# CHAPTER 9 : Final Provisions, Including the Martens Clause (1949 Geneva Conventions)

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## A. Introduction

### I. The Concept and Role of Final Provisions

#### (a). General Features in the Law of Treaties

1. In the light of state practice with regard of the drafting of an international treaty, one may observe that most, if not all long treaties, comprise what is traditionally called 'final provisions'. As a quick glance to the GCs will show, the latter make no exception in this respect, for they contain too a list of final provisions. The latter, as their very label clearly denotes, appear at the very end of the text of the treaty, thus after its normative content. These clauses, which quite naturally vary from one treaty to another, may generally refer to the duration of the treaty, the means by which it is adopted, the means by which states are allowed to express their consent to be bound by it, the conditions under which a state can –perhaps– denunciate it, the terms of its entry into force, the regime (if any) of reservations (and objections) to it, the official languages, the designation of the depository (if any), its recording –henceforth– with the UN secretariat, and so on. Albeit they are different in nature, scope and aim, they are generally reunited under a single heading (i.e.: 'Final provisions'), even though there is no mandatory rule to this effect.
2. These articles are instrumental for the treaty to operate and the indications they contain aim to prevent future disputes between the Parties in this regard. To this effect, in the same manner as all the other (substantive) provisions of the treaty, they embody the authoritative will of the Parties which obviously prevails –in case of litigation or doubt– over their individual wills.
3. With regard of the final provisions, it is noteworthy to observe as Article 24 para. 4 VCLT envisages, some of these provisions have to be applied before the latter's entry into force precisely to make it possible. In short, these are provisions which deploy their legal effects before the entry into force[1], for they are propaedeutic to it. In other words, they must be applied before the treaty's coming into force, for without them to be applicable the very entry into force of the treaty would be jeopardized.

[1] And even earlier, for instance those governing the modalities (i.e. voting procedure and the like) of its adoption.

(b). Specificities of the GCs

4. The Final Provisions are similar, yet not identical, among the four GCs. The minor differences are due, among other factors, to the existence or lack of prior conventions on the same subject-matter the particular GC is meant to complete.

5. Save for the provisions related to the official languages and authentic text, and the introduction of the Martens Clause in relation with the effect of denunciation, GC's final provisions resemble largely to their 1929 counterparts. Generally, the final provisions were not extensively discussed at the International Conferences in Stockholm in August 1948 or at the Geneva Conference in 1949. In fact, besides the question of languages and the introduction of the Martens clause, they were already almost present in their definitive form in the ICRC draft of May 1948 that was prepared following the Conference of experts of April 1947. Besides the introduction of a mechanism allowing national liberation movements to access to AP I, the authentic languages and the six months deadline for the signature of AP I and AP II, the final clauses of the AP I, II and III also resemble the 1949 provisions.

## II. The Law of Treaties and the GCs: some Preliminary Caveats

6. Most of the rules governing the interpretation, application, life, modification and death of international treaties (between states) are admittedly considered to be codified –and progressively developed– by the VCLT 1969. State practice at large and international (as well as domestic) jurisprudence buttress the customary value of the rules contained therein. This is of paramount importance for, by virtue of its Article 4 (non-retroactivity), the VCLT cannot be applied to the GCs even though it is nowadays in force between 111 states among the High Contracting parties to the GCs.

7. Therefore, as the ICJ –alongside with other international tribunals and non-judicial bodies– has adamantly reiterated, what is then applicable is customary law henceforth enshrined in the VCLT. It must nonetheless be noted that the treaties in point have been concluded before the entry into force of the VCLT (thus precluding the application of the VCLT as a result of its Article 4) and even before the commencement of the works of the ILC with regard of the law of treaties. Therefore, it is not self-evident to assume that all the VCLT provisions do reflect customary international law rules existent at the time of the conclusion of the GCs.

8. Quite reassuringly, the ICJ did not hesitate in the *Kasikili/Sedudu* case, to refer to customary international law rules –as codified by the VCLT–, even for treaties that were concluded well before the mere existence of the latter, thus setting the axiom that they have been applicable for a long time.[2] This view is corroborated by international (judicial and arbitral) case-law at large.[3] It does not seem thus unreasonable to rely on the diachronically unity of international law in relation –at the very least– to the law applicable to international treaties.

9. This clarification now set, it is accurate to state that grossly speaking the legal corpus in matter of the Law of Treaties governing the GCs is largely mirrored in the VCLT, except for the succession of states to treaties and for the effects of armed conflicts on

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[2] ICJ, *Kasikili / Sedudu Island (Botswana / Namibia)*, Judgment, 13 December 1999 at para. 18. Likewise: ICJ, *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, 13 July 2009 at para. 47. See also U. Linderfalk, 'The Application of International Legal Norms over Time: The Second Branch of Intertemporal Law', 58 *NILR* (2011), 147-172 at 165. However, in a previous case, the ICJ propounded yet for a synchronically application for she declared: 'It is sufficient to state that the validity of a treaty concluded as long ago as the last quarter of the eighteenth century, in the conditions then prevailing in the Indian Peninsula, should not be judged upon the *basis of practices and procedures which have since developed only gradually*' (ICJ, *Right of Passage over Indian Territory (Portugal* v. *India)*, Judgment, 12 April 1960, at 37).

[3] *Case relative to the Reevalution of the German Mark*, Arbitral Award, 16 May 1980, 84 *RGDIP* (1980), at 1184, para. 16. See also: ICJ, *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment, 17 December 2002, para. 37; ICJ, *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, 12 December 1996, para. 23; ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 21 June 1971, at para 94-104 (at 46-50). *Contra* and more cautious: *Affaire du Lac Lanoux*, Arbitral Award, 16 November 1957, 12 *RIAA*, at 301; *Delimitation of maritime boundary between Guinea-Bissau and Senegal*, Arbitral Award, 31 July 1989, at para. 54 (at 141). See also Eritrea Ethiopia Claims Commission (EECC), *Partial Award of 28 April 2004, Central Front Ethiopia's Claim 2*, at para. 48, 139 *ILR* (2011), at 352-352. In this award, the EECC interpreted the Hague Regulations (not applicable as a matter of treaty law) by reference to a subsequent practice (a US military manual) of 1976.

treaties (Article 73 VCLT). As a result, we are going to apply those rules, the content of which has been 'transcripted' in the latter.[4]

10. Moreover, and lastly, the emphasis should be put on the difference between the interpretation of a treaty and its application. Even though the GCs have been concluded in 1949 they have to be applied today, by taking into account the current status of the international legal system. As the Institut de droit international has authoritatively stated in 1975, in accord with international jurisprudence, '[a]ny interpretation of a treaty must take into account all relevant rules of international law which apply between the parties at the time of application.'[5]

11. It is also important to note, in regards with the GCs that some of its final provisions (on immediate entry into force and denunciation during an armed conflict) depart clearly from the rather formalistic solutions provided for in general international law. This is due to the acknowledgment by the High Conctracting Parties that the specific subject made it necessary to adapt some of the features of the law of treaties to the needs of the protection of war victims.[6]

B. Languages (GC I: Article 55; GC II: Article 54; GC III: Article 133; GC IV: Article 150)

I. Authentic Texts

12. The language into which the treaty is drafted is most of the time, if not always, the official language employed during the negotiations. Authentic in this regard means then that the GCs couched in both French and English languages equally enshrine the true intentions of the negotiating parties.

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[4] For sake of simplicity, we will mention the corresponding VCLT articles, even though it is their customary counterparts (or even clones) which apply to the GCs.

[5] 'The Intertemporal Problem in Public International Law', Session of Wiesbaden (1975), Art. 4.

[6] See P. de La Pradelle, *La Conférence diplomatique et les nouvelles Conventions de Genève du 12 août 1949* (Paris: Éditions internationales, 1951), at 34: 'Deux catégories de dispositions ont été insérées dans les derniers articles des quatre Conventions. Les unes, se référant au droit classique interétatique, intéressent leur applicabilité ou leur durée théorique d'application. Les autres, inspirées par des considérations humanitaires, corrigent l'automatisme des premières en fixant, dans l'éventualité d'un conflit, les conditions spéciales de leur application ou de leur durée réelle.'

13. The main and striking difference between GCs and prior Geneva Conventions, as well as The Hague Regulations lies in the official languages. In this respect, the GCs are in the *Zeitgeist* for they mark the introduction of English, alongside French, as one of the official languages of the codification of IHL (the Geneva Conventions of 1929 were redacted solely in French). Admittedly, French was hitherto the main, if not the sole diplomatic language. In latter international conferences on IHL, the authentic languages would be extended to the other four official languages of the UN –Russian, Spanish, Chinese and Arabic–, in accordance with UN practice.[7] Thus the APs I-III were redacted in the six official languages of the UN (AP I: Art. 102; AP II: Art. 28; AP III: Art. 17).

14. Hence, these two languages enjoy exactly the same formal value and the *travaux préparatoires* were held in both languages with a simultaneous translation. Indeed, the working languages within a diplomatic conference are more than often the official languages of the text eventually adopted, while the reversal is not always true.[8]

15. In case of discrepancies, the customary rule as reflected in Article 33 para. 4 VCLT provides that 'the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.'[9] According to some commentators, the 'role of Article 33 is precisely to rehabilitate or maintain the unity of meaning of a multilingual treaty.'[10]

16. According to Article 33 para. 3 VCLT 'the terms of the treaty are *presumed* to have the same meaning in each authentic text'.[11] Yet, this presumption does not solve by a touch of magic wand all the doubts, uncertainties and divergences likely to stem from

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[7] See already Article 29 of the 1954 Hague Convention Convention for the Protection of Cultural Property in the Event of Armed Conflict, extending the authentic languages to Russian and Spanish.

[8] As the UNC conference in San Francisco shows wherein only English and French were the two working languages, even though the UNC is couched in five languages (thus adding Chinese, Spanish and Russian) as prescribed by the Conference itself.

[9] ITLOS, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion, 1st February 2011, at para. 57.

[10] A. Papaux, R. Samson, 'Article 33. Convention of 1969,' in O. Corten, P. Klein (eds), *The Vienna Conventions on the Law of Treaties*, (Oxford: OUP, 2011), at 872.

[11] Our emphasis.

the sheer existence of two (or even more) authentic texts in different languages. Firstly, and the very numbering of the VCLT provisions in this respect clearly shows, in order to reconcile the meanings flowing from the texts, the interpreter ought, at least tentatively, to carry on the interpretation of the provision concerned in accordance with Article 31 (general *rule* of interpretation) and subsidiarily with Article 32 VCLT (supplementary *means* of interpretation). It is only then, by resorting to the interpretation first of the text (in all the official languages), that it could be possible to ascertain the potential divergences and eventually 'reconcile' them.[12]

17. Furthermore, if no 'reconciliation' to this effect can be achieved, then Article 33 para. 4 requires adopting the meaning 'which *best* reconciles the texts, *having regard to the object and purpose*' (italics added).[13] It is not indeed by accident that this provision emphasizes this essential element of the general rule of interpretation stated in Article 31 para. 1 VCLT. As far as the GCs are concerned, this is of the utmost importance, and one can hardly underestimate, at least theoretically, the vast field of application stemming from this rule on conflict of texts in different language, by taking into account the noblest purposes of the GCs.

18. A proposal was submitted by the ICRC to establish French as the language of reference in case of different significations stemming from the two official languages, as envisaged by Article 33 para. 1 VCLT *in fine*, but the Conference rejected this proposal.[14] It can also be noted that an attempt to introduce a special rule favouring the

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[12] Our emphasis. In its recent advisory opinion, the ITLOS affirmed yet that although there was no sensible difference of meaning between the terms used in the six authentic versions of UNCLOS, '[a] comparison between the terms used in these provisions of the Convention is nonetheless useful in clarifying their meaning' (ITLOS, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion, 1st February 2011, at para. 63). See also ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections*, Judgment, 1st April 2011, para. 123.

[13] As it has been wisely observed: 'The meaning of "best" in paragraph 4 remains undetermined. According to what is one interpretation judged preferable to another?' (Papaux, Samson, supra note 10, at 882).

[14] *Actes de la Conférence diplomatique de Genève de 1949*, (Berne: Département politique fédéral, 1950) Tome II, Section A, at 25, 30, 68, 107-108.

interpretation most favourable to the victims of armed conflicts ('*in dubio pro victima*' or interpretation *pro victimis*) was abandoned.[15] Such a maxim of interpretation not confined to the question of languages and proper to IHL, would nevertheless be an interesting tool in view of the ever numerous attempts to tail down the protections provided by the GCs. It could be seen as a concretization of the principle of good faith and as one of the functions of the Martens clause seen as an interpretative aide.[16] In fact such a rule of interpretation would be adopted later in the context of human rights protection (Article 29 let. a) ACHR).[17]

II. Official Translations

19. At the request of the Diplomatic conference, the Swiss Federal Council prepared, in cooperation with the interested states, an official translation of the GCs in Spanish and Russian, [18] the Chinese delegate expressing discontent that it was not asked to the Swiss Federal Council to make also an official translation in Chinese language.[19] By the way, almost all states translated the text of the GCs in the realization of obligations arising of their municipal legislation.[20] It is unclear whether 'official translations' enjoy any particular status for the sake of treaty interpretation. They obviously do not reach to the status of 'authentic text',[21] but arguably, the fact that they were *authorized* by the Conference provide them with an aura of multilateralism and higher reliability than for purely national translations. As noted by the ICRC Commentary to AP I, purely national official translations 'are official in so far as they are established or recognized by a state; they should not be confused with official translations produced

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[15] Ibid., at 68 (P. de Geouffre de La Pradelle, Monaco).

[16] See infra MN 115.

[17] See A.F. Amaya y Villarreal, 'El principio *pro homine*: interpretación extensiva *vs.* el consentimiento del Estado', 5 *Revista Colombiana de Derecho Internacional* (2005), 337-380.

[18] 'Message du Conseil fédéral à l'Assemblée fédérale concernant l'approbation des Conventions de Genève pour la protection des victimes de la guerre du 12 août 1949,' *Feuille fédérale* (101st year, 15 December 1949), 1121-1336, at 1144.

[19] *Actes,* supra note 14, Tome II, Section A., at 368.

[20] The depository as well as the ICRC hold also a collection of national translations. These are sometimes notified by the depository.

[21] See e.g. Pictet Commentary GC I, at 402.

in accordance with the provisions of the treaty itself, as defined above.'[22] It might be useful to recall in this regard that the act of translating is more than a purely formal step for municipal purposes but has to do with the application of the normative content of the GCs since the translation of the text and Annexes of GC III in the language of prisoners of war is an obligation in order to place it 'in places where all [prisoners] may read them.'[23]

20. For practical reasons, it goes without saying that in cases of divergent meanings between one of the official languages and any of the official translations, the former will obviously prevail. In this connection, it is not superfluous to note that, as to underline the different legal status between on one side, the authentic texts, and the official translations, on the other, Plenipotentiaries' signatures were apposed on the former and not –also– on the latter. This is indeed quite understandable for states wills is enshrined in the French and English texts (*instrumenti*) and not –technically speaking– on the official translations.

C. Conclusion and Entry into Force of the GCs (GC I: Articles 56-58; GC II: Articles 55-57; GC III: Articles 136-138; GC IV: Articles 151-153)

21. The procedure regarding the making of the GCs is, as it was for the 1929 GC and as it will be for the AP I-III, articulated in two steps, namely signature firstly and ratification, secondly. Once these two phases are accomplished the GCs are ready to enter into force.

I. Signature

22. According to the Law of Treaties, the act of signature performed by a state's plenipotentiary (Article 7 VCLT), entails *a minima* the legal effect of 'adoption of a treaty' (Article 9 VCLT), which marks the formal end of diplomatic negotiations and thus its birth. In fact, as from its adoption, a treaty becomes a 'living instrument' in the realm of international legal relations; at the same time, thus, the official and definitive

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[22] ICRC Commentary APs, at 1122, para. 3890.

[23] Article 41 para. 1 GC III. See also Article 99 para. 2 GC IV as regards 'places of internment' of civilians. See Chapters 47 and 64.

text of the treaty is thereby drawn up. Authentication, on the other hand, is the act through which states participating to negotiations certify that the adopted text is truly the authentic one. In a way, they perform a notarial act, which is normally carried out by any procedure 'provided for in the text or agreed upon by the states participating in its drawing up' (Art. 10 let. a) VCLT). Alternatively, i.e. if none of the aforementioned scenarios comes true, then authentication can be carried out through either representatives' signature or by their initialling (Art. 10 let. b) VCLT) of the text or of the final act which contains it. In the case in point, the GCs provided for the signature to entail this authentication effect. The GCs have been respectively adopted by 47 votes in favour without opposition and with one abstention (GC I), 48 votes in favour without opposition and with one abstention (GC II), unanimously (49 delegations that took part to the vote, GC III) and 47 votes in favour without opposition and with two abstentions (GC IV).[24]

23. All the states invited to participate at the Conference were allowed to sign the GC and thus participate at their formal adoption. Eighteen states signed the GCs on 12 August 1949 (which has become accordingly the date of their adoption), while twenty-seven did the same on 8 December of the same year; the remaining states did so at a later stage before February 12, 1950 as stipulated in relevant GCs articles.[25] Moreover, the first three GCs were also respectively open to signature to the 'Powers not represented at that Conference but which are parties to the Geneva Conventions of 1864, 1906 or 1929 for the Relief of the Wounded and Sick in Armies in the Field' (GC I: Article 56),[26] 'to the Tenth Hague Convention of October 18, 1907, for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 1906, or to the Geneva Conventions of 1864, 1906 or 1929 for the Relief of the Wounded and Sick in

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[24] *Actes,* supra note 14, Tome II, Section B., at 522. Israel abstained from voting GC I, II and IV because of the question of the emblem (ibid.). 63 states were present at the Conference of which 4 had the status of observators. See La Pradelle, supra note 6, at 30-31.

