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THE CONTRIBUTION OF THE INTERNATIONAL COURT OF JUSTICE TO THE DEVELOPMENT OF INTERNATIONAL HUMANITARIAN RULES AND PRINCIPLES

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Abstract

In spite of the fact that the International Court of Justice (hereinafter 'the Court' or the 'ICJ'), the principal judicial organ of the United Nations[1] might not be the first international court to come to mind concerning International Humanitarian Law (IHL)[2], it is argued in this study that its judgments and advisory opinions serve as a base both for the development[3] of this field of law (IHL), and for the process called "humanization of international law".[4]

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1 United Nations Charter Article 92.

2 This absolutely is not meant to imply that the role of the ICJ is not important, but merely to highlight the fact that specialized courts like international criminal courts and tribunals are more central to IHL violations. The purpose is neither to underestimate the ICJ; on the contrary, if it was believed that it did not play any significant part regarding IHL issues, the title of the article would have been set to reflect a suspicious way of looking at the subject and the above argument would not have been put forth.

3 "Development" refers to occasions where the Court has established new rules and/or clarified the existing ones.

4 This argument is underlied by the assumption that the IHL and international law reciprocally influence each other. On that account, as the expression of "humanization of international law" demonstrates, it is accepted that not only does international public law influence human rights and humanitarian law, but these two fields also have a reforming effect on public international law as well which even extend to its other subdisciplines. For example, by way of encouraging new approaches on the longstanding debate between international and domestic law, international criminal law, by opening a way to an unprecedented tendency of the criminal jurisdictions of these two main areas of law to make references to one another has modified the theory of international law. (This also seems to have a potential of making in some way a contribution to the "unification" between norms of seperate regimes of international law by increasing interdependency between diverse areas -of law-.)
As another example of the effects of international criminal law on international law which this time brings along more practical consequences for the latter can be given as such: Inter-

Grounded on such a point, the purpose of this article is instantiated as to address the relevant jurisprudence of the ICJ regarding IHL such as -contentious cases and advisory opinions of- Corfu Channel Case[5], Military and Paramilitary Activities in and against Nicaragua[6], Legality of the Threat or Use of Nuclear Weapons[7], Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory[8] and Armed Activities on the Territory of Congo[9] and to examine these cases for identifying how the Court has approached to the basic general principles of IHL and then to investigate whether it has -through the findings of these cases submitted and the requests of advisory opinions transmitted-, really made any noteworthy and/or original contribution to it, as assumed in the article.

To that end, first of all, a general introduction of the subject will be sketched out by focusing spesifically on the (positive) influence of the increase in the rhetoric of the notion of "humanitarian" in international law on the norms of IHL. Following the Introduction, an overview of the significance and the role of international courts and tribunals in international law in general will be given place and discussed briefly. As the underlying aspect of the study, this part is also planned so as to constitute the primary legal theoretical framework of the research. In order to achieve our main purpose, starting with the reasons of the ICJ's distinguishing role and importance for the matter at hand, next section of the article will be devoted to analyzing the case law mentioned above. Lastly in the Conclusion part, in the light of all these cases, the contribution of the ICJ to IHL will be attempted to be assessed.

Keywords: *Public International Law, International Court of Justice, International Humanitarian Law, Case Law of International Law, Humanization of International Law*

national criminal law can be said to have served as a platform where international law is no longer understood as a set of norms solely pertaining to the regulation of relations amongst and between states, but also as consisting of norms addressing the individual. Nevertheless, for the sake of completeness, it should be reminded that this article will be confined to ICJ's effects on IHL, whilst influence of international law on IHL via other instruments (other than ICJ) and/or IHL influences on international law is left out of the borders of this article.

5 Corfu Channel Case, Judgment of April 9th, 1949: ICJ Reports, p. 4.

6 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports 1986, p. 14.

7 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996, p. 226.

8 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, p. 136.

9 Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005, p. 168.

ULUSLARARASI ADALET DIVANI'NIN ULUSLARARASI İNSANCIL HUKUK KURAL VE İLKELERİNİN GELİŞİMİNE KATKISI

Öz

Uluslararası İnsancıl/İnsanî Hukuk[10] konusunda akla gelebilecek ilk mahkeme olacak olmamasına rağmen; bu makalede, Birleşmiş Milletler'in temel hukuk organı olarak Uluslararası Adalet Divanı'nın çekişmeli dava ve danışma görüşlerinin[11], hem bu alanın (Uluslararası İnsancıl Hukukun) gelişimi[12] için, hem de "uluslararası hukukun insanîleşmesi" adı verilen süreç için bir temel oluşturma yönünde etkide bulunduğu öne sürülmektedir.[13] Bu noktadan yola çıkılarak, makalede, uluslararası insancıl hukuka ilişkin Divan içtihadı (Korfu Kanalı Davası[14], Nikaragua'da ve Nikaragua'ya Karşı Militer ve Paramiliter Faa-

[10] Bu ifade, Uluslararası Adalet Divanı'nın öneminin bulunmadığı gibi bir anlama kesinlikle gelmemelidir; buradaki amaç, yalnızca, uzmanlaşmış uluslararası ceza mahkemeleri gibi mahkemelerin uluslararası insancıl hukuk ihlâlleri açısından daha merkezî bir öneme sahip oldukları gerçeğine dikkat çekmektir. Bunun yanısıra, amaç, bu rolü azımsamak da değildir; bilakis, eğer Uluslararası Adalet Divanı'nın uluslararası insancıl hukuka ilişkin belirgin bir önemi olduğuna inanılıyor olmasaydı, çalışmanın başlığı, bu şüpheci bakış açısını yansıtır şekilde belirlenirdi ve yukarıda yer alan iddia ileri sürülmüş olmazdı.

[11] Birleşmiş Milletler Andlaşması Madde 92.

[12] Burada kullanılan "gelişim" kelimesi, Mahkeme'nin yeni kurallar ortaya koyduğu ve/veya mevcut olanları açığa kavuşturduğu durumları ifade etmektedir.

[13] Bu iddia, uluslararası insancıl hukukun ve uluslararası hukukun her ikisinin de birbirleri üzerinde etkilerinin bulunduğu varsayımına dayandırılmaktadır. Buradan hareketle, "uluslararası hukukun insanîleşmesi" ifadesinden de anlaşılacağı gibi, sadece uluslararası hukukun insan hakları veya insancıl hukuk üzerinde etkisinin olduğu değil, fakat bu iki hukuk dalının, bizzat uluslararası hukuk üzerinde yenilikçi bir etki yarattığı gibi, bu etkinin yayılarak uluslararası kamu hukukunun diğer alt-disiplinlerine de nüfuz ettiği kabul edilmektedir. Meselâ, uluslararası ceza hukuku, ulusal ve uluslararası ceza yargılamalarının birbirlerine önceden örneği görülmemiş bir biçimde atıfta bulunmalarının yolunu açarak uluslararası hukuk teorisinde uluslararası hukuk ile iç hukuk ilişkilerine ilişkin kadim tartışmalarda önemli bir değişim yaratmıştır. (Bu durum, aynı zamanda farklı hukuk alanları arasındaki karşılıklı bağımlılığı da artırarak uluslararası hukukun, kendisinin farklı rejimlerine ait normlar arasında "birleşme"yi sağlayıcı yönde bir katkıda da bulunma potansiyeline de sahip görünmektedir.) Uluslararası ceza hukukunun uluslararası hukuk üzerinde, bu kez daha pratiğe dönük sonuçlar yaratan bir değişime neden olduğu başka bir örnek olarak ise şu verilebilir: Uluslararası ceza hukukunun, uluslararası hukukun artık sadece devletler arasındaki ilişkileri düzenleyen değil, fakat bireylere yönelik olarak da kurallar içeren bir normlar bütünü olarak anlaşıldığı bir zemin yaratma yönünde katkı sağlamış olduğu söylenebilir. Buna rağmen, bu konuda herhangi bir eksikliğe mahal vermemek adına hatırlatmakta fayda vardır ki bu makale, yalnızca Uluslararası Adalet Divanı'nın uluslararası insancıl hukuk üzerindeki etkisi ile sınırlıdır. Uluslararası hukukun uluslararası insancıl hukuk üzerindeki Uluslararası Adalet Divanı dışındaki farklı araçları vasıtasıyla gerçekleşen etkileri ve/veya uluslararası insancıl hukukun uluslararası hukuk üzerindeki etkileri bu çalışmanın sınırları dışında bırakılmıştır.

[14] Corfu Channel Case, Judgment of April 9th, 1949: ICJ Reports, p. 4.

liyetler Davası[15], Nükleer Silâh Tehdidi ya da Kullanımının Hukuka Uygunluğu Danışma Görüşü[16], İşgal Altındaki **Filistin Topraklarında Duvar** *İnşasının* **Hukukî Sonuçları**[17] *ve* **Kongo Topraklarındaki Silâhlı Faaliyetler Davası**[18]*) ele alınmaktadır. İncelenen içtihada ilişkin bulgular ise, nihai olarak Mahkeme'nin uluslararası insancıl hukukun genel ilkelerine ilişkin yaklaşımının belirlenmesi ve makalede varsayıldığı gibi bu hukuk alanına gerçekten de değerli ve/veya özgün bir katkıda bulunmuş olup olmadığının değerlendirilmesi maksadıyla değerlendirilmektedir.*

Bu amaç üzerine kurulan araştırmada öncelikle, uluslararası hukukta artan "insancıllık/insanîlik" söyleminin uluslararası insancıl hukuk normları üzerindeki (olumlu) etkisi üzerinde duran genel bir giriş kısmına yer verilecektir. Giriş kısımını takiben, uluslararası hukukta uluslararası mahkemelerin rol ve önemi kısaca ele alınacaktır. Çalışmayı destekleyici bir boyut olarak, bu bölüm aynı zamanda araştırmanın hukukî kuramsal altyapısını oluşturacak şekilde düşünülmüştür. Bir sonraki başlık altında, çalışmanın ana amacını gerçekleştirebilmek adına Uluslararası Adalet Divanı'nın konumuz açısından ayırdedici rolü ve önemiyle başlamak suretiyle yukarıda sözü edilen içtihadlarda yer alan insancıl hukuk ilkeleri analiz edilmektedir. Nihayet Sonuç kısmında, tüm bunların ışığında Uluslararası Adalet Divanı'nın uluslararası insancıl hukuka olan katkısı değerlendirilecektir.

