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The International Court of Justice and International Humanitarian Law: A Critical Study

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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[2] might not be the first international court to come to mind concerning International Humanitarian Law (IHL)[3] , it is argued in this study that its judgments and advisory opinions serve as a base both for the development [4]of this field of law (IHL), and for the process called "humanization of international law. Grounded on such a point, the purpose of this article is 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 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. First of all, a general introduction of the subject in the first chapter will be sketched out by focusing specifically on the (positive) influence of the increase in the rhetoric of the notion of "international humanitarian law "(IHL)and stresses the norms governing IHL.The second chapter discusses the relationship between IHL and general international law and the reasons for the ICJ's distinguishing role and importance for the matter at hand, and the third chapter will be devoted to analyzing the case law. Lastly in the Conclusion part, in the light of all these cases, the contribution of the ICJ to IHL will be assessed.

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[2] United Nations Charter Article 92
[3] 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.
[4] "Development" refers to occasions where the Court has established new rules and/or clarified the existing ones
[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.

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I. INTRODUCTION

International humanitarian law is a major part of public international law and constitutes one of the oldest bodies of international norms. As the principal judicial organ of public international law, the International Court of Justice contributes to the understanding of the fundamental values of the international community expressed in international humanitarian law.[9] Judicial decisions as such are not a source of law, but the dicta by the International Court of Justice are unanimously considered as the best formulation of the content of international law in force.[10] From a general international law perspective, international case law is therefore of the utmost importance in determining the legal framework of humanitarian law.[11] 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".[12] So much so, the changing of the "law of war"

[9] For a more general perspective, see P.-M. Dupuy, "Le juge et la règle de droit", RGDIP, Vol. 93, 1989, pp. 570-597; ibid., "Les 'considérations élémentaires d'humanité' dans la jurisprudence de la Cour internationale de Justice", in: R.-J. Dupuy (ed.), Mélanges en l'honneur de Nicolas Valticos. Droit et justice, Pedone, Paris, 1999, pp. 117-130; G. Abi-Saab, "The International Court as a world court", in V. Lowe. & M. Fitzmaurice (eds), Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings, Grotius Publications, Cambridge University Press, 1996, pp. 3-16; V. Gowlland-Debbas, "Judicial insights into fundamental values and interests of the international community", in A.S. Muller, D. Raic & J.M. Thuranszky (eds), The International Court of Justice: Its Future Role after Fifty Years, Martinus Nijhoff Publishers, The Hague/Boston/London, 1997, pp. 327-366

[10] H. Lauterpacht, The Development of International Law by the International Court, Stevens & Sons, London, 1958, in particular pp. 6-22, and pp. 61-71; E. McWhinney, "The legislative role of the World Court in an era of transition", in R. Bernhardt, W.K. Geck, G. Jaenicke. & H. Steinberger (eds), Völkerrecht als Rechtsordnung, internationale Gerichtsbarkeit, Menschenrechte: Festschrift für Hermann Mosler, SpringerVerlag, Berlin-Heidelberg-New York, 1983, pp. 567-579

[11] On the importance of international case law in the field of humanitarian law or human rights, see I.P. Blishchenko, "Judicial decisions as a source of international humanitarian law", in A. Cassese (ed.), The New Humanitarian Law of Armed Conflict, Editoriale Scientifica S.r.l., Naples, 1979, pp. 41-51; R. Abi-Saab, "The 'general principles' of humanitarian law according to the International Court of Justice", International Review of the Red Cross, No. 766, 1987, pp. 381-389; N.S. Rodley, "Human rights and humanitarian intervention: The case law of the World Court", International and Comparative Law Quarterly, Vol. 38, 1989, pp. 321-333; S.M. Schwebel, "The treatment of human rights and of aliens in the International Court of Justice", in V. Lowe & M. Fitzmaurice (eds), Fifty Years of the International Court of Justice. Essays in Honour of Sir Robert Jennings, op. cit. (note 1), pp. 327-350

[12] 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

was to a large extent a process of humanization driven by human rights norms and principles of humanity.[13]This is why, despite their divergences, 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."[14]

