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The International Court of Justice and the international humanitarian law rules for armed conflicts

La Corte Internacional de Justicia y las normas de derecho internacional humanitario en conflictos armados

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ABSTRACT. This article analyzes the undermined importance of the International Court of Justice's (ICJ) case law in interpreting international humanitarian law (IHL) and its relationship with public international law. It examines how the ICJ has elevated IHL to customary law, declaring it "intransgressible" and equating it with jus cogens, and identified particular obligations for the parties in conflict. The article studies how the Court has clarified the relationships between customary IHL with the law of treaties and has declared which elements of IHL constitute the most basic principles of humanity, applicable whether it is an international or non-international armed conflict. Finally, the text analyzes how the Court has discouraged counterproductive separations between the application of IHL and international human rights law.

KEYWORDS: customary law; International Court of Justice; humanitarian law; peremptory norm; treaties

RESUMEN. El artículo analiza la importancia socavada de la jurisprudencia de la Corte Internacional de Justicia (CIJ) para establecer la interpretación del derecho internacional humanitario (DIH) y su relación con el derecho internacional público. El artículo estudia cómo la CIJ ha elevado el DIH a derecho consuetudinario y lo ha declarado "intransgressible", equiparándolo con el jus cogens y ha identificado obligaciones particulares para las partes en conflicto. El artículo estudia cómo la Corte ha aclarado las relaciones entre el DIH consuetudinario con el derecho de los tratados y ha declarado qué elementos del DIH constituyen los principios más básicos de humanidad, aplicables tanto si se trata de un conflicto armado internacional como de uno no internacional. Finalmente, el texto analiza cómo la Corte ha desalentado separaciones contraproducentes entre la aplicación del DIH y el derecho internacional de los derechos humanos.

PALABRAS CLAVE: costumbre; Corte Internacional de Justicia; Derecho internacional humanitario; norma imperativa; tratados

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Introduction and theoretical approach

The contemporary International Humanitarian Law (IHL) scholarship and case-law research is heir to the proliferation of *ad hoc* decisions by international criminal tribunals (Schlütter, 2010) and the recent experience of its Residual Mechanism (Soufi, 2015), the International Criminal Court's ICC current activity, and its jurisprudential development in the matter of judging individual responsibility under armed conflicts (Sánchez, 2018). In general, contemporary IHL teaching focuses on the applications of internal armed conflict-derived rules—as a predominant form of conflict—and its particularities (Olasolo, 2019) and the study of the practice by National Armies and Organized Armed Groups, reflected in national legislations and the “rules of engagement” (Ardila-Castro, 2020). These feed customary international law, duly codified by the International Committee of the Red Cross (ICRC) (Henckaerts, 2005), which has developed an enormous amount of specific and deeply technical international law rules and identified their international criminal consequences. Paradoxically, this scope makes us forget, or at least overlook, the International Court of Justice's fundamental role in establishing the nature, definition, and application of international humanitarian law in selected cases since its first judgment in the *Corfu Channel case*.

This article proposes that it is fundamental to recapitulate the cases in which the International Court of Justice has been confronted with applying and analyzing facts or rules relating to international humanitarian law. As pointed out recently by authors such as Chetail (2003) in “The contribution of the International Court of Justice to international humanitarian law” or Gardam (2003) because of its special institutional characteristics, the International Court of Justice's normative relationship with international humanitarian law has special legal effects on States that cannot be ignored in the due application and development of international humanitarian law in internal armed conflicts or by the relevant actors guided by the most basic humanitarian guarantees.

Starting with the theoretical foundations of this position, first, we must highlight that, as the principal judicial organ of the United Nations, the International Court of Justice has a normative interpretative power and a particular “norm-making” capacity in identifying the rules of law and determining their nature like customary rules, *erga omnes*, and *jus cogens* (Henckaerts, 2005), that exceeds those that national courts, *ad hoc* international criminal courts, or transitional scenarios may have in their jurisprudence.

Thus, by identifying certain characteristics of international humanitarian law in its different aspects through the cases that will be analyzed, we propose that the International Court of Justice's proclamations on the nature and content of international humanitarian law has a broader universal effect on progressive development (Lauterpacht, 1982) and normative consolidation than other tribunals' judgments.

