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## HAGUE INTERNATIONAL TRIBUNALS

# The International Court of Justice as a Guardian of the Unity of Humanitarian Law

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**Abstract**
This article seeks to examine whether the International Court of Justice has developed jurisprudence on international humanitarian law and whether this has exerted any influence on the decisions adopted by other international courts and tribunals. In so doing, it revisits the issue of the value of judicial decisions under international law. Finally, it reveals that despite the non-operation of the rule of *stare decisis* in international law, the Court's jurisprudence on international humanitarian law has been a persuasive precedent for other international courts and tribunals.

**Key words**
fragmentation of international law; International Court of Justice; international humanitarian law; international jurisprudence

## 1. INTRODUCTION

The International Court of Justice (the Court, or ICJ) is the 'principal judicial organ' of the United Nations.[1] It is the sole international court or tribunal to have a universal and general function, since it is open to all states and its jurisdiction encompasses, *inter alia*, all cases that the parties refer to it.[2] The Court's function is 'to decide in accordance with international law such disputes as are submitted

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1. UN Charter, Art. 92. The precise meaning of the expression 'principal judicial organ' is somewhat unclear. For Rosenne, that provision implies that the UN may set up other judicial organs; he adds that the UN Charter implicitly recognizes that there is no hierarchical relationship between the various judicial organs that the UN may establish. See S. Rosenne, *The Law and Practice of the International Court, 1920–1996* (1997), I, at 140 ff. A different interpretation could be that the Court is the sole principal organ of the UN having the power of exercising judicial functions. However, UN practice shows that principal organs such as the General Assembly and the Security Council have established judicial organs, such as the UN Administrative Tribunal, the International Criminal Tribunal for the former Yugoslavia (ICTY), and the International Criminal Tribunal for Rwanda (ICTR). This practice would thus contradict such an interpretation of Art. 92 of the UN Charter.
2. UN Charter, Art. 93(1); ICJ Statute, Arts. 35(1) and 36(1).

to it'.[3] Therefore the Court may exercise its jurisdiction in respect of legal disputes involving the applicability of international humanitarian law. The Court may also deal with that branch of international law in the exercise of its advisory jurisdiction, since the Court may be requested to render an advisory opinion 'on any legal question'.[4]

Already in its first judgment on the merits of a case, *Corfu Channel*, the Court revealed that certain international obligations could be based on 'elementary considerations of humanity', which, according to the Court, are applicable in wartime as well as in peacetime. The subsequent determination and interpretation of rules of international humanitarian law in a series of judgments and advisory opinions have enabled the Court to elaborate a concise but significant jurisprudence regarding this field of international law.

The Court's precedents on international humanitarian law are important for the Court itself, given that the Court's list of cases more and more often includes contentious and advisory proceedings involving humanitarian law issues. Thus (i) the Court may rely on its own precedents to enhance the quality of its legal reasoning, and consequently the persuasiveness and authority of its judgments and advisory opinions; and (ii) the parties to a contentious case and the participants in advisory proceedings may have a reference in respect of what the Court will probably decide or opine with regard to a particular legal issue. In addition, the Court's precedents are relevant for any other court or tribunal – national or international – whose applicable law encompasses international humanitarian law,[5] since the Court's findings of customary rules of international humanitarian law may facilitate the application of these rules by other courts and tribunals (and also by itself). Stated differently, the Court's precedents render visible the customary rules of international humanitarian law, whose existence might otherwise be uncertain. Furthermore, by relying on the Court's precedents, other courts and tribunals may also reinforce the quality of their own legal reasoning and enhance the convincingness of their decisions, by reason of the authority and persuasiveness usually enjoyed by those precedents.

There is an extra reason for pointing out the importance of the existence of the Court's precedents regarding international humanitarian law, namely that there are countless international courts and tribunals 'being at work in a non-hierarchical situation'.[6] Given that several such courts and tribunals apply international humanitarian law on a regular basis, the Court's precedents may serve as homogenizer in order to avoid inconsistencies in the determination and interpretation of the basic rules and principles of international humanitarian law. This article investigates whether the Court's precedents on international humanitarian law have done so. More generally, it postulates that the Court's precedents may play a crucial role

3. ICJ Statute, Art. 38(1).
4. UN Charter, Art. 96(1).
5. See, for instance, the decision 7957/04 adopted on 15 September 2005 by the Israeli Supreme Court sitting as the High Court of Justice. The decision is available at http://elyon1.court.gov.il/files_eng/04/570/079/a14/04079570.a14.htm (last visited 2 May 2007).
6. See M. Shahabuddeen, *Precedent in the World Court* (1996), at 92.

for minimizing the risks of fragmentation of international law, given the Court's prestige and long standing as international judicial organ.[7]

For these reasons, the Court's dealings with international humanitarian law deserve a careful examination as offered in this article, in order to verify how in a period of around sixty years the Court has identified and interpreted a series of basic general principles on the matter and to establish the manner in which the Court's precedents – which, as judicial decisions, are merely means for the determination of legal rules – have an impact on the practice of other international courts and tribunals.

The article consists of three further sections. Section 2 identifies and examines the Court's jurisprudence on international humanitarian law,[8] section 3 reveals the impact of that jurisprudence on decisions of other international courts and tribunals, and, finally, section 4 formulates the conclusions.

## 2. Humanitarian law in the Court's jurisprudence

So far, the Court has dealt with international humanitarian law issues in the following judgments and advisory opinions:[9] (i) *Corfu Channel*;[10] (ii) *Military and Paramilitary Activities in and against Nicaragua*;[11] (iii) *Legality of the Threat or Use of Nuclear*