Similarly, ad hoc tribunal for the former Yugoslavia (ICTY)[15] 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."[16] 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 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 strengthened the application of its sources,

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

[14] 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 strengthened part of international law, it has started to become a forerunner of the law of war, nonetheless

[15] 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"

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

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especially the regulations of Geneva Conventions and the customs of war.[17]

II. INTERNATIONAL HUMANITARIAN LAW AND GENERAL INTERNATIONAL LAW

Contemporary international humanitarian law is composed of: (A) a complex set of conventional rules, (B) customary norms and (C) jus cogens, which the case law of the International Court of Justice helps to clarify and interpret. Unity and complexity of treaties of international humanitarian law The systematic codification and progressive development of humanitarian law in general multilateral treaties started relatively early when compared to other branches of international law[18]. Contemporary humanitarian law is the outcome of a long normative process, whose more immediate origins date back to the late nineteenth century with the movement towards codification of the laws and customs of war. As a result, international humanitarian law is one of the most codified branches of international law. This very substantial body of law is characterized by two sets of rules: the "Hague Law", whose provisions relate to limitations or prohibitions of specific means and methods of warfare, and the "Geneva Law", which is mainly concerned with the protection of victims of armed conflicts, i.e. non-combatants and those who do not or no longer take part in the hostilities.[19] With the adoption of the Additional Protocols of 1977, which combine both branches of international humanitarian law, that distinction is now mainly historical and didactic. In its Advisory Opinion of 8 July 1996 on the Legality of the Threat or Use of Nuclear Weapons, the International Court of Justice acknowledges in unequivocal terms the basic unity of international humanitarian law. It makes definitively clear that this branch of international law contains both the rules relating to the conduct of hostilities and those protecting persons in the power of the adverse party. By so doing, the Court retraces 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' (...) fixed the rights and duties of belligerents in their conduct of operations and limited the choice of methods and

[17] International 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).

[18] On the historical development of international humanitarian law, see: G. Best, Humanity in Warfare: The Modern History of the International Law of Armed Conflicts, Weidenfeld and Nicholson, London, 1980; P. Haggenmacher, Grotius et la doctrine de la guerre juste, Presses Universitaires de France, Paris, Graduate Institute of International Studies, Geneva, 1983; J. Pictet, "The formation of international humanitarian law", International Review of the Red Cross, No. 244, 1985, pp. 3-24;

[19] See on this distinction: S.E. Nahlik, "Droit dit 'de Genève' et droit dit 'de La Haye': Unicité ou dualité?", AFDI, Vol. XXIV, 1978, pp. 1-27; F. Bugnion, "Law of Geneva and Law of The Hague", International Review of the Red Cross, No. 844, 2001, pp. 901-922.

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".[20] The Court concludes that: "These two branches of the law applicable in armed conflict have become so closely interrelated that they are considered to have gradually formed one single complex system, known today as international humanitarian law. The provisions of the Additional Protocols of 1977 give expression and attest to the unity and complexity of that law".[21]

The underlying unity of international humanitarian law is grounded on the basic values of humanity shared by every civilization. As Judge Weeramantry points out: "Humanitarian law and custom have a very ancient lineage. They reach back thousands of years. They were worked out in many civilizations — Chinese, Indian, Greek, Roman, Japanese, Islamic, modern European, among others. Through the ages many religious and philosophical ideas have been poured into the mould in which modern humanitarian law has been formed. They represented the effort of the human conscience to mitigate in some measure the brutalities and dreadful sufferings of war. In the language of a notable declaration in this regard (the St. Petersburg Declaration of 1868), international humanitarian law is designed to 'conciliate the necessities of war with the laws of humanity'.[22] The numerous treaties of humanitarian law express the continuing concern of the international community to maintain and preserve fundamental rules in the specific context of armed conflicts, where the rule of law is particularly threatened. According to the International Court of Justice's own words, the set of conventional rules applicable in time of armed conflict is: "fundamental to the respect of the human person and 'elementary considerations of humanity'.[23] The Court thereby underlines that the same fundamental ethical values are shared both by humanitarian law and human rights law. Despite their different historical backgrounds and their own normative specificities, the central concern of both branches of international law is human dignity. They originate from the same source: the laws of humanity. In addition to acknowledging this common conceptual framework, the Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons also contributes to a better understanding of the interplay between treaties of humanitarian law and human rights law.[24] Indeed, the Court confirms the convergence and complementarity of human rights and