Secondly, its Statute being the most paradigmatic of the criteria for establishing the sources of international law in its Article 38, not only does the ICJ's particular authority and relationship with the sources of international law endow it with special power in establishing the content of international law but also, as an inter-state tribunal, the scope of its jurisprudence and advisory function is broader than the sometimes restricted and extremely casuistic-technical character of international criminal tribunals' jurisprudence, which as their mandate undoubtedly requires, deal with situations particular to the responsibility of individuals and is not easily extended into universal principles.

When analyzing cases of international State responsibility for internationally wrongful acts involving the major treaties of international humanitarian law such as the Geneva Conventions or the Convention on the Prevention and Punishment of Genocide, the International Court of Justice necessarily generates much more universalizable criteria on the nature of IHL rules in terms of its most essential principles (Crawford, 2002).

In turn, in its advisory opinions, the Court's ruling on what "is the law in force" in the matter in question (Verma, 2018) generates a pronouncement of special relevance for international law. This particular progressive development of international law in advisory jurisdictions is increasingly recurrent in international tribunals. It is based both on the strategic questions submitted by legal entities with procedural standing, such as states or international organizations, and the tribunals' initiative to take advantage of the opportunity to answer the questions submitted to them to generate normative developments (Abello-Galvis & Arévalo-Ramírez, 2019).

In this sense, it is the ICJ that, through its decisions and the justifications (*dictum*) included in them, is called upon to establish the relationship between particular regimes of law, such as the law of the sea or environmental law (Vinales, 2008), with general public international law (general international law) (Chetail, 2003). The decisions analyzed in this article precisely exemplify this work of unification of international humanitarian law with the precepts of public international law. It analyzes and pronounces the customary nature of its rules and their relationship with classical issues of public international law and the law of treaties, including their temporal application, denunciations or reservations, the hierarchical relationship of IHL rules with concepts such as *ius cogens* or *erga omnes* obligations, and the legal structure of IHL itself concerning its status as a single law derived from basic principles of humanity.

This ICJ task has already occurred with other regimes, such as international human rights law; through its judgments, it has succeeded in establishing the necessary links to interpret it as a formative part of general international law.

The following sections will analyze the decisions of the ICJ's extensive docket (Arévalo-Ramírez & Martínez Vargas, 2018), recognized as directly related to international humanitarian law, and the criteria emanating from these decisions considered funda-

mental contributions of the Court to the understanding of international humanitarian law and its conception and application by the parties to the conflict.

Methodological approach of the case law review

Using all the available cases that relate to IHL since 1947 and a methodology involving a case-law doctrinal analysis with a descriptive-analytic approach to normative sources, this article examines how the ICJ jurisprudence has elevated international humanitarian law to customary law, declared it “intransgressible”—equating it with *jus cogens*—, and identified particular obligations for the parties in conflict, complementing the work of traditional customary IHL sources like the ICRC Customary International Humanitarian Law Handbook.

The article also studies how the Court has clarified the relationships between customary international humanitarian law with the law of treaties on issues such as reservations or denunciations to international humanitarian law treaties by states, establishing the elements of humanitarian law that constitute principles emanating from the most basic principles of humanity, which go beyond considerations relating to whether it is an international or non-international (internal) armed conflict or a case relating to the means of war or the principle of distinction.

Finally, the text analyzes how the Court has effectively avoided counterproductive separations between the scope of application of international humanitarian law and international human rights law (IHRL).

Discussion and analysis of ICJ case-law on international humanitarian law

Advisory Opinion on the legality of the threat or use of nuclear weapons (1996) and the indivisible nature of IHL

In the 1996 Advisory Opinion: *The Legality of the Threat or Use of Nuclear Weapons*, the ICJ had the particular opportunity, because of the tenor of the question, to analyze one of the typical discussions relating to international humanitarian law. Namely, the question of whether it is a unitary and indivisible body of rules (conventional, customary, and others) that applies uniformly or whether the idea remains, as taught, a law divided into sub-issues usually attributed to sets of treaties, as replicated by the concepts of “Hague Law” and “Geneva Law.” The latter is usually understood as the set of rules regulating the use and humanitarian prohibitions predicated on the means of war and weapons; the other as the basic protections and guarantees of humanity to be observed over combatants and non-combatants.