7. The question of the risks of fragmentation of international law has led to the production of considerable scholarly writing and also to the preparation of a report by a study group of the International Law Commission (ILC). See Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, adopted by the ILC at its 58th session, in 2006, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/61/10, para. 251).
8. In that respect two considerations apply. The first is that the Court's findings concerning the law of genocide are not the object of examination in this article, since strictly speaking that law pertains to international criminal law and not to international humanitarian law; nor are the determinations about the attribution to states of conduct contrary to international humanitarian law that is performed by a person or group of persons and is directed or controlled by those states or those about the hierarchy of the rules of international humanitarian law and the effects of the violation of international humanitarian law obligations, given that they pertain to the law of state responsibility. The second consideration is that although previous scholarly writing addresses the issue of the ascertainment of international humanitarian law by the Court, either it does not encompass the most recent judgments and advisory opinions of the Court or, when it does so, it is written in Spanish and hence its reading may be difficult or even impossible for many. The scholarly works addressing the global issue of international humanitarian law and the Court are the following: R. Abi-Saab, 'The "General Principles" of Humanitarian Law according to the International Court of Justice', (1987) 69 (259) *International Review of the Red Cross* 367; S. Schwebel, 'The Roles of the Security Council and the International Court of Justice in the Application of International Humanitarian Law', (1995) 27 *New York University Journal on International Law & Politics* 731; V. Mani, 'The International Court and the Humanitarian Law', (1999) 39 (1) *Indian Journal of International Law* 32; J. Gardam, 'The Contribution of the International Court of Justice to International Humanitarian Law', (2001) 14 LJIL 349; V. Chetail, 'The Contribution of the International Court of Justice to International Humanitarian Law', (2003) 85 (850) *International Review of the Red Cross* 235; F. Raimondo, *Corte Internacional de Justicia, derecho internacional humanitario y crimen internacional de genocidio* (2005).
9. The *Trial of Pakistani Prisoners of War (Pakistan v. India)* case also involved international humanitarian law issues, but was discontinued by the applicant. The same applies to the cases *Armed Activities in the Territory of the Democratic Republic of the Congo (Democratic Republic of the Congo v. Rwanda) (1999–2001)* and *Armed Activities in the Territory of the Democratic Republic of the Congo (Democratic Republic of the Congo v. Burundi) (1999–2001)*. Bosnia and Herzegovina's application concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (1993–2007)* also alleged violations of international humanitarian law; however, the Court did not dealt with this issue because of jurisdictional impediments.
10. *Corfu Channel (United Kingdom v. Albania)*, Merits, Judgment of 9 April 1949, [1949] ICJ Rep. 4.
11. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, [1986] ICJ Rep. 14 (hereinafter *Nicaragua* judgment).

*Weapons*;[12] (iv) *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*;[13] and (v) *Case Concerning Armed Activities on the Territory of the Congo*.[14]

The relevant legal findings are briefly set out in the next subsections.

### 2.1. *Corfu Channel*

The United Kingdom, the applicant in this case, had requested the Court to adjudge and declare, *inter alia*, that on 22 October 1946 damage was caused to two British ships, which resulted in the death and injuries of a number of British officers, by a minefield in Albanian territorial waters; that the minefield was laid down by the connivance or with the knowledge of the Albanian government; that Albania did not notify the existence of the minefield as prescribed by the Hague Convention VIII of 1907; and that the Albanian government had breached international obligations and was thus internationally responsible towards the United Kingdom.[15]

Having found that the Albanian government knew of the existence of the minefield in its territorial waters, the Court declared:

> The obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them. Such obligations are based, not on the Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.[16]

Accordingly, the Court held Albania internationally responsible for the explosion of the mines and for the resulting damages and loss of life.[17]

Strictly speaking, the Court did not apply international humanitarian law in the case.[18] As pointed out by the Court, the Hague Convention VIII of 1907 was not applicable to the case because the factual situation *sub judice* did not occur in wartime. Nevertheless, the holding is germane to international humanitarian law because of the implicit recognition by the Court that the 'elementary considerations of humanity' are a legal principle applicable not only in peacetime, but also in wartime. More generally, the Court's finding is relevant in that it extends the applicability of the obligation to notify minelaying beyond situations of armed conflict, which

12. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] ICJ Rep. 226 (hereinafter *Nuclear Weapons* advisory opinion).
13. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, [2004] ICJ Rep. 136. (hereinafter *The Wall* advisory opinion).
14. *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005. Unreported. The text of the judgment is available at the website of the ICJ: http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=crw&case=126 (hereinafter *Armed Activities* judgment).
15. *Corfu Channel*, *supra* note10, at 10.
16. Ibid., at 22.
17. Ibid., at 36.
18. See also Schwebel, *supra* note 8, at 734.

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avoids the always difficult determination of whether a conflict is an armed conflict pursuant to international law.

In the years following the judgment, some publicists doubted whether the elementary considerations of humanity could possess normative character and assist in the formation of conventional and customary rules.[19] Notwithstanding these opinions, the fact remains that the Court based its judgment on the violation, *inter alia*, of the 'well-recognized' legal principle of elementary considerations of humanity. What is more, the Court has resorted to this precedent to settle international humanitarian law issues in later judgments and advisory opinions, as we shall see later. Therefore, despite some initial doubts in scholarly writing as to whether the elementary considerations of humanity could possess normative character, the Court's later practice has dissipated all hesitations in that regard.

### 2.2. *Military and Paramilitary Activities in and against Nicaragua*

The *Nicaragua* judgment dealt with controversial legal issues, including the applicability of international humanitarian law norms. Obviously, this article centres on the issues germane to the applicability of those norms. Such issues concern two factual findings by the Court. The first is that US government agents placed mines in territorial waters of Nicaragua without notifying shipping in general of the existence of the minefields.[20] The second is that Central Intelligence Agency (CIA) agents prepared a manual of guerrilla warfare to be employed in training *Contra* forces (the term *Contras* refers to those who fought against the then Nicaraguan government); the manual advised certain measures (such as shooting civilians who were trying to leave a town) that, according to the Court, breached international humanitarian law.[21]

From the outset it is worth recalling that the Court had found that its jurisdiction in the case was qualified by a US reservation. The reservation excluded from the Court's jurisdiction legal disputes arising out of a multilateral convention, unless all parties to the convention affected by the Court's decision were also parties to the case before the Court.[22] This was important, because it led the Court to evaluate the conduct of the United States in the light of customary international humanitarian law.

