

The Role of the Advisory Opinion of the International Court of Justice in Establishing the Rules of International Humanitarian Law

(In light of the advisory opinion on the legality of the threat or use of nuclear weapons)

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Abstract

As a weak power regarding the International Court of Justice jurisdiction, known as the advisory opinion, the research is trying to clarify probable impact of the power in enhancing and developing the international humanitarian law, that may be come through the advisory opinions, which we take one of the most important of it (the advisory opinion on the legality of the threat or use of nuclear weapons).

Keywords: International Court of Justice, advisory opinion, international humanitarian law, threat or use of nuclear weapons.

1. Introduction

The International Court of Justice as one of the organs of the United Nations specializes in international disputes, non-criminal nature, but there were a lot of attempts to subdue criminal matters of competence, as part of attempts to establish an international criminal court. These attempts have failed, but that there was an effective role of the Court in some criminal matters that led to the development of the rules of international humanitarian law.

This study relates to the role played by the International Court of Justice in the development of the rules of international humanitarian law, as non-criminal nature, where the Court considers that under Article 92 of the Charter of the United Nations principal judicial organ of the United Nations, and the Court shall exercise its statutory in two types of jurisdiction: competence court to consider the cases brought before it, and the competence of advisory opinion at the request of the General Assembly and the Security Council, or the permission of the General Assembly of the other branches of the United Nations and its specialized agencies, to ask the court about legal question within the scope of work (Abu Al-Wafa, 1996, p. 59).

The court's jurisdiction includes all the issues before it, and provided for by the Charter of the United Nations, and the relevant international treaties, with the exception of the criminal nature of conflict, but that there is no impediment prevents the display of disputes relating to human rights. And actually touched on the court for many of the issues relating to international humanitarian law, both in its terms, or in advisory opinions, such as the issues of racial discrimination, genocide, and the right to self-determination.

Most of the international conventions on human rights, which concluded in the framework of the United Nations, include provisions that allow certain referral of disputes to the International Court of Justice for adjudication, or the interpretation of treaties, or applied, at the request of the parties to the conflict. The researcher studied in the following themes:

A: the definition of the International Court of Justice

B: the jurisdiction of the International Court of Justice in the consolidation of international humanitarian law

C: assess the role of the International Court of Justice in establishing the rules of international humanitarian law

1.1 What is the International Court of Justice?

International Court of Justice was established in 1945, a substitute for the PCIJ, which had been established in 1920, after the conviction of the international community to settle international disputes by peaceful means, through a judicial body, in accordance with the principles of justice and international law, after the international agreement during business Preparatory Charter of the United Nations. It was decided to create such a court, and causing its statute, the Charter of the United Nations, and has become one of the United Nations organs, unlike the International Court of Justice, which were not permanent as well as during the league⁽¹⁾.

For the jurisdiction of the court, the statute does not preclude the referral of disputes to any other international court, or any international arbitration, as agreed by the conflicting parties. And limited the right to sue at this court on three categories⁽²⁾:

1. Member States of the United Nations, and is, all parties to the Statute of the Tribunal⁽³⁾.

¹ Article 95 of the Charter of the United Nations

² Article 34 of the Statute of the International Court of Justice

³ Article 93 of the Charter of the United Nations

2. States which acceded to the Statute of the Court, other than members of the United Nations, in accordance with the conditions determined by the General Assembly, and on the recommendation of the Security Council.
3. States that wish to litigation before the court, without being a member of the statute, and under the conditions imposed by the Security Council⁽¹⁾.

The court consists of the 15 independent judges, who have high moral character⁽²⁾, nor shall there be more than one judge of the same State, and who are elected by the General Assembly of the United Nations Security Council from a list of candidates⁽³⁾. In such a way some personal considerations, that is their choice of high moral character, obtaining qualifications of the appointment in the judiciary in their countries, and if they are of high-ranking, and acclaimed sufficiency in international law, must also take into account the representation of different legal systems of the world⁽⁴⁾.

1.2 The jurisdiction of the International Court of Justice and its impact on international humanitarian law

The ICJ has two types of jurisdiction as follows:

I. the judicial jurisdiction

This jurisdiction over the cases that is provided to the court as a general rule, this jurisdiction is optional based on a compromise between the conflicting parties, and meets the principle of sovereignty, where you can't force the state to adjudicate before the court against her will. This is known as the limited jurisdiction of the ICJ that means state must agree to resort to the ICJ to settle disputes in which it is a party (Aljondi, 1997, p. 222).

So the Court shall have jurisdiction in the following conditions (Abdel-Hamid, 2000, p. 313):

- A. If the parties of the conflict agreed to refer the dispute to court
- B. In the case of existence of agreements includes ICJ jurisdiction concerning the interpretation or implementation of the treaties
- C. Declaration of a state to accept the court's jurisdiction with other State accepting the same obligation

2. The advisory jurisdiction

This is different jurisdiction with advisory nature, relates to the formulation of the legal opinion from the court, when a legal question submitted to it by the General Assembly or the Security Council, or other organs of the specialized agencies according the GA's permission. Thus, the states or entities or individuals and international organizations do not have this jurisdiction unless it was submitted to the GA and it approved to request the court. This request shall be in writing, accompanied by documents, and is committed to the court to issue an advisory opinion (Mkhaimar, 2000, p. 229).

