

# DON'T MENTION THE WAR (ON TERROR): FRAMING THE ISSUES AND IGNORING THE OBVIOUS IN THE ICJ'S 2005 *ARMED ACTIVITIES* DECISION\*

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## I INTRODUCTION

It is widely recognised that international relations — indeed the very structure and actors comprising the international scene — have changed enormously since the establishment of the United Nations at the end of the Second World War.<sup>1</sup> In particular, the period in international relations following September 11, 2001 — and especially since the invasion of Iraq in 2003 by a United States-led coalition — has been variously depicted as a ‘new constitutional moment’,<sup>2</sup> a ‘difficult and precarious transitional moment in the international legal system governing the use of force’,<sup>3</sup> and a ‘Grotian Moment’.<sup>4</sup> The invasion of Iraq itself has been described as marking ‘a crucial moment in the history of international law’,<sup>5</sup> and having about it ‘an aura of ominous implication for international order’.<sup>6</sup>

The 2005 *Armed Activities on the Territory of the Congo* decision<sup>7</sup> of the International Court of Justice addresses a wide range of important issues in international law, including: the concept of self-defence; the prohibition against the use of force; belligerent occupation; the application of international human

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\* *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Judgment)* [2005] ICJ <<http://www.icj-cij.org>> at 18 May 2007 (‘*Armed Activities*’).

<sup>1</sup> See Anne-Marie Slaughter and William Burke-White, ‘An International Constitutional Moment’ (2002) 43 *Harvard International Law Journal* 1, 2; Tom Farer, ‘The Prospect of International Law and Order in the Wake of Iraq’ (2003) 97 *American Journal of International Law* 621, 627.

<sup>2</sup> Slaughter and Burke-White, above n 1, 2.

<sup>3</sup> Jane Stromseth, ‘Law and Force after Iraq: A Transitional Moment’ (2003) 97 *American Journal of International Law* 628, 629.

<sup>4</sup> In the sense of a moment that ‘tests the foundations of the discipline, exaggerates its incoherency, and cries out for a reconceptualization, not mere reform’: Ibrahim Gassama, ‘International Law at a Grotian Moment: The Invasion of Iraq in Context’ (2004) 18 *Emory International Law Review* 1, 33.

<sup>5</sup> Carsten Stahn, ‘Enforcement of the Collective Will after Iraq’ (2003) 97 *American Journal of International Law* 804, 822.

<sup>6</sup> Farer, above n 1, 626.

<sup>7</sup> *Armed Activities (Judgment)* [2005] ICJ <<http://www.icj-cij.org>> at 18 May 2007.

rights law and international humanitarian law; and the illegal exploitation of natural resources. The Court's judgment is, at first glance, impressively thorough.<sup>8</sup> However, the judgment seems blissfully unaware of the 'war on terror' which has dominated international relations and international legal scholarship since 2001.<sup>9</sup>

The judgment's silence is particularly surprising in relation to three interrelated clusters of issues: pre-emptive and anticipatory self-defence, particularly in regards to non-state actors and 'failed states'; the question of whether Uganda had committed an act of aggression; and the problem of 'human rights-free zones' in international human rights law and international humanitarian law. Following a brief outline of the factual matrix of the case, the issues in dispute and the Court's findings, this case note examines the Court's treatment of each of these issues in turn, and explores some possible explanations for the judgment's silence on the relevance of those issues within a wider contemporary context. This case note highlights the way in which the judgment quarantines law from politics, and how that distinction is paradoxically reinforced by the separate opinions of several members of the Court.

## II FACTUAL MATRIX, ISSUES IN DISPUTE AND SUMMARY OF FINDINGS

The ICJ action by the Democratic Republic of the Congo ('DRC') against Uganda emerged from a complex set of circumstances following the overthrow of the Congo's long-time President, Mobutu Sese Seko, in 1997.<sup>10</sup> Mobutu came to power in the mid-1960s, and had ruled since then with the support of the US, France and Belgium.<sup>11</sup> With the end of the Cold War, that support weakened and Mobutu's increasingly cruel, kleptocratic and corrupt autocracy became vulnerable to political opposition.<sup>12</sup> Around the same time, ethnic divisions in

<sup>8</sup> For a summary of the case, see Margaret McGuinness, 'Case concerning Armed Activities on the Territory of the Congo: The ICJ Finds Uganda Acted Unlawfully and Orders Reparations' (2006) *American Society of International Law Insights* <<http://www.asil.org/insights/2006/01/insights060109.html>> at 18 May 2006. The Court's decision has been subjected to some early criticism: see generally Phoebe Okowa, 'Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)' (2006) 55 *International and Comparative Law Quarterly* 742; Ryszard Piotrowicz, 'The Easter Bunny, the Tooth Fairy, Santa Clause and the Security Council: A Heart of Darkness at the ICJ in *Democratic Republic of Congo v Uganda*' (2006) 80 *Australian Law Journal* 162, 164.

<sup>9</sup> See, eg. Jackson Nyamuya Maogoto, *Battling Terrorism: Legal Perspectives on the Use of Force and the War on Terror* (2005); Antony Anghie, 'The War on Terror and Iraq in Historical Perspective' (2005) 43 *Osgoode Hall Law Journal* 45; Joan Fitzpatrick, 'Speaking Law to Power: The War against Terrorism and Human Rights' (2003) 14 *European Journal of International Law* 241; Richard Ashby Wilson (ed), *Human Rights in the 'War on Terror'* (2005).

<sup>10</sup> For the sake of simplicity, I use 'DRC' and 'the Congo' interchangeably throughout this case note, including in relation to the period during Mobutu's rule in which the state was called Zaire (October 1971 – May 1997).

<sup>11</sup> See generally Osita Afoaku, *Explaining the Failure of Democracy in the Democratic Republic of Congo: Autocracy and Dissent in an Ambivalent World* (2005) 62–5; Crawford Young and Thomas Turner, *The Rise and Decline of the Zairian State* (1985) 363–95; Michela Wrong, *In the Footsteps of Mr Kurtz: Living on the Brink of Disaster in Mobutu's Congo* (2001).