[20] Legality of the Threat or Use of Nuclear Weapons, op. cit. (note 6), p. 256, para. 75
[21] Ibid.
[22] Ibid., Dissenting Opinion of Judge Weeramantry, pp. 443-444
[23] Ibid., p. 257, para. 79
[24] On the relationships between human rights and humanitarian law, see: A.S. Calogeropoulos-Stratis, Droit humanitaire et droits de l'homme: La protection de la personne en période de conflit armé, Graduate Institute of

humanitarian law and recognizes the continuing applicability of human rights law in time of armed conflict: "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 the right to life [guaranteed under Article 6 of the International Covenant] 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."[25] Humanitarian law can therefore be regarded as a species of the broader genus of human rights law. This is not a distinction in terms of their intrinsic nature, but a distinction based on the context of application of rules designed to protect human beings in different circumstances. Although in the present case the right to life, as guaranteed in Article 6 of the International Covenant on Civil and Political Rights, adds no substance to the existing humanitarian law, the Court's recognition of the continuing applicability of human rights treaties in time of armed conflict is of considerable importance for two main reasons. At the substantive level, provisions of human rights treaties go beyond conventional humanitarian law and fill some normative gaps, particularly in the context of non-international armed conflict and internal strife.[26] At the procedural level, human rights treaties contain sophisticated enforcement mechanisms that may supplement the more rudimentary mechanisms for the implementation of humanitarian law, mainly based on a preventive and State-oriented approach[27]

International Studies, A.W. Sijthoff, Geneva/Leiden, 1980, p. 119; Y. Dinstein, "Human rights in armed conflict: International humanitarian law", in T. Meron (ed.), Human Rights in International Law: Legal and Policy Issues, Clarendon Press, Oxford, 1984, pp. 345-368; A. Eide, "The laws of war and human rights: Differences and convergences", in C. Swinarski (ed.), Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet, op. cit. (note 8), pp. 675-698

[25] Legality of the Threat or Use of Nuclear Weapons, op. cit. (note 6), p. 240, para. 25. For a commentary on this passage of the Advisory Opinion, see V. Gowlland-Debbas, "The right to life and genocide: The Court and international public policy", in L. Boisson de Chazournes. & P. Sands

[26] See on this question: Y. Dinstein, "The international law of civil wars and human rights", Israel Yearbook on Human Rights, Vol. 6, 1976, pp. 62-80; S. Junod, "Human rights and Protocol II", IRRC, No. 236, 1983, pp. 246-254; Th. Meron, Human Rights in Internal Strife: Their International Protection, Hersh Lauterpacht Memorial Lectures, Grotius Publications, Cambridge, 1987

[27] B.G. Ramcharan, "The role of international bodies in the implementation and enforcement of humanitarian law and human rights law in non-international armed conflict", American University Law Review, Vol. 33, 1983, pp. 99-115;

(A) The fundamental principles of international humanitarian law

A major contribution of the International Court of Justice is that it has singled out, clarified and specified fundamental principles of international humanitarian law. Its case law, although sparse and fragmented, enables the identification of the basic rules of humanitarian law — qualified by the Court sometimes as "fundamental general principles of humanitarian law"[28] and sometimes as "the cardinal principles [...] constituting the fabric of humanitarian law".[29] These principles may be regrouped in three different categories: the fundamental principles relating to the conduct of hostilities, those governing the treatment of persons in the power of the adverse party, and those relating to the implementation of international humanitarian law

(B) Fundamental principles relating to the conduct of hostilities

The fundamental principles relating to the conduct of hostilities identified in the Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons are: the principle of the distinction that must be made between civilians and combatants; the prohibition of the use of weapons that cause superfluous injury or unnecessary suffering; and the residual principle of humanity contained in the Martens Clause.

