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How to cite

WEILL, Sharon. The role of national courts in applying international humanitarian law: from apology to judicial activism. Doctoral Thesis, 2012. doi: 10.13097/archive-ouverte/unige:23575

This publication URL: https://archive-ouverte.unige.ch/unige:23575
Publication DOI: 10.13097/archive-ouverte/unige:23575

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Geneva University

Faculty of Law

Doctoral Thesis

The Role of National Courts in Applying International Humanitarian Law – *From Apology to Judicial Activism*

by Sharon WEILL

Supervisor: Professor Marco SASSÒLI

Imprimatur number 852

- 2012 -

Acknowledgments

Many thanks to Prof. Sassoli for his supervision, support and dedication. It was during Professor's Sassoli classes that I encountered for the first time deconstruction exercises of international humanitarian law courts' ruling, owing to his pedagogy based on a critical learning of case studies. Prof. Sassoli provided me with all the legal tools to analyse legal decisions and, not less important, with a critical prism for understanding the international legal order.

Putting the decision into their political context was made possible also due to my personal working experience with NGOs and international organisations, field researches in different conflict zones, which allowed me to study the rulings in a contextual manner, taking into account the broader political interests than the particular ones of the litigating parties. In this context I owe special thanks to Mr. Ivan Jovanovic, head of the war crimes unit of the OSCE in Serbia, who introduced me to the war crimes trials in Serbia, and adv. Nery Ramati, who shared with me his experience of litigating before Israeli military courts in the OPT.

I am also very much grateful for the availability of Prof. Benvenisti from Tel Aviv University to host me as a visiting researcher and for the interest he had in my work, which in many aspects has followed his analysis on the role of courts. This research could not have been done without the generous support of the Swiss National Fund for Scientific Research (FNS) .

My PhD is dedicated to my girls Zoe and Maayane, who were born during this research, with the hope that the international legal system, which they will live, will be a legal system whose norms are judicially enforced against those who violate them.

Finally, my warmest thanks go to Bartolomeo Conti, my partner and love.

The idea of law, in spite of everything, seems still to be stronger than any ideology of power.

H. Kelsen[1]

[1]H. Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts. Beitrag zu einer Reinen Rechtslehre* (1920).

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Introduction

> International law has undergone many welcome revolutionary changes in recent decades. I remember that 50 years ago – when I was a young student at the Faculty of Law of the Hebrew University of Jerusalem – the subject of Public International Law (as opposed to Private International Law) was a negligible and peripheral subject (even though it was taught as a required course). Public International Law was not seen by us – we the students – as worthy of the title "law", and the institutions of the international community, including the International Court of Justice, received the same treatment. The years passed, and public international law got stronger and began to stand on its own two feet as a legal system worthy of the title "law". It is fortunate that public international law has developed in that way, although the road is long before it will turn into a legal system of full standing; as a legal system whose norms can be enforced against those who violate them.
>
> *Justice M. Cheshin, Vice President of the Israeli High Court of Justice*[2]

International humanitarian law was one of the first branches of international law to be codified. Through the years, since the start of its codification in the nineteenth century, international humanitarian law has evolved to be one of the most complete, coordinated, and codified branches of international law, and it forms today a universally normative framework which binds every state in the world, along with other subjects of international law, such as non-state armed groups and even individuals. As with all branches of law, whether these originate from public, private, national or international law, the rules of international humanitarian law are often violated. That the law would be violated is all but predictable, and therefore the rule of law dictates that a violation of the law will trigger the competence of a law enforcement by an independent judiciary.[3] In the spirit of the statement cited above, whether international humanitarian law would form "a legal system of full standing" depends on whether it would be "a legal system whose norms can be enforced against those who

[2] HCJ 7957/04 *Mara'abe et al. v Israel Prime Minister et al.* (2005), paragraph 2 of the seperate opinion of Judge Cheshin (hereinafter: *The Mara'abe* case). Yet, in this decision the Israeli High Court of Justice enforced international humanitarian law and ruled against the State in a case related to the route of the Separation Wall.

[3] J. Raz, 'The Rule of Law and Its Virtue' (1977) 93 The Law Quarterly Review 2, reproduced in K. C. Culver (ed) *Readings in the Philosophy of Law* (2nd edn, Broadview Press, Ontario, 2008), pp. 13-27.

violate them", a view that echoes Kelzen's vision of any legal system as coercive.[4] This view, though far from unanimous among legal theorists, corresponds to that held by other international leading scholars such as Prof. Antonio Cassese and Prof. Richard Falk, and it will be the underlying theoretical assumption of the my study.[5]

The international community has expressed its willingness to empower courts to enforce international humanitarian law, and established a legal enforcement mechanism which relies both on national and international courts. According to this enforcement model, two international courts have jurisdiction over violations of international humanitarian law. These are the International Criminal Court (ICC), which is competent to determine individual criminal responsibility for committing war crimes,[6] and the International Court of Justice (ICJ), which has jurisdiction to determine State responsibility for such violations and to interpret international humanitarian law in settlement of dispute procedures (State *v*. State) and in Advisory Opinions.[7] The jurisdiction of both the ICC and the ICJ is restricted by the principle of State sovereignty: the ICC's jurisdiction by the complementary principle, which regulates the relations between the ICC and national tribunals, attributing primary jurisdiction to the national jurisdiction;[8] and the ICJ jurisdiction by the non-compulsory nature of that

[4] H. Kelsen*, Law and Peace in International Relations* (Mass: Harvard University Press, Cambridge, 1942), p. 52.

[5] See, for example, A. Cassese, *Violence and Law in the Modern Age* (Princeton University Press, Princeton, 1988), pp. 4-7. R. Falk, *The Role of Domestic Courts in the International Legal* (Syracuse University Press, Syracuse, 1964), p. 22. On the debate in American literature between enforcement v. voluntary compliance (the theoretical assumption that State would freely comply with international law as expression of their self interest to maintain the legal order - a choice, which is under the entire discretion of the sovereign state), see below at pp. 26-28. For a general background on the different theoretical schools including positivism (divided to: classical voluntary positivism; Kelzen's normative positivism; Scelle's sociological objectivism and pragmatic positivism), natural law, judicial militantism and critical legal studies, see P. Daillier and A. Pellet, *Droit International Public* (7ème éd, L.G.D.J., Paris, 2002), pp. 78-82.

[6] Article 8 of the Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 U.N.T.S 3 (hereinafter: the Rome Statute).

[7] See, for example, V. Chetail, 'The Contribution of the International Court of Justice to International Humanitarian Law' (2003) 85 International Review of the Red Cross, p.235-269.

[8] The principle of complementary is defined in Article 17 of the Rome Statute and paragraph 10 of its preamble. J.K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdiction* (Oxford University Press, Oxford, 2008), p. 95.

court and the necessity of having the States' consent in order to hold the proceedings.[9] These limits on jurisdiction reflect the traditional structure of the legal order based on the principle of State sovereignty as laid down in Article 2(7) of the 1945 UN Charter. Yet, the scope of "domestic jurisdiction" in Article 2(7) of the UN Charter is not necessarily an obstacle to the judicial enforcement model, because it attributes to national courts a special role in enforcing international law. This argument was first raised by Professor Falk in the 1960s:

> To achieve international order, it is therefore necessary to rely upon horizontal distribution of authority and power among independent states…. [I]t is likely that progress towards a more rational delimitation of jurisdiction will result from efforts to improve the horizontal method of allocating legal competence rather than from efforts to centralize authority[;] … from this viewpoint, one grows more cautious about investing a high percentage of one's enthusiasm in proposed expansions of the compulsory jurisdiction of the ICJ or in attempts to narrow the scope of 'domestic jurisdiction' in Article 2(7) of the UN Charter.[10]

The limited role of the international jurisdiction reinforces the important responsibility which national jurisdictions have. And indeed, the judicial enforcement of international humanitarian law relies primarily on domestic courts. This structure was foreseen by the Geneva Conventions in 1949, which imposed an explicit obligation on States Parties to incorporate the relevant rules into domestic legislation, with a view of the enforcement of international law governing armed conflict by national courts, at least as far as the obligation to prosecute individuals who committed war crimes regardless of their nationality and where the crimes were committed is concerned.[11] Other provisions include the use of the Red Cross

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[9] S. Rosenne, *The Law and Practice of the International Court, 1920-2005*, Vol. II Jurisdiction (4th edn, Martinus Nijhoff, Leiden, 2006), pp. 549-550.

[10] R. Falk (n 5), p. 22. Almost 50 years later, this idea was rephrased by Professor P.A. Nollkaemper where he observed that: "Basing the primary role of national courts in the protection of the international rule of law on the principle of sovereignty presents something of a paradox. The principle of sovereignty has traditionally served as to give states control over process of adjudication. In a Frankenstein-like reversal, it now provides a basis for courts to turn their dependent position into an independent power against the state." P.A. Nollkaemper, *National Courts and The International Rule of Law* (Oxford University Press, Oxford, 2011), pp. 25-26.

[11] Common first paragraph of Articles 49/50/129/146 respectively to the Four Geneva Conventions of 1949, and Article 85(1) of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 U.N.T.S 3 (hereinafter: the Additional Protocol I of 1977). See, generally, R. O'Keefe, 'The Grave Breaches Regime and Universal Jurisdiction' (2009) 7 Journal of International Criminal Justice 4, pp. 811-831.

emblem,[12] the protection of cultural property,[13] and conventions regulating the use of weapons.[14] Almost 50 years after the Geneva Conventions, the ICC, which establishes its criminal jurisdiction according to the complementary principle, respected that basic structure, and unlike the International Criminal Tribunal for the former Yugoslavia (ICTY) or the International Criminal Tribunal for Rwanda (ICTR), left the primary obligation to enforce international humanitarian law in the hands of national courts. One of the most notable examples for the exercise of criminal competence over grave breaches of the Geneva Conventions by national courts is today in the Balkan states, in their post-conflict era.[15]

National courts can assume their role to ensure that states comply with their international obligations - that can be implicitly deduced from Common Article 1 of the Four Geneva Conventions – also while exercising judicial review over state actions.[16] Yet, it is

---

[12] Articles 42, 44, 53 and 54 of the Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 U.N.T.S 31 (hereinafter: the First Geneva Convention of 1949), and Articles 44,45 of the Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 U.N.T.S 85 (hereinafter: the Second Geneva Convention of 1949).

[13] Article 28 of the Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May 1954, entered into force 7 August 1956) 249 U.N.T.S 240 (hereinafter: the Convention for the Protection of Cultural Property of 1954) and Article 15 of Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (adopted 26 March 1999, entered into force 9 March 2004) (hereinafter: the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property).

[14] Article 9 of the Convention on Cluster Munitions (adopted 30 May 2008, entered into force 1 August 2010). For other example see below fn 114.

[15] For example, the Belgrade War Crimes Chamber established in 2003 is one of the few domestic courts in the world to prosecute its own nationals for war crimes committed in a conflict that ended a few years before its creation. Within its first six years of operation, the War Crimes Chamber has rendered judgments in 16 cases involving 50 defendants (see, below at pp. 127-147). With regard to the conflict in the Former Yugoslavia, third States had exercised their competence based on universal jurisdiction and in a number of cases. Yet, in practice, prosecution based on universal jurisdiction remains relatively rare, mainly because of the political implications of such cases, and their possible clash with other international principles such as comity.

[16] Depending on the constitutional structure of each jurisdiction, an individual may allege that a state has infringed on their rights deriving from international humanitarian law, like, for example, rights conferred upon protected persons in occupied territories or the rules related to detention of combatants The most extensive jurisprudence of this kind is from the Israeli High Court of Justice regarding State actions in the Occupied Palestinian Territories (OPT). In *Hamdan* the US Supreme Court recognized that rules of detention afford rights

important to emphasise that the enforcement of international norms depends above all on the national empowerment of courts to apply international humanitarian law through the "domestication" of the international obligation.[17] National courts will not be able to derive jurisdiction from international law beyond the level of empowerment vested in them by national laws and the national constitutional framework. Moreover, in the current legal structure, those claims are typically raised before the forum of the wrongdoing state, and not against third-party states, because of state immunity. Therefore, the international legal order allocates more specifically a special role to courts of the responsible state as an active enforcement agent of international humanitarian law.[18]

National courts, which constitute a major pillar of the international judicial enforcement mechanism, have thus a dual judicial function: they operate as conventional domestic institutions and as agents of the international legal systems. As observed by Professor Pierre-Marie Dupuy:

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to individuals that can be enforced by court. *Salim Ahmed Hamdan v Donald H. Rumsfeld et al.,* 548 U.S. 557 (2006) (hereinafter: *The Hamdan* case). For more details, see below at pp. 235-242.

[17] P.A. Nollkaemper (n 10), pp. 44-45.

[18] For a discussion of the legal competence to review a third State's wrongful acts, see, e.g., P.A. Nollkaemper, 'Internationally Wrongful Acts in Domestic Courts' (2007) 101 American Journal of International Law 760, pp. 760-799; M. Evans, 'International Wrongs and National Jurisdiction' in M. Evans (ed), *Remedies in International Law: the Institutional Dilemma* (Hart Publishing, Oxford, 1998), pp. 173, 186–89 (focusing mainly on the lack of possibility for a State to be held liable before the courts of another State). Because of the (still very strong) conception of sovereignty and State immunity of jurisdiction before third State's courts, this is not common – at least not in the domain of international humanitarian law. An attempt of this kind was recently rejected by the Divisional Court in the High Court of Justice of England and Wales: "For the courts of England and Wales to decide whether Israel is in breach of its international obligations and, if so, the extent and nature of the breach or breaches, is beyond their competence. That is so whether or not Israel were to decide to contest the allegations before the court. Indeed, the dilemma in which Israel, a sovereign state, would be placed demonstrates the unacceptability of the claimant's proposition." Apart for the issue of jurisdiction, another crucial problem was the question of standing. See <http://www.alhaq.org/pdfs/Al-Haq%20v%20UK%20Judgment.pdf> (accessed 3 April 2011). However, practice shows that in certain cases a court could pronounce, even implicitly, on States' wrongful acts. For a potent example of an implicit statement of this kind, see the UK House of Lord in *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598 [2003] UKHRR 76 CA , para. 106 (hereinafter: *The Abbasi* case).

> le juge interne agit à la fois, selon le mécanisme du « dédoublement fonctionnel » bien décrit par Georges Scelle, comme juge suprême de son ordre juridique interne et comme agent d'application du droit international en cours d'évolution.[19]

While the international judicial system, composed of national and international courts, has been established, international law has also continuously been enforced by political actors, traditionally confined to that role through the exercise of diplomacy. Thus, today, international law stands at a crossroads: it can serve as a common legal basis to govern the international community, which as a commitment to the rule of law should equally be enforced by courts, or it can serve as a tool to justify the *raison d'Etat* and to enable the exercise of its arbitrary power – a situation whereby, if the arbitrary power is not constrained by a system of checks and balances, including the judiciary, international law becomes vulnerable to manipulation and abuses. This is particularly pertinent when dealing with international humanitarian law. International humanitarian law is applicable during armed conflicts, the most violent situations in which a state may be involved. In these times, the state is empowered (and also constrained) by the law to use the most violent means and methods in order to achieve its military goals, the use of which is unimaginable in any other context. That draconian power that may be exercised if it is not supervised to conform to the prescribed rules, such as the principle of distinction, has a potential to bear catastrophic consequences on the lives and security of a vast number of innocent persons. Thus, the theoretical assumption that states would comply with international law out of their own willing, as expression of their self interest to maintain the international legal order, seem unconvincing, given that they hold such formidable power. Naturally, courts cannot be the only institution responsible for providing the necessary checks and balances over the state's exercise of its power during armed conflict, and bearing in mind the special features of armed conflicts, these would meet particular obstacles that they would be required to surmount. Yet, the enforcement of international law by courts seems essentials, as in every legal system, and even more particularly in cases of the law applicable during an armed conflict. Thus, from a rule of law perspective, outlined and analysed in the first chapter, it is to be hoped that the growing

[19] *Public sitting held on Tuesday 13 September 2011, at 10 a.m., at the Peace Palace, President Owada presiding, in the case concerning Jurisdictional Immunities of the State* (*Germany v Italy*: Greece intervening) CR 2011/18 (Prof. Dupuy, Oral Submission before the International Court of Justice for Italy), p. 55 (hereinafter: *Oral Submission before the International Court of Justice for Italy*) <http://www.icj-cij.org/docket/files/143/16679.pdf> (accessed 23 October 2011). See also R. Falk (n 5), pp. 14, 22-23.

practice of courts will gradually replace the political enforcement of international law, and that the proper function of national courts in their application of international law, along with the work of international courts, will result in an international order governed by the international rule of law.

Within this general perspective, this study aims to establish a method of analysis enabling to evaluate how national courts enforce international humanitarian law in light of the core principles of the international rule of law. The first chapter aims at situating the central issue – the roles of domestic courts in applying international humanitarian law – within a theoretical context. This is done in several stages. First, it sets out the general theoretical basis on which domestic courts exercise this role: the emerging concept of *the international rule of law*. Then, the methodological and theoretical approaches to the analysis of the *de facto* role of national courts over the following four chapters - and which is the core of my work, are outlined.

The structural requirements to enable courts to apply international humanitarian law, namely, the legislations defining the application of international humanitarian law within the national system and the competence of courts to apply the law, the standing and the guarantee of the independency of judges are not under review in this work. I focus entirely on the *functional* role of courts in international humanitarian law cases.

