

The advisory role of international courts in the evolution of human rights law¹

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Abstract

Human rights have the pedigree of a distinguished struggle against oppression: everyone shall be treated with respect for their inherent dignity and human worth.³ The horrors of the Second World War provided the legal basis for the modern human rights law. The establishment of the United Nations (UN) signalled the beginning of an international concern for the protection of human rights. Human rights transnational institutions have developed human rights principles, some recognized as jus cogens norms. Nonetheless the application of human rights law in courts is almost always contested. The functions of international courts such as the International Court of Justice (ICJ) are dependant on the States volition and the settlement of disputes between them. Whenever asked by the UN organs and specialized agencies, international courts also give advisory opinions on contentious legal questions. The impact of international jurisprudence on contemporary international law is significant, assessing key areas of international law, such as law of the sea, international environment law and international human rights law. Note that, in this paper we focus on the particular impact of the advisory opinions on the human rights law.

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1. Introduction

The advisory function of international courts is understood and accepted as a non-binding recommendation that allows international bodies and institutions to adopt a certain behaviour in their activities and future decisions. An advisory opinion does not have a *res judicata* effect and does not create obligations. Despite the non-legally binding nature of the issued opinions, it doesn't prevent it from being an effective instrument in the continuous evolution of international law. These opinions are able to give voice to principles or customs or to its consolidation. For example, in 1949, ICJ delivered an advisory opinion in which it stated that the UN was a subject of international law and could enforce its rights by bringing

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³ A. Clapham, *Human Rights – A Very Short Introduction*, Oxford University Press, 2nd edition, 2015.

international claims, based upon the international custom created in at that time.⁴ This statement was against the belief of the majority of states at the time and allowed an innovative change in international law, recognizing international organizations as a subject of international law. More recently, in 2019,⁵ ICJ recognized the right to self-determination as a *fundamental human right* having a *broad scope of application*, giving rise the possibility for resorting to self-determination outside the decolonization context.⁶ After the 2017 *Catalunya Referendum*, and the more recent Scotland First Minister calls for a new Scottish independence referendum,⁷ will the 2020's be the decade of the self-determination proliferation within the democratic regimes context? We will return to this issue on paragraph 3.

2. Two concepts: *erga omnes* obligations and *jus cogens* norms

For the purpose of this paper we have to distinguish between two concepts: *erga omnes* obligations and *jus cogens* norms. As a brief introduction we can argue that *jus cogens* has been a source of controversy since its inclusion in the Vienna Convention on the Law of Treaties because of the differences, proximity, or coincidence with the concept of *erga omnes* obligations. There are two currents of opinion: one that supports the partial overlap between *jus cogens* norms and *erga omnes* obligations (peremptory norms imply the existence of these obligations); and one that supports the existence of a complete overlap between the two being the one and the same.⁸ Regardless of the overall position adopted, the

⁴ In the case of *Reparation for injuries suffered in the service of the United Nations*, the ICJ, after defining the object and purpose of the UN Charter, concluded that the organization would not be able to carry out its functions without having a certain degree of legal personality at the international level. The Court's teleological approach allowed an innovative change in international law: it created a new rule of customary law following a request on the interpretation of treaty provisions. See *Reparation for injuries suffered in the service of the United Nations*, International Court of Justice, Advisory Opinion, in *ICJ Rep*, 1949, p. 174.

⁵ *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, in *ICJ Reports*, 2019, p. 95.

⁶ J. Klabbers, '*Shrinking Self-determination: The Chagos Opinion of the International Court of Justice*', *ESIL Reflections* 8:2, 2019.

⁷ M. Holden, '*Scotland's Sturgeon hints at legal move if independence vote blocked*', *REUTERS Europe News*, November 30, 2020, available here: <https://www.reuters.com/article/us-britain-scotland-idUSKBN28A0QD> (last seen 31.12.2020)