• The principle of the distinction between combatants and non-combatants

The principle of the distinction between combatants and non-combatants is the first of "the cardinal principles (...) constituting the fabric of humanitarian law" identified by the Court in its Advisory Opinion of 1996. According to the Court, 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".[30] The Court thus reaffirms a well-established principle in international case law.[31] A few months before the World Court delivered its Advisory Opinion, the First Chamber of the International Tribunal for the former Yugoslavia concluded that: "the rule that the civilian population as such, as well as individual civilians, shall not be the object of attack, is a fundamental rule of international humanitarian law applicable to all armed conflicts".[32] The distinction between combatant and non-combatant is the cornerstone of all humanitarian law.[33]

[28] Military and Paramilitary Activities in and against Nicaragua, op. cit. (note 5), p. 113, para. 218
[29] Legality of the Threat or Use of Nuclear Weapons, op. cit. (note 6), p. 257, para. 78
[30] Ibid.
[31] Greco-German Arbitral Tribunal, Kiriadolou v. Germany, 10 May 1930, ibid., Vol. 10, p. 100; District Crt. of Tokyo, Shimoda case, 7 December 1963, ILR, 32, pp. 629-632
[32] ICTY, case IT-95-11-R61, 8 March 1996, Prosecutor v. Martic, para. 10
[33] F. Kalshoven, The Law of Warfare. A Summary of its Recent History and Trends in Development, A.W. Sijthoff/Henry Dunant Institute, Leiden/Geneva, 1973

This basic principle derives from the axiom that is the very foundation of international humanitarian law, namely that only the weakening of the military potential of the enemy is acceptable in time of armed conflict. The St Petersburg Declaration of 29 November/ 11 December 1868 was the first multilateral instrument to embody the principle of distinction. Since then it has been reiterated in numerous instruments and in various forms.[34] But it was not until 1977, with the adoption of the two Protocols additional to the Geneva Conventions, that this customary rule was given formal clear-cut expression at the universal level. In its Article 48, entitled "Basic rule", Protocol I states: "In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives." Therefore, according to Article 57(1) of Protocol I: "In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects."

(C) Fundamental principles relating to the treatment of persons in the power of the adverse party

The basic rules governing the treatment of persons in the power of the adverse party are contained in Article 3 common to the four Geneva Conventions, which is traditionally regarded as a sort of treaty in miniature. This provision lays down a minimum standard of humanity and was pronounced by the Court in its Judgment of 27 July 1986 on Military and Paramilitary Activities in and against Nicaragua to be one of "the fundamental general principles of humanitarian law". [35] According to common Article 3: "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, without 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;

[34] See for example the texts cited by Judge Weeramantry in his Dissenting Opinion: Regulations respecting the Laws and Customs of War on Land (Article 25) in Annex to the 1907 Hague Convention (IV) respecting the Laws and Customs of War on Land; 1907 Hague Convention (IX) concerning Bombardment by Naval Forces in Time of War (Article 1

[35] Military and Paramilitary Activities in and against Nicaragua, op. cit. (note 5), pp. 113-114, para. 218

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(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 (...)". This provision was the only treaty law applicable to internal armed conflict until the adoption of Protocol II in 1977.[36]

(D) Fundamental principles relating to the implementation of international humanitarian law

The case law of the International Court of Justice enables three basic rules governing respect for international humanitarian law to be drawn, namely: the obligation to respect and to ensure respect for humanitarian law; humanitarian assistance; and the prohibition of genocide.

• Obligation to respect and to ensure respect for international humanitarian law

The obligation to respect and to ensure respect for international humanitarian law is expressed in Article 1 common to the Geneva Conventions and Additional Protocol I: "The High Contracting Parties undertake to respect and to ensure respect for the present Convention [or Protocol] in all circumstances".[37]This provision draws attention to the special character of international humanitarian law instruments. They are not commitments entered into on a basis of reciprocity, binding on each State party only insofar as the other State party complies with its own obligations. By their absolute character, norms of international humanitarian law lay down obligations vis-à-vis the international community as a whole. Each member of the international community is therefore entitled to demand that they be respected. The International Court of Justice confirms that common Article 1 is not a stylistic clause devoid of any real legal weight, but a norm firmly anchored in customary law and entailing obligations for every State, whether or not they have ratified the treaties in question. The Court acknowledges in its Judgment of 27 July 1986 concerning Military and Paramilitary Activities in and against Nicaragua 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

