

HUMAN RIGHTS IN CUSTOMARY INTERNATIONAL LAW

Written By **Pranav Chadha**

BBA L.LB Law Graduate from Amity Law School, Noida

INTRODUCTION

It's fair to say that human rights have come a long way since the times of Hitler condemning the Jews to the gas chambers or for that matter Stalin purging twenty million Russians to death, which records for the worst genocide in history. International lawyers at that time believed Stalin's actions to be within the sovereignty of the Soviet Union calling it a matter of domestic jurisdiction (*D'Amato, Human Rights as Part of Customary International Law: A Plea for Change of Paradigms, 1995-1996*). The Nuremberg Trials¹ and the Genocide Convention of 1948² is seen as a major breakthrough for establishment of human rights following the Second World War at the international level. The Nicaragua Judgment³ further strengthened the role of Human Rights in customary international law by holding the United States in breach of the code. But what exactly is the role of Customs in International Law and its relation with human rights?

Custom has become an incredibly significant source of law in areas such as human rights obligations⁴. Custom can be described as “evidence of a general practice accepted as law.”⁵ Custom can further be divided into traditional custom and modern custom, two opposing approaches. To consider a custom acceptable at the international stage it is necessary for it to be to of state practice and of an obligation to perform in a certain way. The concept of ‘Jus Cogens’ refers to certain fundamental, overriding principles of international law, from which no derogation is ever permitted.⁶ This has been enshrined in Article 53 of the Vienna Convention on the Law of Treaties, 1969. The development of a hierarchy-based structure for ‘jus cogens’ reflects the effort

¹ The Nuremberg Trials established genocide as a war crime

² The Genocide Convention of 1948 established genocide as a crime under international law whether committed at the time of peace or war

³ See the case *Nicaragua v United States: Military and Paramilitary activities in and against Nicaragua*

⁴ Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law*

⁵ International Court of Justice *Staute Article 38(1)(b)* [hereinafter ICJ]

⁶ See Ian Brownlie, *Principles of Public International Law* (5th edition, Oxford, 1998)

of the international bodies for a normative order in which higher rights are compelled upon nations, to assure no deviation from human rights. The Geneva Convention has in it these certain norms that can be regarded as Jus Cogens.⁷

Many great scholars such as Theodor Meron, Anthony D'Amato and Louis Henkin have given conflicting and opinionated views upon international law and the role of human rights. Louis Henkin mentions genocide, apartheid, slavery, extrajudicial killings, disappearances and torture or inhuman treatment as crimes against humans. But it is worth noting that, is human abortion, for instance, equivalent to genocide, as many activists would claim? (D'Amato, Human Rights as Part of Customary International Law: A Plea for Change of Paradigms, 1995-1996) By this logic, its even closer to genocide as the government is funding and facilitating an activity, which claims millions of unborn lives. Along the same lines, would indentured labour count as slavery? Or for that matter what would count as official torture? Would being harassed by military or criminals be torture or is an incident of someone beating his wife fall also under this? What is the line that can be drawn between torture and inhumane treatment? Many activities around the world that can get people thinking, about including things under the ambit of this phrase. Capital punishment, which is barred in many countries is considered legal in the USA and makes a strong case for inhumane treatment. These are some of the main questions this paper aims to answer and obtain a clearer picture regarding human rights under the ambit of customary international law.

PROBLEM IDENTIFICATION

Custom as a Source of Law

Customary International law is created by the practice of states. But it has been a huge debate to identify, what constitutes this practice. Factors such as frequency, prolonged usage, universality and consistency come into play. Is there a need for 'opinio juris' and if so, to what extent (Akehurst, Custom as a Source of International Law, 1976)? In a book, Professor D'Amato says that only physical acts count as state practice. Even though claims may express a legal norm, they cannot constitute the material components of custom.⁸ Although, this is a minority view.

⁷ Report of the International Law Commission (hereinafter mentioned as the ILC), on the work of its thirty- second session, 35 UN GAOR Supp. (No. 10) at 98, UN Doc. A/35/10 (1980).

⁸ D'Amato, The Concept of Custom in International Law (1971) p.88

Analyzing the Fisheries Jurisdiction Case⁹ or the North Sea Continental Cases, we find that the International Courts treated the Truman Proclamation and various other claims by other States as state practice, having given rise to a rule of customary law.¹⁰ D'Amato argues that such claims and statements made by states cannot be treated as customary law as they may conflict with one another, a defect, which physical acts do not suffer from. But in practical aspect, physical acts of one state may collide with physical acts of another state, as a states act in different ways at different times. Dr. Thirlway chose a less restrictive definition of state practice and accepts claims and statements made by other states as customary law, but only when they are made in context of a particular situation and not just in mere *abstracto* (Thirlway, *International Customary Law and Codification*, 1972).