The first factual finding is visibly analogous to the one made by the Court in the *Corfu Channel* case; their difference resides in the fact that while in the *Corfu Channel* case the planting of mines took place in peacetime, in the *Nicaragua* case it occurred in wartime. This difference would in principle have rendered the Hague Convention VIII of 1907 applicable to the *Nicaragua* case. But ultimately it did not, because of the above-mentioned US reservation. Given that the Court thus had to settle the issue in the light of customary international law, it was almost natural that the Court turned

19. See, e.g., G. Schwarzenberger, *International Law* (1957), I, 51. See also I. Yung Chung, *Legal Problems Involved in the Corfu Channel Incident* (1959), 162.
20. *Nicaragua* judgment, *supra* note 11, at 48, para. 80.
21. Ibid., at 68–9, para. 122.
22. Ibid., at 421–6, paras. 67–76.

to its *Corfu Channel* precedent in order to evaluate the conduct of the United States. It did so in the following terms:

> if a State lays mines in any waters whatever in which the vessels of another State have rights of access or passage, and fails to give any warning or notification whatsoever, in disregard of the security of peaceful shipping, it commits a breach of the principles of humanitarian law underlying the specific provisions of Convention No. VIII of 1907. Those principles were expressed by the Court in the *Corfu Channel* as . . . 'certain general and well recognized principles: elementary considerations of humanity, even more exacting in peace than in war'.[23]

Accordingly, the Court declared the United States internationally responsible because of its failure to notify the existence of minefields, a failure that constituted a breach of obligations under customary international law.[24] Thus the judgment makes it clear that the elementary considerations of humanity are a customary principle of humanitarian law. If some uncertainty still existed with respect to the normative character of the principle of elementary considerations of humanity, the *Nicaragua* judgment should have cleared all doubts in that regard.

After that the Court had to judge the legality of the preparation and dissemination of the manual of guerrilla warfare in the light of international humanitarian law. But since it could not do this on the basis of the four Geneva Conventions of 1949 because of the US reservation, it evaluated the conduct of this country in accordance with the 'fundamental general principles of humanitarian law'. According to the Court, 'the Geneva Conventions are in some respects a development, and in other respects no more than the expression of such principles'.[25] So the question comes up as to what precisely those principles are for the Court.

The first principle determined by the Court is that Article 3 common to the four 1949 Geneva Conventions encompasses rules applicable in internal and international armed conflicts. For the Court, in international armed conflicts the rules laid down in common Article 3 are applicable as a minimum standard, in addition to the more sophisticated rules stipulated in the four Conventions. The Court reached such a conclusion because, in its view, the rules laid down in common Article 3 reflect elementary considerations of humanity.[26] Once again, the *Corfu Channel*'s precedent played a crucial role in the Court's legal reasoning.

It is worth recalling the remarkable development that such a finding represented for international humanitarian law. As is well known, common Article 3 was intended to set up a minimum humanitarian standard applicable exclusively to internal armed conflicts.[27] It is thus obvious that the Court's development consisted in extending the applicability of the provisions laid down in common Article 3 to international armed conflicts.

23. Ibid., at 112, para. 215.
24. Ibid., at 147–8, subpara. 8.
25. Ibid., at 113, para. 218.
26. Ibid., at 114, para. 218.
27. J. Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary* (1952), I, 48.

The second principle determined by the Court concerns Article 1 common to the four 1949 Geneva Conventions. According to the Court,

> there is an obligation on the United States Government, in the terms of Article 1 of the Geneva Conventions, to 'respect' the Conventions and even 'to ensure respect' for them 'in all circumstances', since such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression. The United States is thus under an obligation not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3 common to the four 1949 Geneva Conventions . . .[28]

Thus the Court determined the customary status of the obligation to respect and to ensure respect for the four Geneva Conventions. What is more, it extended the scope of application of the obligation to internal armed conflicts. The Court's finding constituted a decisive advancement for the cause of international humanitarian law, since until then common Article 1 had been interpreted as applying in the context of international armed conflicts only.[29]

To be clear, the finding of the customary nature of what the Court called 'fundamental general principles of humanitarian law' was controversial, in the context of the Court itself and also in scholarly writing. Judge Ago was 'most reluctant to be persuaded that any broad identity of content exists between the Geneva Conventions and certain "fundamental general principles of humanitarian law", which, according to the Court, were pre-existent in customary law, to which the Conventions "merely give expression" (§ 220) or for which they are at most "in some respects a development" (§ 218)'.[30] Judge Jennings also was not convinced that the 1949 Geneva Conventions 'could be regarded as embodying customary law'.[31] A common argument against the Court's finding is the Court's alleged failure to provide evidence of relevant state practice and *opinio juris* instead of finding the proof in the terms of the treaties that it could not apply because of the US reservations.[32] On the other hand, the Court's finding was supported by leading scholars.[33]

Finally, it should be noted that in spite of such a controversy, those findings of the Court were a valuable precedent for the International Criminal Tribunal for the former Yugoslavia (ICTY), as we shall see later.[34]

### 2.3. *Legality of the Threat or Use of Nuclear Weapons*

In these advisory proceedings the Court was requested to render its opinion on whether the threat or use of nuclear weapons is in any circumstance permitted under international law.[35]

28. *Nicaragua* judgment, *supra* note 11, at 114, para. 220.
29. See, e.g., the commentary of Pictet, *supra* note 27, at 26.
30. See *Nicaragua* judgment, *supra* note 11, at 184, para. 6 (Judge Ago, Separate Opinion).
31. Ibid., at 537 (Judge Jennings, Dissenting Opinion).
32. See Schwebel, *supra* note 8, at 742 and the literature cited there in notes 32 and 33.
33. For occurrence, see Abi-Saab, *supra* note 8, at 367–72.
34. See section 3.2, *infra*.
35. *Nuclear Weapons* advisory opinion, *supra* note 12, para. 1.

As far as international humanitarian law is concerned, the Court first addressed the issue of the relationship between this branch of international law and international human rights. The Court decided to examine such a relationship, given that while some states had affirmed that the use of nuclear weapons would breach the right to life as protected in Article 6 of the International Covenant on Civil and Political Rights (ICCPR) and other human rights treaties, others had contended that those legal instruments do not mention weapons and are not intended to regulate the lawfulness of the use of nuclear weapons.[36]

According to the Court, pursuant to Article 4 of the ICCPR the applicability of this legal instrument does not cease in wartime, with the exception of certain provisions that may be derogated from in times of national emergency.[37] International humanitarian law is the *lex specialis* in wartime. Therefore the test to be applied for determining, for example, what an arbitrary deprivation of life is in the context of an armed conflict falls within the realm of the *lex specialis* – that is, international humanitarian law.[38]

Another relevant legal finding relates to the issue of whether the threat or use of nuclear weapons is contrary to the obligations concerning the protection of the environment laid down in Articles 35(3) and 55 of the First Additional Protocol of 1977. In the opinion of the Court these obligations are 'powerful constraints for all the States having subscribed to these provisions'.[39] Given the emphasis on explicit subscription to the rule, it is clear enough that the Court implied that the obligations laid down in those legal provisions were not part of customary international law. Whether or not that finding is still valid is a controversial issue. On the one hand, in the view of the International Committee of the Red Cross (ICRC) there is a customary rule of international humanitarian law whereby 'The use of methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment is prohibited. Destruction of the natural environment may not be used as a weapon'; this rule applies in international armed conflicts and arguably in internal armed conflicts too.[40] On the other hand the ICRC's views on this matter have been put into question and the Court's opinion is considered to be still valid.[41] Given those divergent standpoints, the issue of whether that Court's finding is still valid remains an open question.

