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The International Court of Justice and the development of international humanitarian law

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Abstract

Both in its advisory and contentious jurisdiction, the International Court of Justice has made considerable contributions to the evolution and interpretation of international humanitarian law (IHL). The judgments and advisory opinions of the Court in various cases have also developed the regulation of armed conflicts by showing the interplay of other bodies of international law and have shaped the development of non-binding IHL norms. The purpose of this short article is to consider the role of the International Court of Justice in the development of IHL.

Keywords: International humanitarian law, International Court of Justice, jurisdiction, law of occupation, *Corfu Channel* case, *Wall Opinion*, *Nuclear Weapons Opinion*, *Nicaragua* case, *Democratic Republic of the Congo v. Uganda*.

Introduction[1]

In considering the role of the International Court of Justice (ICJ or the "Court") in the development of international humanitarian law (IHL), it is necessary to remember that courts have until recently played a relatively minor role in the

development of IHL. After the war crimes trials which followed the Second World War, there was very little in the way of jurisprudence from national courts[2] and almost none from international courts and tribunals until the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) began their work in the 1990s. Instead, the focus was on the development of treaty law, with the four Geneva Conventions, the two 1977 Protocols and specialist agreements such as the 1980 Conventional Weapons Convention. Customary IHL remained important, especially with regard to occupied territory, but its development owed more to military manuals and other aspects of State practice than to the analysis of those developments by courts.

That picture changed with the arrival of the international criminal tribunals, in particular the ICTY and the ICTR, and, later, the International Criminal Court (ICC). Many of their judgments, especially those of the ICTY, have been of enormous value in their methodical treatment of both customary and treaty-based IHL. By contrast, the work of the ICJ on this aspect of international law is seldom studied. The number of cases which have come before the Court that raise issues of IHL has been relatively small and, at least in its earlier judgments, the ICJ had not entered into the details of IHL. Nevertheless, a study of the ICJ's jurisprudence on IHL shows it to have been more important than is generally realized.

The jurisdiction of the ICJ

To understand the contribution which the ICJ has made to the development of IHL, it is necessary to consider the two, quite different, types of jurisdiction which its Statute confers upon the Court.[3]

1 For a more detailed treatment of the subject, see Claus Kress, "The ICJ and International Humanitarian Law", in Christian J. Tams and James Sloan (eds), *The Development of International Law by the International Court of Justice*, Oxford University Press, Oxford, 2013, p. 263; Christopher Greenwood, "The International Court of Justice and International Humanitarian Law", in Charles Chernor Jalloh and Olufemi Elias (eds), *Shielding Humanity: Essays in International Law in Honour of Judge Abdul G. Koroma*, Brill, Leiden, 2015; Abdelwahab Biad, *La Cour internationale de Justice et le droit international humanitaire : Une lex specialis revisitée par le juge*, Emile Bruylant, Brussels, 2011; Luigi Condorelli, "Le droit international humanitaire, ou de l'exploitation par la Cour d'une terra à peu près incognita pour elle", in Laurence Boisson de Chazournes and Philippe Sands, *International Law, the International Court of Justice and Nuclear Weapons*, Cambridge University Press, Cambridge, 1999; Fabián Raimondo, *Corte internacional de Justicia, derecho internacional humanitario y crimen internacional de genocidio*, Del Puerto, Buenos Aires, 2005; and Talis Prado Pinto Junior and Arthur Roberto Capella Giannattasio, "O direito internacional humanitário nos pereceres consultivos da Corte Internacional de Justiça: Uma conjugação de perspectivas utópicas e apologéticas", *Revista de Direito Internacional*, Vol. 18, No. 2, 2021.

2 For more elaborated assessment, see Sharon Weill, *The Role of National Courts in Applying International Humanitarian Law*, Oxford University Press, Oxford, 2014.

3 The Statute of the International Court of Justice (the Statute), which was signed at the same time as the Charter of the United Nations in 1945, is annexed to the Charter. Article 93 of the Charter provides that all States Members of the United Nations are automatically parties to the Statute. See Charter of the United Nations, available at: https://www.icj-cij.org/en/charter-of-the-united-nations (all internet references were accessed in October 2022).

The contentious jurisdiction of the Court is limited to cases between States.[4] In contrast, therefore, to the cases that come before the ICC or an international criminal tribunal, the focus of an IHL case before the ICJ is not whether a particular individual has committed genocide, a war crime or crime against humanity, but whether one of the States party to the case has incurred international responsibility for a breach of international law, including IHL. That allows the ICJ to better step back from the details of specific incidents and examine patterns of conduct. It is particularly evident in its judgments in the case between the Democratic Republic of the Congo (DRC) and Uganda pertaining to the law of occupation.[5] In addition, while the judgments of the ICTR and ICTY are necessarily confined to the particular conflicts which led to their establishment and the ICC has so far dealt with cases from one part of the world, the ICJ has been able to range more widely, as the review of its case law in the next two parts of this article will demonstrate.

