The contribution of the International Court of Justice to international humanitarian law

VINCENT CHETAIL*

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.[1] 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.[2] From a general international law perspective, international case law is therefore of the utmost importance in determining the legal framework of humanitarian law.[3] Since the remarkably brief and elusive reference to the "elementary considerations of humanity" in its first Judgment delivered on 9 April 1949 in the *Corfu Channel Case*,[4] the International Court of Justice has had occasion to deal with questions of humanitarian law in two highly debated cases: the Judgment of 27 June 1986 concerning *Military and Paramilitary Activities in and against Nicaragua*[5] and the Advisory Opinion delivered ten years later on 8 July 1996 concerning the *Legality of the Threat or Use of Nuclear Weapons*.[6] These two cases have been commented on at length, and it is not our intention to study here the specific circumstances of each case[7] or the particular position of the Court concerning nuclear weapons with regard to international humanitarian law.[8] We deliberately choose to place the case law of the International Court of Justice in a more general perspective within the framework of humanitarian law and to

* The author is a teaching and research assistant at the Graduate Institute of International Studies (Geneva) and at the Centre of European and Comparative Law (Lausanne). He was also a consultant for the United Nations High Commissioner for Refugees. The author is grateful to Professors Vera Gowland-Debbas and Andrew Clapham for their helpful comments. He also wishes to thank his colleagues Mariano Garcia Rubio and Jeremy Allouche for their revision of the final draft of this article.

consider it in the light of the other relevant cases, mainly the Advisory Opinion on *Reservations to the Genocide Convention*[9] and the contentious case on *Application of the Convention on the Prevention and Punishment of the*

1 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.

2 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*, Springer-Verlag, Berlin-Heidelberg-New York, 1983, pp. 567-579; O. Schachter, "Creativity and objectivity in international tribunals", *ibid*., pp. 813-821; L. Condorelli, "L'autorité de la décision des juridictions internationales permanentes", in Société Française pour le Droit International, *La juridiction internationale permanente*, Colloque de Lyon, Pédone, Paris, 1986, pp. 277-313; R.Y. Jennings, "The judicial function and the rule of law in international relations", in *International Law at the Time of its Codification: Essays in Honour of Roberto Ago*, Vol. III, Milano — Dott. A. Giuffrè Editore, 1987, pp. 139-151; M. Mendelson, "The International Court of Justice and the sources of international law", in V. Lowe V. & M. Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings*, *op. cit.* (note 1), pp. 63-89; F. Francioni, "International 'soft law': A contemporary assessment", *ibid.*, pp. 167-178; J.J. Quintanan, "The International Court of Justice and the formulation of general international law: The law of maritime delimitation as an example", in: A.S. Muller *et al.* (eds), *The International Court of Justice. Its Future Role after Fifty Years*, *op. cit.* (note 1), pp. 367-381; S. Rosenne., *The Law and Practice of the International Court, 1920-1996*, Vol. III, The Hague/Boston/London, Martinus Nijhoff, 1997, in particular pp. 1606-1615 and 1628-1643; M. Shahabuddeen, *Precedent in the World Court*, Grotius Publications, Cambridge University Press, 1996, in particular pp. 1-31 and pp. 67-96.

3 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.

4 *Corfu Channel Case (Merits)*, ICJ Reports 1949, p. 22.

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

6 *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 1996, p. 226.

Crime of Genocide.[10] It will thus be shown how the case law of the International Court of Justice represents a major contribution from the twofold perspective of clarifying the relationship between international

7 These cases have been the object of the most abundant literature written on the cases of the Court. For the *Case concerning Military Activities in Nicaragua,* see in particular the special issue of the *American Journal of International Law*, Vol. 81, 1987; P.W. Kahn, "From Nuremberg to The Hague: The United States position in *Nicaragua* v. *United States*", *Yale Journal of International Law*, Vol. 12, 1987, pp. 1-62; P.-M. Eisemann, "L'arrêt de la CIJ dans l'affaire des activités militaires et paramilitaires au Nicaragua et contre celui-ci", *AFDI*, Vol. XXXII, 1986, pp. 153-189; J. Verhoeven, "Le droit, le juge et la violence: Les arrêts Nicaragua c. Etats-Unis", *RGDIP*, Vol. 91, 1987, pp. 1159-1239; T.D. Gill, *Litigation Strategy at the International Court: A Case Study of the* Nicaragua *v.* United States *Dispute*, Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1989; W. Czaplinski, "Sources of international law in the Nicaragua case", *International and Comparative Law Quarterly*, Vol. 38, 1989, pp. 85-99; C. Lang, *L'affaire Nicaragua/Etats-Unis devant la Cour internationale de Justice*, LGDJ, Bibliothèque de droit international, Vol. 100, Paris, 1990; J. Crawford, "Military activities against Nicaragua case (*Nicaragua* v. *United States*)", in Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. 3, Max Planck Institute for Comparative Public Law and International Law, Elsevier, Amsterdam/Lausanne/New York/Oxford/Shannon/Singapore/Tokyo, 1997, pp. 371-378. For the case on the *Legality of the Threat or Use of Nuclear Weapons*, see the numerous and extensive contributions published in the special issue of the *International Review of the Red Cross*, No. 823, 1997; L. Boisson de Chazournes. & P. Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons*, Cambridge University Press, Cambridge, 1999. See also: M. Perrin de Brichambaut, "Les avis consultatifs rendus par la CIJ le 8 juillet 1996 sur la licéité de l'utilisation des armes nucléaires dans un conflit armé (OMS) et sur la licéité de la menace et de l'emploi d'armes nucléaires (AGNU)", *AFDI*, Vol. XLII, 1996, pp. 315-336; V. Coussirat-Coustère, "Armes nucléaires et droit international: A propos des avis consultatifs du 8 juillet 1996 de la Cour internationale de Justice", *ibid.*, pp. 337-356; R.A. Falk, "Nuclear weapons, international law and the World Court: A historic encounter", *American Journal of International Law*, Vol. 91, 1997, pp. 64-75; M.J. Matheson, "The Opinions of the International Court of Justice on the threat or use of nuclear weapons", *ibid*., pp. 417-435.

8 See notes 6 and 7. For a general appraisal of the legality of nuclear weapons, see also: G. Schwarzenberger, *The Legality of Nuclear Weapons*, Stevens & Sons, London, 1958; M.N. Singh, *Nuclear Weapons and International Law*, Stevens & Sons, London, 1959; I. Brownlie, "Some legal aspects of the use of nuclear weapons", *International and Comparative Law Quarterly*, Vol. 14, 1965, pp. 437-451; A. Rosas, "International law and the use of nuclear weapons", in: *Essays in Honour of Erik Casrén*, Finnish Branch of the International Law Association, Helsinki, 1979, pp. 73-95; R.A. Falk, L. Meyrowitz. & J. Sanderson, *Nuclear Weapons and International Law*, Center of International Studies, Woodrow Wilson School of Public and International Affairs, Princeton University, Princeton, 1981; E. David, "A propos de certaines justifications théoriques à l'emploi de l'arme nucléaire", in C. Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, International Committee of the Red Cross, Martinus Nijhoff Publishers, Geneva/The Hague, 1984, pp. 325-342; S. McBride, "The legality of weapons of social destruction", *ibid.*, pp. 401-409; L.C. Green, *The Contemporary Law of Armed Conflict*, 2nd ed., Juris Publishing, Manchester University Press, 2000, pp. 128-132.

9 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion,* ICJ Reports 1951, p. 15.