Furthermore, the Court pointed out that international humanitarian law is the result of the convergence of two branches of international law, namely the so-called 'Hague Law' (which includes the 1899 and 1907 Hague Conventions on the laws and customs of war) and the so-called 'Geneva Law' (which includes the 1864, 1906, 1929,

36. Ibid., at para. 24.
37. Ibid., at para. 25.
38. Ibid.
39. Ibid., at para. 31.
40. See Rule 45, in J.-M. Henckaerts, 'Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict', (2005) 87 (857) *International Review of the Red Cross* 175, at 202.
41. See Y. Dinstein, 'The ICRC Study on Customary International Humanitarian Law', (2006) 36 *Israel Yearbook on Human Rights* 1.

and 1949 Geneva Conventions on victims of armed conflicts).[42] According to the Court, the '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'. On the other hand, the 'Geneva Law' 'protects the victims of war and aims to provide safeguards for disabled armed forces personnel and persons not taking part in the hostilities'.[43] The First Additional Protocol of 1977 is proof of their convergence, since it lays down rules pertaining to the methods and means of warfare as well as to the protection of victims of armed conflict.[44] In this regard, suffice it to say that the convergence between the 'Hague Law' and the 'Geneva Law' had already been noticed and pointed out by scholars more than a decade before the Court's opinion.[45]

But the Court also made significant legal findings in this advisory opinion. The most important one is the ascertainment of 'the cardinal principles' of international humanitarian law.[46] According to the Court, these are the principle of distinction, the Martens Clause, and the prohibition of causing unnecessary suffering to combatants.

The Court noted that the principle of distinction aims 'at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants'.[47] Accordingly, states must never use weapons that do not distinguish between civilian and military targets,[48] that is, between civilian objects and military objectives in the terminology of the First Additional Protocol of 1977 (Art. 52(1)). As expressed in scholarly writing,[49] the Court's finding of the customary nature of the principle of distinction is very important, for the reason that the only conventional formulation of the principle of distinction is found in the First Additional Protocol of 1977, which, as mentioned above, in the opinion of the Court was not entirely part of customary international law.

With respect to the principle of the prohibition of causing unnecessary suffering to combatants, the Court affirmed that, according to this principle, the use of weapons causing unnecessary suffering to combatants or uselessly aggravating their suffering is prohibited. As a result, 'States do not have unlimited freedom of choice of means in the weapons they use.'[50]

As far as the Martens Clause is concerned, the Court observed that, pursuant to it, in the absence of relevant law the civilians and combatants remain under the

42. *Nuclear Weapons* advisory opinion, *supra* note 12, para. 75.
43. Ibid.
44. Ibid.
45. For instance see G. Aldrich, 'Some Reflections on the Origins of the 1977 Geneva Protocols', in C. Swinarski, (ed.), *Études et essais sur le droit international humanitaire et sur les principes de la Croix-Rouge en l'honneur de Jean Pictet* (1984), at 130.
46. *Nuclear Weapons* advisory opinion, *supra* note 12, para. 78.
47. Ibid.
48. Ibid.
49. See L. Doswald-Beck, 'Le droit international humanitaire et l'avis consultatif de la Cour internationale de Justice sur la licéité de la menace ou de l'emploi des armes nucléaires', (1997) 79 (823) *Revue internationale de la Croix-Rouge* 41.
50. *Nuclear Weapons* advisory opinion, *supra* note 12, para. 78.

protection of the principles of international law derived from custom, from the principles of humanity, and from the dictates of public conscience.[51]

Unquestionably, the three cardinal principles of international humanitarian law referred to above apply in the context of international armed conflicts, since they are laid down in legal instruments applicable in armed conflicts of that kind. The principle of distinction is stipulated in Article 48 of the First Additional Protocol of 1977. The prohibition of causing unnecessary suffering to combatants is established in several international instruments, such as the Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight (Saint Petersburg, 29 November/11 December 1868) and Article 23(e) of the Hague Regulations on land warfare of 1899 and 1907. The Martens Clause was first included in the 1899 Hague Convention II with Respect to the Laws and Customs of War on Land; it underlies Articles 63, 62, 142, and 158 of the First, Second, Third, and Fourth 1949 Geneva Conventions respectively; and it is also stipulated in Article 1(2) of the First Additional Protocol of 1977. The question arises as to whether these principles are also applicable in internal armed conflicts. The answer is in the affirmative. First, it should be noted that the Court did not make their applicability conditional on the existence of an international armed conflict, which might mean that it deems these principles applicable in internal armed conflicts too. Second, as far as the principle of distinction is concerned, the ICTY pointed out that it is applicable in both international and internal armed conflicts, and in support of its contention it cited the Court's precedent.[52] Finally, the recent ICRC study on customary international humanitarian law asserts the applicability of the three cardinal principles in both international and internal armed conflicts.[53] The study is particularly significant because it was carried out with the assistance of a group of experts on international humanitarian law representing the various regions and legal families of the world.[54]

The Court went on to assert that 'a great many rules of international humanitarian law are so fundamental to the respect of the human person' (they reflect, in the Court's words, 'elementary considerations of humanity') that they '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'.[55] It did not express which specific rules are so fundamental. Nevertheless, it is not difficult to infer that they should at least include the rules reflecting the 'fundamental general principles of international law' referred to by the Court itself in the judgment of the *Nicaragua* case (i.e. the rules encompassed by common Arts. 1 and 3) and the rules expressing the 'cardinal principles of humanitarian law' ascertained by the Court in this advisory opinion.