[25] See La Pradelle, supra note 6 at 13-42; G. Best, *War and Law Since 1945*, (Oxford: OUP, 1994), at 80-179; J. Pictet, 'De la Seconde Guerre mondiale à la Conférence diplomatique de 1949', 67 *Revue internationale de la Croix-Rouge* (1985), at 9-14.

[26] 'Five States availed themselves of this opportunity, two of them having been represented at the Conference by Observers', Pictet Commentary GC I, at 403.

Armies in the Field' (GC II: Article 55) and 'to the Convention of July 27, 1929' (GC III: Article 136). The consolidated number of signatory states is the same for all the GCs and stands at 61.[27] All the GCs bear the same date of conclusion which correspond accordingly to the date of signature, i.e. 12 August 1949.

24. The adoption of a treaty marks its birth and thus, as an infant juristic act, the treaty must be protected by international law against any conduct of a signatory state 'which would defeat [its] object and purpose', before its entry into force, as provided for in Article 18 VCLT. In other words, a state which has signed the treaty before ratifying it (para. a) or a state which has already ratified it or accessed to it (para. b) must then refrain –pending its entry into force– from acts which would jeopardise its future operation. This provision surely constitutes one of the manifold applications of the principle of good faith, and it is thus applicable to the GCs too. Yet, the practical effect of this rule is diminished by two specificities of the GCs. The first is embodied in a common provision which requires the signatory parties to ratify as soon as possible the GCs,[28] thus shortening the time wherein Article 18 let. a) is deemed to apply –an issue which has become absolutely moot. The second one stems from another common provision according to which the GCs shall enter into force *immediately* (thus before the elapse of the 6-month period) if the state having ratified it (or accessed to) is party to a conflict commenced before this date.[29]

## II. Expression of the Consent of a State to Be Bound by the GCs

### (a). By Ratification

25. Article 11 VCLT, the customary status of which is undisputed, enumerates different means of expressing this paramount consent, to which the very existence of a treaty as a juristic act is subordinated. This provision is open-ended as the sheer literal interpretation clearly reveals (the last fragment of the sentence thus recites: 'or by any other means if so agreed'). As a consequence, several kinds of expression can

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[27] J. Pictet, 'The New Geneva Conventions for the Protection of War Victims', 45 *AJIL* (1951), 462-475, at 468.

[28] See infra MN 27.

[29] See infra MN 48-51.

specifically be found, ranging from signature till accession (signature, exchange of instruments, ratification, acceptance or accession, or any other set means). States thus enjoys –for they have in fact so wanted in the VCLT– a wide margin of choice which is subsequently reduced by what the given treaty has specifically designated or, failing this, by what the Parties has established during the negotiations. In any case, the consent to be bound cannot be expressed but through the (explicitly or implicitly) prescribed formalities, any other solution could not be in fact lightly presumed.[30]

26. In short, leaving aside the exchange of letters, two are the main kinds of treaties according to the modalities of expression of states consent to be bound: i.e. the long and the short procedures (yielding respectively to 'formal' and 'simplified' treaties). While the latter recognizes to the act of signature the *additional* effect of expressing state's consent to be bound, in the former, such consent is conveyed by a further act, namely *ratification*, which generally involves the participation of another (one or several) state organ.

27. Since the GCs have been concluded through the two-step procedure, ratification must be carried out for the signatory state to express its consent to be bound, thus paving the way for their entry into force.[31] One of the most striking peculiarities of the GCs with regard of ratification process is undoubtedly the prescription directed to signatory states that the 'Convention[s] shall be ratified as soon as possible.' This 'pressing recommendation'[32] made upon states pursues a two-fold purpose. The most obvious one is of course to accelerate the entry into force of the GCs, the second one, already stressed, is that the accession of non-signatory states is not possible as long as the GCs have not entered into force. By way of consequence, to speed up the ratification process was a means guaranteeing their future universality.

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[30] ICJ, *North Sea Continental Shelf (Federal Republic of Germany/Netherlands)*, Judgment, 20 February 1969, at 26-27, para. 28. However, the possibility of a tacit ratification (or accession) cannot at all be ruled out in principle; besides, the PCIJ has in the past admitted such a situation; see PCIJ, *Certain German Interests in Polish Upper Silesia (Merits)*, Judgment, 25 May 1926, at 28.

[31] ICJ, *Ambatielos case (United Kingdom* v. *Greece) (Preliminary Objection)*, Judgment, 1st July 1952 at 43.

[32] Pictet Commentary GC I (at 404).

28. As already pointed out, participating states at the Conference opted –as it was the case for the 1929 Geneva Conventions and will it be for AP– for the two-step procedure. In the case in point, the GCs explicitly specified that the two only means of expressing state consent to be bound are ratification and accession. The GCs require signatory states to deposit their instruments of ratification with the Swiss Government, i.e. the depository of the GCs.[33] Unlike other treaties, the GCs have indeed opted for the deposit of instruments related to them and not for their exchange between contracting parties. Since the GCs are a multilateral and open law-making conventions striving for being universal (which in fact they ended to be), the solution of deposit –instead of exchange– is the most suitable with their nature. The technique of direct exchange of instruments is more suitable to contract-treaties, whereby parties agree to *exchange* reciprocal performances. As it will be shown later on, the GCs enshrine values and pursue goals which transcend high contracting parties individual interests. Accordingly, the Depository (para. 2 of the common provision) is required to make a copy of each instrument of ratification and send it to all the other contracting parties. In this connection, it ought to be stressed that what is relevant is the date of the deposit of the instrument and not the authorization given by the treaty-making organ (according to the municipal law) to the Executive which must be taken into account in order to determine the date at which the state concerned has express its consent to be bound.

(b). By Accession (GC I: Article 60; GC II: Article 59; GC III: Article 139; GC IV: Article 155)

29. This means of expressing state consent to be bound by the treaty is closely intertwined with ratification insofar as in both cases we are faced with formal treaties. Since in these cases signature does not convey state consent, an additional act is thus required; hence, accession –as Article 11 VCLT clearly shows– entails the same legal effects than ratification. However, accession distinguishes itself from ratification to the extent that state concerned has not signed the treaty, in other words it has not adopted it, and this for several reasons: either –though having participated to the negotiations– it

[33] See infra MN 56-59.

refused to do so while the treaty was still opened for adoption (through signature) or it was not invited to take part to them. However, for a state to accede to a treaty it is necessary that the latter provides specifically for this possibility. In sum, it must be an 'open treaty', so that states not having signed it can subsequently become parties to it.[34] In fact, there does not exist, under general international law, an overall right, vested in any state –or other subject of international law–,[35] to become party to any treaty if the latter does not provide for it. This stems from the freedom of states in matter of treaties: in the same way that states are free to conclude treaties or to accede to them, so they are free to open them to other states not having taken part to their negotiation. As already underlined the GCs rank, by the express will of the signatory parties, among the most open international treaties.

30. As well as the 1929 Geneva Conventions, the GCs are quite obviously open conventions aiming at becoming universal,[36] which in fact ultimately they became. In accordance with common GCs' provisos in this respect, the GCs are thus open to 'any Power' not having signed them. As already stressed, a state can access to them only if they have already entered into force.[37] This requirement is consonant with the general –yet not mandatory[38]– regime of the law of treaties, for it meets the need that before an outside party (to the negotiation) may become party to a treaty, the latter must have entered into force. To this effect, signatory states must play the paramount role for

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[34] PCIJ, *Free Zones of Upper Savoy and the District of Gex*, Judgment, 7 June 1932, at 145-146.

[35] This raises the controverted question of the faculty of international organizations to access to the GCs on which see e.g. R. Kolb, *Droit humanitaire et opérations de maintien de la paix* (2nd ed., Geneva: Helbing & Lichtenhahn, 2006), at 113-114 and the references (arguing that a dynamic interpretation of the term 'Power' (*Puissances*) would permit the accession of international organizations).

[36] As authoritatively stated by the ICRC, the GCs 'draw their strength from their universality' (Pictet Commentary GC I, at 408).

[37] Additional Protocols allow for accession even prior to the entry into force (See Article AP I: Article 94; AP II: Article 22; AP III: Article 10). See M. Takemoto, 'The 1977 Additional Protocols and the Law of Treaties', in Mélanges Pictet, at 251-252 (arguing that this change reflects the evolution of the law of treaties).

[38] In fact, some multilateral treaties are open for accession the day after the treaty closes for signature. See for example the 1997 Kyoto Protocol to the UN Framework Convention on Climate Change (Art. 24 para. 1).

they are the true progenitors of the GCs. At the same time, though, in order for making real the openness of the GCs the latter provide that 'the Convention shall come into force after not less than two instruments of ratification have been deposited' (see e.g. Article 58 GC I). In fact, if the threshold would have been higher, this would have delayed the 'opening' of the GCs to the potential accessing states.

31. For historical reasons, i.e. the explosion of the number of states since 1949 (due primarily to the decolonization process), the group of accessing states to the GCs is almost two-fold compared to that of the signatory states. But a similar disproportion had already arisen with the 1864 Geneva Convention, 'probably the earliest instance in which the original parties (not all of which exist today as independent States) became so heavily outnumbered by acceding parties.' [39]

(c). By Succession

(i) i. General Remarks on the Succession to the GCs

32. Lastly, it is noteworthy to remind that another means of becoming a high-contracting party to the GCs which is not envisaged by the latter themselves, but from general international law, is that of 'succession'.[40] In other words, a new state can become party to the GCs as a result of a succession of states to treaties. This matter is regulated by customary international law, grossly codified and (largely progressively developed) by the 1978 Vienna Convention on Succession of States in Respect of treaties, whose Article 2 para. 1 (b) defines the succession of states as 'the replacement of one State by another in the responsibility for the international relations of territory' concerned. By way of consequence, the GCs, as any other 'open' multilateral treaty, can still count new parties to them, on the condition that the predecessor state (i.e. the state which has been replaced by the new state in the 'responsibility for the international relations to which the succession of States relates'

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[39] S. Rosenne, 'Participation in the Geneva Conventions (1864-1949) and the Additional Protocols of 1977' in Mélanges Pictet, at 804.

[40] See B. Zimmermann, 'La succession d'États et les Conventions de Genève', in Mélanges Pictet, at 113-123. See also E. David, *Principes de droit des conflits armés* (4th ed., Brussels: Bruylant, 2008), at 199-206.

(let. (d) of the aforementioned provision) was, at the time of the succession, party to them.

33. The Vienna Convention on Succession of States in Respect of Treaties distinguishes between different types of succession and institutes different rules for the succession to multilateral treaties according to the respective situations: (1) newly independent states –those states accessing to independence in the exercise of their right to self-determination–, (2) uniting of states and (3) separation of states. As far as newly independent states are concerned, Section 1 and 2 of Part III of the Vienna Convention provide for an opting-in system –also called the clean slate principle–, according to which a newly independent state is not considered to succeed to multilateral treaties unless it expressly affirms its intention to be bound.[41] Concerning uniting of states, the general rule allegedly applicable to the GCs is that of continuity (Article 31 to 33).[42] Finally, there is uncertainty as regards separation of states outside the colonial context (or the context of the exercise of a right to secession flowing from the right to self-determination). The rule adopted by the Vienna Conference (Article 34) provides for continuity, but it remains doubtful that the Convention reflects customary international law on this aspect.[43] Against this backdrop, some authors have advocated for the alleged automatic succession to certain limited categories of multilateral treaties, such as 'law-making'[44] or 'humanitarian' treaties.[45]

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[41] In this aspect, the Vienna Convention can be considered as reflecting customary international law on the matter. See e.g. *Case concerning the delimitation of maritime boundary between Guinea-Bissau and Senegal*, Arbitral Award of 31 July 1989, 20 *RIAA*, 119-213, at 136, para. 44. See E. Henry, 'Article 16', in G. Distefano, G. Gaggioli (eds), *Commentaire de la Convention de Vienne de 1978 sur la succession d'États en matière de traités* (Brussels: Bruylant, forthcoming).

[42] A.-L. Graf-Brugère, 'Article 31' in Distefano, Gaggioli, supra note 41.

[43] See e.g. International Law Association, *Rio de Janeiro Conference (2008): Aspects of the Law of State Succession, Draft Final Report*, at 4.

[44] See the seminal article by W. Jenks, 'State Succession in Respect of Law-Making Treaties', 29 *BYIL* (1952), 105-144.

[45] See e.g. ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 11 July 1996, Separate Opinion of Judge Shahabuddeen, at 634-639 and Separate Opinion Judge Weeramantry, at 640-655. For a critical appraisal of their arguments, see B. Stern, 'La succession d'États,' 262 *Recueil des cours*

34. While the substantive rules of the GCs are largely considered as reflecting customary international law,[46] there are still practical grounds for which it is necessary to determine with certainty the quality of party to the GCs of a new state,[47] especially given the fact that the behaviour of some new states in this respect remains sometimes unclear for a long period. Thus, for instance, at the time of writing, South Sudan has, to the authors' best knowledge, taken no action as to manifest its opinion regarding its hypothetical quality of party to the GCs.[48] This fact, as well as the frequent and sometimes long delay between the moment of the independence and the accession,[49] raises once again the important issue of the automatic (mandatory) succession to humanitarian treaties.

35. Despite this long-standing debate, it is generally held that there are no sufficient evidence of state practice and *opinio juris* to conclude to the existence of a customary rule of international law applicable to the GCs of 1949.[50] Thus, while 55 new states

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(1996), 9-438, at 176-190. See also M. T. Kamminga, 'State Succession in Respect of Human Rights Treaties,' 7 *EJIL* (1996), 469-484, at 482.

[46] See infra, Chapter 32.

[47] This is necessary for the recognition of National Societies by the Movement (see Article 4 of the Statutes of the International Red Cross and Red Crescent Movement).

[48] But see ICRC, *Annual Report 2011* (Geneva: ICRC, 2012), at 90: 'In South Sudan, the ICRC provided legal expertise to the authorities regarding their succession to the 1949 Geneva Conventions and the promulgation of the Red Cross Act.' On 11 November 2011, South Sudan notified its succession to the Oslo Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction of 18 September 1997.

[49] In the case of the Maldives, for example, the instrument of accession to the GCs occurred almost 26 years after its independence (see depositary notification of 12 July 1991). This problem could be solved by the way of acceptation of the application in conformity with Common Article 2 para. 3 and the rules on provisional application of the Vienna Convention on Succession of States in Respect of Treaties. See Zimmermann, supra note 40, at 119-122. The acceptance provided for in Common Article 2 para. 3 GC does not necessarily have to be explicit (Takemoto, supra note 37, at 256) and will have immediate effect (GC I: Article 62; GC II: Article 61; GC III: Article 141; GC IV: Article 157).

[50] A. Rasulov, 'Revisiting State Succession to Humanitarian Treaties: Is There a Case for Automaticity?', 14 *EJIL* (2003), 143-171, at 167.

have declared themselves bound by the GCs by virtue of state succession,[51] only a handful of them have expressed the opinion that they are bound as an automatic consequence of the ratification by the predecessor state.[52] The majority have declared themselves bound in vaguer terms, thus leaving open the hypothesis that they became parties not through automatic succession, but pursuant to the exercise of their right to opt in. Such states as Togo, Dahomey (Benin), Ivory Coast, Congo (Léopoldville), Mauritania, Nigeria and Upper Volta thus declared that they *confirmed* their quality of parties, implying that they could have *infirmed* it.[53] On the other side, arguably 51 new states that could have have claimed to *succeed* to the GCs,[54] –either by way of the alleged automatic succession or through their right to opt in–, have rather chosen to *access* to the GCs.

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[51] The practice related to the GCs up to 1968 has been digested by the Secretariat of the ILC in 'Succession of States to Multilateral Treaties: Studies Prepared by the Secretariat', Doc. UN A/CN.4/200/REV.2 and A/CN.4/200/ADD. 1 and 2, in *Yearbook of the International Law Commission* (1968-II), 1-87, at 32-54. All the notifications of the depository from 1977 on are available online: www.eda.admin.ch/depositary. Prior to this date, the content of notifications related to the status of the GC can be found in D. Schindler, J. Toman, *The Laws of Armed Conflicts* (4th ed., Leiden: Martinus Nijhoff Publishers, 2004), at 635-693. See also the information in ICRC, supra note 48, at 505-512.

[52] See e.g. the notification of the depositary of 12 June 1978 relating to Tonga. According to its declaration, Tonga 'considers itself bound by the four [GC] … *in virtue* of their former ratification by the United Kingdom' (italics are ours). See also the declarations of Tuvalu, Grenada (notification of 8 may 1981) or Samoa, according to which Samoa 'has declared that it considers itself bound by the four Geneva Conventions … *in virtue of the ratification of these Conventions by New Zealand*.' (italics are ours).

[53] ICRC, *Bericht über die Tätigkeit des internationalen Komitees vom Roten Kreuz: 1962*, (Geneva: ICRC, 1963), at 59-60.