10 *Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia) (Preliminary objections),* ICJ Reports 1996, p. 595.

humanitarian law and general international law on the one hand (Part 1), and identifying the content of the fundamental principles of international humanitarian law on the other (Part 2).

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.[11] 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.[12] 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.

11 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; G.I.A.D. Draper, "The development of international humanitarian law", in *International Dimensions of Humanitarian Law*, Henry Dunant Institute/UNESCO, Geneva/Paris, 1988, pp. 67-90; G. Best, "The restraint of war in historical and philosophical perspective", in A.J.M. Delissen. & G.J. Tanja (eds), *Humanitarian Law of Armed Conflict: Challenges Ahead, Essays in Honour of Frits Kalshoven*, Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1991, pp. 3-26; M. Howard, G.J. Andreopoulos & M.R. Shulman, *The Laws of War: Constraints on Warfare in the Western World*, Yale University Press, New Haven/London, 1994; L.C. Green, *The Contemporary Law of Armed Conflict*, *op. cit.* (note 8), pp. 20-53.

12 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.

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 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".[13]

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".[14]

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

13 *Legality of the Threat or Use of Nuclear Weapons*, *op. cit.* (note 6), p. 256, para. 75.
14 *Ibid.*

> 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'."[15]

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'."[16]

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.[17] Indeed, the Court confirms the convergence and complementarity of human rights and humanitarian law and recognizes the continuing applicability of human rights law in time of armed conflict:

15 *Ibid.*, Dissenting Opinion of Judge Weeramantry, pp. 443-444.

16 *Ibid.*, p. 257, para. 79.

17 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 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; A.H. Robertson, "Humanitarian law and human rights", *ibid.*, pp. 793-802; M. El Kouhene, *Les garanties fondamentales de la personne en droit humanitaire et en droit de l'homme*, Nijhoff, Dordrecht, 1986; L. Doswald-Beck. & S. Vité, "International humanitarian law and human rights law", *International Review of the Red Cross*, No. 800, 1993, pp. 94-119; T. Meron, "The convergence between human rights and humanitarian law", in D. Warner (ed.), *Human Rights and Humanitarian Law: The Quest for Universality*, Martinus Nijoff, The Hague, 1997, pp. 97-105; R.E. Vinuesa., "Interface, correspondence and convergence of human rights and international law", *Yearbook of International Humanitarian Law*, Vol. 1, 1998, pp. 69-110; R. Kolb, "The relationship between international humanitarian law and human rights law: A brief history of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions", *International Review of the Red Cross*, No. 324, 1998, pp. 409-419.

> "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."[18]

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.[19] At the procedural level, human rights treaties contain sophisticated enforcement mechanisms that may supplement the

18 *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. Gowland-Debbas, "The right to life and genocide: The Court and international public policy", in L. Boisson de Chazournes. & P. Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons*, *op. cit.* (note 7), pp. 315-337.

19 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; H.S. Burnos, "The application of international humanitarian law as compared to human rights law in situations qualified as internal armed conflict, internal disturbances and tensions, or public emergency, with special reference to war crimes and political crimes", in F. Kalshoven. & Y. Sandoz (eds), *Implementation of International Humanitarian Law*,

more rudimentary mechanisms for the implementation of humanitarian law, mainly based on a preventive and State-oriented approach.[20]

Customary nature of humanitarian law treaties

Already in its first Judgment**,** delivered on 9 April 1949 in the *Corfu Channel Case*, the International Court of Justice referred indirectly to the customary nature of humanitarian law treaties. The point was that a specific obligation to notify the presence of a minefield is contained in the Hague Convention VIII of 1907. However, Albania — the defendant — was not a party to it. Moreover, this convention applies in time of war, which was not the case. The Court considered nevertheless that:

Martinus Nijhoff Publishers, Dordrecht, 1989, pp. 1-30; P.H. Kooijmans, "In the shadowland between civil war and civil strife: Some reflections on the standard-setting process", in: A.J.M. Delissen. & G.J. Tanja (eds), *Humanitarian Law of Armed Conflict: Challenges Ahead*, *Essays in Honour of Frits Kalshoven*, *op. cit.* (note 11), pp. 225-247; F. Hampson, "Human rights and humanitarian law in internal conflicts", in: M.A. Meyer (ed.), *Armed Conflict and the New Law*, The British Institute of International and Comparative Law, London, Vol. II, 1993, pp. 53-82; H.P. Gasser, "A measure of humanity in internal disturbances and tensions: Proposals for a code of conduct", *International Review of the Red Cross*, No. 262, 1988, pp. 38-58; T. Meron, "Draft model declaration in internal strife", *International Review of the Red Cross*, No. 262, 1988, pp. 59-104; A. Eide, A. Rosas & T. Meron, "Combating lawlessness in gray zone conflicts through minimum humanitarian standards", *American Journal of International Law*, Vol. 89, 1995, pp. 215-223; R. Abi-Saab, "Human rights and humanitarian law in internal conflicts", in D. Warner (ed.), *Human Rights and Humanitarian Law: The Quest for Universality*, *op. cit.* (note 17), pp. 107-123; C. Sommaruga, "Humanitarian law and human rights in the legal arsenal of the ICRC", *ibid.*, pp. 125-133; D. Momtaz, "The minimum humanitarian rules applicable in periods of internal tension and strife", *International Review of the Red Cross*, No. 324, 1998, pp. 455-462; A. Eide, "Internal disturbances and tensions", in: *International Dimensions of Humanitarian Law*, *op. cit.* (note 12), pp. 241-256; T. Hadden. & C. Harvey, "The law of internal crisis and conflict", *International Review of the Red Cross*, No. 833, 1999, pp. 119-134

20 See: 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; M. Sassoli, "Mise en oeuvre du droit international humanitaire et du droit international des droits de l'homme: Une comparaison", *ASDI*, Vol. XLIII, 1987, pp. 24-61; C. Cerna, "Human rights in armed conflict: Implementation of international humanitarian law norms by regional intergovernmental human rights bodies", in F. Kalshoven & Y. Sandoz (eds), *Implementation of International Humanitarian Law*, *op. cit.* (note 19), pp. 31-67; R. Wieruszewski, "Application of international humanitarian law and human rights law: Individual complaints", *ibid.*, pp. 441-458; D. Weissbrodt & P.L. Hicks, "Implementation of human rights and humanitarian law in situations of armed conflicts", *International Review of the Red Cross*, No. 800, 1993, pp. 94-119; D. O'Donnell, "Trends in the application of international humanitarian law by United Nations human rights mechanisms", *International Review of the Red Cross*, No. 324, 1998, pp. 481-503; L. Zegveld, "The Inter-American Commission on Human Rights and international humanitarian law: A comment on the *Tablada* Case", *ibid.*, pp. 505-511; A. Reidy, "The approach of the European Commission and Court of Human Rights to international humanitarian law", *ibid.*, pp. 513-529.

> "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-recognised 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." [21]

The Court acknowledges that the specific provisions of the Hague Convention of 1907 were declaratory of a general principle of international law, and therefore admits — at least implicitly — the customary nature of the conventional rule expressed in the Convention.[22] This conclusion was reiterated by the Court in its Judgment of 27 July 1986 in the *Case concerning Military and Paramilitary Activities in and against Nicaragua*:

> "[I]f a State lays mines in any waters whatever (...) and fails to give any warning or notification whatsoever, in disregard of the security of peaceful shipping, it commits a breach of the principles of humanitarian law underlying the specific provisions of Convention No. VIII of 1907".[23]

The latter case was likewise an occasion for the Court to examine the customary nature of the four Geneva Conventions of 12 August 1949.[24] Indeed, the multilateral treaty reservation of the United States appeared to preclude the Court from applying the Geneva Conventions as treaty law. The Court, however, did not find it necessary to take a stance with regard to the relevance of the U.S. reservation, because:

21 *The Corfu Channel Case (Merits), op. cit.* (note 4), p. 22.