⁸ Frowein states that although the notions of *jus cogens* and obligations *erga omnes* refer to different legal consequences, they are related to each other in important aspects. A rule for which no derogation is allowed (because of its fundamental nature - *jus cogens*), will normally be a rule for which all states have a legal interest in compliance (*erga omnes*). Conversely, Rao argues that *jus cogens* and *erga omnes* are two different aspects, with different implications in relation to the same set of obligations of general interest to the international community as a whole. Thus, when it comes to *jus cogens*, it intends to emphasize a more substantive aspect of the norm and, therefore, does not know any derogation. When referring to the nature of *erga omnes*, the aim is to emphasize the right to invoke responsibility for violations of obligations of an imperative nature under general international law. For Suy these two concepts, *jus cogens* and *erga omnes*, "are often confused (...) the effects are different. A treaty that conflicts with *jus cogens* is null, while a behaviour or action that violates a peremptory rule that establishes an obligation *erga omnes* calls for a special State responsibility. The

logical consequence is that: *jus cogens* norms necessarily give rise to *erga omnes* obligations.⁹ Violations of human rights law have been linked to *jus cogens* norms in a multitude of contexts and the latter have been recognized by human rights courts,¹⁰ by international criminal tribunals¹¹ and even with some reservations by the ICJ, which has avoided ruling on *jus cogens* norms, while giving wide coverage to *erga omnes* obligations¹² Considering the qualification of a norm

distinction between *jus cogens* rules as peremptory rules of international law and *erga omnes* obligations, which are also peremptory rules, is the fact that *jus cogens* is part of treaty law, whereas *erga omnes* obligations are part of the State's responsibility law for internationally wrongful acts. For Bianchi, these two categories of rules, although complementary, remain distinct, and considering them synonymous creates the risk of undermining the legal distinction of each category. As Gianelli notes there is a "substantial overlap" of the two concepts (*jus cogens* and *erga omnes*), it means that there is no perfect coincidence. See Jochen Abr. Frowein, *Reactions by Not Directly Affected States to Breaches of Public International Law*, in *RCADI*, T. 248, 1994-IV, pp. 345-437. P. S. Rao, *Countermeasures in International Law, The Contribution of the International Law Commission*, in *Studi di Diritto Internazionale in Onore di Gaetano Arangio-Ruiz*, Vol. II, Editoriale Scientifica, Napoli, 2004, pp. 853-880; E. Suy, *Article 53, 1969 Vienna Convention*, in O. Corten; P. Klein (eds.), *The Vienna Conventions on the Law of Treaties, A Commentary*, Vol. II, Oxford University Press, 2011, pp. 1224-1233; A. Bianchi, *Human Rights and the Magic of Jus Cogens*, in *EJIL*, Vol. 19, 2008, pp. 491-508; A. Gianelli, *Le Conseguenze delle Gravi Violazioni di Obblighi posti da Norme Imperative tra Norme Primarie e Norme Secondarie*, in M. SPINEDI, A. Gianelli, M. L. Alaimo (eds.), *La Codificazione della Responsabilità Internazionale degli Stati alla prova dei fatti, Problemi e spunti di riflessione*, Giuffrè Editore, Milano, 2006, pp. 245-290. For further developments see J. A. Azeredo Lopes, *Usa da Força*, in J. A. Azeredo Lopes et al. (eds.), *Regimes Jurídicos Internacionais*, I, Universidade Católica Editora, 2020, pp. 7-212.

⁹ C. J. Tams, *Enforcing Obligations Erga omnes in International Law*, Cambridge University Press, 2005, p. 146.

¹⁰ See, for instance, *Al-Adsani v. United Kingdom*, European Court of Human Rights, judgment of 21 November 2001, par. 61.

¹¹ *Prosecutor v. Furundzija*, International Criminal Tribunal for the Former Yugoslavia, judgment of 10 December 1998, par. 153.

¹² In the *Arrest Warrant* case the Court declined to discuss the Belgian argument according to which immunity could not be invoked if a norm of *jus cogens* had been violated. And in the ICJ opinion on the *Legality of Use or Threat of Use of Nuclear Weapons* the Court ends up creating the concept of *intransgressible principles of humanitarian law* to avoid referring to *jus cogens* norms. Even so, it seems ICJ today clearly accepts the concept of peremptory norms, at least since the case of *Military Activities* and, soon after, in the case of *Genocide*. In the first case, the Court addressed both the obligations *erga omnes* and the peremptory norms of general international law, in a perspective of jurisdiction, noting that it has already had the opportunity to emphasize that the opposability *erga omnes* of a norm and the rule of consent to jurisdiction they are two different things, and that the fact that rights and obligations *erga omnes* may be casual in a dispute is not enough to empower the Court to hear that dispute. The ICJ added that the same applies to the relationship between norms of general international law (*jus cogens*) and the establishment of the jurisdiction of the Court: the fact that a dispute concerns the respect for a norm that has this nature, which, certainly in the case of the prohibition of genocide, it cannot in itself establish the Court's competence to assess it. In the second case, in 2007, the Court reaffirmed the *jus cogens* nature of the ban on genocide. Some years later, in the case of *Jurisdictional Immunities* and in the Matters relating to the obligation to prosecute or extradite, this jurisdiction advanced a definition of an imperative rule that is very close to that of art. 53 VCLT and considered that the prohibition of torture was of that nature and was, therefore, non-derogable. In this case concerning jurisdictional immunities, which opposed Germany to Italy (with intervention by Greece), based on decisions of Italian courts in which, following actions brought by individuals, those jurisdictions ordered Germany to pay damages for the damage caused, during