Anahtar Kelimeler: *Uluslararası Hukuk, Uluslararası Adalet Divanı, Uluslararası İnsancıl Hukuk, Uluslararası Hukuk İçtihadı, Uluslararası Hukukun İnsanîleşmesi.*

INTRODUCTION

It is no doubt that throughout the history, a reference to human rights for the justification of all sorts of political behavior -crystalized as internal/international policies- has never been more essential and centric.[19] Therefore,

[15] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports 1986, p. 14.

[16] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996, p. 226.

[17] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, p. 136.

[18] Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005, p. 168.

[19] Such an argument might not seem to be difficult to foresee or interesting to be mentioned particularly, but it should be noted that there exist some remarks which require this to be emphasized. For example, some of these remarks claim that the states' compliance to human rights law and/or humanitarian law is merely a strategy to enhance their influence and prestige in international community. Nevertheless this approach can be challenged by some others as such: This assumption (the assumption that the real purpose of the states' compliance to human rights law and/or humanitarian law is to enhance influence and prestige of the states) itself illustrates that compliance to these two branches of international law is at least an important matter, thus, it can be seen that the above opinion is inconsistent in itself.

since recent decades, a development and enthusiastic interest in international human rights law which is reached both in the formulation and the wide acceptance of human rights concepts, rules and principles (at least on the text and/or in the rhetoric; i.e. substantively and terminologically) can be verified without difficulty. Thus, it is beyond controversy that being one of its components, this area of law is enjoying a much stronger position in contemporary global legal order compared to the past.[20]

One consequence of such an increasing attention to human rights is the coming into existence a more "humanitarian" way of looking at issues of international law which has ended up with a change in manifold branches of this field of law (international law). One of these fields is what was used to be called the "law of war" / "law of armed conflict", or which is lately supplanted by the term "international humanitarian law".[21] So much so, the changing of the "law of war" was to a large extent a process of humanization driven by human rights norms and principles of humanity.[22] This is why, despite their divergencies, these two branches, namely human rights law and IHL, seem to be commonly conflated. Meron writes that "under the influence of human rights, the law of war has been changing and acquiring a more humane face: the inroads made on the dominant role of reciprocity; the fostering of accountability; the formation, formulation and interpretation of rules."[23] Similarly Luban puts it precisely and in a general sense: "… international humanitarian law and international human rights law share the same 'essence'…"[24]

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[20] It is noteworthy to point out that, the law of human rights is not confined to some classical rights but that it also encompasses peace, disarmament, environmental issues, etc. This is substantial to point out, since the cases indicated do involve such considerations.

[21] However, the task of finding out the relationship between the ICJ and human rights is not as easy as it seems, since, the judgments of the Court dealing with human rights issues may, from time to time, be obscure mainly because it is restricted regarding *locus standi* for individuals. In other words, the cases of the ICJ do not usually attribute the individuals and their rights as clear as, for instance, a human rights court or an international criminal court would do.

[22] MERON, *The Humanization of International Law*, p.1.

[23] *Ibidem.* It is a difficult and contested legal question whether international human rights law takes priority over IHL or the other way around, or neither. (Luban, Çevrimiçi: http://ssrn.com/abstract=2589082). On the other hand, it should be noted that the law of war was much earlier developed in international relations than the law of human rights. But since the emergence of human rights law as a much strenghtened part of international law, it has started to become a forerunner of the law of war, nonetheless.

[24] LUBAN, *supra* note 23.

Similarly, *ad hoc* tribunal for the former Yugoslavia (ICTY[25]) has remarked that; "The essence of the whole corpus of international humanitarian law as well as human rights law lies in the protection of the human dignity of every person, whatever his or her gender. The general principle of respect for human dignity is the basic underpinning and indeed the very *raison d'être* of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law."[26] Hence, an international court also appears to have approved such an opinion.

The most influential reasons of why one of the most affected branches of international law from this change is IHL, can be explained in a more detailed way as follows: It is widely known that since the end of the Cold War, armed conflicts in different areas of the world have mostly been ethnic, religious or communal. This has caused the breaking up of the distinction between the combatants and civilians and though no less than the preceding periods, due to the destructiveness of these armed conflicts and their prevalence, -aside from enormous human suffering which shakes the conscious of an ordinary person and is therefore more physico-sociological based than legal-, the world has witnessed vast numbers of violations of human rights and humanitarian principles. Thus, despite the fact that the phenomenon of internal conflict is, for sure, not unprecedented, since then, a change in the nature of warfare has been experienced which has invoked the need for the nourishment of IHL and thus can be accepted as to have made positive impacts on this branch of law. Apart from IHL, by creating a growing demand to ensure accountability for horrendous crimes of IHL, International Criminal Law has also been subject to such positive effects for it has strenghtened the application of its sources, especially the regulations of Geneva Conventions and the customs of war.[27]

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[25] The former name of the Court : "International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991"

[26] Judgment, Furundzija, IT-95-17/1-T, Trial Chamber, 10 December 1998, p.72, para. 183.

[27] Internatinal criminal law is not confined to crimes of war, or war crimes, only. It also encompasses crimes that can be committed during peacetime such as crimes against peace (aggression). But war crimes and crimes against humanity are more closely linked to the core of IHL. (GREPPI, Çevrimiçi:https://www.icrc.org/eng/resources/documents/article/other /57jq2x.htm).

All these developments, which Meron calls "humanization of humanitarian law"[28], coupled with increasing global media coverage have enforced international community to focus on humanitarian issues more and more and the principles of IHL to be onstage.[29] For instance, United Nations General Secretary Kofi Annan in a statement in September 1999, has declared that there is a "developing international norm" to forcibly protect civilians who were at risk from genocide and masskilling.[30]

To sum up, this state of affair has given way essentially to two related repercussions: The broadening of the scope of IHL and the ICJ's wider possibility and potential to exercise its jurisdiction inrespect of legal disputes involving the applicability of IHL. What is more, the Court can also deal with IHL in case it is requested to render an advisory opinion 'on any legal question'.[31]

In fact, many can be said on IHL and its peculiarities, historical and recent developments and instruments, its relations to human rights, consequences of humanization of international law and its influence on IHL, the impact of the ICJ's jurisprudence on decisions of other international courts and tribunals -which have all been made into an issue of scholastic debate-, and much more. Nevertheless, all these topics deserve separate inquiries on their own and exceed the limits of this research, not to mention its redundancy in so far as the title of the article is considered. Therefore, it is inevitable that major issues must be left out of the discussion and it suffices to make some general explanations enough to draw the necessary framework for the study. Similarly, although case law of the ICJ concerning human rights law and other similar branches of law could also be touched upon –since the Court treated issues pertaining to international human rights and IHL alongside of each other-, what have been focused in this article are issues particularly and purely concerning IHL.

A second limitation of the research is that, the case law analysis will be made through a *selected* number of cases where humanitarian law issues

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[28] MERON, *The Humanization of Humanitarian Law*, p.239-278.

[29] They may, moreover, provide for the penalization of perpetrators of war crimes, crimes against humanity or genocide even when the perpetrator's country of origin is not party to international humanitarian treaties.

[30] Annual Report of Secretary-General to General Assembly, SG/SM/7136

[31] United Nations Charter, Article 96(1).

are evaluated as pivotal, for, there are also cases where the Court did deal with humanitarian issues but just as a secondary dimension of the issue and limitedly; such cases will not be taken into account. Finally, given my modest purpose of the article, neither detailed content of the cases examined or their specific circumstances, nor separate and dissenting opinions are given place except for a few remarks; since it is only required to center upon the jurisdiction of the Court in regards to IHL and its evaluation. Thus, it should be reminded that the article does not stipulate a thorough examination of the relevant jurisdiction of the ICJ, for this would require dozens of pages of information and evaluation on each particular aspect of each of the cases.

Further in this regard, one other point to cite is that the present article will be restricted to the evaluation of the contribution of the ICJ on IHL only by *its own jurisdiction*. It *is* mentioned in the text that ICJ has also provided noteworthy contributions to the development of IHL through decisions of other international courts and tribunals by its precedents, but this will take only a few lines of explanation.

In addition to all the foregoing, the reader should be reminded of the fact that the case law handled reflects, -not an explanatory but- a justificatory theoretical background for the assumption of the study, which is inevitably the very spirit of the context in which the topic is placed. Otherwise, it would be necessary to investigate firstly the issues/disputes which *should/could*, but *have not* been, brought to the Court, and secondly the jurisdiction of the Court which could have touched humanitarian motives, indicate humanitarian considerations and/or apply IHL instruments but which it has not. It is probable that such a preference could at some point lead to a different framework and context which possibly requires a study group to overcome.

1- THE ROLE OF JURISPRUDENCE IN INTERNATIONAL LAW

Although my object in this part of the article is not to concentrate on or retrace the fairly familiar terrain of revealing the role of jurisprudence in international law, prior to the case law analysis, I find it beneficial to express it as the underlying aspect of the study and explain my way of approach towards it.

First of all, I believe that in international law, the inseparability of (international) legislation and (international) adjudication should not be failed to be

recognized, since the rationale and the essence of international law requires its development to be dependent on jurisprudence which is inherent to and a crucial part of it. Especialy in common law –which, because precedents have a binding character, is more in accordance with the system prevalent in international law than Romano-Germanic legal family-, it is a widely accepted truth that the law cannot be isolated from cases since it develops on a case-by-case basis. Yet still, this should not be taken for granted and the question of 'Can international judicial bodies be called law-making at all?' should be asked and answered by international law instruments provided in international law –especially by the predominant doctrine, since the content of the question more requires so-.