22 In the course of its Memorial to the Court, the United Kingdom argued that: "since the adoption of the Convention in 1907, States have in their practice treated its provisions as having been received into general international law. Even Germany, who in the wars of 1914-1918 and 1939-1945 was guilty of serious breaches of the Convention, publicly professed to be complying with its provisions. The Allied Powers in both wars held themselves bound by the Convention and throughout observed the provisions relating to notification": *ICJ Pleadings*, Vol. 1, p. 39.

23 *Military and Paramilitary Activities in and against Nicaragua, op. cit* (note 5), p. 112, § 215.

24 For a commentary, see: T. Meron, "The Geneva Conventions as Customary Law", *American Journal of International Law*, Vol. 81, 1987, pp. 348-370; R. Abi-Saab, "The 'general principles' of humanitarian law according to the International Court of Justice", *op. cit.* (note 3), pp. 381-389.

> "[I]n its view the conduct of the United States may be judged according to the fundamental general principles of humanitarian law".[25]

The Court began its analysis with the general and unchallengeable assessment that:

> "[I]n its view, the Geneva Conventions are in some respects a development, and in other respects no more than the expression of such principles".[26]

Although the Court focused its judgment on two particular articles of the Geneva Conventions as reflecting customary law (i.e. common Articles 1 and 3), the generality of the formula cited above seems to postulate the customary nature of the Geneva Conventions as such, or at least of the great majority of their provisions. As Judge Koroma recognized ten years later:

> "By reference to the humanitarian principles of international law, the Court recognized that the Conventions themselves are reflective of customary law and as such universally binding".[27]

The intermingling of treaty law and customary law confirms that, contrary to the commonly held opinion, custom cannot be reduced to only general legal principles and may be as detailed and technical as conventional provisions. But the conclusion of the Court was essentially declaratory, without deeming it necessary to examine the *opinio juris* and State practice relating to the customary nature of the Geneva Conventions. Indeed, the Court gave a tautological explanation mainly based on the common articles on denunciation, according to which:

> "[The denunciation] shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience."[28]

The Court added in the same vein that the fundamental rules contained in common Article 3

25 *Military and Paramilitary Activities in and against Nicaragua, op. cit.* (note 5), p. 113, para. 218.

26 *Ibid.*

27 *Legality of the Threat or Use of Nuclear Weapons*, Dissenting Opinion of Judge Koroma, *op. cit.* (note 6), p. 580.

28 Cited in: *Military and Paramilitary Activities in and against Nicaragua, op. cit*. (note 5), pp. 103-104, para. 218.

"are rules which, in the Court's opinion, reflect what the Court in 1949 called 'elementary considerations of humanity'."[29]

The Court seemed to consider that the intrinsically humanitarian character of the Geneva Conventions dispensed it from any explicit discussion of the process by which treaty obligations reflect or become customary obligations.[30] The Advisory Opinion of 8 July 1996 on the *Legality of the Threat or Use of Nuclear Weapons* was the occasion for the Court to give an *a posteriori* justification of its affirmation formulated ten years before. In that Opinion the Court begins by recalling the importance of the humanitarian values on which the whole law of armed conflicts is based:

"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 'elementary considerations of humanity', as the Court put it in its Judgment of 9 April 1949 in the *Corfu Channel Case* (...), that the Hague and Geneva Conventions have enjoyed a broad accession".[31]

The Court sees a confirmation of the customary nature of humanitarian law in the declarations of other international bodies. It recalls that:

"The Nuremberg International Military Tribunal had already found in 1945 that the humanitarian rules included in the Regulations annexed to the Hague Convention IV of 1907 'were recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war'."[32]

The Court also refers to the Report of the Secretary-General adopted in 1993 and introducing the Statute of the International Tribunal for the former Yugoslavia, which was unanimously approved by the Security Council, according to which:

"The part of conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflict as embodied in: the Geneva Conventions of 12 August 1949 for the Protection of War Victims; the Hague Convention (IV)

29 *Ibid.*, p. 104.

30 For a critique of this approach, see in particular: A. D'Amato, "Trashing customary international law", *American Journal International Law*, Vol. 81, 1987, pp. 101-105; R.G. Clark, "Treaty and custom", in L. Boisson de Chazourne. & P. Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons*, *op. cit.* (note 7), pp. 171-180.

31 *Legality of the Threat or Use of Nuclear Weapons*, *op. cit.* (note 6), p. 257, para. 79.

32 *Ibid.*, p. 258, para. 80.

Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907; the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948; and the Charter of the International Military Tribunal of 8 August 1945."[33]

The International Court of Justice concludes on that basis that:

"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."[34]

The Court confirms in unambiguous terms that the large majority of the provisions of the Hague and Geneva Conventions are declaratory of customary law. However, the Court is less categorical with regard to the provisions of Protocol I:

"[T]he Court recalls that all States are bound by those rules in Additional Protocol I which, when adopted, were merely the expression of the pre-existing customary law, such as the Martens Clause, reaffirmed in the first article of Additional Protocol I".[35]

The Court suggests therefore that Protocol I is only in part a codification of customary rules of humanitarian law.[36] However, this qualification of the declaratory nature of Protocol I does not mean that many of its provisions, which did not codify custom at the time of their adoption, may be considered nowadays as customary norms. Indeed, in its famous *North Sea Continental Shelf Cases*, the Court recognizes that the set of rules contained in a multilateral Convention may be considered

"as a norm-creating provision which has constituted the foundation of, or has generated a rule which, while only conventional or contractual in its origin, has since passed into the general *corpus* of international law, and is now accepted as

33 *Ibid.*, para. 81.

34 *Ibid.*, para. 82.

35 *Ibid.*, p. 259, para. 84.

36 See, however, the Dissenting Opinion of Judge Koroma, considering that: "Additional Protocol I (...) constitutes a restatement and a reaffirmation of customary law rules based on the earlier Geneva and Hague Conventions. To date, 143 States have become parties to the Protocol, and the customary force of the provisions of the Protocol are not based on the formal staus of the Protocol itself": *ibid.*, p. 580.

> such by the *opinio juris*, so as to have become binding even for countries which have never, and do not, become parties to the Convention. (...) [E]ven without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected".[37]

Although the Court did not feel the need to examine that question in the context of Protocol I, the accession of 143 States and the continued restatement of its validity constitute substantial signs of the customary process in which that Protocol is involved.[38]

Jus cogens and principles of humanitarian law

Traditionally linked to the notion of international public order, the concept of *jus cogens* presupposes that there are some rules which are so fundamental to the international community that States can not derogate from them.[39] *Jus*

37 *North Sea Continental Shelf Cases (Federal Republic of Germany* v. *Danemark/Netherlands),* ICJ Reports 1969, pp. 41-42, paras. 71 and 73.