as peremptory is to State practice and the decisions of judicial bodies,¹³ it should be noted that in 2019 the International Law Commission (ILC) adopted, at first reading, a draft of conclusions and annexed it to the *Peremptory Norms of general international law (jus cogens)*. In the draft the ILC identifies in a non-exhaustive list the following peremptory norms: prohibition of aggression, prohibition of genocide, prohibition of crimes against humanity, basic rules of international humanitarian law, prohibition of racial discrimination and apartheid, prohibition of slavery, prohibition of torture and, the right to self-determination.¹⁴ In this case, in a broad sense, and in line with the position shown by the International Law Association, “international human rights law... includes not merely human rights law *stricto sensu* but any international norm capable of conferring rights and duties directly on individuals regardless of nationality including under international humanitarian law and international criminal law”. It should be noted that, as a natural extension of the above said, one can consider most of the aforementioned *jus cogens* norms as part to international human rights law.¹⁵

3. Four ICJ opinions

Four ICJ opinions can be identified which significantly influenced its evolution towards viewing human rights law in this broad sense: *Legality of Use or Threat of Use of Nuclear Weapons*,¹⁶ *Legal Consequences of the Construction of a*

World War II, by Nazi forces. The Court insisted that the non-derogable character was one of the fundamental characteristics of the *jus cogens* rules, but considered that, in fact, this fact did not prevail the application of the rule in question over the principle of immunity from the jurisdiction of the State, anchoring itself in the case law of several national courts and that of the ECtHR, namely in the case of *Al-Adsani c. UK*. Finally, in the case of *Questions relating to the Obligation to Prosecute or Extradite* the Court reiterated, invoking in support of several international conventions and the opinion of States, the *jus cogens* nature of the rule that prohibits torture. See *Armed Activities on the Territory of the Congo* (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, in *I.C.J. Reports*, 2006, p. 6; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, in *I.C.J. Reports*, 2007, p. 43; *Jurisdictional Immunities of the State* (Germany v. Italy: Greece intervening), Judgment, in *I.C.J. Reports*, 2012, p. 99; *Questions relating to the Obligation to Prosecute or Extradite* (Belgium v. Senegal), Judgment, in *I.C.J. Reports*, 2012, p. 422. In a more developed way and with reference to these cases see, D. Castelleo, *Legal Consequences of Peremptory Norms in International Law*, Cambridge University Press, Cambridge, 2017, pp. 47-50; Y. Dinstein, *War, Aggression and Self-Defence*, Cambridge University Press, Cambridge, 2017, pp. 109-113; S. Talmon, *Jus Cogens after Germany v. Italy: Substantive and Procedural Rules Distinguished*, in *Leiden Journal of International Law*, vol. 25, 2012, pp. 979-983.

¹³ J. Crawford, *International Crimes of States*, in J. Crawford, A. Pellet and S. Olleson (eds.), *The Law of International Responsibility*, Oxford University Press, 2010, pp. 405-414.

¹⁴ *Report of the International Law Commission*, 71. Session, A/74/10, 16 September 2019, Chapter V.

¹⁵ International Law Association, *Final Report on the Impact of International Human Rights Law on General International Law, Report of the 72nd Conference of the International Law Association* (2006) 457.

¹⁶ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, in *ICJ Reports*, 1996, p. 226.

