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# The International Court of Justice and the Law of Armed Conflicts

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## 1. Introduction

The Permanent Court of International Justice did not deal with the laws of war in any of its decisions. As such, the International Court of Justice (ICJ, or ‘the Court’) was called upon to develop its jurisprudence on the law of armed conflicts without the benefit of a legacy from its predecessor. It took a while for the Court to address the *jus in bello*. While it referred to its 1949 Judgment in the *Corfu Channel* case<sup>1</sup> in a number of subsequent pronouncements on the law of armed conflicts, the *Corfu* Judgment did not deal directly with this body of law. It was not until 1986, with the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (the *Nicaragua* case)<sup>2</sup> that the Court engaged in its first substantial treatment of the subject matter. At this moment in time, most of the modern treaty law on the law of armed conflicts—the detailed four 1949 Geneva Conventions (GC I to IV) and the two 1977 Additional Protocols thereto (AP I and II)—had already entered into force and provided for a fairly detailed legal regime with respect to international armed conflicts.<sup>3</sup> In addition to the *Nicaragua* case, the Court dealt with the subject matter in a substantial way in three other cases, two of which were advisory in nature: *Legality of the Threat or Use of Nuclear Weapons* in 1996 (*Nuclear Weapons*)<sup>4</sup> and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* in 2004 (*Wall*),<sup>5</sup> and one of which was contentious: the 2005 Judgment in the *Case Concerning Armed Activities on the Territory of the Congo*

<sup>1</sup> *Corfu Channel (UK v Albania)* (Merits) [1949] ICJ Rep 4.

<sup>2</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* (Merits) [1986] ICJ Rep 14.

<sup>3</sup> For a fairly comprehensive collection of the international treaties governing the law of armed conflict, see German Federal Foreign Office/German Red Cross/Federal Ministry of Defence (eds), *Documents on International Humanitarian Law* (St Augustin bei Bonn: Academia Verlag, 2nd edn 2012).

<sup>4</sup> *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226.

<sup>5</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136.

(*DRC v Uganda*).<sup>6</sup> In addition, certain observations in the *Case Concerning the Arrest Warrant of 11 April 2000* (*Arrest Warrant* case, 2002),<sup>7</sup> in the *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Genocide* case, 2007),<sup>8</sup> in *Jurisdictional Immunities of the State* (*Jurisdictional Immunities*, 2012),<sup>9</sup> and in *Questions Relating to the Obligation to Prosecute or Extradite* (*Prosecute or Extradite*, 2012)<sup>10</sup> complete the present picture of the Court's case law on the law of armed conflicts. These cases provided the Court with the opportunity to address a vast number of legal issues covering almost the entire field of the law of armed conflicts. The political sensitivities of the issues before the Court differed from occasion to occasion, as did the level of controversy within the Court in an almost accurate reflection thereof. While the Court pronounced itself in virtual unanimity on the law of armed conflicts in the *Nicaragua* case, its Advisory Opinion in *Nuclear Weapons* gave rise to an unprecedented occurrence whereby all of the judges issued individual statements in the form of declarations, separate or dissenting opinions.<sup>11</sup> The *Nuclear Weapons* Opinion calls to mind Hersch Lauterpacht's famous statement: 'if international law is at the vanishing point of law, the laws of war are at the vanishing point of international law',<sup>12</sup> as well as Christopher Greenwood's subsequent observation that 'the laws of weaponry and targeting are, still more conspicuously, at the vanishing point of the laws of war'.<sup>13</sup> As we shall see, it was the advisory proceedings in *Nuclear Weapons* that provided the Court with an opportunity to move to the ultimate vanishing point of the law.

## 2. The judicial *acquis*: a sketch

It is not apparent that the doubts about the legitimacy of the continued existence of a *jus in bello*, which were expressed in some quarters shortly after the modern *jus contra bellum* had been enshrined in the Charter of the United Nations (UN Charter),<sup>14</sup> have ever disturbed the Court. In 1949, in the *Corfu Channel* case, the Court did not seem to question the continued validity of the Hague Convention of

<sup>6</sup> *Armed Activities on the Territory of the Congo (DRC v Uganda)* [2005] ICJ Rep 168.

<sup>7</sup> *Arrest Warrant of 11 April 2000 (DRC v Belgium)* [2002] ICJ Rep 3.

<sup>8</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Merits) [2007] ICJ Rep 43.

<sup>9</sup> *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* Judgment of 3 February 2012 (<<http://www.icj-cij.org/docket/files/143/16883.pdf>> (accessed on 17 May 2013)).

<sup>10</sup> *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* Judgment of 20 July 2012 (<<http://www.icj-cij.org/docket/files/144/17064.pdf>> (accessed 17 May 2013)).

<sup>11</sup> See H Thirlway, 'The Nuclear Weapons Advisory Opinions: The Declarations and Separate and Dissenting Opinions' in L Boisson de Chazournes and P Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons* (Cambridge: CUP, 1999) 390.

<sup>12</sup> H Lauterpacht, 'The Problem of Revision of the Law of War' (1952) 29 *BYIL* 360, 382.

<sup>13</sup> C Greenwood, 'Current Issues in the Law of Armed Conflict: Weapons, Targets and International Criminal Liability' (1997) 1 *Singapore J Intl & Comparative L* 441, 441–2.

<sup>14</sup> *ILC Ybk* 1949, 51–3.

1907, No VIII, though it rejected its applicability in that case.<sup>15</sup> And in 1986, when the Court laid the ground for its jurisprudence on the law of armed conflicts in the *Nicaragua* case, it did not even mention the temporary post-Charter hesitation as regards the survival of the law of armed conflicts. The existence of a law of armed conflicts and the latter's co-existence with the modern prohibition on the use of force was simply taken for granted.

## 2.1 Basic issues

### 2.1.1 Terminology

While the Court alluded to the concept of war in the *Corfu Channel* case, it has never used the traditional language of 'the laws and customs of war',<sup>16</sup> instead embracing the modern term 'law of armed conflicts'. Throughout its jurisprudence<sup>17</sup> the Court has displayed a preference for the term 'international humanitarian law' to describe the vast majority of rules forming the law of armed conflicts, the only exception being the law of neutrality. In *Nuclear Weapons*, the Court summarized the main features of the historical development in the area as follows:

The 'laws and customs of war'—as they were traditionally called—were the subject of efforts at codification undertaken in The Hague (including the Conventions of 1899 and 1907), and were partly based upon the St. Petersburg Declaration of 1868 as well as the results of the Brussels Conference of 1874. This 'Hague Law' and, more particularly, the Regulations Respecting the Laws and Customs of War on Land, fixed the rights and duties of belligerents in their conduct of operations and limited the choice of methods and means of injuring the enemy in an international armed conflict. One should add to this the 'Geneva Law' (the Conventions of 1864, 1906, 1929 and 1949), which protects the victims of war and aims to provide safeguards for disabled armed forces personnel and persons not taking part in the hostilities. These two branches of the law applicable in armed conflict have become so closely interrelated that they are considered to have gradually formed one single system, known today as international humanitarian law. The provisions of the Additional Protocols of 1977 give expression and attest to the unity and complexity of that law.<sup>18</sup>

### 2.1.2 Teleology

In the *Corfu Channel* case, the Court recognized the existence of 'elementary considerations of humanity, even more exacting in peace than in war',<sup>19</sup> thereby establishing a point of reference for an overarching set of principles and rules of high moral character governing behaviour in times of peace and armed conflict alike. In its 1951 Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, the Court implicitly built on the concept of 'elementary considerations of humanity' and determined that the goal of

<sup>15</sup> *Corfu Channel* (n 1) 22.

<sup>16</sup> However, the term '*jus in bello*' is used repeatedly in *DRC v Uganda* (n 6).

<sup>17</sup> Beginning with the Judgment in *Nicaragua* (Merits) (n 2) 112, para 216.

<sup>18</sup> *Nuclear Weapons* (n 4) para 75. <sup>19</sup> *Corfu Channel* (n 1) 22.

the Genocide Convention was to ‘confirm and endorse the most elementary principles of morality’.<sup>20</sup> In *Nicaragua*, the Court went on to make an explicit connection between what it called a ‘minimum yardstick’ applicable in all armed conflicts and the ‘elementary considerations of humanity’ as recognized in the *Corfu Channel* case,<sup>21</sup> and in *Nuclear Weapons* the Court expressed its conviction that the ‘intrinsic humanitarian character of the legal principles in question’ permeates ‘the entire law of armed conflict’.<sup>22</sup> In *Wall* the Court recognized that, with the advent of Geneva Convention IV, the goal of protecting civilians had acquired the primary place within the law of belligerent occupation, while the protection of the rights of the state whose territory is occupied holds an equally prominent place in the classic law of belligerent occupation as embodied in the 1907 Hague Regulations.<sup>23</sup> The Court thus emphasized the humanitarian nature of the contemporary law of armed conflicts and the latter’s ultimate purpose of ensuring respect for the human person. In that sense, the Court considered the law of armed conflicts to form part of a body of ‘humanitarian law’ in a broader, non-technical sense, which also covers human rights law and international criminal law.

### 2.1.3 *Legal nature*

The Court did not mention the law of armed conflicts explicitly when it introduced the concept of obligations *erga omnes* in its 1970 Judgment in *Barcelona Traction, Light and Power Company, Limited (Second Phase)*.<sup>24</sup> In *Wall*, however, the Court, having once more referred to the concept of ‘elementary considerations of humanity’, explicitly stated that ‘a great many rules of humanitarian law applicable in armed conflict . . . are essentially of an *erga omnes* character’.<sup>25</sup> While the Court did not take the additional step of characterizing those ‘great many rules’ as *jus cogens* in *Nuclear Weapons*, it held as follows:

It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and ‘elementary considerations of humanity’ . . . that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.<sup>26</sup>

The precise legal meaning of ‘intransgressible principles of international customary law’ has remained something of a mystery. On the one hand, it would be somewhat curious to assume that the Court simply wished to remind its readers of the binding

<sup>20</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 15, 23.

<sup>21</sup> *Nicaragua* (Merits) (n 2) para 218.

<sup>22</sup> *Nuclear Weapons* (n 4) 259, para 86.

<sup>23</sup> *Wall* (n 5) para 95.

<sup>24</sup> *Barcelona Traction, Light, and Power Company, Limited (Belgium v Spain) (Second Phase)* (Merits) [1970] ICJ Rep 3, paras 33–4.

<sup>25</sup> *Wall* (n 5) para 157.

<sup>26</sup> *Nuclear Weapons* (n 4) para 79.

nature of ‘principles of international customary law’.<sup>27</sup> On the other hand, the Court stated in another paragraph of *Nuclear Weapons* that it did not see the need to pronounce on the matter of *jus cogens*.<sup>28</sup> The picture has not changed since, despite the Court encountering an excellent opportunity to clarify matters in *Jurisdictional Immunities of the State*. Here, the Court was confronted with the argument that the *jus cogens* character of those conduct rules of the law of armed conflicts that underlie the war crimes provisions, necessitate an exception to the customary international law immunity of the state in civil proceedings. The Court, however, again refrained from deciding the *jus cogens* issue and denied the existence of the alleged immunity exception even on the assumption that the relevant conduct rules of the law of armed conflicts formed *jus cogens*.<sup>29</sup>

#### 2.1.4 *Scope of application*

The Court has not engaged in an effort to specify the meaning of the terms ‘international’ and ‘non-international armed conflict’. In both the *Nicaragua* and *Genocide* cases, however, the Court dealt with the question of how to classify a conflict—ie whether it is international or non-international in nature—where a foreign state intervenes in an armed struggle within another state. In *Nicaragua*, the Court deemed it possible that in such a scenario a non-international armed conflict and an international armed conflict may co-exist.<sup>30</sup> The Court did not specify, however, whether such a parallel application of the laws of non-international and international armed conflict would be the legal consequence whenever the conduct of non-state forces could not be attributed to the foreign state. In the *Genocide* case the Court did not decide this question, either. Here, however, the Court opined in passing that ‘logic does not require the same test to be adopted’ with respect to attribution and conflict qualification and that therefore the ‘overall control’ of the intervening state over the non-state armed forces, while not warranting the attribution of the latter’s conduct to the former state, ‘may well’ be sufficient to justify the qualification of the entirety of the hostilities as one comprehensive international armed conflict.<sup>31</sup>

In *Wall*, the Court affirmed the applicability of the law of military occupation as part of the law of international armed conflict to the territories, which Israel has been holding in possession since the 1967 armed conflict between Israel and Jordan. The Court held this to be the case irrespective of whether or not Jordan had any rights in respect of those territories before 1967. This conclusion was based on the view that the first paragraph of Article 2 of the Fourth Geneva Convention applies whenever an armed conflict has arisen between two contracting parties and that ‘the object of the second paragraph is not to restrict the scope of application of

<sup>27</sup> L. Condorelli, ‘Le droit international humanitaire, ou de l’exploration par la Cour d’une *terra* à peu près *incognita* pour elle’ in Boisson de Chazournes and Sands (n 11) 234.