To face the truth, the question of interrelationship of sources of international law was not extensively discussed during the drafting of Article 38 of the Statute of Permanent Court of Justice[32]. Nonetheless, subsequent to the drafting of the Statute, a great deal of ink has started to be spilled on this issue and scholars have begun to produce a large body of work about the sources and their hierarchy. Coming to day, Article 59 of the Statute of the ICJ limits the impacts of the decisions of the Court by stating that "the decision of the Court has no binding force except between the parties and in respect of that particular case."[33] Similarly, turning back to Article 38 of the Statute of the ICJ which is a desirable and good tool to start with because of its widely acceptance as reflecting the enumeration of formal provenances of international law, it shall be seen that subparagraph 1(d) also assigns a secondary status to judicial decisions as a source of international law by defining them as "subsidiary means for the determination of rules of law".[34]

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[32] Nevertheless, this issue is worth being discussed. For example, "custom" is formed by the writings of academics and judicial decisions. General principles of law can, on the other hand be derived from custom. Again, treaties and custom are highly interrelated two sources. Apart from that, even Article 38, which, in one way or another is attempted to be made reference to (though with suspicion from time to time), is a treaty provision. What can be inferred out of this phenomenon briefly is that the question of hierarchy of sources and how and in what order they are to be applied is already a big question on its own, let alone the unique question of the role of judicial decisions.

[33] Article 59 of (of the Statute of the ICJ):
The decision of the Court has no binding force except between the parties and in respect of that particular case.

[34] Article 38 (of the Statute of the ICJ):
1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

These follow that the primary function of the ICJ is defined as application of law in the settlement of disputes; *not* "law-making". Besides, such situation is not confined to the ICJ. Statutes of many other international courts, except for the Rome Statute establishing International Criminal Court (ICC), also envisage similar clauses. Rome Statute provides that "The Court may apply principles and rules of law as interpreted in its previous decisions."[35]

Hence, it is clear that formally and traditionally, judicial decisions, whether of domestic or international courts, are regarded as subsidiary means for interpreting the law. Notwithstanding the foregoing, insofar as they address customary international law by way of unveiling state practice and *opinio juris*, domestic courts should be considered to be effective on international law-making. Further in that regard, in case of the lack of proper international enforcement mechanisms –which is the case with public international law-, domestic courts become essential actors in the enforcement of international law. It is also true that when the domestic courts take part in the adjudication of international law issues, or where the borders of international and domestic law are not clear-cut, domestic courts commence to work as direct international law instruments. It is clear that this latest explanation is to establish the importance of the role of jurisprudence for international law in general by exemplifying domestic courts' roles, in other words to benefit their supportive feature for the legal issue at stake.

Apart from the domestic courts, the fact that international courts and tribunals too, resort to previous judicial decision and arbitral awards frequently, reveal the importance of jurisprudence for international law.

Another object of support for the assumption of the primary role of international courts with regards to international law-making is that, it should be discerned that article 38 does neither indicate how international law is

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations;
d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

[35] Article 21/2.

made, neither unfolds how it is interpreted. It merely lists the sources for the practitioner to take into consideration when implementing international rules and deciding. Thus, it would *not* be uncontested to claim that jurisprudence should naturally be regarded to be occupying solely a secondary place in international law-making underlied by the fact that it is assigned as secondary as a source of international law.

Furthermore, although judicial decisions are not defined as a primary source of law in some of the before-cited sources, the *dicta* by the ICJ are unanimously considered as the best formulation of the content of international law in force.[36] For example, Higgins, the first woman judge on the ICJ, holds that "The Courts's function is to settle disputes between states and to provide advice to authorized organs. It is not to develop international law in the abstract. But, of course, the very determination of specific disputes, and the provision of specific advise, *does* develop international law. This is because the judicial function is not simply the application of existing rules to facts. The circumstances to which it will be said to apply, the elaboration of the content of a norm, the expansion upon uncertain materials, all contribute enormously to the development of international law. It is, in fact, hard to point to a case in which all the Court has done is to apply clear, existing law to the facts… Of course, at the formalistic level this is of limited consequence, because the decisions of the Court are said to be a subsidiary source of international law (Article 38 (I) (c) of the Statute) and because any judicial determination is subject to article 59, whereby it is only binding upon the parties before it. But it is a commonplace that the reality is otherwise. Far from beign treated as a subsidiary source of international law, the judgments and opinions of the Court are treated as authoritative pronouncements upon the current state of international law. And the Court itself knows that intellectual coherence and consistency is the cornerstone of continuing respect for its jurisprudence. Thus, even though a particular determination of law will be binding only upon the parties before it, it will invariably …. invoke previous jurisprudence and *dicta* pertinenet to the present facts… Although at the formal level the judgment of the Court in the case of State A *v.* State B will not bind State Z, State Z is bound by the relevant rule of international law, which has been articulated by the Court, and which would no dount be directly applicable to it also, if the occasion

[36] CHETAIL, p. 235.

arose. Even advisory opinions have a role of great importance."[37].

Similarly, Lauterpacht, besides seeing the ICJ as an agency of pacific settlement, also contends that "it has made a tangible contribution to the development and clarification of the rules and principles of international law."[38]

Moreover, Boyle and Chinkin also address that international courts and tribunals do more than apply the law and that they are also a part of the process for making it.[39]

Jennnings, as a former president of the Court, also appears to uphold the same view:

> "And here the message I want to convey is that the International Court of Justice, the Principal Judicial Organ of the United Nations, has a dual role to play. It is readily and generally thought of as being well suited to the settlement of disputes. But in so doing, it has also a vital role in the development and elaboration of general law. A glance at, for example, the near now 90 volumes of the International Law Reports demonstrates very clearly the extent to which judicial decisions are now an important source of international law. Moreover, a glance at virtually any report of a decision by the International Court of Justice itself, will demonstrate the extent to which the decision is indebted to the 'jurisprudence' of previous decisions."[40]

From the excerpts above, it would be fair to say that the prominent experts support the idea that the judicial determinations are more than merely a secondary provenance for international law. What is more, the Court itself has also responded in the Legality of the Use or Threat of Nuclear Weapons to the concerns of some states that the Court can and should not fit itself with a role of improper law-making capacity, by the words:

> "It is clear that the Court cannot legislate… Rather its task is to engage in its normal judicial function of ascertaining the existence or otherwise of legal principle and rules… The contention that the giving of an answer to the question posed would require the Court to legislate is based on a supposition that the present *corpus juris* is

[37] HIGGINS, p. 202-203.
[38] LAUTERPACHT, p. 3-5.
[39] BOYLE, CHINKIN, p. 310.
[40] JENNINGS, p. 241.

> devoid of relevant rules in this matter. The Court could not accede to this argument; it states the existing law and does not legislate. This is so even if, in stating and applying the law, the Court necessarily has to specify its scope and sometimes note its general trend."[41]

The supposition in the paper towards the role of jurisdiction in international law is such that the jurisprudence of international tribunals helps in the systematizing and articulating areas of IHL, determining its existing rules, clearing the meaning and scope of norms and/or shedding light on abstract concepts by interpreting, thus elucidating them which is vital for the implementation of international law as a whole. Moreover, international courts' interpretation might go well beyond what is mostly envisaged and reach some creative consquences which reflect the changing conditions of the international community, since all the possible situations can not have been foreseen by the drafters of the time. For instance, although there does not exist the right to clean environment among the provisions of the European Convention on Human Rights, it is observed that the European Court of Human Rights has relied on the right to respect private and family life to develop such a right with the reasoning that serious harm to the environment may effect the welfare of persons and thus damage their private and family life[42]. Likewise, innovative decisions of the courts such as the ICTY on Joint Criminal Enterprise, and of *ad hoc* tribunal for Rwanda (ICTR)[43] on rape as an act of genocide, or the ICC's case law on indirect co-perpetration through a hierarchical organization are instances of this contribution of international courts on the development of international human rights law and international criminal law which form a part of international law.[44]

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[41] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996, p. 226, para.18.

[42] ECHR, Lopez Ostra v. Spain, Judgment of 9 December 1994, App 16798/90 Series A no. 303-C, (1995) 20 EHRR 277.

[43] International Criminal Tribunal for Rwanda

[44] On the other hand, it should be pointed out that how international courts establish rules of customary international law and how they apply the methods of interpretation regulated in the Vienna Convention on the Law of Treaties is not exempt from criticism. This is especially true for international criminal courts' law-making practice.Both within and outside the courts, critical voices can be discerned (by dissenting and concurring opinions of the judges and legal scholarship's expressionsof concerns and critique.)

To take one step further, although the traditional two-element approach, namely seeking evidence of State practice ("a general practice") and *opinio juris* ("accepted as law"), is generally recognized as the identification methodology of the existence of a state of customary rule; there in fact exists no treaty, no customary rule or general principle for this task to be facilitated. Thus, again, together with academic writings, this is where international judicial practice drops in to become one of the main sources of searching for the seek for evidence of an international customary law.

Nevertheless, one might suggest that regarding the value of customary international law, especially in relation to the present topic (mainly IHL and secondarily International Criminal Law), international legal scholarship is saturated with skepticism. This skepticism is due to the fact that the validity of customary law as a source of today's international law sometimes faces objections in literature and therefore addressing the importance of the role of judicial decisions in international law making via their role (judicial decisions' role) in the clarification of customary rules would not be a proper evidence of their international law making -at least under IHL-. But, in the opinion of this author, it is needless to seek evidence for the importance of international customary law, and even more importantly *especially* for this field of law, because there exists an abundance of cases of international criminal tribunals that have already affirmed the applicability of customary international law for IHL.[45] Further in this regard, as ICJ has invoked in the North Sea Continental Shelf case, customary law must have equal force for all members of the international community and cannot be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour.[46] Likewise, Greppi notes the importance of customary law for IHL: "Customary law has come to play a role of paramount importance, since contemporary humanitarian law applicable in armed conflicts is no longer limited to the Geneva Conventions and their Additional Protocols. Customary law has

[45] For instance; in the ICC's Bashir case, two Pre-Trial Chambers had concluded that a new customary international rule denying personal immunity had formed. This, indeed, as a reference to custom, is indicative of its importance. Again, in the ICTR Nahimana case, the defendant, based on the Rome Statute's 30 years of maximum fixed term, had appealed against 35 years imprisonment. But the Appeals Chamber had rejected such argument by conferring that he had not certified that there is a customary law in force when crimes occurred (and that the 1998 Rome Statute is not binding on ICTR)

[46] North Sea Continental Shelf, Judgment, I.C.J. Reports 1969, p. 3, para.63.

accelerated the development of the law of armed conflict, particularly in relation to crimes committed in internal conflicts."[47]

Briefy, it is submitted that a state is generally bound by customary international law whether it expressed its consent to be bound by the rule or not. This is especially true if that custom is part of *jus cogens,* which is mostly the case for IHL, since among international humanitarian custom can exist *jus cogens* norms. This latest claim can be supported by Meron's statement that certain violations of Geneva Conventions are *jus cogens* norms;[48] especially common article 3 could be counted as such.[49]

Because the territory where international law functions is an avenue where no central legislative or law-making body exists and where custom plays an important role in developing the law, judicial decision-making is supposed to have a significant effect, too. It is easy to argue that the international courts *did* have transformed some rudimentary notions into more precise definitions and provided legal maturation of the legal regime. Besides, international law and IHL specifically develop in interplay with the questions and issues confronted in cases. As Boyle and Chinkin puts it; "In a decentralised system without a legislative law making process and where unwritten law is developed through the amorphous processes of state practice and *opinio juris*, judicial decision-making carries great weight through exposition of the law. International courts, in particular the ICJ, play a significant role both in crafting and ensuring consistency in contemporary international law."[50]

Aside from this general explanation, it can be indicated that in a broader sense, all international courts, but especially the ICJ, have expounded on the relationship between treaty and customary international law, have given impetus to the process of transformation from soft law to hard law, and have provided authoritative weight to the process of International Law Commission (ILC) evidencing their position as a vehicle for the integration of international law into international relations.[51]

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[47] GREPPI, *supra note* 27.