38 See on this question: A. Cassese, "The Geneva Protocols of 1977 on the humanitarian law of armed conflict and customary international law", *UCLA Pacific Basin Law Journal*, 1984, pp. 57-118; D.W. Greig, "The underlying principles of international humanitarian law", *Australian Year Book of International Law*, Vol. 9, 1985, pp. 46-85; G.H. Aldrich, "Progressive development of the laws of war: A reply to criticisms of the 1977 Geneva Protocol I", *Virginia Journal of International Law*, Vol. 27, 1986, pp. 693-720; C. Greenwood, "Customary law status of the 1977 Geneva Protocols", in A.J.M. Delissen & G.J. Tanja (eds), *Humanitarian Law of Armed Conflict: Challenges Ahead*, *Essays in Honour of Frits Kalshoven*, *op. cit.* (note 11), pp. 93-114; G. Abi-Saab, "The 1977 Additional Protocols and general international law", *ibid.*, pp. 115-126; L.R. Penna, "Customary international law and Protocol I: An analysis of some provisions", 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. 201-225.

39 See among the classic literature: A. Verdross, "*Jus dispositivum* and *jus cogens* in international law", *American Journal of International Law*, Vol. 60, 1966, pp. 55-63; M. Virally, "Réflexions sur le *jus cogens*", *AFDI*, Vol. XII, 1966, pp. 5-29; E. Suy, "The concept of *jus cogens* in public international law", in *Lagonissi Conference on International Law*, Geneva, 1967, pp. 17-77; K. Marek, "Contribution à l'étude du *jus cogens* en droit international", in *Recueil d'études de droit international en hommage à Paul Guggenheim*, Graduate Institute of International Studies, Geneva, 1968, pp. 426-459; A. Gomez Robledo, "Le *ius cogens* international: sa genèse, sa nature, ses fonctions", *RCADI*, 1981, III, pp. 9-217; L. Alexidze, "Legal nature of *jus cogens* in contemporary international law", *ibid.*, pp. 223-268; G. Gaja "*Jus cogens* beyond the Vienna Convention", *ibid.*, pp. 271-316. See also: R. St. J. Macdonald, "Fundamental norms in contemporary international law", *Canadian Yearbook of International Law*, Vol. XXV, 1987, pp. 115-149; G.A. Christenson, "*Jus cogens*: Guarding interests fundamental to international society", *Virginia Journal of International Law*, Vol. 28, 1988, pp. 585-628; G.M. Danilenko, "International *jus cogens*: Issues of law-making", *European Journal of International Law*, Vol. 2, 1991, pp. 42-65; C. Annacker, "The legal régime of e*rga omnes* obligations in international law", *Austrian Journal of Public International Law*, Vol. 46, 1994, pp. 131-166.

cogens was defined for the first time in an international instrument in Article 53 of the 1969 Vienna Convention on the Law of Treaties, according to which:

> "[a] peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".[40]

The International Court of Justice has addressed the issue of *jus cogens* or related concepts, such as obligations *erga omnes*, in various contexts closely linked to humanitarian law, e.g. fundamental human rights,[41] the prohibition of the threat or use of force,[42] and the peoples' right to self-determination.[43] The Court's first reference to the notion of obligation *erga omnes* was made with regard to the outlawing of genocide. In its Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* of 28 May 1951, the Court highlights the particular nature of this Convention so as to recognize implicitly that the outlawing of genocide represents an obligation *erga omnes*:

> "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 interest 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."[44]

40 See also Article 53 of the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

41 *Barcelona Traction, Light and Power Compagny Limited (Belgium* v. *Spain),* ICJ Reports 1970, p. 32, para. 33.

42 *Military and Paramilitary Activities in and against Nicaragua, op. cit.* (note 5), p. 100, para. 190.

43 *Case concerning East Timor (Portugal v. Australia),* ICJ Reports 1995, p. 102, para. 29.

44 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion*, ICJ Reports 1951, p. 23.

Later, in its *Barcelona Traction* Judgment of 5 February 1970, the Court expressly confirms that the outlawing of genocide is an obligation of this nature and clarifies the general concept of obligation *erga omnes*. According to the Court:

> "[A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State (...). By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination".[45]

More recently, in the *Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide (Preliminary objections)* of 11 July 1996, the Court reiterates its Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, according to which:

> "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 (...). 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)".[46]

The Court deduces from the object and purposes of the Convention as set out in its Opinion of 28 May 1951 that:

45 *Barcelona Traction, Light and Power Company Limited (Belgium* v. *Spain), op. cit.* (note 41), p. 32, para. 33.

46 A*pplication of the Convention on the Prevention and Punishment of the Crime of Genocide, op. cit.* (note 10), p. 616, para. 31.

> "the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*".[47]

This latter confirmation is particularly interesting for two reasons. First, the Court considers that the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide in 1948 had the effect of crystallizing the outlawing of genocide as an obligation *erga omnes*. Secondly, it admits that it is not only the outlawing of genocide itself which has acquired the status of an obligation *erga omnes*, but the entire Convention, including in particular the obligation to bring to trial or extradite persons having committed, incited or attempted to commit such an international crime.

Conversely, the Court was much less clear with regard to the legal character of norms applicable to the conduct of hostilities and the protection of victims of armed conflicts. In its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court stated that there was no need for it to deal with the issue of whether such rules are part of *jus cogens* or not. It considered that the request by the General Assembly raised the question of the *applicability* of humanitarian law with regard to the use of nuclear weapons but not the question of the *legal character* of these norms.[48] By so doing, the Court unfortunately missed the opportunity to clarify the status of *jus cogens* in international humanitarian law.[49] Nevertheless the Court recognized that:

> "[The] fundamental rules [of humanitarian law] 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*".[50]

This last expression does not belong to the existing legal vocabulary and it was previously unknown in international law. As Professor Condorelli rightly observed, "it is unlikely that the Court merely meant [...] that those principles must not be transgressed. That, indeed, is true of any rule of law that imposes any

47 *Ibid.*

48 *Legality of the Threat or Use of Nuclear Weapons*, *op. cit.* (note 6), p. 258, para. 83.

49 See J. Werksman & R. Khalastchi, "Nuclear weapons and j*us cogens:* Peremptory norms and justice preempted?", in L. Boisson de Chazournes & P. Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons*, *op. cit.* (note 7), pp. 181-198.

50 *Legality of the Threat or Use of Nuclear Weapons*, *op. cit.* (note 6), p. 257, para. 79 (emphasis added).

obligation at all!"[51] The solemn tone of the phrase and its wording show, on the contrary, that the Court intended to emphasize the importance of humanitarian norms for international law and order as a whole and the particularity of such norms in comparison with the other ordinary customary rules of international law. This enigmatic expression of "intransgressible principles" may therefore be interpreted in two different ways. On the one hand, the Court could be suggesting that fundamental principles of humanitarian law constitute norms of *jus cogens in statu nascendi*, which are on the point of becoming peremptory norms of international law but cannot yet be plainly considered as such. It can be argued, on the other hand, that by underlining the intransgressible character of the fundamental rules of humanitarian law, the Court implicitly admits the peremptory character of such rules, but refrains from doing so explicitly, because it is dealing with the more limited issue of the applicability of such norms to the case under consideration. Following the same line of reasoning, some judges go one step further and acknowledge in clear terms that the principles and rules of international humanitarian law do have the character of *jus cogens*. President Bedjaoui holds, in his Separate Opinion, that the majority of rules of humanitarian law have to be considered as peremptory norms of international law.[52] Judge Weeramantry, in his Dissenting Opinion, states categorically that:

> "The rules of the humanitarian law of war have clearly acquired the status of *ius cogens*, for they are fundamental rules of a humanitarian character, from which no derogation is possible without negating the basic considerations of humanity which they are intended to protect."[53]

51 L. Condorelli, "Nuclear weapons: A weighty matter for the International Court of Justice", *International Review of the Red Cross*, No. 319, 1997, p. 14.