[54] Qatar does not consider though that the end of its status as protected state should be deemed as a case of state succession (CR 2000/17, p. 15). Lithuania, Latvia and Estonia, while accessing to the GC of 1949, have parrellely issued a declaration of continuity with regards to the 1929 Conventions (see depositary notifications of 10 February 1992). This fact reflects the thesis of the (resurrected) continuity of the Baltic countries after the collapse of the USSR (see e.g. M. Koskenniemi, M. Letho, 'Succession d'États dans l'ex-U.R.S.S., avec examen particulier des relations avec la Finlande,' 38 *AFDI* (1992), 179-219, at 190-198. On the concept of resurrection of states, see G. Cansacchi, 'Identité et continuité des sujets internationaux', 130 *Recueil des cours* (1970-II), 1-94, at 47-59.

36. The international case law relating to the question of automatic succession to humanitarian treaties is rather poor and diverging. In the *Genocide case (Bosnia Herzegovina* v. *Serbia)* the ICJ was asked by Bosnia to declare the Genocide Convention applicable to the Federal Republic of Yugoslavia as a result of automatic succession to humanitarian treaties but discarded to decide the case on this ground.[55] Whereas the arbitral jurisprudence is at least inconclusive in this regard,[56] the ICTY applied the doctrine of automatic succession to humanitarian treaties.[57]

37. The practice of the UNSC is rather poor on this matter, let alone the questions that arise as to the competence of the UNSC to adjudicate on the applicability of IHL in concrete situations. Thus, while the UNSC has been growingly involved in the implementation of IHL, it generally favors broad statements regarding the obligation of involved actors to respect IHL, rarely mentioning specific instruments in its resolutions as was recently illustrated in the case of South Sudan.[58] A case that

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[55] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 11 July 1996, at 611-613, paras 21-23.

[56] See EECC, *Partial Award of 1st July 2003, Prisoners of War Eritrea's Claim 17*, XXVI *RIAA* (2009), 23-72, at 38, para. 35. The Commission did not apply nor envisaged the application of the rule enshrined in Article 34 of the 1978 Vienna Convention on Succession of States in Respect of Treaties (providing for continuity in cases of separation of parts of a state). This statement is not helpful as it indicates either that Eritrea is to be considered in the eyes of the Commission as a 'newly independent state' for the sake of succession to treaties to which the clean slate rule applies (Article 16 of the Vienna Convention) or that Eritrea is a separating state but that the rule of Article 34 does not reflect customary international law.

[57] See ICTY, *The Prosecutor v. Tihomir Blaškić*, Trial Chamber Decision of 4 April 1997 on the Defence Motion to Strike Portions of the Amended Indictment Alleging 'Failure to Punish' Liability, IT-95-14-A, para. 12; ICTY, *The Prosecutor v. Zejnil Delalić, Zdravko Mucić (aka 'Pavo'), Hazim Delić and Esad Landžo (aka 'Zenga'), 'Čelebići Case,'* Trial Chamber Judgment of 20 February 2001, IT-96-21-A, paras 107-115, particularly para. 111.

[58] See G. Nolte, 'The Different Functions of the Security Council with Respect to Humanitarian Law,' in V. Lowe, A. Roberts, J. Welsh, D. Zaum (eds), *The United Nations Security Council and War: The Evolution of Thought and Practice since 1945*, (Oxford: OUP, 2008), at 519-534. See also M. Roscini, 'The United Nations Security Council and the Enforcement of International Humanitarian Law,' 43 *Israel Law Review* (2010), 330-359. See, lastly, Resolution 2047 (2012) of 17 May 2012.

supports the thesis of continuity can nevertheless be found in Resolution 307 (1971) of 21 December 1971 adopted shortly after the independence of Eastern Pakistan in the context of the third Indo-Pakistani war and in which the SC '*[c]alls upon*, all those concerned to take all measures necessary to preserve human life and for the observance of the Geneva Conventions of 1949 and to apply in full their provisions as regards the protection of the wounded and sicks, prisoners of war and civilian population.'[59] This formulation implies that the SC considered that the GCs was *de jure* applicable not only in relations between India and Western Pakistan, but also between the troups of the newly established state of Eastern Pakistan and those of Western Pakistan. Putting additional weight to this thesis, Bangladesh later declared itself bound to the GCs as a matter of succession, on 4 April 1972. A comparable situation occurred as regard to Bosnia and Herzegovina.[60]

38. As regards the ICRC, in a first phase it applied the continuity thesis[61] and thus considered that the new states that had not (yet) made any declaration of continuity were nevertheless bound by the GCs.[62] But from 1964, the ICRC started to give the number of states that were *expressly* bound by the GCs[63] and from 1980 it expressed the view that only states that had taken explicit step as to their quality of parties to the GCs could be considered members of the International Conference of the Red Cross

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[59] This resolution is quoted in R. Cryer, 'The Security Council and International Humanitarian Law' in S.C. Breau, A. Jachec-Neale (eds), *Testing the Boundaries of International Humanitarian Law*, (London: BIICL, 2006), 245-275, at 255.

[60] See SC Resolution 771 (1992) adopted on 13 August 1992 (several months before the declaration of continuity issued by Bosnia and Herzegovina in 1993) '[*reaffirming*] that all parties to the conflict are bound to comply with their obligations under international humanitarian law and in particular the Geneva Conventions of 12 August 1949.'

[61] ICRC, *Bericht über die Tätigkeit des internationalen Komitees vom Roten Kreuz: 1961* (Geneva : ICRC, 1962), at 52-53 and H. Coursier, 'L'accession des nouveaux Etats africains aux Conventions de Genève,' 7 *AFDI* (1961), at 760-761.

[62] ILC, supra note 51, at 37, para. 151.

[63] ICRC, *Bericht über die Tätigkeit des internationalen Komitees vom Roten Kreuz: 1963* (Geneva, 1964), at 53.

and Red Crescent.[64] A number of the states, such as Kenya and Guinea, that the ICRC considered bound as a matter of succession later acceded to the GCs.[65]

39. Beside these elements of state practice, the authors of these lines do not have knowledge of cases where state parties to the GCs involved in an armed conflict with a new state claimed that the latter was bound by the GCs as matter of succession to treaties. The fact that a great number of new states chose to access to the GCs or made simple declarations of succession according to which no *opinio juris* can be inferred leads to a negative answer to the question of the existence of a customary rule providing for automatic mandatory succession to the GCs. In theory, these facts raise the question of the legal nature of the accession instrument in cases where the state is already to be considered a party to the treaty as a matter of state succession and the (dubious) possibility for a state to accede to such a treaty. If it considered that the law of treaties does not allow a state to access to a treaty of which it is already a party as a matter of succession, then the thesis of continuity (even with an opting-out right) is put into serious doubts… On the other side, the rare expressions of *opinio juris* have been in favour of a rule of continuity and none of these have been expressly rebutted by other states. One may also consider that there is no explicit expression of a contrary *opinio juris*. We are thus possibly in the presence of one of these situations in which the Martens' clause could play the role of 'game changer' for the rules on the formation of customary international law.[66] Such a line of arguments might provide a plausible (though doubtful) explanation of the position of the ICTY Appeals Chamber in *Delalić et al.*[67]

40. The major practical difference between cases of succession and cases of accession occurs in situations where a state neither issues a declaration of succession nor transmits a instrument of accession to the GCs at the effective date of the independence. If the state later issues an instrument of accession, the accession 'shall

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[64] See Zimmermann, supra note 40, at 118-119.

[65] ICRC, *Bericht über die Tätigkeit des internationalen Komitees vom Roten Kreuz: 1965* (Geneva: ICRC, 1966), at 62.

[66] See infra MN 116.

[67] But for R. Kolb, the rule of continuity flows from the principle of good faith (R. Kolb, 'Principles as Sources of International Law (With Special Reference to Good Faith)', 53 *NILR* (2006), 1-36, at 33).

take effect six months after the date on which [it is] received' while if it latter issues a declaration of succession, the GCs shall be deemed applicable retroactively as from the date of the accession to independence.

(ii) Succession and Accession in Cases of Contested Statehood

41. In cases of contested statehood, the instruments of accession should be deemed valid only once the state objectively exists, which is generally proven when it has been recognized by the international community. Where (intended) 'instruments of accession' are issued prior to the date of effective independence, they should be considered inexistent and therefore a new instrument should be deposited once statehood is established. The depositary of the GCs, in conformity with the law of treaties, has not been entrusted with any adjudicating function in this regard, whether in a positive way (declaring the intented accession effective) or in a negative way (declaring it void).[68] In the case where a state came to have a diverging view on such a matter, it has the possibility of bringing 'the question to the attention of the signatory States and the contracting States' (Article 77 para. 2 VCLT), which would give rise to an international dispute.

42. In the case of Algeria, thus, the Provisional Government of the Algerian Republic (GPRA) 'accessed', –Libya acting as an intermediary–, to the GCs on 20 June 1960 in the course of hostilities with France. The Swiss Federal Council transmitted the GPRA's intention to access to the High Contracting Parties, suscitating a protestation by France. Algeria's quality of state party to the GCs was thus a contentious case until the conclusion of the Evian Agreement in 1962. Arguably, Algeria was recognized as an independent state by no more that 17 states at the end of 1959 (29 states by April 1961), making any accession or succession impossible. The intented accession suscitated the objection of France, who consequently continued to consider the

[68] F. Ouguergouz, S. Villalpando, J. Morgan-Foster, 'Article 77. Convention of 1969,' in Corten, Klein, supra note 10, vol. II, at 1753. But this does not forbid the depositary to express its opinion in its quality of High Contracting Party.

Algerian War as a non-international armed conflict.[69] The ICRC's annual report thus gives an additional, and allegedly effective, date of accession of the independent state of Algeria to the GCs (3 July 1962).[70]

43. Following this practice, the Swiss Federal Council, in 1989, while informing the High Contracting Parties of Palestine's steps toward accession to the GCs, has refused to take further action, considering that it was 'not in a position to decide wether this communication can be considered as an instrument of accession in the sense of the relevant provisions of the Conventions and their additionnal Protocols.'[71]

44. A more flexible approach has nevertheless been advocated, at least as regards declarations of accession issued by movements of national liberation from the 1960's and later on, favoring the accession to the GCs.[72] This evolution later resulted in the adoption of Article 1 para. 4 AP I and 96 para. 3 AP I[73] which opens the possibility for an 'authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in Article 1, paragraph 4' to make a unilateral declaration manifesting its undertaking to apply AP I and the Conventions.

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[69] See the Swiss report of a meeting between Swiss Federal Counsellor Petitpierre and French Prime Minister Debré (Diplomatic Documents of Switzerland, DoDiS-15122 at the following address: http://dodis.ch/15122) and the *procès-verbal* of the Swiss Federal Council detailing its legal analysis (Diplomatic Documents of Switzerland, DoDiS-15122 at the following address: http://dodis.ch/15163). On the context of this intended accession, see M. Flory, 'Algérie algérienne et droit international,' 6 *AFDI* (1960), 973-998, at 981 and 987-988; F. Perret, 'L'action du Comité international de la Croix-Rouge pendant la guerre d'Algérie (1954-1962),' 86 *IRRC* (2004), at 917-951. But according to Michel Veuthey, the accession of 20 June 1960 can be deemed as a success (M. Veuthey, 'Learning from History: Accession to the Conventions, Special Agreements, and Unilateral Declarations,' in M. Vuijlsteke (ed.), *Relevance of International Humanitarian Law to Non-State Actors*, Collegium, No.27, (Bruges: College of Europe, Spring 2003), 139-151, at 143. See also, more generally on Algeria's accession to independence, J. Crawford, *The Creation of States in International Law* (2nd ed., Oxford: OUP, 2006), at 385 and 387 (with references to the works of M. Bedjaoui on the question).

[70] ICRC, supra note 48, at 507.

[71] Communication of the depositary of 13 September 1989. See also communication of 11 December 1990 and 31 July 1991.

[72] G. Abi-Saab, 'Wars of National Liberation in the Geneva Conventions and Protocols,' *Recueil des cours* (1979-IV), 353-445, at 399-403.

[73] Ibid., at 403-415.

Additionaly, in cases where instruments of accession have been communicated before the effective birth of a new state, the GCs seem to have been considered as binding as from the internationally recognized date of the emergence of the new state, without having to issue a new instrument of accession.

## III. Entry into Force (GC I: Article 58; GC II: Article 57; GC III: Article 138; GC IV: Article 153)

### (a). General Remarks

45. Article 24 of the VCLT provides information as to when and under which conditions a treaty enters into force thus deploying the entirety of its legal effects.[74] Following the same pattern as in most, if not all, of VCLT provisions, Article 24 refers primarily to either what the treaty says or, failing that, what the negotiating states have 'agreed' upon (para. 1). If no provision is contained in the treaty and no indication can be drawn from the treaty's *travaux préparatoires*, then VCLT fixes a general rule according to which the latter will enter into force 'as soon as consent to be bound [by it] has been established for all negotiating States' (para. 2).[75] Indeed, in par with Article 9 (relating to adoption), unanimity is likewise required, so that no prejudice is brought to the principle of the autonomy of will.

46. According to their relevant provisions, the GCs have come into force after two instruments of ratification had been deposited with the Swiss Government. The common –as for the content– provision of the GCs specifies, in quite an unusual way, that 'not less than two instruments of ratification.' This would mean that in case of an avalanche of deposit of instruments of ratification on the same day, then the first two would suffice to propel the GCs into force between the two (or more) first ratifying states six months after the day of notification. Unlike the vast majority of multilateral

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[74] We must add that international law admits the possibility of a provisional application of the treaty, i.e. before its entry into force (article 25 VCLT).

[75] See ICJ, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)(Preliminary Objections)*, Judgment of 11 June 1998, at 294, para. 31.

conventions, even related to the protection of human rights,[76] to international criminal law,[77] or to the conduct of hostilities[78], the Diplomatic conference fixed the lowest threshold for the GCs to enter into force (i.e. two ratifications).[79] For both practical and legal reasons, the 6-month period is necessary in order to allow the participant state to carry out all the appropriate steps (administrative, legislative, etc.) within its municipal system to put it in consonance with the international obligations flowing out of the GCs.[80] As it was the case for their adoption, the entry into force of the GCs is the same, i.e. 21 October 1950; Switzerland and Federal Republic of Yugoslavia having respectively ratified them on 31 March 1950 and on 21 April of the same year.

47. Furthermore, as regards application, a distinction must be made between those provisions which shall be applicable in peace-time[81] and those, on the contrary, which, though in force between contracting parties, depend on the fulfilment of Articles 2 and 3 for their application, the existence of an armed conflict, be it respectively international or non-international. In this respect, thus, application is disconnected

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[76] ICESCR required 35 instruments of accession or ratification (Art. 27 para. 1) as well as its germane ICCPR (Art. 49 para.1).

[77] ICC Statute required 60 instruments of ratification or ratification (Art. 126 para. 1), while the 1949 UN Genocide Convention contented itself with 20 (Art. XIII).

[78] For instance: The Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (20 instruments according to its Article 5 para. 1) or the Oslo Convention on Cluster Munitions (30 instruments according to its Art. 17 para.1).

[79] In this connection it is noteworthy to recall that the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, needed only 5 instruments of ratification or accession for its entry into of force (Art. 33 para.1).

[80] See infra Chapter 31.

[81] These include mainly Common Art. 1 (concerning the undertaking 'to respect and to ensure respect for the present Convention in all circumstances'; see Chapter 6), Art. 23 GC I and Art. 14 GC IV (establishment of hospital and safety zones and localities; see Chapter 40), Art. 26 GC I (notification of the names of societies authorized 'to render assistance to the regular medical service of its armed forces'; see Chapter 39), Art. 44 GC I (rules on the use of the emblem; see Chapter 42) and Art. 44 GC II (on distinguishing signs), Art. 47 GC I, Art. 48 GC II, Art. 127 GC III and Art. 144 GC IV (dissemination of IHL; see Chapter 29).

from entry into force since some conditions must be reunited for the former to be triggered.

(b). Immediate Effect (GC I: Article 62; GC II: Article 61; GC III: Article 141; GC IV: Article 157)

48. From the outset this scenario must be distinguished from that of provisional application as encompassed by Article 25 VCLT, insofar as in the latter case a state has not necessarily expressed its consent to be bound and can still thus 'notify its intention not to become party to the treaty' (para. 2). On the contrary, it is referred here to the obligation for the states to give immediate effect to some of the provisions of the GCs *once the state in point has already ratified it or accessed to it*, pending the six-month period set out by the GCs, *if a war has broken out in the meanwhile*. In other words, the entry into force of the GCs vis-à-vis the state concerned is merely a matter of time and it is moreover ineluctable.[82] In order for this immediate effect to take place, the Swiss Federal Council is required to effectuate the communication of 'ratifications or accessions received from Powers in a state of war … by the quickest method.' As it has been observed, the lengthy procedure established by common para. 2 ought not to be followed strictly.[83] Taking into account the circumstances, the best available (and safe) means of communication can be availed of by the Swiss Federal Council in order to communicate to the other contracting parties the deposit by the state concerned of its instrument of ratification or accession. A possible case of application could have been that of the 'accession' on behalf of Algeria by the GPRA during the hostilities with the French government.[84] If the accession had been deemed possible, the GCs should have entered into force immediately after the ratification by the GPRA.

49. The relevant common provision of the GCs establishes that '[t]he situations provided for in Articles 2 and 3 shall give immediate effect.' These two provisions envisage

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[82] In fact, a state cannot, under the Law of Treaties 'withdraw' its instrument of ratification or accession, no more than by the way it can towards its act of signature. The only way to free itself from the bounds of the treaty, consists in its denunciation, once it has entered into force.