51. Ibid. The literature on the Martens Clause is immense. See, for instance, A. Cassese, 'The Martens Clause: Half a Loaf or Simply Pie in the Sky?', (2000) 11 EJIL 1087; and T. Meron, 'The Martens Clause, the Laws of Humanity, and the Dictates of Public Conscience', (2000) 94(1) AJIL 78.
52. *Prosecutor v. Kupreškić et al.*, Case No. IT-95–16-T, Judgement, 14 January 2000, para. 521.
53. J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, 2 vols. (2005). See Rules 1, 70, and 87, in Henckaerts, *supra* note 40, at 198, 204, and 206, respectively.
54. On the methodology employed and the manner in which the study was organized see ibid., at 178–86.
55. *Nuclear Weapons* advisory opinion, *supra* note 12, para. 79.

In the opinion of the Court, 'the great majority' of the conventional rules of international humanitarian law are part of customary law.[56] What are those rules? The Court was not explicit. Apparently it was referring to rules of the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto and to the four Geneva Conventions of 1949, because in the preceding paragraphs it had observed that the International Military Tribunal at Nuremberg (IMT) and the UN Secretary-General had declared their customary nature.[57] If indeed the Court was referring to that legal instrument, the determination of its customary nature would be a simple reaffirmation of the finding previously made by the IMT. As far as the four 1949 Geneva Conventions are concerned, the determination of the customary status of the 'great majority' of their rules leaves unanswered the question of precisely which rules the Court consider to be part of customary law and which rules are not so considered.

### 2.4. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*

In these advisory proceedings the Court was requested to render its opinion on what the legal consequences are of the construction of the wall built by Israel in the occupied Palestinian territory, in accordance with international law, including the Fourth Geneva Convention of 1949 and relevant resolutions of the UN Security Council and the General Assembly.[58]

In its opinion the Court reaffirmed the customary status of the 1907 Hague Convention (IV) and of the Regulations annexed thereto,[59] a status that had been affirmed in the *Nuclear Weapons* advisory opinion, as stated above. The fact that those legal instruments had attained customary status was extremely relevant in these advisory proceedings, for the reason that Israel is not a state party to those instruments and the Court had to evaluate in the light of such instruments the legality of certain measures taken by that state.

The applicability of the Fourth Geneva Convention of 1949 in the Occupied Palestinian Territory to the legal issue at stake had been the object of controversies during the proceedings. In fact, Israel – differently from most of the other participants in the advisory proceedings – was of the view that the Palestinian Territory was not a sovereign territory before its annexation by Jordan and Egypt and is not a territory of a state party to that Convention, as required by the Convention.[60] In the opinion of the Court, however, pursuant to Article 2(1) of the Convention, this legal instrument is applicable when the following two conditions are met: (i) there exists an armed conflict, regardless of whether a state of war has been recognized by the contending parties; and (ii) the armed conflict opposes two or more states parties to the Convention. Therefore, if these two conditions have been met, the Convention

56. Ibid., at para. 82.
57. Ibid., at paras. 80–1.
58. *The Wall* advisory opinion, *supra* note 13.
59. Ibid., at para. 89.
60. Ibid., at para. 90.

is applicable, in particular, in any territory occupied during the conflict by one of the states parties.[61]

Further in that regard, the Court declared that the aim of Article 2(2) of the 1949 Fourth Geneva Convention is not to restrain the scope of application of the Convention as defined by Article 2(1) by excluding from the scope of application of the Convention the territories that are not under the sovereignty of one of the states parties to the Convention. According to the Court, the purpose of Article 2(2) is to make it clear that even if the occupation carried out in the course of an armed conflict meets no armed resistance, the Convention is still applicable.[62] Therefore, given that Israel and Jordan were parties to the Convention when the armed conflict that opposed them began, the Court found that the Convention is applicable in the Palestinian Occupied Territories regardless of the previous status of these territories.[63]

Furthermore the Court addressed the issue of the relationship between human rights and humanitarian law, as it had done in the *Nuclear Weapons* advisory opinion. From the outset, it reaffirmed that humanitarian law is the *lex specialis* in wartime,[64] and in this respect it recalled the precedent of the *Nuclear Weapons* advisory opinion. In addition the Court explained that three scenarios are possible: (i) some rights may be wholly regulated by international humanitarian law; (ii) others may be wholly governed by international human rights law; (iii) others may be regulated by both international humanitarian law and international human rights law.[65] Clearly, it is in the last situation that international humanitarian law is the *lex specialis* and international human rights law the *lex generalis*.

Finally, with regard to the applicability of international humanitarian law in these advisory proceedings, the Court stressed that

> Article 1 of the Fourth Geneva Convention, a provision common to the four Geneva Conventions, provides that 'The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.' It follows from that provision that every State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with.[66]

The Court's finding is consistent with the ICRC's traditional interpretation of common Article 1.[67] However, Judge Kooijmans was of the opinion that the preparatory work of the 1949 Geneva Conventions does not support the majority's finding. According to Judge Kooijmans, the preparatory work reveals that common Article 1 aims at ensuring respect for the Conventions by the population as a whole and, as such, it was directly related to common Article 3. Judge Kooijmans also made it manifest that even if he did not support a restricted interpretation of common Article 1,

61. Ibid., at para. 95.
62. Ibid.
63. Ibid., at para. 101.
64. Ibid., at para. 105.
65. Ibid., at para. 106.
66. Ibid., at para. 158.
67. See Pictet, *supra* note 27, at 25 ff.

he did not know whether the majority's interpretation of this legal provision is in conformity with positive law because it was not supported with legal arguments.[68] Notwithstanding the sensible arguments put forward by Judge Kooijmans, the fact remains that the traditional interpretation made by the ICRC in respect of common Article 1 has been endorsed by the large majority of the Court opinion and it has thus been considerably reinforced. For this reason it is likely that that such an interpretation shall be considered by other international courts and tribunals as a persuasive precedent.