<sup>12</sup> Afoaku, above n 11, 89–117; Herbert Weiss and Tatiana Carayannis, 'The Enduring Idea of the Congo' in Ricardo René Larémont (ed), *Borders, Nationalism and the African State* (2005) 144–5.

neighbouring Rwanda were growing, reaching a climax with the genocide of Tutsis in April – July 1994,<sup>13</sup> and ending with the overthrow of the Hutu government. An exodus of Hutu refugees — including many former militia and *génocidaires* — crossed Rwanda's border into camps maintained by the United Nations High Commissioner for Refugees, further destabilising Mobutu's Congo.<sup>14</sup> These camps became launching pads for attacks on Rwanda and the Congolese Tutsis (Banyamulenge).<sup>15</sup> When Rwanda's pleas for international assistance went unheeded, the Rwandan army combined with the Banyamulenge and other opposition groups in the Congo to attack the Hutu refugee camps and marched onwards to Kinshasa with help from Uganda, Burundi and Angola.<sup>16</sup>

The rebel leader who emerged, and who eventually succeeded Mobutu in May 1997, was Laurent-Désiré Kabila. As time passed, however, popular opinion in the Congo gradually hardened against the foreign invaders, as well as against the Banyamulenge who were seen to be holding high positions in Kabila's government and army.<sup>17</sup> Although anti-Tutsi feelings had previously existed in the Congo, these sentiments intensified with numerous incidents of harassment and humiliation of local populations by Rwandan and Banyamulenge soldiers, and soon crystallised into anti-Tutsi movements and organisations.<sup>18</sup> These developments required Kabila to distance himself from his foreign sponsors, making public announcements and taking other steps to assert Congolese independence of Rwanda in particular.<sup>19</sup> Meanwhile, Kabila was unable to gain control of the Congo's border areas, which were crucial to Ugandan and Rwandan security.<sup>20</sup> On 27 July 1998, Kabila ordered all foreign troops to leave the Congo's territory.<sup>21</sup> Soon afterwards, more Ugandan and Rwandan soldiers crossed into the Congo and began intermittent clashes with DRC troops.<sup>22</sup>

The 'Second Congo War' (1998–2003) — the events of which were in dispute in *Armed Activities* — involved, at one time or another, the forces of no fewer than nine African countries in armed conflict on the Congo's territory. A variety of rebel groups and other non-state militia were also involved in this conflict.<sup>23</sup>

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<sup>13</sup> On the genocide and events leading up to it: see generally Gérard Prunier, *The Rwanda Crisis: History of a Genocide* (1995); Linda Melvern, *Conspiracy to Murder: The Rwandan Genocide* (2004).

<sup>14</sup> Weiss and Carayannis, above n 12, 146; Prunier, above n 13, 281–311; Afoaku, above n 11, 137.

<sup>15</sup> Weiss and Carayannis, above n 12, 146.

<sup>16</sup> Kevin Dunn, *Imagining the Congo: The International Relations of Identity* (2003) 2–3; Weiss and Carayannis, above n 12, 145–6; Afoaku, above n 11, 134–7.

<sup>17</sup> Afoaku, above n 11, 150.

<sup>18</sup> Filip Reyntjens, 'Briefing: The Second Congo War: More than a Remake' (1998) 98 *African Affairs* 241, 243–4; Weiss and Carayannis, above n 12, 150.

<sup>19</sup> Reyntjens, above n 18, 245; Weiss and Carayannis, above n 12, 150–1.

<sup>20</sup> Weiss and Carayannis, above n 12, 150.

<sup>21</sup> *Ibid* 151.

<sup>22</sup> Reyntjens, above n 18, 246.

<sup>23</sup> Okowa, above n 8, 743. In 1999, the DRC also initiated actions in the ICJ against Burundi (withdrawn in 2001) and Rwanda (withdrawn in 2001 and a new application made in 2002). A more recent ICJ judgment concerns the jurisdiction of the Court and admissibility of the application against Rwanda: *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda) (Jurisdiction)* [2006] ICJ <<http://www.icj-cij.org>> at 18 May 2007.

In early August 1998, a newly formed rebel movement against Kabila, led by mutinous Congolese army units, received support from Ugandan, Rwandan and Burundian troops.<sup>24</sup> In late August 1998, Angola, Zimbabwe and Namibia intervened in support of Kabila.<sup>25</sup> By September 1998, Chad, Libya and the Sudan had also come to Kabila's aid.<sup>26</sup> Shifting allegiances and motivations make it very difficult if not impossible to identify culpability for each of the innumerable human rights abuses committed during this time by both state and non-state parties. Suffice it to say that these wars — and the ongoing conflicts in the Congo — have been conducted at the expense of millions of lives.<sup>27</sup>

In *Armed Activities*, the DRC claimed that Uganda had violated conventional and customary international law in three areas: first, in relation to the principle of non-use of force, peaceful settlement of disputes, respect for sovereignty and non-interference in domestic matters, by occupying DRC territory and actively extending military, logistic, economic and financial support to irregular forces there; second, in relation to respect for sovereignty over natural resources, the right to self-determination, and non-interference in domestic matters, by illegally exploiting Congolese natural resources and pillaging its assets and wealth; and third, in relation to fundamental human rights, by committing acts of oppression, including killing, injuring, abducting or despoiling DRC nationals.<sup>28</sup> In summary, the Court found that Uganda had violated the sovereignty and territorial integrity of the DRC, interfered in the DRC's internal affairs and committed a grave violation of the prohibition against the use of force in art 2(4) of the *Charter of the United Nations*;<sup>29</sup> was an occupying power in part of the DRC;<sup>30</sup> was internationally responsible for violations of international human rights law and international humanitarian law;<sup>31</sup> and was internationally responsible for its military's looting, plundering and exploitation of the DRC's natural resources.<sup>32</sup> However, the Court did not uphold the contention that Uganda had violated the principle of the DRC's sovereignty over its natural resources.<sup>33</sup>

The Court also considered two counterclaims by Uganda: first, that since 1994 the DRC had supported or tolerated military operations and other destabilising activities carried out against Uganda by hostile armed groups based

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<sup>24</sup> The number of these troops eventually swelled to tens of thousands of soldiers from Uganda, Rwanda and Burundi on Congolese territory: see Christian Scherrer, *Genocide and Crisis in Central Africa: Conflict Roots, Mass Violence and Regional War* (2002) 260. See also Weiss and Carayannis, above n 12, 151.

<sup>25</sup> Weiss and Carayannis, above n 12, 151.

<sup>26</sup> Reyntjens, above n 18, 247.

<sup>27</sup> An estimated 3.9 million people died as a result of the Congo wars between 1998 and 2004: Benjamin Coghlan et al, 'Mortality in the Democratic Republic of Congo: A Nationwide Survey' (2006) 367 *The Lancet* 44. Described as 'one of the most devastating humanitarian disasters of our day', the conflicts also displaced nearly 10 per cent of the Congo's population: Weiss and Carayannis, above n 12, 145.

<sup>28</sup> *Armed Activities (Judgment)* [2005] ICJ [24] <<http://www.icj-cij.org>> at 18 May 2007.

<sup>29</sup> *Ibid* [165].

<sup>30</sup> *Ibid* [178].

<sup>31</sup> *Ibid* [219]–[220].

<sup>32</sup> *Ibid* [246].