Wall in the Occupied Palestinian Territory,¹⁷ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*¹⁸ and *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*.¹⁹

a. For the *Nuclear Weapons* case, the ICJ recognized that the International Covenant on Civil and Political Rights as still applied in cases of armed conflict and that States had a duty to protect the environment. This opinion recognized for the first time the rules of international environmental law as customary law and also that those same rules were applicable in times of armed conflict. As such, the ICJ brought forward the changes that occurred in the international community and in international law, which recognized the existence of a customary rule developed over decades. The ICJ expressly recognized that nuclear weapons violated the right to life and that human rights law continued to apply in times of war while emphasizing the possibility of humanitarian law being used to interpret a human rights norm. Therefore, at least in this context, human rights law cannot be interpreted differently from international humanitarian law,²⁰ which is the *lex specialis* applicable to armed conflicts.²¹

b. Now let us look to a more recent case. For the *Wall in the Occupied Palestinian Territory* opinion not only did the ICJ repeated that the protection provided by human rights conventions does not cease in situations of armed conflict except by way of derogating clauses, it also identified three situations that may arise in the relation between international humanitarian law and human rights: the rights that result exclusively from international humanitarian law; the rights that result exclusively from human rights; and the rights that result from these two branches of international law. Having this in mind, the Court concluded that international humanitarian law will be considered *lex specialis* in relation to international human

¹⁷ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, in *ICJ Reports*, 2004, p. 136.

¹⁸ *Reservations to the Convention on Genocide*, Advisory Opinion, in *I.C.J. Reports*, pp. 19-51, p. 1.5."

¹⁹ *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, in *ICJ Reports*, 2019, p. 95.

²⁰ *In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable lex specialis, namely, the law applicable in armed conflict, which is attack the civilian population with the primary purpose to spread terror, designed to regulate the conduct of hostilities.* Opinion, par. 25.

²¹ In the Advisory Opinion on the *Legality of Nuclear Weapons*, the ICJ states that the protection afforded by the International Covenant on Civil and Political Rights does not end in time of war, except under the effect of Article 4 of the same Covenant, which provides that some obligations imposed by this instrument can be waived in the event of public danger. Respect for the right to life, however, does not constitute a prescription that can be overridden. In principle, the right not to be arbitrarily deprived of life also applies during hostilities. However, in such a case, it is up to the applicable *lex specialis*, that is, the law applicable to armed conflicts, designed to regulate the conduct of hostilities, the determination of what constitutes an arbitrary deprivation of life. Thus, it is only under the perspective of the law applicable in armed conflicts, and not under that of the Pact itself, that it can be said whether a death caused by the use of a certain type of weapons in the course of an armed conflict can be considered as a deprivation life contrary to article 6 of the Covenant.

rights law.²² Furthermore, the ICJ chose to reflect an increase in individual rights over state rights and to ignore the concept of *jus cogens* norms completely, focusing its approach on *erga omnes* obligations. This choice ended up creating some confusion within the international community, perhaps justifying why the ICJ has chosen to re-address this concept in subsequent cases.²³