The scale according to which the court's function is assessed is inspired by the terminology employed in Professor Koskenniemi's thesis of the structure of the international legal argument.[20] That scale identifies four functional roles: (1) the *apologist* role of courts, in which they serve as a legitimating agency to the state's actions; (2) the *avoiding* role of courts, in which they, for policy considerations would avoid exercising jurisdiction over a case; (3) the normative application role of the courts, in which they apply the international humanitarian law as required by the rule of law; and (4) the *activist* role of courts, in which they will introduce moral judgements in favour of the protection of the individual, beyond the requirements of the law.

The theoretical definition of the each of the court's function is largely based on the scholarship of Professor Benvenisti, who has been analysing national courts and their application of international law over almost two decades. Then, each role corresponds to a chapter of my thesis (chapter 2-5) in which different case studies illustrate in details its nature

[20] M. Koskenniemi, *From Apology to Utopia – The Structure of International Legal Argument* (Cambridge University Press, New York, 2005).

and effect. Revealing the court's function in order to situate a decision on the activist-apology scale is carried out by a critical analysis of the court ruling, in which both the legal argument and the political context are examined. This is done through a technique of deconstruction, which aims at revealing the political character of what appears, a priori, to be a neutral application of objective rules. The deconstruction method which I propose gives special attention to the distinction between question of law (interpretation, legal test) and question of facts (fact-finding), the political context in which a particular decision was rendered and the more general political line of the court that emerges through the reading of a number of rulings and their outcome in the long run.

Thus, this research situates the varying roles of the courts on the activist-apology scale, through the deconstruction of a large number of international humanitarian law cases, in order to reveal the *de facto* role of national courts in applying international humanitarian law. This methodology offers a useful tool for understanding the function of national courts and it provides a mapping of courts' rulings. In light of the international rule of law as the founding framework, judicial decisions within each category can be then legally (and politically) justified or delegitimized. It is hoped that this work will serve as a basis for future analysis, such as studying the factors that lead courts to choose any of the categories, and especially what the necessary conditions are for reaching their optimal functional role from the standpoint of the international rule of law.

CHAPTER I

The International Rule of Law and International Humanitarian Law

1. The International Rule of Law

> The time has come for mankind to make the rule of law in international affairs as normal as it is now in domestic affairs. Of course the structure of such law must be patiently built, stone by stone. The coast will be a great deal of hard work, both in and out of government particularly in the universities of the world…. One final thought on the rule of law between nations: we will have to remind ourselves that under this system of law one will sometimes lose as well as win. But here is another thought: nations can endure and accept an adverse decision, rendered by competent and impartial tribunals."
>
> *Dwight D. Eisenhower, US President, 1959*[21]

1.1 The (domestic) rule of law

The rule of law is a political ideal that supposes that it is *good to be ruled by law* as an alternative to any other form of governance or social control.[22] The formal version of the rule of law, which identifies the fundamental principles which are required for a community to be ordered by law, provides structural constraints on the arbitrary exercise of power and emphasises that the law and the legal institutions must have certain formal features if they are to perform their functions effectively. As noted by Raz, the rule of law "is essential for securing whatever purposes the law is designed to achieve".[23] In other words, it sets a minimum of procedural conditions for the rules and the legal structure for a community to be organized and ruled by the law. It is generally accepted, for example, that the rule of law

[21] D. Eisenhower, 'Remarks upon Receiving an Honorary Degree of Doctor of Laws at Delhi University' (11 December 1959) Dwight D. Eisenhower – Memorial Commission <http://www.eisenhowermemorial.org/menu.php?mid=35#1959> (accessed 3 April 2011).

[22] According to Bradly "the point of the law is to differentiate between de facto power, which might be possessed by the state or by private actors, and the exercise of power that is legitimated somehow by the community as a whole." W. Bradly Wendel, 'Legal Advising and the Rule of Law' in K. Tranter et al. (eds), *Reaffirming Legal Ethics – Taking Stock and New Ideas* (Routledge, Abingdon, 2010), p. 50.

[23] J. Raz (n 3), p. 23.

demands that the law should be publicly promulgated, clear, and have general and prospective application and that the equal application of the laws be administrated by impartial and independent courts which are accessible to all.[24] Complying with the formal aspect of the rule of law is a preliminary stage to organise different subjects in a certain way, based on the law. Hence, the rule of law is a general normative principle, and a legal system can meet the normative requirements to a greater or lesser degree.

While the basics associated with the rule of law are very old[25]— the modern notion of the formal rule of law, which is still "the most influential restatement of the rule of law since the eighteen century" [26], was formulated only in 1885 by the English Scholar, A. V. Dicey, who coined the expression itself.[27] In his famous publication, *Introduction to the Study of the Law of the Constitution*, Dicey identified the rule of law as entailing three fundamental components:

(1) to be ruled by law, not by discretionary power;
(2) all subjects– individuals and state officials – are equal before the law, and the law is equally applicable to all; and
(3) the general jurisdiction of ordinary courts is the best source of legal protection.

The first element is "the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power."[28] Dicey further notes that the rule of law "is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint."[29] The second principle in Dicey's model relates to "equality before the law, or the equal subjection of all classes to the ordinary law of the law administered by the ordinary law courts."[30] It is further explained that "not only that … no man is above the law, but (what is a different thing) that here every man, whatever be his rank

[24] A. Marmor, 'The Ideal of the Rule of Law' in D. Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (2nd edn, Wiley-Blackwell, Oxford, 2010), p. 666.

[25] Going as far back as Plato and Aristotle; see J.N. Shklar, 'Political Theory and the Rule of Law' in A.C. Hutchinson & P. Monahan (eds), *The Rule of Law: Ideal or Ideology* (Carswell, Toronto, 1987), p. 1.

[26] J.N. Shklar, 'Political Theory and the Rule of Law' in S. Hoffmann (ed) *Political Thought and Political Thinkers* (University of Chicago Press, Chicago, 1998), p. 26.

[27] On the origin of the phrase see: H.W. Arndt, 'The Origins of Dicey's Concept of the 'Rule of Law'' (1957) 31 Australian Law Journal 117.

[28] A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, London, 1885), p. 202.

[29] *Ibid*, p. 188.

[30] *Ibid,* p. 202.

or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals."[31]

Dicey's third principle is that the rule of law entails that "the law of the constitution […] is not the source but the consequence of the rights of individuals, as defined and enforced by the courts."[32] Thus, according to Dicey, fundamental rights "are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts."[33] In this element Dicey meant that as far as it concerns the rule of law, protection of individual rights should be achieved through the British common law technique and not through the written constitution favoured on the European continent. Namely, he argued that judge-made individual rights would give more effective protection than constitution because the latter can be changed more easily by governments. It should be noted that the third element is highly linked to British constitutionalism that existed at that time, as he himself stated, and has today, it seems, very little relevance.[34] At the same time, although the model of the rule of law has been constantly developed since the late nineteenth century, Dicey's contribution can still be found in the scholarship of most contemporary authors. As Sir Watts puts it:

> [Dicey's] emphasis in particular on the rule of law as comprising – put broadly – the absence of arbitrary power, and the subjection of all equally to the ordinary law of the land, is of lasting value.[35]

Contemporary scholars in legal studies and political sciences have followed this essentially positivist version of the rule of law, and have developed models that emphasise the formalistic or procedural aspects of the rule of law.[36] Today it seems that there is a remarkable

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[31] *Ibid*, p. 193.

[32] *Ibid*, p. 203.

[33] *Ibid*, p. 195.

[34] J. Crawford, 'International Law and the Rule of Law' (2003) 24 Adelaide Law Review 3, p. 5.

[35] A. Watts, 'The International Rule of Law' (1993) 36 German Yearbook of International Law 15, p. 18. See also, for example, I. Brownlie, *The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations* (Martinus Nijhoff Publisher, The Hague, 1998), p. 212.

[36] These include scholars such as Hayek, Finnis, Fuller, and Raz. Most of the features of the formal rule of law were defined by Fuller (L. Fuller, *The Morality of Law* (Yale University Press, New Haven, 1964). Hayek provided that "the laws must be general equal and certain." F.A. Hayek, *The Political Idea of the Rule of Law* (National Bank of Egypt, Cairo, 1955), p. 34. His definition of the rule of law is that "government in all its

consensus on what the rule of law requires.[37] One of the most inclusive definitions of the rule of law is probably the one formulated by Raz, who identified eight fundamental elements, common to all legal systems:

(1) all law should be prospective, open, and clear;

(2) the law should be relatively stable;

(3) the making of particular laws (particular legal orders) should be guided by open, stable, clear, and general rules;

(4) the independence of the judiciary must be guaranteed;

(5) the principles of natural justice must be observed;

(6) the courts should have review powers over the implementation of the other principles;

(7) the courts should be easily accessible; and

(8) the discretion of the crime-prevention bodies should not be allowed to pervert the law.

In addition, as Raz underlines, many of the principles, which can be derived from the basic idea of the formal rule of law depend for their validity "on the particular circumstances of different society."[38]

Formal v. substantial rule of law - In addition to that formal conception of the rule of law, which states that whatever the content of the law, it is always better to be governed by a system of laws then by arbitrary power,[39] a substantive version, which requires the incorporation of a certain idea of justice into the content of the rules, has been developed. The key difference between these two versions is that the formal conception rejects the existence

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actions is bound by rules fixed and announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge." F.A. Hayek, *The Road to Serfdom* (Routledge, London, 1993), p. 54. Finnis lists the following principles: rules have to be prospective, possible to comply with, promulgated, clear, coherent with one another, sufficiently stable, the making of decrees is limited, and officials are accountable for compliance with the rules. J. Finnis, *Natural Law and Natural Rights* (Oxford University Press, New York, 1980), pp. 270-271; J. Raz, (n 2), p. 16-19.

[37] A. Marmor (n 24), p. 666.

[38] J. Raz (n 3), p. 16.

[39] A. Marmor (n 24), p. 666.

of the rule of law as being dependant on the content of the laws which rule,[40] whereas the substantive version of the rule of law insists that:

> moral and political rights be recognized in positive law, so that they may be enforced upon the demand of individual citizens through courts or other judicial institutions of the familiar type, so far as this is practicable. The rule of law in this conception is the ideal of rule by an accurate public conception of individual rights. It does not distinguish … between the rule of law and substantive justice; on the contrary it requires, as part of the ideal of law, that the rules in the book capture and enforce moral rights.[41]

In my research, I have chosen to limit the analysis of the rule of law to its formal aspect.[42] This is for two main reasons, one theoretical and the other practical. I understand the rule of law as providing the formal requirements needed for a system to be ruled by the law. However, it is not a synonym for moral justice. The rule of law assumes that it is *good to be ruled by law*. This should not be confused with being ruled by a *good* law, which is a noble ideal in and of itself, but its relevance to the formal rule of law is questionable. The ideal of the rule of law is something that is essential to legalism per se. As observed by Raz, the rule of law is a political ideal which a legal system may lack or possess to a greater or lesser degree – the better the law meets these standards, the better the legal system is. Having said that, the rule of law is just "one of the virtues by which a legal system may be judged and by which is to be judged. It is not to be confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity of man."[43] That is to say, that the requirements of the rule of law are the requirements necessary for a community to be governed by law. Setting a system of social control is a political task. Basing it on the rule of law will limit the exercise of political/arbitrary powers, and also minimise the danger that can be created by the power of law itself. Being ruled by a *good* law, though by no means a less important task to be achieved, is, however, a distinct issue, and one that is related to a distinct process. This leads me to the second reason for focusing on the

[40] See generally: B.Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, Cambridge, 2004); P.P. Graig, 'Formal and Substantive Conceptions of the Rule of law: An Analytical Framework' in *Public Law* (1997), pp. 467-487.

[41] R. Dworkin, *A Matter of Principle* (Mass: Harvard University Press, Cambridge, 1985), pp. 11-12.

[42] Yet, I am well aware of the critics of this choice: see for example, H. Charlesworth, 'Comment' (2003) 24 Adelaide Law Review 13, pp. 13-14.

[43] J. Raz (n 3), p. 14.

formal aspects of the rule of law – and one that is essentially practical. Today we still need to establish that international relations should be ruled by law in its very basic legalistic understanding. At international level we find ourselves at a very preliminary phase in which the sovereign has to accept to be governed by law and to renounce to its power, just as it was at domestic level at the beginning of the eighteenth century. So for practical reasons, at this stage of the development of international law, we should be focusing on establishing the formal rule of law, as was achieved at the domestic level in early times. Another practical reason for my choice is related to the fact that we attempt to involve in this project States coming from different regimes, culture, legal tradition, etc. Therefore, while aiming at identifying the fundamental elements of the international rule of law, and thereby elaborating a definition that should be applicable to different legal, cultural, and political systems, it is necessary to focus – at least at this stage – on the formal aspect of the rule of law, in the sense that "'formalism' refers to the attributes of law that are so significant to it as to define what law is."[44]

1.2 *Externalising* the elements of the formal rule of law

The rule of law is a notion that originates in the context of domestic legal systems. Structurally, the international legal system differs to a great extent from the national one. Most of the apparent disparities are probably due to the fact that at the international level there is no separate legislative authority, nor a central enforcement body, as is found in national democracies. Another important difference is the subject of the law, which normally applies to States, which are sovereign with regard to their domestic sphere, and only relatively rarely bear directly upon individuals. Due to these divergences, a preliminary question that needs to be clarified is whether is it possible to *externalise* the concept of the rule of law to the international sphere, i.e., to apply the principles of the rule of law to the relations between States and other subjects of international law. [45] As expressed by one scholar:

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[44] S. Beaulac, 'The Rule of Law in International Law Today' in G. Palombella and N. Walker (eds), *Relocating the Rule of Law* (Hart Publishing, Oxford, 2009), p. 205. "In fact, to address legality per se at the international level is already a monumental task, not to speak of an inquiry into whether the legal rules in question amount to good law or bad law" (p. 201).

[45] This term *externalized* is used by Stephane Beaulac. It refers to "the process by which a feature or characteristic that exists within the inside set is projected or attributed to circumstances or causes that are present in the outside space according to an internal–external dichotomous structure." *Ibid*, p. 204.

> The problem is the uncritical assumption that domestic legal principles can be translated directly to the international sphere.... This fails to take account of structural differences between international law and domestic law—the horizontal organization of sovereign and quasi-sovereign entities as opposed to the vertical hierarchy of subjects under a sovereign—but also of the historical and political context within which the rule of law was developed.[46]

Indeed it seems that most, if not all, scholars are well aware of the structural differences of these two legal systems.[47] Yet, as Crawford has rightly observed: "we have to be fully aware of the differences between domestic and international contexts – but also of the relativity of that distinction".[48] Moreover, it seems that "the problem is not so much one of conceptualization but of commitment"[49] – which is, at least at the theoretical level, not the same thing at all.

In order to answer this preliminary question of externalizing a domestic concept to the international sphere, it must be examined whether the political ideal of the rule of law is a valid ideal for governing the relations between nations and other subjects of international law. The objective of the rule of law is to provide a structure for defining and guiding the relations of its subject based on the perception that while the law guides the behaviour of its subject it minimises the danger that results from the exercise of an arbitrary power. Thus, it seems *a priori* that the application of the principle of the rule of law would be justified at the international level as much as it is at the national level. If it is true that subordinating arbitrary power to law is a political ideal that we are interested to promote in the context of the governance of the international community, it seems that the concept of rule of law as developed in its national context and which promotes this ideal, could (and should) be externalized to the international sphere, albeit with the necessary adaptation. The formal

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[46] S. Chesterman, 'An International Rule of Law?' (2008) 56 American Journal of Comparative Law 331, p. 366.

[47] See, for example, A. Watts (n 35), p. 16, S. Beaulac (n 44), p. 204, J. Crawford (n 34), p. 5; M. Kumm, 'International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model' (2003) 44 Virginia Journal of International Law 19, p. 22; C. Sampford, 'Reconceiving the Rule of Law for a Globalizing World' in S. Zifcak (ed), *Globalisation and The Rule of Law* (Routledge, London, 2005), pp. 9-10.

[48] J. Crawford (n 34), p. 12.

[49] C. Sampford, 'Legal Ethics in a Post-Westphalian World: Building the International Rule of Law and other Tasks' in K. Tranter et al. (eds), *Reaffirming Legal Ethics – Taking Stock and New Ideas* (Routledge, Abingdon, 2010), p. 84.

conception of the domestic rule of law provides (1) that people should be ruled by the law and obey it, and (2) that the law should be such that people will be able to be guided by it.[50] Equally, an international community being organised according to the rule of law demands that the law regulate the relations between States and other actors subjected to international law, and which "provide in the long term a quasi-constitutional framework within which particular rules of law operate."[51] As the international rule of law subordinates the relations of States and other subjects of international law to the law and not to an arbitrary power, it constitutes a counterweight to political power, which ensures that no abuses of authority occur. Put differently, it is the sovereignty of the States which is limited by the international rule of law.

> Under the principle of international legality, less powerful states tend to be more effectively protected against impositions by powerful states. Just as the rule of law became the battle cry for political reformers in much of Europe in the eighteenth and early nineteenth centuries to curb the arbitrary exercise of authority on the domestic level, so the international rule of law has been embraced in the twentieth century as a means of reining in the exercise of power by militarily and economically powerful actors on the international level.[52]

In addition to promoting a political ideal of governance, two other main arguments favour importing the notion of the rule of law to the international level: self-interest concerns related to national security and stability would lead to the inevitable conclusion that an international community should be governed by the rule of law. When States' actions can be better predicted, this would necessarily lead to a more secure and stable world.[53] Second, there is the argument of "coherency". Prof. Crawford observed that a risk of inconsistency will emerge if the international community will not be governed by the rule of law:

> [D]oes international law apply the policy: the rule of law for others not for itself? ... [I]n the long run national systems founded on the rule of law can not tolerate review by an international

[50] J. Raz (n 3), p. 15.