52 "Il ne fait pas de doute pour moi que la plupart des principes et règles du droit humanitaire et, en tout cas, les deux principes interdisant l'un l'emploi des armes à effets indiscriminés et l'autre celui des armes causant des maux superflus, font partie du *jus cogens*. La Cour a évoqué cette question dans le présent avis; mais elle a toutefois déclaré qu'elle n'avait pas à se prononcer sur ce point dans la mesure où la question de la nature du droit humanitaire applicable aux armes nucléaires ne rentrait pas dans le cadre de la demande que lui a adressée l'Assemblée générale des Nations Unies. La Cour n'en a pas moins expressément considéré ces règles fondamentales comme '*des règles intransgressibles du droit international coutumier*'", *Legality of the Threat or Use of Nuclear Weapons*, *op. cit.* (note 6), para. 21, p. 273.

53 *Ibid.*, p. 496. He notices that Judge Roberto Ago considered in 1971 in his course at The Hague Academy of International Law that the rules of *jus cogens* include: "the fundamental rules concerning the safeguarding of peace, and notably those which forbid recourse to force or threat of force; *fundamental rules of a humanitarian nature* (prohibition of genocide, slavery and racial discrimination, *protection of essential rights of the human person in time of peace and war*)".

Judge Koroma likewise points out that:

> "Already in 1980, the [International Law] Commission observed that 'some of the rules of humanitarian law are, in the opinion of the Commission, rules which impose obligation of *jus cogens*'."[54]

It is regrettable that the Court raises the issue of the fundamental nature of humanitarian law without clarifying the existing link between this body of international rules and their potential character of peremptory norms of general international law. Nevertheless, whatever the uncertainties regarding the definitive position of the Court on this point may be, its case law certainly contributed to the identification of fundamental principles of humanitarian law able to be considered as norms of *jus cogens*.

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"[55] and sometimes as "the cardinal principles [...] constituting the fabric of humanitarian law".[56] 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.

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

54 *Ibid.*, p. 574. This interpretation has likewise gained the recognition of the majority of legal opinion. See in addition to the references already mentioned: G. Abi-Saab, "The specificities of humanitarian law", 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. 265-280; L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law*, Lakimiesliiton Kustannus, Finnish Lawyers' Publishing Company, Helsinki, 1988; J. Kasto, *Jus Cogens and Humanitarian Law*, International Law Series, Vol. 2, London, 1994.

55 *Military and Paramilitary Activities in and against Nicaragua*, *op. cit.* (note 5), p. 113, para. 218.

56 *Legality of the Threat or Use of Nuclear Weapons*, *op. cit.* (note 6), p. 257, para. 78.

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".[57]

The Court thus reaffirms a well-established principle in international case law.[58] 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".[59]

The distinction between combatant and non-combatant is the cornerstone of all humanitarian law.[60] 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

57 *Ibid.*

58 As early as 1927, the Greco-German Mixed Tribunal considered in the case of *Coenca Brothers* v. *Germany* that « il est un des principes généralement reconnus par le droit des gens que les belligérants doivent respecter, pour autant que possible, la population civile ainsi que les biens appartenant aux civils »: *Recueil des décisions des tribunaux arbitraux mixtes*, Vol. 7, p. 683. See also: 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.

59 ICTY, case IT-95-11-R61, 8 March 1996, *Prosecutor* v. *Martic*, para. 10.

60 See in particular: 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; E. Rosenblad, *International Humanitarian Law of Armed Conflict: Some Aspects of the Principle of Distinction and Related Problems*, Henry Dunant Institute, Geneva, 1979; R.R. Baxter, "The duties of combatants and the conduct of hostilities (Law of the Hague)", in *International Dimensions of Humanitarian Law*, *op. cit.* (note 12), pp. 93-133.

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.[61] 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."

It is specifically prohibited to launch attacks directed deliberately at civilian objects,[62] attacks with the purpose of terrorizing the population,[63] reprisals against civilians[64] and indiscriminate attacks.[65] The Protocol purports to give a comprehensive definition of "indiscriminate attacks" in all forms of warfare. Article 51(4) describes and prohibits three types of indiscriminate attacks:

"(a) those which are not directed at a specific military objective;

(b) those which employ a method or means of combat which cannot be directed at a specific military objective; or

(c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol;

61 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); 1923 Hague Rules of Aerial Warfare (Articles 22 & 24); League of Nations Assembly Resolution of 30 September 1928; United Nations General Assembly Resolutions 2444 (XXIII) of 19 December 1968 and 2675 (XXV) of 9 December 1970.

62 Articles 52-56 of Protocol I and Article 13(2) of Protocol II.

63 Article 51(2) of Protocol I and Article 13(2) of Protocol II.

64 Articles 51(6), 52(1), 53(c), 54(4), 55(2) and 56(4) of Protocol I.

65 Article 51(4) and (5) of Protocol I.

and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction".

It goes on to give two particular examples:

"(a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and

(b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated".

It is thus clear that the fundamental principle of distinction between combatant and non-combatant cannot be easily dissociated from the rules inherent in its implementation. The statement by the International Court of Justice cited above follows the same reasoning. After having formulated the principle of distinction, it specifies its content by including both the prohibition of attacks against civilians and the prohibition of indiscriminate weapons. This judicial acknowledgement is at first sight self-evident, since, for practical purposes, the use of indiscriminate weapons must be equated with the deliberate use of weapons against civilians.[66] But from a normative point of view, as Louise Doswald-Beck points out,[67] this equation of the use of indiscriminate weapons with a deliberate attack on civilians should not be overlooked. By confirming that the prohibition of the use of indiscriminate weapons is an integral part of the customary principle of distinction, it is a welcome clarification of the state of the law, for the only conventional expression of that prohibition is contained in Additional Protocol I.[68] Moreover, the Court's interpretation implies that, despite the absence of any explicit mention to that effect, the prohibition contained in Additional Protocol II of deliberate attacks on civilians automatically

66 A. Cassese, "Means of warfare: the traditional and the new law", in A. Cassese (ed.), *The New Humanitarian Law of Armed Conflict*, Editoriale Scientifica, Naples, 1979, p. 164.

67 L. Doswald-Beck, "International humanitarian law and the Advisory Opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons", *International Review of the Red Cross*, No. 316, 1997, p. 37.

68 See: A. Cassese, "The prohibition of indiscriminate means of warfare", in R.J. Akkermann. (ed.), *Declarations on Principle: A Quest for Universal Peace. Liber Amicorum Discipulorumque Prof. Dr. Bert V.A. Röling*, Leiden, 1977, pp. 171-194; H. Blix, "Area bombardment: rules and reasons", *British Yearbook of International Law*, Vol. 49, 1978, pp. 31-69.

means that indiscriminate weapons must not be used in non-international armed conflicts.

