attacks against non-military objects are not justified even based on the principle of military necessity; thus, such attacks may be seen as violating Common Article 3 of the Conventions.

In Kupreskic Case, the Court endorsed the protection of civilians in conflict, acknowledging that the principle of discrimination is universally well-established as a backbone of humanitarian law.[67] Having invoked achievements in Tadic Case, the Tribunal did confirm the customary character of the principle in relation to both internal and international conflicts, and conceded adherence by all states without any objection, including those that have not approved the first additional protocol. In the Tribunal's view, Article 57 is now a part of CIL, and applies to internal armed conflicts.[68] Therefore, modern international law prohibits any attack that fails to discriminate between military and non-military objects and people. In Meladic, Karadzic, Kordich and Kupreskic cases, the ICTY also confirmed the prohibition of any blind attack against the belligerent forces, and referred to it as an accepted obligation in internal armed conflicts. It thus follows that discrimination is now widely accepted as an IHL principle applicable to both international and non-international conflicts.

b-c) *The Prevention of Torture*

Torture is regarded as inhuman behaviors that had been incurred upon individuals since a very long time ago. It is defined as "imposing sever bodily pain or suffering for the purpose of punishment, getting confess or revealing the identity of a perpetrator's accomplices".[69]

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[67] ICTY, Kupreskic Case 2000, para. 521.

[68] ICTY, supra note 31, para. 521.

[69] Amir hosein RANJBARIAN, "Legal Status of the Rule of Torture prevention in the contemporary international law", (2005), Journal of legal and political studies of Tehran University, Vol.70, at 148.

Today, almost any human and humanitarian legal instrument prohibits torture as an obscene violation of human rights degrading man's dignity both physically and spiritually. This prohibition started with the adoption of the Liber Code in 1863, and was subsequently codified in the Convention against Torture (1984). The prohibition is absolute and cannot be suspended regardless of the time of peace or war.[70]

This prohibition can be inferred from the body of public international law as well as where the international judicial jurisprudence has clearly confirmed that the prevention of torture is now part of customary international law, and in the hierarchy of the sources of this system owns the status of *jus cogens*. It must be recalled that, in Nicaragua Case, the ICJ endorsed the customary character of Common Article 3 of the Geneva Conventions, stating that it is reflecting the preliminary considerations of humanity that guarantees a minimum touch of humanitarian rules including the prevention of torture, and that it applies to both international and non-international armed conflicts.[71] In addition, as to the recognition of fundamental humanitarian principles, the function of the ICJ in Nuclear Weapons Case indicates that the prohibition of torture has a progressive status in the domain of general substantial rights.[72]

However, it seems that the jurisprudence of the ICTY reflects a more axiomatic manifestation of the prevention of torture in CIL. For example, in Furnudzija Case, the Tribunal endorsed the customary character of the aforementioned rule. It furthermore held that it is a *jus cogens* rule containing *erga onmes* obligations, and recalled that international legal system of human and humanitarian legal rights had proceeded alongside. The Tribunal also held that such prevention penetrated into the body of the public international law once the Liber

[70] Including internal and international
[71] ICJ, supra note 6, paras. 217-220.
[72] ICJ, supra note 6, paras. 80-83.

Code, The Hague Conventions, especially Articles 4 and 46, regulations annexed to the Fourth Convention of 1907, the Geneva Conventions of 1949 and the 1977 Additional Protocols were codified. Indeed, the ICTY believed that these instruments, particularly the Geneva Conventions, have been approved by all states; thus, it was of the opinion that the prevention of torture enjoys a universal admission.[73]Along with Furnudzija, the ICTY has in some other cases confirmed the customary character of the prohibition of torture in international law. These included Jelisic Case,[74] Kupreskic Case [75] and Kunarac Case[76].

Apart from the aforementioned cases, there is still room for discussion about other subject-matters. However, given that our main object was to examine the function of the tribunals in question, it suffices to end the argument here and let more precise verifications be evaluated in the context of other essays.

Conclusion

The traditional approach to the identification of customary rules pertaining to humanitarian considerations is unlikely to prove effective. The process of identification must be in concordance with the modern approach in that *opinio juris* is established *ab initio*; this position has been confirmed by most states. *Opinio juris*, containing a substantial element, is not derived from the preliminary considerations of states' practice, but from the principles of humanity and requirements of public

[73] ICTY, Furnudzija Case, (Prosecutor v. Anto Furund), Judgment, [1998], I.C.T.Y, IT-95-17/1-T, at 137-142.
[74] ICTY, Jelisic Case, (Prosecutor v. Goran Jelisic), judgment, [1999], I.C.T.Y, IT-95-10-t, para. 138.
[75] ICTY, supra note 31, paras. 822-23.
[76] ICTY, Kunarac Case, (Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic), Judgment, [2001], I.C.T.Y, IT-96-23/1-T, paras. 466, 883, 886, 888.

conscience, and rests upon virtual, idealistic theories of natural law as a predetermined, eternal principle. It should be mentioned that the forwarding method is not implemented in all cases though. Likewise, it is probable for a rule to be identified as "customary" through the traditional approach as implemented for the recognition of the principle of "self-determination" in the jurisprudence of the ICJ.[77]

This article provided a detailed reappraisal of the development of the international judicial jurisprudence and its role in the identification of rules of CIL, as a result of developments of the principles of humanity. Having understood the non-coherent status of the international community, we believe that, in view of its prompt flexibility and fluid nature, custom enjoys a special status when compared with other sources. Judicial entities such as the ICJ have also been realized as the most authoritative sources in order to evaluate legal rules, and are deemed invaluable treasures for identification whose functions are modified by constant changes of the international community

[77] Western Sahara Case, Advisory Opinion, [1975], I.C.J, Rep. 61, paras. 54-55.