The "General Principles" of humanitarian law according to the International Court of Justice

by Rosemary Abi-Saab

In its Judgment of 27 June 1986 in the case concerning *"Military and Paramilitary Activities in and against Nicaragua"* [1], the International Court of Justice dealt at length with some of the most vexed questions in humanitarian law. Although the Court had previously touched upon certain problems in this legal field, for example in the *Corfu Channel case* [2] and that of the *Pakistani Prisoners* [3], this was the first time it expressed itself in detail on more general issues, notably on the customary nature of the "general principles" of humanitarian law.

This approach, whose essential purpose is to ensure respect for the general principles of humanity in all circumstances, is in line with the concern felt at the present time by those engaged in the theory and practice of humanitarian law, in the face of repeated violations of the rules to which most States have nevertheless expressly subscribed, since participation in the Geneva Conventions is virtually universal. The problem is extremely acute and efforts have been made to determine whether the obligation to respect humanitarian law (and hence condemnation of its violations) might not derive from the existence and recognition of "general principles" which would be binding in all circumstances, whether or not the States concerned were party to the Conventions and whether or not there were any doubts as to the applicability of the Conventions

[1] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits*, I.C.J. Reports 1986, p. 14.

[2] *Corfu Channel case, Merits*, I.C.J. Reports 1948, p. 4.

[3] *Trial of Pakistani Prisoners of War*, I.C.J. Reports 1973, p. 344.

as treaties in certain circumstances. It is a question of political rather than legal strategy: by reducing the obligations of humanitarian law to a certain number of general principles, it is easier to see whether essentials have been violated and from the tactical point of view of scrutiny of application, it becomes possible to look beyond the details of the texts and concentrate on what is clear and fundamental.

What then would these principles be? How can they be distilled from the existing body of rules without reducing its content exclusively to these general principles? These are some of the questions now under discussion, with a very specific concern in mind: namely to bring out more clearly the obligations of States and the possible violations of humanitarian law and to ensure absolute respect for minimum standards of humanity in all circumstances, even where the situation is not formally covered by the humanitarian law embodied in the Conventions.

In this context, it is especially interesting to follow the reasoning set out by the Court in its recent Judgment which, as we shall see, has brushed aside previous doubts on the subject, in order to reach the conclusion that humanitarian law has a customary character, in other words that it belongs to general international law, and this no doubt will afford better protection for the victims.

The American reservation

In the case under consideration, the Court decided to base its reasoning on customary law because of the American reservation concerning multilateral treaties. This reservation led the Court, throughout its Judgment, to relate the alleged violations to customary law and not to the relevant provisions of the Conventions.

The declaration by the United States accepting the compulsory jurisdiction of the Court under the "Optional Clause" of the Court's Statute contains a reservation which excludes:

> "disputes arising under a multilateral treaty, unless: 1) all parties to the treaty affected by the decision are also parties to the case before the Court, or 2) the United States of America especially agrees to the jurisdiction" [4].

[4] *Military and Paramilitary Activities...*, para. 42. At the time this reservation was made, the original English text gave rise to numerous difficulties of interpretation; see Maus, Bertrand, *Les réserves dans les déclarations d'acceptation de la juridiction obligatoire de la Cour internationale de Justice*, Geneva, Droz, 1959.

This exclusion of multilateral treaties has obvious consequences for the content of the law applicable to the dispute. But, in the Court's view, the fact that principles "have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law" [5]. The Court also recalls that "The existence of identical rules in international treaty law and customary law has been clearly recognized by the Court in the North Sea Continental Shelf cases" [6].

Accordingly, the Court does not consider it necessary to decide upon the applicability of the American reservation and, in particular, on exclusion of the applicability of the Geneva Conventions to the present case [7] since in its view "the conduct of the United States may be judged according to the fundamental general principles of humanitarian law..." [8].

"Elementary consideration of humanity" and "fundamental general principles of humanitarian law"

Paradoxically, the most flagrant violation of humanitarian law, the mining of Nicaraguan ports by the United States, was the easiest point for the Court to deal with and did not lead to detailed discussion. In this field, customary law is very explicit and well established, since the Nuremberg Tribunal declared The Hague Conventions and Regulations of 1907 to be part of customary law. It was in this context that the Court spoke first of a violation of the "principles of humanitarian law":

> "... 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..." [9]

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[5] *Military and Paramilitary Activities...*, para. 174.

[6] *Ibid.* para. 177.