[48] MERON, *Human Rights and Humanitarian Norms as Customary Law*, p.9.

[49] On the other hand, for the sake of completeness, it must be emphasized that Nieto-Navia points out that scholarship is directed at the fact that many of the provisions of (Geneva) Conventions do not qualify to be *jus cogens* norms. (NIETO-NAVIA, p. 640)

[50] BOYLE, CHINKIN, p.268.

[51] *Ibid*., at p.269.

In short, although this mission of jurisprudence falls short of law-making theoretically, in practice, law-making function of the international courts and tribunals can be assumed to be an uncontentious truth. Thus, as constituting one of the oldest bodies of international norms, IHL too, is without doubt to be determined and developed *also* by international case law. In the following part of the paper, case law of the ICJ dealing with IHL will be handled and used in evaluating its weight in IHL rules and principles.

2- JURISPRUDENCE OF THE ICJ RELATING TO IHL

One of the fields of law that IHL is closely related to is International Criminal Law which has been improved by international criminal courts and tribunals to a great deal -some examples of which are given above-. Accordingly, the jurisprudence of these courts' and tribunals' are intrinsically related to IHL.[52] This is the reason why it has been mentioned above that regarding IHL, the ICJ would not have been the first international court to come to mind. Nevertheless, the ICJ too, by its contentious and advisory jurisdictions, can be considered as providing enforcement of the provisions of treaties related to IHL at state level whilst international criminal courts promote and help ensuring the culture of compliance with the humanitarian law instruments at individual level by prosecution of the perpetrators of certain grave breaches. It should not, however, be forgotten to note that the prosecution of the perpetrators of war crimes is but one dimension of maintaining peace after an armed conflict has taken place; so what seems to be highlighted above is the deterrence effect of prosecution.

Similarly, as Raimondo explains, a second reason why the Court's decisions or opinions on IHL are valuable might be that the cases coming before the Court include more and more often issues of humanitarian law and so as to increase persuasiveness and authority of its judgments and advisory opinions and enhance the quality, it becomes accordingly more and more crucial for the Court to determine and interpret rules in accordance with its earlier decisions and legal reasonings. As the Court relies on its earlier decisions, other courts and tribunals also start to turn to ICJ decisions, and moreover, the parties to a contentious case and the participants in advisory

[52] The reason that the cases related to genocide are left out of borders of this article is because it is more related to international criminal law than IHL.

proceedings begin to have a prediction about the Court's decisions or opinions. Moreover, as he adds, the Court's precedents are also references for other national or international courts or tribunals which might also work for avoiding the risk of fragmentation of international law[53] paving the way for judicial dialogue or cross-references among the courts. It is probable that such a situation will entail serving, to some extent, as a dissipation of the lack of law making authority in international law.

Besides, it should be added that not only for the affirmation of the precedents, but also for the reason of explaining why any precedent does not apply to the case at stake, are precedents of the Court being recalled frequently.

Last but not the least, the environment in which the potential law-making impact of international organizations, corporations, international commissions of inquiry, various groups, etc. is being discussed and the traditional way of understanding under formalism is revisited, it would be irrational and unfair to suggest that ICJ is far from providing considerable contribution to an ancient branch of international law, IHL.

Especially with regards to IHL, the practice of international criminal courts' relying upon ICJ precedents is a proof of the ICJ as a means for the determination and interpretation of the rules and principles of IHL. Now we can proceed with the relevant case law of the ICJ which we had previously cited.

a- Corfu Channel Case

Continuing with the case law, the very first contentious case of the ICJ, the Corfu Channel case[54] is the first to be cited. This conflict had arisen between Albania and United Kingdom (UK) in the territorial waters of Albania where two British warships struck mines, incurred heavy material damage and caused loss of human life (some members of the crew) while exercising a right of innocent passage. UK sent some more warships to sweep the minefield. Albanian waters had previously been swept in 1944 and 1945. Therefore, filing a case, the UK accused Albania of having laid, or, having allowed a third party to lay the mines after mine-clearing operations by the Allied naval authorities.

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[53] RAIMONDO, p.2.

[54] Corfu Channel Case, Judgment of April 9th, 1949:ICJ Reports, p. 4.

In the judgment of the Court, the significant passage for IHL is:

> "The obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them. Such obligations are based, not on the Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States."[55]

In its judgment, -although revealing that the Hague Convention (No VIII) was not applicable because the two states were not at war-; the ICJ provided that, by extending the applicability of obligation to notify mine-lying beyond situations of armed conflict, certain international obligations could be based on 'elementary considerations of humanity'which are applicable in wartime as well as in peacetime. Accordingly, the Court held that Albania was responsible under international law for the explosion of the mines and for damage and loss of life that resulted therefrom.[56] So, by the Court, state responsibility was based on some principles, "elementary considerations of humanity", which was vested with the status of general principles of law recognized by civilized nations as set out Article 38 of the Statute establishing the ICJ. By the ICJ's introduction of this principle and the declaration of the responsibility of Albania although it was not party to the Convention (which does not make a difference ultimately, since the Convention was already announced as being applicable in time of war), customary nature of humanitarian law treaties had been pointed out. This surely is an important contribution in terms of the level of protection for the individual by way of a new consept. And it is obvious that the recognition of the customary character of IHL ascertains that it belongs to general international law, which will no doubt provide better protection for the victims.[57]

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[55] *Ibid*. at, p.22.
[56] *Ibid.,* at p.36.
[57] ABI-SAAB, p.368.

As Chetail explains;

> "These obligations have a separate and independent existence under general international law, since they derive from the general principles of humanitarian law to which the Conventions have merely given specific expression.…. They give expression to what the Court has called 'elementary considerations of humanity'. As general principles of international law, they thus provide a minimum standard of humane conduct in the particular context of armed conflict. These rules reflect one of the most significant developments of contemporary international law, characterized by the emergence of core norms designed to protect certain overriding universal values. International humanitarian law itself preserves a certain universal ethical foundation based on a minimum of essential humanitarian norms which constitute the common legal heritage of mankind."[58]

b- Military and Paramilitary Activities in and against Nicaragua

It is equally noteworthy to mention that the Court did recourse to the aforamentioned principle in its subsequent cases. For instance it has also admitted the customary nature of the four Geneva Conventions in its Judgment of 27 July 1986 in the Case concerning Military and Paramilitary Activities in and against Nicaragua[59] (which is, as Abi-Saab puts it; the first time the Court expressed itself in detail on more general issues, notably on the customary nature of the "general principles" of humanitarian law[60]) by acknowledging that the specific provisions of the Hague Convention of 1907 were declaratory of a general principle of international law; when giving its decision about the applicability of IHL to the case.[61] The Court's first finding was similar to the one in Corfu Channel case; because both of the cases were about planting mines, merely with one difference such that mine-planting in Corfu Channel case occured in peacetime, while in wartime in the Nicaragua case. Yet, due to the United States' (US) reservation concerning multilateral treaties[62] -as the other party to the dispute-, this did

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[58] CHETAIL, p.268.

[59] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports 1986, p. 14.

[60] ABI-SAAB, p.367.

[61] CHETAIL, p.243.

[62] United States' reservation excluded this state from the Court's jurisdiction legal disputes

not yield to any difference in the application of the Hague Convention.[63] This is because in the Court's view, the fact that principles had been codified or embodied in multilateral conventions did not mean that they ceased to exist. Secondly, it is also true that they applied as principles of customary law.[64] On this account, the Court made its reasonings pursuant to customary IHL[65] and stated that:

> "…the Geneva Conventions are in some respects a development, and in other respects no more than the expression, of such principles."[66]

Surely, acknowledging the status of the principles provided for in the Conventions also as customary law[67], brings along their being binding upon States even without ratification of the Conventions or other instuments where they are embedded. Thus, it is natural for the Court to find the USA responsible for the failure to notify the existence of minefields since it constituted a breach of obligations under customary international law[68] which once more makes clear that the elementary considerations of humanity are customary principles of IHL.

> "…if a State lays mines in any waters whatever in which the vessels of another State have rights of access or passage, and fails to give

arising under a multilateral convention, unless all parties to the to the treaty affected by the decision are also parties to the case before the Court, or unless the United States specially agrees to the jurisdiction. (Military and Paramilitary Activities in and against Nicaragua [Nicaragua v. United States of America], Merits, Judgment, ICJ Reports 1986, p.14, para. 42).

[63] It should be noted that the conduct of the United States may be judged according to the fundamental general principles of humanitarian law; therefore the Court did not even consider it necessary to decide upon the applicability of this reservation or on the exclusion of the applicability of the Geneva Conventions to the present case. (Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports 1986, p.14, para. 218.)

[64] *Ibid*. at, para. 174.

[65] RAIMONDO, p. 5-6.

[66] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports 1986, p.14, para.218.

[67] Judges Jennings and Ago have some doubts about the Conventions' expressing customary law consisting of general principles. (Military and Paramilitary Activities in and against Nicaragua, Dissenting Opinion of Judge Jennings, ICJ Reports, 1986, p.528-546; Military and Paramilitary Activities in and against Nicaragua, Separate Opinion of Judge Ago, ICJ Reports, 1986, p.181-191.)

