The Role of Custom in the Formation of the Obligatory Nature of the International Humanitarian Law Treaties

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Abstract:

International custom is considered one of the main important sources of public international law in general, and it is distinguished by its evolving nature and its ability to adapt to the changing conditions of international life. As well as its value and its past and present impact on the prevailing relations between the persons of international law. Furthermore, the custom in international human law has special importance to form the obligatory nature of its provisions and obligate all countries to it, even those that did not sign any convention that is related to the law. It also has the ability to limit the reservation to Conventions of International Humanitarian Law, and their amendments, which requires shedding light on this source, which is the most important among all other sources, regardless of the rank or position it occupies.

Keywords: Custom, International Humanitarian Law, Sources of International Humanitarian Law, Reservation to Treaties, Amending Treaties.

Introduction

In the late 19th century and/or the early 20th century, there have been several attempts to codify the international norms in the armed conflicts under international treaties open to countries for joining. A number of international treaties(1) have been concluded up to the four Geneva Conventions of 1949 as a major step for the provisions of the International Humanitarian Law. This has been followed by numerous agreements for the development of the provisions of the International Humanitarian Law and codification of its customary rules.

Research Significance

Custom is the main source, and it is no exaggeration to say that it is in general, the first source for the International Humanitarian Law as it is binding on everyone; especially if it is not a member state of the treaties of the International Humanitarian Law. Such documents may have shortcomings in some texts due to deficiency or ambiguity and the need to keep pace with developments. This emphasizes the major role that the

(1) These include: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 1868, the Hague Third Convention for the Pacific Settlement of the International Disputes of 1899, rules and laws of the nuclear war, the adaptation of the principles of Geneva Convention of 1868 to sea Warfare, and other conventions. For more details, refer to: Abbas Madawi, Unconventional Traditional Sources in the Public International Law, a Master's Thesis, Faculty of Law and Political Sciences, 2013, P. 61 et seq.

custom plays in the Public International Law in general and the International Humanitarian Law in particular.

Research Problem

The main problem of the research addresses the answer to the following question: **What is the role of custom in the formation of the binding nature of the International Humanitarian Law Treaties?**

In the course of answering such a question, the following sub-questions will be answered as well:

1- What is the notion of custom as a source of the provisions of the International Humanitarian Law?

2- What is the special significance of custom to the provisions of the International Humanitarian Law?

3- What is the relation between custom and the treaties governing the International Humanitarian Law?

Research Objectives

The study is concerned with explaining the International Custom's role, abilities and relation to the legal texts included in the International Humanitarian Law field, in several points, including:

- Support the legal principles that are necessary for consolidating the notion of custom as a vital source for the provisions of the International Humanitarian Law, so as to achieve principles that are able to deepen our knowledge and

provide us with further understanding of the customary rules of the provisions of the International Humanitarian Law.

- Explain aspects of the current legal problems arising from the relations of custom to the treaties governing the International Humanitarian Law; and predicting the potential problems to prevent them, and searching for appropriate solutions.

- Highlight the influence of custom on limiting the state authority in the reservation and withdrawal from the treaties governing the provisions of the International Humanitarian Law, and its role in the amendment to such treaties.

Research Methodology

The nature of the study requires us to follow the analytical or deductive approach to analyze the notion of custom in order to know the legal rules governing the relation of custom to other sources, and afterwards to know and monitor the position of jurisprudence and judiciary.

Preliminary Requirement

The Notion of Custom as a Source of the Provisions of the International Humanitarian Law

In general, the sources tend to attribute the binding nature to the international legal rules. Article (38/1) of the statute of the International Court of Justice, which is considered an integral part of the Charter of the United Nations, provides that "The court, whose function is to settle the disputes submitted to it in accordance with the International Law, shall apply: …… (b) International custom, as evidence of a general practice accepted as law. Hence, it is evidently clear that the custom is a source of the provisions of the International Humanitarian Law as a branch of the International Public Law(1).

First: Definition

The International Custom is a set of legal rules that have emerged in the international community as states have habitually followed them for long that such rules have been established and states considered such rules as binding and obligatory.(2)

(1) Prof. Salahuddin Amer: Introduction to Study of the Public International Law. Its Essence and Sources, Dar Al-Nahda Al-Arabia, 1st Edition 1984, P.199 ae seq, In the same vein, see also:

Hugh Thirlway: The sources of international law, Oxford University Press, Second edition, 2019,pp.5:25.

(2) Prof. Mohammed Hafiz Ghanim, Principles of the Public International Law, Al-Nahda Al-Jadida Printing, Cairo, 1991, P. 99; and Prof. Moustafa Sayed =

Part of the jurisprudence argues that the International Custom is a set of the international customary rules derived from the international customs as evidence of a general practice accepted as law. It is agreed in the international jurisprudence in general that the customary rule is a habit that subjects of the international law usually used to follow in their behaviors and international relations, whether such a habit is a positive behavior or merely omission, coupled with their opinion that such a habit is as equal as the binding international legal rule.(1)

The statute of the International Court of Justice describes the custom as a general practice accepted as a law. The Court also confirms, in its provisions, that the custom is available as a result of the practices performed by states and the legal belief of the international community for the necessity to act.(2)

In my opinion, it is true to refer to the notion of the custom as a source for all the provisions of the Public International Law. However, it is better to set a definition for the custom as a source for the provisions of the International Humanitarian Law so that it can clearly explain special characteristics of the International

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Abdulrahman, the Public International Law, Al-Nahda Al-Arabia, Cairo, 2002, P.2.

(1) Prof. Salahuddin Amer, the above reference, P. 349.

(2) Michal Stepien: Taking the Two-Elements Theory of International Customary Law Seriously – Problems with Double Counting, Wroclaw Review of Law, Administration & Economics, December 2018 p 86.

Humanitarian Law. Such definition shall also recognize the custom's aspects distinguishing it from other branches of the Public International Law.

