

Commentary

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As I agree with most points made by Professor Stein and Judge Pocar, I shall limit my comments to two points. The first one concerns the methodology and sources of international humanitarian law in general. The second one relates more specifically to the evolving diversity of goals and functions of humanitarian law and the necessity to understand and apply the existing rules in the current policy context.

The first point on the sources of humanitarian law starts out from the basic premise that no special rules exist, or should be recognized, in this area which would in principle depart in any way from those recognized for public international law in general. In other words, the canon of principles laid down in Article 38 of the Statute of the International Court of Justice will apply to humanitarian law as well. The jurisprudence of the ICJ has been consistent with this postulate. As to the relationship between treaty law and customary law in particular, the rulings in the *North Sea Continental Shelf* case,¹ the *Nicaragua* case² and the *Nuclear Weapons* advisory opinion³ do not point to any divergence in the Court's approach between humanitarian law and other areas of public international law. The nuances of these three decisions may not be always identical. It has been noticed rightly that the *North Sea Continental Shelf* decision, for instance, seems to require a more comprehensive and detailed examination of State practice than the *Nicaragua* decision. All three

1. *North Sea Continental Shelf* (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 3 (Feb. 20).

2. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27) [hereinafter *Nicaragua* case].

3. *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, 1996 I.C.J. 78 (July 8).

decisions converge inasmuch as they are based on the same view that “it should not lightly be assumed that treaty law evolves into customary law.”⁴ Widespread practice and corresponding *opinio iuris* will be required for the formation of customary law, with or without parallel treaty law. This maxim has to be adapted to the circumstances of the context in regard to the number and characteristics of relevant States, and the practice of the major States will have to be given considerable weight.

At the same time, it is appropriate to assume that the rules on the persistent objector will also be operative in the context of humanitarian law. While we all agree that the strengthening and expansion of the rules protecting the victims and the innocents deserve our support, it is also clear that behind these rules lie carefully balanced compromises which take into account the nature of warfare. Against this background, it should not be generally presumed that States are inclined to interpret those rules in *favoram humanitatem* at the cost of their freedom in the means and methods of warfare.

Special issues may arise in those areas of customary law and treaty law which are frequently disregarded in State practice. In such a setting it will be necessary to examine carefully to the extent possible whether States assume that the relevant rule is valid in principle, and point to special justifications for their departure from the rule, or clarify whether it must be concluded that States do not consider themselves to be bound in general. Of course, the first alternative describes the setting of considerable State practice regarding the prohibition of the use of force. Many governments act contrary to a rule, but nonetheless accept it in principle by way of pointing to one of the justifications that allow them, or would allow them if the relevant facts existed, to act contrary to the rule. The issue will become more complex if no attempt to justify the conduct is made. In case a considerable number of States fall into this category, it will have to be assumed that the rule has been eroded. Such a process of derogation may take different forms, depending on the precise circumstances.

In the extreme setting, it is possible that the rule as such can no longer be considered to be valid and that States are no longer bound by any norm in the relevant context. Another version of a process of this kind will exist where States do not flatly disregard the rule but apply it frequently in a generally restricting manner; under such circumstances, the understanding of the rule will have to be adapted to the practice. This will also be the case if State practice disregards the rule in a specific area of application. Evidence of such

4. North Sea Continental Shelf, *supra* note 1, at 41, No. 71.

different types of derogation can be found in various areas of humanitarian law. The common denominator of all such developments lies in the requirement to take into account State practice in identifying and interpreting the rules of humanitarian law. In the context of treaty law, Article 31 of the Vienna Convention on the Law of Treaties⁵ points in the same direction.

The second part of my remarks concerns the diversity of goals, functions and faces of humanitarian law. The essential point which I wish to make is that the various branches of humanitarian law resulting from this diversity need to be viewed in an integrated context so that the development of the law as a whole will be kept and tied together.