- The prohibition of the use of weapons that cause superfluous injury or unnecessary suffering[69]

This prohibition is, for the Court, the second of "the cardinal principles (...) constituting the fabric of humanitarian law" on the conduct of hostilities:

> "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."[70]

Like the foregoing principle, it is a reaffirmation of a long-established provision of international customary law, codified in the Preamble to the 1868 St Petersburg Declaration and the Hague Regulations of 1899 and 1907,[71] and restated in Additional Protocol I.[72] Despite broad recognition of the existence of this basic rule of international humanitarian law, its application raises the difficult question of the criteria to be used in distinguishing between necessary and unnecessary suffering.[73] The Court proposes a pragmatic approach to this difficult issue. It defines "the unnecessary suffering caused to combatants" as "a harm greater than that unavoidable to achieve legitimate military objectives".[74] The assessment of the legality of a weapon or its use depends therefore on the balance between the degree of injury or suffering inflicted and the degree of military necessity, in the light of the particular circumstances of each case. Judge Shahabuddeen observes that:

> "[S]uffering is superfluous or unnecessary if it is materially in excess of the degree of suffering which is justified by the military advantage sought to

69 See: M. Aubert, "The International Committee of the Red Cross and the problem of excessively injurious or indiscriminate weapons", *International Review of the Red Cross*, No. 279, 1990, pp. 477-497; H. Meyrowitz, "The principle of superfluous injury or unnecessary suffering. From the Declaration of St. Petersburg of 1868 to Additional Protocol I of 1977", *International Review of the Red Cross,* No. 299, 1994, pp. 198-122.

70 *Legality of the Threat or Use of Nuclear Weapons*, *op. cit.* (note 6), p. 257, para. 78.

71 Article 23(e) of the Hague Regulations of 1899 and 1907.

72 Article 35(2) of Protocol I: "It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering".

73 See in particular H. Blix, "Means and methods of combat", in *International Dimensions of Humanitarian Law*, *op. cit.* (note 12), pp. 138-140.

74 *Legality of the Threat or Use of Nuclear Weapons*, *op. cit.* (note 6), p. 257, para. 78.

be achieved. A mechanical or absolute test is excluded: a balance has to be struck between the degree of suffering inflicted and the military advantage in view. The greater the military advantage, the greater will be the willingness to tolerate higher levels of suffering".[75]

Implementation of the rule necessarily requires a case-by-case assessment, within the general framework provided by the Court, of the specific circumstances of a particular situation**.** It is difficult in the abstract to go beyond that general criteria relating to the prohibition of the use of weapons that cause unnecessary suffering or superfluous injury.

- The Martens Clause

The Martens Clause, named after the Russian delegate to the 1899 Hague Peace Conference, is one of the most enigmatic and elusive provisions of international humanitarian law.[76] The Court notes that:

"[T]he Martens Clause (...) 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 I 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'."[77]

The Court's Advisory Opinion confirms that the Martens Clause is a customary rule and is therefore of normative status, regulating State conduct despite the absence of any particular rule. According to Jean Pictet, the basic rules contained in that clause "serve in a sense as the bone structure in a living body, providing guidelines in unforeseen cases and constituting a complete summary of the whole, easy to understand and indispensable for the purposes of

75 *Ibid.*, p. 402. See also: Dissenting Opinion of Judge Guillaume, *ibid.*, p. 289; Dissenting Opinion of Judge Higgins, *ibid.*, pp. 586-587.

76 See on this clause: S. Miyazaki, "The Martens Clause in international humanitarian law", 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. 433-444; R. Ticehurst, "The Martens Clause and the laws of armed conflict", *International Review of the Red Cross*, No. 824, 1997, pp. 125-134.

77 *Legality of the Threat or Use of Nuclear Weapons*, *op. cit.* (note 6), p. 257, para. 78.

dissemination".[78] However, there is no generally accepted interpretation of the Martens Clause and its precise meaning is highly debated. The Clause may indeed be understood in two different ways. First, it may merely be intended to recall the continued relevance of customary law when treaty law is not applicable, in which case the "principles of humanity" and the "dictates of public conscience" referred to in the Clause would be redundant and would only provide the ethical foundations of the customary laws of war. Secondly, it may however be argued that the "principles of international law" referred to in the Clause are derived from three different and autonomous sources, namely "established custom", the "principles of humanity" and the "dictates of public conscience". Arguably, the Martens Clause enables one to look beyond treaty law and customary law, and to consider principles of humanity and the dictates of the public conscience as separate and legally binding yardsticks.

The International Court of Justice unfortunately does not settle this question. Nevertheless, Judge Shahabuddeen, in his Dissenting Opinion, gives a very thorough analysis in favour of the second interpretation:

> "[T]he Martens Clause provided authority for treating the principles of humanity and the dictates of public conscience as principles of international law, leaving the precise content of the standard implied by these principles of international law to be ascertained in the light of changing conditions, inclusive of changes in the means and methods of warfare and the outlook and tolerance levels of the international community.[79] (...) It is (...) difficult to accept that all that Martens Clause did was to remind States of their obligations under separately existing rules of customary international law. (...) The basic function of the Clause was to put beyond challenge the existence of principles of international law which residually served, with current effect, to govern military conduct by reference to 'the principles of humanity and ... the dictates of public conscience'." [80]

He quotes the United States Military Tribunal at Nuremberg in the *Krupp* case in 1948, which stated that:

> "[The Martens Clause] is much more than a pious declaration. It is a general clause, making the usages established among civilized nations, the

78 J. Pictet, *Development and Principles of International Humanitarian Law*, Martinus Nijhoff Publishers, Dordrecht, Henry Dunant Institute, Geneva, 1985, p. 59.

79 *Legality of the Threat or Use of Nuclear Weapons*, Dissenting Opinion of Judge Shahabuddeen, *op. cit.* (note 6), p. 406.

80 *Ibid.*, p. 408.

> laws of humanity and the dictates of the public conscience into the legal yardstick to be applied if and when the specific provisions of the Convention (...) do not cover specific cases occurring in warfare, or concomitant to warfare."[81]

Judge Shahabuddeen points out that the Court had used "elementary considerations of humanity" as the basis for its judgment in the *Corfu Channel Case;* it therefore implies that "those considerations can themselves exert legal forces".[82] In other words, the Martens Clause would be a specification of the "elementary considerations of humanity" applied in the context of armed conflict. He concludes that as far as nuclear weapons were concerned, the risks associated with them meant that their use was unacceptable in all circumstances.[83] We know, however, that the Court did not agree with this last interpretation.[84] Although the debate on the legal meaning of the Martens Clause remains open, the merit of the Advisory Opinion was to underline this significant and frequently overlooked provision of international humanitarian law and allow a dynamic approach to the law of armed conflict.

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

81 *Loc. cit.*

82 *Ibid*., p. 407.

83 *Ibid*., p. 411.

84 By seven votes to seven, the Court concludes with the President's casting vote that: "the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law. However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake". By doing so, the Court seems to blur the traditional distinction between *jus ad bellum* and *jus in bello*. For a critical commentary on the position of the Court, see in particular: E. David, "Le statut des armes nucléaires à la lumière de l'avis de la CIJ du 8 juillet 1996", in L. Boisson de Chazournes. & P. Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons*, *op. cit.* (note 7), pp. 209-227; L. Condorelli, "Le droit international humanitaire, ou de l'exploration par la Cour d'une *terra* à peu près *incognita* pour elle", *ibid.*, pp. 228-246; C. Greewood, "*Jus ad bellum* and *jus in bello* in the *Nuclear Weapons* Advisory Opinion", *ibid.*, pp. 247-266; R. Müllerson, "On the relationship between *jus ad bellum* and *jus in bello* in the General Assembly Advisory Opinion", *ibid.*, pp. 267-274; J. Gardam, "Necessity and proportionality in *jus ad bellum* and *jus in bello*", *ibid.*, pp. 275-292. For an exercise of legal deconstruction of the so-called concept of State survival, see M.G. Kohen, "The notion of 'State survival' in international law", *ibid.*, pp. 293-314.