One of the relevant legal norms of international humanitarian law that is applied by the ICJ, the issue of sources, since the Court applied the following sources at the determination of the dispute⁽⁵⁾:

- International conventions.
- International norms.
- General principles of law established by the United Nations.
- provisions and doctrines of senior authors in common law in various countries
- the principles of international justice

Among the most important judgments of the Court in the field of international humanitarian law, the advisory opinion issued by the court on 1996 at the request of the General Assembly of the United Nations, on the legality of nuclear weapons, and here the Court considered it to see whether the use of nuclear weapons is illegal, given the principles and the rules of international humanitarian law applicable to armed conflicts, it must return to the laws and customs of war derived from the Hague law, and to the rules contained in the four Geneva Conventions of 1949.

The Court adopted in that decision some principles of international humanitarian law (Atlam, 1991, p. 91):

- a. The principle of distinction between combatants and non-combatants in order to protect civilians
- b. Duty to do no harm and unnecessary suffering or unexplained
- c. The need to confront the development of military technology to with the principle of relativity
- d. The Court confirmed the basic concepts of the following⁽⁶⁾:
 - it confirmed to establish the basic principles of international humanitarian law as a customary law

¹ Article 35/2 of the Statute of the International Court of Justice

² Article 2 of the Statute of the International Court of Justice

³ Article 3-5 of the Statute of the International Court of Justice

⁴ Article 38 of the Statute of the International Court of Justice

⁵ Article 38/1 of the Statute of the International Court of Justice

⁶ Hazem Atlam, opcit, p90-91

- it confirmed that the minimum standards of international humanitarian law applies to all types of armed conflict , regardless of the absence of a clear definition of armed conflict so far
- Put human and fundamental rights in the heart of the rule of law , especially Jus Cogens

It follows from the decision and the principles that applied, that international humanitarian law applies to nuclear weapons, The Court considered that the threat to use, or use of nuclear weapons, contrary to the rules of international law applicable in international disputes, but the court confirmed that it can't assert categorically about the legality or illegality of the threat, or use, in the circumstances of legitimate self-defense, when the survival of the state itself is threatened (Statement of the International Committee of the Red Cross to the General Assembly of the United Nations concerning the advisory opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons, 1997).

It should be noted for the Jus Cogens, that it was emphasized several times by the court through its judgment, these rules and the nature of jus, in the case of military activities in Nicaragua, the court found that Common Article Three of the Geneva Conventions, represent a customary rule of international law, and it reflects the basic considerations of humanity, as well as in the advisory opinion of the Court on the legality of the threat or use of nuclear weapons or their use, the court approved that the basic rules of international humanitarian law is one of the principles of customary international law, and in the separate opinions of some judges considered that the rules of war crimes became Jus Cogens (Naqvi, 2003, p. 114).

3. Assess the role of the advisory opinion of the ICJ in establishing the rules of international humanitarian law

The ICJ advisory opinion on the legality of the threat, or use of nuclear weapons in 1996, and other decisions and advisory opinions in ICJ judgment, confirmed that there is a wide range of rules of international humanitarian law, which applies to armed conflicts, and which are basic principles in the field of respecting human personality, and elementary considerations of humanity. Have confirmed, for example, in its judgment in 1949 in the case of the Strait of Corfu that the Hague Conventions and Geneva Conventions of 1949 received very wide acceptance by States, and they are basic rules that apply to all countries parties or non-parties of the agreements. The court added that the Secretary- General in his report for the year 1993 on the Statute of the Court of Yugoslavia that the principle of legality (no crime or punishment except by virtue of the law) which is contained in the rules of international humanitarian law, is considered without any doubt, as a part of customary law (Dowald - Beck, 1997).

The court accepts and applies Jus Cogens of international humanitarian law, which are widely acceptable in the international community. The whole international jurisprudence on the status of these rules, because of its high values for humanity, and because of their long history, authenticity, and wide spread in all over the world, considered it as an absolute obligation, which can't be stopped at the borders or scope of mutual conventional obligations⁽¹⁾.

The Jus nature of the international humanitarian law was also confirmed by the ICJ, However, the limited role of the court, comes from the inability of the court to exercise its competence, except with the consent of states, or a declaration of accepting its competence. Where according to ICJ in the Barcelona Traction case in 1970 some of the rules of natural jus, was mentioned, that was including the prohibition of the use of force, and the prohibition of piracy, slavery and genocide (Aljondi, 2005, p. 19), which indicates that all the provisions of these crimes is such Jus Cogens.

4. Conclusion

The study explored that the ICJ has an important role in perpetuating the rules of international humanitarian law, this has appeared in many of its famous decisions and advisory opinions, especially the advisory opinion issued by the court on 1996 on the legality of nuclear weapons, the court perpetuated in this decision the major principles of international humanitarian law, such as the principle of distinction between combatant and non-combatant in order to protect civilians, the duty to do no harm and unnecessary or unexplained suffering, and the need to cope the development of military technology with the principle of relativity.

The study also showed that the court emphasized in many of its Precedents to establish the basic principles of international humanitarian law as a customary law. From that the minimum standards of

¹ Amer Zemmali in Talk Session III: In the seminar challenge immunity obligation to cooperate with the International Criminal Court and States not parties to the Statute of Giuseppe Nizi, in: The Challenge of impunity, a scientific symposium at the Faculty of Law of the University of Damascus under the auspices of Dr Hassan Resha the Minister of Higher Education of Syria, Publications of international Committee of Red Cross, 2002, p151

international humanitarian law, which applies to all types of armed conflict, regardless of the absence of a clear definition of armed conflict so far. Court has also contributed by its Precedents the human and fundamental rights in the heart of the rule of law.

The researcher recommends in this occasion to develop the work of the UN system, expanding the scope of the court's jurisdiction, modifying its statute to achieve accordance with the general provisions in the judiciary, such as the compulsory jurisdiction of the Court, and the development of mechanisms for the implementation of its decisions, and expanding the scope of competence in the field such as giving the right of the advisory opinion to the countries and international organizations.

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