An important limit to the contentious jurisdiction is that it depends on both Parties to a case having consented to the jurisdiction of the Court.[6] That consent does not have to be given in relation to the specific dispute; a clause in a bilateral or multilateral treaty which provides that the Court shall have jurisdiction over disputes concerning the "interpretation or application" of that treaty is sufficient.[7] Such a clause appears in many treaties but it covers only disputes relating to the interpretation or application of that treaty and cannot provide a basis for jurisdiction over disputes falling outside the scope of the treaty. That has seriously limited the ability of the Court to rule on issues of IHL, because none of the IHL treaties contains a clause conferring jurisdiction on the ICJ. It was for that reason that the Court's two judgments relating to the conflicts in the former Yugoslavia[8] contain no ruling on whether there had been violations of the Geneva Conventions or Protocols and are confined to the question of

4 Statute, Art. 34.

5 *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v. Uganda*), Judgment on the Merits, 19 December 2005, *ICJ Reports 2005*, p. 168 (*DRC v. Uganda* (*Merits*)); Judgment on Reparations, 9 February 2022 (*DRC v. Uganda* (*Reparations*)).

6 Statute, Art. 36.

7 Article 36(2) of the Statute, the so-called "Optional Clause" also provides for a State to opt in to a system whereby each accepts the jurisdiction of the ICJ with regard to disputes between itself and another State which has also made a declaration under the Optional Clause. It was on this basis that the Court had jurisdiction in the *DRC v. Uganda* case, where both States had made declarations. By contrast, it lacked jurisdiction in the parallel case brought by Uganda against Rwanda, because Rwanda had made no Optional Clause declaration and the Court held that there was no other treaty in force between the two States which could have afforded jurisdiction. *Armed Activities on the Territory of the Congo* (*New Application: 2002*) (*Democratic Republic of the Congo v. Rwanda*), Judgment of 3 February 2006, *ICJ Reports 2006*, p. 6. At the time of writing, seventy-three States, out of a total of 193, had made Optional Clause declarations. ICJ, "Declarations Recognizing the Jurisdiction of the Court as Compulsory", available at: https://icj-cij.org/en/declarations.

8 *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, *ICJ Reports 2007*, p. 43; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Croatia v. Serbia*), Judgment of 3 February 2015, *ICJ Reports 2015*, p. 3.

whether there had been a breach of the Genocide Convention, as that was the only relevant treaty to contain (Article IX) an ICJ jurisdiction clause.

The Court also possesses an advisory jurisdiction which permits it to "give an advisory opinion on any legal question" if it is requested to do so by the United Nations General Assembly, the Security Council or any other organ of the United Nations or specialized agency authorized by the General Assembly to make such a request.[9] As will be seen, two opinions of the ICJ – on nuclear weapons[10] and the construction of a wall in the Palestinian occupied territories[11] – are an important contribution to our understanding of IHL. The advisory jurisdiction is not subject to the limitations considered above but it has its own problems. In particular, the need for a general opinion on a question such as the legality of using nuclear weapons may lead the Court to gloss over the fact that different States are subject to different legal regimes (depending, for example, on whether or not they are party to the Additional Protocols), while difficulties may also arise from the absence of clear evidence regarding matters of fact.

The case law of the ICJ on IHL

For the first forty years of its existence, i.e. up to 1996, the Court said very little about IHL. That comparative silence reflected the nature of the cases referred to it during that period. There was a brief reference to the "elementary considerations of humanity, even more exacting in peace than in war" in the *Corfu Channel* case[12] but the facts of that case hardly gave the Court the opportunity to say much about IHL.

It had a rather greater opportunity in the *Nicaragua* case in 1986, which concerned support by the United States for the "*contra*" rebels in Nicaragua.[13] While the main focus of that case was on the compatibility of the United States' action with the customary international law regarding recourse to force,[14] Nicaragua also made allegations about the mining of Nicaraguan ports and the commission of atrocities by the US-sponsored "*contra*" rebels. Nicaragua did not, however, allege that it was engaged in an armed conflict and did not accuse the United States of violations of IHL as such.[15] The Court nevertheless held that:

> The conflict between the *contras*' forces and those of the Government of Nicaragua is an armed conflict which is "not of an international character".

9 Statute, Chapter IV, Art. 65.
10 *Legality of the Threat or Use of Nuclear Weapons* (*Request by the General Assembly*), *ICJ Reports 1996*, p. 226 (*Nuclear Weapons Opinion*).
11 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Reports 2004*, p. 136 (*Wall Opinion*).
12 *Corfu Channel* case (*United Kingdom v. Albania*), Judgment of April 9th, 1949, *ICJ Reports 1949*, p. 22.
13 *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v. United States of America*), *ICJ Reports 1986*, p. 3 (*Nicaragua* case).
14 The Court was unable to apply the relevant provisions of the United Nations Charter for jurisdictional reasons; see *Nicaragua* case, pp. 92–7.
15 *Nicaragua* case, p. 112, para. 216.