A supporter of the theory that custom is an implied agreement between states, Strupp, argued that only the practice of organs competent to make treaties in the name of the state is the only real state practice.¹¹ By this logic, the effect of this statement would be to exclude national laws as state practice. Not only this but it would also discount the practices of all departments of the Executive which do not have the power to make treaties in the name of the state, which is obviously way too restrictive. Omissions can also be regarded as State Practice. Omissions accompanied by *opinio juris* can give rise to customary law.¹² One such instance can be seen in the *Nottebohm* case where the International Court based its decision on the 'practice of certain states, which refrain from exercising protection.'¹³ Most writers include omissions as State Practice (Tunkin, 1974). The practices of International organizations may create rules of customary law (Akehurst, *A Modern Introduction to International Law*, 1971). Even individuals and writers on international law, have no effect until their views are accepted by States or International Law.

Does the quantity of practice support an acts case of becoming customary law? There have been innumerable cases where abundant practice has given rise to customary law but at the same time it does not necessarily imply that less abundant practice would have been incapable to establish

⁹ ICJ Reports, 1974, pp. 3, 47, 56-8, 81-8, 119-20, 135 and 161

¹⁰ ICJ Reports, 1969, pp. 3, 32-3, 47 and 53

¹¹ Strupp, *Recueil des cours*, 47 (1934)

¹² P.C.I.J, Series A, No. 10 (1927)

¹³ I.C.J Reports, 1955, pp. 4, 22

that rule.¹⁴ In the Rights of Passage Case it was held that if a practice lasted more than 125 years it would be considered as having given rise to a rule of customary law¹⁵ but nowhere does it say that a period lesser than that wouldn't exactly do the same. In 1958, during the Geneva conference, Greece said that a period of 10 years was too short to establish a rule of customary law, but there were twenty states which disagreed to this, claiming the rule to have already become part of customary law (Slouka, 1968). The number of states taking part in the practice can also be a point of discussion. While older authorities believe that all States must agree to a rule before it becoming customary law¹⁶, Article 38(1)(b) of the International Court's Statute¹⁷ believes that general practice and not universal practice would suffice.¹⁸

Constant and uniform practice gives rise to rule of customary law.¹⁹ Inconsistencies in State practice don't necessarily prevent a rule from being of customary law unless these are major and fatal.²⁰ Often the practices followed by one state are contrary to other states. It is also argued that the practices of some states are more important than other, but different scholars have voiced conflicting opinions. A state can also be bound by a rule of customary law even though it has not consented to that rule. The logic behind this is that, if the dissent of a single state could prevent a new rule, then new rules would rarely be created.²¹ The traditional theory states that new states, are automatically bound by all rules of customary law at the time they gain independence. But again, this theory is not accepted by all, especially writers from the communist countries.²² Keeping in line with the traditional theory, it can be agreed that a state can pull out of a rule of customary law by disagreeing to it before the rule is established, but not afterwards, while the new states cannot enjoy this right merely because of the reason that independence came too late for them.²³ For the International jurist and institutions, to judge each case on its own merits, and examining all conflicting opinions, sure seems a task.

¹⁴ Read Rights of Passage Case

¹⁵ I.C.J Reports, 1960, pp. 6, 40

¹⁶ Tinoco Case, 1923, vol.1, pp. 375, 381

¹⁷ Will be written only as article 38(1)(b) from here on now

¹⁸ Guggenheim, *Traite' de droit international public*, vol 1 (1953), p.47

¹⁹ Rights of Passage Case, I.C.J Reports, 1960, pp. 6, 40

²⁰ I.C.J Reports, 1950, pp. 266, 276-7

²¹ Michael Akehurst, *Custom as a Source of International Law*, 1971, p. 26

²² Tunkin, *Droit international public; problemes theoriques* (1965), p. 87

²³ *ibid*, Akehurst, p. 28

Another condition of the traditional approach requires the practice of the customary law to be accompanied by *opinio juris*. Article 38(1)(b) says that, ‘the practice must be accepted as law’, which makes *opinio juris* a requirement, but leaves its meaning surrounded by ambiguity. The traditional approach requires the state to believe something to already be law before it in fact becomes law. This also happens to be the biggest criticism of the traditional approach. Most authors who have a dissenting view deny any requirement of *opinio juris*. One prime example of this would be, Professor D’Amato who surrogates *opinio juris* for an accompanied articulation of a rule of customary law (Akehurst, Custom as a Source of International Law, 1976). Yet this theory can be criticized as it pays weightage to beliefs and not statements. Its fair to agree that States can make statements without believing them to be true, but what truly gives them the status of a rule is whether or not they are challenged by other states.