This distinction is usually considered a strength of international humanitarian law. It is one of the most widely codified branches of law, with a long tradition of treaties relating to the weapons regulation and a long history of conferences and conventions, from the first humanitarian agreements prior to the Great Conference of 1907 to the current Additional Protocols of 1977 to the Geneva Conventions. However, their application by *ad hoc* criminal tribunals has shown that their separate idealization (the law of weapons on the one hand and the law of humanitarian guarantees on the other) can lead to normative gaps. Moreover, it can lead to debates on which norms apply to a state and which do not, depending on its ratified treaties when the idea that both sets of norms reflect the same unitary principles and customs should prevail.

In this regard, in the advisory opinion on the legality of the threat or use of nuclear weapons (International Court of Justice, 1996), the ICJ took an affirmative position on how this instrument had achieved the absolute consolidation of both parts of IHL as a single system after Protocol I of 1977¹. It definitively developed the simultaneous application of the two regimes as one, both being expressions of the same customary principles of humanitarian nature. In this regard, the International Court of Justice (1996) stated:

75. A large number of customary rules have been developed by the practice of States and are an integral part of the international law relevant to the question posed. 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. 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.

76. Since the turn of the century, the appearance of new means of combat has –without calling into question the longstanding principles and rules of international law– rendered necessary some specific prohibitions of the use of certain weapons, such as explosive projectiles under 400 grammes, dum-dum bullets and asphyxiating gases. Chemical and bacteriological weapons were then prohibited by the 1925 Geneva Protocol. More recently, the use of weapons producing “non-detectable fragments”, of other types of “mines, booby traps and other devices”, and of “incendiary weapons”, was either

1 Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts [Protocol I], 8 June 1977.

prohibited or limited, depending on the case, by the Convention of 10 October 1980 on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects. The provisions of the Convention on “mines, booby traps and other devices” have just been amended, on 3 May 1996, and now regulate in greater detail, for example, the use of anti-personnel land mines. (p. 34 [sic]).

In terms of the scope of application established by the ICJ in 1996, the unification and indivisibility of IHL rules must be taken into account and fully observed by all State agents, members of the judiciary, members of armed groups, and any actors in conflict to avoid debates regarding one-sided applications. For instance, the false argument that only states shall comply with the usage of certain weapons, depending on the status of their ratification of certain treaties, and that those obligations do not extend to members of organized armed groups opposing the state. It also allows a better understanding of the holistic way in which humanitarian considerations should be applied in the face of new instruments and forms of warfare that simultaneously threaten the restrictions on weapons and the principle of distinction (e.g., cluster munitions, autonomous bomber drones). In turn, in Paragraphs 75 and 76 of the Advisory Opinion, the scenario set by the Court for establishing the applicable law (Savoie, 2005) is of vital importance regarding the sources of IHL. With declarative force, it expresses (Meron, 1987) that the Hague and Geneva codification process is representative (Talmon, 2015) of international customary law and not merely of a conventional regime.

The advisory opinion on the legality of the threat or use of nuclear weapons and the relationship between international humanitarian law and international human rights law

The relationship between IHL and human rights, whether enshrined at the domestic level (Ramelli, 2004) or with international human rights law (IHRL), is a complex relationship with multiple positions reflected in the doctrine (Tomuschat, 2010), the conduct of states, and the possibilities of exception and suspension enshrined in different instruments. It is often said that in armed conflict scenarios, whether internal (von der Groeben, 2011) or international, broad suspensions of human rights are allowed. International humanitarian law is applied, almost as a “replacement”; humanitarian guarantees are applicable in exchange for suspending the usual human rights regime. However, this position is not legally correct. The different nature of human rights instruments compared to those of international humanitarian law does not admit such a simple or immediate derogation due to the mere occurrence of armed conflict.