[7] The Court speaks in this connection of the Geneva Conventions applicable to the *settlement* of the dispute (para. 217), whereas the Conventions are concerned with the protection of the victims and the conduct of belligerents.

[8] *Military and Paramilitary Activities...*, para. 218.

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

However, although the Court acknowledged at the outset that the mining of ports led to its "examination of the international humanitarian law applicable to the dispute" [10], it did not refer explicitly to humanitarian law in its subsequent examination of this question, notably in the operative part of the Judgment, where it simply stated in Point 6 that:

> "... by laying mines in the internal or territorial waters of the Republic of Nicaragua during the first months of 1984, the United States of America has acted, against the Republic of Nicaragua, in breach of its obligations under customary international law not to use force against another State, not to intervene in its affairs, not to violate its sovereignty and not to interrupt peaceful maritime commerce."

This brief reference to the mining of the ports nevertheless deserves special attention since the Court notes that it expressed itself in the same way in the *Corfu Channel* case in speaking of:

> "certain general and well recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war..." [11]

It is on the basis of this statement that the recent Judgment makes the transition from "elementary considerations of humanity" to the "general principles" of humanitarian law. By referring both to the "principles of humanitarian law underlying the specific provisions of Convention No. VIII of 1907" [12] and to its pronoucement in the *Corfu Channel* case, to establish the existence of a violation of humanitarian law, the Court appears to make no distinction between "considerations of humanity" and the "general principles of humanitarian law". This could create an impression that there is confusion of two ideas which are generally considered to have different content. Bearing in mind the ultimate objective to be attained in the use of such concepts, however, the distinction between them does not appear to be absolutely fundamental. "Considerations of humanity" would thus represent general principles, or an ethical or moral basis, applying in all circumstances, in times of peace as well as in times of armed conflict. The more specific "principles of humanitarian law" would be those im-

[10] *Ibid.*, para. 216.

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

[12] *Ibid.*

plementing the principles of humanity in circumstances of actual or potential armed conflict. The principles of humanitarian law may also constitute a new stage following on that of "considerations of humanity", in the crystallization and specification of the reasoning of the Court on the matter through its own jurisprudence.

The general principles of humanitarian law

When the Court reaches the point of defining more fully what it means by the "fundamental general principles of humanitarian law" (which it regards as corresponding to what it called "elementary considerations of humanity" in 1949), it identifies them with the rules set forth in Article 3, common to the four Geneva Conventions, which deals with armed conflicts of a non-international character. According to the Court, these rules constitute a minimum, applicable in all circumstances, including *international* armed conflicts [13].

This approach may present a problem, since the substance of Article 3 is generally regarded as the minimum applicable in *internal* conflicts, in which the parties are also encouraged to apply other provisions of the Geneva Conventions through special agreements. In international conflicts, on the other hand, the Conventions apply in their totality, in the form in which they have been accepted by all the States subscribing to them. Experts on these questions have always avoided referring to a "minimum" of rules applicable in international conflicts. It is, moreover, for this reason that not all experts agree on the desirability of encouraging a search for "general principles" of humanitarian law, lest the Geneva Conventions be reduced to a few rules deemed essential, at the expense of others of equal importance, especially the rules of implementation; for fear, in other words, of reducing the whole body of humanitarian law applicable to international conflicts to this minimum of principles, to the detriment of the numerous more specific rules of humanitarian law applying to conflicts of this type.

However, in order to grasp the full significance of the Court's reasoning, we have to consider it in the context of the specific

[13] *Ibid.*, para. 218.

problem that the Court had to resolve. What it sought to establish in this case was that the alleged actions in any event fell within the minimum standards applicable in all circumstances, whether the conflict was international or not [14]. It should be noted that the Court was aware of the danger mentioned above and immediately added that, in the case of international conflicts, this minimum applicable in all circumstances is independent of "the more elaborate rules which are also to apply to international conflicts" [15].

The Court thus surmounted the problem by establishing a direct linkage—indeed a continuity—between the minimum principles and the Conventions as a whole, by considering the latter to be only the expression, and in certain respects the development, of these principles, with the difference between the general (or minimum) principles and the rest of the Conventions lying only in their respective degree of specificity.

The approach which had previously been followed in identifying the general principles of humanitarian law was thus reversed. For the Court, the point was not to attempt, as some experts have done, to seek in the Geneva Conventions those provisions which might be described as general principles applicable in all circumstances, but rather to regard the Conventions themselves as instruments which simply express or develop such general principles.