Treaties are exercised as part of State practice and have the ability to create customary rules if they are complemented by *opinio juris*. For example, a treaty or its *travaux preparatoires*²⁴ may claim the treaty to be declaratory of pre-existing customary laws (Akehurst, Custom as a Source of International Law, 1976). A treaty not accompanied by *opinio juris* may be used in practice but in cases such as these it is not the treaty but the practice, which is, which creates these customary rules. The remarkable thing about the legal subject is the perhaps the never-ending perplexity which surrounds the dissenting opinions. While D’Amato absolutely agrees that treaties creates customary law while in the case of *The State (Duggan) v. Tapley* the Irish Supreme Court refused to accept the same.²⁵

Now that a fair idea about the creation of customary international law has been obtained, it is worth discussing it through a detailed analysis and in relation with Human Rights law.

Human Rights and Customary International Law

Customary international law continues to play a substantial role in both codified and uncodified fields as has been enshrined in Article 38(1) of the Statute of the International Court of Justice. About customary international law, Meron said that it now comes up in almost every international

²⁴ Such statements constitute state practice and evidence of *opinio juris* even if the treaty never comes into force.

²⁵ I.L.R 18 (1951), pp. 336, 338-9

court and tribunal, and mostly has an impact on the outcome (Meron, 2011). There are many ways in which the rules of customary international law are relevant for international human rights law. Customary international law of human rights applies to and between States, which are not party to the human rights treaties, as well as between parties to the treaties and non-parties (Wood, 2016). Perhaps the most appealing part for those advocating for human rights is that if a rule belongs to customary international law it is still binding on all those who are part of the treaty whether those states consented or not. Also, when rules of human rights apply to international organizations, they usually apply as customary international law. Matters such as state succession or the application of human rights treaties are governed by customary international law. On the other hand, certain arguments have been made that a thing such as customary international law of human rights doesn't exist at all. Thirlway believes that because human rights is a matter between the state and its subjects and not a matter between different states, it should not be counted as a practice for identifying a rule of customary international law (Thirlway, *Human Rights in Customary Law: An Attempt to Define Some of the Issues*, 2015). But in true application, the aforementioned statement seems incorrect as in fact; human rights obligations do apply between states.

The International Law Commission (ILC) on 2nd June 2016 adopted a set of 16 draft conclusions for identifying rules of customary international law, which have been helpful in establishing a clearer picture about human rights as part of customary international law. It is now accepted that not just physical conduct but also verbal acts can be accepted as 'practice.' This has been reflected through draft conclusion 6, paragraph 1. Moreover, draft conclusion 8, paragraph 2 says makes clear that no particular duration is required for a rule of custom to emerge. The ICJ in its explanation in the case of *Nicaragua v United States of States*²⁶ said that when inconsistencies breach a rule, it does not necessarily prevent a practice from being established. Moving on, draft conclusion 11, states that-

- A treaty rule may codify a rule existing at the time of the conclusion of the treaty
- A treaty rule may lead to manifestation of a rule may start to materialize before the conclusion of a treaty

²⁶ Military and Paramilitary Activities in and against Nicaragua, (*Nicaragua v. United States of America*), Merits, Judgments, I.C.J Reports 1986, p. 14, 98

- A treaty rule may give rise to a new rule of customary law

Each of these processes may happen in the field of human rights but the texts of treaties alone cannot establish a new rule of customary international law, but need to be supported by established practice and backing by the courts. The inception of human rights activity in the field of international law can be traced back to the Nuremberg Trials. For the first time genocide was declared as a war crime and the offenders were punished accordingly. Perhaps, a greater link of human rights to international law can be established through tracing the Nuremberg Trials and much later on, the Nicaragua Judgment.

The Nuremberg Trials and International Law

Nuremberg, was not simply just a war crimes trial but was also the first real trail for violation of human rights, and marked a beginning for the law of human rights rather than the traditional law of war (Ryan, 2007). It did so by establishing three principles, which were absolutely key for a better and sustainable future which were-

- The charter of the Tribunal held individuals accountable for their actions under international law. No longer were the laws of war only applicable to states.
- The charter explicitly defined, ‘crimes against humanity’ which included those actions, which had been taken by the defendants before the World War II.
- It established that the leaders of an enemy nation could be held accountable in judicial proceedings.