My definition for the custom as a source of the provisions of the International Humanitarian Law is that it represents the rules governing both national and international armed conflicts, with which the warring parties used to comply, follow, and feel bound.

Second: The Elements of Custom:

The International Custom contains two elements, i.e., the material element that involves the international practices, and the mental element that is compliance in the formation of the International Customary Law.

1- Material Element:

The material element involves the recurrence of a specific case in a way leading to the emergence of international social habits. This occurs when countries used to a code of conduct, whether adversely such as refraining from performing a specific conduct, or positively such as taking a specific conduct. For example, the International Customary Rule that obliges a dispute to be resolved by way of arbitration, has firstly arisen in a form of a specific case, i.e., the recourse to arbitration by a state for the settlement of a dispute that has been arisen with another state.

Afterwards, states got used to adopting arbitration for the settlement of disputes with the non-use of force(1).

The International Court of Justice has emphasized the importance of the existence of the material element, and included it in several provisions concerning with the customary rules. In the North Sea Continental Shelf Case, the Court confirms the existence of one of the International Customary Rules, which requires "an established practice" together with the legal opinion or principle"(2).

2- Mental Element:

Regarding the mental element that must be available in the custom to become an international legal rule and binding, the mental element means states being convinced that such a conduct is necessary and believes that following it is obligatory. With this mental element, the custom can be distinguished from habits and courtesies that are merely ordinary behaviors subject to situational considerations or social decorum that guarantee no obligation. The

(1) Prof. Abdul-Ghani Mahmoud, The Customary Rule in the Public International Law, 1st Edition, Dar Al-Nahda Al-Arabia, 1990, p.40؛and:

Laurence R. Helfer, Ingrid B. Wuerth : Customary International Law: An Instrument Choice Perspective, Michigan Journal of International Law, Vol. 37, Summer 2016. P565.

(2)North Continental Shelf (Federal Republic of Germany v. Netherlands/Denmark). [1969] ICJ Rep. 3, para 77.

modern international law has enshrined this mental or psychological element(1).

The Court had emphasized the significance of the existence of the mental element in the customary rules in the case of the Jurisdictional Immunities of the State between Germany and Italy. The court had indicated therein that what makes a custom distinctive from other rules is the belief of the binding nature of the legal rule(2).

(1) Prof. Mohammed Al-Majthoub: Mediator in the Public International Law, Beirut, El-Dar El-Gamaya, 1999, p.10.

(2) The cases brought to the court arose from acts committed by the German armed forces in the Italian lands DURING THE Second World War. Germany assumed the full responsibility for the large-scale killings of civilians and mistreatment to members of the Italian armed forces who were used as forced workers. Germany further did not deny that with such acts it had violated the International Humanitarian Law. However, when the Italian courts had permitted procedures and rendered judgements against Germany concerning the claims arising from such illegal acts committed by Germany, Germany brought a case against Italy before the International Court of Justice, and (firstly) argued the permission for similar procedures and that the Italian courts had neglected its obligation to respect the immunity of Germany under the International Law; (secondly) that such obligation had been violated too upon taking constraints against (Villa Vigoni) building that Germany owned and dedicated for boosting the German cultural relations with Italy; (thirdly), that the decisions of the Greek courts shall be applicable in Italy due to violations of the International Humanitarian Law committed by the German Reich in Greece. By a fourth case, Germany had defended (fourthly) that Italy must verify that the decisions taken by its courts and other judicial authorities that violated the German immunity are no longer effective.

For more details, refer to:

Rudolf Geiger, Taking Decisions On Customary International Law By The International Court Of Justice In The Case Jurisdictional Immunities Of The

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First Topic

The Significance of Custom in the International Humanitarian Law

The custom plays a vital role in the formation of the provisions of the International Humanitarian Law and its governing norms. In view of indicating the significance of custom, we must discuss the factors contributing to the emergence of custom in the International Humanitarian Law, together with highlighting the custom's role in the formation of the governing norms in the International Humanitarian Law. In this topic, I explain the factors that have contributed to the emergence of custom in the International Humanitarian Law in the First Requirement, in addition to The generality of custom and peremptory rules in the Second Requirement.

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State Germany V. Italy; Greece Intervening),2012, Wroclaw Review of Law, Administration & Economics, Vol 8:2 Special Issue,2018, p234.

First Requirement

The Factors Contributed to the Emergence of Custom in the International Humanitarian Law

First- Monotheistic Religions:

The monotheistic religions play a significant role in executing, guiding and directing the human factor and in the emergence of the international custom in the International Humanitarian Law together with reducing the effects of the armed conflicts. Religions are originally for the happiness and interests of people to live peacefully.

One of the most important objectives of the monotheistic religions is to protect the human in both the time of peace and the time of war. It would be no exaggeration for me to say, in this regard, that what has been emphasized in several charters relating to the International Humanitarian Law, concerning the protection of the civilians and non-combatants, prohibition of the indiscriminate use of weapons and indiscriminate attacks, good treatment of war prisoners, ensuring the protection of objects, prohibition of the mutilation of bodies and safety to those who are allowed to enter, merely reveals what had been already included in the religious teachings. The three monotheistic religions, i.e., Islam, Christianity and Judaism, are all similar in respect of the respect of the human in general, calling for the human dignity and equality, which is the base for all the human rights.

For instance, Muslim scholars have developed rules for the war law, which are rules that humanize the armed conflict by protecting lives of the non-combatants, showing respect to enemy's combatants, prohibition against doing harm to the enemy's properties unless so required by the military necessity or if an attack took place unintentionally as a collateral harm(1).