²² See *Advisory Opinion on the Legal Consequences of Building a Wall in Occupied Palestinian Territory*, para. 106; later, in the case of *Armed Activities in the territory of Congo (Democratic Republic of Congo v. Uganda)*, December 19, 2005, ICJ refers to that paragraph, at para. 216. On the relationship between these legal regimes, with a survey of the practical consequences of this approximation, namely on the nature of *lex specialis* of international humanitarian law see, A. Lopes, *Enfim reunidos? Direito dos Conflitos Armados e Direito Internacional dos Direitos Humanos*, in W. Brito; J. Pueyo Losa (dirs.), *Conflitos Armados, Gestão Pós-conflitual e Reconstrução*, Andavira editora, Santiago de Compostela, 2011, pp. 39-65. See also M. I. Tavares, in J. A. Azeredo Lopes *et al.* (eds.), *Regimes Jurídicos Internacionais*, I, Universidade Católica Editora, 2020, pp. 213-280 and L. Doswald-Beck, *International humanitarian law and the Advisory Opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons*, in *International Review of the Red Cross*, no. 316, 1997, pp. 35-55. Nevertheless, the ICJ centred its interpretation on the term “armed attack” of Article 51 of the United Nations Charter and, contrary to the position taken by the United Nations Security Council, limited the concept of “armed attack” to cases of self-defence in the scope of international relations, excluding cases of anti-terrorist offensives that have taken place in territories under the control of the State following action perpetuated under the same article 51. Although not as well received by the international community as the previous opinion, it should be noted that not even the Israeli courts dared to challenge the ICJ’s interpretation, basing its subsequent decisions on the lack of concrete knowledge by the court and quoting Judges Higgins and Kooijmans. In this regard, Judge Rosalyn Higgins’ explanation of vote is usually invoked in the *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *Advisory Opinion*, in *ICJ Reports*, 2004, p. 136, Separate Opinion of Judge HIGGINS, pp. 207-218, par. 33: “there is, with respect, nothing in the text of Article 51 that thus stipulates that self-defence is available only when an armed attack is made by a State.” Rosalyn Higgins then criticizes the fact that the ICJ was stuck with its position in the Nicaragua case, when it necessarily integrates the State and only the State under Article 51, even when - as it did at the time - it refers to the art. 3, g), of resolution 3314. However, it is important to note it, immediately afterwards it states the following: “while accepting, as I must, that this is to be regarded as a statement of the law as it now stands, I maintain all the reservations as to this proposition that I have expressed elsewhere.” In other words, Higgins defended, at the time, that the position was defensible as a positive right, admitting, however, that Article 51 could come to include other types of behaviour considered as an armed attack and attributable to non-state actors. Judge Kooijmans also spoke out against the position of the majority of the Court in the same Opinion. Kooijmans’ main argument is that, in these resolutions, the Security Council recognized the right of self-defence without referring to authorship by a state. And he goes on to say that (as in fact it did) the Security Council referred to acts of international terrorism, “without further qualification”, as a threat to peace and security that authorizes it to act under Chapter VII. More went on to say that, in resolution 1373, the Council makes this qualification without referring to any particular state. For this reason, he concludes, the “state” interpretation of article 51 regarding the authorship of the armed attack would be called into question, with this “new approach to the right of self-defence”. See Separate Opinion of Judge Kooijmans, pp. 219-234. See also Security Council, Resolution 1267, 15 October 1999, and Resolution 1333, 19 December 2000, par. preamble. 7, and par. preamble. 14.

²³ See *Armed Activities on the Territory of the Congo (New Application: 2002) (Dem. Rep. Congo v. Rwanda)*, *Jurisdiction and Admissibility*, in *ICJ Reports*, 2006 1, at paras 64 and 125.

c. In the *Reservations to the Genocide Convention* case,²⁴ the ICJ confirmed the customary nature of the ban on genocide and limited the use of reservations in relation to humanitarian treaties. This opinion came to be in response to the admissibility and effects of reservations in Treaties, with the separability of reservations being at the origin of the issue. The ICJ upon confirming that the States involved had signed the Convention for the Prevention and Suppression of the Crime of Genocide for civil and humanitarian reasons, concluded that the prohibition of genocide was a customary rule and therefore limited the possibility of adding reservations for treaties of this type as doing so would go against their very reason for existence. In other words, the Court assumed that the contracting States would at least want what is essential to the purpose of the Convention to be kept intact.²⁵

d. Finally, for the *Chagos opinion* the ICJ stated that “[the] Court is conscious that the right to self-determination, as a fundamental human right, has a broad scope of application. However, to answer the question put to it by the General Assembly, the Court will confine itself, in this Advisory Opinion, to analysing the right to self-determination in the context of decolonization”.²⁶ Being generally accepted that the right to self-determination has, on the one hand, a close connection with human rights and can be seen as an *assumption* of the enjoyment of fundamental rights; and that, on the other hand, their scope goes well beyond the anti-colonial reference, the question that arises is: Will this ICJ statement be the *Pandora Box* for the disruption of several States?

With the entry into force of protocol 16, referred to by some doctrine as the protocol of dialogue,²⁷ the advisory role of the courts has come under increased scrutiny. However, unlike in previous situations, it is the national superior courts that may request the European Court of Human Rights (ECtHR), for an advisory opinion on the interpretation and application of the rights and freedoms provided for in the Convention and additional protocols. The Commissioner for Human Rights of the Council of Europe and the State whose national courts have activated this mechanism will also be allowed to intervene thus expanding the forum for discussion. Again, despite being non-binding, the fact that the opinion contribute for the evolution of international human rights law is emphasized. It can lead to a common

²⁴ *Reservations to the Convention on the Prevention and Punishment of the Crime and Punishment of Genocide*, International Court of Justice, advisory opinion of 28 May 1951, p. 15.