The diversity and the branches to which I refer essentially consists of the following three parts:

- (1) The protection of potential victims, being the primary goal of humanitarian law as it has evolved historically, remains the key concern.
- (2) The necessity to leave room to fight a war for a good cause in an efficient manner must be preserved. This concerns Professor Dinstein's point that we do not want a war to last forever, and John Norton Moore's emphasis on the need to fight effective wars in our contemporary world.
- (3) Following the developments in the past decade, we need to view humanitarian law increasingly through the lenses of international criminal law, as the two areas are increasingly linked together.

Why is it necessary to point to the distinctness of these diverse goals and branches? The concern here is a fragmentation in the outlook on humanitarian law that may occur when the three segments noted above are seen in isolation without regard to the necessity to fashion and design the rules so as to reflect the existence and the special needs of all three branches. In practice, the three perspectives have their own "constituencies" which may or may not be prepared in practice to accept that their own concerns need to be merged with the policies and considerations underlying the two other concerns. As to the protective dimension of humanitarian law, it is widely known that its causes are championed especially in scholarly circles, but also by a number of

5. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

governments. Perhaps it is fair to say that the favorite clause of this part of the international humanitarian law community is the Martens Clause drafted in 1899 for the first time and phrased in Article 1(2) of Protocol I⁶ as follows: “In cases not covered by this Protocol, civilians and combatants enjoy the protection of the principles of international law derived from the established custom, from the principles of humanity and from the dictates of public conscience.”⁷ This emphasis on humanity and the public conscience as the overarching goal of humanitarian law echoes the fundamental purpose of humanitarian law, and from an abstract point of view no one will disagree with the noble cause expressed by the Martens Clause.

Nevertheless, it will not be denied that another part of the community concerned with humanitarian law may have priorities in practice which highlight factors additional to those reflected in the Martens Clause. I refer to the military sector and to the actors on the ground. Any realistic consideration will have to conclude that it is not surprising that this community is often less concerned with the principles of the Martens Clause than with the interpretation of the law in a manner which allows flexibility, military advantage and ultimately the operation and conclusion of a successful military operation ended within an appropriate timeframe.

The third branch of the contemporary humanitarian law relates, of course, to the enforcement community, charged with the application of the modern rules of international criminal law. It appears that the application and interpretation of this dimension of international humanitarian law may present the most difficult challenge for the entire body of rules in the coming years. The universe of criminal law as generally accepted in most parts of the world is characterized by distinct principles such as the prohibition of *ex post facto* laws, the presumption of innocence, the prohibition of vagueness of criminal rules and an emphasis on the subjective perception of the individual concerned. Should the rules of international criminal law based on the laws of war be

6. Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Conflicts, June 8, 1977, 1125 U.N.T.S. 3, DOCUMENTS ON THE LAWS OF WAR 422 (A. Roberts & R. Guelff eds., 3d ed. 2000) [hereinafter Protocol I].

7. The Martens clause first appeared in the preamble to the Hague Convention (II) of 1899. It states:

Until a more complete code of the laws of war is issued, the 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 civilised nations, from the law of humanity, and the requirements of the public conscience.

fashioned so as to be as transparent and predictable as possible? Should these rules be construed so as to allow a wide margin of appreciation and an emphasis *ex ante* for the actor on the ground?⁸ Should the main emphasis in the interpretation concern the broad protection of the victim, even though this would be at the expense of the special guarantees characteristic of criminal law and also at the expense of chilling the enthusiasm of those States willing to wage a just war?

These three modes of interpreting international criminal law are emphasized here only for the sake of separating and isolating the potential perspectives. In reality, these approaches will be blended in one way or another in the application of the law. What is remarkable, however, is that the International Criminal Tribunal for the former Yugoslavia (ICTY) has come fairly close to emphasising the third, the “humanitarian approach” in the context of applying Articles 57 and 58 of Protocol I dealing with the necessity of feasible precautions for the civilian population. Generally speaking, the Tribunal was faced in this context with an unusually generally worded, imprecise rule, uncharacteristic for language typical of criminal law. The court would have had the opportunity to narrow down the meaning of the two articles by way of a narrow construction. It would have been possible to interpret the rules taking into account the necessity of military efficiency, and an approach respecting the rule of the margin of appreciation would also have been conceivable.