Second– Domestic laws and Instructions issued to Armies:

Many of the customary rules had been constituted from former wars, e.g., the instructions states issued to their forces. For example, the chivalry principle of the military honor, which had played a major role in the formation of many customary rules in the Middle Ages in Europe, which also enshrines the combatant and knight trait that prevents him from attacking an injured or

(1) The title of the International Humanitarian Law is alternatively new. The Muslim scholars had discussed the provisions of the International Humanitarian Law with various terms, for example, the Treatment of Infidels by the Army Chapter (Al-Sarkhasi's Mabsut, Dar Al-Maarefa, Beirut, 1398 – 1987, Vol. 1, p.30) , Forbidden and commendable Jihad and its Subsequences (Al-Shafii Al-Saghir: Nihayat al-Muhtaaj to Sharh al-Minhaj (The *End* of the *Needy* to Explaining the *Curriculum*, Dar Al-Fekr, Beirut, 1404 AH – 1984, Vol. Part 8, p. 60), the Method of Striving (Imam Nawawi, Rawdat Al-Talebin, Islam House, Part 10, p. 238), and Permissible Defeat of the Enemy (Ibn Rushd, The Beginning of the End of the Industrious and Frugal, Mostafa Bab Halabi & Sons Press, Cairo, 1401 AH – 1981, Part 1, p.382).

For more details on Islam and rules of the International Humanitarian Law, refer to Prof. Ahmed Abu Al-Wafa: The General Theory of the International Humanitarian Law in the International Law and Islamic Law, 1st Edition, Dar Al-Nahda –al-Arabia, Cairo, 2006, p. 165 :215P and: Laurence R. Helfer, Ingrid B. Wuerth : op cit,p569.

prisoner, or attacking private properties. However, the chivalry principle has a shortcoming that it is limited to the combat between the Christian knights only, not the non-Christian ones in the European countries. This principle is further governed by the equality rule in the execution of the (Principle of Reciprocity). Nevertheless, the chivalry principle was a reason for mitigating the ravages of war on the non-combatants(1).

Domestic laws play a significant role in the emergence of the international customs. The domestic law of a group of states can be used as a model for other states, which afterwards constitutes the start of an international practice and then the formation of a custom(2).

Both the domestic laws and the instructions that states issue to their armies during wars had substantially contributed to the formation of numerous rules accepted among states, that they had become a part of the International Law. Examples for this include The Lieber Code of the United States of America that was enacted during the American Civil War in 1863. Such instructions are considered a keystone on the international level. The key items of such instructions had included the distinction between the civilians and the military nationals, doing no harm to the civilians, protection of the religious places and protection of women and

(1)Prof. Ali Zaalan Me'ma, Prof. Mahmoud Khalil Jaafar, Haidar Kazem Ied Ali: The International Humanitarian Law, Saysaban Library, Baghdad, 2015, p. 96 et seq.

(2) Prof. Abdul-Ghani Mahmoud; The Customary Rule in the Public International Law, Dar Al-Nahda Al-Arabia, 1st Edition, 1990, p. 26 et seq.

children, prohibition of the use of toxic substances in wars. Such instructions had affected several international conventions(1).

Third– International Organizations:

Both of the governmental and non-governmental international organizations play a vital role in the formation and development of the emergence of the custom in the International Humanitarian Law by holding conferences, preparing draft conventions and constituting expert committees for the execution of the International Humanitarian Law.

Such organizations play a major role in preventing or reducing the violation of the provisions of the International Humanitarian Law by their duties and overseeing the application of the law. Such organizations do not render judgements against those who violates the law rules; however, they play effective role in spreading the provisions of the law, identifying the law, directly contributing to the organization of international conferences, and preparing conventions(2). For instance, the currently most significant conventions that governing the International

(1) the *Diplomatic Conference* on the Reaffirmation and *Development* of the International Humanitarian Law *Applicable* in *Armed Conflicts*

CDDH, Official Records, Yves Sandoz, Christophe Swinarskt, Bruno Zimmermann (eds.), Commentary on the Additional Protocols, ICRC, Geneva, 1987, pp44:62.

(2) O'qba Abdul-Kareem Khateeb, The Role of the Non-Governmental International Organizations in the Protection of the Human Rights, PhD Thesis, Faculty of Law, Ain Shams University, 2018, p. 338.

Humanitarian Law have been concluded through the international conferences that were organized by the International Committee of the Red Cross (ICRC)(1).

The International Committee of the Red Cross exerts great efforts in the codification of the international customs in the International Humanitarian Law field. It also initiated the aforementioned study titled "The Customary International Humanitarian Law" in 1996 with the participation of a group of eminent experts to consider the current practices of states in the International Humanitarian Law. The purpose of such a study was to identify the Customary Law in such a field, and accordingly articulate the legal protection the customary law provides to war victims. The study had identified 161 rules of the Customary International Humanitarian Law rules that constituting the common core of the International Humanitarian Law binding on

(1) The International Committee of the Red Cross has established an initiative by a man named "Henry Donan" who helped the wounded Soldiers in the "Battle of Solferino" in 1859. Then he tried to gain a broad support of the political leaders in order to exert more effort for the protection of the war victims. He had two main ideas focusing on developing a treaty that obliges armies to provide due care to all wounded soldiers; establish national societies helping the military medical services. Since its establishment in 1963, the sole purpose of the International Committee of the Red Cross was to protect and help the victims of the armed conflicts and unrests by working all over the world, encouraging the development of the International Humanitarian Law and promoting its respect by governments and weapon bearers. The story of the International Committee of the Red Cross reflects the development of the human work, Geneva Conventions and the Red Cross and Red Crescent Movement.

For more details, refer to https://www.icrc.org/en/who-we-are

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all parties to all the armed conflicts. Such rules also reinforce the legal protection for war victims all over the world(1). This has, in turn, developed the law, found the reasons for the customary rule, investigated the extent of the contribution of such rules to directing states' conducts and behaviors in the international relations, and motivated states to rely on the customary rules in the preparation of the military laws(2).