<sup>28</sup> *Nuclear Weapons* (n 4) para 83.

<sup>29</sup> *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* (n 9) para 93.

<sup>30</sup> *Nicaragua (Merits)* (n 2) para 219. <sup>31</sup> *Bosnian Genocide* (n 8) para 405.

the Convention, as defined by the first paragraph, by excluding therefrom territories not falling under the sovereignty of one of the contracting parties'.<sup>32</sup>

In *Nuclear Weapons*, the Court found that 'the principle of neutrality... is applicable to all international armed conflict'.<sup>33</sup>

### 2.1.5 Sources

As a rule, the Court has taken the relevant treaty law as the starting point of its legal analysis and it has tended to give priority to this body of law so long as the relevant treaty was applicable and the Court had jurisdiction in relation to it. At the same time, customary international law has been playing a significant role in the Court's jurisprudence from the outset. Somewhat oddly, the Court avoided using the word 'custom' in *Nicaragua*, where it spoke of '(fundamental) general principles of humanitarian law',<sup>34</sup> though it clearly had customary international law in mind. In *Nuclear Weapons*, the Court made its reference to custom explicit and, as we have seen, it went so far as to declare that 'a great many rules of humanitarian law applicable in armed conflict', as contained in the Hague and Geneva Conventions, are of a customary nature.<sup>35</sup> The use of the words 'a great many' does, of course, also imply a tacit qualification, leaving the door open for the Court to determine, if the need arises, that a certain treaty provision contained, for example, in Additional Protocol I, had not (yet) acquired customary law status. In *Nuclear Weapons*, the Court also referred to the Martens Clause. It did not, however, rely on 'the principles of humanity' and 'the dictates of public conscience' as a source of law independent from custom.<sup>36</sup>

### 2.1.6 The law of armed conflicts within the international legal order

Without making a general statement to this effect, the Court has repeatedly made it clear that it does not think that the existence of an armed conflict *ipso facto* terminates or suspends the operation of treaties concluded in peacetime between the states parties to an international armed conflict. In *Nuclear Weapons*, the Court expressed the view that

the issue is not whether the treaties relating to the protection of the environment are or are not applicable during an armed conflict, but whether the obligations stemming from these treaties were intended to be obligations of total restraint during military conflict.<sup>37</sup>

In *DRC v Uganda*, the Court, referring back to a statement made in *United States Diplomatic and Consular Staff in Tehran*, recalled that the Vienna Convention on Diplomatic Relations continues to apply between two states notwithstanding the

<sup>32</sup> *Wall* (n 5) paras 90–101. <sup>33</sup> *Nuclear Weapons* (n 4) para 89.

<sup>34</sup> *Nicaragua* (Merits) (n 2) para 218.

<sup>35</sup> For the full quotation see 2.1.3; text accompanying n 26.

<sup>36</sup> *Nuclear Weapons* (n 4) paras 78, 87. <sup>37</sup> *Nuclear Weapons* (n 4) para 30.

existence of a state of armed conflict between them.<sup>38</sup> In particular, the Court has taken the view that international human rights treaties continue to apply during armed conflicts. It made one statement of a specific nature and one more general statement in that respect. In *Nuclear Weapons*, the Court observed that:

the protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.<sup>39</sup>

In *Wall*, the Court, having endorsed this passage from *Nuclear Weapons*, held as follows:

As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.<sup>40</sup>

The qualification in *Nuclear Weapons* of the targeting rules (as part of the law on the conduct of hostilities) as *leges speciales* with respect to the meaning to be given to the concept of 'arbitrary deprivation of life' in Article 6 of the International Covenant on Civil and Political Rights, probably falls within the first of the three categories of situations listed in the above quotation. In *Wall*, the Court was concerned with the second type of situation when it found that Articles 12 (on liberty of movement etc) and 17 (on the right to privacy etc) of the International Covenant on Civil and Political Rights applied to Israel's construction of the barrier in the occupied territories without seeing the content of those fundamental rights as being superseded by any *lex specialis* flowing from the law of belligerent occupation.<sup>41</sup>

In *Nuclear Weapons*, the Court also turned its attention to the interrelation between the law of armed conflicts and the *jus contra bellum* under the UN Charter. In the abstract, the Court made the following statement, which fully embraces the idea of the complete separation of the law of armed conflicts from the *jus contra bellum*:

[A] use of force that is proportionate under the law of self-defence, must, in order to be lawful, also meet the requirements of the law applicable in armed conflict which comprise in particular the principles and rules of humanitarian law.<sup>42</sup>

<sup>38</sup> *DRC v Uganda* (n 6) para 323. <sup>39</sup> *Nuclear Weapons* (n 4) para 25.

<sup>40</sup> *Wall* (n 5) para 106. <sup>41</sup> *Wall* (n 5) paras 128, 136.

<sup>42</sup> *Nuclear Weapons* (n 4) para 42.

In the same Advisory Opinion, however, the Court reached a conclusion, the second (sub-) paragraph of which leaves room for the interpretation that the right to self-defence may, in extreme circumstances, trump the law of armed conflicts:

It follows from the above-mentioned requirements 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 extreme circumstance of self-defence, in which the very survival of a State would be at stake.<sup>43</sup>

In *Wall*, the Court, perhaps inadvertently, again cast a shadow of doubt on the rigour with which it adheres to the separation thesis. Immediately after identifying ‘breaches by Israel of various of its obligations under the applicable international humanitarian law’, the Court queried whether the construction of the barrier might be consistent with Article 51 of the UN Charter. It then found that the conditions of Article 51 had not been fulfilled and that the latter provision was therefore irrelevant in the case before it.<sup>44</sup> This is different from stating unambiguously that Article 51 of the UN Charter is not capable, as a matter of principle, of justifying a breach of international humanitarian law.

## 2.2 ‘Geneva law’

In *Nuclear Weapons*, the Court emphasized the treaty fusion between the ‘Geneva’ and the ‘Hague’ law through Additional Protocol I, and on closer inspection it turns out that this long-cherished distinction between those two ‘branches’ of the laws of war has never been analytically watertight. Yet, the distinction between those rules which apply primarily to those not (or no longer) taking part in hostilities and those which primarily govern the conduct of hostilities continues to provide a convenient structure for the exposition of the primary rules of the law of armed conflicts and the following brief perusal of the respective Court’s jurisprudence will therefore adhere to this distinction.

### 2.2.1 *General principles and rules*

In the *Nicaragua* case, the Court (without explicitly referring to the concept of custom, as we have seen<sup>45</sup>) identified the existence of ‘fundamental general principles of humanitarian law’ applicable outside the treaty framework of the 1949 Geneva Conventions. The Court held as follows:

Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a

<sup>43</sup> *Nuclear Weapons* (n 4) para 105 *sub E*.

<sup>45</sup> See in 2.1.5; text accompanying n 35.

<sup>44</sup> *Wall* (n 5) para 139.



minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called 'elementary considerations of humanity' . . .<sup>46</sup>

The Court brought those general principles to bear with regard to the killing, by non-state actors in a non-international armed conflict, of judges, police officers, state security officers, etc. The Court found such killings to be in violation of the prohibition on carrying out summary executions and 'probably also of the prohibition of "violence to life and person, in particular murder to [sic] all kinds . . ."'.<sup>47</sup>

### 2.2.2 *The law of belligerent occupation*

The law of belligerent occupation formed the object of observations by the Court in *Wall* and the *DRC v Uganda* case. To date, it is this branch of the law of armed conflicts that has received the most detailed attention by the Court.

#### 2.2.2.1 **The prerequisites of belligerent occupation**

In the *DRC v Uganda* case, the Court elaborated upon the customary prerequisites of a belligerent occupation as set out in Article 42 of the 1907 Hague Regulations, and it applied this body of law to the Ugandan presence in the Democratic Republic of the Congo at the material time. The relevant paragraph reads as follows:

In order to reach a conclusion as to whether a State, the military forces of which are present on the territory of another State as a result of an intervention, is an 'occupying power' in the meaning of the term as understood in the *jus in bello*, the Court must examine whether there is sufficient evidence to demonstrate that the said authority was in fact established and exercised by the intervening State in the areas in question. In the present case the Court will need to satisfy itself that the Ugandan armed forces in the DRC were not only stationed in particular locations but also that they had substituted their own authority for that of the Congolese Government.<sup>48</sup>

On this basis, the Court rejected the idea of an 'indirect' occupation by a foreign state through non-state actors, unless the latter's conduct is attributable to that foreign state.

#### 2.2.2.2 **Prolonged occupation**

In the *Wall* case, the Court applied Article 6, paragraph 3 of Geneva Convention IV to Israel's 'prolonged' occupation of the West Bank. The Court did not specify the date of the 'general close of military operations' as referred to in this provision, but it stated that 'the military operations leading to the occupation of the West Bank ended a long time ago'.<sup>49</sup> Starting from that premise, the Court determined that at the material time only those Articles of Geneva Convention IV, which are

<sup>46</sup> *Nicaragua* (Merits) (n 2) para 218.

<sup>48</sup> *DRC v Uganda* (n 6) para 173.

<sup>47</sup> *Nicaragua* (Merits) (n 2) para 255.

<sup>49</sup> *Wall* (n 5) para 125.

listed in Article 6, paragraph 3, remained applicable in the occupied territory in question.<sup>50</sup>

### 2.2.2.3 Substantive obligations

In the *DRC v Uganda* case, the Court had little difficulty qualifying the atrocities committed by the Ugandan armed forces against civilians in the occupied territory in the Democratic Republic of the Congo as falling under Articles 27 (respect for the person, honour, family rights, etc) and 32 (protection from physical suffering or extermination) of Geneva Convention IV.<sup>51</sup> In addition, the Court made the following general observation regarding the key duty of the occupying power under Article 43 of the 1907 Hague Regulations:

This obligation [comprises] the duty to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate violence by any third party.<sup>52</sup>

In *Wall*, the Court found Israel's settlements in the West Bank to be in violation of Article 49, paragraph 6 of the Fourth Geneva Convention. In that context, the Court adopted the following interpretation of Article 49, paragraph 6:

That provision prohibits not only deportations or forced transfers of population such as those carried out during the Second World War, but also any measures taken by an occupying Power in order to organize or encourage transfers of parts of its own population into occupied territory.<sup>53</sup>

The Court also held that the construction of the barrier violated Article 49, paragraph 6, because it 'contributed to demographic changes' in the occupied territories.<sup>54</sup>

The Court also dealt with a number of provisions in the 1907 Hague Regulations and in the Fourth Geneva Convention which seek to protect property interests. In that respect, it drew an initial distinction between the conduct of hostilities provisions contained in Section II and those governing the law of belligerent occupation as set out in Section III of the 1907 Hague Regulations, and held that Article 23(g) of the latter Regulations, which forms part of Section II, was not pertinent with respect to the construction of the Wall.<sup>55</sup> The latter's construction, however, was said by the Court to have led 'to the destruction or requisition of properties under conditions which contravene the requirements of Articles 46 and 52 of the Hague Regulations of 1907 and of Article 53 of the Fourth Geneva Convention'.<sup>56</sup>

<sup>50</sup> *Wall* (n 5) para 125.

<sup>51</sup> *DRC v Uganda* (n 6) para 211; the Court does not, however, explicitly cite the two pertinent provisions.