> The acts of the *contras* towards the Nicaraguan Government are therefore governed by the law applicable to conflicts of that character; whereas the actions of the United States in and against Nicaragua fall under the legal rules relating to international conflicts.[16]

By implication, the Court thus found that there were two separate armed conflicts – one of an international and the other of an internal character – existing in parallel, a conclusion which would have important ramifications a decade later in the early jurisprudence of the ICTY. Nevertheless, the Court avoided the need to explore the resulting differences between the substantive humanitarian law applicable to the international conflict and that applicable to the internal conflict by characterizing the provisions of Article 3 common to the four Geneva Conventions (which apply to conflicts "not of an international character occurring in the territory of one of the High Contracting Parties") as "a minimum yardstick" applicable to any armed conflict, whether international or non-international in character.[17] Referring back to the *Corfu Channel* case, the Court also found that those provisions "reflect what the Court in 1949 called 'elementary considerations of humanity'".[18] Far more significant for the development of IHL is what the Court said in three later cases.

The *Nuclear Weapons Opinion*

The first one of interest is the *Nuclear Weapons Opinion* of 1996.[19] The General Assembly asked the Court to give an opinion on the question whether "the threat or use of nuclear weapons [is] in any circumstances permitted under international law".[20] For the first time, therefore, the Court was confronted with a case in which IHL occupied the central position.[21] Three points stand out in the Court's analysis.

First, the Court rejected the argument that there had emerged a specific rule of IHL prohibiting all use of nuclear weapons.[22] No such prohibition could be deduced from treaties which restricted particular activities concerned with nuclear weapons, such as the ban on atmospheric nuclear tests or the creation of zones in which States agreed not to deploy nuclear weapons.[23] The Court also rejected the theory that nuclear weapons were somehow included within the prohibitions of poisons and chemical weapons. Although this theory had been

16 *Ibid.*, p. 114, para. 219.
17 *Ibid.*, p. 114, para. 218. Neither Nicaragua nor the United States were parties to the Additional Protocols to the 1949 Geneva Conventions.
18 *Nicaragua* case, p. 112, para. 215.
19 The present author was counsel for the United Kingdom in that case. For a collection of different views about what the Court said, see L. Boisson de Chazournes and P. Sands, above note 1.
20 *Nuclear Weapons Opinion*, p. 228.
21 The Court also referred to the provisions of the United Nations Charter on the legality of recourse to armed force, human rights law and international environmental law.
22 *Nuclear Weapons Opinion*, p. 266, para. 105(2)(B).
23 *Ibid.*, pp. 249–53, paras 59–63.

popular in some quarters for many years,[24] the Court dismissed it as incompatible with the understanding of the terms used at the times the relevant treaties were concluded, as well as with the subsequent practice of the parties to those treaties.[25] Finally, the Court held that no customary humanitarian law rule had emerged specifically banning nuclear weapons. In this context, the Court acknowledged the importance of the series of General Assembly resolutions on the subject, which the Court held "reveals the desire of a very large section of the international community to take, by a specific and express prohibition of the use of nuclear weapons, a significant step forward along the road to complete nuclear disarmament".[26] Nevertheless, the Court noted that none of the resolutions concerned suggested that there was a specific prohibition of nuclear weapons in customary international law and that the support which they had received had to be balanced against the substantial opposition they had attracted and the other instances of State practice which contradicted the existence of such a rule. The Court concluded:

> The emergence, as *lex lata*, of a customary rule specifically prohibiting the use of nuclear weapons as such is hampered by the continuing tensions between the nascent *opinio juris* on the one hand, and the still strong adherence to the practice of deterrence on the other.[27]

Secondly, the Court held that the general principles of IHL were applicable to the use of nuclear weapons, even though those principles had become part of customary international law before nuclear weapons technology came into existence.[28] In doing so, the Court rejected an argument once vigorously advanced by a number of States and writers, that the use of nuclear weapons would be something that lay outside the scope of IHL unless and until States concluded a treaty to prohibit or regulate that use.[29] The Court thus found that the use of nuclear weapons, like the use of any other weapon, in armed conflict was subject to the principle of distinction and the prohibition of unnecessary suffering.[30] In doing so, it made reference to the famous Martens Clause.[31] The Court did not, however, base any findings upon this provision and its failure to do so suggests it did not accept the

24 See, e.g., Nagendra Singh, *Nuclear Weapons and International Law*, Frederick A. Praeger, New York, 1959.
25 *Nuclear Weapons Opinion*, p. 248, paras 53–7.
26 *Ibid.*, p. 255, para. 73.
27 *Ibid.*, p. 255, para. 73.
28 *Ibid.*, p. 259, paras 85–6.
29 It is noticeable, however, that none of the thirty-three States which participated in the proceedings chose to advance this argument.
30 *Nuclear Weapons Opinion*, pp. 257–9, paras 78–84.
31 This clause, which first appeared in the Hague Convention II with respect to the Laws and Customs of War on Land, 29 July 1899 (entered into force 4 September 1900), takes modern form in Article 1(2) of Additional Protocol I of 1977 to the 1949 Geneva Conventions:

> In cases not covered by this Protocol or by other international agreements, civilian and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of the public conscience.

Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I).

suggestion that the Martens Clause is the basis for freestanding obligations which find no other expression in IHL.

Thirdly, when the Court came to apply these principles to a possible use of nuclear weapons, its conclusion was equivocal. After examining the arguments advanced on each side of the debate, the Court explained that it lacked a sufficient basis for a determination of the validity of the view that the use of tactical nuclear weapons might be lawful. The Court went on to state:

> Nor can the Court make a determination of the validity of the view that the recourse to nuclear weapons would be illegal in any circumstance owing to their inherent and total incompatibility with the law applicable in armed conflict. Certainly, as the Court has already indicated, the principles and rules of law applicable in armed conflict – at the heart of which is the overriding consideration of humanity – make the conduct of armed hostilities subject to a number of strict requirements. Thus, methods and means of warfare, which would preclude any distinction between civilian and military targets, or which would result in unnecessary suffering to combatants, are prohibited. In view of the unique characteristics of nuclear weapons […] the use of such weapons in fact seems scarcely reconcilable with respect for such requirements. Nevertheless, the Court considers that it does not have sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance.[32]

The Court concluded that:

> Accordingly, in view of the present state of international law viewed as a whole, as examined above by the Court, and of the elements of fact at its disposal, the Court is led to observe that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake.[33]

That conclusion was then reflected, albeit in slightly different language, in paragraph (E) of the *dispositif*, in which the Court, by seven votes to seven on the casting vote of the President, found that:

> … the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law;
>
> However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an

32 *Nuclear Weapons Opinion*, pp. 262–3, para. 95.
33 *Ibid.*, p. 263, para. 97.

> extreme circumstance of self-defence in which the very survival of a State would be at stake.[34]

Of the seven judges who voted against this paragraph of the *dispositif*, four considered that the paragraph went too far in finding limits on the legality of using nuclear weapons, while three thought that the Court should have found that any use of nuclear weapons was unlawful.

The *Wall Opinion*

In this case, the General Assembly asked the Court in 2003 for an opinion on the question:

> What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949 and relevant Security Council and General Assembly resolutions?[35]

The Court had no doubt that Israel was the occupying Power in the territories situated between the "Green Line" (the Armistice Delimitation Line fixed in 1949) and the former eastern boundary of the Palestine Mandate, including East Jerusalem.[36] All of these territories had been controlled by Jordan between 1949 and 1967 and came under the control of the Israeli armed forces during the armed conflict between Israel and Jordan in 1967. At that point, they became occupied territories under customary international law. The Court held that none of the events since 1967 – including Israel's declaration that East Jerusalem was part of Israel, the 1994 peace treaty between Israel and Jordan and the agreements between Israel and the Palestinian authorities – had altered their status as occupied territory or Israel's status as the occupying Power. The Court therefore held that Israel was bound by the customary international law of belligerent occupation, including those rules contained in Section III of the 1907 Hague Regulations respecting the Laws and Customs of War on Land, the provisions of which have long been regarded as an authoritative statement of the customary law.[37] The 1907 Regulations had been supplemented in 1949 by the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, many of the provisions of which are concerned with occupied territory.[38]

34 *Ibid.*, p. 266, para. 105(2)(E).
35 *Wall Opinion*, above note 11, p. 141.
36 *Ibid.*, p. 167, para. 78.
37 International Military Tribunal Nuremberg, Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945–1 October 1946, Official Text in the English Language, Vol. 1, pp. 253–4. Hague Convention IV respecting the Laws and Customs of War on Land, 18 October 1907 (entered into force 26 January 1910).
38 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950).

Israel had, however, long maintained the position that the Fourth Geneva Convention was not applicable to the West Bank and East Jerusalem, although it undertook to apply the "humanitarian provisions" of the Convention.[39] According to Israel, the West Bank and East Jerusalem, though controlled by Jordan between 1949 and 1967, had never lawfully been part of the territory of Jordan so that when Israel occupied them in 1967 it was not, in the words of Article 2(2) of the Geneva Conventions, an "occupation of the territory of a High Contracting Party". This argument attracted almost no support outside Israel[40] and, indeed, was widely criticized by leading Israeli international lawyers,[41] on the ground that the applicability of the Fourth Geneva Convention was determined by Article 2(1), the conditions of which were manifestly satisfied by the armed conflict between Israel and Jordan. The Court had no hesitation in holding that the Fourth Geneva Convention was applicable. The text of Article 2, taken as a whole, the *travaux préparatoires* and the subsequent practice of the parties all pointed to such a conclusion.[42]

More unexpected is what the Court said about Article 6(3) of the Fourth Geneva Convention, which provides that:

> In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143.