The Nuremberg Trial was a consolidated effort on the part of the USA and its allies, to punish the atrocities of the Nazi’s and the Axis during the Second World War. After months of internal debate and negotiation a charter was brought into force, which has since defined human rights in the field of international law. Individual obligation for violations of human rights, international concern with a government’s treatment of its own citizens and accountability through a judicial process that gives the citizens/defendants significant rights and places decisions in the hands of courts and not military commanders.²⁷

²⁷ Allan A. Ryan, Nuremberg’s Contribution to International Law, 2007, p. 89

Nicaragua v United States: Military and Paramilitary Activities In and Against Nicaragua

Nicaragua filed a suit against the United States, accusing them for conducting illegal military and paramilitary activities in and against Nicaragua.²⁸ They also alleged that the United States military carried out certain attacks to overthrow the newly formed government of Nicaragua. The United States in response challenged the jurisdiction of the ICJ and sought protection through Article 51 of the UN Charter, by stating that it relied upon an inherent right of collective self-defence. America explained their actions as proportionate and appropriate assistance to countries like Costa Rica, Honduras and El Salvador in response to Nicaragua's acts of aggression against these nations. The ICJ in its decision found the United States to have violated customary international law and disregarded their plea of self-defence as justification for their force upon Nicaragua.

The Court held that United States violated its customary international law obligation by using force against another state with its activities with the *contras*. This prohibition is found in Article 2(4) of the United Nations charter and in customary international law. The United States were found to have violated customary international law when they laid mines in Nicaraguan ports and also when they attacked the Nicaraguan ports, oil installations and a naval base. It also assisted the *contras* by entering into the Nicaraguan territory and participated in acts of civil strife. The arming and training of the *contras*, and supply of funds in itself, amounted to interference in the internal affairs of Nicaragua.

With direct attacks aimed at Nicaragua in the year 1983 and 1984, United States violated Customary International Law obligation to not use force against another state. The court went on to define armed attack as action by regular armed forces across an international border (paragraphs 187-201). The court further held that mere frontier incidents wouldn't be held as armed attacks because of a miniscule scalability of attack. Assistance to rebels by providing weaponry and logistical support would also not constitute armed attack but instead be regarded as intervention in internal affairs of other states. The defence used by United States under Article 51 of the UN Charter was not considered accurate, as under Customary International Law, self-defence is only available against a use of force that amounts to an armed attack. The court looked extensively into

²⁸ I.C.J 1984 I.C.J 39

the conduct of Nicaragua, El Salvador, Costa Rica and Honduras to determine if an armed attack was undertaken by Nicaragua against these three countries, which in turn would necessitate those countries to act in self-defence against Nicaragua. It was noted that no country declared themselves as victims of an armed attack by Nicaragua and neither did they request any assistance from the USA to exercise those rights of self-defence for them. Even though the United States claimed that they exercised those rights in self-defence under Article 51, they never reported it at the time of doing so nor did they profess to use any force. Based on these, the court did not accept United States' justification for carrying out the aforementioned activities. The International Court of Justice found United States in breach of its Customary International Law obligation also due to the fact that it trained and aided, military activities. Also it violated sovereignty of Nicaragua by directing its aircrafts and laying mines over and on the Nicaraguan territory.

Both Nicaragua and United States were part of the Geneva Conventions, but the former refused summoning them in the proceedings, maybe to avoid its own acts to be judged under common Article 3 which is applicable in case of armed conflict not of international character occurring in the territory of one of the contracting parties to the 1949 Conventions. It also applies to a situation where the conflict is within the State, between the Government and the rebel forces or between the rebel forces themselves.²⁹ The court also did not find it necessary to refer to these conventions as the conduct of the United States could very well be judged by principles of humanitarian law.³⁰ Certain provisions are said to be declaratory of customary law, such as the common article on denunciation,³¹ which states that, by denouncing the Conventions, no state can detract from its international law obligations and the laws of humanity.

But some authors such as Anthony D'Amato have criticized the court's approach in this case. A rule of customary law arises out of state practice and is not essentially found in UN resolutions and other such political documents. To add to that, *opinio juris* has nothing to do with acceptance of rules in such documents, but is a psychological element connected to the materialization of a customary rule as state practice.³² The court gave no self-determined evidence of its theory that

²⁹ Conflicts such as the ones in 1980's in Lebanon and in Somalia post 1991.

³⁰ 1986 ICJ REP. at 113, paragraph. 218.