<sup>52</sup> *DRC v Uganda* (n 6) para 178. <sup>53</sup> *Wall* (n 5) para 12.

<sup>54</sup> *Wall* (n 5) para 134. <sup>55</sup> *Wall* (n 5) para 124.

<sup>56</sup> *Wall* (n 5) para 132.

In the *DRC v Uganda* case, the Court also addressed the exploitation of natural resources in an occupied territory and established a connection with the old prohibition of pillage. The passage in question reads as follows:

[W]henever members of the UPDF [Uganda Peoples' Defence Forces] were involved in the looting, plundering and exploitation of natural resources in the territory of the DRC, they acted in violation of the *jus in bello*, which prohibits the commission of such acts by a foreign army in the territory where it is present. The Court notes in this regard that both Article 47 of the Hague Regulations of 1907 and Article 33 of the Fourth Geneva Convention of 1949 prohibit pillage.<sup>57</sup>

### 2.3 'Hague law'

*Nuclear Weapons* provided the Court with a rare opportunity to set out its views on certain important aspects of the law governing the conduct of hostilities and, more specifically, the law prohibiting certain means of conduct. In its search for a specific prohibition on the recourse to nuclear weapons the Court shed light on the terms 'poison or poisoned weapons' as used in Article 23(a) of the 1907 Hague Regulations and on the terms 'asphyxiating, poisonous or other gases' and 'all analogous liquids, materials or devices' as employed in the 1925 Geneva Protocol. The Court required in all cases that 'the prime, or even exclusive, effect' of such weapons is to poison or asphyxiate, a requirement which led the Court to exclude nuclear weapons from the scope of the terms concerned.<sup>58</sup> The Court did not dwell upon the definition of the key term 'chemical weapon' as contained in the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, but confined itself to the statement that this term does not cover nuclear weapons either.<sup>59</sup> Having failed to identify any treaty provision with a universal scope of application specifically prohibiting the use of nuclear weapons, the Court was also unable to establish the existence of a rule of customary international law specifically prohibiting the use of nuclear weapons:

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.<sup>60</sup>

The Court then inquired as to whether a prohibition on the use of nuclear weapons results from a general rule on the law on the conduct of hostilities. At this juncture, the Court made an exception to its general approach to the sources of law as set out above and left undecided the applicability of the First Additional Protocol to the Geneva Conventions to the use of Nuclear Weapons.<sup>61</sup> Instead it placed all the emphasis on the relevant customary law. The Court recognized two paramount customary law principles governing the choice of means of conduct:

<sup>57</sup> *DRC v Uganda* (n 6) para 245.

<sup>59</sup> *Nuclear Weapons* (n 4) para 57.

<sup>61</sup> *Nuclear Weapons* (n 4) para 84.

<sup>58</sup> *Nuclear Weapons* (n 4) paras 55–6.

<sup>60</sup> *Nuclear Weapons* (n 4) para 73.

The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets. According to the second principle, it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing such harm or uselessly aggravating their suffering. In application of that second principle, States do not have unlimited freedom of choice of means in the weapons they use.<sup>62</sup>

Applying those principles to the legal question before it, the Court reached the conclusion that:

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.<sup>63</sup>

To this cautiously worded conclusion, the Court then added the famous observation 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.<sup>64</sup>

These two ‘inconclusive conclusions’ reappear (in a somewhat differently worded fashion) as two subparagraphs in the *dispositif*.<sup>65</sup>

The *Nuclear Weapons* Court dealt separately with the protection of the environment in times of armed conflict and it established, as flowing from Articles 35, paragraph 3, and 55 of Additional Protocol I, the:

general obligation to protect the natural environment against widespread, long-term and severe environmental damage; the prohibition of methods and means of warfare which are intended, or may be expected, to cause such damage; and the prohibition of attacks against the natural environment by way of reprisals.<sup>66</sup>

While the Court described these rules as ‘powerful constraints’, it was careful to add the words ‘for all the States having subscribed to these provisions’, which places a significant question mark over the customary nature of those rules. With respect to nuclear weapons, the *dictum* on Articles 35, paragraph 3, and 55 of Additional Protocol I is further qualified by the Court’s general *caveat* as to this Protocol’s applicability. With respect to customary international law, the Court was more cautious, holding that ‘respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality’.<sup>67</sup>

<sup>62</sup> *Nuclear Weapons* (n 4) para 78.

<sup>64</sup> *Nuclear Weapons* (n 4) para 97.

<sup>66</sup> *Nuclear Weapons* (n 4) para 31.

<sup>63</sup> *Nuclear Weapons* (n 4) para 95.

<sup>65</sup> *Nuclear Weapons* (n 4) para 105 *sub E*.

<sup>67</sup> *Nuclear Weapons* (n 4) para 30.

## 2.4 Enforcement

The Court has made a number of important statements on issues of state responsibility, and it has also begun to deal with questions pertaining to individual criminal responsibility for certain breaches of certain rules of the law of armed conflict.

### 2.4.1 State responsibility

#### 2.4.1.1 Attribution

In the *DRC v Uganda* case, the Court determined that the fact that the *ultra vires* nature of an act of a member of the armed forces of a state does not hinder the attribution of this act to the state of the armed forces concerned:

According to a well-established rule of a customary nature, as reflected in Article 3 of the Fourth Hague Convention respecting the Laws and Customs of War on Land of 1907 as well as in Article 91 of Protocol I additional to the Geneva Conventions of 1949, a party to an armed conflict shall be responsible for all acts by persons forming part of its armed forces.<sup>68</sup>

In *Nicaragua*, the Court decided to apply the generally applicable prerequisites for the attribution of conduct by private persons within the context of the law of armed conflict.<sup>69</sup> In the *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* the Court confirmed the non-existence of a *lex specialis* in this respect and, in interpreting *Nicaragua*, identified as relevant in this context the two separate concepts of an organ *de facto* and of a person acting under the effective control of the state concerned. In that respect, the Court considered Articles 4 and 8 of the International Law Commission (ILC) Articles on State Responsibility for Internationally Wrongful Acts as embodying customary international law.<sup>70</sup>

#### 2.4.1.2 State assistance with acts contrary to the law of armed conflict by private persons and a state's lack of due diligence in that respect

In *Nicaragua*, the Court derived from Common Article 1 of the Geneva Conventions the obligation of states parties not to encourage private persons to act in breach of the law of international armed conflict. This obligation was held to reflect customary international law and was determined to extend to conduct of private persons contrary to provisions of the law of non-international armed conflict.<sup>71</sup> The USA was held to have violated this customary rule by supplying private persons with a manual on psychological operations which contained advice to 'neutralize' certain targets not amounting to a military objective within the meaning of the law of armed conflicts.<sup>72</sup>

<sup>68</sup> *DRC v Uganda* (n 6) para 214.

<sup>69</sup> *Nicaragua* (Merits) (n 2) paras 108–16.

<sup>70</sup> *Bosnian Genocide* (n 8) paras 385–415.

<sup>71</sup> *Nicaragua* (Merits) (n 2) para 220.

<sup>72</sup> *Nicaragua* (Merits) (n 2) para 255.

In *DRC v Uganda*, the Court again had to deal with the facilitation by a state of acts of private persons contrary to the law of armed conflicts. This time, the Court analysed the action within the context of the state's 'duty of vigilance' over the conduct of private persons in a state of belligerent occupation. In respect of this duty, the Court found that:

the fact that Uganda was the occupying Power in Ituri district . . . extends Uganda's obligation to take appropriate measures to prevent the looting, plundering and exploitation of natural resources in the occupied territory to cover private persons in this district and not only members of Ugandan military forces.<sup>73</sup>

#### 2.4.1.3 Belligerent reprisals and necessity

In *Nuclear Weapons*, the Court refrained from stating its view on the customary nature of the prohibition contained in Article 51, paragraph 6 of Additional Protocol I on launching attacks against the civilian population or civilians by way of reprisals. It merely held as follows:

Certain States asserted that the use of nuclear weapons in the conduct of reprisals would be lawful. The Court does not have to examine, in this context the question of armed reprisals in time of peace, which are considered to be unlawful. Nor does it have to pronounce on the question of belligerent reprisals save to observe that in any case any right of recourse to such reprisals would, like self-defence, be governed *inter alia* by the principle of proportionality.<sup>74</sup>

In the *Wall* case, the Court held that the construction of the barrier was (*prima facie*) in breach of certain conduct rules of the law of armed conflicts. It then considered the issue of the applicability of the state of necessity as a ground precluding international wrongfulness within the law of armed conflicts. Here again, the Court refrained from deciding the core question and instead rejected the 'state of necessity-defence' on the facts. It nevertheless mentioned the main argument against relying on the state of necessity argument within the context of the law of armed conflicts:

[T]he Court is bound to note that some of the conventions at issue in the present instance include qualifying clauses of the rights guaranteed . . . Since those treaties already address considerations of this kind within their own provisions, it might be asked whether a state of necessity as recognized in customary international law could be invoked with regard to those treaties as a ground for precluding the wrongfulness of the measures or decisions being challenged.<sup>75</sup>

#### 2.4.1.4 Reparation

In *Wall*, the Court confirmed the obligation of a state in breach of the law of armed conflicts to make reparation pursuant to the law of state responsibility for internationally wrongful acts. In the same Advisory Opinion, the Court did not deal in any detail with the question of whether, in addition to the victim state(s), individual victims were also directly entitled to claim reparation under the law of armed

<sup>73</sup> *DRC v Uganda* (n 6) para 248; see also para 179.

<sup>74</sup> *Nuclear Weapons* (n 4) para 46. <sup>75</sup> *Wall* (n 5) para 140.

conflicts. It would appear to be stretching things to read an affirmative statement to that effect into the following passage of the Advisory Opinion:

Moreover, given that the construction of the wall in the Occupied Palestinian Territory has, *inter alia*, entailed the requisition and destruction of homes, businesses and agricultural holdings, the Court finds further that Israel has the obligation to make reparation for the damage caused to *all the natural and legal persons concerned*. [emphasis added]<sup>76</sup>

In *Jurisdictional Immunities*, the Court was careful to distinguish between, on the one hand, the (procedural) immunity of the state before the courts of another state in civil proceedings for reparations for serious violations of the law of armed conflicts and, on the other hand, the (substantive) obligation of the internationally responsible state to make reparation. Only the first issue was before the Court and, accordingly, it did not answer the question whether the individual victim of a serious violation of the law of armed conflicts possesses a right to reparation under international law against the internationally responsible state. The following passage, however, may be read to indicate a certain reluctance to admit to an (unfettered) right to reparation of the individual victim:

[A]gainst the background of a century of practice in which almost every peace treaty or post-war settlement has involved either a decision not to require the payment of reparations or the use of lump sum settlements and set-offs, it is difficult to see that international law contains a rule requiring the payment of full compensation to each and every individual victim as a rule accepted by the international community of States as a whole as one from which no derogation is permitted.<sup>77</sup>

#### **2.4.1.5 The legal position of third states in case of a violation of the law of armed conflicts**

As was mentioned above,<sup>78</sup> the Court determined in *Wall* that ‘a great many rules of humanitarian law applicable in armed conflict . . . are essentially of an *erga omnes* character’. The Court specified that, as a consequence thereof, all states possess a legal interest in reacting to a violation of those rules. In the same Advisory Opinion, the Court went one important step further and held that, as a result of Article 1 of the Fourth Convention:

every State party to that Convention, whether or not it is a party to a specific conflict, is under an *obligation* to ensure that the requirements of the instruments in question are complied with. [emphasis added]<sup>79</sup>

The Court went some way to give content to this obligation and identified the duties of all states not to recognize the illegal situation and not to render aid or assistance to its maintenance.<sup>80</sup> The Court also held that:

<sup>76</sup> *Wall* (n 5) para 152.

<sup>77</sup> *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* (n 9) para 94.

<sup>78</sup> See 2.1.3: text accompanying n 25. <sup>79</sup> *Wall* (n 5) para 158.

<sup>80</sup> *Wall* (n 5) para 159.

the United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation resulting from the construction of the wall and the associated régime taking due account of the present Advisory Opinion.<sup>81</sup>

As such, the Court has placed the avenue for collective action in the forefront without unambiguously rejecting the idea of a third state's right (or even obligation) to adopt unilateral countermeasures.