[51] A. Watts (n 35), p. 23.

[52] M. Kumm (n 47), pp. 25-26.

[53] A. Watts, 'The Importance of International Law' in M. Byers (ed), *The Role of Law in International Politics* (Oxford University Press, Oxford, 2000), p. 7.

systems not so founded. … So we end by affirming the need for the rule of law as a virtue at the international level….[54]

It therefore seems that the rule of law is relevant for the international community as much as it is for national legal systems. Yet, because of the major differences between these two legal systems, the domestic conception of the rule of law should be imported to the international sphere in a flexible manner that could be adapted to its unique features, thus serving as "an approximate guide to the content of their international analogue".[55]

1.3 The core elements of the international rule of law

On the assumption that the core elements of the rule of law may be externalized *mutandis mutandis* to the international legal sphere, and that this importation, at least at this stage, shall be restricted to its formal version, at least three core elements of the international rule of law may be identified. These core elements constitute, almost anonymously, the very basic requirements for regulating any community by the application of legal norms. The degree of the compliance with these core elements will indicate the extent to which the international legal system endorses the political ideal of the international rule of law. Put differently, if it is sought that the international legal order comply with the (international) rule of law – the following three basic principles must be observed:[56]

(1) the existence of a body of normative rules, which were procedurally adequately created as opposed to an arbitrary power to regulate the relations of its subject. The laws should possess some characteristics, namely that they will not to be arbitrary, i.e., they should be certain, general, non-retroactive and generally stable.

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[54] J. Crawford (n 34), pp. 8-10.

[55] A. Watts (n 35), p. 16.

[56] Based on the fundamental elements proposed by Watts and followed by Beaulac. See also. P.A. Nollkaemper (n 10), pp. 2-3; R. Higgins, 'The ICJ and the Rule of Law' - Speech to the United Nations University (11 April 2007), pp. 2-3 <http://www.unu.edu/events/files/2007/20070411_Higgins_speech.pdf> (accessed 23 April 2010): "How then, in this national model, should an 'international rule of law' look? First, there should be an executive reflecting popular choice, taking non-arbitrary decisions applicable to all, for the most part judicially-reviewable for constitutionality, laws known to all, applied equally to all, and independent courts to resolve legal disputes and to hold accountable violations of criminal law, itself applying the governing legal rules in a consistent manner."

(2) the law must be equal. All its subjects are equal before it (i.e. no State/organization/individual is above it); and the law should be equally applicable to all its subjects.

(3) the law has to be effectively and equally enforced, by accessible, independent and impartial courts.

The third requirement, which is reviewed in this research, is essential and not only from the standpoint of the *international rule of law*. More fundamentally, it relates to the essence of a legal order in itself, that, by definition, it ought to be a "coercive order". Coercion is a central feature of Kelsen's view of a legal order. According to Kelsen, what distinguishes law from other normative systems, such as morals, is the coercive force of law. He considered physical coercion to be the requisite of a legal normative order, as a legitimate, binding legal system could exist only if it was a coercive system. In addition, in order to assure the unity of law he conceived international law as a legal system above State legal systems. At that time, Kelsen found the coercive element in the international order in the form of a "just war": "whether or not international law can be considered as true law depends upon whether it is possible to interpret international law in the sense of the theory of *bellum justum*" [57]. Yet, Kelsen must be read within his own context: an "Austrian intellectual personally involved in the tragedy of the Second World War, for whom legal internationalism is very likely a (noble) ethico-political option"[58]. Today it appears clearly that the coercion element is to be found in the judiciary: national and international courts.[59] The concept of coercion is central also in D'Amato's scholarship. Prof. D'Amato is of the view that the question of coercion is not inherent to the law itself. Theoretically, the law could be completely obeyed without the question of compliance being rise. Yet, "whether the subjects of the law are states or people,

[57] H. Kelsen (n 4), p. 52. The international community should be ruled by a law that, as at domestic level, in cases of violations need to be enforced by a court.

[58] D. Zolo (n 1), p. 323.

[59] For further exposition of Kelzen's positivist theory in relation to international law, see H. Kelsen, 'Law is a Coercive Order' in *General Theory of Law and State*, trans A. Wedberg (Mass: Harvard University Press, Cambridge, 1949), p. 19; A. Carty, 'The Continuing Influence of Kelsen on the General Perception of the Discipline of International Law' (1998) 9 European Journal of International Law 2, p. 344; F. Rigaux, 'Hans Kelsen on International Law' (1998) 9 European Journal of International Law 2, p. 325.

our experience in the real world teaches us the unassailable fact that, to be effective, law must be enforced by physical sanctions."[60]

Louis Henkin's famous observation states that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time"[61]. The reason why states obey international law rules has been a wide subject of discussion among legal theorists in American universities. The New Heaven School at Yale University, consistently argued that international law is not a body of binding norms, but a process of authoritative decision making[62]. Policy oriented legal scholars such as Myres McDougal, W. Michael Reisman, Jack Goldsmith, and Eric Posner argue that international law has no independent force.[63] That approach does not see any rule of international law as compulsory. Rules are guidelines for ways to cooperate with other states. States only act for self-interested reasons and their self-interest is determined by political factors and not legal ones. Therefore international relations are shape by force and not by law.

> The notion of law as a body of rules, existing independently of decision-makers and unchanged by their actions, is a necessary part of the intellectual and ideological equipment of the political inferior.[64]

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[60] A. D'Amato, 'Is International Law Coercive?' (2008) Northwestern University School of Law Paper Series, p. 4. D'Amato focuses on reprisal as a method of coercion. It is possible that practically the use of violence is an effective manner to enforce the law. However, I would not justify those methods. In my view, the coercion shall be gained by the judiciary as at domestic level.

[61] L. Henkin, *How Nations Behave: Law and Foreign Policy* (Columbia University Press, New York, 1979), p. 47.

[62] H. Hongju Koh, 'Why Do Nations Obey International Law?' (1997) 106 The Yale Law Journal 8, p. 2622; B.H. Weston, O. Schachter, W.M. Reisman, R.A. Falk and M.S. McDougal, 'McDougal's Jurisprudence: Utility, Influence, Controversy' (1985) 79 American Society of International Law Proceedings of the Annual Meeting, p. 283; R. Falk, 'Casting the Spell: The New Haven School of International Law' (1995) 104 The Yale Law Journal 7, pp. 1991, 1997.

[63] M.S. McDougal et al., *Human Rights and World Public Order: The Basic Policies of an International law of Human Dignity* (Yale University Press, Yale, 1980); M.S. McDougal & W.M. Reisman, *International Law Essays* (The Foundation Press, New York, 1981); W.M. Reisman, *Nullity and Revision: The Review and Enforcement of International Judgments and Awards* (Yale University Press, Yale, 1971); and M.S. McDougal & W.M. Reisman, 'International Law in Policy-Oriented Perspective' in R.St. J. MacDonald & J. Douglas (eds), *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (Martinus Nijhoff, Boston, 1983), p. 247–290.

[64] W.M. Reisman, 'The View from the New Haven School of International Law' (1992) 86 American Society of International Law Proceedings of the Annual Meeting 118.

On the New Haven school approach D'Amato writes:

> Rather than denying that law needs to be enforced by physical power, the late Myres McDougal and his associates founded the New Haven school upon the proposition that physical power *is* law. That which is enforced is law. All other norms can be disregarded; they are nothing but paper-and-ink norms. Obey the sword, for it is mightier than the pen…. what the New Heaven School taught was a theory of inequality that was as true for power as it was false for law.[65]

Another American approach to deny the dimension of coercion in international law is the theory of exceptionalism. This view is presented by Prof. Glennon as follow:

> The needs of the powerful are different from the needs of the weak; the powerful don't need to be concerned about penalties for violation that might dissuade the weak. Obligation is therefore a function of power and influence. A rule that "obliges" the weak may not oblige the powerful — even though the powerful may miscalculate and flout that rule to their peril. That, in a nutshell, is how legal obligation emerges and also how legal obligation fades…When norms generate a sufficient measure of compliance, we call them 'law'.[66]

D'Amato notes that the difference between these approaches is that "the New Haven school teaches that the strongest states make the law while exceptionalism holds that the strongest states are exempt from the law"[67]. These views obviously do not correspond to my founding theoretical assumption on which my work is based, which is essentially positivist, inspired by Kelsen. In American literature, more relevant to my work is the approach of Prof. Harold Hongju Koh. His position recognizes the binding force of international law through domestic systems, and calls for a transnational process, in form of domestication of international rules into domestic law.[68]

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[65] A. D'Amato (n 60), pp. 13-16.

[66] M. J. Glennon, 'Force and the Settlement of Political Disputes' (Debate with Alain Pellet, The Hague Colloquium on Topicality of the 1907 Hague Conference, 7 September 2007), p. 5. Available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1092212> (accessed 20 January 2012).

[67] *Ibid*, p. 18.

[68] H. Hongju Koh (n 62), p. 2659. "A transnational actor's moral obligation to obey an international norm becomes an internally binding domestic legal obligation when that norm has been interpreted and internalized into its domestic legal system." See also H. Hongju Koh, 'International Law as Part of Our Law' (2004) 98 American Journal of International Law 1, p. 43; H. Hongju Koh, 'Transnational Public Law Litigation' (1991) 100 The Yale Law Journal 8, pp. 2360-2366.

1.4 The growing reference to the rule of law by international institutions

The term rule of law has been employed in a growing manner by international legal institutions and instruments, and it seems that a trend is emerging, gradually, of applying certain elements of the rule of law to the international sphere.[69] This section provides a number of examples of how international legal actors perceive the rule of law at international level.

Explicit reference to the rule of law in international legal instruments

The preamble to the 1948 Universal Declaration of Human Rights states that "it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law."[70] Article 3 of the Statute of the Council of Europe provides that "every Member of the Council of Europe must accept the principle of the rule of law." The sixth preambular paragraph of the *1950 European Convention of Human Rights* provides that "governments of European countries which are likeminded and have a common heritage of political traditions, ideals, freedom and the rule of law". In the reference to the rule of law in these instruments, although its importance is recognised at international level, the rule of law remains relevant mainly to the domestic legal systems of States.

The International Criminal Tribunal for the former Yugoslavia

The ICTY first referred to the commitment to the rule of law in *Tadic*. While ruling on the legality of the establishments of the tribunal in which they operate, the ICTY Appeals Chamber, stated that:

> Such a Court ought to be rooted in the rule of law and offer all guarantees embodied in the relevant international instruments. … [T]he requirement that the International Tribunal be 'established by law' is that its establishment must be in accordance with the rule of law. This appears to be the most sensible and most likely meaning of the term in the context of

[69] According to Tamanaha, while the rule of law on a national level, "remains a work in progress", the second project of the application of the rule of law internationally "has only just begun". B.Z. Tamanaha (n 40), p. 127. "In international affairs the international rule of law has not yet been firmly established. But steady progress is being made. The rule of law is not something that can be established overnight." A. Watts (n 53), p. 7.

[70] Universal Declaration of Human Rights - UNGA Res 217A (III) (10 December 1948) UN Doc. A/RES/217 A (III), Preamble.

> international law. For a tribunal such as this one to be established according to the rule of law, it must be established in accordance with the proper international standards; it must provide all the guarantees of fairness, justice and even-handedness, in full conformity with internationally recognized human rights instruments.[71]

As stated by the Chamber, the ICTY has to conform to the domestic notion of the rule of law, that includes procedural aspects and respect for substantial rights of due process. More generally, it can be deduced that the (domestic) notion of the rule of law should be applied to international judicial institutions.

European Court of Human Rights

An important number of European Court of Human Rights cases refer in different contexts to the obligation of States and their national legal systems, under the Court's review, to comply with the rule of law. For example, in *Klass* the Court stated that:

> the rule of law implies, inter alia, that an interference by the executive authorities with an individual's rights should be subject to an effective control which should normally be assured by the judiciary, at least in the last resort, judicial control offering the best guarantees of independence, impartiality and a proper procedure.[72]

Judge Mark E. Villiger observed that the European Court of Human Rights views the concept of the rule of law as including a legal system in which individuals enjoy substantial and

[71] *Prosecutor v Tadic*, (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY IT-94-1 (2 October 1995), §§ 42 and 45.

[72] *Klass and Others v Germany* (Judgment) European Court of Human Rights No. 5029/71 (6 September 1978), § 55. For other examples see: *Fevzi Saygili v Turkey* (Judgment) European Court of Human Rights No. 74243/01 (8 January 2008), § 32: "it was not possible to reconcile the provision which precluded any judicial scrutiny of acts performed by the governor of the state of emergency region with the concept of the rule of law"; *Khatsiyeva and Others v Russia* (Judgment) European Court of Human Rights No. 5108/02 (17 January 2008), § 144: "a prompt response by the authorities in investigating the use of legal force may generally be regarded as essential in maintaining public confidence in maintenance of the rule of law". See also *Gulsenoglu v Turkey* (Judgment) European Court of Human Rights No. 16275/02 (29 November 2007), § 47; *Brecknell v The United Kingdom* (Judgment) European Court of Human Rights No. 32457/04 (27 November 2007), § 65.

enforceable rights, and that the laws have to be predictable and equally implemented for all.[73] In addition, he indicates that

> the notion of rule of law developed by the Court is suitable, and applicable, for all instances and authorities which apply international law – among them States of course, but also international courts, arbitration tribunals and the various international treaty monitoring bodies. [74]

The United Nations

The General Assembly has referred to the rule of law as an agenda item since 2006 and has adopted resolutions on the issue at its last forth sessions.[75] During the General Assembly's sixty-fourth session, with regard to the subtopic "The rule of law at the international level" (October - November 2009), it was generally agreed that the rule of law is based on a number of core principles:

> Reference was made in particular to the 2005 World Summit Outcome Document. Some delegations also mentioned the general obligation to honour international obligations in good faith, the obligation to refrain from the threat or use of force, the obligation to settle disputes by peaceful means, the obligation to protect human rights and fundamental freedoms and abide by international humanitarian law. Some delegations further stated that the principle of sovereign equality of States was an important element in the promotion of the rule of law at

[73] M.E. Villiger, 'Domestic Courts and the International Rule of Law – the Perspective of the European Courts of Human Rights,' p. 10. The article was presented at *The First International Law in Domestic Courts (ILDC) Colloquium*, University of Amsterdam, held at The Hague on 28 March 2008 <http://www.jur.uva.nl/aciluk/object.cfm/24A0465F-1321-B0BE-A477AEC5C2BEDC6B> (accessed 23 April 2010).

[74] *Ibid*, pp. 10-11.

[75] UNGA Res. 61/39 (18 December 2006) UN Doc A/RES/61/39 on "The rule of law at the national and international levels" reaffirms "the need for universal adherence to and implementation of the rule of law at both the national and international levels and its solemn commitment to an international order based on the rule of law and international law, which together with the principles of justice, is essential for peaceful coexistence and cooperation among States." Other relevant resolutions are UNGA Res. 62/70 (8 January 2008) UN Doc A/RES/62/70, UNGA Res. 63/128 (15 January 2009) UN Doc A/RES/63/128 and UNGA Res. 64/116 (15 January 2010) UN Doc A/RES/64/116. All UN documents relating to the rule of law are available at 'The UN and the Rule of Law' website <http://www.un.org/en/ruleoflaw/index.shtml> (accessed 23 April 2010).

> the international level; the selective enforcement of international law was mentioned as an example of the failure to respect that basic principle.[76]

In its last resolution on the topic "The rule of law at the national and international levels", adopted on 15 January 2010, the General Assembly "reaffirms further that States shall abide by all their obligations under international law" and "invites Member States to focus their comments in the upcoming Sixth Committee debate on the sub-topic 'Laws and practices of Member States in implementing international law.'"[77] Since 2004, the UN Secretary-General has issued a number of reports on the rule of law. The first of these reports, "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies", offered a definition to the rule of law:

> The rule of law is a concept at the very heart of the Organization's mission. It refers to a principle of governance in which all persons, institutions and entities, public and private,

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[76] The summary of the session available at the General Assembly's official website at <http://www.un.org/ga/sixth/64/RuleofLaw.shtml> (accessed 23 April 2010). Particularly interesting is the statement by the US delegation: "The United States has reinvigorated its commitment to the rule of law at the international level, including in the arena of international humanitarian and human rights law and through its participation in the work of multilateral institutions. The Obama Administration signaled the seriousness of its commitment in these areas in its very first week of being in office. Among the President's first Executive Orders were orders that mandated the closure of the Guantanamo Bay detention facility, instituted searching reviews of U.S. detention and interrogation policies, closed CIA secret detention facilities, and caused all interrogations to be governed by the widely accepted guidelines set forth in the U.S. Army Field Manual…. In conclusion, the United States appreciates the Sixth Committee's interest in promoting respect for and adherence to the rule of law at the national and international level. We are strong proponents of respect for and adherence to the rule of law and look forward to working with others on practical measures to advance those objectives." Statement made by Laura G. Ross, Senior Advisor to the Permanent Representative of the United States to the Sixty-fourth Session of the General Assembly, in the Sixth Committee, on Agenda Item 83: The Rule of Law at the National and International Levels (New York, 14 October 2009) <http://usun.state.gov/briefing/statements/2009/130581.htm> (accessed 23 April 2010).

[77] UNGA Res. 64/116 (15 January 2010) UN Doc A/RES/64/116, paras. 2,12. See also the International Committee of the Red Cross official statement: "the International Committee of the Red Cross welcomes the importance placed by the Sixth Committee and the Secretary-General on the promotion of the rule of law, and in particular the increased attention to international criminal law and the accountability of perpetrators of the most serious international crimes." 'The Rule of Law at National and International Level,' United Nations, General Assembly, Sixty-fifth Session, Sixth Committee, on Agenda Item 85, Statement by the International Committee of the Red Cross (New York, 14 October 2010).