³¹ Common Article 63/62/142/158

³² Anthony D'Amato, *Trashing Customary International Law*, 1987, p. 102

states had accepted the nonintervention rule in various resolutions and documents (D'Amato, *Trashing Customary International Law*, 1987). If voting for a UN resolution meant, investing it with *opinion juris*, then the latter would have no independent meaning and the court might as well apply the UN resolutions, labeling it as customary law. Instead of commencing with describing state practice, the Court ended with it. What can be derived from the Court's opinion is that whenever state practice conflicts with the nonintervention rule, the practice is deemed as illegal, which absolutely strips state practice of any independent character. The court's theory is complemented by absence of supporting evidence. While the court gives preference to the nonintervention theory, in some other cases such as the humanitarian intervention³³, antiterrorist reprisals,³⁴ individual and collective enforcement measures,³⁵ and trans boundary force.³⁶ It is difficult to see a rule of customary law of nonintervention in the abovementioned examples that are inconsistent with such a rule. The court tried to give a rule of customary international law without even considering the practice of states and without giving any independent meaning to *opinion juris*. The court does no better, while considering the impact of treaties upon custom. The court was, to some extent, misled into believing that Article 2(4) of the UN Charter is customary and general international law.³⁷ The United States made this point to convince the Court that the UN Charter was pivotal to this case. The Court took the bait by simply concluding that the treaty rule of nonintervention was almost identical to customary law. A treaty however is not equivalent to custom and only binds parties to the treaty and only according to the provisions contained therein.

Geneva Conventions and the Subsequent Protocols of 1977

The Geneva Conventions are the principle legal documents of International Humanitarian Law. These conventions are four international treaties, which have been signed by almost all the nations of the world. They provide certain rules, which safeguard the members of the armed forces who

³³ Lilllich, *Humanitarian Intervention: A reply to Dr. Brownlie*, in *Law and Civil War in the Modern World*.

³⁴ US raid on Libya, or the Israeli raids on Palestine.

³⁵ D'Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110 (1982).

³⁶ D'Amato, *Israel's Air Strike upon the Iraqi Nuclear Reactor*, 77 AJIL 584 (1983).

³⁷ 1986 ICJ REP. at p. 99, paragraph. 187

are wounded, sick, or shipwrecked; prisoners of war; and civilians; as well as medical personnel, military officers and civilian support workers of the military.

The Nazi brutalities, led to the Nuremberg Trials and the adoption of the Universal Declaration of Human Rights and the human rights clauses in the UN Charter. Right about that time, the 1949 Geneva Conventions were also adopted. While the First, Second and Third Conventions were more like the fundamental model of Humanitarian Law, the common clauses and the Fourth Geneva Convention were entirely new concepts. The most significant of these clauses was the common Article 3, which for the first time in the history of International Law introduced regulation of non-international armed conflicts into multilateral treaties. Following is an overview which would bring to light specific provisions of each convention with respect to human rights in international law.

THE FIRST GENEVA CONVENTION

The First Geneva Convention protects those soldiers who are out of the battle due to whatsoever reason. These 64 articles protect the wounded and sick soldiers, medical personnel, facilities and equipment. It also protects the wounded and sick civilian support personnel accompanying the armed forces, military chaplains and civilians who take up arms to prevent an invasion. Following are some of the specific provisions of The First Convention-

- Article 12- The wounded and sick shall be protected and respected and shall not be discriminated on the basis of sex, religion, race, nationality etc. They shall not be murdered or subjected to torture.
- Article 15- The wounded and sick shall receive adequate care and be protected against pillage and receive human treatment.
- Article 15-16- All the parties involved in a conflict shall search for and collect the wounded and the sick, expressly after battle, and provide such information to the Central Tracing Agency of the International Committee of the Red Cross (ICRC).
- Article 9- This convention, acknowledges the right of the ICRC to assist the wounded and the sick. Assistance can also be provided by Red Cross and Red Crescent national societies,

authorized impartial relief organization, and neutral governments. Apart from this, even local civilians may be asked to provide care for the wounded and the sick.

THE SECOND GENEVA CONVENTION

The Second Geneva Convention adapts to the First Geneva Convention to reflect the conditions at sea. It seeks to protect wounded and sick combatants on board ships or at sea. It contains 63 articles, which apply to armed forces members who are sick, wounded or shipwrecked, hospital ships and medical personnel, and civilians who accompany armed forces. Some of the important provisions of this convention are-

- Article 12, 18- Parties in a battle shall take every conceivable measure to search for, collect and care for the wounded, sick and shipwrecked.³⁸
- Article 21- To help collect and care for the sick, wounded and shipwrecked, appeals can be made to neutral vessels, merchant ships and yachts.
- Article 36-37- Any religious, medical, and hospital personnel serving on a combat ship, if captured, must be sent back to their side as soon as possible with respect and dignity.
- Article 22- Hospital ships shall not be used for any military purpose and shall not be subject to an attack or capture. The names and hospital ships shall be conveyed to all parties in conflict.
- Article 14- A warship cannot capture a hospital ship's medical staff, but it can hold the wounded, sick and shipwrecked as prisoners of war, provided the warship has the necessary means to care for them.