<sup>33</sup> *Ibid* [244].

in the DRC;<sup>34</sup> and second, that Congolese armed forces had attacked the Ugandan Embassy in Kinshasa, and maltreated and confiscated property belonging to Uganda and Ugandan diplomats and nationals. The first counterclaim did not succeed because Uganda had failed to provide conclusive evidence of the DRC's support for anti-Ugandan rebel groups<sup>35</sup> and the Court could not conclude that the absence of action by the DRC was tantamount to tolerating their activities.<sup>36</sup> The Court upheld the second counterclaim.<sup>37</sup>

### III SELF-DEFENCE, FAILED STATES AND NON-STATE ACTORS

The judgment's treatment of the legal arguments relating to self-defence was surprisingly cursory.<sup>38</sup> The Court rejected allegations that Uganda had been subject to intermittent attacks by Congo-based rebel forces being supplied and equipped by the DRC,<sup>39</sup> and that the attacks had been 'stepped up' immediately preceding the relevant period.<sup>40</sup> Uganda had not reported these escalated attacks to the Security Council,<sup>41</sup> nor had it ever claimed to have been subjected to an attack by the armed forces of the DRC.<sup>42</sup> There was no proof that the DRC was involved in any armed attacks that had been launched on Uganda from the DRC's territory.<sup>43</sup> The Court thus found that 'the legal and factual circumstances for the exercise of a right of self-defence by Uganda against the DRC were not present',<sup>44</sup> and since 'the preconditions for the exercise of self-defence' were also absent, the Court saw no need to consider 'whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces'.<sup>45</sup>

The Court thus neatly skirted a prime opportunity to expound or develop an area of law that has achieved notoriety through *The National Security Strategy of the United States of America* ('*National Security Strategy*').<sup>46</sup> Asserting the right of the US to 'act alone, if necessary, to exercise our right of self-defense by acting pre-emptively against ... terrorists, to prevent them from doing harm against our people and our country',<sup>47</sup> the *National Security Strategy* argues that there is a 'compelling ... case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack'.<sup>48</sup> This appears to expand the application of anticipatory self-defence beyond cases

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<sup>34</sup> Ibid [276].

<sup>35</sup> Ibid [303]–[305].

<sup>36</sup> Ibid [301].

<sup>37</sup> Ibid [340], [343]–[344].

<sup>38</sup> Ibid [141]–[147].

<sup>39</sup> Ibid [120].

<sup>40</sup> Ibid [132], [135].

<sup>41</sup> Ibid [145].

<sup>42</sup> Ibid [146].

<sup>43</sup> Ibid.

<sup>44</sup> Ibid [147].

<sup>45</sup> Ibid.

<sup>46</sup> National Security Council (US), *The National Security Strategy of the United States of America* (2002) <<http://www.whitehouse.gov/nsc/nss.pdf>> at 18 May 2007.

<sup>47</sup> Ibid 6.

<sup>48</sup> Ibid 15.

involving both necessity and immediacy.<sup>49</sup> According to the *National Security Strategy*, however, the US and its allies are threatened by non-state actors,<sup>50</sup> including al Qaeda — an international terrorist network of irregular forces and the primary enemy of the ‘war on terror’. Among the lessons of September 11 is that ‘weak states, like Afghanistan, can pose as great a danger to [the US] national interests as strong states’ inasmuch as they are ‘vulnerable to terrorist networks and drug cartels within their borders’.<sup>51</sup>

These concerns articulated by the *National Security Strategy* were curiously anticipated by a Ugandan High Command (‘UHC’) document, dated 11 September 1998, which was reproduced by the Court in its judgment.<sup>52</sup> As with the *National Security Strategy*, the UHC document expresses the concern that failed states may provide a breeding ground for attacks by non-state actors. The latter refers to the Congo being used as ‘a base and launching pad for attacks against Uganda’ by ‘the enemies of Uganda’, presumably the ‘Uganda dissident groups’ referred to later in the document as ‘receiving assistance from the Government of the DRC and the Sudan’.<sup>53</sup> The UHC document further states that ‘successive governments of the DRC have not been in effective control of all of the territory of the Congo’<sup>54</sup> and resolves to maintain Ugandan military forces in the Congo so as to ‘secure Uganda’s legitimate security interests’.<sup>55</sup> Significantly, these security interests appear to be largely anticipatory of future possibilities rather than current facts. Uganda wishes to ‘deny the Sudan opportunity to use the territory of the DRC to destabilize Uganda’,<sup>56</sup> ensure that instability caused by fighting in the Congo ‘do[es] not adversely affect the security of Uganda’,<sup>57</sup> and ‘be in position to safeguard the territory integrity of Uganda against irresponsible threats of invasion from certain forces’.<sup>58</sup>

The last expressed concern, in particular, seems to pre-echo the assertion in the *National Security Strategy* of the right to pre-emptive or anticipatory self-defence.<sup>59</sup> This issue was in fact raised and debated in the Court’s public hearings for *Armed Activities*. Representatives of the DRC expressed wonder at Uganda’s arguments that it had intervened ‘not in order to *repel* an armed Sudanese or Congolese attack, but to avoid the *risk* that such an attack might

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<sup>49</sup> Michael Bothe, ‘Terrorism and the Legality of Pre-Emptive Force’ (2003) 14 *European Journal of International Law* 227, 237. The traditional requirements of imminence and necessity are derived from *The Caroline* (Exchange of Diplomatic Notes between the United Kingdom of Great Britain and Ireland and the United States of America), Letter from Mr Webster to Mr Fox (24 April 1841) (1841–42) 29 *British and Foreign State Papers* 1129, 1138. *The Caroline* is understood to represent the ‘inherent’ or customary right of self-defence preserved by art 51 of the *UN Charter*: Sean Murphy, ‘Self-Defense and the *Israeli Wall* Advisory Opinion: An *Ipse Dixit* from the ICJ?’ (2005) 99 *American Journal of International Law* 62, 64–5.

<sup>50</sup> *National Security Strategy*, above n 46, 30.

<sup>51</sup> *Ibid* Introduction.

<sup>52</sup> *Armed Activities (Judgment)* [2005] ICJ [109] <<http://www.icj-cij.org>> at 18 May 2007.

<sup>53</sup> *Ibid*.

<sup>54</sup> *Ibid*.

<sup>55</sup> *Ibid*.

<sup>56</sup> *Ibid*.

<sup>57</sup> *Ibid*.

<sup>58</sup> *Ibid*.

<sup>59</sup> *National Security Strategy*, above n 46.

occur'.<sup>60</sup> In the DRC's view, Uganda seemed 'to be endorsing the theories of "preventive", or "pre-emptive", action, the avowed purpose of which is to make radical changes to the rules of the *United Nations Charter*'.<sup>61</sup> In response, Uganda denied that its legal position was based upon preventive or pre-emptive action, and instead framed the issue in terms of 'the principles of State responsibility and the duty to prevent the use of national territory by armed bands launching armed actions against neighbouring States'.<sup>62</sup>

The concepts and approaches proposed in the *National Security Strategy* — and at issue in the UHC document and *Armed Activities* — are, of course, highly controversial, legally as well as politically. On the one hand, the 'advent of catastrophic terrorism' has led many to recognise that 'private terror networks' can be at least as destructive as state-sponsored terrorism,<sup>63</sup> and that 'complex, repressive States, weak States, destitute States, and States in internal chaos' can breed discontent and provide recruits, as well as training grounds, for terrorist organisations.<sup>64</sup> At least one prominent international lawyer has recommended the formulation of a collective 'duty to prevent' that would target and prevent 'nations run by rulers without internal checks on their power' from acquiring weapons of mass destruction.<sup>65</sup> More moderately, another prominent international lawyer has argued that pre-emptive self-defence should be considered 'responsibly, on a case-by-case basis' but must be permissible in wider circumstances than previously allowed under customary international law.<sup>66</sup> Ruth Wedgwood has urged that the *UN Charter* be approached with a 'teleological understanding' in order 'to counter the unpredictable violence of state and nonstate actors',<sup>67</sup> and even Richard Falk has acknowledged that 'new rules are needed to deal with the interactions among non-territorial actors'.<sup>68</sup>

On the other hand, there has been a chorus of disapproval from international lawyers in response to the *National Security Strategy* and the war in Iraq in particular. Among other things, this criticism notes that the *National Security Strategy* doctrine of pre-emptive self-defence is 'potentially very broad in scope'.<sup>69</sup> In the case of the war in Iraq, there appeared to be neither imminence nor necessity, and as such there are 'strong legal, moral, and political reasons to

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<sup>60</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Oral Pleadings of Democratic Republic of the Congo — Translation)* (12 April 2005) [2005] ICJ [32] <<http://www.icj-cij.org>> at 18 May 2007 (emphases in original).