The ICJ clarified part of this debate by choosing to exemplify the general rule regarding the continuity of obligations under the Covenant on Civil and Political Rights

during armed conflicts that trigger the application of the Geneva Conventions and their protocols. In this regard, the International Court of Justice (1996) stated in its Advisory Opinion:

24. Some of the proponents of the illegality of the use of nuclear weapons have argued that such use would violate the right to life as guaranteed in Article 6 of the International Covenant on Civil and Political Rights, as well as in certain regional instruments for the protection of human rights. Article 6, paragraph 1, of the International Covenant provides as follows: “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”

In reply, others contended that the International Covenant on Civil and Political Rights made no mention of war or weapons, and it had never been envisaged that the legality of nuclear weapons was regulated by that instrument. It was suggested that the Covenant was directed to the protection of human rights in peacetime, but that questions relating to unlawful loss of life in hostilities were governed by the law applicable in armed conflict.

25. The Court observes that the protection of the International Covenant of [sic] 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 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 (pp. 239-240 [sic]).

In paragraphs 24 and 25 of the 1996 Advisory Opinion, the Court demonstrates how different situations within the armed conflict can violate both the existing general IHRL norms and specific reinforced protections and guarantees derived from the relevant IHL norms. It also expresses that the latter’s applicability due to the existence of the armed conflict does not automatically derogate the general human rights norms. Their suspension requires compliance of one or the other regime with specific norms (Hampson, 2008), including duly activated states of emergency, enactment of legislation publicly declaring the alteration of social order, or the confirmation of situations of loss of humanitarian protection that turns individuals from objects into lawful military objectives.

The advantage of this interpretation, as pointed out by authors such as Chetail (2003) or Milanović (2009), is that the diametrically different nature of universal and regional human rights treaties can complement the war-minded specificity of the norms of international humanitarian law. In addition, the norms of IHRL have monitoring mechanisms with more robust and diverse monitoring, enforcement, and dispute

resolution mechanisms than those usually included in IHL treaties, such as the Geneva Conventions. Their continued and concomitant non-derogation and application during armed conflict can subsequently ensure access to international human rights law justice in regional or universal settings.

Advisory Opinion on the legality of the threat or use of nuclear weapons and the normative hierarchy of international humanitarian law: *Ius Cogens*, customary law, principles, and the Martens Clause

In paragraphs 78 to 79 of the 1996 Advisory Opinion on nuclear weapons, the ICJ establishes a special legal nature of the basic principles of IHL. In these two paragraphs, the Court (1) states the basic guarantees of IHL from which the Geneva Conventions and the well-known “common articles” (De chazournes & Condorelli, 2000) emanate, (2) declares them as customary international law, and (3) seems to classify them in a special legal category of sources similar to that of *ius cogens* (International Court of Justice, 1996).

78. The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first 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. According to the second principle, it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In application of that second principle, States do not have unlimited freedom of choice of means in the weapons they use.

The Court would likewise refer, in relation to these principles, to the Martens Clause, which was first included in the Hague Convention II with Respect to the Laws and Customs of War on Land of 1899 and which has proved to be an effective means of addressing the rapid evolution of military technology. A modern version of that clause is to be found in Article 1, paragraph 2, of Additional Protocol 1 of 1977, which reads as follows:

“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.”

In conformity with the aforementioned principles, humanitarian law, at a very early stage, prohibited certain types of weapons either because of their indiscriminate effect on combatants and civilians or because of the unnecessary suffering caused to combatants, that is to say, a harm greater than that unavoidable to achieve legitimate military objectives. If an envisaged use of weapons would not meet the requirements of humanitarian law, a threat to engage in such use would also be contrary to that law.

79. It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and “elemen-

itary considerations of humanity” as the Court put it in its Judgment of 9 April 1949 in the *Corfu Channel* case (*I.C.J. Reports 1949*, p. 22), that The Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law. (p.35 [sic])

In the final sentence of Paragraph 79, the International Court of Justice establishes the universality of such principles independent of the ratifications of treaties because of their customary content. However, it adds that they must also be binding because they are “intransgressible” principles of customary international law. The previous, seemingly, stated to hide the formula of *jus cogens* without mentioning it directly (Shelton, 2006), as the category of “intransgressible” is not common when referring to custom or any other international legal norm referring to its binding nature. The Court’s reinforcement of IHL (Chetail, 2003, p. 242), elevating them to the category of “intransgressible,” is usually understood as its way of classifying them as norms of peremptory international law (Wood, 2018).