The role that the international organizations play has not been limited to the idea of organizing conferences and preparing agreements, but the International Committee of the Red Cross has proved its ability and efficiency in convincing states to sign

(1) This study contains two parts: the first volume "Rules" provides a comprehensive analysis of the customary rules of the International Humanitarian Law applicable in the national and international armed conflicts. Regarding the fields of the International Humanitarian Law, the second volume "Practice" contains a brief on the related states' practices (legislation, military manuals, Case laws and official statements), in addition to the practices of the international judiciary / semi-judiciary bodies, conferences and organizations. It is better to note that the second volume of the study is currently refined and amended as a part of a joint project with the British Red Cross Society.

The first volume is titled "The Customary International Humanitarian LAW", Vol. 1, issued to the International Committee of the Red Cross is available on the following link:
https://www.icrc.org/data/files/publications/ar/icrc_004_pcustom.pdf

Entry date: 11/06/2021

(2) Prof. Abu Baker Mohammed El-Deeb, The Role of Media in the Spread of the International Law Rules, a research paper introduced to the Conference of the Legal and Ethical Controls for the Media, held from 9th to 10th of September at the Faculty of Law, Ain Shams University, 2018, p. 1631.

treaties governing the provisions of the International Humanitarian Law. All such practices performed by the international organizations have significantly contributed to the emergence of the international rules of the International Humanitarian Law(1).

(1) For example, the Committee encouraged the authorities in Afghanistan to ratify the Four Geneva Conventions governing the International Humanitarian Law to execute its provisions. To that end, the Committee held several meetings in 2002 for Afghanistan to join the Four Geneva Conventions. In 2004, the Committee completed its meetings to motivate Afghanistan to join the other two protocols of 1977, and discuss to what extent the law is enforced. The Committee continued to perform its tasks tirelessly until its effort were successful and Afghanistan joined the two protocols in November 1st, 2009. The Committee afterwards tried to encourage the Afghani authorities to join the International Convention on Cluster Munitions duly signed on 30 May 2008. Indeed, Afghanistan joined such a convention on 8 September 2011. For more details, refer to:

O'qba Abdul-Kareem Khateeb: The aforementioned reference, p. 358.

Second Requirement

The generality of custom and peremptory rules

First: Generality of the Customary Rules in the International Humanitarian Law:

The custom in the International Humanitarian Law is significantly vital, as most of the provisions of this law is a customary rule binding on everyone unlike conventions. The International Humanitarian Law is not limited to the humanitarian rules like Hague Conventions and the Four Geneva Conventions together with their additional protocols(1). However, the International Humanitarian Law goes beyond these rules to all the humanitarian rules derived from the custom(2), especially that such

(1)Three Additional Protocols have been annexed to the Geneva Conventions since 1949. The first protocol of 1977 thereof provides the protection of the international armed conflicts victims. The second protocol, which has been developed in the same year, governs the protection of the non-international armed conflicts victims. The third protocol, which has been annexed to the conventions in 2005, presents the new red (crystal) sign for protection together with the two effective signs of the Red Cross and the Red Crescent. For this, refer to

https://www.icrc.org/en/doc/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf

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(2) It should be noted that the Public International Law, in turn, is no longer in the same status as before as described as a mere law for coordination between sovereigns organized uniformly, together with all the legal and liberal equality required by such a description, moving it away from being a dependent and

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documents may have shortcomings in some texts due to deficiency or ambiguity. Thus, the Public International Law rules remain significantly unclear in general(1).

For instance, the preamble of the 1899 Hague Convention stressed the importance of the custom in the International Humanitarian Law. This preamble provided:

Warriors and individuals remain protected under the International Law that has been formed by custom between the modern nations by the humanitarian laws, principles of the public conscience, between combatants and nationals until the war law is completed. Most of the international conventions on the International Humanitarian Law have recurring on text for this concept such as the First(2), Second(3), Third(1) and Fourth(2)

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following law like a domestic law. However, it is a law that emerges from the consensus of wills and is based on compliance with it on the satisfaction of those to whom it is addressed with its provisions including states in the first place. In the absence of a higher legislator represented by a central authority, whose rules are imposed from higher. Hence, those who are addressed therewith are forced to adhere to the concealed message that is associated with a clear penalty threatening whoever objects and vowing whoever breaches.

For this, refer to:

Prof. Nizar Al-Ankabi, the International Humanitarian Law, 1st Edition, Dar Wael for Publishing and Distribution, Amman, Jordan, 2010, p.64.

(1) A. Bianchi, "Human Rights and the Magic of Jus Cogens", European Journal of International Law, 19, (2008), 491, 493.

(2) See Article 63 of the First Genevan Convention.

(3) See Article 62 of the Second Geneva Convention.

Geneva Convention together with the first and second(3) additional protocol. This was approved by the International Court of Justice through its consulting opinion about the legality of threating with the nuclear weapons and using them on 8 July 1996. Further, the reason for the large number of the International Humanitarian Law rules to be applicable in the armed conflicts is some humanitarian consideration. The Hague and Geneva conventions have a wide range joining. All states shall observe such conventions whether ratified, whether you have ratified them or failed to ratify then, as such conventions constitute the principle of the Customary International Law and may not be violated(4).

The custom is binding, even on the states that failed to involve in the formation of the customary rule. This is evidently clear upon the application of the custom itself in the International Humanitarian Law field, especially given the rules states that *Nullum crimen et nulla poena sine lege* (that one cannot be punished for doing something that is not prohibited by law. usually, a text is not required for criminalizing and punishing. A convicting judgment may be decided for an act that is not set forth as an offence or crime. The best example for this is the War

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(1) See Article 44 of the Third Geneva Convention.

(2) See Article 158 of the Fourth Geneva Convention.

(3) See Article 1 of the First Protocol annexed to the convention and included in the preamble of the Second Protocol.

(4) ICJ: Rrpots.1996, P.257.

Criminal courts in the middle of the last century such as the Nuremburg courts. This is in considering that the International Humanitarian Law has not been derived from the treaties only, but from the states' practices, which have been gradually recognized globally(1).