[83] Pictet Commentary GC II, at 280.

[84] See supra MN 42.

respectively the existence of an international armed conflict or of an occupation (even without resistance) *and* the existence of a non-international armed conflict. For the *si omnes* clause has been ejected by the GCs –this was already the case with the 1929 GCs (Article 25 para. 2 of the Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field and Article 82 para. 2 of the Convention relative to the Treatment of Prisoners of War)[85]– the immediate effect, in the scenario of an international armed conflict, will take place even though 'one of the Powers in conflict may not be a party to the' relevant GC (Article 2 para. 3).

50. As for the practicalities, the GCs will enter into force at the date of the notification of its instrument of ratification (or accession) if the armed conflict (or occupation), in which the state concerned is involved, has already commenced or, inversely, at the moment when the armed conflict (or occupation) commences if the state concerned has already expressed the consent to be bound.

51. Here again, the GCs specificities break in to soften the rigid technicalities inherent to the Law of Treaties, since the principle of effectiveness and actual application –dearly to 'treaties of a humanitarian character' (Article 60 Para. 5 VCLT)– and the principle of humanity jointly command the immediate application of the GCs. The overriding of the Law of Treaties is not new, for the 1929 Geneva conventions embodied a germane proviso which mentioned 'state of war' (Articles 95 and 37 respectively). On the contrary, neither AP I nor AP II or AP III do embody such a solution. But this immediate application is arguably also applicable to the APs as their purpose is to 'supplement' (Article 1 para. 3 AP I), 'to develop and supplement' (Article 1 para. 1 AP II) or '[reaffirm] and [supplement]' (Article 1 para. 2 AP III) the GCs.[86]

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[85] On the discussion of those provisions, see *Actes de la Conférence diplomatique de Genève, Juillet 1929* (Genève: Imprimerie du Journal de Genève, 1930), at 321-330, 511 and 621-622. See also International Military Tribunal for the Far East, *Judgment of the International Military Tribunal for the Far East*, Judgment of 4 November 1948, in N. Boister, R. Cryer (eds), *Documents on the Tokyo International Military Tribunal* (Oxford: OUP, 2008), at 106.

[86] ICRC Commentary APs, at 1081, paras. 3738-3739. See also, more expressively, J.-F. Quéguiner, 'Commentary on the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem (Protocol III),' 89 *IRRC* (2007), 175-207, at 202.

## IV. Registration (Articles 64 GC I; 63 GC II; 143 GC III; 159 GC IV)

### (a). Rationale and Scope of the Provision

52. At last, Article 80 VCLT embodies the obligation –for state parties– to transmit the treaty 'to the Secretariat of the United Nations for registration or filing and recording, as the case may be, and for publication' (para. 1). But even if the treaty is governed by customary international law, UN members are at any rate required to register it with the UN Secretariat, in accordance with Art. 102 UNC, to which Article 80 VCLT implicitly refers. In sum, the obligation enshrined in Art. 80 supplements *–ratione materiae–* that provided for *–ratione personarum–* in Art. 102 UNC; it could seem today redundant, but one has to set it in 1960's when some states were not parties to the UNC. The rationale of both provisions is, as it has been authoritatively stated, 'to reinforce the fight against secret treaty-making and ensure more transparency and security in international legal relations.'[87] While Art. 80, quite understandably, does not elaborate on the possible sanctions had a treaty not to be registered, the corresponding (and older) UNC provision clearly provides that in such a case 'no party [to this treaty] may invoke [it] before any organ of the United Nations' (para. 2).

53. Without entering into details, it ought to be recalled that this UNC provision is not a novelty in international legal relations for it is the descendant of Art. 18 LoN, itself the incarnation of one of President Wilson's Fourteen Points (that related to 'open diplomacy'), purporting to eradicate secret treaties, considered to have grandly facilitated the outbreak of World War I. Yet, while pursuing the same goal, this article was even more stringent than its UNC offspring, for it provided that, failing registration with the LoN Secretariat, '[n]o such treaty or international engagement shall be binding until so registered.' Instead, the sanction arising out from the lack of registration with the UN Secretariat consists in the inopposability of the treaty concerned before the UN; in other words, a state cannot avail of the latter before any of UN organs;[88] notably the possibility of a case being brought to the ICJ in matter of

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[87] P. Klein, 'Art. 80. Convention of 1969,' in Corten, Klein, supra note 10, vol. II, at 1797.

[88] Another question (even if nowadays quite theoretical) is that of a treaty concluded between a UN Member and a non UN-Member. If the former fails to register it within the UN Secretariat, it breaches

a dispute arising out of the interpretation and application of anyone of the GCs, as by the way recommended by the Diplomatic Conference in 1949 (Resolution 1).

54. Therefore, unlike more stringent LoN's regime, '[n]on-registration or late registration, on the other hand, does not have any consequence for the actual validity of the agreement, which remains no less binding upon the parties.'[89] Actually, this cannot happen for the depository has duly registered the GCs with the UN Secretariat.

55. Prior 1929 Geneva Conventions had to be registered with the Secretariat of the League of Nations, the latter having been succeeded by the UN, it is then not surprising that the GCs must be registered with the former's Secretariat.[90]

(b). Depository Functions and Swiss Government Specific Tasks in this Regard

56. According to the aforementioned provisions, the Swiss Federal Council (i.e. Swiss Government) has been vested with the function of keeping the record of all the notifications of ratification (as well as of accession or of succession) and the eventual reservations (and their acceptations or objections) and declarations states may have appended to. The Swiss Federal Council is also assigned the task of keeping the original text of the GCs in its achives and of transmitting certified copies of their text to the 'Signatory and Acceding states' (as well as the successing states).

57. Beside registration, the depositary also usually proceeds to notify acts related to the physiology of a treaty: reservations, objections (and withdrawal thereof) and denunciation.[91] The Swiss Federal Council has been designed in times of peace to play

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Art. 102 UNC thus loosing the right to avail of the treaty before any UN organs. The question, under the LoN régime, was exhaustively discussed by the arbitral tribunal in *Pablo Nájera (France) v. United Mexican States*, Arbitral Award of 19 October 1928, V *RIAA*, 466-508, at 471, para. 6.

[89] ICJ, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility*, Judgment of 1st July 1994, at 122, para. 29. See also *Actes*, supra note 14, Tome II, Section B., at 91 (Lamarle, France): 'la communication aux Nations Unies … est une simple formalité et n'a aucun effet sur la validité des Conventions.'

[90] Similarly, AP I (Art. 101 para.1), AP II (Art. 27 para.1) and AP III (Art. 16 para.1) contain a germane provision setting out the obligation of registration with the UN Secretariat as well as the depository's function to this effect.

[91] See the list of functions as codified in Article 77 VCLT.

the role of intermediary for the communication of official translations of the text of the Conventions 'as well as the laws and regulations which [the High Contracting Parties] may adopt to ensure the application thereof' (Art. 48 GC I, Art. 49 GC II, Art. 128 GC III, Art. 145 GC IV). Additionally, in the practice, the Swiss Federal Council has issued notifications related to changes as to the use the emblems[92] and, in other (rare) cases, it has notified communications related to concrete situations of application of the Conventions.[93]

58. Historically, the Swiss Federal Council has played an important role as initiator and convenor of the all the diplomatic conferences for the adoption or revision of Geneva Conventions.[94] This longstanding practice –arguably giving rise to an exlusive right to convene the diplomatic conferences under customary international law[95]– has been later concretized into a formal responsibility, under Article 7 AP I and Article 97 AP I, –according to which the depositary has been entrusted with the function of convening of 'a meeting of the High Contracting Parties, at the request of one or more of the said Parties and upon the approval of the majority of the said Parties to consider general problems concerning the Application of the Conventions and of the Protocol.' Nothing of the kind was provided for in the GCs, with the result that those meetings should only be convoked on the request of parties to AP I.[96] Those meetings have a 'legislative' objective, with their conclusion leading potentially to amendments to AP

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[92] See e.g. notification of 9 January 1989 (Decision of the People's Republic of Bangladesh 'to use henceforth the red crescent instead of the red cross as the emblem and distinctive sign') or notification of 20 October 1980 ('decision of the Islamic Republic of Iran to use henceforth the Red Crescent instead of the Red Lion and Sun'). Article 3 para. 1 let. b) AP III echoes this practice.

[93] See e.g. notification of 29 January 1991 transmitting a note of the US Department of State to the Embassy of the Republic of Iraq at Washington, 'concerning the presence of two U.S. military hospital ships in the waters of the Arabian Peninsula.'

[94] See e.g. D. Schindler, 'Die Schweiz und das Völkerrecht,' in A. Riklin, H. Haug, R. Probst (eds), *Nouveau manuel de la politique extérieure suisse* (Berne: P. Haupt, cop., 1992), 99-119, at 103; M. Sassòli, 'La Suisse et le droit international humanitaire – Une relation privilégiée?,' 45 *Annuaire suisse de droit international* (1989), 47-71 or S. Gamma, L. Caflisch, 'La Suisse, dépositaire des Conventions de Genève,' 165 *Beilage zur Allgemeinen schweizerischen Militärzeitschrift* (1999), 7-9.

[95] Sassòli, supra note 94, at 69.

[96] ICRC Commentary APs, at 104, para. 266.

I or the GCs, rather than an 'executive' function of incrementing the implementation of AP I or the GCs –especially in cases where AP I does not formally apply. The commentary of the ICRC therefore rightly asserts that '[w]ith the expression "general problems," the Conference wished to exclude the discussion of specific situations, to which other provisions apply.'[97] Therefore, in 2006, in the context of the War in Lebanon, the Depositary refused to convene 'an urgent meeting of the High Contracting Parties "to discuss the serious breach of IHL in Lebanon by Israel".'[98] Under Article 97 AP I the depositary has even been conferred the right (and responsibility) to 'decide, after consultation with all the High Contracting Parties and the International Committee of the Red Cross, whether a conference should be convened to consider' proposed amendments to AP I (see likewise Article 24 AP II and Article 13 AP III).

59. The establishment by the state parties to AP I of a depository with highly advanced tasks, not merely of a notarial nature, but with the mission of convening such meetings, or even diplomatic conferences, and hence dealing with questions of compliance –although the depositary's tasks are to be clearly distinguished of that of Protective Power–,[99] underlines the distinctive feature of the GCs as universal law-making conventions which enshrine 'purely humanitarian and civilizing purpose' and where 'the contracting States do not have any interests of their own'.[100]

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[97] Ibid., at 106, para. 274.

[98] Notification of 12 September 2006. In this notification, the Depositary noted that '[t]he Geneva Conventions do not contain any provision on the convening or the organisation of meetings of the High Contracting Parties with a view to considering alleged violations committed in a given conflict and do not provide for a particular role of the depositary in this regard. For these reasons, and without a mandate of the High Contracting Parties, the depositary replied on 11 September 2006 that it was not in a position to convene such meeting as requested.'

[99] Sassòli, supra note 94, at 64. See generally on the role of Protective Powers, Chapter 26.

[100] ICJ, *Reservations to the Convention on Genocide*, Advisory Opinion of 28 May 1951, at. 23.

## D. Reservations

### I. General Regime

60. The topics dealt with in this section ranks among the thorny questions having excruciated ILC as well as jurisprudence for decades. It suffices to recall that notwithstanding VCLT establishes a comprehensive regime in matters of reservation, ILC felt the need in 1994 'to add [this] question to its agenda in an attempt to clarify *once and for all* the rules which are applicable to them.'[101] This is all the more meaningful when one knows that the ILC was the author of the Draft articles which formed the basis of negotiation in Vienna 1968-1969 giving birth precisely to the VCLT.

#### (a). Definition of Reservation

61. Grossly speaking, a reservation is a unilateral juristic act (i.e. a declaration) emanating from a state on the verge to become a Party to a treaty (or to adopt it), by which it aims to modify or to exclude the application of one or several of its provisions. In short, it is as if the state concerned attempted to revive –unofficially and *ex post facto*– negotiations after they have been officially ended with a view to amend the treaty. Consequently, as such, reservations generally affect multilateral treaties. In fact, as for bilateral treaties, a reservation formally signifies the official reopening of negotiations and technically it wouldn't make much sense.

62. According to Art. 2 para. 1 let. d) VCLT –and in the light of relevant jurisprudence– the definition of reservation can be broken down into two types of requirements: formal and substantive.

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[101] A. Pellet 'Article 19. Convention of 1969,' in Corten, Klein, supra note 10, vol. I, at 409. This is even more authoritative for the author has been ILC's special rapporteur, designated in 1994, to carry on precisely the clearing-up task auspiciated by the ILC. As of today, after 17 (!) years of unremitting work and on the basis of 17 (!) Special Rapporteur's Reports and one note, ILC has definitively issued a 'Guide to Practice on Reservation to Treaties,' in ILC, *Report on the work of its sixty-third session (26 April to 3 June and 4 July to 12 August 2011)*, UN Doc. A/66/10, at 12-51 and UN Doc. A/66/10, Add.1.

(i) Formal Characteristics

63. There are three cumulative formal elements making up a reservation. The first refers to its *nature*, i.e. a reservation is a unilateral juristic act since its author aims some definite legal effects accordingly envisaged by public international law. The second pertains to the *moment* of formulating it, for a state cannot formulate a reservation at any time whatsoever, but only 'when signing, ratifying, accepting, approving or acceding to a treaty' (Art. 19 VCLT).[102] This means that reservation is by all means a unilateral act which nonetheless needs a support to graft to in order to be considered as such. In short, a reservation is not a standing alone juristic act, but it must be supported (conveyed) by another act by which either the state expresses its consent to be bound by the treaty or to adopt it (or, even, both of them at the same time as in the case of a short procedure treaty). Finally, and third, is the *absence of formalism*, once again reaffirmed in the VCLT, for, as its Article 2 para. 1 let. d) makes clear, the qualification of a reservation as such is made regardless of its 'name' or wording. In other words, whatever be the label and denomination given to it by the reserving state, what it counts are the effects aimed at by the latter (i.e. modifying or excluding the application of one or several provisions of the treaty concerned).

(ii) Substantive Characteristics

64. In addition to the three formal characteristics, there is a second category itself grouping together two substantive features contributing to define a reservation. They are as well indispensable in order to qualify a state's declaration vis-à-vis a treaty as a true reservation to it. The former, which is inferred from one of the formal requirements (i.e. the moment of its formulation), focuses on the condition the reserving state poses in order to become a party to the treaty; in fact, its consent to be bound by (or the adoption of the) treaty is subject to the acceptance of its reservation. The latter, in short, becomes the condition from which depends its instrument (be it signature, ratification, accession, etc.). In this regard, the other states parties have to

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[102] See also ICJ, *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility*, Judgment, 20 December 1988, at 85, para. 35.

take a stand by either accepting or objecting, as the arbitral tribunal underlined in the *UK/France Continental Shelf case*.[103]

65. The other substantive feature attached to the qualification of 'reservation' focuses on the aim pursued by the latter, i.e. to 'exclude or modify the legal effect of certain provisions of the treaty in their application of that State' (Article 2 (d) VCLT). In this respect, the ILC' Guide to Practice shed a welcome light for it provides that '[t]he character of a unilateral statement as a reservation or an interpretative declaration is determined by the legal effect it purports to produce' (para. 1.3).[104]

(b). Validity (Admissibility) of Reservations

66. When dealing with the regime of reservations to international treaties it is of paramount importance to distinguish between the intrinsic validity of reservations (i.e. is it admissible for a state party to formulate a reservation to a given treaty) and their opposability (i.e. what are the legal effects of a reservation to the treaty and moreover what are the consequences of other states parties' reaction to it). In this section, we will explore the first question which, as it will be shown, is instrumental to the second, for an invalid reservation is generally deemed to engender no legal effects.

67. These two aspects of analysis must not be confused and must be the object of a distinct examination because the rules are different. Furthermore, every time we are faced with an issue of reservation to a treaty, we must begin by questioning its admissibility, and then move on to its eventual legal effects on the given treaty. Evidently, it is only in cases where the reservation was ruled admissible that we must pursue the analysis with opposability.

68. VCLT's solution –embodied in its Article 19–, enshrines the principle according to which a state is entitled to formulate a reservation *unless*:

(a) the reservation is prohibited by the treaty;

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[103] *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic*, Arbitral Award, 30 June 1977, XVIII *RIAA*, 3-129, at 40, para. 55. See P.-H. Imbert, 'La question des réserves dans la décision arbitrale du 30 juin 1977 relative à la délimitation du plateau continental entre la République française et le Royaume-Uni de Grande-Bretagne et Irlande du Nord', 24 *AFDI* (1978), 29-58, at 32.

[104] See also ECtHR, *Case of Belilos v. Switzerland*, Judgment, 29 April 1988, para. 49.

(b) the treaty provides that only specified reservations,[105] which do not include the reservation in question, may be made; or

(c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty

Therefore, the regime of reservations validity can be construed as follows: if the reservation is expressly or implicitly admitted by the treaty (respectively in accordance with Arts. 19 (a) or (b), then there is no need for other contracting parties to accept it (Art. 20 para. 1);[106] on the contrary, other states are free to object it (either simply or expressing their intent for the treaty not to enter into force vis-à-vis the reserving state) –the so-called radical objection (Art. 20 para. 4 (b), last fragment). On the contrary –as it is the case for the GCs–, if the treaty is silent, then the assessment of the validity of a given reservation is left to any contracting party (Art. 19 (c)).[107] The latter have then to react either by objecting (Art. 20 para. 4 (b), first fragment), accepting (Art. 20 para. 4 (a)) or objecting (and at the same time expressing the intent for the treaty not to enter into force vis-à-vis the reserving state). Likewise, according to Article 20 para. 5, 'a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by end of a period of twelve months after it was notified.' Therefore, the so-called *circumstantial silence* amounts to acceptation as for its effects. In international customary law, this period becomes 'reasonable time' having regard to the circumstances.