#### 2.4.2 *Individual criminal responsibility*

As of yet, pronouncements by the Court on the law of war crimes remain few in number, and those pronouncements do not deal with specific questions of substantive international criminal law. In *Jurisdictional Immunities*, the Court confirmed the concept of war crimes as crimes under international law as established by the Nuremberg International Military Tribunal.<sup>82</sup> In the *Arrest Warrant* case, the Court denied that there was an exception to immunity *ratione personae* before a foreign criminal court for international crimes.<sup>83</sup> At the same time, the Court observed *obiter* that the international law on immunities did not represent a bar to criminal prosecution in the following circumstances:

First, such persons [those holders of high-ranking office in a state, including the Foreign Office, enjoying international immunity *ratione personae*; CK] enjoy no immunity under international law in their own countries, and may thus be tried by those countries' courts in accordance with the relevant rules of domestic law.

Secondly, they will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity.

Thirdly, after a person ceases to hold the office of Minister of Foreign Affairs, he or she will no longer enjoy all the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity.

Fourthly, an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the Former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention. The latter's Statute expressly provides, in Article 27, paragraph 2, that '[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person'.<sup>84</sup>

<sup>81</sup> *Wall* (n 5) para 160.

<sup>82</sup> *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* (n 9) para 81 in conjunction with para 52.

<sup>83</sup> *Arrest Warrant* (n 7) para 58.

<sup>84</sup> *Arrest Warrant* (n 7) para 61.



## 2.5 Humanitarian assistance

In *Nicaragua*, the Court found that the provision of strictly humanitarian aid to persons or forces in another country during a non-international armed conflict did not constitute an intervention and was also otherwise lawful under international law. According to the Court, such lawful humanitarian assistance presupposes that such assistance is limited to the purposes of preventing and alleviating suffering, protecting life and health, and ensuring respect for the human being, and that it is given without discrimination to all in need.<sup>85</sup>

## 2.6 The law of neutrality

It has already been mentioned<sup>86</sup> that the Court, in *Nuclear Weapons*, found that ‘the principle of neutrality . . . is applicable to all international armed conflict’. In the same Advisory Opinion, the Court considered this principle to be ‘of a fundamental character similar to that of the humanitarian principles and rules’.<sup>87</sup> This strongly suggests that the Court believed in the customary nature of the principle. The Court refrained, however, from specifying the principle’s content. Instead it referred to the legal view as formulated by Nauru during the advisory proceedings:

The principle of neutrality, in its classic sense, was aimed at preventing the incursion of belligerent forces into neutral territory, or attacks on the persons or ships of neutrals. Thus: ‘the territory of neutral powers is inviolable’ (Article 1 of the Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, concluded on 18 October 1907); ‘belligerents are bound to respect the sovereign rights of neutral powers . . .’ (Article 1 to the Hague Convention (XIII) Respecting the Rights and Duties of Neutral Powers in Naval War, concluded on 18 October 1907), ‘neutral states have equal interest in having their rights respected by belligerents . . .’ (Preamble to Convention on Maritime Neutrality, concluded on 20 February 1928). It is clear, however, that the principle of neutrality applies with equal force to transborder incursions of armed forces and to the transborder damage caused to a neutral State by the use of a weapon in a belligerent State.<sup>88</sup>

As the Court did not explicitly endorse that statement, its status in the Advisory Opinion is not entirely clear. The most plausible way to read the Opinion in this context is to assume that the Court embraced Nauru’s position implicitly and included the principle of neutrality into that body of principles and rules or the law of armed conflicts which, according to this view, will ‘generally’ be violated by a use of nuclear weapons. It must be acknowledged, however, that such a reading is not unambiguously borne out by the wording of the relevant passages of the Advisory Opinion.

<sup>85</sup> *Nicaragua* (Merits) (n 2) para 242.

<sup>87</sup> *Nuclear Weapons* (n 4) para 89.

<sup>86</sup> See 2.1.4; text accompanying n 33.

<sup>88</sup> *Nuclear Weapons* (n 4) para 88.

### 3. Some reflections on the character and style of the Court's jurisprudence

An exhaustive legal commentary on the Court's case law would probably not reveal any clear-cut error of law. It would, however, certainly bring to light a significant number of more or less controversial legal statements, some of which the Court made without much or even any legal reasoning. It is open to serious doubt, for example, whether a belligerent occupation presupposes the *exercise of actual authority* by a foreign force (as the Court held without much supporting legal analysis in *DRC v Uganda*<sup>89</sup>), or whether the *ability* of such a force to exert authority over a specific area does not suffice.<sup>90</sup> It is also surprising, to mention one more example, how laconically the Court, in *Wall*, dealt with the 'legal oddity' of Article 6, paragraph 3 of Geneva Convention IV on prolonged belligerent occupation,<sup>91</sup> even if, at the end of the day, the Court could not avoid that provision's application to Israel's belligerent occupation of the Palestinian territories.<sup>92</sup> I shall refer to some more examples of 'light statements' of this kind later, but I shall not draw up a complete list, because it is not the purpose of this essay to present an exhaustive legal commentary of the judicial *acquis*. In the following section, I am instead interested primarily in the character and style of the Court's jurisprudence.<sup>93</sup>

#### 3.1 More moderation than thirst for adventure in the laboratory of legal experimentation

In 1989, Luigi Condorelli characterized the law of armed conflicts as a 'laboratory of legal experimentation'. He listed the obligation *erga omnes*, the undertaking under Common Article 1 of the Geneva Conventions to 'ensure respect' for the Conventions, and the category of *jus cogens* among the innovative legal doctrines that a deeper study of the law of armed conflicts could bring to light, and which,

<sup>89</sup> See 2.2.2.1; text accompanying n 48.

<sup>90</sup> In the latter sense, see the Separate Opinion of Judge Kooijmans in *DRC v Uganda* (n 6) paras 47–9; the expert views as recorded in T Ferraro (ed), *Occupation and other Forms of Administration of Foreign Territory* (Geneva: International Committee of the Red Cross, March 2012) 19; see also S Verhoeven, 'A Missed Opportunity to Clarify the Modern *Ius Ad Bellum*. Case Concerning Armed Activities on the Territory of the Congo' (2006) 45 *Military L & L of War Rev* 355, 361–2.

<sup>91</sup> See 2.2.2.

<sup>92</sup> On the controversies surrounding Art 6, para 3 of the Fourth Convention, see, generally, A Roberts, 'Prolonged Military Occupation: The Israeli-Occupied Territories 1967–1988' in E Playfair (ed), *International Law and the Administration of Occupied Territories* (Oxford: OUP, 1992) 36–9 (using the term 'legal oddity' at 38); for a critique of the manner in which the Court applied Art 6, para 3 to the Israeli occupation, see A Imseis, 'Critical Reflections on the International Humanitarian Law Aspects of the ICJ *Wall* Advisory Opinion' (2005) 99 *AJIL* 102, 105–9; for criticisms of the ICJ's approach to Art 6, para 3, see also the expert views as recorded in Ferraro (n 90) 77–8.

<sup>93</sup> A reader familiar with Sir Hersch Lauterpacht's *The Development of International Law by the International Court* (London: Stevens & Sons, 1958) will recognize that the selection of topics was inspired by this *magnum opus*.

once discovered in that area, could then spill over into international law more broadly.<sup>94</sup> It is essentially the *Wall* Opinion that marked the beginning of the Court's work in this laboratory. In light of its famous *dictum* in *Barcelona Traction*, it did not come as a surprise that the Court applied the concept of the obligation *erga omnes* to the law of armed conflicts. The much more remarkable engagement with legal experimentation consisted in the determination that the undertaking to 'ensure respect' in Common Article 1 of the Geneva Conventions means that all states parties to the Conventions, whether or not they are party to the relevant armed conflict, are under a duty to react to violations of those Conventions. With this finding, the Court (implicitly) endorsed an interpretation which had famously been put forward by Jean S Pictet in his *Commentaries on the Geneva Conventions*<sup>95</sup> and which has subsequently been taken up and elaborated upon by Luigi Condorelli and Laurence Boisson de Chazournes.<sup>96</sup> In 1999, however, this reading of Common Article 1 was powerfully challenged by Frits Kalshoven.<sup>97</sup> Kalshoven reminded his readers how surprisingly progressive it would have been for states in 1949 to enshrine a duty of third states to react to breaches of the law of armed conflicts and he demonstrated that the *travaux préparatoires* did not reveal such an intention. In light of those counterarguments and in light of the fact that subsequent state practice relating to Common Article 1 could hardly be said to support the progressive interpretation, the Court appeared thirsty for adventure when it embraced such an interpretation without any regard for the contrary point of view<sup>98</sup>—notwithstanding the fact that it refrained from elaborating too much on the precise contours of the duty of third states to react.

Such thirst for adventure has, however, remained the exception. Instead, the Court has shown an almost curious degree of moderation with respect to the recognition of the concept of *jus cogens*. Given the Court's jurisprudence on the basic principles of the law of armed conflicts as expressions of elementary considerations of humanity, in light of the textual argument provided by the formulation of a common provision of the Geneva Conventions (Articles 51, 52, 131, and 148),<sup>99</sup> and finally with a view to the fact that in 1995 the International Criminal Tribunal for the Former Yugoslavia (ICTY) had recognized the *jus cogens*

<sup>94</sup> L Condorelli, 'Le droit international humanitaire en tant qu'atelier d'expérimentation juridique' in W Haller, A Kötz, G Müller and D Thürer (eds), *Im Dienst der Gemeinschaft: Festschrift für Dietrich Schindler zum 65. Geburtstag* (Basel: Helbing Lichtenhahn, 1989) 193–200.

<sup>95</sup> JS Pictet, *La Convention de Genève pour l'amélioration du sort des blessés et des maladies dans les forces armées en campagne* (Geneva: International Committee of the Red Cross, 1952) 27.

<sup>96</sup> L Condorelli and L Boisson de Chazournes, 'Quelques remarques à propos de l'obligation des états de "respecter et faire respecter" le droit international humanitaire "en toutes circonstances"' in C Swinarski (ed), *Études et essais sur le droit international humanitaire et sur les principes de la Croix-Rouge en l'honneur de Jean Pictet* (Dordrecht: Martinus Nijhoff, 1984) 17–35; L Condorelli and L Boisson de Chazournes, 'Common Art 1 of the Geneva Conventions revisited: Protecting Collective Interests' (2000) 82 *IRRC* 67–86.

<sup>97</sup> F Kalshoven, 'The Undertaking to Respect and Ensure Respect in all Circumstances: From Tiny Seed to Ripening Fruit' (1999) 2 *Ybk Intl Hum L* 3–61.

<sup>98</sup> This omission was criticized by Judge Kooijmans in his Separate Opinion in *Wall* (n 5) 232–4, paras 46–51.

<sup>99</sup> On this argument see Condorelli (n 94) 198.

character of most customary rules of international humanitarian law,<sup>100</sup> one could have expected the Court to make a similar statement in 1996 in *Nuclear Weapons*. Instead, it introduced the new legal category of ‘intransgressible principles of international customary law’ in order to avoid a finding on the *jus cogens* issue.<sup>101</sup> Even after having rejected, in *Jurisdictional Immunities*, an effort to derive far-reaching legal consequences from the *jus cogens* nature of a norm, the Court remained careful not to determine positively that the rules of the law of armed conflicts in question were of such a nature. Again perhaps somewhat in contrast to the Court’s progressive approach to Common Article 1, but much more understandable as a matter of the *lex lata*, is its rejection of a war crimes exception to the international law immunity *ratione personae* before foreign courts in *Arrest Warrant*<sup>102</sup> and its reluctance to recognize an international legal right to reparation of an individual victim of a war crime.<sup>103</sup>

All in all, Luigi Condorelli would probably agree that, apart from the concept of the obligation *erga omnes* and the idea of a duty of third states to react to violations of the law of armed conflicts, there is still considerable room for the ICJ to explore the latter body of law’s potential to serve as a laboratory of legal experimentation.

