Chapter Three

Visions of Development

I. INTRODUCTION

In very general terms, as far the theory of customary international (criminal) law is concerned, there are only few hypotheses which envisage a general concept of the development of customary norms. Theories develop upon issues concerning the formation of customary international law in a particular area of international law or a particular problem which has arisen in practice. Nevertheless, some theories – developed mainly in the field of international human rights and international humanitarian law – put their conception of the formation of customary rules in a greater perspective: one is that of the humanisation of humanitarian law emphasising the ‘dictates of public conscience’ and the ‘laws of humanity’, as expressed in the Martens Clause. Another builds on the concept of the international community and on certain fundamental values serving as its constitutional basis. Contrary to that, it has also been held that the development of custom in the field of international criminal law could be viewed as evidence of the growing fragmentation of international law.

As this book tries to show whether a development of customary international law has actually taken place and how, it will be interesting to see whether the developments described by those three theories may actually be traceable and hence provide an adequate picture of the current status of this source of international law.

II. THEORETICAL CONCEPTIONS OF THE DEVELOPMENT OF CUSTOMARY INTERNATIONAL (CRIMINAL) LAW

Some of the theoretical conceptions outlined in the previous chapters of this book also comprise methodological suggestions of the development of customary international criminal law. Yet, there are not many such theories: in fact, only concepts which recognise the existence of different sorts of customary
international law\(^1\) as well as a particular category of customary norms of a hierarchically higher position, such as the deductive approach\(^2\) or the ‘core rights’ approach,\(^3\) take into account an overall concept for the development of customary rules. Moreover, theories asserting that certain value-loaded norms of international human rights law of international humanitarian law are characterised by general principles of international law agree on their particular and influential position within the international legal system.\(^4\) As a matter of fact, naturalist approaches to customary international law will also refer to a greater concept of the development of international law, as they too assume that international law is based on certain core values which determine the formation of all legal rules and principles.\(^5\)

Reluctance to outline a general perspective for the formation of customary rules or for the development of international law as a whole, yet again depends on the individual conception of the theories developed for the formation of customary rules. Positivist conceptions, for example, which rely on entirely formalistic approaches to international law find no need to point in a general direction for the possible future development of international law. To them, customary international law is in reality only the outcome of a formal process of the formation of legal rules.\(^6\) The three main approaches envisaging a general perspective for the development of rules of customary international criminal law will be introduced briefly below.

### A. The humanisation of humanitarian law

The most specific approach to the formation of customary norms of international human rights and humanitarian law is the core rights theory developed by Meron, as stated in the first chapter of this book. His approach propagates the “humanization of humanitarian law”,\(^7\) which he interprets as

> a process of osmosis or application by analogy…[by which] the recognition as customary of norms rooted in international human rights instruments has affected the interpretation and eventually the status, of the parallel norms in instruments of international humanitarian law.\(^8\)

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\(^1\) See above, 37ff.

\(^2\) See above, 39ff.

\(^3\) See above, 42ff.

\(^4\) See above, 73ff.

\(^5\) See above, 48f.

\(^6\) See above, 16ff.

\(^7\) T. Meron (2000) 94 AJIL, 239ff.

\(^8\) T. Meron (n. 7) 244.