In the *Kupreskic* case referred to by Judge Pocar, the ICTY chose to interpret Articles 57 and 58 in the specific light of the Martens Clause laid down in Article 2 of Protocol I.⁹ In effect, this reading of the rules led to a very broad understanding and to an emphasis on the protective dimension of Protocol I, with no special regard for the first and second branch of international humanitarian law in the sense mentioned above. The ICTY found that these rules must be interpreted “so as to construe as narrowly as possible the discretionary power to attack belligerents and, by the same token, so as to expand the protection accorded to civilians.”¹⁰ Clearly, for purposes of enforcement, the ICTY thus has underlined a distinctly humanitarian approach to the interpretation of the Protocol I. The ruling shows no apparent regard for the classical

8. The concept of the margin of appreciation has been widely used by the European Court of Human Rights in the context of the application of human rights norms which, in the view of the court, must be interpreted to take into account the special situation of the member States as they apply the law.

9. See *Prosecutor v. Kupreskic et al.*, Judgment, I.C.T.Y. No. IT-95-16-T, Jan. 14, 2000, ¶ 525.

10. *Id.*

requirements of criminal law, nor was any attention paid, it appears, to any approach favoring a margin of appreciation for those who have to render decisions during times of war. As to the wording of the Martens Clause in the modern sense, as reflected in Protocol I, the literal reading leaves no doubt that the clause will only be applied in cases “not covered by this Protocol.”¹¹ Thus it has to be assumed that the Martens Clause must be applied only in areas not addressed by the written rules. This is quite different from assuming, as the ICTY did, that the Martens Clause must serve as a rule of interpretation for the written rules which are written in a manner so as to be in need of interpretation. The implication of the ICTY’s approach is indeed then to broaden the protective dimension of the humanitarian rules in a general manner, without attention to the other branches of this body of rules. It is more than doubtful whether such an approach is consistent with the original intention of the Martens Clause and with the contemporary need to integrate all concerns embodied in humanitarian law.

When we speak about the lessons of the Kosovo, the humanitarian approach adopted by this decision of the ICTY reflects our general hope that this decision has taught former President Milosevic and his disciples a lesson which future warmongers and warlords and dictators will eventually remember. The urgent question, however, remains whether this approach satisfies all goals and functions present in humanitarian law. What about the chilling effect for those who are willing to fight a war with a just cause? What are the consequences of such a chilling effect? Does such an approach in an unintended way protect a dictator from those who may be called upon to fight him? And, more generally, what is the effect of such an approach to humanitarian law doctrine on the acceptance by governments of an international criminal system?

There are no clear-cut answers to these questions, but they need to be addressed because they concern serious questions. We are living through a period of fundamental changes in the laws of armed conflict, and it is important that the implication of all these changes are thought through in a broad debate where the requirements of criminal law guarantees are discussed, where the realities of military conduct are taken into account and where not only the noble humanitarian aspirations in an isolated sense are highlighted. Possibly, the international community will decide to adopt the humanitarian approach favored by the ICTY, but we must do so in a manner which is responsive to all elements and dimensions of the laws of war as they will operate in practice. I

11. Protocol I, *supra* note 6, art. 1(2).

submit that our reflections on the choices to be made in the future are still at an early stage. Whoever wishes to take the moral high ground for the development of humanitarian law is also under moral pressure to consider the implications in all their various facets on international relations. This requires, in particular, both a focus on the impact of any change of law on those national leaders who are most likely to start an illegal war and to cause unnecessary suffering, and also on the conduct of those leaders and nations who are most likely to defend potential victims against an illegal war and thus to end unnecessary suffering.