

The Contribution of the International Court of Justice to International Humanitarian Law



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October 2012

Structure

- Relationship between IHL and other fields/branches of international law
- Contribution of the ICJ to interpreting and developing rules and principles of IHL – discussion of relevant case law
- Concluding remarks

IHL and other Branches/Areas of International Law

- IHL does not operate in a vacuum:
- International Law of Human Rights;
- International (Peace and) Disarmament Law;
- International Environmental Law;
- International Criminal Law.
- Treaty Law (ILC study topic – drafting articles on this issue)

IHL and Disarmament (1)

- - The Geneva Gas Protocol of 1925;
- - The 1972 Bacteriological and Chemical Weapons Convention;
- - The Non-Proliferation Treaty of 1968;
- - The Convention on the Prohibition of Military or Any Other Hostile Use of Environmentally Modification Techniques of 1976 (ENMOD);
- - 1981 Conventional Weapons Convention and its Protocols on prohibiting use of non-detectable fragments, mines, booby-traps and other similar devices and incendiary weapons;
- - The 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer or Anti-Personnel Mines and on Their Destruction (Mine Ban Treaty, or Ottawa Treaty)
- - 2008 Convention on Cluster Munitions.

Disarmament (2)

- Prohibition of unnecessary suffering or superfluous injury – cardinal principle of IHL (ICJ, *Nuclear Weapons Advisory Opinion*).
- Compliance with the principle of distinction between combatants and non-combatants – cardinal principle of IHL (ICJ, *Nuclear Weapons Advisory Opinion*).
- AP I, Art. 35(2): “It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause *superfluous or unnecessary suffering*.”

IHL and Protection of the Environment

- Legal basis: AP I, Art. 35(3) (Methods and Means of Warfare – Basic Rules) and 55 (Protection of the natural environment); 1978 ENMOD Convention.
- AP I, Art. 35(3) : “It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause *widespread, long-term and severe damage* to the natural environment.”
- While AP I speaks about widespread, long-term, and severe damage to the natural environment, the 1978 ENMOD Convention uses the three qualifications disjunctively, and presupposes destruction, damage, or injury to any other State Party.

The Environment and Environmental Considerations

- The environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn (*Nuclear Weapons*, par. 29).
- States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives (*Nuclear Weapons*, par. 30).

ICJ on Protection of the Environment under IHL

- Because of their radiation, nuclear weapons have harmful effects on health, agriculture, natural resources and future generations (underlining the potential to destroy all civilization and the entire ecosystem of the planet).
- While the existing international law relating to the protection and safeguarding of the environment does not specifically prohibit the use of nuclear weapons, it indicates important **environmental factors** that are properly to be taken into account in the context of the **implementation of the principles and rules of the law applicable in armed conflict.**

IHL and Treaty Law

- International Law Commission: “The effect of armed conflict on treaties”:
- First, the traditional view held that treaties did not survive armed conflict.
- Second, early twentieth century view maintained that war does not affect treaties, subject to some exceptions.
- Third, the modern view is embodied in the general statement that armed conflict does not *ipso facto* terminate or suspend treaties.

Effect of Armed Conflict on Treaties

- **Factors to be taken into account according to ILC:**
- Type of treaty;
- Magnitude of the conflict;
- There is strong support for the proposition that operations carried out pursuant to Chapter VII of the Charter of the United Nations will suspend or abrogate inconsistent treaties;
- Whereas it was traditionally understood that armed conflict had a greater effect on bilateral treaties than on multilateral treaties, there is evidence that this distinction has diminished.

IHL and International Criminal Law

- ***Creation of ad hoc* Tribunals and internationalised criminal judicial bodies to enforce IHL:**
- **ICTY**
- - Article 2 of the ICTY Statute gives the Tribunal the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 1949;
- - Article 3 of the ICTY Statute gives the Tribunal power to prosecute persons for violations of the laws or customs of war.
- **ICTR**
- - Article 4 of the ICTR: Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II
- Special Court for Sierra Leone, Panels of East Timor, Extraordinary Chambers in the Courts of Cambodia.

IHL in the ICC Statute

- Article 8 of the ICC Statute gives a very detailed description of war crimes, distinguishing between international and non-international armed conflicts:
- (a) Grave breaches of the Geneva Conventions of 1949, Art. 8(2)(a)(i)-(viii);
- (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, Art. 8(2)(b)(i)-(xxvi);
- If one reads the 26 items listed under this paragraph then it is possible to discern the criminalization of behaviour prohibited under the international humanitarian law instruments.
- (c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, Art. 8(2)(c)(i)-(iv).

Highlight: ICTY Case Law

- After recalling the ICJ's *Nuclear Weapons* precedent that the principle of distinction between civilian and combatants was a cardinal principle of humanitarian law, the ICTY went further holding that the customary rule as determined by the Court was applicable in any type of armed conflict, hence in both international and internal armed conflicts.
- In dealing with the question as to when attacks on military objectives are unlawful because they cause indiscriminate damage to civilians even though the objectives in themselves are legitimate the Trial Chamber held that the concept of 'elementary considerations of humanity' as developed by the Court in the *Corfu Channel* and in the *Nicaragua* cases and in the *Nuclear Weapons* advisory opinion had to be used to interpret and apply this principle in practice (*Prosecutor v. Kupreškić*, 2000).

ICJ's Contribution to IHL

- First and foremost the ICJ clarifies and develops rules and principles of IHL applicable to the cases before it: that legal process has been characterized also as the “humanization of IHL”, see T. Meron;
- It integrates IHL concepts and principles within the wider framework of international law;
- It also contributes to maintaining the unity of IHL and its uniform application by international judicial bodies operating in the field of IHL.