THE THIRD GENEVA CONVENTION

The Third Geneva Convention sets out rules for treatment of prisoners of war. It contains 143 articles which require the prisoners of war to be treated humanely, be adequately accommodated,

³⁸ Refers to anyone who is adrift for any reason, including those who are forced to land at sea or to parachute from aircraft.

and be provided with food, clothing, and medical care. Moreover, it gives out guidelines on labor, discipline, recreation, and criminal trial. A prisoner of war can be someone who belongs to the armed forces, a volunteer militia, or a civilian accompanying such armed forces, of an enemy state.

Certain important provisions of the convention are-

- Article 70-72, 123- The names of the prisoners of war must immediately be sent to the ICRC.
- Article 13-14, 16- The prisoners of war must be allowed to contact their respective families and receive care packages.
- Article 25-27, 30- Prisoners of war shall not be subjected to torture or any kind of medical experimentation and must be protected against acts of violence. They shall also not be discriminated on the basis of any grounds such as sex, political beliefs, nationality, religion etc.
- Article 23- Female prisoners of war must be treated appropriately with due regard to their sex.
- Article 17- Prisoners of war shall provide their name, rank, date of birth and other such necessary details to their captors.
- Article 50, 54- Prisoners of war must be accommodated in clean housings, and provided with food, clothing and medical care for the maintenance of their health. They must not be housed in war zones where they might be exposed to dangerous conditions. Also, they can be made to do non-military work under reasonable working conditions and a fair wage.
- Article 82, 84- Prisoners of war can be tried according to the laws of the country they are held captive in. The captors need to ensure a fair trial for the prisoner.
- Article 109, 110- Prisoners of war that are in critical health conditions must be returned to their parent country.
- Article 118- If and when the conflict ends, the prisoners of war must be released and upon request, returned to the parent state without delay.
- Article 125- The ICRC, on behalf of the prisoners of war, can carry out humanitarian activities for them.

THE FOURTH GENEVA CONVENTION

The Fourth Geneva Convention seeks to protect civilians that are present within areas of armed conflict and/or occupied territories. This convention has 159 articles, some of which are-

- Article 79-135- If security permits, the civilians must be allowed to lead normal lives, without being deported, except for extraordinary circumstances or/and security measures.
- Article 33-34- If for some reason internment of a civilian under The Fourth Convention is necessary then, the conditions should at the very least be equivalent to that of prisoners of war.
- Article 27- The safety, honor and religious practices of these civilians must be respected.
- Article 32, 13- Civilians must be protected from murder, torture, brutality and discrimination on basis of sex, caste, religion etc.
- Article 33. 49- Civilians shall not be subjected to collective punishment or deportation.
- Article 24. 25- Children who are separated from their families or orphaned, must be protected and taken care of. The ICRC is required to assist these children.
- Article 14, 18- Hospitals and safety zones shall be established for the wounded, sick and aged, and also for children under the age of 15, mothers of children under the age of 7 and expectant mothers.
- Article 55, 58- Medical supplies and objects used to conduct religious practice shall be allowed with such area as mentioned under this convention.
- Article 40- The civilians are not to be coerced into doing military related work for the occupying force.
- Article 54- The civilians shall be paid fairly for any assigned work.
- Article 55- The occupiers, shall provide food and medical facilities to the general population under their occupied territory.
- Article 59- If the requirements under Section 55 cannot be met, then the occupying power, shall facilitate relief shipments by unprejudiced humanitarian organizations such as the ICRC.
- Article 89-91- Internees shall receive sufficient food and clothing along with protection from war.

- Article 107, 108- Internees have the right to send and receive mail and receive relief shipments.
- Article 132- Children, pregnant mothers, mother of young children and the sick and wounded, if interned for a substantial period of time, shall be released at the earliest notice.