> including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.[78]

Other reports are the Secretary-General's report, "Strengthening and Coordinating United Nations Rule of Law Activities" of August 2008,[79] and the Annual report on strengthening and coordinating United Nations Rule of Law Activities" of August 2009,[80] among others[81]. The Security Council has held thematic debates on the rule of law and

[78] Report of the Secretary-General, 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (23 August 2004) UN Doc S/2004/616, para. 6.

[79] Report of the Secretary-General, 'Strengthening and Coordinating United Nations Rule of Law Activities' (6 August 2008) UN Doc A/63/226. The report underscores the importance of the rule of law at the international level and examines the way to encourage implementation of international norms at national level. It outlines that "there is much to be reaffirmed and strengthened with respect to our approach to the rule of law at the international level" (para. 22); and it states that the UN "has little credibility if it fails to apply the rule of law to itself. The United Nations is a creation of international law, established by treaty, and its activities are governed by the rules set out in its Charter. Appropriate rules of international law apply mutatis mutandis to the Organization as they do to States" (para. 27).

[80] Report of the Secretary-General, 'Annual Report on Strengthening and Coordinating United Nations Rule of Law Activities' (17 August 2009) UN Doc A/64/298. This is the first annual report on UN efforts to strengthen engagement on the rule of law at the national and international levels. The report emphasizes the need for active engagement by States in strengthening the rule of law at the international level as being critical to maintaining international peace and security and to addressing contemporary global challenges. "Doubtless, much work remains if the rule of law at the international level is to be fortified. Moving this agenda forward requires the active engagement of Member States. An ongoing, open discourse should assist in formulating concrete and innovative measures to this end. In this regard, under the leadership of the Deputy Secretary-General, the Rule of Law Coordination and Resource Group, supported by the Rule of Law Unit, initiated in 2009 the dialogue with Member States on the rule of law at the international level. This initiative — which should further strengthen the work of the Organization in this field — should be welcomed" (para. 20).

[81] Other reports are Report of the Secretary-General 'Annual Report on Strengthening and Coordinating United Nations Rule of Law Activities' (17 August 2009) UN Doc A/64/298; Report of the Secretary-General 'Uniting Our Strengths: Enhancing United Nations Support for the Rule of Law' (14 December 2006) UN Doc A/61/636; Report of the Secretary-General 'In Larger Freedom: Towards Development, Security and Human Rights for All' (21 March 2005) UN Doc A/59/2005; and Report of the Secretary-General 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (23 August 2004) UN Doc S/2004/616.

adopted a resolution stressing the importance of the rule of law in the context of the protection of civilians in armed conflict.[82] Responsibility for the overall coordination of rule of law work rests with the Rule of Law Coordination and Resource Group. It is chaired by the Deputy Secretary-General and supported by the Rule of Law Unit. The Group adopted a Joint Strategic Plan for 2009–2011.[83]

To sum up, as indicated by President Higgins, "despite this flood of reports, we still do not have a clear definition of what it meant by 'the rule of law at the international level'."[84] As shown, the reference to the rule of law by international fora and instruments is done either with a view to strengthening the application of the rule of law at the domestic level, or for the submission of a specific international institution to the requirements of the rule of law (as an international court or a peacekeeping mission).[85] Yet, the *international rule of law* is not a simple substitution with the domestic notion of the rule of law. Although international bodies more and more refer to the rule of law, there is still divergence on the general understanding of what constitute the international rule of law, its core elements, and their content. Having said that, it can be reasonably assumed that the three fundamental elements identified in the previous section are not exhaustive, but do certainly represent the essential core of the international rule of law.

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[82] In para.11 of UNSC Res. 1674 (28 April 2006) UN Doc S/RES/1674, the Council: "*Calls upon* all parties concerned to ensure that all peace processes, peace agreements and post-conflict recovery and reconstruction planning have regard for the special needs of women and children and include specific measures for the protection of civilians including …(v) the re-establishment of the rule of law …

[83] United Nations, 'Rule of Law Coordination and Resource Group - Joint Strategic Plan 2009–2011' (February 2009) <http://www.unrol.org/files/RoLCRG%20Joint%20Strategic%20Plan.pdf> (accessed 23 April 2010). The Group consists of the Department of Political Affairs (DPA), the Department of Peacekeeping Operations (DPKO), Office of the High Commissioner for Human Rights (OHCHR), the Office of Legal Affairs (OLA), UN Development Programme (UNDP), The UN Children's Fund (UNICEF), The Office of the UN High Commissioner for Refugees (UNHCR), the UN Development Fund for Women and the UN Office on Drugs and Crime (UNODC).

[84] R. Higgins (n 56), p. 9.

[85] According to Chesterman, the reference to the rule of law by UN bodies is made within three contexts: human rights, development (the rule of law as essential for economic growth), and conflict resolution (the rule of law as essential for transitional justice and post conflict reconstruction). Yet, in all the references he mentions, when the term rule of law was advanced by UN bodies (such as UNDP, the General Assembly, the Security Council, or a peacekeeping mission) it was to strengthen the rule of law at domestic level, and not to regulate the relations between States and other subjects of international law at international level. S. Chesterman (n 46), pp. 348-356.

2. International Humanitarian Law and the International Rule of Law

Legal systems can meet the normative requirements of the (international) rule of law to a greater or lesser extent. The following part examines the extent to which international humanitarian law – as a legal system, a specific branch of the international legal order – complies with the core elements of the international rule of law. Each of the three elements previously identified of the international rule of law are examined. The first two are discussed relatively briefly, as my aim is mainly to situate the core of my research – the role of national court in applying international humanitarian law – into its contextual framework, which is to be found within the third element. The examination of the three fundamentals is done as follows: (1) *The existence of a normative framework as opposed to an arbitrary power to regulate the relations of its subject*: here I examine whether the rules of international humanitarian law constitute a normative framework as required by the rule of law, and that international humanitarian law rules are known, prospective, clear, and stable; (2) *The equal application of the law*: in this section I analyze the requirement of equality, namely that the international humanitarian law applies to all of its subjects in an equal manner and that each subject is equal before the law; and (3) *Effective and equal enforcement by an impartial, independent and accessible judiciary.* In this section each feature is examined through the prism of the structural and the functional role of the national courts in applying international humanitarian law.[86]

[86] I will focus only on national courts. The role of international courts, which I do not imply is less important, will therefore remain open for further research.

2.1 The existence of a normative framework

Today, it is hardly possible to claim that international law is not law.[87]As international humanitarian law is one of the most complete, coordinated, and codified branches of international law, it is not an exception to that statement, rather one of its best illustrations. International humanitarian law forms a universal normative framework, which, since the start of its codification in the nineteenth century, has been in constant development, aiming at adapting itself to contemporary situations.[88] It has evolved to enlarge the categories of person entitled to the law's protection (military wounded, sick, and shipwrecked, prisoners of war, and civilians), the situations to which international humanitarian law is applicable (non-international as well as international armed conflict), and has broadened the limitations and prohibitions of specific means and methods of warfare. The sovereignty of States, although recognised as fundamental elements in international law, is not unlimited, but is subordinated to the law: it is free to operate within the boundaries defined by international humanitarian law. The fundamental distinction between *jus in bellum* and *jus ad bello* clearly demonstrates the limitations imposed on the power of States, as does their obligation to respect the law "in all circumstances" as required by Common Article 1 of the four 1949 Geneva Conventions: no matter which side is responsible for the armed conflict, all belligerents are under the

[87] "Today, indeed few people would seriously doubt that there is a body of norms that enjoy the characteristic and pedigree of law on the international plane. International law is regarded as true positive law, which forms part of a real legal system." S. Beaulac (n 44), p. 205. For similar statements in relation to the international rule of law see: "…ongoing debates over whether international law is "law" in any strict sense of the word, a largely sterile inquiry due to the dearth of strong theories of international law and the abundance of practice accepting its legality nonetheless." S. Chesterman (n 46), p. 366; "there need be no doubting the existence of a body of rules of public international law providing the legal basis for the conduct of international relations between those states" A. Watts (n 35), p. 26; "Of course, it is no longer sufficient to dismiss claims based on international law on the grounds that it is not really law. Claims denying the legal character of international law, invoking either state sovereignty – the lack of a sovereign on the international level – or the lack of centralized enforcement mechanisms, have generally failed." M. Kumm (n 47), p. 20. More generally, see T.M. Franck, *Fairness in International Law and Institutions* (Oxford University Press, New York, 1995) that claims that international law no longer has to defend its existence but can now make substantive progress as it entered its post-ontological era; L. Henkin (n 61), p. 95: "The deficiencies of international law and the respects in which it differs from domestic law do not justified the conclusion that international law is not a law…"

[88] Y. Sandoz, *The International Committee of the Red Cross as Guardian of International Humanitarian Law* (ICRC, Geneva, 1998) <http://www.icrc.org/eng/resources/documents/misc/about-the-icrc-311298.htm> (accessed 22 October 2011).

obligation to respect international humanitarian law. That includes the limitations on the means and methods of warfare, the detailed instructions on the treatment of civilians and protected persons, and how to administrate occupied territories. These obligations do not depend on reciprocity.[89] Also *necessity* can not be a valid argument for any subject of international humanitarian law to act in a lawless zone: international humanitarian law was designed to apply in the most extreme situations of violence—armed conflicts—in which all *necessity* demands were already taken into account when drafting the law.[90] In this context it should be highlighted that compliance with the rule of law must be distinguished from compliance with the law. If a subject violates the law, even intentionally, it does not mean that it does not operate within an environment governed by the rule of law.

2.1.1 The normative framework: Sources of international humanitarian law

Treaties - The year of adoption of the first Geneva Convention, 1864, is usually referred to as the date of birth of modern, codified international humanitarian law[91], situating it among the first branches of international law to be codified. International humanitarian law has continued to evolve to become one of the most codified and universally ratified branches of international law.[92] An important feature of humanitarian law treaties is that they constitute an exception to the general treaty rules on *Termination or suspension of the operation of a treaty as a consequence of its breach* – i.e., the respect of treaty of "humanitarian nature" is not subjected to the requirement of reciprocity.[93] Yet, according to the requirements of the 1969

[89] According to both treaty and customary law: Article 60(5) of the Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 U.N.T.S 331 (hereinafter: the Vienna Convention on the Law of Treaties) and J.M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law - Volume I: Rules* (Cambridge University Press, Cambridge 2005), Rule 140, p. 498. An online updated database is available at: <http://www.icrc.org/customary-ihl/eng/docs/home> (accessed 12 January 2012).

[90] M. Sassòli, 'State Responsibility for Violations of International Humanitarian Law' (2002) 84 International Review of the Red Cross 846, pp. 415-417.

[91] M. Sassòli, A. Bouvier and A. Quintin, *How Does Law Protect in War?* (3rd ed., Geneva, ICRC, 2011), p. 139; ICRC – Advisory Service on International Humanitarian Law, 'What is International Humanitarian Law?' (July 2004) <http://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf> (accessed 5 May 2010).

[92] See the International Committee of the Red Cross database on treaty ratification of more than 100 treaties <http://www.icrc.org/IHL.nsf> (accessed 5 May 2010).

[93] Article 60(5) of the Vienna Convention on the Law of Treaties.

Vienna Convention on the Law of Treaties these treaties are binding only upon States Parties, and the rules are applicable only reciprocally (for example, *1977 Additional Protocol I* will be applicable to belligerents in an armed conflict only if both sides have ratified it).

Among important early instruments we can mention the 1863 Lieber Code, the 1864 first Geneva Convention, the 1868 St. Petersburg Declaration, and the 1880 Oxford Manual. The period since the beginning of the 20th century can be characterised as the codification years of contemporary international humanitarian law, essentially codified in the Hague Conventions of 1899 and 1907, the fourth Geneva Conventions of 1949, and their three Additional Protocols (two of 1977 and the third of 2005). These founding instruments are supplemented by numerous weapons' treaties including the 1925 Geneva Protocol on Gas Warfare, the 1980 Convention on Conventional Weapons and its Protocols, the 1993 Chemical Weapons Convention, the 1997 Ottawa Convention on Anti-Personnel Mines, and the 2008 Cluster Munitions Convention; and other treaties dealing with specific issues as the 1954 Hague Convention on the Protection of Cultural Property in Armed Conflict and its 1999 Protocol, and the 2000 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict. Finally, the Rome Statute that established the ICC is an important step in the codification phase.

Custom - Even if a State is not party to a humanitarian treaty, many international humanitarian law rules are considered to reflect customary international law, which is binding upon all States. In 2005, the International Committee of the Red Cross published a study of customary international humanitarian law in which it identified 161 customary rules binding upon all States and, in the case of the rules deemed applicable in non-international armed conflict, also upon non-State actors.[94] Although this list of rules is not exhaustive, it is an important step toward the identification and publication of customary norms, required for the rule of law.[95]

General principles - As in domestic law, the answers to legal questions can be determined by general principles.[96] General principles of international humanitarian law include the principle of humanity (the Martens Clause), the principle of distinction, the principle of proportionality,

[94] J.M. Henckaerts and L. Doswald-Beck (n 89).

[95] A. Watts (n 35), p. 28.

[96] According to Article 38 of the Statute of the International Court of Justice: "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: … (c) the general principles of law recognized by civilized nations."

the principle of necessity, and the prohibition of causing unnecessary suffering.[97] These principles serve as supporting the rules and have to be taken into consideration for their interpretation.

2.1.2 The rules should be known, prospective, clear and stable

"The law inevitably creates a great danger of arbitrary power – the rule of law is designed to minimize the danger created by the law itself."[98] Therefore, the rule of law requires that the laws be adequately publicised, not retroactive, clear, and stable.[99] Although the legislation process at international level is very different from the one at national level, the rules have to possess these characteristics in order to guide the subjects' behaviour in the long term without being arbitrary. International humanitarian law seems to respect these requirements.

Publication - General rules of public international law require that treaties should be transmitted to the Secretariat of the United Nations for registration and publication.[100] Specific provisions in each major international humanitarian law treaty provide for the same obligation.[101] In addition, international humanitarian law enjoys a high level of accessibility, through national and international official internet sites.[102] Member States have to translate

[97] See M. Sassòli, A. Bouvier and A. Quintin (n 91), p. 158-160.

[98] J. Raz (n 3), p.23.

[99] *Ibid*, p.16.

[100] Article 80(1) of the Vienna Convention on the Law of Treaties and Article 102 of the Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 U.N.T.S 15 (hereinafter: the United Nations Charter). Yet, this is not a condition for their entry in force!

[101] See for example, Articles 64/63/143/159 respective of the Four Geneva Conventions of 1949; Article 101 of the Additional Protocol I of 1977; Article 27 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978), 1125 U.N.T.S 609 (hereinafter: the Additional Protocol II of 1977); Article 16 of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (adopted 8 December 2005, entered into force 14 January 2007) (hereinafter: the Additional Protocol III of 2005).

[102] These are available on the United Nations website <http://treaties.un.org/Pages/Home.aspx?lang=en> (accessed 5 May 2010) and International Committee of the Red Cross website <http://www.icrc.org/ihl.nsf> (accessed 5 May 2010) and usually on the national website of the respective government or ministry of foreign affairs.

the Geneva Conventions and their first Additional Protocol.[103] The International Committee of the Red Cross supports States in complying with this task and assists them in disseminating the Conventions. As noted above, it also published 161 rules it had adduced of customary international humanitarian law, contributing thus to the respect of the international rule of law.

Prospective - The requirement that treaty rules be non-retroactive is regulated by Article 28 of the 1969 Vienna Convention.[104] As for individual criminal responsibility, the principle of non-retroactivity was endorsed by the Rome Statute,[105] which grants jurisdiction *ratione materia* over war crimes to the ICC. According to Article 146 of the Fourth Geneva Convention, States Parties are under the obligation to "enact any legislation necessary to provide effective penal sanction" for individuals alleged to have committed grave breaches of the convention. This legislation should, at national level, respect the requirement of non-retroactivity, as provided by international human rights law.[106]

The requirements of publication and non-retroactivity not only apply to international humanitarian law treaty rules themselves, but also to their content, in the authority that international humanitarian law grants to legislate or to adjudicate. For example, during a military occupation, the legislative authority of the military commander and the jurisdiction *ratione materiae* of the occupying forces' military courts are restricted by the publication and non-retroactivity requirements.[107]

Stable - International humanitarian law rules are stable. It is the complexity in changing international humanitarian law rules and adapting them to new realities, rather than their

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[103] Articles 48/49/128/145 respective of the Four Geneva Conventions of 1949, Article 84 of Additional Protocol I of 1977.

[104] M.E. Villiger, 'Non-Retroactivity of the Convention' in *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers, Leiden-Boston, 2009), Martinus Nijhoff Online (21 January 2010) http://nijhoffonline.nl/extract?id=nij9789004168046_nij9789004168046_i-1058-51 (accessed 5 May 2010).

[105] Articles 22 – 24 of the Rome Statute.

[106] Article 15 of the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 march 1976) 999 U.N.T.S 171 (hereinafter: the International Covenant on Civil and Political Rights).

[107] See Article 65 of the Fourth Geneva Convention of 1949: "The penal provisions enacted by the Occupying Power shall not come into force before they have been published and brought to the knowledge of the inhabitants in their own language"; and Article 67 of the Fourth Geneva Convention of 1949: "The courts shall apply only those provisions of law which were applicable prior to the offence, and which are in accordance with general principles of law."

changing nature, which is most often criticised. Indeed, international humanitarian law rules should be stable, but not static.