69. Some conventions have adopted mixed solutions. For instance, the Convention on racial discrimination establishes that a reservation will be considered contrary to the treaty's object or purpose, thus invalid, if at least two thirds of the convention's state

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[105] See also ibid. at 39-40, para. 63.

[106] Save two specific exceptions provided for in Articles 20 (2) and (3).

[107] In this respect, Combacau states that (especially) Art. 19 (c) mingles the logics of validity and that of opposability for the former depends in fact from the latter as it is ultimately either the acceptation or the objection to the reservation which decides its fate (J. Combacau, *Le droit des traités* (Paris: P.U.F., 1991) at 58-63).

parties object. This solution bridges Article 19 (b) and (c) as reveals the overlapping between the logics of validity and opposability, the former depending on the latter.[108]

(c). Opposability of Reservations

70. Whereas Article 19 governs the intrinsic validity of reservations to a treaty, Articles 20 and 21 establish the regime of their effects to the treaty (coupled with other contracting parties' reactions). In sum, and leaving aside for the moment the case of a treaty affected by a modifying reservation and an objection to it, the overall situation is quite simple. The acceptation of (or the silence vis-à-vis) the reservation by another contracting state will make the former a party to the treaty (Art. 20 para. 4) (a)). As for the provisions affected by the reservation, the latter will modify the former 'to the extent of the reservation' (Art. 21 para. 1 (a) and (b)). By all means, the treaty will not be modified between 'the other parties to the treaty *inter se*' (Art. 21 para. 2).

71. The objection to the reservation *coupled* with the specific intention 'definitely expressed' from the state therefrom to prevent the treaty to enter into force between it and the reserving state, will deprive the reserving state of any conventional links between them (Art. 20 para. 4 (b), last fragment). This is the so-called situation of a *radical* objection for it aims to strike the reserving state in its *very roots*, i.e. its quality of reserving state to become party to the treaty.

72. On the contrary, the objection to a reservation without expressing the aforementioned intention, will let the treaty enter into force between the reserving and the objecting states (Art. 20 para. 4 (b) first fragment). As for the provisions affected by the reservation concerned, they 'do not apply as between the two States *to the extent of the reservation*' (Art. 21 para. 3).[109] Through its specification, this topical provision establishes a different regime for depending on the character of the reservation: abrogative or modifying. The term 'extent' –introducing the notion of relativity for the effects sought by the reservation– is the focus. In the first case and according to

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[108] See ICJ, *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility*, Judgment, 3 February 2006, paras 77-79.

[109] ICJ, *Reservations to the Convention on Genocide*, Advisory Opinion, 28 May 1951, at 27.

Article 21 para. 3, the combined effect of the reservation and its objection leads to the deletion of the provision affected by the reservation. In the case of the modifying reservation, the result would *at first glance* appear to be the same since the measure will translate into the non-application of the provision affected by the reservation, to its extent. In reality, the situation is less clear than for the abrogative reservation.

73. In this respect, three different interpretations could be suggested: a) logical processes, favouring the reserving state and leading to the *de facto* application of the reservation; b) linguistic process, the provision in its entirety would not apply; and c) conceptualist explanation, the part of the provision affected by the reservation would not apply. First of all, according to the hermeneutic principle of effectiveness (in French 'effet utile'), it ought to attribute an effective meaning to the fragment 'to the extent of the reservation,' otherwise its insertion in Art. 21 para. 3 would have been meaningless. In a seemingly enigmatic passage, the arbitral tribunal in the *UK/France Continental shelf case*, where a French (modifying) reservation had been opposed by a UK objection, so declared:

> the combined effect of the French reservations and their rejection by the United Kingdom is neither to render Article 6 inapplicable *in toto,* as the French Republic contends, nor to render it applicable *in toto,* as the United Kingdom primarily contends. It is to render the Article inapplicable as between the two countries *to the extent, but only to the extent, of the reservations*; and this is precisely the effect envisaged in such cases by Article 21, paragraph 3 of the Vienna Convention on the Law of Treaties and the effect indicated by the principle of mutuality of consent.[110]

74. It is noteworthy to spend a few words about the scenario of a reservation formulated on a provision reflecting customary international law. Even if the reservation could be admissible under the law of treaties, thus excluding the provision in point to operate vis-à-vis the reserving state, this does not affect at all the binding nature of the customary international law rule, the content of which is similar if not identical to that

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[110] Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic, Arbitral Award, 30 June 1977, XVIII RIAA, 3-129, at 42, para. 61 (emphasis added).

of the provision concerned.[111] This effect ensues from the separatedness between these two formal sources of international law.[112] Quite intuitively, this is all more true when –unlikely event nonetheless– the proviso affected by the reservation enshrines a *jus cogens* rule.[113] The formulation of a reservation to a law-making treaty such as the GCs is of very limited effect as far as the substantive rules are concerned, for states remain bound by customary counterpart of the provision affected by the reservation and given that the GCs are universally deemed to reflect corresponding customary law rules.[114]

75. Lastly, if a state becomes party to the GCs through a notification of succession, the generally accepted rule is that the reservations are presumed to apply unless the new state expressly renounces to the benefit of the reservations (see Article 20 of the Vienna Convention on Succession of States in Matters of Treaties).[115]

### II. Regime Provided for in the GCs

76. The GCs do not contain a specific regime for reservations, –as a matter of fact, no provision whatsoever deals with the question of reservations in the GCs–, and are therefore entirely dependent on the customary regime on reservations to multilateral treaties as codified by the VCLT.[116] This solution was expressly confirmed in AP I and II, all the proposals for the introduction of specific regime having been rejected.[117] Reservations issued at the time of signature must be confirmed at the moment of ratification; unlike the accession, where the reservation is definitive by this act only. Therefore, ratifying or accessing states to AP I or II may not liberate themselves from

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[111] See ICJ, *North Sea Continental Shelf (Federal Republic of Germany/Netherlands)*, Judgment, 20 February 1969, para. 65, at 40.

[112] See likewise ILC, supra note 101, para. 4.4.2, at 498-500.

[113] Ibid., para. 4.4.3, at 500-502.

[114] See infra MN 94-97 and Chapter 32.

[115] See also G.P. Buzzini, 'Article 20,' in Distefano, Gaggioli, supra note 41.

[116] See e.g. C. Pilloud, 'Les réserves aux conventions de Genève de 1949,' 58 *Revue internationale de la Croix-Rouge* (1976), 131–149 and 195–221, at 132 and L.S. Boudreault, 'Les réserves apportées au Protocole additionnel I aux Conventions de Genève sur le droit humanitaire,' 6 *Revue québécoise de droit international* (1989/1990), 105–119.

[117] ICRC Commentary APs, at 1059-1060, para. 3666 and at 1063-1064, paras 3681-3685.

provisions of the GCs by issuing reservations to provisions of the APs that are substantially equivalent to those of the GCs.[118]

77. A certain number of reservations have been issued either at the time of signature, ratification or accession. Of the reservations issued at the time of signature, some have not been confirmed at the moment of ratification, others have been confirmed. Some reservations were also withdrawn several years after their expression.[119] Some of them are statements of non-recognition and shall therefore not be considered properly as reservations.[120] Others can rather be considered as interpretative declarations or declarations of intention or as the result of a misunderstanding. A relatively small amount of them do really have a modificatory or abrogative character and have in some cases effectively given rise to objections by third states parties (such as the USA).[121] In no case has a state refused to enter into conventional relationships with a reservatory state on the ground of a contentious reservation.

78. This is not the place for an exhaustive analysis of the reservations and the controversies that some of them have engendered.[122] Let us only remind that in some cases, controversial reservations have later given rise to developments in conventional law. Thus, reservations issued by such states as Guinea-Bissau regarding the condition for resistance movements to be recognized as combattants have paved the way to the compromissory solution of Article 44 para. 3 AP I. In another field, Israel's declaration on the use of the Red Star of David eventually led to the adoption of AP III in 2005.

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[118] J. Gaudreau, 'Les réserves aux Protocoles additionnels aux Conventions de Genève pour la protection des victimes de la guerre,' 85 *IRRC* (2003), 143–184, at 150 and R. Kolb, *Ius in Bello: Le Droit International des Conflits Armés* (2nd edn, Brussels: Bruylant, 2009), at 151.

[119] See the reservations to Article 68 para. 2 GC III (death penalty in occupied territories) issued by UK and Australia.

[120] See ILC, supra note 101, at 94-97, para. 1.5.1; Gaudreau, supra note 118, at 147.

[121] On the reservations of the USSR and other socialist states and the objection by the USA, see R.R. Baxter, 'The Geneva Conventions of 1949 Before the United States Senate,' 49 *AJIL* (1955), at 550-555.

[122] See for an almost exhaustive treatment of the question Pilloud, supra note 116.

## E. The Relationship with Previous Conventions: the Question of Treaties over Time on the Same Subject-Matter

### I. Application, Termination, Modification

79. It is material from the outset to distinguish, when dealing with relations between successive treaties in time, application from termination. Unsurprisingly, VCLT accurately differentiates these two scenarios by providing two separate rules governing them. The issue of application hierarchy of treaties over time is regulated by Article 30 whilst the topic of termination of treaties on the account of the conclusion of a treaty on the same subject matter is governed by Article 59.

80. As far as application is concerned, and leaving aside as irrelevant in the case in point the question of primacy of application of the UNC over any other international agreement, Article 30 para. 3 sets out the general rule according to which if all the states are parties to the successive treaties, then 'earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.' This regime is thus established, unless, as envisaged in para. 2 of the same proviso, none of the treaties in point specifies 'that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty.'

81. Leaving aside the specific scenario of Article 103 UNC, relating to UN obligations, there is another exception to the 'later treaty' rule, i.e. that encompassed by Article 30 para. 2. This exception is familiar to the Law of treaties to the extent that it embodies the logical approach pervading the VCLT, for it envisages the scenario in which one of the treaties –within the series over time– establishes which of them (itself or another one among them) shall prevail if there is any incompatibility between them (so that in the series of successive treaties there is indicated by the states a *superior treaty*). Alternatively, this same paragraph sets another possibility, i.e. that anyone of the successive treaties 'specifies … that it is not to be considered as incompatible with an earlier or later treaty.' As it is apparent, this solution is founded upon the (collective) will specifically expressed in the treaty thus derogating to the general

régime established by the VCLT in Art. 30 paras 3 and 4 which will be dealt with right away.[123]

82. Hence, provided that we are not in the scenario depicted by these two exceptions, the application of the principle set out in Article 31 para. 3 leads us to two different hypotheses. Either all the parties to the earlier treaties are also parties to the latter (identity of the parties scenario), so that the first treaty 'applies only to the extent that its provisions are compatible with those of latter treaty,' or (non-identity of the parties), some of the parties to the earlier treaty are not parties to the latter. In this case, according to para. 4, 'as between State Parties to both treaties the same rule applies as in paragraph 3' (a), while 'as between a State Party to both treaties and State Party to only one' of them, 'the treaty to which both States are parties' will apply between them (b).

### II. Relationship with Prior Hague Conventions and the 1929 Geneva Conventions[124]

83. Now, as far as abrogation is concerned, Article 59 envisages that the abrogation of a prior treaty by the conclusion of a later one can result either by an express stipulation in the latter or by, failing such provision, if such an intention from the Parties can be 'otherwise established' (para. 1 let. a)). Alternatively, the conclusion of the later treaty can yield to the termination of the prior treaty if 'provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time' (let. b)). As far as the first case in point is concerned, VCLT solution is in phase with its other provisions, i.e. either an explicit provision contained in the treaty or states parties' intention to abrogate the earlier treaty. In this last scenario, as elsewhere in germane VCLT provisions, the burden of proof is placed on the shoulders of the state which alleges it. The second subsection, instead, puts the emphasis, failing the fulfilment of the conditions set out in the previous paragraph, on the intrinsic radical incompatibility of the earlier treaty provisions with those embodied in the later ones. By virtue of this, a tacit abrogation of the prior treaty is

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[123] In this vein, an agreement concluded by a UE Member state which is incompatible with EU Law: CJEC, *Ålhström v. Commission*, Judgment, 27 September 1988, C-89/85, para. 16-17.

[124] See also Chapters 33 and 51.

thus implied. In the *Franciska case*, brought in 1855 before a British Prize Court, the tribunal envisaged precisely the possibility of an implied revocation on the account an 'absolute incompatibility,' though making clear that the presumptions run against this kind of revocation, for if the Parties wished to abrogate the treaty they normally do it explicitly through the insertion in the later treaty of revoking clauses.[125] In this connection it ought to be underlined the similarities and differences between this provision and Art. 30 VCLT, i.e. the rules governing the application of treaties over time. Quite obviously, the two provisions regulate two different phenomena related to the Law of Treaties, leaving aside the two (alternative) hypothesis enunciated in the first section of Article 59 para. 1, it remains rather awkward to distinguish the ordinary incompatibility (envisaged in Article 30) thus leading to the mere inapplicability of the earlier (or inferior) treaty *and* the radical incompatibility (envisaged in Art. 59 para. 1 let. b) thus leading to its abrogation. The effects in point are sufficiently different to justify an adequate and cautious analysis with a view of determining which of them is the more appropriate.

(a). Hague Conventions (1899 and 1907)

84. As its Article 58 sets out in an uncontroversial manner, the GCs II 'replaces the Xth Hague Convention of October 18, 1907, for the adaptation to Maritime Warfare of the principles of the Geneva Convention of 1906, in relations between the High Contracting Parties.' We are clearly faced to an example of application of aforementioned Article 59 para. 1 let. a) VCLT. Since nowadays all states parties to the X$^{th}$ 1907 Hague Convention are parties to GC II, then the latter definitively applies in the relations between high contracting parties.

85. The situation is different as regards the relations between GCs III and IV and the Hague Regulations. According to the relevant provisions of GC III and GC IV, these instruments are respectively designed to be 'complementary'(Article 135 GC III) and to 'be supplementary' (Article 154 GC IV) to the relevant Chapters and Sections of the Hague Regulations. The slight difference of wording –only in the English text–

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[125] Quoted in Lord Arnold McNair, 'L'application et l'interprétation des traités d'après la jurisprudence britannique,' 43 *Recueil des cours* (1933-I), 247-308, at 283-284.

between the relevant provisions of GC III and GC IV does not seem to have any legal consequence; the clearly expressed intention in both cases being that the new GCs should not be seen as completely 'replacing' the Hague Regulations.[126] The cautious wording used by this proviso, is in par with established international treaties' drafting techniques, insofar as it aims to stress that not only it is assumed that there is no divergence between conventions concerned but also that the later treaty is founded upon the same principles of the earlier ones.

86. As far as GC IV is specifically concerned, it ought to be noted that its scope is slightly narrower than 1907 Regulations for the latter dealt not only with the treatment of civilians but also with the conduct of hostilities, i.e. laws of war at large. Therefore, these aspects and issues are not addressed to in the GC IV unless they have an impact on the protection of civilians. In this sense, then, the term 'supplementary' must be construed so as to encompass the common scopes between GC IV and 1907 Regulations.[127]

(b). Geneva Conventions (1864, 1906 and 1929)

87. As regards former Geneva Conventions, however, GC I and III are deemed to 'replace' their prior namesake conventions although they do not abrogate them. Thus, according to its Article 59, GC I is intended to '[replace] the Conventions of 22 August 1864, 6 July 1906, and 27 July 1929, in relations between the High Contracting Parties' while GC III 'replaces the Convention of July 27, 1929, in relations between the High Contracting Parties.' As pointed out before, unless an explicit intention can be found, the 'replacement' of the 1929 Convention by GC I and GC III does not amount to the former's abrogation.[128] Therefore, states parties to both of them are simultaneously

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[126] Pictet Commentary III, at 636; Pictet Commentary IV at 613.

[127] R.T. Yingling and R.W. Ginnane, 'The Geneva Conventions of 1949', 46 *AJIL* (1952) at 417: 'Thus, those articles of the Hague Regulations (such as Articles 43 and 55) which have no counterpart in the Civilian Convention continue to bind states which are parties to both the Hague and Geneva Civilian Conventions. And states which are bound by the Hague Conventions, but not by the Civilian Convention, will remain subject to the Hague Regulations relating to occupied territory.'

[128] Pictet Commentary GC I, at 407; Pictet Commentary GC III, at 636.

bound by them and in the event of conflicting provisions, prior Geneva conventions will then bow before subsequent ones.

F. Denunciation (Article 63 GC I; Article 62 GC II; Article 142 GC III; Article 158 GC IV)

I. Regime

88. There are many reasons why a treaty would come to termination or a party may withdraw from it; obviously, one of them is that the treaty will cease to be applied 'in conformity with [its] provisions' (Article 54 let. a) VCLT). The solution embodied in the GCs –and reiterated in AP I (Article 99), AP II (Article 25) and AP III (Article 14)– pertains to this provision. In this regard, the GCs appear to be rather old-fashioned especially if one takes into account that they clearly are law-making treaties, i.e. establishing general and abstract rules of behaviour. Therefore, at least under this angle, the GCs are not really innovative for they leave unaffected the High Contracting Parties' primeval right to liberate themselves from them.