The potential application of this provision had generally been ignored or discounted in the literature about the occupation, with most governments and commentators tending to assume that the Convention applied in its entirety.[43] The Court, however, held that "the military operations leading to the occupation of the West Bank in 1967 ended a long time ago" and that, consequently, only those provisions of the Convention listed in Article 6(3) were applicable.[44]

This is the first judicial application of Article 6(3), and it is interesting that the Court considered that it was triggered by the close of military operations between contending regular armed forces. The Court reached that conclusion notwithstanding the high level of violence that continued to exist in the occupied territories, which the Court considered did not reach the threshold required of an armed conflict. The result is unfortunate in that the list of provisions which

39 See Meir Shamgar (ed.), *Military Government in the Territories Administered by Israel, 1967–1980: The Legal Aspects*, Hebrew University Jerusalem, Jerusalem, 1982, pp. 31 ff.

40 See, e.g., Christopher Greenwood, "The Administration of Occupied Territory in International Law", in Emma Playfair (ed.), *International Law and the Administration of Occupied Territories*, Oxford University Press, Oxford, 1992.

41 See, e.g., Yoram Dinstein, *The International Law of Belligerent Occupation*, Cambridge University Press, Cambridge, 2009, pp. 20–1.

42 *Wall Opinion*, above note 11, pp. 173–7, paras 90–101.

43 See, e.g., Adam Roberts, "Prolonged Military Occupation", in E. Playfair, above note 40, pp. 36–9.

44 *Wall Opinion*, above note 11, p. 185, para. 125.

continue to apply is somewhat arbitrary (although the Court cannot be blamed for that). It is difficult, for example, to understand why the duties in relation to education and the provision of food and essential supplies imposed upon the occupying Power by Articles 50 and 55, respectively, or its obligations regarding hospitals and health services under Articles 56 and 57, should cease one year after the close of military operations even though the occupation remains. To a large extent, however, the Court's decision that the occupying Power continues to be bound by the provisions of the International Covenants on Civil and Political Rights and Economic and Social Rights, as well as the Convention on the Rights of the Child,[45] filled the void left by the inapplicability of those provisions of the Fourth Geneva Convention excluded by Article 6(3). On the nature of the legal regime thus applicable, the Court was careful to point out that:

> Whilst the drafters of the Hague Regulations of 1907 were as much concerned with protecting the rights of a State whose territory is occupied, as with protecting the inhabitants of that territory, the drafters of the Fourth Geneva Convention sought to guarantee the protection of civilians in time of war regardless of the status of the occupied territories, as is shown by Article 47 of the Convention.[46]

Applying the provisions of the humanitarian law on belligerent occupation which it had found to be applicable and the relevant provisions of human rights law, the Court concluded that Israel's construction of the wall in the occupied territory was a breach of its obligations.[47] In this context, the Court relied, *inter alia*, upon the prohibition on an occupying Power to transfer parts of its own population into the occupied territory (Article 49 of the Fourth Geneva Convention), which it held was violated by the establishment of Israeli settlements in the occupied territory.[48] It also found that the deprivation of private property involved either in the construction of the wall or as a consequence thereof was a breach of the rules stated in Articles 46 and 52 of the Hague Regulations and the provisions of Article 53 of the Fourth Geneva Convention.[49] Perhaps most importantly, the Court found that the conditions of life which the wall imposed upon Palestinian residents in the area which it enclosed and the overall deprivation of liberty of movement violated both humanitarian law and human rights principles, including the right of self-determination.[50]

As for the consequences of these violations of the law, the Court held that they engaged the responsibility of Israel, which was under an obligation to cease the violations and to ensure *restitutio in integrum* or, if that was not possible, to make compensation.[51] It could not rely upon either self-defence or necessity to preclude

45 *Ibid.*, pp. 177–81, paras 102–13.
46 *Ibid.*, p. 175, para. 95.
47 *Ibid.*, p. 201, para. 163(3)(A).
48 *Ibid.*, pp. 191–2, para. 134.
49 *Ibid.*, p. 189, para. 132.
50 *Ibid.*, pp. 189–92, paras 133–4.
51 *Ibid.*, p. 197, para. 147 and following paragraphs.

the wrongfulness of its actions. Concerning necessity, the Court considered that, to the extent that humanitarian law permitted reliance upon a concept of necessity, that concept was built in to the specific provisions of the relevant treaty. Hence, it noted that, while there was a limited necessity qualification upon the general obligation in Article 49(1) regarding deportation and transfer of population, no such qualification applied to the obligation in Article 49(6).[52] On the consequences for States other than Israel, the Court concluded that Article 1 of the Fourth Geneva Convention – by which "the High Contracting Parties undertake to respect and ensure respect for the present Convention in all circumstances" – placed them "under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention".[53]

DRC v. Uganda (*Armed Activities*)

The third major case involving IHL was *DRC v. Uganda*.[54] Unlike the *Nuclear Weapons* and *Wall* cases, *Armed Activities* was a contentious case, so that there was a far more substantial body of evidence before the Court.[55] Moreover, the basis for the jurisdiction of the Court in *Armed Activities* was the declarations made by the Parties under the Optional Clause; since these contained no sweeping reservations, the Court was able to consider the full range of allegations about violation of both customary and treaty-based IHL.