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".[85] 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;
>
> (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.[86] But the Court does

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

86 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*, The Johns Hopkins University Press, Baltimore/London, 1974, pp. 518-536; R.R. Baxter, "*Ius in bello interno*: The present and future law", *ibid.*, pp. 499-517; C. Lysaght, "The scope of Protocol II and its relation to Common Article 3 of the Geneva Conventions of 1949 and other human rights instruments", *American University Law Review*, Vol. 33(1), 1983, pp. 9-27; S.S. Junod, "Additional Protocol II: History and scope", *ibid.*, pp. 29-40; R. Abi-Saab, *Droit humanitaire et conflits internes: Origine de la réglementation internationale*, A. Pedone/Henry Dunant Institute, Paris/Geneva 1986; G. Abi-Saab, "Non-international armed conflicts", in *International Dimensions of Humanitarian Law*, *op. cit.* (note 12), pp. 217-239.

not conclude that the conventional text is an exact equivalent to the customary rules to which the Conventions give specific expression. The general principle of humanitarian law expressed in common Article 3 goes beyond the conventional restraints of the Geneva Conventions and is applicable to every type of armed conflict, whether internal or international. The Court explains in concise terms that:

> "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'".[87]

It confirms the interpretation already given in 1952 by the Commentary to the Geneva Conventions published by the International Committee of the Red Cross, for which:

> "[Article 3] merely demands respect for certain rules, which were already recognized as essential in all civilized countries, and enacted in the municipal law of the States in question, long before the Convention was signed. (...) The value of the provision is not limited to the field dealt with in Article 3. Representing, as it does, the minimum which must be applied in the least determinate of conflicts, its terms must *a fortiori* be respected in the case of international conflicts proper when all the provisions of the Convention are applicable".[88]

Without prejudicing — as the Court points out — the other rules of humanitarian law specifically applicable to international armed conflicts, Article 3 accordingly constitutes a common humane basis from which belligerents should never depart in any circumstances,. The Court's *dictum* testifies to a more general trend towards an increasing connection between the law of internal armed conflicts and the law of international armed conflicts,[89] a trend which is moreover not confined solely to the basic rules

87 *Military and Paramilitary Activities in and against Nicaragua*, *op. cit.* (note 5), p. 114, para. 218.

88 J. Pictet (ed.), *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field: Commentary*, International Committee of the Red Cross, Geneva, 1952, pp. 50 and 52.

89 R. Abi-Saab, "Humanitarian law and internal conflicts: The evolution of legal concern", in A.J.M. Delissen & G.J. Tanja (eds), *Humanitarian Law of Armed Conflict: Challenges Ahead*, *Essays in Honour of Frits Kalshoven*, *op. cit.* (note 11), p. 223.

contained in common Article 3.[90] All the fundamental principles of humanitarian law identified in the present study must, by their very nature, be considered applicable to all types of armed conflict. To quote the Court's own words in the *Nuclear Weapons* Opinion:

> "[T]he intrinsically humanitarian character of the legal principles in question (...) permeates the entire law of armed conflict and applies to all forms of warfare and to all kinds of weapons, those of the past, those of the present and those of the future".[91]

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".[92]

90 See, for example, in the context of rules applicable to the conduct of hostilities: ICTY, Case No. IT-94-I-AR72, Oct. 2, 1995, *Prosecutor* v. *Tadic*, paras. 126-127. For a commentary on this case, see C. Greenwood, "International humanitarian law and the *Tadic* case", *European Journal of International Law*, Vol. 7, 1996, No. 2, pp. 265-283. For a general assessment of this trend, see also: F. Kalshoven, "Applicability of customary international law in non-international armed conflicts", in: A. Cassese (ed.), *Current Problems of International Law: Essays on U.N. Law of Armed Conflict*, Dott. A. Giuffre, Milan, 1975, pp. 267-285; K. Obradovic, "Les règles du droit international humanitaire relatives à la conduite des hostilités en période de conflits armés non-internationaux", *Yearbook of the International Institute of Humanitarian Law*, 1989-1990, pp. 95-115; R.S. Myren, "Applying international laws of war to non-international armed conflicts: Past attempts, future strategies", *Netherlands International Law Review*, 1990, pp. 347-371; M.N. Shaw, *International Law*, 4th ed., Grotius Publications, Cambridge, 1996, pp. 815-818.

91 *Legality of the Threat or Use of Nuclear Weapons*, *op. cit.* (note 6), p. 259, para. 86.

92 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; F. Kalshoven, "The undertaking to respect and ensure respect in all circumstances: From tiny seed to ripening fruit", *Yearbook of International Humanitarian Law*, Vol. 2, 1999, pp. 3-61.

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 Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression".[93]

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".[94]

The United States consequently violated the customary obligation to respect and to ensure respect for international humanitarian law by publishing and distributing a military manual encouraging the *contras* to commit acts contrary to general principles of that law.[95] This was a manifest breach of the obligations expressed in common Article 1, but the obligation to respect and to ensure respect for international humanitarian law goes far beyond this passive duty not to encourage violation of humanitarian law. As Professors Laurence Boisson de Chazournes and Luigi Condorelli point out, "the obligation to respect and to ensure respect for humanitarian law is a

93 *Military and Paramilitary Activities in and against Nicaragua*, *op. cit.* (note 5), p. 114, para. 220.
94 *Ibid*.
95 *Ibid*., p. 130, para. 256.

two-sided obligation, for it calls on States both 'to respect' *and* 'to ensure respect' for the Conventions. 'To respect' means that the State is under an obligation to do everything it can to ensure that the rules in question are respected by its organs as well as by all others under its jurisdiction. 'To ensure respect' means that States, whether engaged in a conflict or not, must take all possible steps to ensure that the rules are respected by all, and in particular by parties to conflict".[96] Although it is still difficult to grasp all the various practical implications of this obligation, the judicial acknowledgement of such a general principle of humanitarian law provides a firm legal basis for the international community as a whole to bear a wider and more active responsibility in ensuring respect for international humanitarian law.[97]

- Humanitarian assistance

Humanitarian assistance is one of the most direct and practical means of assuring respect for international humanitarian law. The Court acknowledges, in its Judgment of 27 July 1986 concerning *Military and Paramilitary Activities in and against Nicaragua*, that:

> "There can be no doubt that the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives, cannot be regarded as unlawful intervention, or as in any other way contrary to international law. The characteristics of such aid were indicated in the first and second of the fundamental principles declared by the Twentieth International Conference of the Red Cross. (...) [According to those principles], an essential feature of truly humanitarian aid is that it is given 'without discrimination' of any kind. In the view of the Court, if the provision of 'humanitarian assistance' is to

96 L. Boisson de Chazournes & L. Condorelli, "Common Article 1 of the Geneva Conventions revisited: Protecting collective interests", *International Review of the Red Cross*, No. 837, 2000, p. 69.