THE COMMON ARTICLE 3

The Common Article 3, as the name suggests, is mentioned in all four of the Geneva Conventions of 1949. It extends to non-international armed conflicts. It aims to clarify the status of those who have put down their arms, or have exited the conflict as a result of sickness and injury. Such parties must be treated humanely without any discrimination on the basis of sex, religion, race, colour etc. The Common Article 3 seeks to prohibit violence to life and persons, taking of hostages, outrage upon personal dignity and passing of sentences and carrying out executions without any judgment being pronounced by a formal courts of that particular state. The wounded and sick must also be treated and information regarding such civilians or parties must be afforded to the ICRC.

THE PROTOCOL I

The Protocol I provided special protection to shield civilian medical recruits and transportation units. This was seen as a significant improvement in providing medical assistance to victims. The means of identification of medical transport such as radio signals and radar were adapted to modern technology. One of the other major innovations, also seen as controversial, was the change in the prisoner of war status in a circumstance of internment. Progress was seen in the rules, which govern the treatment of hostilities, the methods and means of warfare and protection of the civilian population. A few rules added governing the conduct of hostilities was-

- Parties do not possess unrestricted right to choose methods of warfare as enshrined in Article 35.
- It became forbidden to deploy weapons to cause needless injury and harm as mentioned in Article 35.

- Civilians and their possessions must not be subjected to attack as mentioned in Articles 48, 50 and 52.

These rules were seen as major developments in the rules of international humanitarian law. The protocol also introduced the inclusion of new war crimes such as – attacks on civilian population; attacks against hazardous fixings such as nuclear power plants; forced deportation; attacks on monuments and spiritual heritage sites and denial of free and fair trial. In spite of these rules being set in stone, rarely is it seen that the people in breach of them are convicted. The primary reason for this can be blamed on the states, which disrespect their obligations under the Conventions and the Protocols. On a positive note, both law and practice is slowly and gradually moving in the direction of modifying all these acts of states as war crimes, no matter the nature of the armed conflict. Some of the important provisions of the First Protocol are as follows-

- Article 51, 54- Attacks on civilian population and destruction of food, water and other survival apparatus is prohibited.
- Article 53, 56- Attacks against dangerous fittings and places of religious worship is prohibited.
- Article 76, 77- Women, children and civilian medical personnel shall have in place, special protection schemes.
- Article 15, 79- Mentions measures for protection of journalists.
- Article 77- Children under the age of 15 shall not be recruited into the armed forces.
- Article 43-44- Clarifies the status of members practicing guerrilla warfare as combatants who cannot hide their allegiance and must be recognized as combatants while organizing an attack.
- Article 35- Weapons causing “superfluous injuries”, shall be prohibited.
- Article 85- Using protective emblems recognized by the Geneva Conventions, for the deception of enemy forces shall be regarded as a war crime.
- Article 17, 81- The ICRC and other impartial humanitarian organizations shall be permitted to provide medical and other assistance.

THE PROTOCOL II

The Protocol II, is the first ever treaty which elaborates on the protection of victims that are caught up in high-intensity internal conflicts such as civil wars. It is an outstanding complement, to the Common Article 3 of the Geneva Conventions, which before the introduction of this protocol was the lone provision applicable to such situations. It can be seen as a substantial improvement upon the common Article 3, which did not provide protections for civilians against hostilities. The main contribution of the protocol can be seen in the following principles-

- Humanity- Non-combatants shall not be subjected to hostility and shall be respected, protected and treated humanely.
- Military inevitability- The military personnel may be attacked, but injury shall be limited to as little as possible.
- Proportionality- When protection cannot be absolute, the previously mentioned points shall be weighed against each other in utmost good faith.

Other key Articles of this protocol are-

- Article 4- People who are not directly involved in the hostilities shall be respected and treated humanely. The Protocol II prohibits violence to life and health of people, particularly in the form of murder, terrorism, slavery etc. as these are the fundamental rights of citizens.
- Article 4- Children are to be evacuated to a safe area and reunited with their families.
- Article 5- Persons who are interned/detained during internal conflicts shall be humanely according to the rules mentioned in the Geneva Conventions.
- Article 7, 9- This article seeks to solidify the stance of the wounded, sick and shipwrecked.
- Article 13, 14- Attacks on civilians and their property and objects are forbidden.
- Article 18- Impartial humanitarian organizations like the ICRC, shall be permitted to carry on relief activities.

The International Court of Justice and Customary International Law

In 2012, the International Law Commission (ILC) developed a report upon, “Formation and evidence of customary international law” with Michael Wood as the chief drafter. The earlier work of the ILC was discussed, along with the application of the rules of customary international law and the identification of these rules in certain concrete cases. Focus was also directed towards the current state of international law and its impact on the formation of the rules of customary international law.