Clear - International humanitarian law rules are in most cases very detailed and clear and enjoy a high level of consistency between the different treaties. Therefore, many international humanitarian law rules are self-executing and can be directly applicable at national level.[108] Yet, other international humanitarian law rules require legislation to be adopted at national level in order to provide the required clarification to make them enforceable.[109] Watts mentions an additional requirement – the completeness of the law. The law "must be capable of governing all situations which may arise within it, and that accordingly the courts must be able to decide on the basis of applicable law all cases brought before them."[110] Completeness demands that there should not be a *lacuna* in law. Similarly, rules that allow for the application of discretion may open the door to arbitrariness. Many legal norms in international humanitarian law leave a degree of discretion to the State so as to be capable to adapt to different situations (consider, for example, the term *security reasons).* This is also a result of the international negotiation process. At the same time, discretion must operate within the borders of the law, and its exercise can be challenged in light of the law.

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[108]A self executive norm was defined by Kelsen as "a norm of international law which is applicable by organs of the states without further implementation by national law…this should be distinguish from so called transformation of international law into national law" that may be required in a particular constitutional legal system of a state to apply international rules in its domestic system. H. Kelsen, *Principles of International Law* (Rinehart & Company, New York, 1952), p. 194 (emphasis added). That is to say that customary law is always directly applicable into domestic legal systems, while treaty law rules require, in dualist legal systems, national transformation. However, even in cases of direct application of international law, only self executive rules may be enforced by courts. For the relations, in general, between international and domestic law, see, e.g., E. Denza, 'The Relationship between International and National Law' in M.D. Evans (ed), *International Law* (2nd edn Oxford University Press, New York, 2006), pp. 423-446; A. Cassese, 'Implementation of International Rules within National Systems' - Chapter 12 - in *International Law* (2nd edn Oxford University Press, New York, 2005), pp. 220-232.

[109] For example, the obligation to repress grave breaches violations through the enactment of domestic penal provision is based, *inter alia*, on the rationale that criminal laws, with respect to the rule of law and the principle of legality, should be detailed and clear (Articles 49/50/129/146 respectively to the Four Geneva Conventions of 1949, and Article 85(1) of the Additional Protocol I of 1977). Only national legislation can define with the necessary clarity and specificity the elements of the crimes and the level of punishment of criminal provisions, and other matters to make them operational such as courts' jurisdiction, prosecutor's authorities, extradition regulations, criminal defence, etc.

[110] A. Watts (n 35) pp. 26, 27.

2.1.3 The obligation to enact implementing domestic legislation

In order to guarantee that rules are sufficiently clear and detailed, all four Geneva Conventions and additional protocols and other international humanitarian law instruments impose an explicit obligation to adopt and endorse specific international humanitarian law rules into domestic legislation. It includes the obligation to provide for effective penal sanctions within domestic criminal law code for grave breaches of the conventions regardless of the nationality of the perpetrator, commonly agreed as entailing universal jurisdiction.[111] Other explicit provisions that require incorporation into national laws and regulations include the use of the red cross emblem,[112] the protection of cultural property,[113] the prohibition and regulation of the use of certain weapons,[114] etc.[115] According to Sassòli and Bouvier, States must adopt national laws for all international humanitarian law rules that are not self-executing, even without having the explicit requirement of national legislation endorsement in

[111] For different models of legislation see – K. Dörmann and R. Geiβ, 'The Implementation of Grave Breaches into Domestic Legal Orders' (2009) 7 Journal of International Criminal Justice 4, p. 703.

[112] Articles 42,44,53 and 54 of the First Geneva Convention of 1949 and Articles 44 and 45 of the Second Geneva Convention of 1949.

[113] Article 28 of the Convention for the Protection of Cultural Property of 1954 states: "Parties to the Convention must take all necessary steps to prosecute and impose sanctions on all persons who violate its provisions." See also Article 15 of the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property.

[114] Article 9 of the Convention on Cluster Munitions states: "Each State Party shall take all appropriate legal, administrative and other measures to implement this Convention, including the imposition of penal sanctions to prevent and suppress any activity prohibited to a State Party under this Convention undertaken by persons or on territory under its jurisdiction or control"; See also Article 14 of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II to the 1980 Convention as amended on 3 May 1996) (adopted 3 May 1996, entered into force 3 December 1998) 1342 U.N.T.S 168 and Article 7 of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (adopted 13 January 1993, entered into force 29 April 1997) 1974 U.N.T.S 45.

[115] "Several provisions in the Convention call in various cases for adaptations or additions to national laws. Penal sanctions, regulations for internment, the establishment of safety zones, the protection of civilian hospitals, the use of the red cross emblem and the identification of young children, all call for legislative action on which the application of the Convention can be based". J. Pictet (ed), *Commentary: Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (ICRC, Geneva, 1958), Article 145, p. 583. According to Articles 48/49/128/145, respectively, of the Four Geneva Conventions of 1949 and Article 84 of the Additional Protocol I of 1977, national legislation should be communicated to the other contracting states.

the treaty, in order to make them operational.[116] This is probably true not only for international humanitarian law provisions, but more generally to all international law rules, which are not self-executing. To date, not all States have comply with their obligations to endorse explicit international humanitarian law rules in their national legislation. At the same time, the 1998 Rome Statute, although it does not provide an explicit obligation that requires national legislation, but only an implicit one through the complementary principle, has accelerated the national legislation of international crimes, including grave breaches of the Geneva Conventions.[117]

The obligation upon States to enact international humanitarian law obligations into national legislation can be seen not only as compliance with the rule of law, as far as it imposes certain characteristics upon the laws such as clarity, but also as an expression of the principle of State sovereignty, and a way to solve the disparity that may exist between international and national law: the sovereign State will be normatively bound by international humanitarian law obligations through the incorporation of international rules into its domestic legislation.[118] Yet, it may happen that the "domestication" process will result in legislation

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[116] As example, they mention the obligations on the State to define the responsible State organ in each national governmental system, since "without such a clarification, the international obligation will remain a dead letter" - M. Sassòli, A. Bouvier and A. Quintin (n 91), p. 361.

[117] See K. Dörmann and R. Geiβ (n 111), p. 719; J.I. Charney, 'International Criminal Law and the Role of Domestic Courts' (2001) 95 American Journal of International Law 1, p. 121. Oddly, according to Knut and Geiβ, when national courts do not comply with their international obligation to prosecute grave breaches, because the absence of national law or its inadequacy, it remains doubtful whether this comply with the complementary principle of the ICC, namely if the national courts are unwilling or unable to prosecute. "Article 17 of the ICC Statute does not explicitly relate to the adoption of national legislation, and it is not fully established in how far insufficient national criminal law provisions and inertia of national legislatures could be subsumed under the criteria of 'unwillingness' or 'inability' as they are spelled out in Article 17(2) and (3) ICC Statute." K. Dörmann and R. Geiβ (n 111), p. 718.

[118] Prof. H. Hongju Koh raised the necessity to "domesticate" international rules, and describe this process as a transnational codification, all states are bound by their domestic legislation to the same rules, for resolving the question of compliance with international law. "It is through this transnational legal process, this repeated cycle of interaction, interpretation, and internalization, that international law acquires its 'stickiness', that nation-states acquire their identity, and that nations come to 'obey' international law out of perceived self-interest. In tracing the move from the external to the internal, from one-time grudging compliance with an external norm to habitual internalized obedience, the key factor is repeated participation in the transnational legal process. That participation helps to reconstitute national interests, to establish the identity of actors as ones who obey the law, and to develop the norms that become part of the fabric of emerging international society." H. Hongju Koh (n

that corresponds to the State's self-interest and not necessarily with the international requirement. A problem that may be faced therefore is domestic endorsement which is not identical to the international law obligation. For example, universal jurisdiction for grave breaches as defined in the international rule, if enacted, has been in most cases replaced by active or passive personality as the basis for jurisdiction, or restricted by other conditions and links to the State such as the requirement of residency.[119] Other impediments in national legislation may be justifications and defences that exclude criminal responsibility, statutes of limitation, and immunity or amnesty laws. A theoretical solution for this disparity may be found in Kelsen's observation that "even when national courts apply a domestic rule they apply international law."[120] Thus, it may be argued that just as in certain national legal systems laws that are unconstitutional may be repealed by the court, domestic laws contradicting international humanitarian law shall be repealed.[121]

With the aim of encouraging States to enact adequate international humanitarian law national legislation, the Advisory Service on international humanitarian law was established within the International Committee of the Red Cross legal division in 1996. Its main objective is to encourage States to fulfil their international humanitarian law treaty obligations at the national level by providing legal and technical assistance in incorporating international humanitarian law into national law, and assisting States to set up national international

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62), p. 2653. See also H. Hongju Koh, 'Why Transnational Law Matters' (2006) 24 Penn State International Law Review 4, p. 745.

[119] A. Cassese, *International Criminal Law* (Oxford University Press, Oxford, 2003), p. 309.

[120] H. Kelsen (n 59), p. 347.

[121] Apparently the Israeli High Court of Justice has followed this approach, and even the Israeli military courts in the occupied territories. For example, domestic Israeli law on illegal combatants, which enables the State to detain enemy "unlawful combatants" until the end of hostilities without penal prosecution, was brought to review before the High Court of Justice also in light of international humanitarian law. Yet, the final ruling of a court may well be in contradiction of international humanitarian law as the following chapter will show. Yet, this is less a structural problem of the rule of law, and related more to a functional assessment. The Ofer military court ruled in *Swartz* that a military court is competent to cancel an order of the military commander if it is contradicting international humanitarian law, MC 06/5, *Swartz v The Military Commander* (2005) (unpublished, on file with the author). That competence was affirmed by the Ofer military court of appeals in the case of Hassin; MCA 08/1779, *Hassin v The Military Prosecutor* (2010) (unpublished, on file with the author). For other examples of how courts functioned in cases in which there is a conflict between the applicable international obligation and the domestic law see E. Benvenisti, 'Judicial Misgivings Regarding the Application of International Norms: An Analysis of Attitudes of National Courts' (1993) 4 European Journal of International Law 2, pp. 162-164.

humanitarian law committees and support their work.[122] The International Committee of the Red Cross publishes regularly the result of its efforts in the International Review of the Red Cross.[123]

2.1.4 The special role of the International Committee of the Red Cross

As already mentioned, the International Committee of the Red Cross has a major role in contributing to the respect of this first element of the rule of law.[124] It had a direct contribution to the codification process of international humanitarian law and works to develop and promote international humanitarian law.[125] Its special role is formally recognised in the Statutes of the International Committee of the Red Cross and Red Crescent Movement. According to Article 5 of these statutes the role of the International Committee of the Red Cross is "to undertake the tasks incumbent upon it under the Geneva Conventions, to work for the faithful application of international humanitarian law applicable in armed conflicts and to take cognizance of any complaints based on alleged breaches of that law", and also "to work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof". The International Committee of the Red Cross is responsible for disseminating the rules of international humanitarian law, and thus contributing to the accessibility and knowledge of the law. It

[122] See for example ICRC – Advisory Service on International Humanitarian Law, 'The Model Law - Geneva Conventions (Consolidation) Act Legislation for Common Law States on the 1949 Geneva Conventions and their 1977 and 2005 Additional Protocols' (31 August 2008) <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/geneva-conventions-protocols-model-law-310808>. See also M.T. Dutli, 'The ICRC Advisory Service on International Humanitarian Law' in M. Bothe (ed), *Towards a Better Implementation of International Humanitarian Law* (Arno Spitz, Berlin, 2001), pp. 59-67.

[123] See for example 'National Implementation of International Humanitarian Law – Biannual Update, January - July 2009' (2009) 91 International Review of the Red Cross 875, p. 627.

[124] " As the guardian of humanitarian law, the ICRC takes measures to ensure respect for, to promote, to reaffirm and even to clarify and develop this body of law"- 'The International Committee of the Red Cross (ICRC): Its Mission and Work (Adopted by the Assembly of the ICRC on 19 June 2008)' (2009) 91 International Review of the Red Cross 874, p. 402.

[125] *Ibid*, p. 491. See also H.P. Gasser, 'International Committee of the Red Cross (ICRC)' in Max Planck Encyclopedia of International Law, para. 14. Available online at <www.mpepil.com> (last accessed 18 March 2011).

provides international humanitarian law courses to soldiers, university scholars, State officials, etc.; publishes and distributes the core treaty texts; and encourages and assists States in endorsing their international humanitarian law obligations into their domestic law. In addition, the International Committee of the Red Cross has a monitoring function and through the constant review of humanitarian rules it seeks to ensure that they are clear and adapted to the reality of contemporary conflicts, and works for their clarification and development when necessary. It has published imperative leading commentary on the Geneva Conventions,[126] the International Committee of the Red Cross customary rule study[127] and, more recently, interpretive guidance on the notion of direct participation in hostilities.[128] In cases of inadequacy of the law it can, for example, initiate expert seminars and diplomatic conferences on the issue, as happened with the law on the use of mines.[129]

To sum up, it can firmly be stated that a complete and coordinated body of international humanitarian law exists and limits the sovereignty of States and other arbitrary powers. This body of law is published, clear, forward-looking in application, and relatively stable. The first requirement of the international rule of law is thus well established.

2.2 Equal application of international humanitarian law

The international rule of law requires the equal subjection of all to the law. It entails that the international humanitarian law should be universal and that all of its subjects are equal before it.

2.2.1 Universality

The rules have to apply to all the members of the community. The customary rules of international humanitarian law apply to all States. In addition, international humanitarian law treaties have attracted a large number of ratifications. Its core instruments are universally

[126] J. Pictet (n 115).

[127] J. M. Henckaerts and L. Doswald-Beck (n 89).

[128] N. Melzer, *Interpretative Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* (ICRC, Geneva, 2009).

[129] Y. Sandoz (n 88).

ratified and the important weapon conventions are very broadly ratified.[130] States which are not party to the treaties are nevertheless bound by their provision which reflects international humanitarian law customary rules and general principles.

2.2.2 Equal applicability

Preliminary condition: an armed conflict - A fundamental aspect of the rule of law is the equal application of the law to all its subjects, and the equality of the subject before that law. Yet, it is not suggested that international humanitarian law would equally apply upon all its (potential) subjects at the same time. International humanitarian law is applicable only in situations of armed conflict. Therefore, only subjects that come within the scope of international humanitarian law must be treated equally by international humanitarian law.

The distinction between jus ad bellum and jus in bellum - International humanitarian law is a unique branch of law in the sense that it regulates the behaviour of its subjects during situations of armed conflict, which originate in the violation of the public international law by one of the belligerents.[131] Nevertheless, based on the clear distinction between *jus ad bellum* and *jus in bellum* all belligerents are equal before international humanitarian law, no matter why the conflict originated and which side is deemed responsible for it. No matter which belligerent is responsible for a violation of *jus ad bellum*, no matter if the belligerent is a super power or a small rebel group, no matter if it is a "just war" a "jihad" or any other moral justification that a belligerent attributes to the cause of the armed conflict, all its belligerents are equally bound and protected by international humanitarian law (although the applicable

[130] As for January 2009 the Geneva Conventions with 194 ratification, the Additional Protocol I of 1977 with 169, the Additional Protocol II of 1977 with 165. See also the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (adopted 16 December 1971, entered into force 10 April 1972) 1015 U.N.T.S 163 with 163 ratifications; Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction with 188 ratification; Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (adopted 18 September 1997, entered into force 1 March 1999) 2056 U.N.T.S 211 with 156 ratification.

[131] One side would necessarily breach the law as the use of force between states is prohibited by Article 2(4) of the United Nations Charter. As for NIAC – it is illegal to use force against State agents according to domestic criminal law.

rules may differ according to the subject, whether it is a State, non state actor or individuals). This principle was recognized in the preamble of *1977 Additional Protocol I*:

> Reaffirming further that the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict.

As Sassòli mentions, this principle must be applied for both practical and humanitarian reasons.[132] It seems, in addition, that this principle is in full accord with the requirements of the rule of law.

The subject of international humanitarian law: States, non-States armed groups, and individuals - Another unique character of international humanitarian law is that it is governing the conduct of both States and individuals. Indeed, its subjects include not only States, as traditional international law, but also non-State armed groups, which are a party to an armed conflict and individuals, who support the war effort of a party to the conflict. Unlike other branches of law that provide a protection to individuals as international human rights law, international humanitarian law offers not only protection but it also imposes obligations upon individuals, and they can be individually responsible for certain of their violations.

- *States: equally bound by all international humanitarian law provisions* -

  However large and powerful, or however small and powerless, each State – if the rule of law is to prevail – must in that one respect at least be treated equally with all other.[133]

A founding principle of the international community is the sovereign equality of States. It constitutes one of the seven fundamental principles of the United Nations,[134] and is a basic

[132] M. Sassòli, A. Bouvier and A. Quintin (n 91), pp. 114-115.

[133] A. Watts (n 35), p. 31. See also "the rule of law involve accepting that IL is not an a la carte choice. It applies as a whole, and for all states, including (and indeed especially) those with the physical and political power to marginalize the law if they so choose" (p. 7).