<sup>61</sup> *Ibid* [32].

<sup>62</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (Oral Pleadings of Uganda)* (18 April 2005) [2005] ICJ [77] <<http://www.icj-cij.org>> at 18 May 2007.

<sup>63</sup> Ruth Wedgwood, 'The ICJ Advisory Opinion on the Israeli Security Fence and the Limits of Self-Defense' (2005) 99 *American Journal of International Law* 52, 61.

<sup>64</sup> Jutta Brunée and Stephen Toope, 'The Use of Force: International Law After Iraq' (2004) 53 *International and Comparative Law Quarterly* 785, 786.

<sup>65</sup> Lee Feinstein and Anne-Marie Slaughter, 'A Duty to Prevent' (2004) 83 *Foreign Affairs* 136, 137.

<sup>66</sup> Abraham Sofaer, 'On the Necessity of Pre-Emption' (2003) 14 *European Journal of International Law* 209, 226.

<sup>67</sup> Ruth Wedgwood, 'The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense' (2003) 97 *American Journal of International Law* 576, 584.

<sup>68</sup> Richard Falk, 'Revisiting the Great Terror War: Remarks Given at the University of Oregon School of Law, November 20, 2003' (2004) 6 *Oregon Review of International Law* 19, 22.

<sup>69</sup> Stromseth, above n 3, 635.

deny both legality and legitimacy to such a use of force'.<sup>70</sup> The Bush administration's identification of terrorists as 'enemy combatants' has moreover enabled terrorists to move 'up a rung in the hierarchy of actors under international law' to a point where they 'can now better challenge the state'.<sup>71</sup>

Against the background of the political and legal controversies surrounding the 'war on terror', then, the Court's silence on these issues is curious.<sup>72</sup> Curiosity becomes perplexity when one notes that previous decisions of the Court regarding self-defence, in a series of decision from the *Nicaragua Case*<sup>73</sup> to the more recent *Oil Platforms* judgment<sup>74</sup> and *Israeli Wall* advisory opinion,<sup>75</sup> had already been subjected to searching analysis and criticism. The latter two decisions in particular have been criticised for failing to take all the relevant facts into account, lacking full legal argumentation, and ignoring wider political realities and recent developments in the law.<sup>76</sup> Following the *Israeli Wall* advisory opinion, one scholar incredulously summed up the Court's apparent position on self-defence:

(1) a state may provide weapons, logistical support, and safe haven to a terrorist group; (2) that group may then inflict violence of any level of gravity on another state, even with weapons of mass destruction; (3) the second state has no right to respond in self-defence against the first state because the first state's provision of such assistance is not an 'armed attack' within the meaning of Article 51; and (4) the second state has no right to respond in self-defence against the terrorist group ...<sup>77</sup>

At a public hearing held on 12 April 2005, in the course of a presentation that challenged Uganda's apparent espousal of preventive or pre-emptive action, the

<sup>70</sup> Richard Falk, 'What Future for the UN Charter System of War Prevention?' (2003) 97 *American Journal of International Law* 590, 598. See also Miriam Sapiro, 'Pre-empting Prevention: Lessons Learned' (2005) 37 *New York University Journal of International Law and Politics* 357, 371.

<sup>71</sup> Mary Ellen O'Connell, 'Enhancing the Status of Non-State Actors through a Global War on Terror?' (2004–05) 43 *Columbia Journal of Transnational Law* 435, 457.

<sup>72</sup> Some scholars have argued that the controversy described here has focused more on the rhetoric of the US government than on its actions: see Ian Johnstone, 'US–UN Relations after Iraq: The End of the World (Order) as We Know It?' (2004) 15 *European Journal of International Law* 813, 834–5; Richard Gardner, 'Neither Bush nor the "Jurisprudes"' (2003) 97 *American Journal of International Law* 585, 588; Wedgwood, 'The Fall of Saddam Hussein', above n 67, 53–4. If that were the Court's view, however, it could have said so.

<sup>73</sup> *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v US) (Merits)* [1986] ICJ Rep 14.

<sup>74</sup> *Oil Platforms (Iran v US) (Merits)* [2003] ICJ Rep 161.

<sup>75</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ <<http://www.icj-cij.org>> at 18 May 2007.

<sup>76</sup> See, eg, Wedgwood, 'The Fall of Saddam Hussein', above n 67; Natalia Ochoa-Ruiz and Esther Salamanca-Aguado, 'Exploring the Limits of International Law Relating to the Use of Force in Self-Defence' (2005) 16 *European Journal of International Law* 499, 523–4; Christian Tams, 'Light Treatment of a Complex Problem: The Law of Self-Defence in the Wall Case' (2005) 16 *European Journal of International Law* 963, 974. Even those who approved of the Court's conclusions in the *Israeli Wall* advisory opinion have been forced to admit that 'a conspicuous feature of this opinion is that, at times, the reasoning is rather abrupt, almost to the point of taciturnity', with the result that 'some points lack full justification': Ian Scobbie, 'Words My Mother Never Taught Me — "In Defense of the International Court"' (2005) 99 *American Journal of International Law* 76, 80.

<sup>77</sup> Murphy, above n 49, 66.

Congo's representative referred to both the *Oil Platforms* judgment and the *Israeli Wall* advisory opinion and directly requested that the Court confirm those decisions.<sup>78</sup> The judgment did not respond explicitly to that request but, if anything, the Court's silence in *Armed Activities* would appear to support the position established in those earlier cases.