### 2.5. *Case Concerning Armed Activities on the Territory of the Congo*

Recently the Court also dealt with international humanitarian law in the *Armed Activities* judgment. This case arose out the application instituted by the Democratic Republic of the Congo against Uganda by reason of alleged acts of aggression committed by the latter on the territory of the applicant, in violation of the UN Charter and of the Charter of the Organization of African Unity.[69]

The Court had to consider the applicability of certain provisions of the Regulations annexed to the 1907 Hague Convention (IV), for the reason that the case revolved around the general issue of belligerent occupation. In this vein, the Court pointed to the customary status of Article 42 of the Regulations by relying on the precedent of its advisory opinion on *The Wall*.[70] Stated differently, it reaffirmed that territory is deemed occupied when it is in fact placed under the authority of the enemy's army and that the occupation does not extend beyond the territory where such authority has been established and can be asserted.[71] Thus in order to establish whether a state is an occupying power according to international humanitarian law, it is crucial to verify whether the enemy's army actually established and asserted authority in the areas at stake.[72] That is, the mere presence of enemy troops does not constitute a belligerent occupation.[73]

Finally, with regard the issues germane to this article, the Court made an important finding with respect to Article 43 of the 1907 Hague Regulations, namely that ensuring respect for relevant human rights and humanitarian law, protecting the population of the occupied territory against acts of violence, and stopping acts of violence by third parties, are measures to be adopted by the occupying power in order to reinstate and ensure public order and safety in the occupied territory pursuant to that legal provision.[74] The Court's finding is important because it makes it clear that ensuring compliance with international human rights law and international humanitarian law is one of the inescapable measures to be adopted on the basis

68. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, [2004] ICJ Rep. 136, paras. 46–50 (Judge Kooijmans, Separate Opinion).
69. *Armed Activities*, Judgment unreported, *supra* note 14, para. 1.
70. Ibid., at para. 172.
71. Ibid., at para. 89.
72. Ibid., at 59, para. 173.
73. Ibid.
74. Ibid., at 60, para. 178. But see the opinion of Judge Parra-Aranguren, in whose view the Court did not prove that the requirements for the application of Article 43 of the 1907 Hague Regulations were met in the circumstances of the case. See *Armed Activities*, Judgment, supra note 14, at 10–11, paras. 44–48 (Judge Parra-Aranguren, Separate Opinion).

of Article 43. It is worth recalling that this legal provision does not mention any explicit measure to be taken by the occupying power.

## 3. The impact of the Court's jurisprudence on humanitarian law in decisions of other international courts and tribunals

### 3.1. The value of judicial decisions under international law

International courts and tribunals often turn to judicial decisions and arbitral awards to interpret legal norms or to determine the existence of rules of customary law and general principles of law.[75] The precise legal value of decisions of international courts and tribunals under international law has been the object of study by publicists interested in the theory of the sources of international law. As pointed out by one of these publicists, the answer to the question 'what are the sources of international law?' is directly related to the conception of the nature of international law.[76]

Article 38 of the ICJ Statute is generally considered as reflecting a universally accepted enumeration of the formal sources of international law.[77] According to subparagraph 1(d) of that provision, judicial decisions are a 'subsidiary means for the determination of rules of law'. The conception attributing a subsidiary role to judicial decisions is consistent with the opinion prevalent in the Romano-Germanic legal family. This opinion contrasts with the common-law legal family, where judicial precedents have binding character.[78]

As regards its own precedents, it may be noted that the Court, analogously to its predecessor the Permanent Court of International Justice (PCIJ), frequently resorts to its own precedents in order to recall the customary status of a given legal rule or principle or a particular legal interpretation.[79] The Court attributes equal importance both to judgments and to advisory opinions,[80] despite the fact that their legal effects are different.[81]

75. See M. Virally, 'Fuentes del derecho internacional', in M. Sorensen (ed.), *Manual de Derecho Internacional Público* (1994) 179; J. Charney, 'Is International Law Threatened by Multiple International Courts and Tribunals?', (1998) 271 *Recueil des cours de l'Académie de droit international*, *passim*.
76. See G. Finch, 'Les sources modernes du droit international', (1935-III) *Recueil des cours de l'Académie de droit international*, at 535.
77. P. Daillier and A. Pellet, *Droit international public* (2002), 114, para. 59.
78. See R. David and C. Jauffret-Spinozi, *Les grands systèmes de droit contemporaines* (2002), 106 ff., 271 ff.
79. When deciding on a customary law issue the Court recalls its own decisions to such an extent that 'it has been accused of paying these more attention than the actual State practice creative of the rules it is called upon to state'. H. Thirlway, 'The Sources of International Law', in M. Evans (ed.), *International Law* (2006), 129.
80. Sorensen made the same observation with regard to the PCIJ. See M. Sorensen, *Les sources du droit international* (1946), at 166.
81. ICJ Statute, Art. 59, which stipulates the legal effects of judgments, reads as follows: 'The decision of the Court has no binding force except between the parties and in respect of that particular case.' Although the Statute does not lay down any precise legal rule stipulating the legal effects of advisory opinions, it is plain from their name that these consist in an advice on legal matters that is devoid of binding effects. This means that the requesting UN organ or specialized agency remains free to give effect to the opinion. For a succinct but illustrative summary of the Court's advisory proceedings see H. Thirlway, 'The International Court of Justice', in Evans, *supra* note 79, at 582–5.

The maxim *rerum perpetuo similiter judicatorum auctoritas* (the authority of cases similarly decided) may help to explain why the Court continuously recalls its own precedents – in judgments and advisory opinions – namely to reaffirm them as much as to explain why they do not apply to the case at stake. By explaining why a precedent does not apply to the case, the Court maintains its own prestige and the authority of the precedent.[82] In general, it may be noted that the practice of international courts and tribunals of invoking judicial decisions is so widespread that it has prompted international judges to think that if in a given case no precedent has been cited the reason is that they do not exist.[83]

Pursuant to Article 59 of the Statute, the Court's judgments are binding only for the states that are parties to the case and in respect of that particular case. This legal provision should be interpreted in the sense that it purports to limit the legal value of the judgments and advisory opinions of the Court as precedent, by declaring that these are not binding as such upon third parties.[84]

Notwithstanding the principle *sententia jus facit inter partes* (the judgment is binding solely for the states that are parties to the case) laid down in Article 59 of the ICJ Statute, states usually accept as valid all findings of rules of customary international law made by the Court.[85] And the states that do not accept those findings as valid will have the heavy burden of proof to the contrary, which may be quite difficult when the state practice preceding the Court's finding at stake is not general, but is rather vague or contradictory instead.[86] In practice, the judgments and advisory opinions of the Court in general enjoy a privileged status not only in the practice of the Court itself but also in that of other international courts and tribunals.[87]

It is noteworthy that while in an exhaustive holding the ICTY's Appeals Chamber verified that it is not bound by the Court's precedents and explained why it could not accept the 'effective control' test upheld by the Court in the *Nicaragua* judgment,[88]