[134] Article 2(1) of the United Nations Charter.

principle of international law.[135] The Draft Declaration on Rights and Duties of States provides in Article 5 that "Every State has the right to equality in law with every other State".[136] The Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, defines the elements of "sovereign equality":

> All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community... In particular, sovereign equality includes the following elements: (a) States are juridically equal… (f) Each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States.[137]

Thus, deriving from the principle of sovereign equality of States, a general principle that applies also to *jus in bellum*, States are juridically equal to each other. Therefore, there is no doubt that international humanitarian law applies equally to all States that are party to an armed conflict. No State enjoys a normatively privileged status that implies a different treatment. If, in practice, powerful States decide to apply to themselves the rule of exception and, in fact, violate the law, this is a matter of enforcement and not a normative concern of equal applicability.[138]

- *Non-State armed groups: bound, as are States, to international humanitarian law applicable to armed conflicts of a non-international character –*

According to the general law governing treaties, international humanitarian law instruments would be binding only upon States that ratified them. Also, customary international humanitarian law rules applicable in international armed conflict would normally apply only to states. Yet, certain international humanitarian law rules must apply also to non-State armed groups, which are party to a non-international armed conflict. This is because it is essential that those at risk from non-State armed groups are entitled to the same protection as those who may be harmed by State armed forces, and, even more importantly, because the

[135] See 'The Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations' UNGA Res. 2625 (XXV) (24 October 1970) UN Doc A/8028 (1970).

[136] Adopted by the International Law Commission at its first session, in 1949. See Annex to UNGA Res. 375 (IV) (6 December 1949) UN Doc A/RES/375(IV).

[137] *Ibid*, note 102.

[138] See, for example, the US position during the Bush administration towards the definition of the statutes of the detainees in Guantanamo.

fundamental principle of equality of belligerents in non-international armed conflict must be respected for the effective application of the law by all parties.[139] States never agreed to explicitly accord combatant status to any non-State armed group, which they tend to perceive as illegal.[140] Yet, according to Sassòli and Bouvier, the applicability of international humanitarian law to these groups in non-international armed conflict can be inferred from the provision that the applicable rules must be respected by "each party to the conflict". By this, States have granted non-State armed groups the status of being subjects of international humanitarian law.[141] Thus, although such groups have not taken part in the formulation of the law they are bound by it.[142] Today, because of the fact that most conflicts are non-international in character, there is a growing tendency among academics and non-governmental organisations, to increase the commitment of non-State armed groups to respect international humanitarian law.[143]

Although the substance of the law of international armed conflict and non international armed conflict contains major (though generally narrowing) differences,[144] international humanitarian law applicable to non international armed conflict should nevertheless be equally applicable to all of its subjects, namely States, non-State armed groups, and

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[139] See M. Sassòli, A. Bouvier and A. Quintin (n 91), pp. 347-348.

[140] Also in international armed conflict necessarily one of the side used the force illegally. Yet, the distinction between *jus ad bellum* and *jus in bello* nevertheless provided for international humanitarian law to be respected by the side irrespectively to who act illegality in jus ad bellum term. As analogy, it should be applicable also in non international armed conflict – even if rebel are not authorized to use force, once they are involved in an non international armed conflict they should be bound by international humanitarian law, and recognize as a party to the conflict.

[141] Yet, the application of international humanitarian law to non international armed conflict does not grant any other status for the non-State armed groups, other than the legal possibility to be bound and enjoy the protection of international humanitarian law. Common Article 3(4) to the Four Geneva Conventions of 1949.

[142] See, for example, common Article 3 to the Four Geneva Conventions of 1949 and Additional Protocol II of 1977.

[143] See, for example, the Geneva Call initiative that is dedicated to engaging armed non-State actors towards compliance with the norms of international humanitarian law and human rights law. "The practice of armed opposition groups, such as codes of conduct, commitments made to observe certain rules of international humanitarian law and other statements do not constitute state practice as such. While such practice may contain evidence of the acceptance of certain rules in non international armed conflict, its legal significance is unclear." J.M. Henckaerts and L. Doswald-Beck (n 89), p. xxxvi (introduction).

[144] Mainly due to the reluctance of States to accord combatant status to fighters of non-State armed groups, and because of the fact that there can not be a situation of occupation in non international armed conflict.

individuals who belong to a party to the conflict. Yet, one of the major tasks that international humanitarian law is facing is to increase the inclusion of non-State armed groups under the auspices of the rule of law – as actors not only bound by the law but also protected by it.

- *Individuals*

Different international humanitarian law subjects have different responsibilities due to the nature of their legal personality. Yet these responsibilities are equally applicable to all subjects of the same nature. States' violation of international humanitarian law will entail state responsibility, and individuals violating certain obligations, will entail individual criminal responsibility. This responsibility is equally applicable to individuals who acted as a State officials or member of the armed forces, member of a non-state armed group, or as individuals belonging to one of the parties to an armed conflict in their own private capacity (judges, doctors, etc.).

2.3 Effective and equal enforcement of international humanitarian law by an independent, impartial, and accessible judiciary

> One can scarcely conceive of the rule of law without there being a possibility of having access to the courts.[145]

The international rule of law requires an assertive role by the courts in the application of international law.[146] A judiciary that applies and interprets the law and which has the binding authority to enforce the law upon subjects and to provide remedies in cases of violations, is a fundamental element of the rule of law. As can already be observed, this is the weakest element of the international rule of law:

[145] *Golder v the United Kingdom* (Judgment) European Court of Human Rights No. 4451/70 (21 February 1975), § 54.

[146] R. Higgins, 'The changing position of domestic courts in the international legal order', Speech at the First International Law in Domestic Courts Colloquium, The Hague, 17 March 2008, p. 1-3; P.A. Nollkaemper (n 10), p. 58; J. Crawford (n 34), p. 12; I. Brownlie (n 35), p. 213.

> The international community has still to solve the problem of enforcement. Until it does so, the international rule of law is bound to be less effective counterweight to international political power and the sovereign independence of states that it could, and should, be.[147]

The rule of law requires that the judiciary follow a number of requirements. It has to be independent, impartial, accessible, and able to provide an effective and equal enforcement of the law. Whether national courts are independent, impartial, accessible, and provide and effective and equal enforcement of international humanitarian law naturally depends on the national legal system in which they operate. In assessing whether national courts possess these features, two aspects need to be examined – the legal framework that empowers courts to enforce international humanitarian law (the structural aspect) and the court's *de facto* enforcement of the international humanitarian law (the functional aspect). Interestingly, the division between the *structural* and *functional* roles of the judiciary is echoed in the ICC complimentarity principle set in Article 17 of the Rome Statute: while the term *unable* indicates structural deficiencies of national courts, unwilling refers to *functional* deficiencies.

2.3.1 Independency and impartiality

Structural aspects

The independence of the judiciary is a general principle of law which requires that the courts be independent from the parties to the dispute. When two sides fall into a conflict that they can not resolve between themselves, it is natural for them to resort to a third party conflict resolver. This is the prototype *triadic structure* of courts (i.e. two disputing parties and a third-party decision-maker)[148]. The condition for this structure to be legitimated is that the conflict resolver is perceived as independent and impartial *vis-à-vis* the two parties in conflict. Courts, in order to achieve their institutional legitimacy, must therefore be perceived

[147] A. Watts (n 35), p. 44. See also "In states that in all other aspects have a reputable quality of the rule of law, the powers of judicial review against the political branches often do not cover international law to the full extent." P.A. Nollkaemper (n 10), p. 50 and the references he cites in fns 19 and 20.

[148] M. Shapiro, *Courts*: *A* Comparative *and Political Analysis* (The University of Chicago Press, Chicago, 1981), p. 8.

as neutral and independent, capable of resolving a conflict between two sides without imposing their own interest.[149]

According to Nollkaemper independency may be understood in two ways:

i. Direct pressure of the political branches

Structurally, the independence of the judiciary is realised mainly through the separation of powers principle. In the context of international humanitarian law, it acquires a special dimension: while the principle of separation of powers has been the traditional justification to grant the power in foreign affairs exclusively to the executive, the requirement of independency in the context of the rule of law "reshapes the separation of powers by requiring the political branches to refrain from influencing the juridical branches."[150] The independent position of court vis-à-vis political powers is guaranteed by several factors set by human rights law. These include formal procedural requirements related to the appointment of judges and their working conditions, the demand that judicial proceedings are conducted openly, fairly and that the rights of the parties are respected.[151] More specifically, the *Institut de Droit*

[149] While decrypting the function of the courts Shapiro reveals that the judges behave much more as political actors who introduce a third interest, that of the regime, than as an independent and impartial body. Shapiro's thesis in "political jurisprudence" is that the courts and judges, one of the three branches of the government, are an integral part of the political system and not a distinct one. *Ibid*, p. 165. Therefore, "if courts are political, the fact needs to be hidden by the judges themselves." Indeed, courts invest enormous rhetorical effort in maintaining their reputations for neutrality and independence. M. Shapiro and A. Stone Sweet, *On Law, Politics and Judicialization* (Oxford University Press, Oxford, 2002), p. 6. M. Shapiro, 'Political Jurisprudence' (1964) 52 Kentucky Law Journal 294, pp. 295-296: "The political jurist begins with what any fool could plainly see if his eyes were not beclouded by century of legal learning: that judges and courts are an integral part of government and politics, and are therefore, first and foremost political actors and agencies." M. Shapiro and A. Stone Sweet (n 149), p. 3. For a contrast position, that reflects the liberal position on courts, objectivity and neutrality see for example Shabtai Rosenne, who states that while the "function of the *existence* of the judicial function is political, the performance of that function is not". Cited in M. Koskenniemi (n. 20), pp. 29-30.

[150] P.A. Nollkaemper (n 10), p. 54. For a lengthy discussion on the separation of power rational see chapter 3 on avoidance doctrines.

[151] Article 14 of the International Covenant on Civil and Political Rights; Article 6(1) of the European Convention on Human Rights (adopted 4 November 1950, entered into force 3 September 1953) , 213 U.N.T.S 222 (hereinafter: the European Convention on Human Rights); UN Basic Principles on the Independence of the Judiciary Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by UN General Assembly Resolution 40/32 (29 November 1985) and UN General Assembly Resolution 40/146 (13 December 1985) (Principle 2 providing that the judiciary "shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or

International (IDI) recommended in its 1993 resolution on the Activities of National Judges and the International Relations of the States that national courts should decide cases involving international claims independently from the State.[152]

ii. Limitation on the courts' competence imposed by the political branches

Denying a court the possibility to apply international law is to be related to limiting the independence of the court and it would "amount to just as much interference by the political branches as direct political pressure".[153] Thus, national legislation related to immunity of the State, amnesty laws, rules that attributes to the executive the exclusive binding interpretation of treaty law, which restrict the application of international humanitarian law, in fact limits the independency of the court.

Functional aspects

i. The independent position of the court *vis-à-vis* the political branches: self-restraint or an active judiciary?

When the structural aspects are in line with the rule of law requirements the degree of enforcement of international humanitarian law by national courts in judicial review cases or criminal cases is highly related to the judicial tradition and the level of independency and strength of the courts vis-à-vis the political branches.[154] In fact, with regard to a number of functional aspects, the analogy to the judicial review of administrative action under domestic law is useful.[155] The more a legal system is used to limit the State through far-reaching

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interferences, direct or indirect, from any quarter or for any reason" in Principle 11 of the UN Basic Principles on the Independence of the Judiciary providing that "securing that the term of office of judges, the independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law."

[152] "National courts should be empowered by their domestic legal order to interpret and apply international law with full independence" - Article 1(1) of the Resolution on the Activities of National Judges and the International Relations of the States, Institut de Droit International (Milan 1993) <http://www.idi-iil.org/idiE/resolutionsE/1993_mil_01_en.PDF> (accessed 3 May 2010). For a comment see E. Benvenisti, 'Judges and Foreign Affairs: A Comment on the Institut de Droit International's Resolution on 'The Activities of National Courts and the International Relations of their State'' (1994) 5 European Journal of International Law 1, pp. 423-439.

[153] P.A. Nollkaemper (n 10), p. 53.

[154] *Ibid*, p. 22.

[155] "Institutionally, national courts - including constitutional courts - are far too weak to withstand persistent majoritarian pressures for long. The assumption is merely that courts, as comparatively independent institutions, have a possible role to play in placing a thumb on the scales in favour of the international rule of law. If national

constitutional review powers, the more it is expected that the judiciary could enforce international humanitarian law. Having said that, it was paradoxically observed that too much independence can limit the effectiveness of international law, as the judiciary may be less able to compel the executive to act. Courts, as a national institution operating within a defined role in the governmental structure of the state, have to be concerned with the effect of their ruling to maintain their legitimacy and the implicit accord with the political branches which accorded it the competence to exercise judicial review and to apply international humanitarian law. Benvenisti describes the court's position in the national system as having a pact with the political branches which attributed to it the judicial review competence: as the State needs to rely on the judiciary as a legitimising agency, the judiciary needs to be attributed the necessary independence to be legitimised in the eyes of the public.[156] Yet, going beyond the implicit limits of this pact could result in imposing limitations on the competence of the court by the legislative. Thus, courts have to take into account the consequence of their ruling, as a follow-up legislation that would invalidate the ruling or more generally their jurisdiction may be enacted. Nollkaemper argues that the political dimension of international law not only *de facto* limits the possibility of full independence of national courts but also questions the very desirability of such independence:

> Independence is not an absolute ideal, but has to take in account the unitary nature of the state in international law, the essential connection between national courts and their domestic legal environment, the independence between organs of the states, and the indeterminate and often political nature of international law.[157]

This observation is relevant also when dealing with international humanitarian law. International humanitarian law is a branch of law that regulates the most extreme situations of violence in which a State can be involved – namely an armed conflict. Naturally in times

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constitutional courts are willing to strike down laws passed by the national legislature, then they should have the institutional clout to do the same thing when enforcing international law." M. Kumm (n 47), p. 24. See also Benvenisti proposes on the basis of that analogy to adjust the requirement of standing. E. Benvenisti (n 152), p. 438.

[156] E. Benvenisti (n 152), pp. 425-427; In 1994, when the article was written Benvenisti held the view that this pact did not include judicial review in foreign affairs, because of the absence of the State's interest in having legal legitimation for its acts abroad and because of the little public demand to have scrutiny over them (discussed below in n. 166 in more details).

[157] P.A. Nollkaemper (n 10), p. 59.

of war it seems reasonable that "courts cannot and should not neglect entirely the international political consequence of a limitation of government power in foreign affair".[158] In their pursuit of the appropriate balance, courts have been developing different avoidance (prudential) doctrines aiming to define whether the question before them will remain under the realm of the law or will be resolved by political actors. These techniques should not categorically be seen as unjustified limitation on judicial power,[159] but also as a "realistic expression of the political nature of international law."[160]

ii. National courts' impartiality

As the judge is an officer of the State, in cases in which the State is a party to the procedure, the question arises of whether the court can truly be as independent and impartial as when it is adjudicating two private sides. According to Professor Shapiro, in such cases, the triadic structure is necessarily weakened as one of the sides may perceive the third as an ally of its adversary.[161] In this respect, when the State is a party to international humanitarian law proceedings, it should not be attributed presumptions in its favour. Borrowing the common law principle of "equality of arms",[162] the State's position should not be binding nor attributed a greater weight than the adverse party.[163] This is valid for the interpretation of the law and establishing the facts. As for the latter, because of the complexity of establishing the facts in international humanitarian law cases, in which the State is usually holding exclusive information, it is already in a better position than its adversary. Granting additional judge-made presumptions in its favour seems to shift the neutrality of the judiciary, which is already

[158] *Ibid*, p. 58.

[159] The IDI Resolution (1993) proposes in Article 2 that "National courts, when called upon to adjudicate a question related to the exercise of executive power, should not decline competence on the basis of the political nature of the question if such exercise of power is subject to a rule of international law". For a critique of this overly embracing position see E. Benvenisti (n 152), pp. 432-438.

[160] P.A. Nollkaemper (n 10), p. 58. Avoidance doctrines are also an essential tool to avoid the development of an apologist jurisprudence that misuses the law (E. Benvenisti, *Ibid*). Having said that, the use and abuse of these avoidance doctrines by courts and governments shall be critically examined. A complete analysis of the avoidance doctrine is conducted in chapter 3.

[161] M. Shapiro (n 148), p. 27.

[162] This principle is a part of the guarantees for having a fair trial in criminal adversary procedures.

[163] The IDI resolution: Article 1.3: 3. Nothing should prevent national courts from requesting the opinion of the Executive, provided that such consultation has no binding effect. On this point E. Benvenisti (n 152), pp. 431-432.

fragile because of its inherent impartiality that exists when dealing with international humanitarian law.

Kosekenniemi's observes a *structural bias* within the international legal order:

> Out of any number of equally "possible" choices, some choices – typically conservative or *status quo* oriented choices – are *methodologically privileged* in the relevant institutions.[164]

This observation seems to be valid also for national courts which apply international humanitarian law. The inherent impartiality of national judges is related to a number of factors. First, the subjective orientation of the judge himself tends to defend his own national interest and to protect his State.[165] Second, as opposed to the domestic system the State does not have the same interest in the law being independently and impartiality applied.[166] Similarly, in most cases also public opinion prevails over its own national interest, and does not demand the same level of scrutiny as with regard to compliance with national law. These factors influence national courts to be willing to serve their national interest while applying international humanitarian law, more than serving agent of an international legal order.

> The self-defined mission of national court judges as guardians of the domestic legal order has largely remained the same. They continue to regard themselves first and foremost as national agents, and their chief motivation is not to promote global justice but to protect primarily, if not exclusively, the domestic rule of law.[167]

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[164] M. Koskenniemi (n 20), p. 607. See also D. Kennedy, *A Critique of Adjudication (fin du siècle)* (Mass: Harvard University Press, Cambridge, 1997), pp. 59-60.

[165] See generally the critic of American Legal realism, an intellectual movement in the US during the 1930s: "How a judge responds to the facts of a particular case is determined by various psychological and sociological factors, both conscious and unconscious. The final decision, then, is the product not so much of "law" (which generally permits more than one outcome to be justified) but of these various psychological factors, ranging from the political ideology to the institutional role to the personality of the judge." B. Leiter, 'American Legal Realism' in D.M. Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (2nd edn, Blackwell, Oxford, 2010), p. 249.