Three of the separate opinions in *Armed Activities* express concern about the Court's failure to address these issues head-on. Thus Judge Kooijmans, although sharing the Court's conclusions regarding use of force and self-defence, observed that the Court had 'missed a chance to fine-tune the position it took 20 years ago [in the *Nicaragua Case*] in spite of the explicit invitation by one of the Parties to do so'.<sup>79</sup> In an opinion which noted that earlier rulings of the Court are 'problematic less for the things they say than for the questions they leave open', Judge Simma agreed with Judge Kooijmans that the Court 'should have taken the opportunity presented by the present case to clarify the state of the law on a highly controversial matter which is marked by great controversy and confusion'.<sup>80</sup> Pointing to the Court's own contribution to this confusion by its decision in the *Nicaragua Case*,<sup>81</sup> Judge Simma urged the Court to reconsider its position with respect to large-scale attacks by non-state actors, as expressed in the *Israeli Wall* advisory opinion, in light of a number of developments in state and Security Council practice following the terrorist attacks of September 11.<sup>82</sup>

#### IV AN ACT OF AGGRESSION?

Unfortunately, the Court's failure to connect the dots in relation to the above cluster of issues — or even to acknowledge the dots' existence — is not isolated to those issues. Having found that Uganda had no grounds for self-defence,<sup>83</sup> the Court concluded that Uganda had violated the sovereignty and territorial integrity of the DRC, and that its unlawful military intervention was 'of such a magnitude and duration' that the Court considered it to be 'a grave violation of the prohibition on the use of force' in art 2(4) of the *UN Charter*.<sup>84</sup> Notably, however, the Court avoided making a finding of aggression, which the DRC had specifically asked the Court to adjudge and declare against Uganda.<sup>85</sup>

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<sup>78</sup> *Armed Activities (Oral Pleadings of Democratic Republic of the Congo — Translation)* (12 April 2005) [2005] ICJ [35] <<http://www.icj-cij.org>> at 18 May 2007.

<sup>79</sup> *Armed Activities (Judgment)* [2005] ICJ [25] <<http://www.icj-cij.org>> at 18 May 2007 (Separate Opinion of Judge Kooijmans).

<sup>80</sup> *Armed Activities (Judgment)* [2005] ICJ [8] <<http://www.icj-cij.org>> at 18 May 2007 (Separate Opinion of Judge Simma).

<sup>81</sup> *Ibid* [8].

<sup>82</sup> *Ibid* [10]–[11].

<sup>83</sup> *Armed Activities (Judgment)* [2005] ICJ [149] <<http://www.icj-cij.org>> at 18 May 2007.

<sup>84</sup> *Ibid* [165].

<sup>85</sup> *Armed Activities (Judgment)* [2005] ICJ [23], [24] <<http://www.icj-cij.org>> at 18 May 2007 (Separate Opinion of Judge Simma).

There are good legal reasons why the Court may have struggled to reach a finding of aggression.<sup>86</sup> More significantly, however, such a finding has potential political ramifications that do not attach to a mere breach of the art 2(4) prohibition against the use of force. In this regard, a finding of aggression may well have a destabilising effect in cases of fine political balance, and could even lead to further conflict.<sup>87</sup> In the context of the ‘war on terror’, it is noteworthy that some critics of the current war in Iraq have called it an act of aggression.<sup>88</sup>

In their separate opinions, Judges Simma and Elaraby both highlighted the Court’s avoidance of this issue. Judge Simma expressed his frustration with the Court’s inability to ‘call a spade a spade’, arguing that ‘[i]f there ever was a military activity before the Court that deserves to be qualified as an act of aggression, it is the Ugandan invasion of the DRC’.<sup>89</sup> Judge Elaraby likewise asserted that it was ‘incumbent upon the Court to respond to the serious allegation [of aggression]’,<sup>90</sup> and underscored the extreme facts of the case.<sup>91</sup> Given the gravity of the conflict in the Congo and of Uganda’s transgression, it was surely important for the Court to take seriously the DRC’s allegations of aggression.<sup>92</sup>

## V EXTRA-LEGAL ZONES AND PERSONS

More covert activities in the ‘war on terror’ have also generated legal controversy. Place names like Guantánamo and Abu Ghraib have become bywords for the moral, political and legal challenges posed by a war conducted globally against a nebulous adversary. Allegations — and in some cases proof — of torture against prisoners at these and other sites have given rise to suggestions that some persons and places may stand outside the reach of international law.<sup>93</sup> The US government has characterised captured terrorists as ‘unlawful

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<sup>86</sup> Participants in the negotiations leading to the establishment of the International Criminal Court could not agree on how to define the crime of aggression, and have left it to be defined by later amendment to the *Rome Statute* in accordance with arts 121 and 123: *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90, art 5(2) (entered into force 1 July 2002). Although states have not infrequently alleged aggression by other states, the Court has never made an explicit determination of aggression, preferring instead, as in the present case, to frame the issue in terms of the use of force in violation of art 2(4) of the *UN Charter*. But see Mark Stein, ‘The Security Council, the International Criminal Court, and the Crime of Aggression: How Exclusive is the Security Council’s Power to Determine Aggression?’ (2005) 16 *Indiana International and Comparative Law Review* 1, 18–19.

<sup>87</sup> Murphy, above n 49, 75.

<sup>88</sup> See, eg, Joseph Betz, ‘America’s 2003 War of Aggression against Iraq’ (2004) 4 *Nexus: A Journal of Opinion* 145, 159.

<sup>89</sup> *Armed Activities (Judgment)* [2005] ICJ [2] <<http://www.icj-cij.org>> at 18 May 2007 (Separate Opinion of Judge Simma).

<sup>90</sup> *Armed Activities (Judgment)* [2005] ICJ [9] <<http://www.icj-cij.org>> at 18 May 2007 (Separate Opinion of Judge Elaraby).

<sup>91</sup> *Ibid* [18].

<sup>92</sup> The centrality of this issue to the ‘war on terror’ became apparent again soon after the *Armed Activities* case was decided, in relation to the attitudes of states and scholars alike to the conflict between Israel and Hezbollah in mid-2006: see, eg, Victor Kattan, ‘Israel, Hezbollah and the Conflict in Lebanon: An Act of Aggression or Self-Defense?’ (2006) 14 *Human Rights Brief* 26.

<sup>93</sup> Harold Hongju Koh, ‘On American Exceptionalism’ (2002–03) 55 *Stanford Law Review* 1479, 1498, 1509–11.

combatants' who fall in between the two categories of combatant and civilian, and who are therefore not protected by international humanitarian law,<sup>94</sup> and concerns have been voiced that sites such as Guantánamo may become 'legal black holes'.<sup>95</sup> So-called 'extraordinary renditions' of suspected terrorists to states that have fewer legal restrictions on using torture are equally controversial.<sup>96</sup>

In *Armed Activities*, each party claimed breaches of international human rights law and international humanitarian law by the other.<sup>97</sup> Uganda's second counter-claim alleged, among other things, that DRC soldiers had maltreated certain non-diplomatic Ugandan nationals at the airport in Kinshasa as they attempted to leave the Congo.<sup>98</sup> The Court held that this part of the second counter-claim was inadmissible because Uganda was attempting to exercise its right to diplomatic protection with regard to its nationals who were not diplomats, without meeting the conditions under general international law necessary to do so.<sup>99</sup>

In his separate opinion, Judge Simma agreed with this conclusion, but felt that the Court should have 'embrace[d] the situation in which these individuals found themselves', on the basis of international humanitarian law and international human rights law, so as to demonstrate 'that no legal void existed in their regard'.<sup>100</sup> Judge Simma argued that both international humanitarian law and international human rights law applied,<sup>101</sup> and concluded that Uganda would have had standing to bring a claim for the maltreatment of the individuals at the airport, regardless of their nationality.<sup>102</sup>

In making this argument, Judge Simma sought explicitly to place his comments in the context of wider contemporary debates and concerns. He considered that it was necessary to clarify that 'no gaps exist in the law'<sup>103</sup> in similar situations and asserted that such clarification has 'never been as important as at present, in the face of certain recent deplorable developments'.<sup>104</sup>

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<sup>94</sup> Marco Sassòli, 'The Status of Persons Held in Guantánamo under International Humanitarian Law' (2004) 2 *Journal of International Criminal Justice* 96, 105.