[68] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports 1986, p. 14, p.147-148.

> any warning or notification whatsoever, in disregard of the security of peaceful shipping, it commits a breach of the principles of humanitarian law underlying the specific provisions of Convention No. VIII of 1907. Those principles were expressed by the Court in the Corfu Channel as follows: 'certain general and well recognized principles: elementary considerations of humanity, even more exacting in peace than in war."[69]

It may be suggested that the Court, by referring both to the "principles of humanitarian law underlying the specific provisions of Convention No. VIII of 1907" and to its pronoucement in the Corfu Channel case to generate the existence of a violation of humanitarian law, it seems that it does not envisage any distinction between "considerations of humanity" and the "general principles of humanitarian law". In fact, this could create a confusion between these two notions. However, Abi-Saab explains that considering the ultimate objective to be attained in the use of such concepts, this distinction does not appear to be that essential. She continues; " 'Considerations of humanity' would thus represent general principles, or an ethical or moral basis, applying in all circumstances, in times of peace as well as in times of armed conflict. The more specific 'principles of humanitarian law' would be those implementing the principles of humanity in circumstances of actual or potential armed conflict. The principles of humanitarian law may also constitute a new stage following on that of 'considerations of humanity', in the crystallization and specification of the reasoning of the Court on the matter through its own jurisprudence."[70]

It was Nicaragua who brought this case before the Court claiming that the USA was responsible for the unlawful use of armed force or a breach of peace or acts of aggression against Nicaragua and that USA breached its obligations under general and customary international law. If an armed group fighting against a government has become a *de* facto agent of another State, the actions of that group can be attributed to the state under IHL.[71] Nevertheless, the Court held that an effective control of the group by the

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[69] *Ibid.,* para. 215.

[70] ABI-SAAB, p. 370-371.

[71] "The conduct of a person or group of persons shall be considered an act of State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of that State in carrying out the conduct." (ILC Rules on State Responsibility, Article 8).

State at the time of the commission of the alleged violations of the group should have been proved. The Court used the words below:

"Yet despite the heavy subsidies and other support provided to them by the United States, there is no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the contras as acting on its behalf"[72] "… All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the *contras* without the control of the United States. For this conduct to give rice to legal responsibility of the United States, it would in principle have to be proved that the State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed."[73]

As can be seen, after interpreting the effective control test on whether the USA could be held responsible for the violations of IHL, the Court stated that the *contras* were not so closely controlled by the US as to become its government agents.[74] Though not directly related to IHL, this is one of the contributions of the case to international law.

Clearly, in its Nicaragua judgment, one other of the vast legal issues the Court dealt with, which involved a humanitarian law aspect, was the legality of the preparation and dissemination of the manual about guerilla warfare by the USA. Once more, the Court could not consider the subject according to Geneva Conventions because of the USA's reservation; thus determined whether She had acted consistently with the "fundamental general principles of IHL". The Court concluded that:

> "The United States is thus under an obligation not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3 common to the four Geneva Conventions…"[75]

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[72] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports 1986, p. 14, para.109.
[73] *Ibid.,* at para. 115.
[74] *Ibid*., at p.53-65.
[75] *Ibid.*, at para. 220.

As far as the fundamental general principles of IHL are concerned, one of the norms that was extended by the Court was Common Article 3[76] which provides for rules exclusively to be applied in internal armed conflicts to international armed conflicts too, by ruling that the norms set out in the Article were a part of elementary considerations of humanity. The Court held that:

> "Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules 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".[77]

Regarding the rules to be applied, connecting internal and international conflicts to each other has strenghtened the level of protection of civilians and *hors de combat* under IHL which can be evaluated as a valuable contribution to IHL.

It comes as no surprise that crystallizing the "elementary considerations of humanity" by attaching this notion to the principles set down in Common

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[76] Common Article 3 states that:
"In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, wit hout any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
(b) taking of hostages;
(c) outrages upon personal dignity, in particular humiliating and degrading treatment;
(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
(2) The wounded and sick shall be collected and cared for (...)".

[77] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports 1986, p.14, para. 218.

Article 3 is, *inter alia,* another contribution of Nicaragua decision to the IHL.

On the other hand, it is worthwile to remind that, since Article 3 is generally regarded as constituting the minimum applicable in internal conflicts, and that since in international conflicts the Conventions apply as a whole; linking internal and international conflicts to each other might present a problem such as the possibility of the states to reduce the whole body of IHL applicable to international conflicts to this minimum of principles. Likewise, this is why some of the lawyers are not in the line of encouraging "general principles" of humanitarian law lest the Geneva Conventions be reduced to a few rules deemed essential.[78] But it should be noted that the Court, it seems, was aware of this danger and added that, in the case of international conflicts, this 'minimum applicable' in all circumstances is relevant besides "the more elaborate rules which are also to apply to international conflicts"[79]

Another norm that was extended by the Court generates Common Article 1 of the four Geneva Conventions and Additional Protocol I[80]. This regulation can be evaluated as highlighting the absolute character of IHL; which had been mentioned above. This article is not based on reciprocity but setting forth obligations towards the whole international community. Therefore, it implies that, due to its customary nature, the provision's relevance is independent of whether a state has or has not ratified the treaty and thus places upon obligations for every state. Accordingly, the Court held that:

"There is an obligation on the United States Government, in the terms of Article 1 of the Geneva Conventions, to 'respect' the Conventions and even 'to ensure respect' for them 'in all circumstances', since such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression"[81]

As can be seen, the Court came to the conclusion that this article of the Convention should be considered to be a part of the customary status of the

[78] ABI-SAAB, p.371.

[79] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports 1986, p.14, para. 218.

[80] "The High Contracting Parties undertake to respect and to ensure respect for the present Convention [or Protocol] in all circumstances".

[81] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports 1986, p. 14, at para. 220.

obligation to "respect" and even to "ensure respect" for the Geneva Conventions "in all circumstances" and that the Article should also be interpreted as being relevant in *internal*, besides international armed conflicts. Nevertheless there is one interesting point to note here. Courts's view regarding "ensure respect" for humanitarian law, -while logically could have been regarded as part of the procedure for implementing the Conventions rather than as part of their normative provisions-, was recognized as a general principle which is especially essential in the context of the responsibilities of third parties and the international community in general in the face of violations of the Conventions.[82]

The points mentioned above can all be counted amongst the major contributions of this case to IHL. Yet, it is noteworthy to point out that neither the content and implications of the obligation of ensuring respect for the Conventions, nor the legal reasoning of the principles of IHL's deriving from the fact that the majority of these principles are a part of customary international humanitarian law were neatly clarified by the Court. Thus, as a last word, it should be noted that there are some points to be criticised regarding the decision.

c- Legality of the Threat or Use of Nuclear Weapons

In the Legality of the Threat or Use of Nuclear Weapons, the Court has rendered its opinion on the threat or use of nuclear weapons in accordance with international law.[83]

In this case, first, the Court dealt with the issue of whether the use of nuclear weapons was a breach of the right to life as protected in Article 6 of the International Covenant on Civil and Political Rights and other human rights treaties. And It stated that:

> "The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for

[82] ABI-SAAB, p. 374.

[83] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996, p. 226, para. 1.

> the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself."[84]

Out of such a confirmation, it can evidently be inferred that the set of conventional rules applicable in times of armed conflict is "fundamental to the respect of the human person and 'elementary considerations of humanity' ".[85] In this statement, the Court underlines that both IHL and human rights law include the same fundamental ethical values, (they) both center upon the same notion as human dignity and (they) both originate from the same source as the laws of humanity.[86] This also leads to the conclusion that humanitarian law is the continuing applicability of human rights law in time of armed conflict and that these two disciplines of law complement each other. What is more, the Court has adopted that IHL relates to human rights law as the *lex specialis* to the *lex generalis*.[87]

One other point which is rela ted with this issue is the finding of the Court that, assuming that the principles of rules of humanitarian law are not applicable to nuclear weapons, because they were invented after most of the principles and rules of humanitarian law applicable in armed conflicts had come into existence, "would be incompatible with the intrinsically humanitarian character of the legal principles in question which permeates the entire law of armed conflict and applies to all forms of warfare and to all kinds of weapons, those of the past, those of the present and those of the future."[88]

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[84] *Ibid*., at para. 25.
[85] *Ibid.,* at para. 79.
[86] CHETAIL, p. 240.
[87] ESCORIHUELA, p.366. This general articulation of the relationship has been examined by the United Nations International Law Commission as Escorihuela, in this book, has drawn our attention to. It is true that this is also related to the discussion about relations among legal regimes which is in other words called the "fragmentation of international law." (*Ibıdem.*)
[88] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996,

Another matter the Court pointed out concerning IHL is that IHL was the result of the convergence of what are called as 'Hague Law' and Geneva Law'. By doing this, the Court referred to the historical evolution of humanitarian law:

"The 'laws and customs of war' -as they were traditionally called- were the subject of efforts at codification undertaken in The Hague (including the Conventions of 1899 and 1907), and were based partly upon the St. Petersburg Declaration of 1868 as well as the results of the Brussels Conference of 1874. This 'Hague Law' and, more particularly, the Regulations Respecting the Laws and Customs of War on Land, fixed the rights and duties of belligerents in their conduct of operations and limited the choice of methods and means of injuring the enemy in an international armed conflict. One should add to this the 'Geneva Law' (the Conventions of 1864, 1906, 1929 and 1949), which protects the victims of war and aims to provide safeguards for disabled armed forces personnel and persons not taking part in the hostilities".[89]

One point to note is that, in this advisory opinion, as the Court had an opportunity to clarify the legal status of *jus cogens* norms in IHL, it missed it. But at least, it stated that, because the fundamental rules of IHL constitute intransgressible principles of international customary law, they should be observed by all States regardless of whether they (the States) have ratified the conventions that contain these rules or not.[90]

The expression "intransgressible principles of international customary law" is, according to Chetail, the intent of the Court "to emphasize the importance of humanitarian norms for international law and order as a whole and the particularity of such norms in comparison with the other ordinary customary rules of international law."[91] Because, surely all the rules are obligatory; and there should exist a peculiarity if it is particularly underlined. Therefore, this expression can be interpreted in two different ways. One is that the Court could be proposing that the fundamental principles of humanitarian law constitute norms of *jus cogens in statu nascendi*. The other is that, the Court implicitly admits the peremptory character of such rules, but refrains from doing so explicitly, because the case under consid-

p.226, para. 86.