Second: The Influence of Custom on the International Humanitarian Law Peremptory Rules

The Public International Law rules have not been imposed to a state by a supreme body like the national legislations that are imposed by the state on the individuals within its territory. However, the Public International Law rules have been emerged between independent bodies with equal rights, that none of them has authority over the other. There has been a jurisprudential controversy between the majority of jurists about the extent of the binding force the Public International Law rules have, which ensure that they would be respected and executed among the international community.

Referring to the classification of the domestic legal laws and regulations, the legal rules are found to be divided into two types, namely: the supplementary rules, to which parties may agree to the contrary; and the peremptory rules, the contrary to

(1) Abbas Madawi, The Non-conventional Traditional Sources of the Public International Law. A Master's Thesis, Faculty of Law and Political Sciences, 2013, p. 64 et seqP and:

United States Government Printing Office: Trials of war criminals before the numberg of military tribunals, U. S. Government Printing Office, Washington, Volume VI, 1952,p.8

which may not be agreed. The domestic law calls the governing law as the "Public Order Rules". The notion of the peremptory rules or the public order rules in the domestic law is based on the necessity of protecting the main concepts and values prevailing in the society, in addition to protecting the legal system itself. It cannot be envisaged that there is a legal system, while there is no one is committed to maintain it, or they are free to absolutely agree with each other without any constraints(1).

This is the approach that Vienna Convention on the Law of Treaties of 1969 followed. This convention adopted another type of the international legal rules, namely the international legal peremptory rules. Article (53) of such a convention provides that a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. Article (64) of the same convention states that if a new peremptory norm of general international law emerges, any existing treaty, which is in conflict with that norm becomes void and terminates(2).

The aforementioned article refers to three elements for the definition of the governing rule. **First**, the rule shall be public, i.e., binding on all the international community, not on a specific geographical territory. **Second**, the governing rule shall be accepted and recognized by the society, meaning that it has the

(1) Prof. Saeed Salim Juwaili, Introduction to the Study of the International Humanitarian Law, Dar Al-Nahda Al-Arabia, Cairo, Egypt, 2003, p. 172 et seq.

(2) Prof. Ali Sadeq Abu Heif, a former reference, p. 73 et seq.

unanimity of the international community. **Third**, it is not permissible to deviate it or agree to deviate its provisions(1).

The concept of the governing norms is relatively modern in respect of its emergence if compared to its counterpart in the domestic law. The custom is not considered as a direct source of the peremptory norm as the peremptory norm does not rely on the satisfaction of each state(2). However, it is binding on the state legally. The peremptory norms are Meta rules that are applicable independently of the states' will. However, in practice, the base of the Customary International Law is feeling obliged on adopting the international practices to prove that. In this way, the international practices may be a source of the peremptory norm.

The peremptory norm leads to rules called the erga omnes obligations, which are obligations that are vital and significantly important in the international system in the form of peremptory norms. With such norms, any state can litigate any other state for imposing the fulfilment of obligation(3).

(1) For more details on these trends:

Prof. Ibrahim Seif Abdul-Hameed Menshawi, The peremptory Norms in the Modern International Law, PhD Thesis, Faculty of Economics and Political Sciences, Cairo University, 2019, p. 35:36.

(2) Prof. Ibrahim Seif Abdul-Hameed Menshawi, The peremptory Norms in the Modern International Law, p.608.

(3) Roozbeh (Rudy) B. Baker: Customary International Law in the 21st Century: Old Challenges and New Debates, The European Journal of International Law Vol. 21 no. 1,2010, P177.

Jurists of the International Law widely recognize the international custom as the most common source of the peremptory norms, as it creates a general rule that never depends on the states' will and is globally applied.

The custom is now a binding and legitimate source not only in the International Humanitarian Law, but in the International Criminal Law as well, especially that reflects on the two comprehensive laws. The international criminal jurisprudence whenever tries to invocate the provisions of the International Criminal Law, it never looks in the written texts only, but in the customary rules as well, especially given the significant role that the International Criminal Law plays in litigating individuals who fail to abide by the provisions of the International Humanitarian Law(1).

(1) Prof. Mohamed Taer Makha, Prohibition Base on the Custom on the International Criminal Law, Journal of Law, University of Bahrain, vol. 11, Issue 1.2014, p.302.

Second Topic

The Influence of Custom on the Execution of the International Humanitarian Law Treaties

There is a main rule prevailing in the International Law, namely Sanctity of the International Agreements. Deriving from this rule, the provisions of a treaty shall remain effective and binding until such a treaty expires by a method of the expiration of treaties. Parties of such treaties may not, during their effective period, not find an excuse for not implementing the provisions included therein, as the international treaties are not flexible unlike the international custom(1). Nevertheless, the international custom plays a significant role in the execution of the international treaties. In this research paper, I explain the role of the custom in reducing the withdrawal and requirement of reciprocity in the **first requirement**, in addition to the role that the custom plays in limiting the reservation to treaties in the **second requirement**, and finally the role of the custom in the amendment of the international treaties in the **third requirement**.

(1) Hamed Sultan, Aisha Rateb and Salahuddin Amer, The Public International Law, Dar Al-Nahda Al-Arabia, 4th Edition, 1987, p. 255.

First Requirement

The Role of Custom in Reducing the Withdrawal and Requirement of Reciprocity

First – The Role of Custom in the Validity of Obligation by the Provisions of Agreements even in Case of Withdrawal:

Withdrawal is a right for each state in accordance with the International Law Rules and the Vienna Convention on the Law of Treaties of 1969. Most of, or all, treaties emphasize the right of a state to withdrawal. However, it not perceived that this might be permissible in the International Humanitarian Law governing agreements, as given that the International Humanitarian Law rules are the base of the customary provisions that have been codified. No state can relieve itself from the compliance with its treaty obligations relating to the International Humanitarian Law whenever such a state desires so. If such a state can perform this, then the legal relation is then unsafe to an extent leading to the violation of the human dignity through military operations.