In relation to IHL, three points particularly stand out from the 2005 judgment. First, in relation to the applicable law, the Court reaffirmed the approach it had taken earlier in the *Nuclear Weapons* and *Wall* cases that IHL and international human rights law applied in tandem.[56] In this case, however, it was able to apply a more extensive list of IHL instruments since, for the first time, it was confronted with a case in which both parties to the armed conflict were party to Additional Protocol I to the Geneva Conventions of 1977. The Court also considered the application of the international law on natural resources alongside the specific principles of humanitarian law and human rights law relating to the exploitation of natural resources in occupied territory.

Secondly, the Court applied the law on belligerent occupation in a context very different from that with which it was faced in the *Wall* case. Whereas the *Wall* case had concerned a small, densely populated region with a substantial Israeli military presence and undoubted exercise by Israel of governmental authority, *DRC v. Uganda* concerned a vast area of the Congo in which the numbers of

52 *Ibid.*, p. 192, para. 135.
53 *Ibid.*, p. 200, para. 159.
54 *DRC v. Uganda* (*Merits*), p. 168; *DRC v. Uganda* (*Reparations*).
55 In addition, the principles concerning burden and standard of proof and their implications for the Court's findings of fact were applicable. These principles cannot apply in the same way when the Court exercises its advisory jurisdiction; see Christopher Greenwood, "Judicial Integrity and the Advisory Jurisdiction of the International Court of Justice", in Giorgio Gaja and Jenny Grote Stoutenburg (eds), *Enhancing the Rule of Law through the International Court of Justice*, Brill, Leiden, 2014, p. 63.
56 *DRC v. Uganda* (*Merits*), pp. 242–4, paras 216–17.

Ugandan troops present at any given time were comparatively small and the exercise by them of governmental authority far more difficult to establish. Moreover, in marked contrast to the *Wall* case, the occupation here was said to exist at a time when hostilities were still ongoing.

The Court applied the test laid down in Article 42 of the Hague Regulations that territory was considered occupied only when actually placed under the authority of the hostile army and extended only to those areas where such authority had actually been established and could be exercised.[57] On that basis, it considered that it had to:

> … satisfy itself that the Ugandan armed forces were not merely stationed in particular locations but also that they had substituted their own authority for that of the Congolese Government. In that event, any justification given by Uganda for its occupation would be of no relevance; nor would it be relevant whether or not Uganda had established a structured military administration.[58]

The Court held that:

> … the territorial limits of any zone of occupation by Uganda in the DRC cannot be determined by simply drawing a line connecting the geographic locations where Ugandan troops were present, as has been done on the sketch map presented by the DRC …[59]

Only in Ituri, where the Ugandan commander had appointed a governor to administer the territory, did the Court find that Uganda had become the occupying Power. The fact that the commander may have acted without authority did not alter that conclusion.[60]

Thirdly, the Court examined allegations that Uganda had engaged in a practice of looting the natural resources of the occupied territory and other parts of the DRC in which its forces were operating. The Court found insufficient evidence to warrant a finding that this was the product of a policy adopted by the Ugandan Government but held that there had been widespread looting, including of natural resources, in which Ugandan officers and soldiers had engaged.[61] Since Uganda was responsible for all acts of members of its armed forces, irrespective of whether they had acted pursuant to, or in contravention of, their orders,[62] this looting engaged the responsibility of Uganda and was a violation of the prohibition of pillage in Article 47 of the Hague Regulations and Article 33 of the Fourth Geneva Convention.[63] In the occupied area of Ituri, there was also a failure, attributable to Uganda, by the military authorities to take the steps required in exercise of the duty to govern under Article 43 of the Hague

57 *Ibid.*, p. 230, paras 173–4.
58 *Ibid.*, p. 230, para. 173.
59 *Ibid.*, p. 230, para. 174.
60 *Ibid.*, p. 230, para. 176.
61 *Ibid.*, pp. 249–53, paras 237–50.
62 See Hague Convention IV, Art. 3; and AP I, Art. 92; *DRC v. Uganda* (*Merits*), p. 242, paras 213–14.
63 *DRC v. Uganda* (*Merits*), p. 252, para. 245.

Regulations because those authorities had failed to take steps to prevent looting by private persons, particularly members of Congolese rebel groups.

The Court concluded, by a large majority, that Uganda was responsible for serious violations of IHL and international human rights law, most noticeably in causing – or, in some instances, failing to prevent – the deaths of large numbers of civilians[64] and in pillaging the natural resources of the DRC.

In 2022, the ICJ followed its earlier decision with a judgment on the DRC's claim for reparations. While the principle that a State which is responsible for breaches of IHL is under an obligation to pay compensation is well established,[65] with the exception of the decisions of the Eritrea–Ethiopia Claims Commission (EECC),[66] there have been very few pronouncements by international tribunals on the measure of such compensation. The ICJ had already, in its 2005 Judgment on the Merits, held that Uganda was liable to make reparation for the loss of life and damage which it had caused;[67] in the 2022 judgment it gave effect to that decision.