[89] *Ibid.,* at para. 75.

[90] *Ibid*., at para. 79.

[91] CHETAIL, p. 251.

eration is a more limited issue. Some judges even go further and recognize that the principles and rules of IHL do have the character of *jus cogens*.[92]

One other contribution of the opinion is the affirmation of basic principles of IHL which are the distinction between combatants and non-combatants and the prohibition of the use of weapons that cause superfluous injury or unnecessary suffering.[93] The Court identified the distinction between combatants and non-combatants by stating that this principle "is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets."[94]

And as for the prohibition of the use of weapons that cause superfluous injury or unnecessary suffering, the Court has declared that 'unnecessary suffering to combatants' was "a harm greater than that unavoidable to achieve legitimate military objectives"[95] and thus contributed to an extent to the clarification of the ambiguity of the term.

At this point, the Court has also referred to the 'Martens Clause', -which first found its expression in the Second Hague Convention of 1899-, by quoting Article 1 of the 1977 Additional Protocol that reads, "In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience."[96] which affirms the importance of the clause. Another paragraph of the Opinion where reference to the Martens Clause was made, is paragraph 84. "…The fact that certain types of weapons were not specifically dealt with by the 1974-1977 Conference does not permit the drawing of any legal conclusions relating to the substantive issues which the use of such weapons would raise."[97] Again,

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[92] *Ibidem.*
[93] *Ibid.,* at. p. 253-257.
[94] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996, p. 226, para. 78.
[95] *Ibidem.*
[96] *Ibidem.*
[97] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996, p. 226, para. 84.

in Article 87 of the Opinion, the Court pointed to the Martens Clause once more and declared that the existence and applicability of this clause was not debatable and this signified the affirmation that the principles and rules of humanitarian law applied to nuclear weapons.[98]

Meron has clarified Martens Clause by indicating the description of the Diplomatic Conference on the Reaffirmation and Development of International Law Applicable in Armed Conflicts and the *Commentary* of the International Committee of the Red Cross. According to the Diplomatic Conference; the Martens Clause was a principle of interpretation that ruled out an *a contrario* interpretation, because there was always a duty stemming from international law even when there was no any formal obligation regarding the issue at stake. In addition to that, the *Commentary* states that the clause contains a dynamic factor proclaiming the applicability of some principles regardless of the developments in situation or technology.[99] Likewise, Judge Shahabuddeen, in his dissenting opinion has suggested that although the principles remain constant, it would be right to suggest according to Martens Clause that their practical effect could justify a method of warfare sometime but prohibit in another.[100]

On the other hand, in its Opinion, the Court concluded that; "It follows from the above-mentioned requirements that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law; However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake."[101]

Although this clause might be considered weak because of the absract concepts it contains and thus its potential to be interpreted differently, this

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[98] *Ibid*.,at para. 87.

[99] MERON, *The Martens Clause, Principles of Humanity, and Dictates of Public Coscience*, p.81.

[100] Legality of the Threat or Use of Nuclear Weapons, Dissenting Opinion of Judge Shahabuddeen, ICJ Reports, 1996, p. 375-428, p.406.

[101] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996, p. 226, para. 105.

clause is important in the sense that it makes clear that in IHL, not all that is not forbidden by treaties or customary law is permissable, since principles of humanity and dictates of public conscience might be elements restricting the conduct concerned. Nevertheless, as seen in the last article quoted above, (Article 105), recognising the incompatibility of the threat or use of nuclear weapons in IHL in principle, the Court concludes that it could not know whether this is also relevant when a state is using its right to self-defence under a circumstance of a risk of survival. This meant that the Court did not give a concrete answer as to the legality of the threat or use of nuclear weapons, which was exactly what was requested from it, constituting a highly criticised point of view: Should the word 'generally' be interpreted as to mean that there could be some situations where the threat or use of nuclear weapons be lawful according to IHL? If so, why would there be a need to refer to Martens Clause in the first place? If not, what are the conditions of these weapons to be lawful? Judge Higgins also criticizes this by her dissenting opinion: "… What does the term "generally" mean? Is it a numerical allusion, or is it a reference to different types of nuclear weapons, or is it a suggestion that the rules of humanitarian law cannot be met save for exceptions?"[102]

Finally in the *dispositif*, the Court unanimously stated that there existed "an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control."[103]

d- Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory

In the words of Bedi; in 2002, Israel had began constructing a wall which ran not only across its own territory but also across the West Bank territory of Palestine, which forms part of the 'Occupied Palestinian Territory'. According to Israel, this wall was to combat 'terrorist attacks' coming from Palestinians in the West Bank. Palestinian authorities, on the other hand, argued that the construction of the Wall constituted an '*illegal annexation'* of their territory, undermining their right to self-determination.[104] The question

[102] Legality of the Threat or Use of Nuclear Weapons, Dissenting Opinion of Judge Higgins, ICJ Reports, 1996, p. 583-593, p. 586, para. 25.
[103] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996, p. 226, para.105.
[104] BEDI, p.340.

posed by the UN General Assembly thus concerned the legal consequences arising from the construction of this wall being built by Israel as the occupying power in the Occupied Palestinian Territory.[105]

When the ICJ was requested to transmit its opinion on the legal consequences of the construction in the so-called territory, it delivered its opinion under the title of "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory".[106] In this advisory opinion, a high degree of consensus by the judges was reached, therefore, the legal value and authority to be attributed to it, is, to a large extent, considered at least higher than many other advisory opinions.

In the opinion, one of the most insightful points the Court made was clarifying what was to be considered as the "occupied territory". The Court held that; "…under customary international law as reflected in Article 42 of the Regulations Respecting the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 18 October 1907 (…), territory is considered occupied when it is actually placed under the auhority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised."[107] Further on in the same article, the Court continues: "Territories situated between the Green Line (…) and the former eastern boundary of Palestine under the Mandate were occupied by Israel in 1967 during the armed conflict between Israel and Jordan. Under customary international law, these were therefore occupied territories in which Israel had the status of occupying Power. Subsequent events in these territories have done nothing to alter this situation. All these territories (including East Jerusalem) remain occupied territories and Israel has continued to have the status of occupying Power."[108]

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[105] "What are the legal consequences arising from the construction of the wall being built by Israel, the occupying power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?" (A/RES/ES-10/14, 12 December 2003, "Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory".

[106] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, p. 136

[107] *Ibid.,* at para.78.

[108] *Ibidem*.

Another crucial point from the view of IHL emphasized by the Court was the reaffirmation of the customary status of the 1907 Hague Convention (IV)[109] as the Court had previously done in its Nuclear Weapons advisory opinion. By recognizing the customary status of the Convention, the Court gained the opportunity of rendering its opinion independently from Israel's being a state party to the Convention or not, -which it was not-. Apart from that, regarding the applicability of these conventions (Hague Conventions) to the issue at stake, the Court stated that Section III of 1907 Hague Regulations which dealt with military authority in occupied territory was relevant. The Court held that:

"Section III of the Hague Regulations includes Articles 43, 46 and 52, which are applicable in the Occupied Palestinian Territory. Article 4 imposes a duty on the occupant to 'take all measures within his power to restore, and, as far as possible, to insure public order and life, respecting the laws in force in the country'. Article 46 adds that private property must be 'respected' and that it cannot 'be confiscated'. Lastly, Article 52 authorizes, within certain limits, requisitions in kind and services for the needs of the army of occupation."[110] The Court went on that the construction of the wall had led to the destruction or requisition of properties under conditions which contravene the requirements of Articles 46 and 52 of the Hague Regulations of 1907 and of Article 53 of the Fourth Geneva Convention.[111] The Court moreover considered that even though IHL does enable certain exceptions under the

[109] "As regards international humanitarian law, the Court would first note that Israel is not a party to the Fourth Hague Convention of 1907, to which the Hague Regulations are annexed. The Court observes that, in the words of the Convention, those Regulations were prepared 'to revise the general laws and customs of war' existing at that time. Since then, however, the International Military Tribunal of Nuremberg has found that the 'rules laid down in the Convention were recognised by all civilised nations, and were regarded as being declaratory of the laws and customs of war' (Judgment f the International Military Tribunal of Nuremberg, 30 September and 1 October 1946, p. 65). The Court itself reached the same conclusion when examining the rights and duties of belligerents in their conduct of military operations (Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I. C. J. Reports 1996 (1), p. 256, para. 75). The Court considers that the provisions of the Hague Regulations have become part of customary law, as is in fact recognized by all the participants in the proceedings before the Court." (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, p. 136, para.89).

[110] *Ibid.,* at para.124.

[111] *Ibid.,* at para.132.

condition of military exigencies, the requirements for these exceptions to be acceptable were not found adequate under the existing circumstance. In the words of the Court: "..the military exigencies contemplated by these texts may be invoked in occupied territories even after the general close of the military operations that led to their occupation. However, on the material before it, the Court is not convinced that the destructions carried out contrary to the prohibition in Article 53 of the Fourth Geneva Convention were rendered absolutely necessary by military operations."[112] Therefore, it is clear from such considerations pointed out above that, the Court has clarified which the relevant regulati ons of the law of occupation were and has evaluated the violations the construction of the wall and the conduct of Israeli authorities had triggered.

Another important contribution of the Court to point out regarding IHL is that the Court has also cited the distinction in the Fourth Geneva Convention between provisions applying during military operations leading to occupation and those that remain applicable throughout the entire period of occupation.[113] It thus stated Article 6 of the Convention[114] and explained that since the military operations leading to the occupation of the West Bank in 1967 ended a long time ago, only those Articles of the Fourth Geneva Convention referred to in Article 6, paragraph 3, remain applicable in the territory[115] and added in the following article that those provisions include

[112] *Ibid.,* at para. 135.
[113] *Ibid.,* at, para. 125.
[114] Article 6 reads as follows:
"The present Convention shall apply from the outset of any conflict or occupation mentioned in Article 2.
In the territory of Parties to the conflict, the application of the present Convention shall cease on the general close of military operations.
In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143.
Protected persons whose release, repatriation or re-establishment may take place after such dates shall meanwhile continue to benefit by the present Convention."
[115] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, p. 136, para. 125.