<sup>95</sup> Gerald Neuman, 'Closing the Guantánamo Loophole' (2004) 50 *Loyola Law Review* 1, 3. These concerns were reinforced by an opinion of an Assistant US Attorney-General which effectively concluded that interrogation methods tantamount to torture could be used against suspected terrorists: Harold Hongju Koh, 'Can the President Be Torturer in Chief?' (2005) 81 *Indiana Law Journal* 1145, 1149–52.

<sup>96</sup> Ralph Wilde, 'Legal "Black Hole"?: Extraterritorial State Action and International Treaty Law on Civil and Political Rights' (2004–05) 26 *Michigan Journal of International Law* 739, 762–3. In a speech on 6 September 2006, President George W Bush acknowledged publicly that the CIA operates secret prisons outside the US for holding key suspects in the 'war on terror', and that 'alternative' interrogation methods were used to gather information from such suspects: CNN, *Bush: CIA Holds Terror Suspects in Secret Prisons* (2006) <<http://www.cnn.com/2006/POLITICS/09/06/bush.speech/index.html>> at 18 May 2007.

<sup>97</sup> *Armed Activities (Judgment)* [2005] ICJ [181]–[195], [306]–[313] <<http://www.icj-cij.org>> at 18 May 2007.

<sup>98</sup> *Ibid* [308], [332].

<sup>99</sup> *Ibid* [333].

<sup>100</sup> *Armed Activities (Judgment)* [2005] ICJ [19] <<http://www.icj-cij.org>> at 18 May 2007 (Separate Opinion of Judge Simma).

<sup>101</sup> *Ibid* [30].

<sup>102</sup> *Ibid* [37].

<sup>103</sup> *Ibid* [19].

<sup>104</sup> *Ibid*.

Even more explicitly, he referred to ‘the notable hesitation and weakness’<sup>105</sup> with which ‘the community interest underlying international humanitarian and human rights law’<sup>106</sup> is currently manifesting itself in relation to ‘the ongoing attempts to dismantle important elements of these branches of international law in the proclaimed “war” on international terrorism’.<sup>107</sup> Here again, then, a significant lacuna appears in the fabric of the judgment, where one might have expected the Court to be responsive to contemporary concerns.

## VI EXPLAINING THE JUDGMENT’S SILENCE

Why would the Court forgo, in the words of one of its members, ‘a precious opportunity to provide clarification on a number of issues which are of great importance for present-day international society but still are largely obscure from a legal point of view’?<sup>108</sup> How are we to make sense of an international court apparently wilfully avoiding a chance to have its voice heard on the most significant current controversies in relation to the ‘war on terror’?

One possible answer to these questions might be that the Court correctly focussed only on the particular legal issues placed before it, and that any narrowing of those issues was simply a normal part of the judicial settlement process. A former President of the Court has explained that various elements of that process — including the submission of written pleadings, the evolution of those pleadings in the course of oral proceedings, and debate among the judges — serve to concentrate or refine a case to the most decisive issues.<sup>109</sup> Moreover, in its contentious jurisdiction, the Court is only able to recognise and address disputes between particular parties.<sup>110</sup> Broader concerns must therefore pass by the wayside, and should not divert the Court. The risk, of course, is that this narrowing process might lose ‘what is significant so that a conclusion that proceeds on that basis will seem irrelevant’.<sup>111</sup> Moreover, as indicated above it is apparent from the hearings record that each of the above issues *were* placed before the Court. Indeed, the Court was directly requested to make a ruling on them.<sup>112</sup>

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<sup>105</sup> Ibid [38].

<sup>106</sup> Ibid.

<sup>107</sup> Ibid [38]. To Judge Simma, the issue was both pressing and personal:

If the international community allowed such interest to erode in the face not only of violations of obligations *erga omnes* but of outright attempts to do away with these fundamental duties, and in their place to open black holes in the law in which human beings may be disappeared and deprived of any legal protection whatsoever for indefinite periods of time, then international law, for me, would become much less worthwhile: at [41].

<sup>108</sup> *Armed Activities (Judgment)* [2005] ICJ [35] <<http://www.icj-cij.org>> at 18 May 2007 (Separate Opinion of Judge Kooijmans).

<sup>109</sup> Sir Robert Jennings, ‘The Proper Work and Purposes of the International Court of Justice’ in Sam Muller, David Raič and J M Thuránszky (eds), *The International Court of Justice: Its Future Role after Fifty Years* (1997) 33, 33–5.

<sup>110</sup> Ibid 36.

<sup>111</sup> Martti Koskenniemi, ‘Letter to the Editors of the Symposium’ in Steven Ratner and Anne-Marie Slaughter (eds), *The Methods of International Law* (2004) 109, 119.

<sup>112</sup> *Armed Activities (Oral Pleadings of Democratic Republic of the Congo — Translation)* (12 April 2005) [2005] ICJ [35] <<http://www.icj-cij.org>> at 18 May 2007.

Another explanation for the judgment's silence could be that the Court recognised that the issues raised in the proceedings could have wider implications, and deliberately chose not to commit the law in a particular direction until those implications became clearer. According to a former Judge of the Court, a 'policy of judicial self-restraint runs parallel with the general view that it is inappropriate for the Court to over-crystallise the law',<sup>113</sup> and the Court's appreciation of 'the use to which its decisions may be put in other cases as well as their wider repercussions within the international community tends to impose some restraint on its holdings'.<sup>114</sup> Judicial restraint may be especially appropriate where political factors, often involving demands for changes to the law itself, predominate. In such cases, there is a danger that the Court may be regarded as exceeding its proper sphere by creating new law.<sup>115</sup> Certainly, the debate surrounding pre-emptive self-defence has been sufficiently politically charged to make any statement by the Court controversial. In such circumstances, perhaps the Court was wise to say as little as possible. On the other hand, restraint may — and in this case arguably has — led the Court to miss opportunities to clarify or develop the law in desirable and appropriate ways.<sup>116</sup> Furthermore, findings that are not well-argued will damage the Court's credibility among its stakeholders.<sup>117</sup>

A third possible explanation is that the Court's decision, in the sense that it includes both the judgment and the separate opinions,<sup>118</sup> *does* give full consideration to the issues within a contemporary global political context. To adopt the terminology of one scholar describing the Court's *Nuclear Weapons* advisory opinion, the Court adopts an 'elaborate equipoise'<sup>119</sup> and provides a response that is 'equivocal, a cacophony of dicta and holding, ruling and dissent'.<sup>120</sup> Taken as a whole, the *Armed Activities* decision allows each reader to choose between nuance and certainty, sophistication and minimalism. Each can find something to agree with in the decision, and the Court's jurisprudence maintains the complexity necessary for a flexible response to future cases.

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<sup>113</sup> Mohamed Shahabuddeen, *Precedent in the World Court* (1996) 220.