The court, through its recurrent use of Article 38(1)(b), and various judgments has time and again held that customary international law is molded through state practice escorted by *opinio juris*. In the Lotus Case,³⁹ the Permanent Court of Justice had held that international law is birthed from free will of the states, as is expressed in significant conventions. The ICJ in the North Sea Continental Shelf and Continental Shelf cases established that also stressed on the fact that for a rule of customary international law, there must be a settled practice together with *opinio juris*.⁴⁰ The report concludes by determining that the way forward for judicial legislation is neither in the inductive rule nor in the deductive rule of identification, but it is the ICJ’s use of assertion that may truly determine the rules of customary international law.⁴¹

CONCLUSION & SUGGESTIONS

To summarize, it can now be agreed that customary international law is created by practice of the state accompanied by *opinio juris*. The practice might be of international organizations or individuals. As discussed regarding the quantity of practice, the number of states practicing is held to be in higher regard than the frequency of practice. Practice that has been around for a short period of time, may create a customary rule of law, provided they do not clash with the rule. Inconsistencies of a major nature might prevent the creation of a customary rule. States that oppose a rule from its very inception are not bound by the rule so created. Lastly, treaties are included as part of state practice, and if backed as *opinio juris*, can create a rule of customary law.

³⁹ S.S Lotus (France v. Turkey), 1927 P.C.I.J. (ser. A) No. 10 (September 7)

⁴⁰ I.C.J Reports 2012, p.99, 122

⁴¹ Omri Sender & Michael Wood, The International Court of Justice and International Law: A Reply to Stefan Talmon, 2015

International Human Rights Law, since its inception has been a promoter and protector of human rights at both the national and the international level. It is made up of treaties and agreements between states, which bind them legally since the parties have agreed to adhere to them. It is also derived from customary international law, which are basically the rules of law derived out of the conduct of states and the belief that law requires them to act in a certain way. International human rights law is implemented at both domestic and international level. States that ratify human rights treaties have to at any cost respect those rights and make sure that the domestic policies are compatible with international legislation. In a case where the domestic law cannot remedy the deprivations of human rights, the parties should be able to refer the matter to international bodies for enforcement of these rights. There is little difference between international human rights law and humanitarian law. While human rights are regulated between states and individuals, humanitarian law regulates activities of a state and all those parties, which come in contact with it.

Had the Nicaragua Case and its subject matter not been so pivotal to the subject of international law, it could have been ignored as a mere opinion of the court in just another case. On the contrary, the judgment is worth the most detailed analysis which when conducted, throws light upon the failure and incompetence of the court, regarding the nature of custom as a source of international law. The Court's decision was binding on the United States, even though they stormed out of the court in only the jurisdictional phase of the case. Even though the Article 53 of the Court's statute provides that, in the event of a party failing to defend its case, the Court must satisfy itself that the claim of the appearing party is well founded, in the Nicaragua case it felt like an empty formality.

The ineffectiveness of sanctions in the sphere of international law has been a major topic of debate. The incapacity of bodies, which have been given the responsibility of maintaining order, have majorly failed at discharging their tasks. Even if, sanctions are pronounced, they hardly ever appear to be strict towards the perpetrators. The gap between the mechanisms and the actual working, need a major overhaul to establish justice in international law. If this is not done, the work started by the Geneva Conventions and the subsequent protocols would be undone and we would be back to square one. Violations of international humanitarian law fall within the jurisdiction of the states,

and it is up to them to prosecute and punish the offenders. Third party states can also intervene and punish grave violations, such as in cases of war crimes.

The states must adopt strict penal measures and punish offenders who have committed severe violations of international humanitarian law. Prosecution and trials of such offenders must be undertaken by the states, to ensure that they do not get away with lenient sentences. Necessary measures must be adopted to put an end to these grave violations of international humanitarian law some of which are-

- Expulsion of diplomats
- Cutting off diplomatic relations
- Non- renewal of trade agreements with states that violate international law
- Public denunciation of states and organization that violate humanitarian international law
- Countermeasures adopted by international bodies such as the United Nations
- Use of armed force in the case of last resort

In conclusion, it is hoped that the efforts made by various organizations such as the International Law Commission would last for years to come so that they attract interest from governments, other international organizations and institutions. The Nuremberg Trials and the Geneva Conventions were strongholds, in establishing the role of human rights in customary international law, and their impact upon the conduct of conflicts between states has been of pioneer importance. Provisions along with penal consequences have established these conventions as landmarks in the field of International Humanitarian Law and since, have ensured that another happening like that of the World Wars, will not be repeated.