In the paragraphs cited above, the Court also identifies the well-known Martens Clause or Humanity Clause as an effective element and an unequivocal component of the principles of international law that all Parties to a conflict must observe. It deems them an effective mechanism to address the rapid evolution of the means used to conduct hostilities in the face of the slow pace of codifications and the process of treaty negotiation dealing with new issues, which nowadays include autonomous weapons and electronic warfare.

The customary character of IHL in the “Legality of the Threat or Use of Nuclear Weapons” and “Reservations to the Convention on the Prevention and punishment of the crime of Genocide” advisory opinions and in the “Military and Paramilitary Activities” and “Corfu Channel” cases as a shield against reservations and denunciations of IHL treaties

The declaratory and interpretative relationship of the ICJ’s judgments and opinions with the sources of IHL (Abello-Galvis & Arévalo-Ramírez, 2020), its role as the principal State-vs-State jurisdiction identifying the content of international custom, and its relationship with treaties have produced two very useful developments, regarding the quality of IHL as custom in the face of reservations and denunciation of treaties. These situations could be considered, from the perspective of general international law, as formal obstacles to compliance with international humanitarian law.

In the Advisory Opinion on the legality of the threat or use of nuclear weapons (International Court of Justice, 1996), the Court stated:

82. The extensive codification of humanitarian law and the extent of the accession to the resultant treaties, as well as the fact that the denunciation clauses that existed in the codification instruments have never been used, have provided the international community with a corpus of treaty rules the great majority of which had already become customary and which reflected the most universally recognized humanitarian principles. These rules indicate the normal conduct and behaviour expected of States. (p. 36)

In the case of military and paramilitary activities the International Court of Justice (1986) states:

217. The Court observes that Nicaragua, which has invoked a number of multilateral treaties, has refrained from making reference to the four Geneva Conventions of 12 August 1949, to which both Nicaragua and the United States are parties. Thus at the time when the Court was seised [sic] of the dispute, that dispute could be considered not to “arise”, to use the wording of the United States multilateral treaty reservation, under any of these Geneva Conventions. The Court did not therefore have to consider whether that reservation might be a bar to the Court treating the relevant provisions of these Conventions as applicable. However, if the Court were on its own initiative to find it appropriate to apply these Conventions, as such, for the settlement of the dispute, it could be argued that the Court would be treating it as a dispute “arising” under them; on that basis, it would have to consider whether any State party to those Conventions would be “affected” by the decision. [sic] for the purposes of the United States multilateral treaty reservation.

218. The Court however sees no need to take a position on that matter, since in its view the conduct of the United States may be judged according to the fundamental general principles of humanitarian law; in its view, the Geneva Conventions are in some respects a development, and in other respects no more than the expression, of such principles. It is significant in this respect that, according to the terms of the Conventions, the denunciation of one of them

“shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience” (Convention I, Art. 63; Convention II, Art. 62; Convention III, Art. 142; Convention IV, Art. 158).

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 noninternational 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” (*Corfu Channel, Merits, I. C. J. Reports 1949*, p. 22; paragraph 215 above). The Court may therefore find them applicable to the present dispute, and is thus not required to decide what role the United States multilateral treaty reservation might otherwise play in regard to the treaties in question. (pp. 103-104 [sic])

In the cases of the legality of the threat or use of nuclear weapons and military and paramilitary activities, the Court strengthened IHL compliance by elevating the general

principles that inspire the Geneva Conventions to customary law and not subjecting it to the strict world of conventional international law (the law of treaties). On the one hand, the previous in response to the reservation that the United States had presented in one of the cases against the Geneva Conventions. On the other, it interpreted that the norms of international humanitarian law, being customary, are not to be affected by states' observance, following specific denunciations that could be made to conventional instruments that crystallize them, as long as they continue to be bound by custom.