<sup>114</sup> *Ibid* 216.

<sup>115</sup> Takane Sugihara, 'The Judicial Function of the International Court of Justice with Respect to Disputes Involving Highly Political Issues' in Sam Muller, David Raič and JM Thuránszky (eds), *The International Court of Justice: Its Future Role after Fifty Years* (1997) 117, 132.

<sup>116</sup> Shahabuddeen, above n 113, 216; Murphy, above n 47, 76.

<sup>117</sup> For example, Murphy argues that:

States are willing to yield power to an international court of fifteen individuals only when they believe that the court's findings reflect higher levels of deliberation than are found within any one state's machinery: above n 49, 76.

<sup>118</sup> Hugh Thirlway, 'The *Nuclear Weapons* Advisory Opinions: The Declarations and Separate and Dissenting Opinions' in Laurence Boisson de Chazournes and Philippe Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons* (1999) 390, 396.

<sup>119</sup> David Kennedy, 'The Nuclear Weapons Case' in Laurence Boisson de Chazournes and Philippe Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons* (1999) 462, 470.

<sup>120</sup> *Ibid* 462.

## VII LAW AND POLITICS IN THE JUDGMENT AND SEPARATE OPINIONS

Whichever of the above responses seems most plausible, it is undeniable that the separate opinions indicate some significant differences within the Court regarding the proper treatment of politically controversial issues. Yet what interests me even more are the similarities between the opinions and the judgment — what might be considered biases and blind spots that the opinions and the judgment share.<sup>121</sup> In particular, a close reading of the opinions reveals a certain pattern of argumentation that in some ways replicates the judgment's relative silence.

Martti Koskenniemi has described international legal discourse as being structured by two movements: 'ascending' arguments, which trace international legal obligations upwards to 'justice, common interests, progress, nature of the world community or other similar ideas';<sup>122</sup> and 'descending' arguments, which are based on 'State behaviour, will or interest'.<sup>123</sup> The former leads international law into a kind of utopianism exemplified by naturalism, whilst the latter tends towards positivist apologetics for state behaviour.<sup>124</sup> International legal argument oscillates between these two poles, unable to prefer either and attempting to capture both.<sup>125</sup> This provides a dynamic which traps international law in indeterminacy and prevents it from providing coherent justifications.<sup>126</sup> International legal arguments are therefore

structured by the way *lawyers try to maintain and defend their position* by making *other* positions seem subjective and political because either apologetic or utopian. However, each position is ultimately capable of being so classified and thus vulnerable to the corresponding objections. A position which establishes itself by criticizing alternative positions as utopian will *by that very movement* reveal itself as vulnerable to the objection of being apologetic. And *vice-versa*.<sup>127</sup>

The effect of this structure is ultimately to conceal and disguise political choice. International legal argument is thus controlled by and replicates the claims of liberalism, which eschews 'the status of a grand political theory [that] claims to be unpolitical and ... even hostile to politics'.<sup>128</sup> The structure of international legal argument provides a means of 'avoid[ing] openly political rhetoric', but

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<sup>121</sup> I am influenced here by David Kennedy's various writings on the law's 'systematic blindnesses', 'moments of bias and elision' and 'memory lapse[s]': see *ibid* 470; David Kennedy, 'International Law and the Nineteenth Century: History of an Illusion' (1997) 17 *Quinnipiac Law Review* 99, 105; David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (2004) 298–309.

<sup>122</sup> Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (1989) 40.

<sup>123</sup> *Ibid* 41.

<sup>124</sup> *Ibid* 40–8.

<sup>125</sup> *Ibid* 46.

<sup>126</sup> *Ibid* 44.

<sup>127</sup> *Ibid* 50 (emphases in original).

<sup>128</sup> *Ibid*.

leads only ‘into the *constant opposition, dissociation and association of points about concreteness and normativity of the law*’.<sup>129</sup>

In relation to the issues considered above, it is somewhat difficult to compare the argumentative structure of the separate opinions with that of the judgment in *Armed Activities*. This is simply because the judgment is so terse in the relevant parts so as to contain barely any argument at all. What may be compared, however, is their respective treatment of the political vis-à-vis the legal.

The general approach of the judgment to matters of political controversy is to ignore them, so that judgment appears to be free from politics and the Court seems to be merely applying the law as it stands. The separate opinions of Judges Kooijmans, Simma and Elaraby initially appear to be very different to the judgment in this respect. These differences relate to the fact that they engage fully with the political, make reference to wider controversies and prefer alternative paths and make those differences explicit. Yet in each of the opinions, a more or less sharp distinction is drawn between politics and law.

In his extrajudicial writings, Judge Kooijmans has expressed concern regarding the Court’s handling of political sensitivities:

By being too shy, but also by being too assertive, the Court may discourage states to make better use of its procedures, both in their bilateral relations and as members of the organization of which the Court is the principal judicial organ. What is actually required and may be expected from the Court is a balancing act between political potentialities and legal necessities: nothing more, but nothing less.<sup>130</sup>

In his *Armed Activities* separate opinion, however, though obviously worried that the judgment may not be ‘seen as logical and fair in its historical, political and social dimensions’,<sup>131</sup> Judge Kooijmans describes the Court’s task as ‘compel[ling] it to come to a clear and unequivocal determination of the legal consequences of acts committed during that “complex episode”’.<sup>132</sup>

In considering the application of the term ‘aggression’ to actions by Uganda, Judge Elaraby recognises that the distinction between political and legal disputes has become blurred, but makes the distinction anyway:

Although the term’s use in political and popular discourse is often highly charged, it nevertheless remains that aggression is a legal concept with legal connotations and legal consequences, matters which fall clearly within the remit of the Court,

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<sup>129</sup> Ibid 49 (emphasis in original). Boyle makes a similar argument to Koskenniemi regarding the circular arguments of positivist, natural law and other theorists, from the point of view that all these theorists ‘use’ reification ‘to establish that the thing they want us to recognize about international law is already there woven into every strand’: James Boyle, ‘Ideals and Things: International Legal Scholarship and the Prison-House of Language’ (1985) 26 *Harvard International Law Journal* 327, 349.

<sup>130</sup> Peter Kooijmans, ‘The International Court of Justice: Where Does It Stand?’ in Sam Muller, David Raič and J M Thuránszky (eds), *The International Court of Justice: Its Future Role after Fifty Years* (1997) 407, 418.

<sup>131</sup> *Armed Activities (Judgment)* [2005] ICJ [4] <<http://www.icj-cij.org>> at 18 May 2007 (Separate Opinion of Judge Kooijmans).