Corfu Channel (UK v. Albania), Merits, 1949

Minelaying issue:

- The obligations incumbent upon the Albanian authorities consisted in **notifying**, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in **warning the approaching British warships** of the imminent danger to which the minefield exposed them. **Such obligations are based, not on the Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war;... and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.**

Nicaragua case (Nicaragua v. US) Merits, 1986

- The first principle determined by the Court is that Article 3 common to the four 1949 Geneva Conventions (GCs) encompasses rules applicable in internal and international armed conflicts.
- In international armed conflicts the rules laid down in common Article 3 are **applicable as a minimum standard**, in addition to the more sophisticated rules stipulated in the four Conventions.
- The Court reached such a conclusion because, in its view, the **rules laid down in common Article 3** to the 1949 GCs reflect *elementary considerations of humanity*.

Obligation to ‘Respect’ and ‘Ensure Respect’

- [T]here is an **obligation** on the United States Government, in the terms of Article 1 of the Geneva Conventions, to **‘respect’** the Conventions and even **‘to ensure respect’ for them ‘in all circumstances’**, since such an obligation **does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression.**
- The United States is thus under an obligation not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3 common to the four 1949 Geneva Conventions . . .

Legality of the Threat or Use of Nuclear Weapons (1996)

- **“Is the threat or use of nuclear weapons in any circumstance permitted under international law?”**
- Noting that nuclear weapons were invented after most of the principles and rules of humanitarian law applicable in armed conflicts had already come into existence the Court held: **“However, it cannot be concluded from this that the established principles and rules of humanitarian law applicable in armed conflict did not apply to nuclear weapons. Such a conclusion would be incompatible with the intrinsically humanitarian character of the legal principles in question which permeates the entire law of armed conflict and applies to all forms of warfare and to all kinds of weapons, those of the past, those of the present and those of the future.”**

Fundamental Principles of IHL (1)

- The *first* fundamental principle of IHL, according to the ICJ “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”.

Fundamental Principles of IHL (2)

- The *second* fundamental principle according to the Court is the **prohibition to cause unnecessary suffering to the combatants**; thus, it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering.
- In the words of the Court, *unnecessary suffering is harm greater than that unavoidable to achieve legitimate military objectives.*

2004 *Wall Advisory Opinion*

- **Applicable Law:**
- Section III of the 1907 Hague Regulations, which concerns “Military authority over the territory of the hostile State”.
- GC IV, Articles 47 (Inviolability of Rights), 49 (Deportations, transfers, evacuations), 52 (Protection of workers), 53 (Prohibition of destruction) and 59 (Relief – Collective relief).

2004 *Wall Advisory Opinion*

- **Destruction of property**
- **Article 53: “Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.”**
- **The Court found that the construction of the wall had led to the destruction or requisition of properties under conditions which contravened the requirements of Articles 46 and 52 of the Hague Regulations of 1907 and of Article 53 of the Fourth Geneva Convention.**

Reparations for Violations of IHL Norms

- The Court indicated that **reparation** should take place **for all damage** incurred from the construction of the Wall by all **natural or legal persons**.
- It suggested the existence of a *restitutio in integrum* obligation on the part of Israel for land, orchards, olive groves and other immovable property seized from any natural or legal person for purposes of construction of the wall in the Occupied Palestinian Territory.
- Keeping in mind that the Court settles disputes or renders advice at an inter-State level it is rather remarkable that it acknowledged the right to reparation directly to natural or legal persons.
- Recognizing the right to reparation for natural and legal persons for violations of international humanitarian law obligations is an important contribution the Court renders to the interpretation and development of this branch of law.

Obligations for other States under GC IV

- Given the character and the importance of the rights and obligations involved, the Court found that:
- All States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem.
- Additionally, all the States parties to the GC IV are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention.

Armed Activities Case (DRC v. Uganda), 2005

- Uganda, by the conduct of its armed forces, which committed acts of killing, torture and other forms of inhumane treatment of the Congolese civilian population:
- Destroyed villages and civilian buildings,
- Failed to distinguish between civilian and military targets;
- Failed to protect the civilian population in fighting with other combatants;
- Trained child soldiers;
- Incited ethnic conflict and failed to take measures to put an end to such conflict;
- Failed, as an Occupying Power, to take measures to respect and ensure respect for international humanitarian law in Ituri district,
- violated its obligations under international humanitarian law

Summary: Court's Findings re IHL

- The determination of customary rules that express the 'fundamental' or 'cardinal' general principles of humanitarian law:
 - Principle of distinction between civilians and combatants;
 - Prohibition of causing unnecessary suffering to combatants;
 - Obligation to respect and to ensure respect for the Conventions.
- Interpreting Common Article 3 of the 1949 GCs as a minimum yardstick applicable to all armed conflicts (in *Nicaragua v. US*, 1986);
- State responsibility in the event of violations of international humanitarian law.
- Awarding reparations to individuals/legal entities/ and States in case of violation of IHL norms.

Relevant Literature

- Judith Gardam, The Contribution of the International Court of Justice to International Humanitarian Law, *Leiden Journal of International Law* Volume 14 (2001), 349-365
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- Gentian Zyberi, The Development and Interpretation of International Human Rights and Humanitarian Law Rules and Principles Through the Case-law of the International Court of Justice, *Netherlands Quarterly of Human Rights* 25 (2007), 117-139.
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