Each convention of the Four Geneva Conventions set forth an article states that the high contracting parties are free to terminate their contracting, i.e., may unilaterally withdraw from the international family participating in such an agreement having given a one-year period. In any event, it is agreed that this text is a merely a formalistic text. Since the First Geneva Convection has been developed for over one hundred years ago, no state withdrew from it. Such articles are considered subordinate provisions

covering, for example, the practical methods of application. If a state is not embarrassed to announce its withdrawal from one of the Geneva conventions, it is then contracting out of the subordinate rules only, but it may neither terminate the main principles nor release itself from its obligation. Such principles are today a part of the nations' law and international custom(1).

Second – The Role of Custom in the Non-Recognition of the Principle of Reciprocity in the Field of the International Humanitarian Law Conventions:

It is generally acknowledged that the non-execution by a member of a treaty may lead at last to the other member disengages from its obligations, or gives excuses for the termination of the treaty similar to any contracting that is subject, for example, to the domestic laws.

The Principle of Reciprocity is strongly associated with and emerging the sources of the international law form international agreements, international custom and the general principles recognized by the modern nations. The Principle of Reciprocity is the backbone of the equal relations in preserving and maintaining the international safety and security, and in the enforcement of the rules of the international law for the development of the international cooperation and coexistence. Further, the principle of reciprocity plays a significant role in the improvement of the

(1) Prof. Saeed Salim Juwaili, Introduction to the Study of the International Humanitarian Law, Dar Al-Nahda Al-Arabia, Cairo, Egypt, 2002, p. 175 et seq.

international custom and in the development of binding legal rules through international conventions and treaties(1).

Nevertheless, this is not applicable to the International Humanitarian Law Conventions. For instance, the Geneva Conventions: shall remain effective in all circumstances and shall not subject to the reciprocity requirement. No belligerent member may mistreat, for example, war prisoners, or order the murder of them just because its enemy had committed such crimes. This is a grave breach of the humanity concept, and accordingly no one would suffer from its crimes but innocents. While most of treaties aim at preserving the interests of the contracting states, the humanitarian law has a different nature and a higher position without limits. The humanitarian law determines the fates of people. In this regard, it is not relating to mutual benefits, but to a set of substantive rules announcing to the entire world guarantees that are entitled to each person. Each state is committed to itself as it is committed to other states. The issue is a matter of the human life, not about material benefits(2).

(1) Prof. Shawqi Abdul-Majeed Oubaidi, The Principle of Reciprocity, Al-Salam University Journal, Special Issue, November 2019, p. 86.

(2) Prof. Wael Ahmed Allam, The International Humanitarian Law, Sharjah University, Edition 71, 1st Version, 2018, p. 48.

Second Requirement

The Role of Custom in Reducing the Reservation to the International Humanitarian Law Conventions

Reservation means that a state associates its ratification of a treaty with its commitment to a text or more than its texts, or interpreting such a text in a specific manner(1).

With reservations, some states succeed in escaping from some of its obligations arising from the law. In this regard, the custom plays its significant role in minimizing the state's ability to provide reservations to the treaties governing the provisions of the International Humanitarian Law, considering that most of the provisions of the International Humanitarian Law are the base of the customary rules. Especially, if such reservations to such conventions are conflicting with the subject matter of the treaties and their purpose to oblige everyone to them(2).

In accordance with the content of the Vienna convention, the illegal reservation, which is prohibited by the treaty implicitly or explicitly in case the convention sets forth a text explaining the reservations' judgment that is not permissible if the convention is

(1) For this, refer to Prof. Jaafar Abdu-Salam, The International Relations Rules in the international Law and Islamic Law, 1st Version, Al Salam Library, Cairo, 1981, p. 383. And:

Richard W. Edwards Jr: Reservations to Treaties, Michigan Journal of International law, volume 10, issue 2,1989, p.362.

(2) Refer to the International Law Committee Report, Session Sixty-Three, 26 April and 4 July / 12 August 2, p.481

silent in this regard, is conflicting with the subject matter of the convention(1).

The guide to practices relating to reservations provides a definition of the impressible reservation in Article 1-3-3, stating, "Reservation formulated notwithstanding a prohibition arising from the provisions of the treaty or notwithstanding its incompatibility with the object and purpose of the treaty is impermissible, without any need to distinguish between the consequences of these grounds for non-permissibility". This guide to practice in its Article 3-3-3 confirms that acceptance of an impermissible reservation by a contracting State or by a contracting organization shall not affect the impermissibility of the reservation(2).

The purpose of the international conventions in the International Humanitarian Law fields is not to make mutual obligations between the states, which are to be subject to the application of the principle of reciprocity. However, their purpose is to develop a substantive rule for the protection of the human at the time of peace and the time of war, whether against states or individuals. They are both of the peremptory norms in the Public International Law. However, in practice, reservations may be permissible in the conventions relating to the International Human

(1) See Article 19 of the Vienna Convention on the Law of Treaties of 1969.

(2) Prof. Mohammed Sayed Mohammed Ali, Reservation to the International Treaties, PhD Thesis, Faculty of LAW, Assiut University, 2018, p. 175.

Rights Law unlike the conventions relating to the International Humanitarian Law(1).

Nevertheless, the reservation to such treaties is not perceived, unless such reservation is based on logical reasons, religious values that are clear to everyone. An example of this is the Islamic states' reservation to joining the conventions that are relating to the human rights in respect of the article that may be conflicting with the provisions of the Islamic Law. Sometimes, the reservation is made according to the norms prevailing in the local society(2), unlike the International Humanitarian Law that permits

(1) For example, Egypt has reserved to the text of Article 16 and Article 29 concerning the equality between man and woman in all the matters relating to marriage, family relation in the course of marriage and termination of marriage. This was observing the bases of the marital relationship of special sanctity, which derives its provisions from the Islamic Law that pay great attention to achieving integration, which, in turn, would achieve the real equality between spouses not the formalistic equality only. The Islamic Law has ensured special rights for woman such as taking an appropriate dowry, maintaining her fully from the husband's money, providing her with the marital alimony on divorce. The wife also reserves her right and funds in full, and is not obliged to spend any money. The wife further is entitled to the marital alimony and deferred dowry after divorce, e.g., the maintenance during the period of waiting (Iddah) and the consolatory gift (Maata'a). Thus, the Islamic Law has granted the man the right to divorce his wife with unilateral will. It also permits the divorce under a court judgment, but has not set this as a constraint to the man.