### 3.2 An emphasis on major principles

In *Nicaragua* and *Nuclear Weapons*, the Court appeared to be particularly concerned with setting out the guiding principles of the law of armed conflicts. In the former decision, it established, within the realm of the ‘Geneva Law’, the existence of some ‘fundamental general principles of humanitarian law’ governing all armed conflicts,<sup>104</sup> and in the latter Advisory Opinion the Court identified two ‘cardinal principles... constituting the fabric of humanitarian law’<sup>105</sup> pertaining to the ‘Hague Law’. To those key principles the Court added in *Nuclear Weapons* the principle of ‘respect for the environment’<sup>106</sup> as a relevant consideration in the law on the conduct of hostilities, and the ‘principle of neutrality’.<sup>107</sup> Also with respect to the law of belligerent occupation, the Court was eager, both in *Wall* and in the *DRC v Uganda* case, to underline some overarching principles. In the former Advisory Opinion, the Court emphasized the protection of civilians as the main goal of Geneva Convention IV,<sup>108</sup> and the Opinion set out some broad principles on the relationship between the law of armed conflicts and international human rights law.<sup>109</sup> In the latter Judgment, the Court observed the relevance of ‘the applicable rules of international human rights law’ in giving Article 43 of the 1907

<sup>100</sup> *Prosecutor v Dusko Tadić*, ‘Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction’ (Appeal Chamber) (2 October 1995) IT-94-1-AR72 (ICTY), para 143.

<sup>101</sup> For a critique of the undue caution of the Court, see Judge Bedjaoui in his Declaration and Judges Weeramantry and Koroma in their Dissenting Opinions in *Nuclear Weapons* (n 4) para 21, and 496, 572–3, respectively.

<sup>102</sup> See 2.4.2. <sup>103</sup> See 2.4.1.4. <sup>104</sup> See 2.2.1; quotation accompanying n 46.

<sup>105</sup> See 2.3; quotation accompanying n 62. <sup>106</sup> See 2.3; quotation accompanying n 66.

<sup>107</sup> See 2.6. <sup>108</sup> See 2.1; text accompanying n 23.

<sup>109</sup> See 2.1.6; quotation accompanying n 40.

Hague Regulations its proper contemporaneous meaning<sup>110</sup> and formulated the idea that the old prohibition on pillage can be used to deal with exploitation of the occupied territory's natural resources.<sup>111</sup>

While important principles governing the law of armed conflicts have received international judicial recognition, those principles have enjoyed only relatively little elaboration. This is readily understandable where the principle at stake is rather new and where the development of the law has not yet reached a stage of consolidation in every detail. This consideration would appear to apply to the interrelationship between the law of armed conflicts and the international law of human rights, the relevance of the latter body of law within the context of the occupying state's basic duty under Article 43 of the 1907 Hague Regulations, the restraining force of the principle of respect for the natural environment on the conduct of hostilities, and the extension of the old prohibition on pillage to the field of exploitation of the occupied territory's natural resources. In those contexts, which were perhaps not at the heart of the subject matter of the proceedings concerned, the Court has usefully opened the door for future legal developments, but wisely without foreshadowing them in detail. The usefulness of leaving the analysis at the level of a principle of high abstraction is less apparent, however, with respect to the 'principle of neutrality' as referred to in *Nuclear Weapons*. The Court was not only cryptic with respect to the question at stake as to whether and to what extent the use of nuclear weapons affects the 'principle of neutrality', but it also failed even to begin to clarify the distinct legal significance of the principle of neutrality vis-à-vis the principle of the inviolability of a state's territory in times of peace.<sup>112</sup> Somewhat ironically, the one firm statement made by the Court with respect to the 'principle of neutrality'—that is, its applicability 'to all international armed conflict'—is debatable in its sweeping form. The Court did not even mention the possibility that the law of neutrality could constitute the last area in which the concept of *war* retains a measure of legal significance.<sup>113</sup> The Court's reluctance to ascend from the level of first principles to more detailed legal reasoning constitutes even a major weakness of the *Nuclear Weapons* Opinion when it comes to the two 'cardinal principles' governing the choice of means of combat. In her Dissenting Opinion, Judge Higgins succinctly made the point:

It is not sufficient, to answer the question put to it, for the Court merely briefly to state the requirements of the law of armed conflict (including humanitarian law) and then simply to move to the conclusion that the threat or use of nuclear weapons is generally unlawful by reference to these principles and norms . . . At no point in its Opinion does the Court engage in the task that is surely at the heart of the question asked: the systematic application of the

<sup>110</sup> See 2.2.2.3; quotation accompanying n 52.

<sup>111</sup> See 2.2.2.3; quotation accompanying n 57.

<sup>112</sup> C Dominicé, 'The Question of the Law of Neutrality' in Boisson de Chazournes and Sands (n 11) 200, 203–4.

<sup>113</sup> C Greenwood, 'Scope of Application of Humanitarian Law' in D Fleck (ed), *Handbook of International Humanitarian Law* (Oxford: OUP, 2nd edn 2008) 45, 54 (marginal n 209); C Dominicé, 'The Question of the Law of Neutrality' in Boisson de Chazournes and Sands (n 11) 200, 203.

relevant law to the use or threat of nuclear weapons. It reaches the conclusions without the benefit of detailed analysis. An essential step in the judicial process—that of legal reasoning—has been omitted.<sup>114</sup>

It is only natural for a court to begin its jurisprudence in a given field of law by setting out a number of guiding principles. As Rosemary Abi-Saab observed in 1987, the Court may have had another idea in mind when it chose to place so much emphasis on broad principles:

It is a question of political rather than legal strategy: by reducing the obligations of humanitarian law to a certain number of general principles, it is easier to see whether essentials have been violated and from the tactical point of view of scrutiny of application, it becomes possible to look beyond the details of the texts and concentrate on what is clear and fundamental.<sup>115</sup>

While this strategy worked well in *Nicaragua*, by the time of *Nuclear Weapons*, the limits of such a strategy in a situation where it was fundamentally unclear and hotly disputed which results the application of certain general principles to certain factual scenarios would yield, had been revealed.

### 3.3 Some early judicial activism in *Nicaragua* and much more subsequent judicial restraint in *Nuclear Weapons*

In *Nicaragua*, the Court displayed a remarkably activist attitude towards the judicial development of the law of armed conflicts.<sup>116</sup> The Court not only declared (rather than substantiated)<sup>117</sup> Common Articles 1 and 3 of the Geneva Conventions to reflect customary international law, but it went even further and applied the duty to ensure respect under Common Article 1 within a context of non-international armed conflict and determined that Common Article 3 expressed a ‘minimum yardstick’ applicable also in cases of international armed conflicts.<sup>118</sup> The transformation of Common Article 3 into a set of fundamental principles overarching *all* armed conflicts is particularly noteworthy for, as Judge Simma would later observe in his Separate Opinion to the *DRC v Uganda* Judgment,<sup>119</sup> the Court thereby anticipated the residual protective regime, which transcends the nationality limitations under Article 4 of Geneva Convention IV, as established in 1977 by virtue of Article 75 of Additional Protocol I.

<sup>114</sup> Dissenting Opinion of Judge Higgins, *Nuclear Weapons* (n 4) para 9.

<sup>115</sup> R Abi-Saab, ‘The “General Principles” of Humanitarian Law According to the International Court of Justice’ (1987) 27 *IRRC* 367, 368.

<sup>116</sup> See (ICJ Judge) S Schwebel (writing in his scholarly capacity), ‘The Roles of the Security Council and the International Court of Justice in the Application of International Humanitarian Law’ (1994–5) 27 *NYU J Intl L & Policy* 731, who characterizes this part of the *Nicaragua* Judgment as an ‘essentially progressive contribution’.

<sup>117</sup> On the brevity of the Court’s analysis, see T Meron, ‘The Geneva Conventions as Customary Law’ (1987) 86 *AJIL* 348, 351–8.

<sup>118</sup> See 2.2.1; 2.4.2.

<sup>119</sup> Separate Opinion of Judge Simma, *DRC v Uganda* (n 6) paras 28–9.

The Court in *Nuclear Weapons* followed the path taken in *Nicaragua* when it declared, without much supporting analysis, that ‘a great many treaty rules of humanitarian law applicable in armed conflict’ embodied customary international law.<sup>120</sup> However, the *Nuclear Weapons* Court demonstrated a considerable measure of judicial restraint in almost every other important respect. The judicial avoidance of the issues of *jus cogens* and belligerent reprisals has already been mentioned.<sup>121</sup> Furthermore, the Court adopted a conservative interpretation of Article 23(a) of the 1907 Hague Regulations.<sup>122</sup> More importantly, it adopted a ‘classic’ approach when it denied the existence of a customary rule specifically prohibiting the use of nuclear weapons. First, the Court stated that ‘the illegality of the use of certain weapons as such does not result from an absence of authorization but, on the contrary, is formulated in terms of prohibition’<sup>123</sup> and, second, despite the *opinio juris* of ‘a very large section of the international community’ to that effect, it felt unable to identify more than a ‘nascent’ *opinio juris* in support of the existence of a customary law prohibition in light of the dissent expressed by a minority of states through their support for the ‘practice of deterrence’.<sup>124</sup> Equally importantly, the Court resisted the temptation to overcome the hurdle of this minority dissent to a customary law prohibition by reference to the Martens Clause.<sup>125</sup> Instead of seizing the opportunity to recognize the ‘principles of humanity’ and ‘the dictates of public conscience’ as a means to lower the threshold for the identification of a new customary rule or even as an autonomous source of law, the Court used the Martens Clause only as an additional argument in support of the applicability of ‘the principles and rules of humanitarian law to nuclear weapons’.<sup>126</sup> It is interesting to contrast the Court’s (non-)use of the Martens Clause in *Nuclear Weapons* with the manner by which the Clause would subsequently be relied upon by the ICTY in order to establish, despite the dissent expressed by a minority of states, the binding nature also for non-state parties of the prohibition on reprisals against civilians as contained in Article 51, paragraph 6 of Additional Protocol I for states parties and non-state parties alike. The ICTY held as follows:

In the light of the way States and courts have implemented it, [the Martens Clause] clearly shows that principles of international humanitarian law may emerge through a customary process under the pressure of demands of humanity or the dictates of the public conscience, even where State practice is scant or inconsistent.<sup>127</sup>

<sup>120</sup> See 2.1.5; quotation accompanying n 34.

<sup>121</sup> See, respectively, 3.1 and 3.3.

<sup>122</sup> For a progressive interpretation see E David, ‘Le statut des armes nucléaires à la lumière de l’Avis de la CIJ du 8 juillet 1996’ in Boisson de Chazournes and Sands (n 11) 210, 214–17.

<sup>123</sup> *Nuclear Weapons* (n 4) para 52.

<sup>124</sup> See 2.3; quotation accompanying n 60.

<sup>125</sup> See 2.1.5.

<sup>126</sup> *Nuclear Weapons* (n 4) para 87; for a critique of this conservative approach to the Martens Clause, see Dissenting Opinion of Judge Shahabuddeen, *Nuclear Weapons* (n 4) 405; see also Dissenting Opinion of Judge Weeramantry, *Nuclear Weapons* (n 4) 486–91.

<sup>127</sup> *Prosecutor v Kupreškić et al* ‘Judgment’ (Trial Chamber) (14 January 2000) IT-95-16-T (ICTY) para 527; for a critique of this progressive use of the Martens Clause, see C Greenwood, ‘Belligerent Reprisals in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia’ in H Fischer, C Kreß and SR Lüder (eds), *International and National Prosecution of Crimes Under International Law* (Berlin: Berlin Verlag, 2001) 539, 553–4.