(a). Legal Effects

89. According to the Law of treaties, denunciation is indeed a means by which a state party to a treaty show its intention not to be bound anymore by the treaty in point. Since the GCs are multilateral treaties, the denunciation by one (or some of the) Party will not lead of course to their termination but to its withdrawal from the GCs. Therefore, the legal effect of denunciation bears upon the status of the state as party to the GCs and not on the very existence of the latter, as para. 4 of the corresponding provisions rightly affirm, mirroring Article 70 para. 2 VCLT. In other words, the denunciating state merely terminates its participation to the treaty in point, without affecting the latter's existence; as it has been maintained, withdrawal ultimately consists in a termination limited *ratione personarum*.[129] The breakdown of a multilateral treaty into a set of bilateral treaties founded upon the strict principle of reciprocity allows the denunciating party to withdraw from this 'network of bilateral

[129] F. Capotorti, 'L'extinction et la suspension des traités,' 134 *Recueil des cours* (1971-III), 417-588, at 465.

treaties linking states parties two by two,'[130] thus rendering possible the survival of the treaty between the other parties.

90. Albeit its neutral and uncontroversial formulation, common para. 4 hides one of the most shining conquest of IHL purported by the GCs, namely the repudiation of the *si omnes* clause.[131] It was introduced (in the 1868 Saint Petersburg Declaration and later in the II$^{nd}$ and III$^{rd}$ 1899 Hague Conventions) in order to ensure a perfect equality between belligerents in the same conflict.[132] Indeed, unlike prior Geneva and The Hague Conventions, 1929 GC adamantly ejected this clause (by its sheer absence and by the introduction in the 1929 GC of the undertaking to respect the Conventions 'in all circumstances'[133]), not only on humanitarian grounds but also on the account of its adherence to the Law of Treaties as codified in Articles 54 to 56 and 70 para. 2 VCLT, thus renouncing hereby to one of the (hardly praiseworthy) peculiarities of the conventions dealing with the law of armed conflicts. In fact, notwithstanding its tag 'solidarity clause,' the latter enshrined a negative value for its operation led to make the treaty concerned dormant between states parties to it for the sole involvement in the conflict of a state which was not party thereto. On the contrary, the aforementioned principle of reciprocity renders blissfully ineffectual the *si omnes* clause.

91. This notwithstanding, the issue of the denunciation of the GCs remains (and is hopefully bound to remain) a moot one for, until now, no state has ever dared to withdraw from any of the GCs, as well as from prior ones.

(b). Procedure

92. In par with the traditional regime set up by centuries of treaty-drafting, the GCs establish a specific procedure for the right of denunciation to be implemented by a

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[130] H. Ascensio, 'Article 70. Convention of 1969,' in Klein, Corten supra note 10, vol. II, at 1601.

[131] In fact only GC II had the effect of 'abrogating' the *si omnes* clause of Article 18 of the 1907 Hague Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva whereas GC I and GC III only confirmed the previous corresponding provisions of 1929 and GC IV was new.

[132] See S. Watts, 'Reciprocity and the Law of War,' 50 *Harvard International Law Journal* (2009), at 397-398 and 417.

[133] C. Focarelli, 'Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?', 21 *EJIL* (2010), 125-171, at 130-131.

state party. On one side, it must be noted that the withdrawal will take effect one year after the notification of denunciation. This time extension is consonant with traditional practice, too. On the other side, and here the GCs clearly depart from the orthodox path, if 'a denunciation of which notification has been made at a time when the denouncing Power is involved in a conflict shall not take effect until peace has been concluded, and until after operations connected with release and repatriation of the persons protected by the present Convention have been terminated' (common para. 3 of the relevant provisions). This retarded effect of denunciation –which mirrors the (opposite) scenario of the 'immediate effect' of some of the GCs' provisions after the ratification (or accession) pending the entry into force of the GCs vis-à-vis the state having notified them to the Depositary, if precisely this state is involved in a conflict– was an innovation in the general international law of the time.[134]

93. In par with consolidated Law of treaties, the denunciation must be notified in the written form, as for any other procedural acts related to invalidity, termination and suspension. Unsurprisingly, the GCs make no exception in this respect. In accordance with common para. 2, denunciations will be 'notified' to the depository which in turn will transmit them to the other contracting parties.

## II. Relationships with Customary International Law in the Same Subject-Matter

94. As common para. 4 staunchly holds, a state which has withdrawn from the GCs 'shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples….' International legal order is characterized by a plurality of sources as well as their normative equality. Yet, the foundations of their validity (and the evidence demonstrating their existence) remain distinct; so their origins and notions. The same obligation can be prescribed by two distinct norms –distinct in their form rather than their content– since they originate from two distinct formal sources, even though their content, is roughly the same. This

[134] P. Guggenheim, *Traité de droit international public* (Genève: Librairie de l'Université, 1953), tome II, at 311. But see already Article 38 para. 3 of the 1929 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field and Article 96 para. 3 of 1929 Prisoners Convention. See Chapter 3 for the temporal scope of application of the Conventions and Chapter 50 for the question of the repatriation of POWs.

is what is meant by a legal order characterized by a plurality of sources entertaining, moreover, relations among one another (or rather between the ensuing norms). This is all the more true as it is at the origin of these sources that the same authors –the states– were directly or indirectly found. In this vein, one ought to observe that the principle of plurality of sources and its consequences on the denunciation of a treaty is adamantly affirmed in Article 43 VCLT, the last fragment of which affirms that the termination of or withdrawal from a treaty 'shall not in any way impair the duty of any state to fulfill any obligation embodied in the treaty to which it would be subject under international law *independently* of the treaty'.[135]

95. In this regard, it must be remembered that, as declared by the Court in one of its landmark judgements, the Nicaragua case:

> There are a number of reasons for considering that, even if two norms belonging to two sources of international law appear identical in content, and even if the States in question are bound by these rules both on the level of treaty-law and on that of customary international law, these norms retain a separate existence. This is so from the standpoint of their applicability … It will therefore be clear that customary international law continues to exist and to apply, separately from international treaty law, even where the two categories of law have an identical content.[136]

Indeed, the identity of content (*negotium*) does not in any way affect the independence of the envelope,[137] i.e. the formal instrument (*instrumentum*) that carries it. The two sources are founded upon two different and distinct legal rationales and are thus characterized by different modalities of application. Further, they differ from each other as the validity and termination of the norms flowing therefrom. In the light of the foregoing, the existence of plurality of sources entails that a state may still be bound from a customary norm even though it has denunciated a treaty which codifies it.

96. Having regard specifically to the GCs, it is significant that the ICJ, while quoting precisely GCs' common paragraph 4, held in the same Nicaragua case that it: 'sees no

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[135] Our emphasis. See e.g. K. Bannelier, 'Article 43. Convention of 1969,' in Corten, Klein, supra note 10, vol. II, 1031-1043, at 1033-1034.

[136] ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits,* Judgment, 27 June 1986, at 95, 96 paras 178, 179.

[137] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, at 254, para. 69.

need to take a position on that matter, since in its view the conduct of the United States may be judged according to the fundamental general principles of humanitarian law ; in its view, the Geneva Conventions are in some respects a development, and in other respects no more than the expression, of such principles.'[138] Thus, in the unlikely event that a state withdraws from any of the GCs, it will nonetheless be bound by corresponding customary international law rules –the content of which has been authoritatively photographed in the ICRC CIHL Study. In this regard, one can likewise hold that these general international law rules have completed and buttressed the rules contained in the prior relevant Geneva and Hague Conventions. Therefore, even though the dissenting state is party to any of the aforementioned international agreements, it will be bound by current customary international law rules mirrored in the GCs.

97. The existence of a right of denunciation raises the (fortunately theoretical) question of the conclusion by hypothetical (denouncing) states of other treaties differing from the GCs in that they would provide lesser protection. According to the principle of *lex specialis ratione personarum*, such a treaty should be applied in priority to the GCs. But this would be absolutely precluded by the *jus cogens* quality of most of the customary rules reflected in the GCs, thus rendering any such treaty void *ab initio* (Article 53 VCLT).[139] In this connection, the Martens clause is often invoked to attest the peremptory character of the principles of IHL.[140]

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[138] ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits,* Judgment, 27 June 1986, at 113, para. 218.

[139] See David, supra note 40, at 106-114; C. Greenwood, 'Historical Development and Legal Basis,' in D. Fleck (ed.), *The Handbook of International Humanitarian Law* (2nd ed., Oxford: OUP), 1-43, at 39; Kolb, *Ius in Bello*, supra note 118, at 144-148; Sassòli/Bouvier/Quintin, Vol. I, Part I, Chapter 13, at 35. Already see e.g. P. Reuter, 'Principes de droit international public,' 103 *Recueil des cours* (1961), 425-656, at 466-467; A. Gómez Robledo, 'Le *ius cogens* international : sa genèse, sa nature, ses fonctions,' 172 *Recueil des cours* (1981), 9-217, at 179.

[140] Council of State of Belgium, *Projet de loi portant assentiment au Statut de Rome de la Cour pénale internationale*, Opinion of 21 April 1999, partly reproduced in J. Verhaegen, 'L'article 31.1.c. du statut de la Cour pénale internationale. Un autre négationnisme ?' in H.-.D. Bosly et al. (eds), *Actualité du droit international humanitaire* (Brussels: La Charte, 2001), 93-120, at 118; Constitutional Court of

G. Martens Clause, IHL's Innovative Solution

98. As already stated,[141] the denunciation of the GCs may not liberate the denouncing state of its obligations under customary international law ('usages established among civilized peoples'). Thus, the relevant provisions of the GCs (Article 63 para. 4 GC I; Article 62 para. 4 GC II; Article 142 para. 4 GC III; Article 158 para. 4 GC IV) operate as a reminder that customary international law bind the states independently of their conventional commitments. A few authors deny them any further function.[142] But the relevant provisions of the GCs, inspired from the wording of the famous Martens clause, previously inserted in the Preamble of the Hague Convention II of 1899, are conspicuously more expressive, stating that the denunciation 'shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, *from the laws of humanity* and *the dictates of the public conscience*' [our emphasis], adding thus two more potential 'sources' of those 'principles of the law of nations.'

99. Despite the considerable amount of scholarly studies on the topic, the debate in the doctrine is still ongoing as to the exact interpretation of the Martens clause.[143] Thus

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Colombia, *Revisión de constitucionalidad del "Protocolo adicional a los Convenios de Ginebra del 12 de agosto de 1949, relativo a la protección de las víctimas de los conflictos armados sin carácter internacional (Protocolo II) " hecho en Ginebra 8 de junio de 1977, y de la Ley 171 del 16 de diciembre de 1994, por medio de la cual se aprueba dicho Protocolo, proceso que fue radicado con el No. L.A.T.-040*, Sentencia No. C-225/95, 18 May 1995. See also S. Miyazaki, 'The Martens Clause and International Humanitarian Law,' in Mélanges Pictet, 433-444, at 436-439.

[141] See supra MN 94.

[142] Greenwood, supra note 139, at 34-35.

[143] See especially F. Münch, 'Die Martenssche Klausel und die Grundlagen des Völkerrechts', 36 *ZaöRV* (1976), at 347-373; Miyazaki, supra note 140; T. Meron, 'On Custom and the Antecedents of the Martens Clause in Medieval and Renaissance Ordinance of War,' in U. Beyerlin *et al.* (eds), *Recht zwischen Umbruch und Bewahrung: Festschrift für Rudolf Bernhardt* (Berlin: Springer Verlag, 1995), 173-177; P. Benvenuti, 'La Clausola Martens e la tradizione classica del diritto naturale nella codificazione del diritto dei conflitti armati,' in *Scritti degli allievi in memoria di Giuseppe Barile* (Padova: CEDAM, 1995), 173-224; V.V. Pustogarov, 'Fyodor Fyodorovich Martens (1845-1909) – a Humanist of Modern Times,' 312 *IRRC* (1996), 322-338; R. Ticehurst, 'The Martens Clause and the

we will shield ourselves behind a distinguished ICJ Judge according to whom the Martens Clause 'is not easy of interpretation.'[144] But let us insist that the 'reminder' thesis is presently the lowest common denominator, being the only generally accepted interpretation of the Martens clause in the GCs. There is though a consensus that the principles alluded to in the Martens clause pertain at least to the material, as opposed to formal, sources of IHL.[145] There seems also to be agreement that the clause does not amount to the addition of a new formal source of international law.[146] Before

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Laws of Armed Conflict,' 317 *IRRC* (1997), 125-134; V.V. Pustogarov, 'The Martens Clause in International Law,' 1 *J. Hist. Int'l L.* (1999), 125-135; T. Meron 'The Martens Clause, Principles of Humanity, and Dictates of Public Conscience,' 94 *AJIL* (2000), 78-89; A. Cassese, 'The Martens Clause: Half a Loaf or Simply Pie in the Sky,' 11 *EJIL* (2000) 188-202; R. Schircks, *Die Martens'sche Klausel: Rezeption und Rechtsqualität* (Baden-Baden: Nomos, 2002); D. Fleck, 'Friedrich Martens: A Great International Lawyer from Pärnu,' 10 *Baltic Defence Review* (2003) 19-26; C. Swinarski, 'Articulation entre le droit de La Haye et le droit de Genève au lendemain des conférences de 1906 et de 1907,' in Y. Daudet (ed.), *Actualité de la Conférence de La Haye de 1907, Deuxième Conférence de la Paix*, (Leiden / London: Martinus Nijhoff Publishers, 2008), 259-271, at 268; M.N. Hayashi, 'The Martens Clause and Military Necessity,' in H.M. Hensel (ed.), *The Legitimate Use of Military Force: The Just War Tradition and the Customary Law of Armed Conflict* (Aldershot: Ashgate, 2008), 135-159; T. Rensman, 'Die Humanisierung des Völkerrechts durch das *ius in bello* – Von der Martens'schen Klausel zur "*Responsibility to Protect*",' 68 *ZaöRV* (2008), 111-128; M. Salter, 'Reinterpreting Competing Interpretations of the Scope and Potential of the Martens Clause,' *Journal of Conflict & Security Law* (2012), 1-35; J. von Bernstorff, 'Martens Clause,' in R. Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (Oxford: OUP, 2012), Vol. VI, 1143-1146.

[144] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, Dissenting Opinion of Judge Shahabuddeen, 8 July 1996, at 405-406.

[145] See e.g. IACHR, *Barrios Altos Case – Chumbipuma Aguirre and Others* v. *Peru, Merits*, Judgment of 14 March 2001, Concurring Opinion of Judge Cançado Trindade, para. 25.

[146] ICTY, *The Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Kupreškić, Dragan Papić, Vladimir Šantić*, Trial Chamber, Judgment, 14 January 2000, IT-95-16-T, para. 525. See already the position of the US government in the 'Memorandum of Reservations of the USA' appended to the report of the 'Commission on the Responsibility of the Authors of the War and on Enforcement of Penalities,' 14 *AJIL* (1920), at 147. See also the positions of various states in the framework of the advisory proceeding on the legality of the threat or use of nuclear weapons synthesized in Ticehurst, supra note 143. In this sense, see already G. Schwarzenberger, *The Frontiers of International Law* (London: Stevens & Sons Limited, 1962), at 261 and 264-269. See though ILC, *Summary Records of*

trying to cast light on the unfathomable outreach of the Martens clause, by distinguishing and dealing with the different interpretations of the clause that have been advanced in state practice and in the doctrine, it is adequate to replace the clause in its wider legal and historical context.

I. Origins and Context of the Adoption of the Clause

100. Even though a fragmentary avatar can be found in the 1869 Saint-Petersburg Declaration's 'lois de l'humanité',[147] the clause originated in The Hague first Peace Conference of 1899 and was inserted in the Hague Convention (II) with Respect to the Laws and Customs of War on Land. On the genesis of the clause[148], it has been noted that the 'Russian publicist did not intend also to envisage the possibility of considering "the laws of humanity" and the "dictates of public conscience" as distinct sources of law. He used loose language for the purpose merely of solving a diplomatic problem,' i.e. the levies en masse by the population while the territory is already occupied by the invader.[149] In order to avert the fiasco of the Conference –as it had happened for the same reason in Brussels (1874)– the chief of the Russian delegation designed this clause so that, even though this specific scenario of levies en masse was not governed by the Convention (II), 'populations and belligerents (were) to remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience', –which meant concretely that the *franc-tireurs* could no longer be summarily executed.

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*the Meetings of the Forty-Sixth Session*, 2 May-22 July 1994, *Yearbook of the International Law Commission*, 1994, Vol. II(1), at 6, para. 42 (Tomuschat): 'General international law comprised rules of customary law, which in turn derived from practice and *opinio juris*. … General international law had a second source, the dictates of the conscience of mankind (the Martens clause), as underlined by ICJ in its judgment in the Corfu Channel case and the advisory opinion it had delivered in connection with reservations to the Convention on the Prevention and Punishment of the Crime of Genocide.'

[147] See also the Article 14 of the *Tratado de Armisticio* of 1820 between Spain and Colombia according to which the parties engage themselves to conclude 'un tratado que regularice la guerra conforme al derecho de gentes, y a las prácticas más liberales, sabias y humanas, de las naciones civilizadas.'

[148] On the preparatory works and the genesis of the clause, see Cassese, supra note 143.