For more details, refer to

Prof. Mohammed Sayed Mohammed Ali, Reservation to the International Treaties, PhD Thesis, Faculty of LAW, Assiut University, 2018, p. 185.

(2) For example, India reserved to Article 16 of the CEDAW Convention, and affirmed that it supports the Obligatory Registration of Marriage, as it is effective in a large country like India, especially given the variety of its traditions, religions and level of education.

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the reservation to the formalistic texts only, e.g., the Islamic states' reservation to the Red Cross sign and using the Red Crescent sign(1).

The notion of the non-permissibility of the reservations to the International Humanitarian Law rules is based on the fact that there are custom-origin provisions from which states cannot disavow or amend their effects by the international conventions and treaties they conclude. This notion seems to have casted its shadow over the advisory opinion of the International Court of Justice in 1951 concerning the reservations to the Convention on the Prevention and Punishment of the Crime of Genocide

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For more details, refer to

Prof. Mohammed Sayed Mohammed Ali, the aforementioned reference, p.185.

(1) The Red Cross sign is used as a sign of the medical objects, and is the emblem of the Red Cross Organization. It was agreed on it in honor of Henry Donan, and was adopted by the International Committee of the Red Cross according to the flag of the state of Henry Donan but with reversing the color that the cross is red on a white background. When the Islamic and Arab states were specifically called, they agreed to this idea and signed the convention with its same articles and conditions and name but with changing the "cross" term to the "Crescent" term instead ad of a religion feeling, with keeping the red color. From this, the "Red Crescent" EMERGED. THE International Committee of the Red Cross is the founder of the international Red Cross and Red Crescent Movement. For more details, refer to

Prof. Sherif Ahmed Medhat Elwan and Prof. Mohamed Khalil Mousa, The International Law of Human Rights – The Protected Rights, Part Two, 1st Edition, Dar Al-Thaqafa Publishing and Distribution, Amman, Jordan, 2009, p. 59:60.

(CPPCG). This convention referred to the fact that the principles on which the convention is based are widely recognized and accepted by the modern nations, as it obliges state even out of contracting or conventional provisions.

Third Requirement

The Role of Custom in the Amendment of the International Treaties

First– The Role of Custom in the Amendment of the International Treaties:

The international custom was formed after the international treaty in accordance with Article (38) of the bylaws of the International Court of Justice regarding the International law sources. Nevertheless, this does not mean that the treaty is transcendent over the international custom. However, this is a mere order of two sources of equal legal value. However, that governs the priority and transcendence between them is the recognized interpreting rules(1). The general rule in the amendment of the international treaties is that the international treaties are amended under an explicit agreement between the parties to the treaty, whether it is a bilateral or plurilateral treaty that develop a special method for its amendment. Hence, the provisions of an international treaty may be amended implicitly, as an exception of this rule, that their parties take a mutual path for such an amendment. In case the treaty's parties take a specific path that is incompatible with the provisions of the treaty without any

(1) See Prof. Jaafar Abdul-Salam, The Functional Interpretation of the International Treaties, The Egyptian Journal of the International Law, Issue 26 of 1970, p. 160.

objection by any member thereto, such an amendment is deemed as implicit amendment of the treaty(1).

The amendment to a treaty may have several forms, direct amendment, signing a supplementary protocol indicating detailing or interpreting rules of the provisions of the firstly concluded treaty, or by way of the subsequent international practices and acknowledging the same by the rest of parties. This may occur for the protection of the effectiveness of the convention itself. Should other parties thereto maintain the commitment to the contents of the treaty and not to derogate from its provisions, this is deemed as a reason for the termination of the convention(2).

In reality, the amended role of the international custom together with its interpreting role was explicitly recognized by the attendees of the Vienna Conference and members of the participating delegations on grounding for concluding the Vienna Convention on the Law of Treaties of 1969. They all agreed to approve the subsequent behavior as a method of the amendment to the international treaties implicitly, but according to some specific

(1) Prof. Mohamed Khalid Baraa, The Role of the International Custom in the Amendment of the International Treaties, A Study in Light of the International LAW Provisions, Journal of the Faculty of Law and Political Science, Vol. 4, Issue 15.2011, p. 561.

(2) Rebecca Crootof : Change Without Consent: How Customary International Law Modifies Treaties, The Yale Journal Of International Law [Vol. 41,2016. P. 249.

conditions, as this opinion may be a reason for states not to strictly adhere to the treaty that they have concluded(1).

It has been established on the on-field practices, and according to the resolution of the International Court of Justice in its advisory opinion on some of the United Nations expenditures relating to the Peace Keeping Forces in the Middle East in 1992, that the custom may make the formalistic amendment of a treaty, which requires special procedure for its conclusion. In its approval on the custom ability to amend a charter, the Court went even further. It is noted that the International Court of Justice in this opinion explicitly accepted the validity of the resolution well known as the Unity for Peace, which was issued by the United Nations General Assembly in 1950, which is also known for the Secretary of State of the United States of America at that time. This resolution was issued to promote the role of the United Nations General Assembly in keeping the international peace and safety should the Security Council fails to take its resolutions under Chapter Seven of the Charter due to the conflict between the permanent members and using VETO against the resolutions issued by the Security Council. The decision of the Court entitled the United Nations General Assembly to take a decision to send peacekeeping forces to the unrest territories around the world,

(1) Prof. Mohamed Khalid Baraa, the aforementioned reference, p. 562; and:

Theodor Meron: The Continuing Role of Custom in the Formation of International Humanitarian Law, The American Journal of International Law, Vol. 90, No. 2 (Apr., 1996), pp. 238-249.

which are of the competences of the Security Council exclusively(1).