<sup>132</sup> Ibid [3].

particularly when the circumstances of a case coming before the Court call for a decision thereon.<sup>133</sup>

The distinction between law and politics is most evident in Judge Simma's opinion. Referring to the Congo's request for a finding of aggression, Judge Simma remarks that the Security Council 'will have had its own — political — reasons for refraining' from making such a determination, but that

the Court, as the principal judicial organ of the United Nations, does not have to follow that course. Its very *raison d'être* is to arrive at decisions based on law and nothing but the law, keeping the political context of the cases before it in mind, of course, but not desisting from stating what is manifest out of regard for such non-legal considerations. This is the division of labour between the Court and the political organs of the United Nations envisaged by the Charter!<sup>134</sup>

In his extra-judicial writings, Judge Simma has advocated 'a positivist conception of law'<sup>135</sup> that acknowledges 'the indeterminacy of the rule of law and creativity it takes to make sense of it [but seeks to] render the law accessible to scrutiny by others'.<sup>136</sup> In furtherance of this aim, he has suggested that there is a need to broaden the conception of what may be taken as evidence of 'state practice' to allow for 'the rather rapid development of customary law'.<sup>137</sup>

Judge Simma's opinion appears to exemplify this possibility in a number of places. In addressing the international humanitarian law and international human rights law issues, for example, Judge Simma systematically marshals and presents a vast range of legal materials and sources, including the Rules of Court,<sup>138</sup> rulings of the International Criminal Tribunal for the Former Yugoslavia,<sup>139</sup> the *Geneva Conventions*<sup>140</sup> and additional protocols,<sup>141</sup> the

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<sup>133</sup> *Armed Activities (Judgment)* [2005] ICJ [11] <<http://www.icj-cij.org>> at 18 May 2007 (Separate Opinion of Judge Elaraby).

<sup>134</sup> *Armed Activities (Judgment)* [2005] ICJ [3] <<http://www.icj-cij.org>> at 18 May 2007 (Separate Opinion of Judge Simma) (emphasis omitted).

<sup>135</sup> Bruno Simma and Andreas Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View' (1999) 93 *American Journal of International Law* 302, 307.

<sup>136</sup> *Ibid* 306.

<sup>137</sup> *Ibid* 306–7.

<sup>138</sup> ICJ, *Rules of Court* art 80(1) (adopted 14 April 1978). See *Armed Activities (Judgment)* [2005] ICJ [22] <<http://www.icj-cij.org>> at 18 May 2007 (Separate Opinion of Judge Simma).

<sup>139</sup> *Prosecutor v Tadic (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* Case No IT-94-1-AR72 (2 October 1995); *Prosecutor v Du[ko Tadić] (Trial Chamber Opinion and Judgment)* Case No IT-94-1-T (7 May 1997); *Prosecutor v Delalic (Appeals Chamber Judgment)* Case No IT-96-21 (16 November 1998). See *Armed Activities (Judgment)* [2005] ICJ [23] <<http://www.icj-cij.org>> at 18 May 2007 (Separate Opinion of Judge Simma).

<sup>140</sup> *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); *Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950); *Geneva Convention relative to the Protection of Civilian Persons in Time of War of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950). See *Armed Activities (Judgment)* [2005] ICJ [24]–[26] <<http://www.icj-cij.org>> at 18 May 2007 (Separate Opinion of Judge Simma).

International Committee of the Red Cross' Commentary on the *Geneva Conventions*,<sup>142</sup> the Opinion of the European Commission for Democracy through Law (Venice Commission),<sup>143</sup> human rights treaties,<sup>144</sup> and the International Law Commission's 2001 draft on the Responsibility of States for Internationally Wrongful Acts.<sup>145</sup> Although irrefutably impressive, Judge Simma's desire for an accelerated development of the law to deal with all aspects of the case appears to verge somewhat on desperation in these passages.

No less than the judgment's silence, then — but by very different means — the separate opinions construct and maintain a rather hermetic separation between law and politics.

### VIII CONCLUSIONS

It is arguable that the judgment's silence on the issues considered in this case note is due to fundamental divisions within the Court over methodology and approach. Thus Olivier Corten, who acted for the DRC in *Armed Activities*, has elsewhere suggested that 'specialists in international law are radically opposed to each other on the methodological level'.<sup>146</sup> Such disagreement is manifested nowhere more starkly than in relation to the current debates concerning events following September 11. It should not be a great surprise that the same disagreement may also be reflected among the members of the Court,

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<sup>141</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978); *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts*, opened for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978). See *Armed Activities (Judgment)* [2005] ICJ [24]–[26] <<http://www.icj-cij.org>> at 18 May 2007 (Separate Opinion of Judge Simma).

<sup>142</sup> Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987); J Pickett (ed), *Commentary to the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War* (1959). See *Armed Activities (Judgment)* [2005] ICJ [26], [28], [34], [39] <<http://www.icj-cij.org>> at 18 May 2007 (Separate Opinion of Judge Simma).

<sup>143</sup> European Commission for Democracy through Law, Venice Commission, *Opinion on the Possible Need For Further Development of the Geneva Conventions*, 57<sup>th</sup> plen sess, Opinion 245/2003 (12–13 December 2003). See *Armed Activities (Judgment)* [2005] ICJ [27] <<http://www.icj-cij.org>> at 18 May 2007 (Separate Opinion of Judge Simma).

<sup>144</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *African Charter on Human Rights and Peoples' Rights*, opened for signature 27 June 1981, 1520 UNTS 217 (entered into force 21 October 1986); *Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987). See *Armed Activities (Judgment)* [2005] ICJ [31] <<http://www.icj-cij.org>> at 18 May 2007 (Separate Opinion of Judge Simma).

<sup>145</sup> ILC, 'Draft Articles on State Responsibility', in ILC, *Report of the International Law Commission on the Work of Its 53<sup>rd</sup> Session*, UN Doc A/56/10 (2001). See *Armed Activities (Judgment)* [2005] ICJ [35] <<http://www.icj-cij.org>> at 18 May 2007 (Separate Opinion of Judge Simma).

<sup>146</sup> Olivier Corten, 'The Controversies over the Customary Prohibition on the Use of Force: A Methodological Debate' (2005) 16 *European Journal of International Law* 803, 821. See also Sean Murphy, 'The Doctrine of Preemptive Self-Defense' (2005) 50 *Villanova Law Review* 699, 748 (arguing that different views among international lawyers on the legality of pre-emptive self-defence are due to differences of methodology in international law).

particularly in relation to a case involving the use of force.<sup>147</sup> It should, however, be a matter of some considerable concern that a judgment by an international court concerning the largest ‘conventional’ war since the Second World War seems perversely determined to disregard the significance of the issues before it in relation to the legal and political controversies surrounding the ‘war on terror’.

Equally revealing, however, is the manner in which the judgment and the separate opinions converge in their treatment of the relationship between law and politics. Whereas the judgment simply refuses to engage with or even to acknowledge the political controversies surrounding the issues raised in the case, the opinions employ a rather more subtle approach. By acknowledging the political, they seek to neutralise it; their project is to demonstrate not that the political does not exist, but that the law can rise above politics and provide answers in spite of it. The Court thus appears in *Armed Activities* to be in the peculiar position of being able to reach (almost) unanimous *dispositif* findings but incapable of agreeing on how those findings were reached — an unfortunate impasse that serves only to marginalise the influence of the Court and stultify its jurisprudence.

GUY FITI SINCLAIR†

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<sup>147</sup> Christine Gray has suggested that in such cases there is ‘a fundamental division among the judges as to the role of the Court’: ‘The Use and Abuse of the International Court of Justice: Cases concerning the Use of Force after *Nicaragua*’ (2003) 14 *European Journal of International Law* 867, 892.

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