In turn, the reference to the rules of international law as "elementary considerations of humanity," inherited from the Corfu Channel case (International Court of Justice, 1949) and the nature of common Article 3 as a basic and minimum criterion customarily applicable to armed conflicts, prevents its circumvention through mechanisms such as denunciation or reservation of treaties.

The ICJ also discussed the relationship between customary and conventional law regarding reservations and the preservation of the existence and binding nature of custom in the face of reservations, denunciation, or other treaty mechanisms, in the Advisory Opinion "Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide" (1951). Here, by way of custom, the Court also developed the notion of *erga omnes* obligations derived from such universal prohibitions, such as genocide, which are not limited to the conventional scope of its own Convention and its ratifications. Consequently, they do not admit unilateral limitations contrary to its object and purpose by considering that those obligations, derived from custom, can create obligations owned before the entire international community.

The solution of these problems must be found in the special characteristics of the Genocide Convention. The origins and character of that Convention, the objects pursued by the General Assembly and the contracting parties, the relations which exist between the provisions of the Convention, *inter se*, and between those provisions and these objects, furnish elements of interpretation of the will of the General Assembly and the parties. The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as "a crime under international law" involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96 (1) of the General Assembly, December 11th 1946). The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the co-operation required "in order to liberate mankind from such an odious scourge" (Preamble to the Convention). The Genocide Convention was therefore intended by the General Assembly and by the contracting parties to be definitely universal in scope. It was in fact approved on December 9th, 1948, by a resolution which was unanimously adopted by fifty-six States.

The objects of such a convention must also be considered. The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions (International Court of Justice, 1951, p. 23 [sic]).

The “Military and Paramilitary Activities” case: The obligations to respect IHL in non-international armed conflicts and the notion of effective control of the state’s conducts

The mentioned judgment in the *Nicaragua v. United States of America* case includes two fundamental contributions to the substantive and procedural reasoning of IHL and its international adjudication in the context of the state’s international responsibility for internationally wrongful acts.

In this case, the ICJ establishes that the customary scope of Article 1 of the Geneva Conventions not only imposes the obligation on party or non-party States to respect international humanitarian law, understood as the obligation to take all measures to ensure that their agents do not violate the precepts of international humanitarian law. It also includes the customary obligation to ensure respect, for international humanitarian law, in the context of the case, understood as the obligation to disfavor or allow third-party violations of IHL (International Court of Justice, 1986):

219. The conflict between the *contras*’ forces and those of the Government of Nicaragua is an armed conflict which is “not of an international character”. The acts of the *contras* towards the Nicaraguan Government are therefore governed by the law applicable to conflicts of that character; whereas the actions of the United States in and against Nicaragua fall under the legal rules relating to international conflicts. Because the minimum rules applicable to international and to non-international conflicts are identical, there is no need to address the question whether those actions must be looked at in the context of the rules which operate for the one or for the other category of conflict. The relevant principles are to be looked for in the provisions of Article 3 of each of the four Conventions of 12 August 1949, the text of which, identical in each Convention, expressly refers to conflicts not having an international character.

220. The Court considers 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. 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 1949 Geneva Conventions. (p. 104 [sic])

The issue of third parties and the international responsibility of states for internationally wrongful acts (Cafisch, 2017) is of special relevance in this case. It is recognized as one of the most controversial issues in the relationship of the ICJ with the case-law of other tribunals, especially ad hoc tribunals in criminal matters and its developments in the matter of attribution of conduct (Chetail, 2003).

Contrary to the flexible and most recent criteria of general (total) control established by international criminal tribunals, such as the International Criminal Tribunal for the former Yugoslavia (ICTY), one of the first decisions in the judicial activity of the International Court of Justice on this matter occurred in the 1986 case of military and paramilitary activities in Nicaragua. One of the central questions was whether the violations of IHL committed by the irregular forces (*Los contras*), which, according to various sources, were allegedly supported, incited, and even instructed by the United States Government, that confronted the Nicaraguan Government at the time could be attributed to the United States as international law violations of various IHL customary norms.

At the time, the ICJ, identifying the difference between these non-state subjects, grouped as an organized armed group, and the members or agents of State organs of the United States, decided to address this attribution question (Crawford, 2002). It constructed a control criterion with a high and strict threshold, thus avoiding that simpler connections between the State and the *contras* could be considered an attribution link, further requiring the State to have strict and effective control over their conduct, means, and results.