This amendment made the issuance of the Security Council's resolutions is possible if the permanent members do not object thereto by using the veto. Under this custom, it is no longer required to obtain the approval of the permanent states as the Charter requires. The absence or abstention of voting by the permanent states is no longer affects the issuance of resolutions. The Arab League charter requires for the approval on the league membership the consensus of all the members as based on an international custom. However, the approval of the majority of the members is sufficiently enough for the approval of new states in the Arab League, e.g., Kuwait, Emirates and the Sultanate of Oman(2).

One of the practices is the role of the custom in the amendment of the conventions' texts relating to the protection of civilians, and provision of human and medical aids to them in the Geneva Convention. It is widely known that such texts are relating to the international armed conflicts. It is established as a practice to apply such rules to the non-international armed conflicts too up

(1) Prof. Mohamed Khalid Baraa, the aforementioned reference, p. 576.

(2) Prof. Mohamed Saeed Al-Daqaq and Prof. Ibrahim Ahmed Khalifa, The International Regulation, University Publications House, Alexandria, 499:501,2010

to the development of the First Additional Protocol of 1977, which emphasized such rules[1].

Second: Terms of Customary Amendment for Treaties:

1- The amendment shall not be an express provision stipulating a sanction for the offence:

If the conduct is contrary to the text, it would have violated the rules of an international treaty. Such an offence causes legal sanctions imposed by the treaty on those who violates its provisions. In that case, it is not possible to establish an amended custom. On the other hand, it is recognized that custom is an expression of non-written legal rules and the international treaty is a written rule. Thus, it is not logically permissible to amend what is not written in written rules. It is not only that, but even in terms of proving the amendment, custom is difficult to be proven by virtue of non-codification. Thus, how this customary amendment of written and easy-to-proof rules can be proven. Article (39) of Vienna Convention on the Law of Treaties of 1959 provides that (the treaty may not be amended by agreement of the parties. The rules set out in part II shall apply to this Agreement unless otherwise provided for in the treaty) [2]

(1) Rebecca Crootof: op cit, p.274.

(2) Prof. Khaled Muhammed Bazaa: the previous reference, pg.567.

2- The custom shall not be contrary to a peremptory norm of international law:

Accordingly, Article (53) of the Vienna Convention on the Law of Treaties, provided that any treaty inconsistent with a pending provision of global international law that may not be derogated from, and which can only be amended by a new provision of global international law that has the same characteristic, shall be considered null and void. The aforementioned convention stated the content of this term by Article (93), which states that (If a new peremptory norm of general international law appears, any existing treaty that contradicts with this rule shall be null and void and ends in operation.)

Here, the ability of custom to amend international treaties in the field of international humanitarian law becomes apparent. Customary rules can only be amended by rules that have the same legal force. In addition to rules that are similar in terms of generality and abstraction, regardless of the commitment or non-compliance of other countries with their obligations under international conventions.(1)

(1) Steven R. Ratner: International Law Rules on Treaty Interpretation, : Cambridge University,Press, 2022,pp85-89; and:

Prof. Omar Fayez Ahmed Albazor: The Role of the International Security Council in implementing the rules of International Humanitarian Law, PhD thesis, Faculty of Law, Ain Shams University,2016. P.149.

Conclusion

Through this research, under the title "The Role of Custom in the Formation of the Obligatory Nature of the International Humanitarian Law Treaties", we tried to emphasize the effective impact of custom in International Humanitarian Law treaties. Moreover, we defined custom as a source for the provisions of international humanitarian law. These provisions are the rules governing international and non-international armed conflicts, and the warring parties are accustomed to following them and not deviating from them.

We discussed the importance of customary rules in international humanitarian law, as they are binding on all parties, unlike conventions. Especially since humanitarian law does not consist - in the first place - of written rules only, but also it consists of customary rules. In particular, most of the conventions in reality are new confirmation of old customary rules that have developed and expanded. From this point of view, we have clarified the impact of custom on the binding nature of treaties in the field of international humanitarian law. We also have clarified its importance on imposing restrictions on the freedom of states to withdraw and to observe international humanitarian law treaties.

Research Findings:

- We emphasize that the provisions of customary international law will become fundamental international legal norms, whether by stipulating them in collective or bilateral international conventions, especially in the absence of the mandatory obligation of not violating them. Custom is expected to play an important role in the field of international humanitarian law in the future, in the light of the evolution of weapons as well as modern and autonomous means of warfare.

- Custom is a fundamental source of international humanitarian law in general as a binding law for the newly formed states. Custom is not subject to the rule of relativity traces of treaties. It is not considered a subject for reservation or invoking the rule of reciprocity and for the inability to deny its existence.

- Treaties enacted in international humanitarian law should not be a source of customary rules. However, most of these treaties are source of customary rules. The reason to consider these treaties as source of customary rules is the fulfillment of the conditions specific to the customary rule.

Research Recommendations

- We recommend the need to emphasize the formulation of the philosophy of international humanitarian law on common religious foundations that gain additional measures. It also prevents many forms of prejudice, injustice and discrimination. Activating the religious measures can contribute to the revision of international humanitarian law,

and to correct the path for many individuals to abide by its provisions.

- We hope much effort is exerted to strengthen and disseminate customary provisions of international humanitarian law, especially in the context of the current conflicts, as most of the current armed conflicts are non-international. The international community still suffers from the shortcomings of international conventions to regulate non-international armed conflicts.

- The need to distinguish and not confuse between peremptory norms and customary rules, because peremptory norms have their own distinctive characteristics in terms of formation and evidence. The matter of determining the existence of a rule of customary international law differs from the matter of determining if the rule also has additional characteristic of not being derogated by a treaty.