[166] See above the "pact". "While in the domestic sphere all branches of government stand to gain from judicial independence and judicial review, the situation is different with respect to foreign affairs. In this sphere, the political branches of government do not have the same interest in impartial judicial scrutiny of their policies…. Their only interest is the judicial vindication of their action abroad." E. Benvenisti (n 152) , p. 426.

[167] E. Benvenisti and G.W. Downs, 'National Courts, Domestic Democracy, and the Evolution of International Law' (2009) 20 European Journal of International Law 1, p. 61. Friedmann has observed that the role of national

Indeed, courts are national institutions, which operate within their respective societies, favour their own interest and cannot be expected to completely act otherwise.[168] Therefore, it should be aimed that the national interest of the State would be to enforce international humanitarian law.

2.3.2 Effective enforcement of the law and accessibility

i. Applicability

Structural aspects - National courts would be able to apply and enforce international humanitarian law only if international humanitarian law rules are (1) norms which are a part of the applicable law within the national legal system, and (2) a norm that is sufficiently clear and detailed so it can be enforced by a court. In a number of States the applicability of international rules is automatic (for example, in France, the Netherlands, Russia, Switzerland, Turkey and the US). In other places an explicit transformation by the national legislator is required (UK, Israel, India, Germany and Italy). Therefore, States have to adjust their own domestic legal system to be able to enforce international humanitarian law rules. They are required to incorporate them into domestic legislation or to constitutionally empower courts to directly apply international law. And, even in the case in which courts may directly apply international humanitarian law, because international humanitarian law treaties are not always sufficiently detailed to be enforced by a court, State should enact adapting legislation. Treaties are usually defined in general terms as a result of their negotiation process. To become prescriptive law that can be enforced *ratione materiae* by domestic courts, treaties need to be detailed and clear. Therefore, all systems have to adjust their own domestic laws to be able to enforce those international humanitarian law rules which are not self-executing.[169]

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courts in applying international law is limited by the predominance of national prejudice. W. Friedmann, *The Changing Structure of International Law* (Stevens and Sons, London, 1964), pp. 146-147.

[168] P.A. Nollkaemper (n 10), pp. 56-57.

[169] M. Sassòli, A. Bouvier and A. Quintin (n 91), pp. 360-361. When the doctrine of self-execution is understood in this sense, it is related to structural requirements related to the validity of the rules. Other understandings of this doctrine have been developed by US courts, including the right of action and the intent of the government to recognise the treaty as enforceable before domestic courts. These two versions are related to the functional requirement of standing – see below.

Functional aspects - Whether international humanitarian law rules represent a binding norm in the domestic legal system is not merely a normative decision but may be also a policy choice of the courts. While national constitutions may explicitly allow the importation of international law into their respective domestic legal systems, courts, by interpretation, can reach the conclusion that international humanitarian law is not applicable. For example, as suggested by Benvenisti, if the constitution allows the direct application of one source of international law – treaty law or customary law, the constitutional reference to one source could be interpreted as implicitly incorporating the other source as well.[170] Other examples are the weight that should be given to those international norms in case of conflict between an applicable international obligation and a domestic norm; and the determination that a rule is of customary nature, a finding of major importance for the direct applicability of international humanitarian law in dualist systems.

ii. Accessibility and Standing

Structural aspect - Given the central position of the courts in ensuring the rule of law their accessibility is of paramount importance. For that purpose, it is not enough that a State endorses international humanitarian law rules in its domestic legislation to make them enforecable. In order to make these laws enforceable, also access to the courts must be guaranteed by legislation, as if the rules on standing are to be developed by the courts, these are more vulnerable to policy considerations. By denying the individual the right to invoke international law before courts, the political branches of the State interfere in the possibility to have an accessible judiciary as required by the international rule of law, and the risk is that the law will remain dead letter, without the possibility to enforce it.

Functional aspects- Through the rules on standing developed by courts, these define their role in applying international humanitarian law. The US self-executing doctrines related to the direct application of international humanitarian law is probably the best illustration of how even when a norm is applicable according to the Constitution, it is not guaranteed that the norm will be enforced by a national court.

The US Constitution establishes that international treaties are part of the supreme law of the land.[171] Therefore, unlike common law States such as the UK, in which the dualist theory

[170] E. Benvenisti (n 121), pp. 162-164.

[171] The Supremacy Clause, United States Constitution. Article VI, clause 2, provides as follows: This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the

requires national implementing legislation for treaties to be binding at national level, in the US international treaty law is directly binding, and its applicability does not depend on domestic legislation. At the same time, its direct application has been restricted by judges through the development of the self-executing doctrine.[172] Thus, the applicability of international law guaranteed by the Constitution does not automatically entail that international humanitarian law rules will be enforced by a court, even if these were sufficiently detailed. For example, one version of this judge-made doctrine is the demand of a "private cause of action". Under this version of the doctrine private parties may maintain an action in court to enforce a treaty provision only if they possess a private right of action conferred by the treaty. A treaty that does not confer upon the individual a private right is not self-executing. Although this approach has been criticised by various American scholars who claim that a private right of action is unnecessary, at least in cases in which the treaty is invoke defensively,[173] it is a common understanding of the doctrine in US Federal courts,

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Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. Vazquez notes that: "The history of the Supremacy Clause thus shows that its purpose was to avert violations of treaties attributable to the United States, and that the Founders sought to accomplish this goal by making treaties enforceable in the courts at the behest of affected individuals without the need for additional legislative action, either state or federal." C.M. Vazquez, 'The Four Doctrines of Self-Executing Treaties' (1995) 89 American Journal of International Law 4, p. 699.

[172] The distinction between self-executing and non-self-executing treaties was introduced into United States jurisprudence by the Supreme Court for the first time in *Foster v Neilson*, 27 U.S. (2 Pet.) 253 (1829).

[173] C.M. Vazquez (n 171), pp. 719-722. Henkin claims that courts should not require a private right of action both for defensive and offensive claims: "lower courts, however, have suggested that treaties may be enforced in court only when they create a private right of action. This suggestion is untenable. Throughout our history, this Court has enforced treaties at the behest of the right holder, both defensively and offensively, even when the treaties have been no more explicit with respect to judicial enforcement than the GPW, and in many cases far less so." L. Henkin et al., *Amicus Brief of Law Professors in Support of the Petitioner in the Hamdan case (Geneva – Enforceability*) (6 January 2006), p. 11 <http://www.hamdanvrumsfeld.com/HamdanvRumsfeldAmicusBriefofLawProfessorsLouisHenkinetal.pdf> (accessed 5 April 2010). (Hamdan was a case in which the obligations of the Geneva Conventions were raised defensibly – the claim was that Hamdan's rights were violated because the State violated the obligations set out in the Geneva Conventions. See: The Hamdan case, n 16). See also Benvenisti: "if a judicial enforcement of international law is the goal, the doctrine of standing must be applied to admit individual suits that invoke international law, even when they fail to show an infringed personal right". E. Benvenisti (n 152), p. 440.

American jurisprudence increasingly refers to this requirement as the condition for a treaty to be self-executing.[174]

> Another version of defining a treaty as being self-executing is more directly linked to policy reasons. Here, the possibility to invoke a treaty, or the decision whether a treaty is enforceable before domestic court, is defined by the explicit deference to the State's position on the issue. According to this version, a treaty is enforceable in US courts only if the State recognized such a competence while ratifying the treaty.[175] Scholars such as John Yoo, who served as part of the legal team of the Bush administration during the war in Afghanistan, hold the view that the Geneva Conventions can not be enforced by domestic court, but merely via political or military channels.[176] This position was reflected in the famous footnote in *Johnson v. Eisentrager*, where it was suggested by the Supreme Court that it should not consider the merits of the Geneva Conventions.[177]

While the Supreme Court in *Hamdan* labelled this passage as a "curious statement" and noted that it was "buried in a footnote", it ruled that in that case did not need to decide whether the Geneva Conventions can be directly enforced by a US court, because the domestic Article under review endorsed the international obligation.[178] Yet, importantly, as observed by Koh, the legal advisor of the Obama administration, the "majority of the Court denied the government's claim that enemy aliens could never enforce the Geneva Conventions in U.S. courts."[179]

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[174] *Tel Oren v Libyan Arab Republic*, 726 F.2d 774, (D.C.Cir. 1984) (*Hereinafter*: *The Tel Oren* case) (J. Bork, concurring); *Argentine Republic v Amerada Hess Shipping Corp.*, 488 U.S. 428, 440-42 (1989). Other cases are listed in C.M. Vazquez (n 171), p. 719, fn 114.

[175] C.M. Vazquez (n 171), p. 702-707.

[176] J.G. Ku and J.C. Yoo, 'Hamdan V. Rumsfeld: The Functional Case for Foreign Affairs Deference to the Executive Branch' (2006) 23 *Constitutional Commentary*, pp. 179, 190. See also, J.C. Yoo, 'Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution' (1999) 99 Columbia Law Review 8, p. 2218.

[177] *Johnson v Eisentrager,* 339 U. S. 763 (1950), at 789, n. 14.

[178] *The Hamdan* case (n 16), p. 63-65. Article 21 of the UCMJ states that: "The provisions of this chapter conferring jurisdiction upon courts- martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that *by statute or by the law of war may be tried* by military commissions, provost courts, or other military tribunals".

[179] H. Hongju Koh, 'Setting the World Right' (2006) 115 The Yale Law Journal 2350, pp. 2350, 2363. See more on the fourth Chapter.

iii. Equal enforcement

The rule of law requires an equal enforcement of the law upon all its subjects. A "double standards" application is obviously evidence of a practice contradicting this requirement. While the issue of standing may well be regulated by national legislation, and allow individuals or NGOs to access the court and demand remedy for international humanitarian law violations, "avoidance doctrines" developed by judges may limit the *de facto* access to the court. These include several doctrines, notably of non-justiciability (such as the political question) and immunity, as well as question of the convenient fora and subsidiarity rules – all developed by courts. The application of these avoidance doctrines is highly related to the question of the equal application of the law. While the legislation itself is usually not the obstacle for the equal application of international humanitarian law, as, at least in democracies, it is rare that a law would explicitly provide for a double standard/unequal application of international humanitarian law, this is, nevertheless, quite often exercised by courts, through the application of the avoidance doctrine. In politically sensitive cases courts will choose to follow their government's stance and not to exercise their competence and to enforce the law, while in other "easy cases" they will decide to do so.

iv. Skills

Access to court is meaningful only if it can provide an effective remedy for violations. This entails that the individual seeking a remedy shall be entitled to assume that the judgments will be given effect. Moreover, since the courts' judgments establish the law in the case before them, the litigants can be guided by law only if the respective judge applies the law correctly.[180] In this regard, assuring that the judges are equipped with the necessary skills in order to apply international humanitarian law is a part of the requirements of the rule of law. Watt also adds that an "open and fair hearing, absence of bias, are obviously essential for the correct application of the law."[181] Thus, the requirement of independency and rules of fair trials are themselves objectives required to attain the possibility of providing an effective remedy.

[180] J. Raz (n 3), p. 18; A. Watts (n 35), p. 39.

[181] Watts, *ibid*.

3. The Methodology

3.1 The *functional* role of domestic courts in democratic states

As shown above, national courts have a vital role in enforcing international humanitarian law. Would they operate as bodies that aim at enforcing the rule of law, or would they represent the long arm of their government when dealing with international humanitarian law issues?

The *structural* capacity of national courts to apply international humanitarian law is a preliminary step for achieving enforcement of international humanitarian law by national courts. The extent to which a State complies with the rule of law insofar as dealings with the structural role of national courts are concerned, will depend on assessing each of the factors discussed above within the domestic legal system in which each national court operates. First, the applicability of international humanitarian law must be guaranteed. Whether it is a monist state or a dualist state, along with the content and framework of the constitution, will define the extent to which international humanitarian law can be directly applied; each State has the obligation to enact domestic legislation endorsing international humanitarian law, especially when these are not self-executing. Then, the issue of standing as well as the structural independence of the judges must be guaranteed. Obviously, within this ongoing process, each State has complied with the domestic implementation obligation to a varying degree. It is related mainly to internal legislation, and to a strong tradition of domestic rule of law.

My research in the following chapters does not examine these structural questions. These preliminary structural demands were recently studied in a recent collective publication edited by Dina Shelton.[182] I focus entirely on the *functional* aspect of the courts. While certain national systems may comply with the structural requirements to a varying degree, as in most Western democratic states, it is still not certain that the rule of law reigns. Having international humanitarian law legislation endorsed, the *de facto* application of international humanitarian law by national courts is of major importance for the respect of the international rule of law. Even if, structurally, independency, impartiality and the other elements are guaranteed by procedural rules and the principle of separation of powers, it may well be that the *de facto* function of the court will not correspond to the rule of law requirements. The

[182]D. Shelton, ed., *International Law and Domestic Legal Systems, Incorporation, Transformation, and Persuasion* (Oxford, Oxford University Press, 2011).

responsibility for applying international humanitarian law through national institutions depends on judges, who operate within a national context and are bound by national political limits, which they have to respect in order to maintain their legitimacy. Thus, courts may tend to defer to the State position in international humanitarian law matters, in order not to upset their government in sensitive issues involving international humanitarian law. Similarly, courts may develop admissibility rules to avoid jurisdiction. In other situations, they may be interested to legitimise the actions of their government more than to enforce international humanitarian law; or to the contrary, courts may be willing and able to enforce international humanitarian law as required by the international rule of law.

3.2 Assessing the functional role of national courts: from *Apology to Judicial Activism*

The apology-activist spectrum - In order to describe the degree of compliance of national courts with the principles of the international rule of law I use a terminology inspired by Koskenniemi's terminology *from apology to utopia*, with which he described the structure of the international legal argument.[183] While the apology- activist spectrum serves as an excellent framework to describe the varying possible role of the domestic courts in applying international humanitarian law, my work does also assume an external, in Koskenniemi's word *political*, "good" outside this spectrum, which is, as developed above, the international rule of law – to which courts should aspire.

Apology is used to describe the situation in which the court is acting as an apologist body to the political power, which for this purpose is misusing (and even distorting) international humanitarian law in order to legitimate the State's acts. *Activism* refers to a moral objective sought by the court if it goes beyond the object and purpose of the law. Usually, an "activist" decision would not reflect the position of the State. If it does reflect the position of the State, the same decision is more likely to reveal the apologist role of the court then an activist function. In fact, both extremes of the spectrum, activism and apology, reflect a policy approach, a political function of the court – they only differ in the content of the social values and political goals pursued. Thus, the functional role of national courts in applying international humanitarian law can be apologist to State violations (Chapter 2) or may serve as a activist judicial power that will develop the law for protecting victims (Chapter 5). While neither of these two "extremes" seems to be warranted, two possibilities are situated

[183] M. Koskenniemi (n 20), p. 21

in the between those extremes, as intermediate positions.[184] One is the *avoiding role* of courts (chapter 3). In this category, courts will chose not to exercise their jurisdiction for policy considerations that will be favoured by judges over the enforcement of the law, most often because of institutional concerns. Indeed, in certain situations in the current international legal and political order, because of the special connection between international law and politics, it seems that courts do not have always a free and independent choice, and these should be attentive to their national interest. The positive aspect of the *avoiding* option is that here courts do not create bad law for policy reasons as in the apologist category. Yet, from the rule of law perspective it arise several problems, such as the question of the equal enforcement of the law, access to court and the possibility to have an effective remedy for international humanitarian law violation. The favourite option from the rule of law perspectives will be therefore the *normative application* of international humanitarian law (chapter 4). This category prevails over the need to apply the law, the need of the international community to be ruled by a law that is enforced by courts. It may have varying degrees, in order to deal with the inherent political complexity of international law. The inherent necessity to take in account the political context is expressed in this category through, for example, the remedy that is provided (such as to defer back to the political branches the decision how to act after the court has clarified the law).

The approach of Koskenniemi in a nutshell - According to Koskenniemi, international law remains indeterminate because it is based on contradictory premises that need to be accommodated. He demonstrates that each international legal argument remains vulnerable to one of two contradicting critics: being too dependent on State policy, highlighting the infinite flexibility of international law (apologism); or too political, as being founded on speculative utopias and criticized for its moralistic nature. Because international law is based on these contradictory premises it must be indeterminate, so it will be capable of accommodating all positions. That indeterminacy, observes Koskenniemi, is not a deficiency but a central aspect of international law. Because each of these (valid) positions is vulnerable to the corresponding objection, although the international legal discourse works as to make these two positions seen compatible, the result is "an incoherent argument which constantly shifts between the

[184] This is the position presented by Falk, see M. Koskenniemi, *Ibid*, p. 21.

opposite argument"[185]. Koskenniemi's conclusion is that the weakness of the international legal argument appears to be its inability to provide a coherent, convincing justification for solving a normative problem. Consequently, the choice of solution is necessarily dependent on an ultimately political choice[186], while Koskenniemi's assumption is that all choices are equally valid. This is what he names the *politics of international law*. However, Koskenniemi choose to frame the term "rule of law" only in its traditional liberal definition – as representing a complete, hermetic distinction between itself – the law – and politics.[187] To my understanding the term "rule of law" is not the reflection of a dichotomy, or an "extreme" on the scale, as Koskenneimi puts it (law-politics; utopia-apology). It is the political foundation, the legitimate axiom for the organization of the international society, within which political choices are certainly available, but only to a certain extent.