[149] Ibid., at 201-202.

101. Volontarists –majority at the time– saw the rapporteur copy and somewhat shook its spirit and structure, pervading it with a hybrid approach. It resulted into a originally jusnaturalist provision filtered through the volontarist sieve. The limited purposes and scope of the clause was clearly construed by contemporary jurisprudence,[150] in spite of a few dissenting –yet authoritative– opinions.[151] Another prominent delegate at both Hague Conferences, Baron Decamps, for instance, later indicated in a very straightforward fashion that he saw in it more than a verbose slogan designed to reach an empty diplomatic compromise. During the drafting of what would finally become Article 38 para. 1 let. c) of the PCIJ Statute, to avoid the *non liquet*, the Committee of Jurists considered a third pit[152] in which to look for rules to resolve the conflict and thereby accomplish the goal, namely the 'general principles of law recognized by civilized nations.' In this context, Baron Descamps unsuccessfully tried to incorporate the clause in the PCIJ Statute as a general source of international law. In the course of the discussion, he referred to the principles alluded to in the Martens clause in explicitly jusnaturalistic terms–, speaking of the 'loi fondamentale du juste et de

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[150] See *inter alia* F. Despagnet, *Cours de droit international public* (3rd ed., Paris: L. Larose, 1905), at 641. See also Kolb, *Ius in bello*, supra note 118, at 125.

[151] See *inter alia* J.-C. Blüntschli, *Le droit international codifié* (translated by C. Lardy, Paris: Librairie de Guillaumin et Cie, 1870) at 280 (Article 533), 281 (Article 534), 286 ( Article 542) and 296 (Article 567); A.-G. Heffter, *Le droit international de l'Europe* (4th ed., translated by J. Bergson, Berlin/Paris: Müller/Cotillon, 1883), at 262; A. Pillet, 'Le droit international public : ses éléments constitutifs, son domaine, son objet,' 1 *RGDIP* (1894), 1-32, at 14-15; P. Fiore (*Il diritto internazionale codificato e la sua sanzione giuridica*, 4th ed. (Turin: UTET, 1909), at 533), according to whom belligerent states had to abide, in addition to treaty obligations, by the 'rational principles of International Law; by the laws of humanity; and the needs of civilization' (Article 1446; our translation). See also ibid., Article 1453. Even a volontarist positivist of the weight of Dionisio Anzilotti did not hesitate to mention the universal legal conscience about principles prohibiting slavery ('Intervention à la Commission pour la révision des Actes généraux de Berlin et Bruxelles', Paris, 1er août 1919, in *La prassi italiana di diritto internazionale. Terza serie (1919-1925)*, vol. I, Roma, 1995, p. 177). It can be noted in passing that in the celebrated *Paquete Habana* case, the US Supreme Court referred to the notion of 'an established rule of international law, founded on considerations of humanity to a poor and industrious order of men' (*The Paquete Habana*, 175 US 677).

[152] In other words, a 'topos' as evoked by G. Abi-Saab, 'Cours général de droit international public,' 207 *Recueil des cours* (1987), 9-464, at 186.

l'injuste, profondément gravée au cœur de tout être humain et qui reçoit son expression la plus haute dans la conscience juridique des peuples civilisés' –thus evoking Cicero's *recta ratio*.[153] According to other authors, these 'principles of international law' did not yet exist, thus denying the 1899 clause any norm-generating effect.[154]

102. It can be considered that the concept of general principles of law, along with the Martens clause, both being witnesses of the early XXth century's *Zeitgeist*, pertain to the last remnants of the moribund jusnaturalism vis-à-vis the triumphant volontarism. According to Quadri, the general principles of law are considered as evidence of the '*status coscientiae*' of the international Community.[155] That Martens clause and Quadri's construction of Article 38 para. 1 let. c) ICJ Statute are intimately related is

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[153] PCIJ – Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee* (The Hague: Van Langenhuysen Bothers, 1920), at 310 and 323-324. For a similar earlier explicitly Ciceronian reference, see G. Rolin-Jaequemyns, *La guerre actuelle dans ses rapports avec le droit international* (Gand: Imprimerie et lithographie de I.S. van Doosselaere, 1870), at 40. For a study of the links between the language of the clause and the doctrines of natural law, see Benvenutti, supra note 143.

[154] F. von Liszt, *Le droit international* (transl. from the 9th German ed., Paris: Pedone, 1928), at 314 (para. 40). The German added in this direction by fighting the false opinion aiming at mistaking 'les principes du christianisme et les lois de l'humanité, avec les règles positives du droit international' (at 323). Contra, rightly, Judge Shahabuddeen (ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, Dissenting Opinion of Judge Shahabuddeen, 8 July 1996, at 406), according to whom the mere literal interpretation of the verb 'remain' would indicate the pre-existence (parallel) of other rules of international law, whatever be their sources. Modern authors rightly point out that general principles of IHL count among the sources of IHL, independently from customary or conventional international law, under the heading of general principles of law. See e.g. J. L. Rodríguez Villasante y Prieto, 'Las fuentes del derecho internacional humanitario' in J. L. Rodríguez Villasante y Prieto, *Derecho internacional humanitario* (Valencia: Tirant lo Blanch, 2007), at 62; V. Lowe, *International Law* (Oxford: OUP, 2007), at 283.

[155] R. Quadri, 'Cours général de droit international public,' 113 *Recueil des cours* (1964-III), 237-484, at 351.

shown i.a. by Shabuddeen's dissenting opinion appended to the 1996 ICJ advisory opinion on the Legality of Nuclear Weapons.[156]

(a). A *Leitmotiv* of International (Humanitarian) Law

103. After its first adoption in the Preamble of the II[nd] Hague Convention of 1899 and later in the revised version of 1907, the Martens clause has been often reiterated –although with minor modernising adaptations in the drafting–, almost becoming a mantra of conventional humanitarian law,[157] and thus giving additional weight to the opinion of the ICJ according to which the clause itself has become part of customary international law.[158] In 1968, the Diplomatic Conference on Human Rights requested the Secretary General of the UN to remind the UN member states of their obligations under the Martens clause, thus officialising the nexus between Human Rights and IHL.[159] More recently, the clause has also been reproduced in the Preamble of the 2008 Oslo Convention on Cluster Munitions. At this occasion, the Diplomatic Conference stressed 'the role of public conscience in furthering the principles of humanity' and recognized 'the efforts to that end undertaken by the United Nations, the International Committee of the Red Cross, the Cluster Munition Coalition and numerous other non-govermental organisations across the world',[160] thus making plain

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[156] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, Dissenting Opinion of Judge Shahabuddeen, 8 July 1996, at 410: '… but, so far as the Martens Clause is concerned, the views of States are relevant only for their value in indicating the state of the public conscience, not for the purpose of determining whether an *opinio juris* exists as to the legality of the use of a particular weapon.' The distinguished Guyana Judge referred the same concept by resorting to the germane formula 'state of "human conscience and reason"'.

[157] See, for a list of IHL treaties including the Martens clause, von Bersnstorff supra note 143, at 1144.

[158] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, at 260, para. 87; ICTY, *The Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Kupreškić, Dragan Papić, Vladimir Šantić*, Trial Chamber, Judgment, 14 January 2000, IT-95-16-T, para. 525.

[159] Resolution XXIII: 'Human Rights in Armed Conflicts', in *Final Act of the International Conference on Human Rights: Teheran 22 April to 13 May 1968,* UN Doc. A/CONF./32/41, at 18.

[160] See already the Preamble of the 1997 Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction.

that the manifestation of 'public conscience' in the international realm is not a purely interstate matter –although its ascertainment might well be.[161]

104. The clause or its mention of the 'laws of humanity' under the guise of 'elementary considerations of humanity' have also widely been referred to outside the context of the law of armed conflicts. Significantly, the first reference by the International Court of Justice to the notion of 'elementary considerations of humanity' purported to allow the application in peace time of standards that had been developed in treaty law for a situation of war, using an *a fortiori* argument.[162] The notion has also been referred to in other fields of international law such as international criminal law,[163] the law of the sea,[164] the law of international civil aviation[165], or human rights of undocumented

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[161] See e.g. M. Byers, *War Law: International Law and Armed Conflict* (London: Atlantic Books, 2005), at 122: 'Most international humanitarian law treaties contain something called the Martens Clause …. International humanitarian law is, in part, what you and I and the rest of the people on this planet determine it to be.' But see the more cautious approach of K. Anderson, 'The Ottawa Convention Banning Landmines, the Role of International Non-governmental Organizations and the Idea of Internationational Civil Society,' 11 *EJIL* (2000), 91-120.

[162] ICJ, *Corfu Channel Case (Merits)*, Judgment, 9 April 1949, at 22. See P.-M. Dupuy, 'Les "considérations élémentaires d'humanité" dans la jurisprudence de la Cour internationale de justice,' in R.-J. Dupuy, L.-A. Sicilianos (eds), *Mélanges en l'honneur de Nicolas Valticos. Droit et justice* (Paris: Pédone, 1999), 117-130; M. Zagor, 'Elementary Considerations of Humanity,' in K. Bannelier, T. Christakis, S. Heathcote (eds), *The ICJ and the Evolution of International Law: The Enduring Impact of the* Corfu Channel *Case* (London/New York: Routledge, 2012), 264-291.

[163] *Attorney-General of the Government of Israel v. Adolf Eichmann*, 36 *ILR*, at 295; ICTY, *The Prosecutor v. Duško Tadić*, Judgment, Trial Chamber, 7 May 1997, IT-94-1, para. 618. See M. Salter, M. Eastwood, 'Post-war Developments of the Martens Clause: The Codification of "Crimes Against Humanity" Applicable to Acts of Genocide,' 2 *International Humanitarian Legal Studies* (2011), 250-280.

[164] ITLOS, *The M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines* v. *Guinea)*, Judgment, 1 July 1999, para. 155. See also ITLOS, *The "Juno Trader" Case (Saint Vincent and the Grenadines* v. *Guinea-Bissau), Prompt Release*, Judgment of 18 December 2004, para. 77.

[165] Resolution of the Assembly of the ICAO A25-1, *Amendment to the Convention on International Civil Aviation (Article 3 bis)*, 10 May 1984, Preamble: '*Having noted* that in keeping with elementary considerations of humanity the safety and the lives of persons on board civil aircraft must be assured.' Resolution of the Assembly of the ICAO A33-1, Declaration on misuse of civil aircraft as weapons of destruction and other terrorist acts involving civil aviation: '*Witnessing* the abhorrent terrorist acts

migrants.[166] Indeed, many authors consider that the Martens clause extends its scope in the whole spectrum of international law.[167]

(b). Impact of the Specific Place and Wording of the Clause in the GCs of 1949

105. While it is found in the Pramble of the 1899 Hague Convention II or Article 1 para. 2 AP I and again in the Preamble of AP II, the Martens clause is located in the final provisions of the GCs –that are devoid of preamble. Over the years and through codifications over time, the original clause, born out to meet a specific uncovered need resulting from the conduct of hostilities ended up encompassing all the cases not (or not sufficiently) governed by treaty rules. Article 1 (2) AP I clearly belongs to this category. On the contrary, its field of application seems to be different compared to that of the GCs which refer to the clause in the scenario of denunciation and not in general, i.e. 'in cases not covered by this Protocol ….' In other words, it may be tentatively argued that while in the AP I (and in The Hague Conventions), the clause pursues the goal of supplementing treaty obligations by referring to custom, humanity and public conscience, in the GCs, on the contrary, the clause addresses a specific need, arising out of their denunciation by a state party: the latter, though liberated from treaty obligations remains under the empire of other sources and constraints.

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which occurred in the United States on 11 September 2001 resulting in the loss of numerous innocent lives, human suffering and great destruction; … *Recognizing* that such terrorist acts are not only contrary to elementary considerations of humanity but constitute also use of civil aircraft for an armed attack on civilized society and are incompatible with international law' and further 'The Assembly … 1. *Strongly condemns* these terrorist acts as contrary to elementary considerations of humanity, norms of conduct of society and as violations of international law.'

[166] IACtHR, *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03, 17 September 2003, para. 47 (submission of Mexico summarized by the Court). See also the Concurring Opinion of Judge Cançado Trindade, para. 29.

[167] Zagor, supra note 162, at 287; Münch, supra note 143, at 349; Lord Wright of Durley, 'Foreword,' in United Nations War Crimes Commission (UNWCC) (ed.), *Law Reports of Trials of War Criminals* (London: His Majesty's Stationary Office, 1947-1949), Vol. XV, at xiii. As regards international environmental law, see D. Shelton, A. Kiss, 'Martens Clause for Environemental Protection,' 30/6 *Environmental Policy and Law* (2000), 285-286.

106. One can wonder whether any sensible consideration on its function and nature can be inferred by the different location of the Martens clause in different instruments. Therefore, while in the preamble the clause would be deemed to operate *failing* any regulation by the treaty (this was by the way one of the pristine roles of the clause in 1899), in the GCs, it could be argued that the clause would be triggered only by the denunciation and thus it would be applicable solely to the denunciating state. In the same vein, can we reasonably assume that, as for AP I, if a state withdraws from it, it is not bound any more by the Martens clause (for its lack in the denunciation provision); and conversely, that state parties to the GCs are not bound by the Martens since it is not in the Preamble, and for it applies to them only when they withdraw from the GCs?[168] A negative answer is commended by the established customary character of the Martens clause. Following a black-letter law reading, it is furthermore sound to assume that since AP I completes the GCs, then for a state party to both of the treaties, Martens clause eventually deploys both functions (withdraw and supplementing the two treaties).

107. By a weird reversal of location, this clause –quintessential to IHL– is relegated, without nonetheless affecting its status and impact, in the Final provisions. Besides, as already pointed out, the latter has come to play the role of a Preamble, as a Postscript. It could however be argued that the decision to transfer the Martens clause, altogether with that of not contemplating a preamble, denotes the intention to envisage the former as being a truly norm-generating principle. In fact, no few are the authors who consider the Preamble as not appropriate as to contain binding prescriptions to the contracting parties, while it is unchallenged that it forms 'in addition to the text [of the treaty],' the context of the treaty 'for the purposes of [its] interpretation,' as stated in the general rule of interpretation codified in Article 31 para. 2 of the VLCT. Therefore, it will not be too bold too affirm that, according to an established rule of interpretation of the Law of treaties, full effect must be given to a provision contained in an international agreement, i.e. the so-called principle of effectiveness (*ut res magis valeat quam pereat*, or more telling, in French, the '*principe de l'effet utile*').

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[168] See likewise Münch, supra note 143, at 358. See also, F. Münch, 'A propos du droit spontané', in *Studi in onore di Giuseppe Sperduti* (Milano: A. Giuffrè, 1984), 149-162, at 161-162.

108. Although it has been suggested that the slightly different wording of the clause adopted in AP I might have an impact on the meaning of the clause, 'depriving [it] of its intrinsic coherence and legal logic',[169] it seems, according to a prominent actor and witness of the drafting process of AP I that 'a strict linguistic approach should not obscure the policy effects that were pursued and finally reached at the Diplomatic Conference.'[170]

## II. The Functions of the Martens Clause

109. As already mentioned, it goes beyond any doubt and it can hardly be challenged that the Martens clause ranks definitely among those principles, desiderata and concepts – roughly reunited under the tag 'substantive source'– which irrigate and pervade norms of IHL.[171] While, as the ICJ famously stated in the *South West Africa Cases*, 'it is necessary *not to confuse the moral ideal with the legal rules intended to give it effect*'[172], it has been held by numerous authors that the Martens clause play a specific role in the relationships between positive international law and natural law or morals. Therefore, according to these writers, the clause would play the role of a catalytic agent –the positivation of the 'Radbruch formula' in the international legal order?–

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[169] Meron, 'The Martens clause,' supra note 143, at 81. See also in this respect: Cassese, supra note 143, at 209. Indeed, one cannot but share what this late authority wrote: 'The restrictive wording of the Preamble of the Second Additional Protocol only reflects the recalcitrance of the States gathered at Geneva in 1974-1977 in extensively regulating internal armed conflicts' (ibid., at 210).

[170] Fleck, supra note 143, at 24.

[171] See *The Flick Trial* in UNWCC (ed.), supra note 167, Vol. IX, at 33.