Articles 47, 49, 52, 53 and 59 of the Convention[116] and later quoted them.[117]

[116] *Ibid*., at para. 126.

[117] It is noteworthy to quote these provisions that the Court quotes:
According to Article 47:
"Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory."
Article 49:
"Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.
Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.
The Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated.
The Protecting Power shall be informed of any transfers and evacuations as soon as they have taken place.
The Occupyirig Power shall not detain protected persons in an area particularly exposed to the dangers of war unless the security of the population or imperative military reasons so demand.
The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies."
Article 52:
"No contract, agreement or regulation shall impair the right of any worker, whether voluntary or not and wherever he may be, to apply to the representatives of the Protecting Power in order to request the said Power's intervention.
All measures aiming at creating unemployment or at restricting the opportunities offered to workers in an occupied territory, in order to induce them to work for the Occupying Power, are prohibited."
Article 53:
"Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or co-operative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations."
Article 59 is quoted in the main text.

Amongst others, one spefically important application of an IHL regulation to the issue at hand by the ICJ was its interpretation of Article 49 of the (Fourth Geneva) Convention. Obligations deriving from this article, according to the Court, were violated by Israel due to its conduct of deporting and transferring its own civilian population into the territory it occupied. "As regards these settlements, the Court notes that Article 49, paragraph 6, of the Fourth Geneva Convention provides: 'The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.' That provision prohibits not only deportations or forced transfers of population such as those carried out during the Second World War, but also any measures taken by an occupying Power in order to organize or encourage transfers of parts of its own population into the occupied territory. In this respect, the information provided to the Court shows that, since 1977, Israel has conducted a policy and developed practices involving the establishment of Settlements in the Occupied Palestinian Territory, contrary to the terms of Article 49, paragraph 6, just cited."[118]

Again, another important article cited in the opinion is Article 59 which reads;

> "If the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief schemes on behalf of the said population, and shall facilitate them by all the means at its disposal. Such schemes, which may be undertaken either by States or by impartial humanitarian organizations such as the International Committee of the Red Cross, shall consist, in particular, of the provision of consignments of foodstuffs, medical supplies and clothing. All Contracting Parties shall permit the free passage of these consignments and shall guarantee their protection."[119]

Later in the article, by citing Security Council's resolutions too, the Court concluded that Israeli settlements in the Occupied Palestinian Territory had been established in breach of international law.[120]

Whilst the humanitarian aspect of the above articles refereed to in the Court's opinion is clear, Judge Higgins, in her seperate opinion, additionally

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[118] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, p. 183, para. 120.
[119] *İbid.,* at para. 126.
[120] *Ibidem.*

emphasized the importance of these provisions by the words; " Context is usually important in legal determinations. So far as the request of the Assembly envisages an opinion on humanitarian law, however, the obligations thereby imposed are (save for their own qualifying provisions) absolute. That is the bedrock of humanitarian law, and those engaged in conflict have always known that it is the price of our hopes for the future that they must, whatever the provocation, fight 'with one hand behind their back' and act in accordance with international law. While that factor diminishes relevance of context so far as the obligations of humanitarian law are concerned, it remains true, nonetheless, that context is crucial for other aspects of international law that the Court chooses to address. Yet the formulation of the question precludes consideration of that context."[121] Thus, Higgins addresses that although context is important in the determining of international law in general, when IHL is in question, norms of IHL is independent of the context.

Another valuable feature of this advisory opinion in the same framework is indicated in paragraph 155 when considering the legal consequences of the internationally wrongful acts flowing from Israel's construction of the wall as regards other States. Here, the Court declared its observation that the obligations violated by Israel include certain obligations *erga omnes* which it had previously stated in the Barcelona Traction case by emphasizing that such obligations are by their very nature 'the concern of all States' and, 'in view of the importance of the rights involved, all States can be held to have a legal interest in their protection'[122] The Court concludes in the same paragraph that certain obligations *erga omnes* violated by Israel are its obligations under IHL.[123]

Once more for the *erga omnes* character of IHL obligations, the Court recalled its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons stating that the so-called case had recognised that " 'a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and 'elementary considerations of humanity' . . .", that they are 'to be observed by all States whether or

[121] Legal Consequences cf the Construction of a Wall in the Occupied Palestinian Territory, Separate Opinion of Judge Higgins, ICJ Reports, 2004, p. 207-218, p. 210, para 14.
[122] Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment, I.C.J. Reports 1970, p. 32, para. 33.
[123] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, p. 199, para. 155.

not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law'.[124] After collimating the two issues -namely elementary considerations of humanity and intransgressible principles of international customary law-, the Court put forth the conclusion that in its view, these rules incorporated obligations which were essentially of an *erga omnes* character."[125] Indeed, the acknowledgement that many rules of IHL constituted intransgressible principles of international customary law entailing *erga omnes* obligations, which bring along responsibility towards the whole international community, is again, an important contribution to the development of IHL from the side of the ICJ.

Likewise, the Court has observed that Israel also had "an obligation to put an end to the violation of its international obligations flowing from the construction of the wall in the Occupied Palestinian Territory. The obligation of a State responsible for an internationally wrongful act to put an end to that act is well established in general international law, and the Court has on a number of occasions confirmed the existence of that obligation."[126] Moreover, the Court had also added that Israel had the obligation to make reparation or other forms of reparation for the damage Israel caused for the Palestinian population[127] and, -by examplifying the Factory at Chorzow case of 1928 in the Permanent Court of International Justice[128]- to all natural or legal persons.[129] Recognition of the obligation to reparation of infringements of IHL *to natural or legal persons,* is another important contribution of the ICJ to IHL also to be noted.

The Court not only recognized the reparations towards natural or legal persons, but, given the character and the importance of the rights and obligations involved, the Court was also of the view that all States were under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory. Additional to that, pursuant to the Court's opinion, all the States parties to the Geneva

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[124] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996, p. 226, para. 79.
[125] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, p. 136, para.157.
[126] *Ibid.,* at para. 150.
[127] *Ibid.,* at para. 151.
[128] Factory at Chorzow, Merits, Judgment No 13, 1928, P. C. I.J., Series A, No. 17, p. 47.
[129] *Ibid.,* at paras. 152-153.

Convention of 1949 were under an obligation to ensure compliance by lsrael with IHL as embodied in that Convention.[130]

When assessing the applicability of IHL to the Occupied Palestinian Territory, the Court, in its 87. paragraph, also recalled Article 2/4 of the UN Charter[131] and a UN General Assembly resolution in 1970[132] and, further on in the same paragraph, by citing its own Judgment in the case concerning Military and Paramilitary Activities in and against Nicaragua where it was stated that the principles as to the use of force incorporated in the Charter reflected customary international law, the Court added that 'the same was true of its corollary entailing the illegality of territorial acquisition resulting from the threat or use of force'[133]

Again, regarding the applicability of Geneva Convention IV to the Occupied Palestinian Territory, which had been a controversial issue in the proceedings, the position of Israel was that this Convention was not applicable due to the lack of recognition of the territory as sovereign prior to its annexation by Jordan and Egypt. Because of such situation, the territory was not a territory of a High Contracting Party, as required by the Convention.[134]

The Court, too, noted that according to Article 2(1), the Fourth Geneva Convention was applicable when two conditions were fulfilled and that these conditions were, the existence of an armed conflict (whether or not a state of war has been recognized), and that the conflict had arisen between two contracting parties. So, if these two conditions were met, the Convention applied, in particular, in any territory occupied during a conflict by one of the contracting parties.[135]

On the other hand, as opposed to Israel's argument, the Court continued to clarify the object of Article 2(2), and stated that the intention of this

[130] *Ibid.,* at para. 159.
[131] "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations."
[132] "No territorial acquisition resulting from the threat or use of force shall be recognized as legal". (United Nations General Assembly Resolution 2625(XXV) entitled 'Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States).
[133] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, p.136, para.87.
[134] *Ibid.,* at para. 90.
[135] *Ibid.,* at para. 95.

paragraph was not to restrict the scope of application of the Convention, by excluding therefrom territories that did not fall under the sovereignty of one of the contracting parties, but to make clear that the Convention was applicable, even if occupation effected during the conflict had not met an armed resistance.[136] Thus, the Court found that since Israel and Jordan were parties to the Convention when the 1967 armed conflict broke out, the Convention was applicable in the Palestinian territories independent of their prior status.[137] For the confirmation of this finding, the Court also referred to the Convention's *travaux prératoires* and noted that this interpretation reflects the intention of the drafters of the Convention, which was to protect inhabitants in time of war, regardless of the status of the occupied territories, as is shown by Article 47 of the Convention.[138] Definitely, one last important implication of the ICJ on IHL to point out is the relevance of the Fourth Geneva Convention for the occupied territories and its consequences in regards to the states concerned and international community.

e- Case Concerning Armed Activities on the Territory of Congo[139]

In 1999, Democratic Republic of Congo (DRC) had filed an application against Uganda, Rwanda and Burundi claiming violations of human rights and IHL by the armies of these states. Amongst these cases, the ones against Rwanda and Burundi were discontinued in 2001; therefore we will handle the case against Uganda.

DRC requested the Court to adjudge and declare that the Republic of Uganda had committed acts of violence against nationals of the DRC violating, *inter alia*, "the principle of conventional and customary law imposing an obligation to respect, and ensure respect for, fundamental human rights, including in times of armed conflict, in accordance with international humanitarian law" and "the principle of conventional and customary law imposing an obligation, at all times, to make a distinction in an armed conflict between civilian and military objectives".[140]

As findings with regards to the violations of IHL, the Court first handled

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[136] *Ibidem.*
[137] *Ibid*., at para. 101.
[138] *Ibid.,* at para. 95.
[139] Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005, p. 168.
[140] *Ibid.,* at para. 181.