97 For an in-depth study of the practical consequences of the obligation to respect and to ensure respect notably within the framework of the United Nations system, see the article by L. Boisson de Chazournes. & L. Condorelli cited above (note 96). See also: N. Levrat, "Les conséquences de l'engagement pris par les Hautes Parties Contractantes de 'faire respecter' les conventions humanitaires", in F. Kalshoven. & Y. Sandoz (eds), *Implementation of International Humanitarian Law*, *op. cit.* (note 19), pp. 236-296; K. Sachariew, "State's entitlement to take action to enforce international humanitarian law", *International Review of the Red Cross*, No. 270, 1989, pp. 177-195; H.P. Gasser, "Ensuring respect for the Geneva Conventions and Protocols: The role of third States and the United Nations", in: H. Fox. & M.A. Meyer (eds), *Armed Conflict and the New Law*, Vol. II, *Effecting Compliance*, The British Institute of International and Comparative Law, London, 1993, pp. 15-49; U. Palwankar, "Measures available to States for fulfilling their obligations to ensure respect for international humanitarian law", *International Review of the Red Cross*, No. 298, 1994, pp. 9-25.

> escape condemnation as an intervention in the internal affairs of Nicaragua, not only must it be limited to the purposes allowed in the practice of the Red Cross, namely 'to prevent and alleviate human suffering', and 'to protect life and health and to ensure respect for the human being'; it must also, and above all, be given without discrimination to all in need in Nicaragua, not merely to the *contras* and their dependents".[98]

This ruling is extremely important for two main reasons: first, the Court not only confirms the customary character of the fundamental principles of the Red Cross, but considers that these principles have to be respected with regard to any kind of humanitarian assistance, whether it is provided by the Red Cross, or through the United Nations or by States individually. Secondly, such assistance has to meet two basic requirements: its purpose must be truly humanitarian, namely to protect human beings from the suffering caused by war; and it must be given without any discrimination between the beneficiaries. However, the Court does not clearly settle the much debated question as to the right to intervene on humanitarian grounds (the so-called "*droit d'ingérence humanitaire*").[99] The generality of the opening sentence to this paragraph seems to suggest that the two requirements governing humanitarian assistance are self-sufficient and do not need the express consent of the State concerned. It could nevertheless be argued that these conditions deal only with the implementation of humanitarian assistance, and not with its legality. However controversial that question may be, it is clear today that gross violations of humanitarian law are deemed to be a matter of international concern. Measures taken under Chapter VII of the United Nations Charter to redress those violations

98 *Military and Paramilitary Activities in and against Nicaragua*, *op. cit.* (note 5), pp. 124-125, paras. 242-243.

99 See on this question: M. Bettati & B. Kouchner (eds), *Le devoir d'ingérence*, Denoël, Paris, 1987; M.J. Domestici-Met, "Aspects juridiques récents de l'assistance humanitaire", *AFDI*, 1989, pp. 117-148; Y. Sandoz, "'Droit' or 'devoir d'ingérence' and the right to assistance: The issues involved", *International Review of the Red Cross*, No. 288, 1992, pp. 215-227; M. Torelli, "From humanitarian assistance to 'intervention on humanitarian grounds'?", *ibid.*, pp. 228-248; D. Plattner, "Assistance to the civilian population: The development and present state of international humanitarian law", *ibid.*, pp. 249-263; L. Condorelli, "Intervention humanitaire et/ou assistance humanitaire? Quelques certitudes et beaucoup d'interrogations", in N. Al-Nauimi & R. Meese (eds), *International Legal Issues Arising under the United Nations Decade of International Law*, Martinus Nijhoff, The Hague/Boston/London, 1995, pp. 999-1012; J. Patrnogic, "Humanitarian assistance — humanitarian intervention", *ibid.*, pp. 1013-1034; O. Corten & P. Klein, *Droit d'ingérence ou obligation de réaction?*, 2nd ed., Bruylant, Brussels, 1996.

cannot be considered as a breach of the principle of non-intervention in the internal affairs of States.

- Prevention and punishment of the crime of genocide

In its Judgment of 11 July 1996 concerning the application of the Convention on the Prevention and Punishment of the Crime of Genocide, the Court significantly clarified the meaning and legal scope of the obligation to prevent and punish the crime of genocide, in particular the definition of genocide, the imputability of this international crime and the territorial extent of the obligation to punish such a crime.

First, the Court confirms in unequivocal terms that the legal qualification of the crime of genocide is independent of the type of conflict — whether internal or international — where it takes place. The Court begins by recalling the terms of Article I of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, worded as follows:

> "The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish."

It then explains that:

> "The Court sees nothing in this provision which would make the applicability of the Convention subject to the condition that the acts contemplated by it should have been committed within the framework of a particular type of conflict. The contracting parties expressly state therein their willingness to consider genocide as 'a crime under international law', which they must prevent and punish independently of the context 'of peace' or 'of war' in which it takes place. In the view of the Court, this means that the Convention is applicable, without reference to the circumstances linked to the domestic or international nature of the conflict, provided the acts to which it refers in Articles II and III have been perpetrated. In other words, irrespective of the nature of the conflict forming the background to such acts, the obligations of prevention and punishment which are incumbent upon the States parties to the Convention remain identical."[100]

100 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *op. cit.* (note 10), p. 615, para. 31.

Secondly, the Court clarifies the material scope of the obligations undertaken by States parties to the said Convention. It rejects the objection of Yugoslavia, according to which the 1948 Convention would only cover the responsibility flowing from the failure of a State to fulfil its obligations of prevention and punishment and would exclude the responsibility of a State for an act of genocide perpetrated by the State itself:

> "The Court would observe that the reference in Article IX to 'the responsibility of a State for genocide or for any of the other acts enumerated in Article III' does not exclude any form of State responsibility. Nor is the responsibility of a State for acts of its organs excluded by Article IV of the Convention, which contemplates the commission of an act of genocide by 'rulers' or 'public officials'."[101]

Thirdly, the Court determines the territorial scope of the obligation to punish the crime of genocide. It explains, briefly and to the point, that:

> "[T]he rights and obligations enshrined by the Convention are rights and obligations *erga omnes*. (...) [T]he obligation each State thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention".[102]

The Court thus seems to admit — at least implicitly — that by virtue of the legal character of this obligation, States must exercise a universal jurisdiction under general international law. It is a welcome and quite unexpected statement, for, unlike crimes against humanity or grave breaches of humanitarian law, the Convention on the Prevention and Punishment of the Crime of Genocide does not contain any specific provision in that regard.[103]

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

101 *Ibid.*, p. 616, § 32.

102 *Ibid.*, p. 615, § 31.

103 See on this question: E. David, *Principes de droit des conflits armés*, 2nd ed., Bruylant, Brussels, 1999, pp. 665-668.

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.

Résumé

La contribution de la Cour internationale de Justice au droit international humanitaire

Vincent Chetail

L'article évalue la contribution de la Cour internationale de Justice au droit international humanitaire. En tant que principal organe judiciaire du droit international public, la Cour internationale de Justice concourt à mettre en évidence les valeurs fondamentales que la communauté internationale a exprimées dans le droit international humanitaire. Sa jurisprudence représente un apport essentiel, car, d'une part, elle clarifie la relation entre le droit international humanitaire et le droit international général, et d'autre part, elle précise le contenu des principes fondamentaux du droit international humanitaire. L'article examine les arrêts et avis consultatifs de la Cour et évalue la perception que celle-ci a de la relation complexe entre les traités de droit humanitaire, les règles coutumières et le jus cogens.

La Cour internationale de Justice a en outre dégagé et spécifié les principes fondamentaux du droit international humanitaire, lesquels peuvent être regroupés en trois catégories : les principes fondamentaux relatifs à la conduite des hostilités, ceux qui gouvernent le traitement des personnes au pouvoir de la partie adverse, et ceux qui touchent à la mise en œuvre du droit international humanitaire. Ces règles constituent à la fois une synthèse du droit des conflits armés et la quintessence normative de cette branche traditionnelle du droit international.