114. In this respect, the Court notes that according to Nicaragua, the *contras* are no more than bands of mercenaries which have been recruited, organized, paid and commanded by the Government of the United States. This would mean that they have no real autonomy in relation to that Government. Consequently, any offences which they have committed would be imputable to the Government of the United States, like those of any other forces placed under the latter's command. In the view of Nicaragua, 'stricto sensu, the military and paramilitary attacks launched by the United States against Nicaragua do not constitute a case of civil strife. They are essentially the acts of the United States.' If such a finding of the imputability of the acts of the *contras* to the United States were to be made, no question would arise of mere complicity in those acts, or of incitement of the *contras* to commit them.

115. The Court has taken the view (paragraph 110 above) that United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the *contras*, the selection of its military or paramilitary

targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the *contras* in the course of their military or paramilitary operations in Nicaragua. 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 rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed. (International Court of Justice, 1986; p. 104 [sic])

This position would be decisive for consolidating how the Court attributes third-party conducts to states. It would impact its decisions in the so-called “Genocide Cases” in the context of the armed conflict in the Balkans (Cassese, 2007) and is expected to impact its position in the future merits decision in the current case of *Gambia v. Myanmar*, in the docket of the Court since 2019.

Advisory Opinion on the construction of a wall in Palestine.

The International Court of Justice faced another issue closely related to international humanitarian law, territory, and sovereignty (Simma, 2013) in responding to the question of the legal consequences deriving from the construction of the Israeli wall in Palestinian territory. In this case, other members of the international community opposed Israel’s effective control of East Jerusalem and the surrounding townships, alleging Israel’s violation (Sunga, 2006) of the 1949 Geneva Convention on Civilian Persons, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the United Nations Convention on the Rights of the Child.

In its opinion, the Court analyzed the impact of the wall’s construction on the daily life and human rights of the inhabitants of the Palestinian territory. It found that the wall’s construction was contrary to the provisions of the Hague Convention of 1907 and the Fourth Geneva Convention. Moreover, it involved the violation of the freedom of movement of the territory’s inhabitants as guaranteed by the International Covenant on Civil and Political Rights.

In this analysis, the Court, based on its position concomitantly with the application of IHL and IHRL in conflict settings, considered that the construction of the wall also violated the inhabitants’ free exercise of the right to work, access to health, education, and an adequate standard of living under the International Covenant on Economic, Social, and Cultural Rights standards and the Convention on the Rights of the Child.

The Court determined that the establishment of settlements related to the wall and the construction and administration of the wall itself would seriously alter the demographic composition of the occupied Palestinian territory. It considered the previous a contravention of the Fourth Geneva Convention and the relevant resolutions of the Council of Security in the context of civil rights amid conflict. In conclusion, this Advisory Opinion becomes a practical guideline for the rights and duties of occupation forces and their duties regarding international human rights (International Court of Justice, 2004).

Conclusion

The cases and Advisory Opinions analyzed above are a clear expression of the decisive role played by the jurisprudence of the International Court of Justice in establishing the nature and interpretation of international humanitarian law, its incorporation, and its relationship with public international law. In a repeated and consistent manner, the International Court of Justice has elevated international humanitarian law principles and practices into customary law of a universal nature, declaring it “intransgressible” and equating it to *jus cogens*. It has also identified several particular obligations for the parties involved in armed conflicts. Likewise, the Court has clarified the relationship between customary and conventional international humanitarian law and established which of its elements constitute fundamental principles emanating from the most basic principles of humanity. Principles that go beyond the considerations of whether an armed conflict is international or non-international, or whether it is a case concerning the means of warfare or the principle of distinction. The Court’s sociological factor, as the highest court of the United Nations, and its inter-state nature are fundamental to universalizing these premises on international humanitarian law, overcoming merely local positions of the belligerents who tend to contextualize the scope of humanitarian norms according to their own needs or intentions. The Court has also effectively managed to avoid an unnecessary and counter-productive separation between the scope of application of international humanitarian law and international human rights law.

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