[36] 6 J.E. Bond, "Internal conflict and Article Three of the Geneva Conventions", Denver Law Journal, Vol. 48, 1971, pp. 263-285; H.T. Taubenfeld, "The applicability of the laws of war in civil war", in: J.N. Moore (ed.), Law and Civil War in the Modern World

[37] For a commentary on this provision, see: L. Condorelli. & L. Boisson de Chazournes, « Quelques remarques à propos de l'obligation des Etats de 'respecter et faire respecter' le droit international humanitaire 'en toute circonstance' », in: C. Swinarski (ed.), Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet, op. cit. (note 8), pp. 17-35

Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression"[38] The World Court concludes 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".[39]

III. 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. 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.

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.

(A) Corfu Channel Case

Continuing with the case law, the very first contentious case of the ICJ, the Corfu Channel case[40] 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. In the judgment of the Court, the significant

[38] Military and Paramilitary Activities in and against Nicaragua, op. cit. (note 5), p. 114, para. 220
[39] Ibid
[40] Corfu Channel Case, Judgment of April 9th, 1949:ICJ Reports, p. 4.

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.[41] 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 there from.[42] 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 concept. 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.

(B) Military and Paramilitary Activities in and against Nicaragua

It is equally noteworthy to mention that the Court did recourse to the aforementioned 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 (which is, 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) by acknowledging that the specific provisions of the Hague

[41] Ibid. at, p.22
[42] Ibid., at p.36.

Convention of 1907 were declaratory of a general principle of international law; when giving its decision about the applicability of IHL to the case. 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 occurred in peacetime, while in wartime in the Nicaragua case. Yet, due to the United States' (US) reservation concerning multilateral treaties[43] -as the other party to the dispute-, this did not yield to any difference in the application of the Hague Convention.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. On this account, the Court made its reasonings pursuant to customary IHL and stated that: "…the Geneva Conventions are in some respects a development, and in other respects no more than the expression, of such principles."[44] 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…"[45]

(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.[46] 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 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

[43] CHETAIL, p.243.
[44] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports 1986, p.14, para.218
[45] Ibid., at para. 220
[46] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996, p. 226, para. 1.

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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"[47]

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' ". 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. 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.[48]

(D) Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory

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[49].

The question 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.[50] 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

[47] Ibid., at para. 25
[48] 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.
[49] BEDI, p.340
[50] 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"

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the title of "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory".[51] 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 authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised."[52] 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.[53] 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.[54] It thus stated Article 6 of the Convention 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 and added in the following article that those provisions include Articles 47, 49, 52, 53 and 59 of the Convention and later quoted them. [55] When assessing the applicability of IHL to the Occupied Palestinian Territory, the Court, in its opinion, also recalled Article 2/4 of the UN Charter and a UN General Assembly resolution in 1970 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

[51] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, p. 136
[52] Ibid., at para.78
[53] Ibidem
[54] Ibid., at, para. 125.
[55] Ibid., at para. 126

of territorial acquisition resulting from the threat or use of force"[56]

IV. CONCLUSION

Though the decisions of the International Court of Justice relating to international humanitarian law are sparse, its case law has a highly substantive importance that goes well beyond the immediate cases before it. Although we may regret the cautious and somewhat ambiguous position of the Court regarding the compatibility of the threat or use of nuclear weapons with international humanitarian law, the Court's case law as a whole has certainly helped to strengthen and clarify the normative basis of international humanitarian law by highlighting its relationships with general international law and by setting out the basic principles governing the conduct of hostilities and the protection of victims of war. The Court has recognized that fundamental rules of international humanitarian law embedded in multilateral treaties go beyond the domain of purely conventional law. 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. The fundamental principles of humanitarian law identified by the International Court of Justice provide a condensed synthesis of the law of armed conflicts and constitute the normative quintessence of this traditional branch of international law. 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. 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". As a final word, the ICJ can be said to have helped consolidating the status of IHL. If nothing else, by invoking the humanitarian values, the ICJ can be regarded as having contributed to the rules and principles of IHL.

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[56] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, p.136, para.87.

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