The activism of the *Nicaragua* Court and the restraint of the *Nuclear Weapons* Court may ultimately be susceptible to reconciliation to a greater extent than might seem possible at first sight. Both decisions recognize the possibility of declaring treaty provisions that enjoy widespread ratification as reflecting customary international law without the need to adduce a significant amount of further (in particular, non-state-party) practice in support of the respective customary rule. The Court felt entitled to so proceed—despite the famous ‘Baxter paradox’<sup>128</sup>—because of the ‘intrinsic humanitarian character’<sup>129</sup> of the treaty provisions concerned and their intimate connection with ‘elementary considerations of humanity’,<sup>130</sup> which is most apparent from the following passage in *Nuclear Weapons*:

It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and ‘elementary considerations of humanity’ as the Court put it in its Judgment of 9 April 1949 in the *Corfu Channel* case (*I.C.J. Reports 1949*, p. 22), that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.<sup>131</sup>

The Court’s jurisprudence on the law of armed conflicts therefore lends powerful support to the idea, at times captured by the concept of ‘modern custom’,<sup>132</sup> that customary international law of an intrinsically humanitarian nature may come into existence without passing a most stringent ‘inductive’ test. Conversely, the Court’s denial of a specific customary law prohibition on the use of nuclear weapons resulted from a more traditional approach to the identification of a rule of customary law. It may safely be suspected that the Court resorted to this more cautious approach because it was acutely aware of the fact that the search for the customary rule in question was characterized by a tension between a strong humanitarian aspiration and important considerations of (an at least perceived) military necessity,<sup>133</sup> so that a more activist approach had subjected the Court to the reproach of having acted as ‘judicial legislator’.<sup>134</sup>

<sup>128</sup> RS Baxter, ‘Treaties and Custom’ [1970–I] 129 *Recueil des Cours* 27, 64 and 73: ‘as the number of parties to a treaty increases, it becomes more difficult to demonstrate what is the state of customary international law dehors the treaty. . . . As the express acceptance of the treaty increases, the number of States not parties whose practice is relevant diminishes. There will be less scope for the development of international law dehors the treaty’.

<sup>129</sup> See 21.2; quotation accompanying n 22.

<sup>130</sup> See 2.1.2.

<sup>131</sup> *Nuclear Weapons* (n 4) para 79; Judge Shahabuddeen, in his Dissenting Opinion, *Nuclear Weapons* (n 4) 380, specifies that the ‘roots’ of those principles ‘reach into the past of different civilizations’; for a similar statement see Judge Weeramantry, *Nuclear Weapons* (n 4) 443, 478–82.

<sup>132</sup> The concepts of ‘modern’ and ‘traditional custom’ are borrowed from AE Roberts, ‘Traditional and Modern Approaches to Customary International Law: A Reconciliation’ (2001) 95 *AJIL* 757–91.

<sup>133</sup> Cf the opening statement of Judge Schwebel in his Dissenting Opinion in *Nuclear Weapons* (n 4) 311: ‘More than any case in the history of the Court, this proceeding presents a titanic tension between State practice and legal principle.’

<sup>134</sup> Cf the critique addressed by Judge Oda to the authors of the request for an Advisory Opinion, Dissenting Opinion, *Nuclear Weapons* (n 4) 350, para 25: ‘It is to me quite clear that this request was prepared and adopted with highly political motives which do not correspond to any genuine legal mandate of a judicial institution.’



### 3.4 An occasional ambition for exhaustiveness and a significant amount of selectivity in the legal analysis

Parts of the *Wall* Opinion display a tendency to deal exhaustively with the relevant legal issues, thereby clarifying the law to the greatest extent possible. The Court could perhaps have avoided the controversial question of the applicability of Geneva Convention IV to the Occupied Palestinian Territories if it had opted to place exclusive reliance on customary international law. The Court, however, used the opportunity presented to it to clarify the scope of application of modern treaty law on belligerent occupation in conformity with the overwhelming international *opinio juris*.<sup>135</sup> The *Wall* Court also displayed a certain eagerness to avail itself of the opportunity to condemn the Israeli settlements in the occupied territories as illegal despite the fact that the question of the legality of the settlements was not directly before it.<sup>136</sup> The Court was able to bring Article 49, paragraph 6 of Geneva Convention IV directly into play because it construed this provision broadly to the effect that it also covered measures designed to protect illegally established settlements and even, it seems, measures that contributed to demographic changes in the occupied territory in any other way. Having thus established the relevance of Article 49, paragraph 6 to the legal evaluation of the construction of the barrier, it no longer seemed far-fetched for the Court to include in its Opinion the statement that, ‘since 1977, Israel has conducted a policy and developed practices involving the establishment of settlements in the Occupied Palestinian Territory, contrary to the terms of Article 49, paragraph 6’.<sup>137</sup> The Court’s inclination to condemn comprehensively the Israeli settlements in the Occupied Territories is readily understandable from a legal policy perspective. This should not, however, detract attention from the fact that the legal argument which the Court provided in support of its broadening the scope of application of Article 49, paragraph 6 so widely as to include any contribution to demographic changes in an occupied territory, can at best be called thin. This brevity in the legal analysis is particularly deplorable in light of the fact that intentional violations of Article 49, paragraph 6 constitute war crimes under Article 8, paragraph 2(b)(viii) of the Statute of the International Criminal Court.<sup>138</sup> The *Wall* Court’s ambition for exhaustiveness therefore came at the price of cursory legal reasoning.

The *Wall* Opinion also turns out to be quite selective in its legal analysis in certain other respects, such as the statement that the prohibition on destroying or seizing the enemy’s property as contained in Article 23(g) of the 1907 Hague Regulations was inapplicable in the West Bank because that territory was under belligerent occupation.<sup>139</sup> This legal position implies that the state of hostilities

<sup>135</sup> See 2.1.4; Imseis (n 92) 103–5 holds the view that the Court could have engaged more fully with the contrary Israeli position.

<sup>136</sup> See 2.2.2.3.

<sup>137</sup> *Wall* (n 5) para 120.

<sup>138</sup> For a similar view see D Kretzmer, ‘The Advisory Opinion: The Light Treatment of International Humanitarian Law’ (2005) 99 *AJIL* 88, 89–94.

<sup>139</sup> See 2.2.2.3.

(within the meaning of Section II of the Hague Regulations) and the state of belligerent occupation (within the meaning of Section III of the Hague Regulations) are mutually exclusive. Israel, however, had argued that it had erected the barrier in response to the eruption of non-state armed violence after the year 2000, at which point it had reached the intensity and organization levels of an armed conflict. The question before the Court was therefore whether it is legally conceivable that a (non-international) armed conflict can take place within an occupied territory. Unfortunately, the Court chose to ignore this legal issue,<sup>140</sup> the significance of which far exceeds that of the advisory proceedings before it.<sup>141</sup> Furthermore, the Court's view, that the erection of the barrier violated Articles 46 and 52 of the 1907 Hague Regulations, suffers from a superficial legal explanation.<sup>142</sup> The interpretation of both provisions concerned gives rise to important legal questions. It is unclear, to mention only the two most important questions of relevance in the *Wall* proceedings,<sup>143</sup> whether Article 46 also covers the *temporary requisition* of land, and it is open to doubt whether Article 52 covers *immovable* property. The Court mentioned neither of those questions and through this 'light treatment' of part of the subject matter it missed the opportunity to properly elucidate the protection of property interests under the law of belligerent occupation.<sup>144</sup> Finally, the *Wall* Court could have been more exhaustive with respect to the state of necessity. Instead of determining the inapplicability of this ground for precluding the international wrongfulness within the law of armed conflict generally or at least with respect to those (many) rules belonging to that body of law which in themselves express a compromise between humanitarian aspirations and considerations of military necessity, the Court very narrowly confined its rejection of necessity to the facts of the case.<sup>145</sup> While the Court did at least indicate its reluctance to accept the state of necessity as a ground for excluding international wrongfulness within the law of armed conflicts, it is regrettable that the opportunity to clarify this important point of law authoritatively was missed. To have taken this step would not have been exceedingly adventurous in light of the fact that the commentary on Article 25 of the ILC Articles on State Responsibility clearly points in the direction that necessity is (largely) unavailable as a ground for excluding international wrongfulness in the law of armed conflicts.<sup>146</sup>

In comparison with the partial attempt at exhaustiveness in the *Wall* Opinion, the selectivity of legal analysis in *Nuclear Weapons* in two important respects becomes even more apparent. While the *Wall* Court devoted considerable efforts to explaining the applicability of the Fourth Geneva Convention to the Palestinian

<sup>140</sup> Kretzmer (n 138) 95–96.

<sup>141</sup> For a detailed analysis, see the legal views voiced by experts in Ferraro (n 90) 109–44.

<sup>142</sup> See 2.2.2.3.

<sup>143</sup> For a full exposition of the relevant questions of interpretation, see Kretzmer (n 138) 96–8.

<sup>144</sup> For a similar criticism, see Separate Opinion of Judge Higgins, *Wall* (n 5) paras 23–4; she uses the words 'light treatment', para 25.

<sup>145</sup> See 2.4.1.3.

<sup>146</sup> For the position of the ILC on Art 25 of its Articles and the law of armed conflict, see S Heathcote, 'Necessity' in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (Oxford: OUP, 2010) 491, 498.

territories occupied by Israel, the *Nuclear Weapons* Court avoided the controversial question whether Additional Protocol I applies to the use of nuclear weapons<sup>147</sup> and instead relied on customary international law. The Court also explicitly declined to decide on the customary nature of the prohibition on recourse to reprisals under Article 51, paragraph 6 of Additional Protocol I. The Court's laconic statement, that it did not have to pronounce on the matter,<sup>148</sup> offers no justification for its silence and it is difficult not to agree with the Dissenting Opinion of Judge Koroma that the non-pronouncement on the issue of belligerent reprisals constituted an exercise of judicial restraint with respect to an issue of crucial importance for the proceedings before the Court.<sup>149</sup> It is impossible to avoid the impression that the Court shied away from the issue because of the heated controversy surrounding it.<sup>150</sup>

Moreover, in *DRC v Uganda*, the Court was disinclined to provide an exhaustive treatment of the legal issues in one noteworthy respect. It treated, a (second) counterclaim of the defendant state Uganda to the effect that a number of Ugandan nationals had been subjected to inhuman treatment by Congolese armed forces<sup>151</sup> as an attempt to exercise diplomatic protection on behalf of the individuals concerned and rejected it on the basis that Uganda had failed to substantiate the individual's Ugandan nationality. As was demonstrated in the Separate Opinion of Judge Simma, the Court, by confining its legal analysis to narrowly (and somewhat carelessly) worded Ugandan argument in support of its claim, missed the opportunity to confirm that the protective scope of the law of armed conflicts, both under Article 75 of Additional Protocol I and under the 'fundamental general principles' of the law of armed conflicts as identified in *Nicaragua*, extends to persons irrespective of their nationality.<sup>152</sup> Judge Simma referred explicitly to the claim by the United States that certain 'enemy unlawful combatants' fall outside the protective scope of the Geneva Convention in order to explain why he attached great importance to dealing exhaustively with the Ugandan claim in question:

The reader may ask himself why I should give so much attention to an incident which happened more than seven years ago, whose gravity must certainly pale beside the unspeakable atrocities committed in the war in the Congo. I will be very clear: I consider that legal arguments clarifying that in situations like the one before us no gaps exist in the law that

<sup>147</sup> See 2.3, text accompanying n 60; on this question see eg S Oeter, 'Methods and Means of Combat' in Fleck (n 113) 119, 165–8 (marginal n 433).

<sup>148</sup> See 2.4.

<sup>149</sup> Dissenting Opinion of Judge Koroma, *Nuclear Weapons* (n 4) 574–5; for an unconvincing attempt to justify the Court's silence on the matter, see, Dissenting Opinion of Judge Shahabuddeen, *Nuclear Weapons* (n 4) 389.

<sup>150</sup> For the controversy within the Court, see, on the one hand, Dissenting Opinion of Judge Schwebel, *Nuclear Weapons* (n 4) 328–9, and, on the other hand, Dissenting Opinion of Judge Koroma, *Nuclear Weapons* (n 4) 574–5; for the controversy surrounding the more 'audacious' approach adopted by the ICTY in *Kuprescic* (see 3.3), see the quotation accompanying n 127 and the reference therein.

<sup>151</sup> For the specifics of the factual allegations, see *DRC v Uganda* (n 6) para 308.