²⁵ The Court observed that 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. *Reservations to the Convention on Genocide*, Advisory Opinion, in *ICJ Reports*, pp. 19-51, p. 1.5.

²⁶ *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, I.C.J. Reports 2019, p. 95, par. 144.

²⁷ See N. Posenato, *Editorial: O Procoloto do Diálogo entra em vigor*. Joaçaba, v. 19, 2, 2018, p. 325 ss.; Ead., *Diálogo Judicial e Direitos Humanos: o novo Procoloto 16 à Convenção Europeia dos Direitos do Homem*, Joaçaba, v. 15, 1, 2014, p. 259 ss.; Ead., *Il Protocollo n. 16 alla CEDU e il rafforzamento della giurisprudenza sui diritti umani in Europa*, in *Diritto Pubblico Comparato ed Europeo*, v. 3, 2014, p. 1421 ss.

interpretation of the precepts of the European Convention Human Rights by the various member states; it can give rise to new principles or customs; and it can consolidate already existing ones with its recognition. Before the ECtHR, the Inter-American Court of Human Rights (IACtHR) already held consultative powers.²⁸ The Court responds to enquiries made by the member States or its organs regarding the compatibility of internal norms with the Inter-American Convention on Human Rights (IACHR), its interpretation and the interpretation of other Treaties concerning the protection of human rights in the American States. From 1981 to 2020, IACtHR delivered 27 advisory opinions. Among these we detach three cases: *Juridical Condition and Rights of Undocumented Migrants opinion*,²⁹ *Gender Identity and Equality and Non-Discrimination of Same-Sex Couples opinion*,³⁰ and *the State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity opinion*.³¹

a. For the *Undocumented Migrants case*, IACtHR ruled that international principles of non-discrimination forbid discrimination against undocumented migrant workers in the terms and conditions of work. The Court also considered that States have the sovereign right to deny employment to undocumented immigrants but noted that these workers are also protected by human rights in the workplace from the moment that an employment relationship begins. The IACtHR has held that it “considers that the principle of equality before the law, equal protection before the law and non-discrimination belongs to *jus cogens*, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws.”³² This advisory opinion signals the first recognition by an international court of non-discrimination as a *jus cogens* norm, imposing upon the States *erga omnes* obligations.

b. In the *Gender Identity* case, the Court in its advisory opinion establishes an important regional standard which is related to the civil law of marriage and must

²⁸ This system, however, presents several and profound differences in relation to the European counterpart: for example, according to art. 64 of the San José Pact, it can be called upon by any member state of the Organization of American States (in addition to some other regional political bodies), in relation to the interpretation not only of the American Convention on Human Rights, but of any other instrument international, multilateral or bilateral, in force in the American States, and which may affect the protection of human rights. The diverse *ratione materiae* also means that the advisory opinion should not necessarily be provided in relation to a pending judicial procedure.

²⁹ I/A Court H.R., *Juridical Condition and Rights of the Undocumented Migrants*. Advisory Opinion OC-18/03 of September 17, 2003. Series A No.18.

³⁰ I/A Court H.R., *Gender identity, and equality and non-discrimination with regard to same-sex couples. State obligations in relation to change of name, gender identity, and rights deriving from a relationship between same-sex couples (interpretation and scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights)*. Advisory Opinion OC-24/17 of November 24, 2017. Series A No. 24.

³¹ I/A Court H.R., *The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights)*. Advisory Opinion OC-23/17 of November 15, 2017. Series A No. 23.

³² Inter-American Court of Human Rights, *Advisory Opinion OC-18/03 of 17 September 2003, Juridical Condition and Rights of Undocumented Migrants*, para. 10

be interpreted in a comprehensive and progressive manner in matters of Human Rights. This means that the right to marriage applies without distinction or discrimination to diverse sex-gender persons and gives all States parties with the obligation to respect and implement the respective measures necessary to guarantee the recognition and scope of this right to its citizens. The IACtHR's advisory opinion focused on three elements: the developed trend for the interpretation of global laws, the relevant provisions of the IACHR and the positive obligation of state-members derived from the interpretation of these Convention provisions. IACtHR considered that the heterosexual description of marriage adopted in Article 17 (2) of the IACHR must not be read as a prohibition of a legislative enhancement of marriage to same sex couples and ruled that the legal recognition of same-sex marriage is not only permitted, but also required by numerous established constitutional human rights.