[172] ICJ, *South West Africa Cases (Liberia and Ethiopia v. South Africa) (Second Phase)*, Judgment of 18 April 1966, paras 50, 52, at 34, 35 [emphasis added]. See also ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, at 34, para. 49: 'The Court must now turn to certain questions of a wider character. Throughout this case it has been suggested, directly or indirectly, that humanitarian considerations are sufficient in themselves to generate legal rights and obligations, and that the Court can and should proceed accordingly. The Court does not think so. It is a court of law, and can take account of moral principles only in so far as these are given a sufficient expression in legal form. Law exists, it is said, to serve a social need; but precisely for that reason it can do so only through and within the limits of its own discipline. Otherwise, it is not a legal service that would be rendered.' Zagor rightly penned this passage as 'somewhat anomalous' (Zagor, supra note 162, at 279).

allowing for certain moral imperatives to be filtered into positive law.[173] For Tomuschat, for example,

> The Martens clause shows that there exists no watertight dam separating law and morals. In situations of extreme gravity, moral principles may convert themselves into positivist law if that law does not provide for the necessary instruments to deal with the situation at hand. It may well be that the drafters of the Clause were not aware of its potential impact and that its actual text was the result of a diplomatic settlement.[174]

110. But caution is also to be commended in order not to stretch too far the scope of the clause.[175] While the clause has historically played a great role as to the development of IHL, there is no certainty that future invocations will necessarily receive general acceptance. According to certain authors, the principles alluded to in the clause could only be ascertained through 'deductive logic' from established positive law.[176] While this has not necessarily been the case in the past, reference to established rules

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[173] In 1911, an authority so construed the Martens clause, that having in mind the incompleteness of the Laws of War '… it is necessary to appeal to the best customs of the best peoples, and even to supplement and modify them by moral considerations, in order to fill up the gaps in the laws of war….' This author speaks then of a method which he will resort to in order to expound this body of international law (T.J. Lawrence, *The Principles of International Law* (4th ed., London: McMillan & Co., Limited, 1911), at 395). See also Dupuy, supra note 162, at 127; Salter, supra note 143, at 31; Ticehurst, supra note 143, at 134 and Pustogarov, 'The Martens Clause,' supra note 143, at 132 (writing of the clause as a 'connecting link between positive and natural law') See also Kolb, *Ius in bello*, supra note 118, at 123-124 and A. Favre, *Principes du droit des gens* (Paris/Fribourg: L.G.D.J./Éditions universitaires de Fribourg, 1974), at 718, both using the terms of 'positivation' of moral norms.

[174] C. Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century. General Course on Public International Law,' 281 *Recueil des cours* (1999), 9-438, at 356.

[175] Meron, supra note 143, at 88 (stating that '[t]he Martens clause does not allow one to build castles of sand').

[176] See e.g. A. Shibata, 'The Court's Decision *in silentium* on sources,' in Bannelier, Christakis, Heathcote, supra note 162, at 207. According to Shibata, the general principles contained in the ICJ's 'elementary considerations of humanity' are grounded on 'deductive logic' by reference to conventional law and therefore 'are not natural law principles or principles of ethics or morality.' See also Cassese, supra note 143, at 207.

applicable in other fields such as human rights law might be a good way to build a solid argument on the clause.

111. Summing up, the differing functions of the Martens clause within the GCs and IHL at large can be grouped under three general categories, namely the use of the clause as an interpretative tool, the clause as a principle enshrining substantive standards[177]; the first of these being the already mentioned 'reminder of customary international law' function.

(a). The Thesis of a Simple *renvoi* to CIL

112. By reaffirming that humanity is undoubtedly one of the paramount principles which irrigate and pervade whole IHL, the clause pursues the function of preventing that escape (Law of treaties) clauses such as Article 62 VCLT (roughly tagged as *clausula rebus sic stantibus*) might, in the light of technological evolution, impair the empire of humanity in armed conflicts. The Martens clause would thus strike at the very heart of any argument based on the evolution of the art of war as a ground of diluting or even discarding international humanitarian rules. Thus the ICJ asserted in its advisory opinion on the *Legality of Nuclear Weapons* that the clause 'has proved to be an effective means of addressing the rapid evolution of military technology.'[178] This function of the Martens Clause stresses its dynamic aspect: the principles of humanity being immutable yet their 'practical effect would vary from time to time'[179] according to the 'requirements of the public conscience.' In this perspective, the clause could be considered as a potent normative mastic purporting to fill some holes and gaps, as a result of new technologies or new manners of waging war, waiting for IHL to catch up by the usual modes of law-making (treaties and custom).

113. Therefore, the clause has the effect of discarding the application of the residual principle governing public international law according to which 'everything which is not expressively prohibited is permitted' (*Lotus*) by stressing the continuing relevance

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[177] For a different approach, see e.g. Kolb, *Ius in bello*, supra note 118, at 122-126.

[178] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, at 257, para. 78.

[179] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, Dissenting Opinion of Judge Shahabuddeen, 8 July 1996, at 406.

and specific legal weight of the general principles of IHL even in unforeseen situations.[180] In the same vein, it can arguably be said that, through the reversal of the Lotus paradigm, the clause goes beyond the prescription of Article 36 of the AP I by introducing a clear limitation on the state's freedom to resort, in the silence of the Law or faced to the latter's inaccuracy, to means and weapons not (yet) prohibited by a specific norm.

114. In fact, the clause would be redundant if its intended effect would be limited to that of 'reminder' of the binding character of customary international law. A clause with such a limited meaning would be pointless as it would simply 'restate the obvious', *viz.* a long-established and uncontroversial principle of general international law reflected in Article 43 VCLT.[181] This is attested by the discussions in the relevant Commission of the Diplomatic Conference. A much more sober drafting, with a limited reference to 'other obligations of international law,' had been proposed during the discussions at the Diplomatic Conference and was discarded; the consensus being that the proposal was unsatisfying. Rightly thereafter, the Commission decided to accept the proposal of Paul Geouffre de La Pradelle (Monaco) to insert the slightly modified text of the Martens clause in the provisions related to denunciation.[182] The principle of effectiveness thus requires giving full effect (or a 'value-added' effect) to the Martens clause in addition to that deployed by the reference to general international law. Furthermore one can not see why the general and abstract formulation of the clause should preclude it from deploying legal effects, as is sometimes affirmed.[183] In this context, Telford Taylor once wrote that '[w]e do not scrap the Constitution because

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[180] See e.g., G. Abi-Saab, 'The Specificities of Humanitarian Law,' in Mélanges Pictet, 265-280, at 273-275; Miyazaki, supra note 140, at 437; Kolb, *Ius in bello*, supra note 118, at 123.

[181] But see, Å. Hammarskjöld ('Consultation de M. Å. Hammarskjöld' in CICR, *La protection des populations civiles contre les bombardements* (Geneva: ICRC, 1930), 9-51, at 24-25) according to whom the process of codification amounts to the abolition of pre-existent customary international law.

[182] *Actes*, supra note 14, Tome II, Section B., at 69 and ibid., Tome I, at 57. See also La Pradelle, supra note 6, at 35.

[183] See particularly Greenwood, supra note 139, at 34-35. But see already, H. Kelsen, R.W. Tucker, *Principles of International Law* (2nd ed., New York/Toronto: Holt Rinehart and Winston, 1966), at 114-116.

learned judges cannot agree on its interpretation.'[184] It is thus safe to assume, as was affirmed by the prosecutors in the *Hostages* case, that 'full account must be taken of' the Martens clause.[185]

(b). The Clause as an Interpretative Aide

115. The second broad function of the clause is that of a (substantive) principle of interpretation in IHL. As for the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, it is safe to affirm that the main object of the GCs is to safeguard the 'most elementary principles of morality'[186] while preserving certain circumscribed state interests and that, therefore, the GCs should be interpreted with this in mind (Art. 31 para. VCLT). The case law where the clause has been quoted thus provides evidence that the Martens clause allows for a flexible interpretation of humanitarian rules, notably by authorizing the interpreter to have recourse to interpretative tools such as analogy, e.g. with human rights law,[187] or *a fortiori* arguments[188] or ruling out *a contrario* argumentation.[189] Pierre-Marie Dupuy is thus justified in qualifying the clause as a kind of judicial 'joker'[190] –a function that does not seem to stand very far away from the jusnaturalist legacy in that it seems to allow

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[184] T. Taylor, *Nuremberg and Vietnam: An American Tragedy* (Chicago: Quadrangle Books, 1970), at 16. See also ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, Dissenting Opinion of Judge Shahabuddeen, 8 July 1996, at 410.

[185] *The Hostages Trial – Trial of Wilhelm List and Others*, in UNWCC, supra note 167, Vol. VIII, at 82.

[186] ICJ, *Reservations to the Convention on Genocide*, Advisory Opinion, 28 May 1951, at 23.

[187] *Auditeur Militaire v. Krumkamp*, 17 *ILR*, at 389-390. According to I. Brownlie (*Principles of Public International Law*, 4th ed. (Oxford: Clarendon press, 1990), at 28), 'Considerations of humanity … may be related to human values already protected by positive legal principles which, taken together, reveal certain criteria of public policy and invite the use of analogy. Such criteria have obvious connections with general principles of law and with equity, but they need no particular justification.' See also N. Ronzitti, *Diritto internazionale dei conflitti armati*, 3rd ed., Torino, 2006, at 136.

[188] *Trial of Josef Altstötter and Others*, in UNWCC, supra note 167, Vol. VI, at 58.

[189] Meron, supra note 143, at 81.

[190] Dupuy, supra note 162, at 128.

the legal operator to chose the most favorable among the differing reasonable interpretations of a rule.[191]

116. If the contention that Martens clause introduces a new formal sources inside IHL (not to speak of international law at large) must then be rebutted, it can still be legitimately argued that it '*operates within the existing system of international sources* but, in the limited area of humanitarian law, *loosens* the requirement prescribed for *usus*, while at the same time *elevating opinio* (*iuris* or *necessitates*) to a rank higher than that normally admitted.'[192] The clause has equally been deemed able to facilitate the ascertainment of customary humanitarian rules by allowing the legal actor to put enhanced emphasis on the *opinio juris sive necessitatis* element rather than on state practice, notably in the case of the prohibitions of torture[193] or serious sexual assault.[194] In the *Kupreškić* case, the Trial Chamber affirmed, with regards to reprisals against civilians, that it 'is an area where *opinio iuris sive necessitatis* may play a much greater role than *usus,* as a result of the aforementioned Martens Clause'[195] and that '*opinio necessitatis*, crystallising as a result of the imperatives of humanity or public conscience, may turn out to be the decisive element heralding the emergence of a general rule or principle of humanitarian law.'[196] Therefore, in a way, the Martens

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[191] See for the distinction between 'choses favorables' and 'choses odieuses' for the sake of interpretation in the jusnaturalist tradition: L. Ehrlich, 'L'interprétation des traités,' 24 *Recueil des cours* (1928), 1-146, at 27-28.

[192] Cassese, supra note 143, at 214.

[193] ICTY, *The Prosecutor v. Anto Furundžija*, Judgment, Trial Chamber, 10 December 1998, IT-95-17/1-T para 137.

[194] Ibid., para. 168.

[195] See ICTY, *The Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Kupreškić, Dragan Papić, Vladimir Šantić*, Trial Chamber, Judgment, 14 January 2000, IT-95-16-T, para. 527.

[196] Ibid. See also E. Wilmhurst, 'Conclusions,' in E. Wilmhurst, S. Breau, *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge: Cambridge University Press, 2005), 401-413, at 412. But see the observations of Judge David Hunt as regards the opinion of the Appeals Chamber in the case *Prosecutor v. Hadžihasanović, Alagić and Kubura (Decision on Interlocutory Appeal Challenging Jurisdiction in relation to Command Responsibility), Separate and Partially Dissenting Opinion of Judge David Hunt*, para. 39-40, in 133 *ILR*, at 54.

clause does eventually have an impact on the secondary norm on the production of primary norms (to borrow Hart's concepts and terminology) by modifying not only the threshold of evidence but, even more importantly, by insisting on the paramount role of *opinio iuris* in the formation of customary law rules, to which by the way this same clause refers too in its wording. Alternatively, it could be maintained that if the *usus* is downgraded, or even discarded in the context of the Martens clause, then it will not be inappropriate to refer to another 'source' of public international law, i.e. 'general principles of law recognized by civilized nations' under the terms of Article 38 para. 1 (c) of the ICJ Statute.

### (c). The 'Laws of Humanity' as a Substantive Principle of International (Humanitarian) Law

117. Authorities have from time to time affirmed that the 'laws of humanity' or 'elementary considerations of humanity' are nothing but a positive (general) principle of international law which 'covers any wartime activity carried out by a belligerent' whether or not the conduct in point is governed by international law.[197] According to Balladore-Pallieri, this principle of humanity (illustrated by the Martens clause) represents incontestably the 'most general norm of the Laws of War.'[198] Indeed, references to the Martens clause have often been made to indicate that the clause itself suffered violation as a result of certain material conducts. Indeed, the International Military Tribunal in Nuremberg stated that '[p]risoners of war were ill-treated and tortured and murdered, not only in defiance of the well-established rules of

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[197] G. Balladore-Pallieri, *La Guerra* (Padua: CEDAM, 1935), at 139.

[198] Ibid. See also B.V.A. Röling, *International Law in an Expanded World* (Amsterdam: Djambatan. N.V.Amsterdam, 1960), at 37-38 (particularly at 38: 'Such provision presupposes that the principles of the law of nations, as they result from the usages among civilized peoples, the laws of humanity and the dictates of public conscience, contain specific rules of conduct in the event that the treaties are no longer binding.'); A.A. Cançado Trindade, 'International Law for Humankind: Towards a New *Jus Gentium* (II). General Course on Public International Law,' 317 *Recueil des cours* (2005), at 79. See also Salter, supra note 143, at 19-30.

international law, but in complete disregard of the elementary dictates of humanity. Civilian populations in occupied territories suffered the same fate.'[199]

118. In a considerable number of cases, criminal tribunals took support on the Martens clause to provide justification for the criminalisation of inhumane conduct that were allegedly not specifically and explicitely prohibited by the laws of war prior to the World War II, such as torture,[200] arbitrary trials,[201] 'indiscriminate mass arrests for the purpose of terrorizing the population',[202] human medical experiments,[203] theft as a war crime,[204] the killing of hostages,[205] –atlhough a tribunal once refused to adopt the same approach as regards the taking and killing of hostages.[206] There is also no scarcity of broader references to the clause[207] or mention of the clause as a source of obligations –although not as a source of law– overlapping with established rules of customary or treaty law rules.[208]

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[199] IMT, *Trial of the Major War Criminals Before the International Military Tribunal*, Volume XXII (Nuremberg: IMT, 1948), at 470.

[200] *Trial of Kriminalassisstent Karl-Heinz Hermann Klinge*, in UNWCC, supra note 167, Vol. III, at 12. See also, with reference to the UDHR, *Auditeur Militaire v. Krumkamp*, in 17 *ILR* (Year 1950) at 389-390.

[201] *Trial of Hans Paul Helmuth Latza and Two Others* in UNWCC, supra note 167, Vol. XIV, at 58.

[202] *Trial of Gustav Becker, Wilhelm Weber and 18 Others* in ibid., Vol. VII, at 68.

[203] *Trial of Erhard Milch*, in ibid., at 51.

[204] *Trial of Alois and Anna Bohmer and Their Daughters* in ibid., Vol. IX, at 64.

[205] *Trial of Hans Albin Rauter*, in ibid., Vol. XIV, at 119.

[206] In this case, the NMT controversially considered that the taking of hostages could be justified under specific circumstances. For the arguments of the prosecution relying on the Martens clause, see *The Hostages Trial – Trial of Wilhelm List and Others*, in ibid., Vol. VIII, at 82.

[207] Thus in the *Altstötter* case, the court found that various provisions of the Hague Regulations and the clause had been violated (*Trial of Josef Altstötter and Others*, in ibid., Vol. VI, at 92-93).

[208] ICTY, *The Prosecutor v. Martić*, Judgment, Trial Chamber, 8 March 1996, IT-95-11-R61, para. 13: 'This clause has been incorporated into basic humanitarian instruments … Moreover, these norms also emanate from elementary considerations of humanity which constitute the foundations of the entire body of international humanitarian law applicable to all armed conflict.'

119. Most significantly, in the *Military and Paramilitary Activities in and against Nicaragua* case, the ICJ, echoing the Nuremberg Military Tribunal,[209] affirmed that '[the] rules [of common Article 3 GCs] also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called "elementary considerations of humanity"'.[210]

120. Again by reference to the interpretative principle of effectiveness, one of the plausible constructions (if not the sole one) of the Martens clause would be, borrowing Judge Shahabuddeen's words, that the source of the principles 'lay in the clause itself.' This can be put forward notwithstanding or, better, beyond the origins and genesis of the clause, devised to unlock a diplomatic impasse. Does the Martens clause depict a rare scenario of 'normative serendipity'? In view of the contexts in which recourse has been made to the clause, it would then be correct, although a bit ironical, to dub it as the emergency exit of voluntarist positivism...

*Bibliography*

O. Corten, P. Klein (eds), *The Vienna Conventions on the Law of Treaties*, (Oxford: OUP, 2011).

D.B. Hollis (ed.), *The Oxford Guide to Treaties* (Oxford: OUP, 2012).

P. Reuter, *Introduction to the Law of Treaties* (2nd ed., London/New York: Kegan Paul International, 1995).

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[209] *Trial of Alfried Felix Alwyn Krupp von Böhlen und Halbach and Eleven Others* in UNWCC, supra note 167, Vol. X, at 133-134: 'The Preamble is much more than a pious declaration. It is a general clause, making the usages established among civilised nations, the laws of humanity and the dictates of public conscience into the legal yardstick to be applied if and when the specific provisions of the Convention and the Regulations annexed to it do not cover specific cases occurring in warfare, or concomitant to warfare.'

[210] ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits,* Judgment, at 113-114, para. 218.

P. de La Pradelle, *La Conférence diplomatique et les nouvelles Conventions de Genève du 12 août 1949* (Paris: Éditions internationales, 1951).

G. Best, *War and Law Since 1945*, (Oxford: OUP, 1994).

A. Rasulov, 'Revisiting State Succession to Humanitarian Treaties: Is There a Case for Automaticity?', 14 *EJIL* (2003), 143-171.

C. Pilloud, 'Les réserves aux conventions de Genève de 1949,' 58 *Revue internationale de la Croix-Rouge* (1976), 131–149.

T. Meron 'The Martens Clause, Principles of Humanity, and Dictates of Public Conscience,' 94 *AJIL* (2000), 78-89.