The problem which the ICJ faced was similar to that which has arisen in the wake of most major armed conflicts, namely, how to balance the principle that the wrongdoer owes a duty to compensate against the risk that the amount of compensation could cripple the respondent State.[68] In the proceedings leading to the 2022 judgment, the DRC claimed a total of almost 13.5 billion US dollars. The ICJ insisted that the DRC had to prove that the damage had occurred and had been caused by the violations of IHL attributable to Uganda. In that context, it followed the lead of the EECC in recognizing that in claims involving injury to large numbers of people tribunals had accepted a less rigorous standard of proof but had "reduced the levels of compensation awarded in order to account for the uncertainties that flow from applying a lower standard of proof".[69] The ICJ refused, however, to accede to the DRC's submission that it should adopt a broad-brush approach and order Uganda to pay 45% of the total losses suffered by the DRC in a conflict which was part civil war and part the result of a military invasion by a number of States of which Uganda was only one.

In particular, the Court distinguished between the situation in the Ituri area, where it had held that Uganda was an occupying Power, and other areas where Uganda had supported rebel forces and in which its own forces had at times been active but no occupation had been established. In the Ituri area, it held that Uganda had to compensate not only for loss and damage directly

64 *Ibid.*, pp. 239–41, paras 207–11.
65 See, e.g., Hague Convention IV, Art. 3; and the general principle of international law reflected in the International Law Commission Articles on State Responsibility, Art. 36.
66 See Sean D. Murphy, Won Kidane and Thomas R. Snider, *Litigating War: Mass Civil Injury and the Eritrea–Ethiopia Claims Commission*, Oxford University Press, Oxford, 2013; and the collection of decisions in Vol. 135 of the *International Law Reports*. The United Nations Compensation Commission established by the United Nations Security Council in the aftermath of Iraq's invasion of Kuwait has also given a number of interesting decisions.
67 *DRC v. Uganda* (*Merits*), p. 257, para. 259, and p. 281, para. 345.
68 The dangers of getting that balance wrong have been all too evident since the Treaty of Versailles of 1919.
69 *DRC v. Uganda* (*Reparations*), para. 107.

attributable to its own forces but for the loss and damage caused by third parties, since, as the occupying Power, Uganda had an obligation to maintain law and order and protect the local population and natural resources.

Elsewhere, it required compensation only for losses directly attributable to Uganda.

The ICJ ordered Uganda to pay a total of 325 million US dollars in compensation (less than 2.5% of the amount claimed). That amount was attributable to the loss of civilian lives which the ICJ considered could reasonably be attributed to Uganda,[70] personal injury,[71] rape and sexual violence,[72] displacement of people,[73] and for the employment of child soldiers,[74] as well as damage to property[75] and the taking of natural resources.[76] It rejected, however, for lack of evidence, claims relating to loss of life of members of the DRC armed forces (on the grounds that a State could be expected to have more reliable evidence of what had happened to its service personnel than to civilians).[77] The ICJ also rejected a large claim for "macroeconomic damage" for lack of sufficient evidence.[78]

Evaluation of the ICJ's contribution

The ICJ's contribution to the development of IHL is neither systematic nor revolutionary. In saying this, in no sense is the Court being criticized. Courts can hear only the cases which are put before them and neither States nor the relevant United Nations bodies have chosen to bring before the Court what would be needed for a systematic development of the law. Moreover, it is not the role of a court in any legal system, but particularly in the international legal system, to be a revolutionary agent of change. The ICJ is charged by its Statute with the interpretation and application of the law. In fulfilling that role, it necessarily has to make choices between competing interpretations or the apparent conflict between different principles and its choices help to shape the law. However, it must not seek to usurp the position of the community of States by preferring what its judges at any one time think the law ought to be over what an intelligent and impartial assessment of the relevant material establishes that it is. When considering a treaty, the Court must always have in mind the agreement which the parties to that treaty chose to make and respect the language in which they expressed it. When considering customary international law, the Court has to be guided by its own comment that: "It is of course axiomatic that the material of

70 *Ibid.*, paras 145–64.
71 *Ibid.*, paras 173–81.
72 *Ibid.*, paras 188–93.
73 *Ibid.*, paras 214–25.
74 *Ibid.*, paras 205–6.
75 *Ibid.*, paras 240–58.
76 *Ibid.*, paras 273–366.
77 *Ibid.*, para. 165.
78 *Ibid.*, paras 381–4.

customary international law is to be looked for primarily in the actual practice and *opinio juris* of States."[79]

These cautionary notes are particularly important in relation to IHL which deals with matters at the heart of the sensitive matter of national security and the ability of each State to defend itself and its people.

To say that the Court's jurisprudence on IHL is not revolutionary, however, is not to say that it is unimportant. The judgments and advisory opinions considered in this article have made a contribution to the evolution of IHL, which is important at the different levels of general principle, methodology and detail.