c. Last but not the least, for the *Environment and Human Rights* case,³³ the IACtHR issued an advisory opinion on States' obligations to the environment in the context of the right to life and to personal integrity, as expressly recognized in the IACHR. The Court reaffirmed that human rights are dependent on the existence of a healthy environment and as such, it is up to States to take the necessary measures to prevent significant environmental damage both within and without their borders. The Court recognized for the first time the existence of a fundamental right to a healthy environment under the IACHR, created a new test to determine the extraterritorial application of the Convention in cases involving environmental damage and clarified that the content of the duty to prevent transboundary environmental damage as a human rights issue. This opinion could be very relevant in making States accountable for transboundary environmental damage in the future.³⁴ Despite the Court's significant progress, several key issues still need to be clarified in the future jurisprudence such as the nature of the causation, the level of due diligence and the scope of extraterritorial obligations.³⁵ The recognition by an international court of a fundamental right to a healthy environment seems to provide significant ground for new developments in international human rights law. At first, that influence will certainly be felt in the American States,³⁶ but later it could also have influence on

³³ On November 15, 2017, the IACtHR issued an advisory opinion on States' obligations to the environment, in the context of the right to life and to personal integrity, as expressly recognized in the American Convention on Human Rights.

³⁴ R. Abello-Galvis, W. Arevalo-Ramirez, *Inter-American Court of Human Rights Advisory Opinion C-23/17: Jurisdictional, procedural and substantive implications of human rights duties in the context of environmental protection*, in *RECIEL*, 2019, vol. 28, pp. 217-222 in DOI: 10.1111/reel.12290.

³⁵ M. L. Banda, *Inter-American Court of Human Rights' Advisory Opinion on the Environment and Human Rights*, in *ASIL*, Vol. 22, Issue 6, 2018.

³⁶ It is enough to think that, in 2019, the monthly average of deforestation in the Amazon may exceed 2,000 km², with the result that the burnt area may reach 10,000 km². It should be noted that, like any other prediction, this has to be looked at with some caution. However, it is a fact that deforestation is increasing at a rate significantly higher than in the last decade. The President of France, Emmanuel Macron, spoke of an "international crisis" regarding the fires in the Amazon in August 2019, and he did not fail to make the association with what he considered the inertia of the Brazilian Government in adopting more efficient protection measures. In his response, President Bolsonaro accused his French counterpart of an *unreasonable colonialist mentality*. The escalation

the other regional courts.³⁷ There is one point that is certain, and one which goes well beyond this type of discussion: climate change has already resulted in a profound change in approach in relation to certain challenges facing the international sphere.³⁸

4. Conclusions

Member States are seen as international subjects in their international relations. This is not about returning to the question of the international subjectivity of the State, distinct from its internal subjectivity, but rather about emphasizing that same subjectivity and the restrictions on the international level, which are clearly intended to prevent the possibility of interference in the internal affairs of the State. The mention of international relations seldom works nowadays as "protection" of the sovereignty of the State.³⁹ The progress of international human rights law is

led France to question the recently signed EU agreement with Mercosur, threatening not to ratify it. In fact, at the time of signing, France had raised this possibility if Brazil had failed to fulfill its obligations with regard to combating deforestation in the Amazon and the Paris Agreement on climate change, which came into force on 4 November 2016, under the terms of the art. 21 - after ratification by at least 55 States, responsible for a minimum of 55 per cent of global emissions of greenhouse gases. The verbal escalation continued, now with the Brazilian Minister of Education insulting the French president on a social network. See www.theguardian.com/environment/2019/aug/23/amazon-fires-what-is-happening-anything-we-can-do, www.lemonde.fr/politique/article/2019/08/24/a-biar-ritz-macron-mene-l-offensive-sur-l-ecologie_5502490_823448.html and www.dn.pt/mundo/interior/ministro-brasileiro-da-educacao-chama-calhorda-oportunista-e-cretino-a-macron-11238580.html.