<sup>152</sup> For the details of the legal analysis, see Separate Opinion of Judge Simma, *DRC v Uganda* (n 6) paras 24–9.

would deprive the affected persons of any legal protection, have, unfortunately, never been as important as at present, in the face of certain deplorable developments.<sup>153</sup>

*Prosecute or Extradite* constitutes the most recent instance of the Court's inclination to avoid certain difficult issues pertaining to the law of armed conflicts. In that case, the Court declined to deal with the question of whether Senegal had violated a customary law duty to prosecute or extradite a non-national alleged to have committed a war crime in a non-international armed conflict abroad,<sup>154</sup> and confined its jurisdiction to the *aut iudicare aut dedere* regime under the Torture Convention. The reason given by the Court for its limited approach was the absence of a dispute between the parties at the moment of the filing of Belgium's application.<sup>155</sup> As demonstrated in the Separate Opinion of Judge Abraham, it was not inevitable that the Court would adopt such a formalistic approach; had it been genuinely willing to confront the substantive legal issue in question it could have done so.<sup>156</sup> Interestingly, Judge ad hoc Sur, who also rejected the Court's narrow approach to its jurisdiction, opined that the Court was unwilling to address the substantive legal issue out of fear that it would have had to deny the crystallization of the customary law duty as alleged by Belgium, thereby adversely interfering with the development of the law.<sup>157</sup>

All in all, examples of an exhaustive treatment of the legal issues in the *Wall* Opinion are scarce. This is probably best explained by the Court's desire to lend its stamp of approval to certain legal positions which enjoyed (and continue to enjoy) widespread support within the international community. On quite a number of other occasions the Court has been selective. In most instances, the Court would appear to have been disinclined to enter into a thorny area of legal controversy; perhaps at times it was also driven by a reluctance to interfere with a desirable legal development. This explanation, however, does not apply to the *Wall* Court's restraint with respect to the state of necessity as a ground for excluding international wrongfulness or to the *DRC v Uganda* Court's unwillingness to deny the inexistence of legal black holes in the law of armed conflicts.

#### 4. The Court as a political agent and as a diplomat

If one observes the developments from a distance, one might conclude that the Court, in two instances in which the law of armed conflict formed the core of the subject matter before it, in some way stepped out of the judicial role accorded to it. On one occasion, the Court displayed certain features of a political agent, and on

<sup>153</sup> *DRC v Uganda* (n 6) para 19.

<sup>154</sup> On the question whether a customary duty in such cases exists, see Claus Krefß, 'Reflections on the *Iudicare* Limb of the Grave Breaches Regime' (2009) 7 *J Intl Criminal Justice* 789, 794–5.

<sup>155</sup> *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (n 10) para 54.

<sup>156</sup> Individual Opinion of Judge Abraham, *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (n 10) paras 6–20.

<sup>157</sup> Dissenting Opinion of Judge Sur, *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (n 10) paras 17–18.

the other, one might be forgiven for thinking that the Court was composed of diplomats rather than judges. I shall deal with these two cases in turn.

#### 4.1 *Wall* and the pressure of political expectations

In *Wall*, the Court faced an expectation on the part of an overwhelming number of political actors in the international community to seize the occasion to condemn the ‘quasi-defendant’ State of Israel for its construction of the barrier in the occupied territories. While it is readily admitted that Israel had contributed significantly to this expectation through the construction of the barrier and much more through its settlement policy in violation of Article 49, paragraph 6 of Geneva Convention IV, the overwhelming expectation amongst international political actors may be said to have left traces in the judicial quality of the Court’s Advisory Opinion.<sup>158</sup> The Court’s tendency to be exhaustive in some parts and selective in others, as highlighted above,<sup>159</sup> worked largely to the detriment of Israel. The Court’s struggle with the temptation to produce a politically palatable opinion is most apparent, however, in the way it dealt with Israel’s central argument of military necessity. While the Court (correctly) observed that ‘the applicable international humanitarian law contains provisions enabling account to be taken of military exigencies in certain circumstances’, the Court’s application of those provisions to the facts consisted in the following single sentence:

However, on the material before it, the Court is not convinced that the destructions carried out contrary to the prohibition in Article 53 of the Fourth Geneva Convention were rendered absolutely necessary by military operations.<sup>160</sup>

This provoked the following declaration by Judge Buergenthal:

It may well be, and I am prepared to assume it, that on a thorough analysis of all relevant facts, a finding could well be made that some or even all segments of the wall being constructed by Israel on the Occupied Palestinian Territory violate international law . . . But to reach that conclusion with regard to the wall as a whole without having before it or seeking to ascertain all relevant facts bearing directly on issues of Israel’s legitimate right to self-defence, military necessity and security needs, given the repeated deadly terrorist attacks in and upon Israel proper coming from the Occupied Palestinian Territory to which Israel has been and continues to be subjected, cannot be justified as a matter of law.<sup>161</sup>

It is hard to disagree with Judge Buergenthal.<sup>162</sup> In fact, the Court’s outright failure genuinely to address the main Israeli argument came dangerously close to an abdication of its judicial function at a central juncture of its Opinion, and the Supreme Court of Israel was soon able to formulate a powerful challenge to the

<sup>158</sup> For a stronger verdict, see M Pomerance, ‘The ICJ’s Advisory Jurisdiction and the Crumbling Wall between the Political and the Judicial’ (2005) 99 *AJIL* 26, 40, writing that the Court provided ‘a “judicial” cover for further political pressures’.

<sup>159</sup> See 3.4.

<sup>160</sup> *Wall* (n 5) para 135.

<sup>161</sup> Declaration of Judge Buergenthal, *Wall* (n 5) para 3.

<sup>162</sup> For the same view see Imseis (n 92) 111.

*Wall* Opinion's authority by carefully setting out the 'minimal factual basis' for the Court's main legal conclusion.<sup>163</sup> While the Court's succumbing to the temptation to make the decision politically palatable has, unsurprisingly, been conducive to the Opinion's positive reception in the international political arena, and while it has not affected positive appraisals in international legal scholarship,<sup>164</sup> it should not be overlooked that the Court's not allowing justice to 'be seen to be done'<sup>165</sup> came at a price which may well outweigh any possible short-term political gain. The *Wall* Court's treatment of Israel's military necessity claim is likely to have done a disservice to the overall credibility of the international judicial function, as David Kretzmer aptly observed:

International mechanisms for ensuring compliance with norms of [International Humanitarian Law] have always been extremely weak. It is essential that they be strengthened. A major step in this direction has been taken with the establishment of the International Criminal Court. Nevertheless, while this step has been welcomed by many, some experts and a few states, foremost among which are the United States and Israel, remain sceptical. Their scepticism is mainly grounded in the fear that the ICC's decisions will be dictated by politics rather than by law. In this atmosphere the credibility of international judicial organs involved in assessing compliance with IHL becomes more important than ever. The credibility rests largely on the professionalism of such organs and the soundness in law of their opinions. When looked at from this point of view, an opinion whose findings 'are not legally well-founded' is hard to applaud.<sup>166</sup>

#### 4.2 An exercise in diplomacy in *Nuclear Weapons*

One need not be terribly audacious to assume that the formulation of every reasonably difficult decision the Court has had to render has involved an element of judicial diplomacy. The 'titanic tension between State practice and legal principle'<sup>167</sup> which the Court faced in *Nuclear Weapons* probably best explains why important parts of the Opinion appear to be more an exercise in diplomacy than anything else. Already the selectivity of the Court's legal analysis, as highlighted above,<sup>168</sup> can be called diplomatic as the Court thereby avoided two controversial issues of great political sensitivity. It is above all the Court's famous *non liquet*, however, that makes the *Nuclear Weapons* Court appear like a group of diplomats trying to overcome a seemingly irreconcilable divergence of opinion among them. It suffices to read with care the following single sentence to appreciate how desperately those judges, who were in favour of categorically outlawing the use of nuclear weapons, must have struggled over every single word to reduce the significance of the *non liquet* as much as possible:

<sup>163</sup> *Mara'abe et al v The Prime Minister of Israel et al* (Supreme Court Sitting as the High Court of Justice) [2005] HCJ 7957/04 (<[http://elyon1.court.gov.il/Files\\_ENG/04/570/079/A14/04079570.A14.HTM](http://elyon1.court.gov.il/Files_ENG/04/570/079/A14/04079570.A14.HTM)> (accessed 17 May 2013)) paras 61–72, and in particular, para 64.

<sup>164</sup> For a prominent example see Richard A Falk, 'Toward Authoritativeness: The ICJ Ruling on Israel's Security Wall' (2005) 99 *AJIL* 42.

<sup>165</sup> *Imseis* (n 92) 117–18 (with the precise reference to the famous axiom articulated by Lord Justice Hewart, 117 [n 95]).

<sup>166</sup> Kretzmer (n 138) 102.

<sup>167</sup> Judge Schwebel (n 133).

<sup>168</sup> See 3.4.

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*. [emphasis added]<sup>169</sup>

If one reads together the crucial paragraphs of the Court's reasons<sup>170</sup> and its somewhat differently worded summary in the *dispositif*,<sup>171</sup> one cannot but form the impression that the judges adopted precisely that strategy to which diplomats resort at moments of crisis: the search for constructive ambiguity.<sup>172</sup> As though the judges wished to further confirm precisely this impression, they *all*<sup>173</sup> added declarations or separate or dissenting opinions, which were striking in the way they resembled vastly divergent 'interpretive statements' made by state representatives immediately after the adoption of a constructively ambiguous legal document. The final element in this demonstration of the fine art of judicial diplomacy as applied by the *Nuclear Weapons* Court consisted of the making of the further concession to those in favour of a categorical statement of illegality that there is 'an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control'.<sup>174</sup> The need to make this concession to finalize the 'judicial compromise package' must have been so imperative that the limitation posed by the question put to the Court was relegated to a consideration of secondary importance.<sup>175</sup>

The question of whether the *Nuclear Weapons* Court's exercise in diplomacy was a success or not from the perspective of legal policy is almost as difficult to answer as the question that was before the Court. An author of no lesser eminence than the late Thomas Franck has given an affirmative answer:

The result, uncannily, was almost universally welcomed. It tended to be welcomed as Solomonic by governments with and without nuclear weapons and by NGOs that had sparked the request.<sup>176</sup>

Be that as it may, from a legal perspective there is also room for a more critical assessment of Part E of paragraph 105 of the Court's Opinion, which, because of its importance, shall be reproduced once again:

It follows from the above-mentioned requirements that the 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.

<sup>169</sup> *Nuclear Weapons* (n 4) para 95.

<sup>170</sup> *Nuclear Weapons* (n 4) paras 94–7; see 2.3.

<sup>171</sup> *Nuclear Weapons* (n 4) para 105 *sub E*; see 2.3.

<sup>172</sup> Similarly TF Franck, 'Fairness and the General Assembly Advisory Opinion' in Boisson de Chazournes and Sands (n 11) 514–15: 'a text that is more diplomatic than determinate'.

<sup>173</sup> Above, text accompanying n 11 and the reference therein.

<sup>174</sup> *Nuclear Weapons* (n 4) para 105 *sub F*.

<sup>175</sup> The Court was criticized by Judge Guillaume for having decided *ultra petita*: Separate Opinion, *Nuclear Weapons* (n 4) para 1, and by Judge Schwebel, Dissenting Opinion, *Nuclear Weapons* (n 4) 329.

<sup>176</sup> Franck (n 172) 519.