With regard to general principle, the Court has helped to resolve a number of problems which have bedevilled IHL for many years. In its *Nuclear Weapons Opinion*, it made clear that the principles of IHL apply to methods and means of warfare even where those methods and means were developed after the relevant principles became part of the law. It did so by rejecting the argument which had been advanced for many years that nuclear weapons were not subject to pre-existing rules such as the prohibitions of unnecessary suffering and disproportionate civilian harm. Its firm rejection of that argument has important implications not only for the subject of nuclear weapons but also for numerous other developments, such as drone and cyber warfare, which are frequently claimed to stand outside the regulation of the existing law and require a new body of rules. New rules may be useful in relation to such phenomena but, until they are adopted, those methods of waging war do not inhabit some kind of legal black hole but are subject to the existing principles of IHL.

The *Nuclear Weapons Opinion*, the *Wall Opinion* and the judgments in *DRC v. Uganda* have also done much to make clear the position of IHL within the broader framework of international law. In *Nuclear Weapons* the Court dismissed attempts to bypass IHL and outlaw nuclear weapons by relying instead upon general environmental treaties adopted for totally different purposes.[80] In both that Opinion and the *Wall Opinion*, the Court also showed how IHL and human rights law co-exist.[81] This is an important development, given the tendency in some human rights circles to apply human rights treaties in armed conflict without any consideration of IHL as the *lex specialis*.[82] It has also had the useful effect of filling at least some of the gap left by the somewhat eccentric provision of Article 6(3) of the Fourth Geneva Convention, considered above.

So far as methodology is concerned, the Court's insistence on the importance of State practice, which led it to reject arguments that there was a specific prohibition of all threat or use of nuclear weapons on the basis of general statements in General Assembly resolutions that ran counter to the actual

79 *Continental Shelf* (*Libyan Arab Jamahiriya/Malta*), Judgment, *ICJ Reports 1985*, p. 20, para. 27.
80 *Nuclear Weapons Opinion*, pp. 241–2, paras 29–30.
81 *Ibid.*, p. 240, para. 25; *Wall Opinion*, above note 11, p. 178, para. 106.
82 A good example of the rejection of such a narrow approach to the application of a human rights treaty in armed conflict is the judgment of the European Court of Human Rights in *Hassan v. United Kingdom* (2014), *International Law Reports*, Vol. 161, 2016, which cited both the Opinions.

practice of large numbers of States,[83] is a welcome reminder of the need for greater rigour in considering the content of IHL. In this respect, it is interesting to consider what evidence of State practice was before the Court. One particularly significant kind of practice in relation to customary IHL is found in the military manuals published by many States. Their significance was raised during the hearings in *Nuclear Weapons* by a number of States. For example, the Attorney-General for England and Wales (presenting the arguments of the United Kingdom) responded to an assertion by the Foreign Minister of Australia that a prohibition of nuclear weapons had emerged from a series of General Assembly resolutions and the application of general principles by quoting the Commanders' Guide issued to Australian forces which contained an express statement to the contrary.[84] In its Opinion, the Court made no reference to military manuals as such but its rejection of the Australian argument and its references to the actual conduct of States may reasonably be taken as having embraced manuals as evidence of such practice.

It is also important that the Court's methodology in its 2022 decision in *DRC v. Uganda* (*Reparations*) drew extensively upon the use of expert reports and the case law of bodies such as the EECC to fashion a decision which took a realistic approach to the evidence which could be expected of a claimant State in circumstances of armed conflict. It is unlikely, indeed probably impossible, that any tribunal faced with the need to evaluate the damage caused by breaches of IHL in a wide-ranging conflict of extraordinary ferocity could calculate damages in the manner of an investor-State tribunal dealing with a claim for expropriation. The ICJ, however, showed that a different approach could be taken without abandoning a reasoned methodology for arriving at a figure for compensation.

Finally, the Court's rulings on the detail of the law of occupation in its *Wall Opinion* and, even more, in its two judgments in *DRC v. Uganda* have helped to flesh out the law on this subject, much of which is of some antiquity, and have helped to show how it can be applied in a modern context. In particular, the Court insisted on actual control as an indispensable element in determining whether or not territory is occupied and its ruling that the occupying Power is responsible not only for what its own forces do but also for violence which it allows others to commit in breach of its duty to provide effective government.[85] The Court also, in the *Wall Opinion*, authoritatively dismissed the untenable view taken by the Israeli Government that the occupied territories were not subject to the Fourth Geneva Convention. Given the enthusiasm with which States that occupy territory in time of armed conflict seek to avoid their obligations under the Convention, the Court's ruling on this point is likely to have an impact broader than simply within the territories occupied by Israel.

83 *Nuclear Weapons Opinion*, p. 255, para. 73.
84 Sir Nicholas Lyell, QC, MP at CR 1995/34, p. 45, responding to the Hon. Gareth Evans QC at CR 1995/22, pp. 38–42.
85 See, in particular, Hague Convention IV, Arts 42 and 43.