³⁷ On 3 September 2020 six Portuguese children, aided by the Global Legal Action Network, filed a complaint before the ECtHR alleging that 33 European countries (all of the EU 27, plus the UK, Switzerland, Norway, Russia, Turkey and Ukraine) had violated their articles 2, 8 and 14 rights. The Applicants allege that the Respondents are failing to sufficiently reduce their territorial emissions and to take responsibility for their contributions to overseas emissions entailed by their export of fossil fuels, for the import of goods containing embodied carbon and for the contributions to emissions generated abroad by entities domiciled within their respective jurisdictions. P. Clark, G. Liston, I. Kalpouzos, *Climate change and the European Court of Human Rights: The Portuguese case*, in *EJIL Talk*, Blog of the European Journal of International Law, October 6, 2020, and O. W. Pederson, *The European Convention of Human Rights and Climate Change – Finally!*, in *EJIL Talk*, Blog of the European Journal of International Law, September 22, 2020. See application here: <https://youth4climatejustice.org/wp-content/uploads/2020/12/Application-form-annex.pdf>.

³⁸ Today, it is possible to refer to the green self-defence, to emphasize how the impact of certain natural disasters can have obvious equivalence with the effects of an armed attack; and how the concepts of "defence" and "security" of the State can evolve and are evolving at an accelerated rate. Or think, too, of how climate change will have an indisputable, important effect on the interpretation of certain protection regimes; namely by the perception of the threat they represent. It is an issue that has been discussed for some years; but the decision of the Human Rights Committee in the *Ioane Teitiota* case, of January 7, 2020 (CCPR/C/127/D/2728/2016) may be a milestone: Human Rights Committee admitted, for the first time, the hypothesis of the "climate refugee", regarding the very serious process of rising water levels in the Republic of Kiribati. See also L. Carvalho Abreu, *Direito Internacional do Ambiente*, in J. A. Azeredo Lopes et al. (eds.), *Regimes Jurídicos Internacionais*, I, Universidade Católica Editora, 2020, pp. 367-424.

³⁹ J. A. Azeredo Lopes, *Uso da Força*, in J. A. Azeredo Lopes et al. (eds.), *Regimes Jurídicos Internacionais*, I, Universidade Católica Editora, 2020, pp. 7-212.

indisputable, albeit in a less linear way than expected: It is undeniable the almost *Copernican advance* it represents, from a normative point of view, the affirmation and consolidation of international criminal law. The same can be said for the extension of the scope of international humanitarian law which, from the point of view of rights and, perhaps even more, from the point of view of obligations, distinguishes increasingly less, between international and internal armed conflicts.⁴⁰ However, caution is needed when assimilating environmental law with human rights. Both human rights and environmental law developed as different branches of public law. That being said, it doesn't make much sense and may even be counter-productive to only speak of human rights to combat environmental degradation, such as when it affects the right to life. This is a simplistic view of approach to environmental law which tends to reduce environmental values to the very limited sphere of individual interest, thus undermining their inherent nature as public goods indispensable for the life and welfare of society as a whole.⁴¹

Given how ICJ and other similar courts are distinct from Human Rights courts, it is possible to conclude from their various opinions issued that they have an active role in the evolution of Human Rights Law and that those opinions lead to the emergence of new customs, to the consolidation of already existing ones or, at least, to their evolution. It is therefore reasonable to conclude that, despite of the non-binding nature of the advisory opinions issued by the ECtHR, these will be most relevant in the recognition of the principles and customs of international law.

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⁴⁰ A situation of gross and systematic human rights violation, an internal or non-international armed conflict, can be seen and evaluated by the Security Council under art. 39 of the UN Charter; an epidemic or pandemic situation (such as Ebola or COVID19) can justify the Council considering the issue under the light of the maintenance of international peace and security. In resolution 2177, of 18 September 2014, the Council decided that "the unprecedented outbreak of Ebola in Africa constitutes a threat to international peace and security" (para. Preamble. 5). More recently, in resolution 2439, of October 2018, the Council condemned the attacks by several armed groups in the Democratic Republic of Congo, which aggravated the Ebola outbreak that occurred in that territory. In the light of the COVID-19 pandemic outbreak, the Security Council adopted the resolution 2532, of 1 July 2020, expressing its support for the Secretary-General appeal for a global ceasefire and demanded a general and immediate cessation of hostilities in all situations on its agenda. Thus, the threat to peace resulted not only from those acts of violence but, moreover, from the consequences that, from the point of view of the epidemic, could go beyond the borders of that state.

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