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 extreme circumstance of self-defence, in which the very survival of a State would be at stake.<sup>177</sup>

It is true that this formulation, if read within the context of the Opinion as a whole, leaves room for an *interpretatio benevolentiae*, according to which the Court's conclusion would not run counter to the principle of complete separation between the *jus in bello* and the *jus contra bellum*. Christopher Greenwood has offered such an interpretation:

The Court . . . left open the possibility that the use of nuclear weapons might, in some circumstances, be compatible with the *jus in bello*. To be lawful, it would, of course, *also* have to comply with the requirements of the *jus ad bellum*, i.e. of the right of self-defence. The two requirements are, however, cumulative, not alternative. There is, therefore, no need to read the second part of that paragraph as setting up the *jus ad bellum* in opposition to the *jus in bello*.<sup>178</sup>

Attractive as this interpretation is, it does not flow naturally from the Court's formulation;<sup>179</sup> furthermore, as the various individual opinions attached to the main Opinion reveal, it does not represent the shared understanding of those judges. This is most evident from the following passage in Judge Fleischhauer's Separate Opinion, which he formulated in support of Part E of paragraph 105:

The principles and rules of the humanitarian law and the other principles of law applicable in armed conflict, such as the principle of neutrality on the one side and the inherent right of self-defence on the other, which are through the very existence of the nuclear weapon in sharp opposition to each other, are all principles and rules of law. None of these principles and rules is above the law, they are of equal rank in law and they can be altered by law. They are justiciable. Yet international law has so far not developed—neither in conventional nor in customary law—a norm on how these principles can be reconciled in the face of the nuclear weapon . . . there is no rule giving prevalence of one over the other of these principles and rules.<sup>180</sup>

If read in that sense, the Court's *non liquet*, as Judge Higgins rightly stated, 'goes beyond anything that was claimed by the nuclear-weapon states appearing before the Court, who fully accepted that any lawful threat or use of nuclear weapons would have to comply with both the *jus ad bellum* and the *jus in bello*',<sup>181</sup> and it raises, as Christopher Greenwood rightly observed, 'the spectre of a return to theories of . . . the maxim embodied in the German proverb that *Kriegsraison geht vor Kriegsmanier* ("necessity in war overrules the manner of warfare)". By providing

<sup>177</sup> *Nuclear Weapons* (n 4) para 105 *sub* E; for the virtually identical formulation in the reasons, see 263, para 97.

<sup>178</sup> C Greenwood, 'Jus ad bellum and Jus in Bello in the Nuclear Weapons Advisory Opinion' in Boisson de Chazournes and Sands (n 11) 247, 264.

<sup>179</sup> For the same view, see Dissenting Opinion of Judge Higgins, *Nuclear Weapons* (n 4) para 29.

<sup>180</sup> Separate Opinion of Judge Fleischhauer, *Nuclear Weapons* (n 4) 308.

<sup>181</sup> Judge Higgins (n 179).



room for such an interpretation, the formulation of the *non liquet* carries with it an element of *destructive* ambiguity. This makes the encounter with the vanishing point of the law in *Nuclear Weapons* a deeply ambiguous moment in the Court's history.

### 5. Conclusion: on the Court's contribution to the development of the law of armed conflicts

It is probably fair to say that, for a variety of reasons, the Court has not contributed decisively to the settlement of inter-state disputes through its jurisprudence on the law of armed conflicts. In *Nicaragua* and, albeit to a lesser extent, in *DRC v Uganda*, armed conflict issues were of secondary importance compared to questions regarding the *jus contra bellum*. In *Nuclear Weapons* there was no concrete dispute awaiting judicial settlement, and in *Wall* the underlying dispute was of such complexity that it is difficult to think of any opinion that could have contributed in any significant manner to its resolution.<sup>182</sup>

The question of whether and in what way the Court has contributed to the development of the law of armed conflicts requires a nuanced answer. In *Nicaragua*, the Court successfully, if somewhat belatedly, lent its support to the transposition of the classic 'laws and customs of war' into the modern law of armed conflicts. In the same Judgment, the Court began to entrench modern treaty law on the law of armed conflicts, as established by the 1949 Geneva Conventions, into customary international law. In both respects, *Nicaragua* was confirmed by *Nuclear Weapons* and the latter Opinion carried the 'transfer and entrenchment operation' further into the realm of the law on the conduct of hostilities.

In both decisions, the Court made it clear that it did not consider the transposition of the classic laws of war into the Charter era as a largely mechanical transplant. Rather, it strongly emphasized that the substitution of the concept 'international humanitarian law' for that of 'laws and customs of war' was not only a terminological matter, but also signified the liberation of the law of armed conflicts from the normative limitations flowing from the traditional *idea* of inter-state reciprocity as expressed by traditional concepts such as the *si omnes* clause and belligerent reprisals. By connecting the law of armed conflicts with 'elementary considerations of humanity', by declaring an 'intrinsic humanitarian character that permeates the entire law of armed conflict',<sup>183</sup> and by trying to establish a relationship of complementarity—rather than exclusion—with international human rights law,<sup>184</sup> the Court reconceptualized the traditional 'laws and customs

<sup>182</sup> Somewhat ironically, the one case that depended heavily on a question of the law of armed conflict, in which the Court's influence on the settlement of a dispute may have been most significant, did not come to judgment on the merits: *Trial of Pakistani Prisoners of War (Pakistan v India)* (Order) [1973] ICJ Rep 347; for the subject matter, see [1973] ICJ Pleadings, 3–7. See, however, Schwebel (n 116) 736–7.

<sup>183</sup> See 2.1.2.

<sup>184</sup> See 2.1.6.

of war', the codification of which was driven to a significant extent by a utilitarian calculation of state interest, as an integral humanitarian legal regime designed, above all, to ensure respect for the human person.<sup>185</sup> In so doing, and in strengthening the compliance pull through judicial recognition of the *erga omnes* character of the bulk of the rules on armed conflicts and even a duty on the part of third states to react to violations of that body of law,<sup>186</sup> the Court has made a powerful contribution to what Theodor Meron, in a well-known article, has called the 'Humanization of Humanitarian Law'.<sup>187</sup>

At the same time, it must be added that the Court's reluctance to recognize the *jus cogens* character of the core of the law of armed conflicts,<sup>188</sup> its caution in respect of the idea of a right to reparation for individual victims of war crimes,<sup>189</sup> and its refusal to touch upon the customary nature of the prohibition to have recourse to belligerent reprisals against civilians as contained in Article 51, paragraph 6 of Additional Protocol I,<sup>190</sup> demonstrate that the Court is prudent enough not to fully realize, by way of deductive reasoning, the 'progressive potential' which the Court's reconceptualization of the laws of war in a humanitarian spirit entails. Despite its clearly articulated humanitarian impetus, the Court, all in all, has been significantly less adventurous than the ICTY in its stormy early years and it is unlikely that the Court would have found it easy to go as far as the Yugoslavia Tribunal and state that '[a] State-sovereignty-oriented approach has been gradually supplanted by a human-being-approach'.<sup>191</sup>

While the Court has successfully transposed the laws of war into our times, while it has powerfully reconceptualized this body of law in a humanitarian spirit, and while it has firmly entrenched the core part of the relevant rules in customary international law, the Court's contribution to the detailed elaboration of this field of law remains limited. This is, of course, due primarily to the fact that the occasions on which the Court has had the opportunity to pronounce on questions of the law of armed conflicts have been fairly limited in number. However, and as was explained in some detail above,<sup>192</sup> the Court has not fully seized its relatively few opportunities. This is particularly true of the *Wall* Court's refusal to engage genuinely with the various legal rules on the protection of property interests in armed conflicts. For the time being, it seems fair to say that it is above all the International Committee of the Red Cross, and far less the Court, that has helped in the systematization and more precise articulation of certain areas of the law of armed conflicts.<sup>193</sup>

<sup>185</sup> For an earlier assessment in this direction see J Gardam, 'The Contribution of the International Court of Justice to International Humanitarian Law' (2001) 14 *Leiden JIL* 349, 352.

<sup>186</sup> See 2.1.3; 2.4.1.5.

<sup>187</sup> T Meron, 'The Humanization of Humanitarian Law' (2000) 94 *AJIL* 239.

<sup>188</sup> See 2.1.3; 3.1.

<sup>189</sup> See 2.4.1.4; 3.1.

<sup>190</sup> See 2.4.1.3; 3.d.

<sup>191</sup> *Prosecutor v Tadić* (n 100) para 97.

<sup>192</sup> See 3.4.

<sup>193</sup> See eg Ferraro (n 90), which has been referred to repeatedly in this chapter, and see, probably most prominently, N Melzer (ed), *Interpretative Guidance on the Notion of Direct Participation in*

When it comes to the *progressive* development of the law of armed conflicts, it is again not the Court, but the ICTY and perhaps the international *criminal* courts more generally,<sup>194</sup> that must be mentioned in the first place.<sup>195</sup> The ICTY, in its seminal 1995 *Tadić* Decision on Jurisdiction, declared the crystallization of a large body of customary law rules pertaining to the law of non-international armed conflicts and extending to the conduct of hostilities. Moreover, the various international criminal courts have subsequently developed an impressive body of jurisprudence on the modern law of war crimes committed in international and non-international armed conflicts. The Court was at best marginally concerned with those two perhaps most important broader developments in the law of armed conflicts. Certain passages of the Judgment in the *Arrest Warrant* case even read as though the Court had felt the need to cool the temperature somewhat to prevent the stormy renaissance of international criminal justice getting overheated.<sup>196</sup>

Finally, the Court has had only few occasions to confront the most recent challenges of the law of armed conflicts. The *Wall* Court's treatment of the exploitation of natural resources in an occupied territory<sup>197</sup> constitutes one such case, and another is the same Court's subtle allusion to the problem of 'transformative occupation'<sup>198</sup> when referring to international human rights law within the context of Article 43 of the 1907 Hague Regulations.<sup>199</sup> Major challenges, though,<sup>200</sup> such as the 'privatization' of armed violence through the use of private security companies<sup>201</sup> and cyber operations,<sup>202</sup> have not yet reached the Court.

At some point or another, the Court will have to address the point powerfully made by David Kretzmer in a recent article<sup>203</sup> that the increasing resort by states to

*Hostilities under International Humanitarian Law* (Geneva: International Committee of the Red Cross, 2009); see also the International Committee of the Red Cross's *Customary Law Study*: J-M Henckaerts and L Doswald-Beck (eds), *Customary International Law. Volume I: Rules* (Cambridge: CUP, 2005); furthermore, certain less authoritative groups of international law experts, such as those convened by the International Institute of Humanitarian Law to draw up L Doswald-Beck (ed), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (Cambridge: CUP, 1995), deserve to be mentioned here.

<sup>194</sup> For a detailed analysis see S Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford: OUP, 2012) 54–61; S Darcy and J Powderly (eds), *Judicial Creativity at the International Criminal Tribunals* (Oxford: OUP, 2011).

<sup>195</sup> Here again mention must be made of the International Committee of the Red Cross.

<sup>196</sup> In that respect, reference is perhaps primarily to be made to the Court's *obiter dictum* on immunity *ratione materiae* before foreign criminal courts (see 2.4.2; quotation accompanying n 84).

<sup>197</sup> See 2.2.2.3; citation accompanying n 55; for a detailed analysis see L van den Herik and D Dam-de Jong, 'Revitalizing the Antique War Crime of Pillage: The Potential and Pitfalls of Using International Criminal Law to Address Illegal Resource Exploitation During Armed Conflict' [2011] *CLF* 237.

<sup>198</sup> See eg Ferraro (n 90) 67–72.

<sup>199</sup> See 2.2.2.3; quotation accompanying n 52.

<sup>200</sup> For a useful overview, see the International Committee of the Red Cross's Report *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 31/C/11/5.1.2, October 2011.

<sup>201</sup> LA Dickinson, *Outsourcing War and Peace: Preserving Public Values in a World of Privatized Foreign Affairs* (New Haven and London: YUP, 2011).

<sup>202</sup> M Schmitt (ed), *Talinn Manual on the International Law Applicable to Cyber Warfare* (Cambridge: CUP, 2013) 75–256.

<sup>203</sup> D Kretzmer, 'Rethinking the Application of International Humanitarian Law in Non-International Armed Conflict' (2009) 42 *Israel L Rev* 1, 8.

the much broader targeting and detention powers available to them under the ‘law of armed conflicts paradigm’ to address highly destructive (transnational) terrorist threats<sup>204</sup> sheds important light on the fact that the concept of ‘international humanitarian law’ covers only one side of the coin of the ‘law of armed conflicts’ so that, despite the undisputable ‘humanization’ of the law of armed conflicts in the post-World War II era, an important question mark must be placed over the uncritical way in which the term ‘international humanitarian law’ has come to be used not only by the Court, but also by most political actors and many international lawyers.<sup>205</sup>

<sup>204</sup> Claus Kreß, ‘Some Reflections on the International Legal Framework Governing Transnational Armed Conflict’ [2010] *JCSL* 245.

<sup>205</sup> See, however, Schwebel (n 116) 732: ‘Today we speak of international humanitarian law. In less *euphemistic* days, we spoke of the law of war’ (emphasis added).