82. See, e.g., *Temple of Preah Vihear (Cambodia v. Thailand)*, Preliminary Objections, Judgment of 26 May 1961, [1961] ICJ Rep. 17, at 21 ff., with regard to the precedent concerning the *Aerial Incident of 27 July 1955 (Israel v. Bulgaria)*, Judgment of 26 May 1959, [1959] ICJ Rep. 127, at 129, in respect of the validity of the declarations of acceptance of the jurisdiction of the PCIJ.
83. See *Nottebohm (Liechtenstein v. Guatemala)*, Second Phase, Judgment of 6 April 1955, [1955] ICJ Rep. 4, at 43 (Judge Read, Dissenting Opinion).
84. C. Parry, *The Sources and Evidences of International Law* (1965), at 92.
85. V. Degan, *Sources of International Law* (1997), at 193.
86. Ibid.
87. According to the current president of the Court, 'The authoritative nature of ICJ judgments is widely acknowledged. It has been gratifying for the International Court to see that these newer courts and tribunals have regularly referred, often in a manner essential to their legal reasoning, to judgments of the ICJ with respect to questions of international law and procedure. Just in the last five years, the judgments and advisory opinions of the ICJ have been expressly cited with approval by the International Tribunal for the Law of the Sea, the European Court of Human Rights, the European Court of Justice, the United Nations Commission on Human Rights, the Inter-American Commission on Human Rights, the International Centre for Settlement of Investment Disputes, the International Criminal Tribunal for the former Yugoslavia, and arbitral bodies including the Eritrea–Ethiopia Claims Commission.' See Speech by H.E. Rosalyn Higgins, President of the International Court of Justice, to the General Assembly of the United Nations (26 October 2006).
88. *Prosecutor v. Tadić*, Case No. IT-94–1-A, Judgement, 15 July 1999, para. 115 ff. For discussions on this decision see T. Gill, 'Commentary', in A. Klip and G. Sluiter (eds.), *Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia 1997–1999* (2001), Vol. 3, at 868–75, especially at 872–3; Raimondo, *supra* note 8, at 91–6. The controversy about which test (the 'overall' or the 'effective' control test) applies for determining state responsibility arising out the conduct directed or

it did acknowledge their authority.[89] In fact, the Court's concise but significant jurisprudence on international humanitarian law has exerted positive effects on decisions not only of the ICTY but also of other international courts and tribunals, as illustrated below.

### 3.2. The Court's jurisprudence on humanitarian law as persuasive precedents for other international courts and tribunals

The purpose of this section is to reveal a trend, a tendency, on the part of international criminal courts and tribunals to rely on the Court's precedents pertaining to international humanitarian law. Given the modest purpose of the section, it does not consist of a thorough examination of the relevant jurisprudence of those courts and tribunals.

The Court's jurisprudence on international humanitarian law has been cited with approval in particular by the ICTY. The Eritrea–Ethiopia Claims Commission (EECC) and the International Criminal Court (ICC) have also relied on such jurisprudence. On the other hand, if the International Criminal Tribunal for Rwanda (ICTR) has not so far resorted to such precedents it is not because it does not deem them persuasive, but probably because its caseload is rather burdened with cases where chiefly at stake is the applicability of the law of genocide; hence the application by this international tribunal of international humanitarian law, as well as the need to rely on relevant precedents of third courts in that regard, have been minimal. That the ICTR deems the Court's precedents to be significant is unquestionable, since it has resorted to the Court's precedents on the law of genocide.[90]

As far as the ICTY is concerned, it cited and endorsed the Court's precedents on international humanitarian law in its very first case – the *Tadić* case. In that case a trial chamber held that 'The fact that common Article 3 is part of customary international law was definitively decided by the International Court of Justice in the *Nicaragua* case'; it also acknowledged that, as the Court had pointed out, the rules laid down in that legal provision are applicable in both internal and international armed conflicts.[91] It is worth noting that this is the Court's precedent most invoked by the ICTY; it has been cited by the Appeals Chamber[92] and by other

controlled by that state remains controversial, as this year the Court has given the reason why it was unable to share the ICTY's Appeals Chamber's view on that matter and eventually reaffirmed its precedent of the *Nicaragua* judgment. See *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, unreported, paras. 396–407.

89. *Prosecutor v. Aleksovski*, Case No. IT-95–14-1-A, Judgement, 24 March 2000; *Prosecutor v. Delalić et al.*, Case No. IT-96–21-A, Judgement, 20 February 2001, para. 10.

90. See, e.g. *Prosecutor v. Akayesu*, Case ICTR: 96–4-T, Judgment, 2 September 1998, para. 494; *Prosecutor v. Rutaganda*, Case No. ICTR-96–3-T, Judgment, 6 December 1999, para. 46; *Prosecutor v. Bagilishema*, Case No. ICTR-95–1A-T, Judgment , 7 June 2001, para. 54

91. *Prosecutor v. Tadić*, Case No. IT-94–1-T, Decision on the Defence Motion on Jurisdiction, 10 August 1995, para. 67.

92. *Prosecutor v. Tadić*, Case No. IT-94–1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paras. 98 and 102; *Prosecutor v. Kupreškić et al.*, Case No. IT-95–16-T, Judgement, 14 January 2000, para. 534; *Prosecutor v. Delalić et al.*, Case No. IT-96–21-A, Judgement, 20 February 2001, paras. 140–4, 147.

trial chambers.[93] Most importantly, the Court's precedent played a crucial role in such decisions, for the reason that it enabled the ICTY to bolster the proposition that the distinction between international and internal armed conflicts was undergoing a blurring process in respect of the protection of human beings and, consequently, to affirm that violations of the rules encompassed by common Article 3 entail criminal responsibility under international law.