DRC's claims that the Ugandan armed forces caused loss of life to the civilian population, committed acts of torture and other forms of inhumane treatment, and destroyed villages and dwellings of civilians[141] and it took into consideration evidence contained in certain UN documents to the extent that they are of probative value and are corroborated, if necessary, by other credible sources.[142] Thus, it is important to note that the Court found the coincidence of reports from credible sources sufficient to be convinced that massive human rights violations and grave breaches of international humanitarian law had been committed.[143]

The Court further found that there was convincing evidence to support DRC's allegation that the UPDF ("Uganda People's Defence Force", Uganda's armed forces) had failed to protect the civilian population and to distinguish between combatants and non-combatants during fighting against other troops[144] and that it had trained child soldiers in UPDF camps and failed to prevent their recruitment in areas under its control.[145] It is also important to note that in the context of MONUC's (United Nations Organization Mission in the Democratic Republic of the Congo[146]) special report on the events in Ituri on January 2002-December 2003, the Court has noted that indiscriminate shelling was in itself a grave violation of IHL.[147]

Taking into consideration all the above, the Court considered that it had "credible evidence sufficient to conclude that the UPDF troops had committed acts of killing, torture and other forms of inhumane treatment of the civilian population, had destroyed villages and civilian buildings, failed to distinguish between civilian and military targets and to protect the civilian population in fighting with other combatants, incited ethnic conflict and took no steps to put an end to such conflicts, was involved in the training of child soldiers, and did not take measures to ensure respect for human rights and international humanitarian law in the occupied territories."[148]

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[141] *Ibid.,* at para. 206.
[142] *Ibid.,* at para. 205.
[143] *Ibid.,* at para. 207.
[144] *Ibid*., at para. 208.
[145] *Ibid*., at para. 210.
[146] As of 1 July 2010, MONUC was renamed the "United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO)".
[147] Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005, p. 168, para. 208.
[148] *Ibid.,* at para. 211.

Later on, DRC's allegation that Uganda carried out a deliberate policy of terror had not been proven. However, the Court also stressed that the civil war and foreign military intervention in the DRC created a general atmosphere of terror pervading the lives of the Congolese people.[149]

Following this statement, the Court mentioned the rule of international law that the conduct of any State organ must be regarded as an act of that State and thus the omissions of the UPDF and its officers and soldiers were attributable to Uganda.[150] Besides, it was stated by the Court that the view that this attribution to Uganda might not be relevant if the soldiers and officers had acted contrary to the instructions given or exceeded their authority, was irrelevant, since, according to Article 3 of the Fourth Hague Convention of 1907 and Article 91 of Additional Protocol I, a party to an armed conflict would be responsible for all acts by persons forming part of its armed forces.[151]

Furthermore, the Court, by recalling one of its precidents, its advisory opinion on The Wall[152], pointed out that this conduct *did* constitute a breach of Uganda's international obligations, since IHL instruments were applicable in the present case, namely 'in respect of acts done by a State in the exercise of its jurisdiction outside its own territory', particularly in occupied territories and that Uganda had violated its obligations as an occupying Power under IHL instruments which were also binding on the Parties as customary international law[153]. The Court has also mentioned IHL instruments relevant in the case[154].

One other point here is that, for a state to be considered as occupying power according to IHL, it was stated by the Court that not only would the mere presence of the army be considered sufficient but that authority in the territories in question should have been established and exercised by that army.[155]

Foremost to be noted in this respect is 'illegal exploitation of natural

[149] *Ibid.,* at para. 212.
[150] *Ibid*., at para. 213.
[151] *Ibid*., at para. 214.
[152] *Ibid*., at para. 216.
[153] *Ibid.,* at paras. 219, 220.
[154] *Ibid*., at paras. 217, 218, 219.
[155] *Ibid.* at para. 173.

resources' should be mentioned. The Court observed that "…whenever members of the UPDF were involved in the looting, plundering and exploitation of natural resources in the territory of the DRC, they acted in violation of *jus in bello* which prohibits the commission of such acts by a foreign army in the territory where it is present."[156] This is important because it was the first time the Court mentioned the prohibition of illegal looting, plundering and exploitation of natural resources as a part of IHL.

CONCLUSION

I claim in the article that the jurisprudence of the ICJ is an important venue for the development of IHL as it is for public international law in general. From such a perspective, it was interesting to follow the reasoning set out by the Court and meaningful for me to explore in its judgments the contributions to IHL on a case-by-case analysis and see what degree this contribution had reached. Hence, without exaggerating it, I aimed at recognizing and assessing the level (not in a quantitative sense though) of this impact and where it can be found. Needless to say, in order to test my thesis, I set forth some assumptions which I call the premises of the study. As may be apparent so far, one of these premises is the importance of legislation in international law. Without such a presumption, it would not matter in cases concerning humanitarian law issues whether the ICJ has had recourse to IHL instruments or what innovations it introduced into the arena of international law which had not existed beforehand (prior to the case[s] concerned). Thus, I first attempted to demonstrate the importance of the role of courts in judicial law-making in international law as opposed to the general understanding. As far as the main topic is considered, this attempt required support not only from ICJ jurisdiction but also from various other courts like courts of self-contained regimes such as domestic courts or international criminal courts, which is done so.

A second premise on an equal plane as the former, is the existence of an (growing) interaction between legal regimes. This, once more was an obligatory assumption for the study to proceed, since if this was not presumed, any contribution to IHL by the ICJ would not have been searched at all, as these two are bound by different legal instruments -though they both belong to international law in general.-

[156] *Ibid.,* at para. 245.

The above issues pointed out are included in the Abstract, Introduction and the part titled "The Role of Jurisprudence in International Law". In order to be persuasive enough and for academic concerns, all the issues were advanced in a way as to include both the objections and the underlying elements of the assumptions along with emphasis on the reasons of why these assumptions are claimed. Yet, one should once more be reminded of the fact that the next and –the main- section of the article headed "Jurisprudence of the ICJ Relating to IHL", inevitably embraces a justificatory essence because the very spirit of the context so requires. This is apparently in accordance with the purpose of the study which is directed at proving my assertion.

Briefly, the research is set on a two sets of three-level rationale as following, while at the same time pursuing a deduction methodology:

A1- Different legal regimes are not devoid of each-other's effects and are in constant interrelation.

A2- IHL, as a branch of international law, is an integral but seperate part of it. And it is evident then, that the ICJ, as a hard core international law instrument, belongs to a different legal regime than IHL.

A3- In this case the ICJ and IHL are not devoid of each-other's effects and are interrelated.

The second set of three-level rationale which the research is based on is:

B1- Jurisprudence in international law is important for a variety of reasons (clarifying, interpreting, making law, etc…)

B2- The ICJ jurisprudence, as the ICJ being an instrument of international law, is important for international law.

B3- When the A3 (the result reached by the deduction A) is taken into consideration- and added to the data B1 and B2, the conclusion of "the significance of ICJ jurisprudence for IHL norms and principles can be explored" has been reached.

Relying on this account, "Jurisprudence of the ICJ Relating to IHL" has been started to be searched on. Under this topic, not only is the jurisprudence and its contributions on the field of IHL put forth, but also the findings discovered are interpreted in a way as to signify and signal the "potential"

contributions of ICJ on IHL and more importantly the benefits of the "idea" of ICJ's contribution to IHL.

In this search, ultimately, it has been reached to the unsurprising general conclusion that, besides other international courts, ICJ *has* also made significant contributions on the development of international humanitarian rules and principles. In more explicit terms, the ICJ *has*, *inter alia,* contributed to the interpretation, clarification (like rendering the customary rules of IHL visible) and thus the development of IHL rules and principles by applying them to feasible cases before it. Yet more, the Court has not only developed IHL by applying its rules to cases, but it has also developed this field of law by incorporating its concepts and rules into international law which is a broader structure as a whole. For example, in the various cases that have been examined before it, the Court has recognized that fundamental rules of IHL appearing in treaties go beyond the conventional law which can be considered to constitute the highest level of effect for the field. Thus it was confirmed that the assumption of the study was right at least to a certain extent.

It is noticeable throughout the study that only a few number of cases concerned with *purely* humanitarian law issues have been brought before the Court, one reason of which is the lack of compromissory clauses in IHL instruments. It goes without saying that, not only as a matter of protecting humanitarian values embedded in humanitarian law instruments should the states which do not abide by the rules and principles of IHL must ultimately be brought before the Court, but also as a means of fulfilling the obligation to ensure respect for these instruments. Nevertheless -and while this is a consequence of a set of different factors-, a partial explanation of this can be made by mentioning the fact that the states are not so enthusiastic to bring before the Court some matters that high concern or national interest is attributed to.

Apart from the aforamentioned issue of the abstention on the part of states and the low number of cases brought before the Court, states' reluctance to comply with the decisions remains yet to be another problem which is a question of political considerations; not to mention the issue of the worrisome increasing number of infringements of IHL. For instance, it has been shown that disputes which involve an aspect of armed conflict are among the disputes which receive the lowest level of compliance.[157]

[157] PAULSON, p. 457.

It would be misleading, however, to conclude on the basis of these statements that the ICJ has nothing to offer for the development of international humanitarian rules and principles. Because, as has been seen in the judicial proceedings handled in the study, the Court has proved capable of making use of these cases to a large extent, while from time to time with cautious attitutes. Yet, it is also true that there exist shortcomings of the relevant cases analysed, as mentioned throughout the article.

Perhaps one last challenge worth adding here is that the ICJ cannot deal with individual criminal responsibility for grave breaches, which international criminal courts are allowed to. But again, it is also true that ICJ's contribution to IHL can be and is used by these courts and this may contribute IHL in a way as to encourage the states themselves, either with a connection to the crime (principles of jurisdiction based on nationality, territoriality and the protective principle of jurisdiction) or without it (universal jurisdiction in strict sense) to claim jurisdiction, apart from the international venue, for the persons alleged to have perpetrated these crimes.

In this article, the (positive) contribution of the Court is assessed, but it is obvious from the early stages that there remains "difficulties standing in the way of its fuller accomplishment" in the words of Lauterpact.[158] Nevertheless, although there can be made certain criticisms towards and shortcomings of the jurisdiction concerned, from acknowledging the *erga omnes* character and customary nature of obligations of IHL to pointing out the feature of Common Article 3 as the minimum applicable in both national and international armed conflicts, from recognizing the states' duties to comply with IHL to emphasizing the obligation to reparation of infringements of IHL both to natural or legal persons, from affirming the prohibition of illegal looting, plundering and exploitation of natural resources as a part of IHL to the responsibilities of the third parties and international community in the face of violations of IHL rules, the Court can be said to have made contribution to international humanitarian rules and principles in some ways. As the final word, the ICJ can be said to have helped consolidating the status of IHL as of a major contribution. If nothing else, by invoking the humanitarian values, it can be regarded as having contributed to the rules and principles of IHL.

[158] LAUTERPACHT, p. 3-5.

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