Have the Conventions thus become, with the passage of time, the expression of an independent customary law consisting of these general principles, as the Nuremberg Tribunal said of The Hague Regulations? This question is important, in that it affects the extent to which the Geneva Conventions are considered binding. Judge Jennnings, in his dissenting opinion, declined to give an affirmative answer:

> "... there must be at least very serious doubts whether those Conventions could be regarded as embodying customary law. Even the Court's view that the common Article 3, laying down a 'minimum yardstick' for armed conflicts of a non-international character, and applicable as 'elementary considerations of humanity', is not a matter free from difficulty".[16]

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[14] *Ibid.* para. 219: "Because the minimum rules applicable to international and to non-international conflicts are identical, there is no need to address the question whether those actions must be looked at in the context of the rules which operate for the one or for the other category of conflict."

[15] *Ibid.*, para. 218.

[16] *Ibid.*, Dissenting opinion of Judge Jennings, p. 537.

Likewise, in his individual opinion, Judge Ago said he 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' or of which they are at most 'in some respect a development'.[17]

Even so, does not the virtually universal participation in the Geneva Conventions raise them to the status of general international law, whether we call it customary law or something else?

The obligation to "ensure respect" for humanitarian law

Recourse to the general principles of humanitarian law in this case was found to be necessary with regard to the obligation to "ensure respect" for humanitarian law.

Nicaragua had complained of acts committed on its territory against civilians and, in particular, acts of assassination, torture, kidnapping and the execution of prisoners. It had also complained of the production and distribution of a manual on "Psychological Operations in Guerrilla Warfare" and of a second publication (on which the Court did not express a view), entitled "Freedom Fighter's Manual", with the subtitle, "Practical guide to liberating Nicaragua from oppression and misery by paralysing the military-industrial complex of the traitorous marxist state without having to use special tools and with minimal risk for the combatant" [18]. According to Nicaragua, these publications were the work of the CIA (which the Court considered to be an established fact with respect to the first publication [19]) and for which it held the United States to be responsible.

Although the Court considered that acts by the *Contras,* and their possible violations of humanitarian law resulting from incitements in the manual, could not be attributed to the United States, it nevertheless concluded that the United Stated violated the princi-

[17] *Ibid.* Individual opinion of Judge Ago, para. 6.

[18] *Ibid.*, Judgment, para. 117.

[19] *Ibid.*, para. 118.

ples of humanitarian law by producing and distributing the manual. The Court noted that the United States, under Article 1 of the Conventions, was obliged to "respect and ensure respect" for the Conventions, an obligation which, in the Court's view, did not derive only from the Conventions themselves, "but from the general principles of humanitarian law to which the Conventions merely give specific expression".[20] By encouraging persons or groups of persons, through the distribution of the manual, to act in violation of the provisions of humanitarian law, the United States would thus, according to the Court, have violated one of the general principles of humanitarian law, namely to respect and ensure respect for the Conventions.

In this connection, it is interesting to note that in the same Judgment, in the context of Article 51 of the United Nations Charter, the Court considered that the principle of self-defence, in its normative component, belongs to general international law, whereas the obligation to inform the Security Council, being a procedural obligation, is merely of a conventional nature.[21]

However, the obligation in Article 1, common to the four Geneva Conventions, to "ensure respect" for humanitarian law—which could have logically been regarded as part of the procedure for implementing the Conventions rather than as part of their normative provisions—was held by the Court to be inseparable from the basic obligations and was consequently recognized as a general principle. This is especially important in the context of the responsibilities of third parties and the international community in general in the face of violations of the Conventions. There is, moreover, a parallel in the reasoning of the Court on this point with that expressed in its advisory opinion on reservations to the Convention on Genocide:

> "The objects of such a convention must also be considered... In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high

[20] *Ibid.*, para. 220.

[21] *Ibid.*, para. 200.

ideals which inspired the convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions." [22]

The Court thus resolved one of the major problems of present-day humanitarian law by affirming what experts have long hesitated to assert, much as they would like to, namely that the fundamental general principles of humanitarian law belong to the body of general international law, in other words, that they apply in all circumstances, for the better protection of the victims.

Even though the Judgment may be criticized, here and there, for its unusual handling of the terminology and concepts of humanitarian law, and sometimes for its over-hasty conclusions, the reasoning underlying it is nevertheless solidly rooted in the logic and dynamics of international law. Accordingly, it makes a major contribution to consolidating the status of humanitarian law as it faces the challenges of the world today.

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[22] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion of May 28th, 1951,* I.C.J. Reports, 1951, p. 23.