The ICTY also cited and endorsed the Court's precedent whereby the obligation to respect and to ensure respect laid down in Article 1 common to the four 1949 Geneva Conventions is applicable in international as well as in internal armed conflicts. Again, the ICTY resorted to the Court's precedent in order to confirm its interpretation of common Article 3; according to that interpretation, the acts listed in common Article 3 were intended to be criminalized in 1949.[94]

A more specific example can be given with the *Kupreškić* case. In this case, the ICTY's trial chamber relied extensively on the Court's precedents to deal with the issue of the prohibition of attacks on the civilian population. First of all, it recalled the Court's *Nuclear Weapons* precedent that the principle of distinction between civilian and combatants was a cardinal principle of humanitarian law.[95] The trial chamber even went one step further and explicitly held that the customary rule as determined by the Court was applicable in any type of armed conflict, hence in both international and internal armed conflicts. This interpretation is consistent with the Court's precedent, since, as mentioned before, this had not subjected the applicability of the rule to the existence of an international armed conflict. Second, the ICTY's trial chamber dealt with the question as to when attacks on military objectives are unlawful because they cause indiscriminate damage to civilians, even though the objectives in themselves are legitimate. The trial chamber conceded that the principle on precautionary measures left a lot of discretion to the belligerent party. Yet it held that the concept of 'elementary considerations of humanity' as developed by the Court in the *Corfu Channel* and in the *Nicaragua* cases and in the *Nuclear Weapons* advisory opinion had to be used to interpret and apply this principle in practice.[96]

The EECC has also cited a Court precedent with approval, as mentioned above. It did so in an award regarding the treatment of war prisoners. In the award the EECC had to deal, *inter alia*, with Eritrea's argument that the provisions laid down in the Third Geneva Convention of 1949 requiring external scrutiny of the treatment of prisoners of war and access to these by the ICRC were not part of such customary rules. The EECC rejected such an argument. In its view, those provisions are crucial for the regime of protection of war prisoners that has developed in international practice and transformed into customary law. It added that it would be irresponsible on its part not to consider such provisions as customary law, for the reason that,

93. *Prosecutor v. Furundzija*, Case No. IT-95–17/1-T, Judgement, 10 December 1998, para. 138; *Prosecutor v. Aleksovski*, Case No. IT-95–14/1-T, Judgement, 25 June 1999, para. 50; *Prosecutor v. Kupreškić et al.*, Case No. IT-95–16-T, Judgement, 14 January 2000, para. 534.
94. *Prosecutor v. Delalić et al.*, Case No. 96–21-A, Judgement, 20 February 2001, para. 163–4.
95. *Prosecutor v. Kupreškić et al.*, Case No. IT-95–16-T, Judgment, 14 January 2000, para. 521.
96. Ibid., at para. 524.

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as the Court had declared in the *Nuclear Weapons* advisory opinion, most rules of international humanitarian law are to be complied with by all states because they are inviolable principles of customary law. As a result, it held that Eritrea violated customary law by refusing to allow the ICRC to visit Ethiopian war prisoners, register them, and interview them without witnesses, and by failing to provide the prisoners with appropriate assistance.[97] It should be noted that in this case the determination of the customary status of the provisions of the Third Geneva Convention of 1949 was essential, because Eritrea was not a state party to it at the time of the relevant facts.

Finally, as mentioned above, the ICC has also resorted to a Court precedent on international humanitarian law. More precisely, it relied on the Court's *Armed Activities* precedent that Article 42 of the 1907 Hague Regulations is part of customary law; it also upheld the Court's interpretation of that legal provision.[98] True, the Court's precedent was recalled in passing, as the customary status of that legal provision had not been disputed in the case. In fact, the ICC was in the process of determining whether the facts under scrutiny took place in the context of an internal or an international armed conflict.

## 4. Conclusions

The Court has dealt with international humanitarian law only to the extent that the cases submitted and the requests of advisory opinions transmitted to it encompassed issues pertaining to that branch of international law, and to the extent that such cases were not discontinued or jurisdictional barriers did not impede the Court in dealing with such issues. It may be observed that 37 years elapsed between the first and second judgments that dealt with international humanitarian law, namely the judgment of the *Corfu Channel* case in 1949 and the judgment of the *Military and Paramilitary Activities in and against Nicaragua* case in 1986. In total, the Court has determined, interpreted, and applied rules of international humanitarian law in five contentious cases and advisory opinions.

Notwithstanding the relatively limited size of its jurisprudence on international humanitarian law, the Court has provided some noteworthy contributions to the development of this branch of international law. Most notable in this respect is the determination of customary rules that express the 'fundamental' or 'cardinal' general principles of humanitarian law, as the Court called them, namely the rules mentioned by Article 3 common to the four 1949 Geneva Conventions, the obligation to respect and to ensure respect for the Conventions, the principle of distinction between civilians and combatants, the prohibition of causing unnecessary suffering to combatants, and the Martens Clause. Further in this regard, it is of the utmost importance that the Court expanded the scope of application of all those principles.

97. Partial Award, Prisoners of War, Ethiopia's Claim 4 between the Federal Democratic Republic of Ethiopia and the State of Eritrea, 1 July 2003, Eritrea–Ethiopia Claims Commission, paras. 61–62.

98. *Situation en République Démocratique du Congo, Affaire Le Procureur c. Thomas Lubanga Dyilo, Décision sur la confirmation des charges*, 29 janvier 2007, Affaire No. ICC-01/04–01/06, Chambre préliminaire I, para. 212.

Thus the provisions of common Article 3 are also applicable in international armed conflicts, and the fundamental or cardinal principles of international humanitarian law are also applicable in internal armed conflicts. The enlargement of the original scope of application of these principles may definitely be seen as a significant progressive development in the field of international humanitarian law. Moreover, as demonstrated above, on the basis of these general findings the ICTY and the EECC have identified more specific customary rules, such as the provisions of the Third Geneva Convention of 1949 requiring external inspection of the treatment of prisoners of war and access to them by the ICRC.

Another important contribution concerns the introduction of the concept of 'elementary considerations of humanity'. This concept has been used by the Court and also by the ICTY to determine the customary nature of specific fundamental rules, such as Articles 1 and 3 common to the 1949 Geneva Conventions.

In conclusion, in spite of the formal limitations inherent in the decisions of international courts and tribunals (they are simply means for the determination of rules of international law and not binding precedents), the practice of the ICTY, the EECC, and the ICC of relying on the Court's precedents on international humanitarian law reveals the persuasiveness of these precedents as a means for the determination and interpretation of rules of international humanitarian law. Even though, in general, the citation of the Court's precedents is presented as one legal argument among others, there is no doubt that the Court's jurisprudence regarding international humanitarian law has had a considerable impact on the legal reasoning of other international courts and tribunals. From this perspective, it could well be argued that the Court, dependent as it is on the type of cases that are submitted to it, has proved to be a proper guardian of international humanitarian law.