I completely adhere to one of the conclusions of Koskenniemi, already raised by the Critical Legal Studies scholars such as David Kenndy, that any normative application of the law will inevitably entail political choices made during the entire judicial process – from the establishment of the facts to interpretation of the law up to the remedy chosen. However, this is not in contradiction with my understanding of the rule of law, which, inevitably has to leave a margin of political choice within its functional framework. Especially in the context of international law, that is quite indeterminate because of the particular political process of making the rules. Thus, international rule of law does encompass a margin of political choice, a "relative indeterminacy", which means that subjective discretion is necessary, yet it takes place between "the existing limits" of the law. Koskenniemi's important critique on the liberal conception of *relative indeterminacy* is that there is no guidance or consensus on the extent of such permissible discretion, and therefore it will end to be a political choice. Indeed, it is so. This discretion allows the State, civil society, and individuals to contribute to forming the law by influencing public opinion and going to the courts. It seems that my point of divergence with Koskenniemi is not about the critique, but about its relevance (or consequences) for the legal order. While Kosenniemi's conclusion is that as all choices are political, at the end of the day all positions are equally valid from the stance of international law, it seems to me, at least as far as we deal with international humanitarian law, that not all the positions are valid:

[185] M. Koskenniemi (n 20), p. 591. See also pp. 23, 24 and 60.

[186] *Ibid*, pp. 60-69.

[187] This is seemingly to maintain his thesis that this term is structurally vulnerable to the utopian criticism. See, for example, *Ibid,* pp. 88-89 and 613.

there are clear limits, the ones which are provided by positive international humanitarian law (within which discretion is available to a certain extent).

3.3 Theoretical definition of the roles of the court: The Scholarship of Professor Benvenisti

In recent years, national courts have been more and more engaged in applying international humanitarian law. It is due to several factors as national implementing legislation, the development of the legal expertise in international humanitarian law in universities, lawyers from private offices, or NGOs which use international humanitarian law and submit cases before national courts. Professor Benvenisti, who examined more broadly the role of national courts in applying international law in general, reached a conclusion in an article published in 1993, that national courts comply with their governments policy, and do not engage in applying international law:

> [Courts] continued to defer to the their executive branches with respect to the conduct of foreign affairs and to ignore the prescription of theorists that they concentrate on the broader goals of ensuring compliance with international norms and promoting a global rule of law.[188]

In 2008, Benvenisti revised his observation:

> In recent years, courts in several democracies have begun to engage seriously in the interpretation and application of international law and to heed the constitutional jurisprudence of other national courts. … Significantly, the courts have identified international law as a tool that no longer governs only the relations between states, but that can regulate the relations

[188]E. Benvenisti and G.W. Downs (n 167), p. 60. Three techniques have been identified for deferring the application of international law – 1. Limited interpretation of the constitutional authority of courts to apply international law and to import its provision to the domestic system. 2. Interpretation of international rules in light of their government interest like the recognition or non-recognition of a certain, sometimes based on the governments own interpretation of the law and 3. The use of different "avoidance doctrines" such as standing or non-justiciability, act of State, etc, to prevent the application of the law, and providing the executive with a shield from judicial review. See E. Benvenisti, (n. 121) p. 160-173.

> between governments and courts, and can be used—by both sides—for their common or divergent purposes.[189]

In a third article from 2009 Benvenisti and Downs state that

> courts have finally begun to engage quite seriously in the interpretation and application of international law and to heed the constitutional jurisprudence of other national courts, providing an effective check on governments at the national and international levels alike and promoting the rule of law in the international sphere.[190]

As case studies providing evidence for the evolution of judicial cooperation he observed as the courts seek to counterbalance their governments he examines, *inter alia*, the judicial review over counterterrorism laws by different national courts and concludes that:

> National courts are refusing just to rubber-stamp the actions of the political branches of government. They have unmistakably signaled their intention to constrain counterterrorism measures they deem excessive. As reflected in the reasoning of the decisions of many courts, they are seriously monitoring other courts' jurisprudence, and their invocation of international law demonstrates knowledge and sophistication.[191]

Yet, according to Benvenisti, courts remain guided by the national interest, and he doubts the possibility of prosecuting war criminals by third State's courts or to allow suits against their government for war crimes, and believes that jurisprudence in this domain would remain as before, to uphold their government position.

> The self-defined mission of national court judges as guardians of the domestic legal order has largely remained the same. They continue to regard themselves first and foremost as national agents, and their chief motivation is not to promote global justice but to protect primarily, if not exclusively, the domestic rule of law.[192]

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[189] E. Benvenisti, 'Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts' (2008) 102 American Journal of International Law 2, pp. 241, 268.

[190] E. Benvenisti and G.W. Downs (n 167), p. 60. (analyzing the reasons of this change and the likelihood that the strategy of inter-judicial co-operation can be achieved).

[191] E. Benvenisti (n 189), p. 256.

[192] E. Benvenisti and G.W. Downs (n 167), p. 61.

He describes courts as being trapped in the prisoner's dilemma and observes that cooperation between national courts in executing their enforcement role is an important factor for courts to exercise their competence over their own subjects.[193]

My research is largely based on observations and theoretical conceptions made by Benvenisti on the role of courts in the course of the last twenty years. For example, the identification and definition of the court's role in avoiding the application of the law (Chapter 3) originate in an article that he published in 1993.[194] The theoretical framework of the Chapter 4, in which I assess the normative role of courts in applying the law is based on Benvenisti's "ladder theory", in which he identified the gradual role of the courts in judicial review cases and their use the deferral technique.[195] In this context, the added value of my work is double. First, while the works of Benvenisti, deal with international law in general, my research focuses more particularly on international humanitarian law. Restricting the legal branch to international humanitarian law allows me to do a more detailed analysis and through the deconstruction of a large number of cases the different functional roles of courts is well illustrated. Second, it situates the varying roles of the courts on the apology-activist scale, which is a helpful tool for mapping courts' decisions. It enables to further evaluate the legitimacy of the courts' decisions in light of the principles of the international rule of law and the evolution of court's jurisprudence in that respect.

The thesis focus entirely on the *functional* aspect of the courts operating in western democracies with a common law tradition, including the UK, US, Canada, Australia, and Israel and in other jurisdictions such as Italy and Serbia. As the theoretical definition and analysis of the functional roles of courts do not depend on the kind of the procedure under review, the thesis deals with criminal and civil cases as well as judicial review cases during on going conflicts or peace time. Having said that, further empirical work would be required to examine the conditions which bring courts to assume each role, and to what extent criteria such as the kind of procedure under review, the timing of review, whether the court is dealing with an IHL violation of a third state or its own state influence that decision.

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[193] E. Benvenisti (n 121), p. 175 and E. Benvenisti and G.W. Downs, *Ibid*, p. 65.

[194] E. Benvenisti, *Ibid*.

[195] E. Benvenisti, 'United We Stand: National Courts Reviewing Counterterrorism Measures' in A. Bianchi and A. Keller (eds), *Counterterrorism: Democracy's Challenge* (Hart Publishing, Oxford, 2008), p. 251 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=965638> (accessed 22 October 2011).

3.4 The deconstruction of judicial decisions: Exposing the role of national courts

Exposing the functional role of courts is not an easy task, especially when dealing with democracies, in which judicial bodies enjoy a significant degree of structural independency. As a methodology to describe that role, I have chosen to deconstruct the judges' rulings, to examine their legal arguments within their political context. The deconstruction of the legal argument rendered by the judges aims to explain how they choose a political strategy through their use of seemingly *neutral* judicial methods and legal tools. Deconstruction, by concentrating on the language, seeks to reveal how the politics are hidden away.[196] It "is often used as a synonym for criticizing or demonstrating the incoherence of a position."[197] The most important use of deconstruction in the legal discipline is its use as a method of ideological critique "to reveal the terms suppressed by legal discourse; to recover the suppressed terms and re-introduce them into the discourse."[198] In other words, the deconstruction of the legal text reveals the politics of law – it deconstructs the pretended universalism or neutrality, and exposes the particular politics which constitute the context in which the ruling was made.[199]

The deconstruction of case law is done by a critical reading of the text, through a case-by-case analysis, which aims at relocating them in their political context and revealing their functional role. The deconstruction method that I propose put special attention on the following aspects.

i. Interpretation: *Who interprets the text makes the texts*[200]

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[196] Deconstruction started as a technique for reading texts connected to area of philosophy of the language and meaning as developed by Jacque Derrida and Paul de Man. For a comprehensive overview see – J.M. Balkin, 'Deconstructive Practice and Legal Theory' (1987) 96 Yale Law Journal 743, pp. 743-786.

[197] J.M. Balkin, 'Deconstruction' in D. Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (Blackwell Publishing, Oxford, 1999), p. 367. Duncan Kennedy's definition of deconstruction is that it is an *experience* that can happen to you when an argument you thought persuasive is undermined by another argument you also feel compelled to recognize stems from the same premise. D. Cornell, 'Violence of the Masquerade: Law dressed up as Justice' (1990) 11 Cardozo Law Review, p. 1047.

[198] P. Schlag, 'A Brief Survey of Deconstruction' (2005) 27 Cardozo Law Review 741, at p. 744.

[199] J. Derrida, 'The Force of Law: The Mystical Foundation of Authority' (1990) 11 Cardozo Law Review 920, at p. 925-933.

[200] D. Kennedy, 'The Turn to Interpretation' (1985) 58 Southern California Law Review 251, p. 252. "Deconstructionists regard interpretation more as a process of fabrication than of discovery", P. Brest,

> [C]ritique understands unreflective twentieth-century American legal discourse to be power disguised as truth. In this view, the judge orders social relations while "saying the law." When we focus attention on the saying, we are diverted from the ordering. This picture of legal hegemony suggests a form of critique. If we could "expose" what is "really going on" by attacking the ideas about truth that populate judicial discourse we could "delegitimize" judicial decision making.[201]

Interpretation is a central feature of adjudication of any sort, and certainly of judicial review. While filling content into vague statutory terminology expressions such as 'necessity', 'proportionality', 'security', and 'public order', courts introduce a policy choice. When courts are allocated the discretion to fill content in terms that demand interpretation before application, each meaning given to these terms in a concrete dispute is necessarily a political choice, or a *construction*.[202] That process of interpretation is prior to and in service of substance.

> The one thing that unites Kelsen and McDougal, the rule and policy approach, is their insistence on the indeterminate, subjective, political character of interpretation. They, as well as Richard Falk, for example, criticize disguising the arbitrariness of interpretation under the fictions of textual clarity or juristic method. They propose that interpretation be conducted openly by reference to important values.[203]

Taking international humanitarian law as the example reveals that its provisions were drafted by governments and were intentionally formulated in general and vague terms, to enable them to cover a wide variety of situations and conflicts of interests, which allow them a wide discretion to pursue their political/security interests. When courts are asked to exercise

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'Interpretation and Interest' (1982) 34 Stanford Law Review 765, p. 766; See also M. Rosenfeld, 'Deconstruction and Legal Interpretation: Conflict, Indeterminacy and the Temptations of the New Legal Formalism' (1989-1990) 11 Cardozo Law Review 1211. According to Duncan Kennedy, as soon as we view adjudication as interpretation and not merely rule application "we threaten the structure that distinguish law from politics." D. Kennedy (n 164), p. 37.

[201] D. Kennedy (n 200), p. 252.

[202] M. Koskenniemi (n 20), pp. 38-40.

[203] *Ibid*, p. 341. According to Kennedy, each of the theories of adjudication has been a part of a broader political project. Yet, courts have not openly assumed their policy role, and discretion has been understood to take place "within the existing law." *Ibid*, p. 35.

their review competence, their interpretation of whether the agency's exercise of discretion was *reasonable,* is directed not only by the interpretation of these statutory vague terms. First, national courts are the organs that rule whether or not an international humanitarian law norm could be enforced by them, based on their own interpretation of the law. The national courts are the ones that determines if a provision is "directly applicable", "self-executing", "customary", and so on. In addition, in their interpretation the courts are free to choose whether to refer to international jurisprudence or not, and, if so, what weight to attribute to these rulings. As there is no satisfactory regulation of the relations between international and national courts, each national court will naturally choose the most politically convenient option[204].

ii. Fact finding: the politics of establishing the facts

Presumptions, burden of proof, and other general rules are the legal forms for manipulating factual issues to achieve policy goals.[205] Deconstructing the way facts are established suggests that courts, far from being always "revealers of the truth", may be functioning as collaborators to the State's portrayal of reality. For example, courts usually do not reverse on factual grounds a decision taken by the authority in areas under its expertise, as long as the agency can show some evidence in support of its decision. This outcome is the result of two legal presuppositions: First, the general presumption of honesty, good faith, and integrity afforded to agency officials, which assumes that the authority's factual claims are true. Therefore, the version of the facts presented by the State is supported by the courts in an almost unchallenged manner. Unlike when adjudicating two private sides, the courts do not assess where the predominance of evidence lies. The authority's version of the facts is given special weight, and it is the challenging party that has the burden of discharging this factual presumption that works in favour of the State agency. Yet, it becomes extremely difficult to prove that the authority's decision was arbitrary, as States are most often in an excellent position to conceal the facts of their misdeeds from courts and, unlike the other party, also possess all the resources necessary to do so. Taking this factual presumption with the more general one that supposes that the judiciary's lack of expertise prevents it from intervening in a decision that was taken following the professional authority's assessment and the result is

[204] See *The Scorpion* case of the Belgrade War Crime Chamber discussed below at p. 136.

[205] M. Shapiro (n 148), p. 42.

that as long as the agency claims it was guided by *reasonable* considerations, the decision will likely be upheld.

iii. Relocating legal disputes into their political environment

It is necessary to read the courts' decisions in their political context, and not as a mere the application of *neutral* legal rules on facts detached from any environment. Legal decisions have to be examined within their entire context, with the aim of revealing the different interests of the parties, and exposing the political tendency of the court.

a. Relocating the case from the sterile courtroom to its complex reality - Courts tend to strip cases out from their political environment. A complex reality that involves a matrix of political actors and interests is reduced in the distant court's ruling to a calculated selection and evaluation of evidence, which is taken out of any broader context, and transformed into an anonymous dispute on which so-called *neutral* legal codes are applied. However, there is nothing more misleading than this perception. Legal decisions are not "an independent or isolated event but an integral part of a political process in which many agencies interact with one another."[206]

b. Relocating a case into the general political line of the court: Read the ruling in the light of the routine work of the court over the long term and do not examine it as an isolated case stripped out from the political line of the court - Courts render their decisions on a case-to-case basis, and do not impose general policies. This makes their political impact barely visible. Therefore, once the legal decision is deconstructed and relocated in its own particular political context, it is necessary, at a second stage, to decrypt the more general political line of the court by reading together different decisions and observing the court's policy over the long term. In this way, it is not the rare landmark cases that will indicate the court's function, rather the opposite. It is its routine work over the long run that will reveal its true character.

IV. The temporal dimension

The initial stages of an armed conflict are typically characterised by a strong sense of national unity and support to the State. Therefore, State interests are attributed particular

[206] M. Shapiro and A. Stone Sweet (n 149), p. 27 and pp. 168-169.

weight during this periods by courts, which are themselves State institutions, consisting of judges who are citizens of the states, and who share the same sociological and psychological mindset. However, when a review is carried out later during (or after) an armed conflict, the period of time that has elapsed since the occurrence of the facts and the public opinion and/or historical narrative that have been formed during this time, would have an impact on a court's willingness to exercise judicial review over the acts of the government along with its institutional ability to deliver a ruling that would limit a State's acts or attribute to the State responsibility for its violation of the law.

There is another temporal aspect that is particular to grave violations of IHL and criminal cases. War crimes are not subject to statutory limitations, as provided by the 1968 UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. This principle was identified by Rule 106 of the 2005 ICRC Customary Study to be customary in nature. Therefore, war crimes trials (as well as civil suits based on grave IHL violations, in places where national legislation provides for such reparations) can be held a long time after the facts of the case occurred. When war crime cases are dealt by the courts of the responsible State during its post-conflict era, where the historical narrative has established the responsibility of committing war crimes, and enough time has passed so the people directly involved in the violations are not any more part of the decision makers, the administration, and the bureaucracy, the court could more easily rule against one of their own nationals. During an ongoing armed conflict, when responsible individuals still hold the key positions of the government and the army, it is barely conceivable that such trials could take place, and that the court would assume its role as enforcer of the law. In this context, the war crimes trials carried out in Serbia are among the rare examples of prosecution of war crimes just a few years after they were committed. While the national historical narrative, recognising the nation's own responsibility in the conflict, is not yet completely formed, this fact has an impact on its ability and willingness to apply the law.

v. The link of the national court with the case

Whether a court is from the State of the victims, a third State, or the responsible State, will have a major impact on the decision that the court will deliver. It is also of major importance to examine this factor, while attempting to reveal the functional role of a court. If a court, for similar acts, would render different judgments, depending on the nationality of the victims and/or the responsible State/individual, then a practice of double standards is

seen, and the role of the court may be different from what it appears at first glance, as the US Alien Tort Statute cases, discussed in the third chapter show. To avoid double standards and related criticism, courts should enforce the law on their own nationals and provide remedies for victims of their own nationals' violations, even when the victims are aliens. Only then would it be politically justified that these national courts would judge a third State's acts.

In this context, another factor that would influence the role that courts would assume in this context is if the conflict was reviewed by an international court. Politically, it had been easier for national courts to function where their decisions are subsequent to international courts' decisions.

CHAPTER II

The Apologist Role of National Courts: Legitimizing State Policy

1. The Role of Courts as Legitimizing Agency

One of the functions of national courts within a democratic system is the granting of legitimacy to the government and its policies. Studies from the fields of sociology of law and political science suggest that States need to rely on courts as a legitimizing agent. According to Roger Cotterrell, the courts are institutions that ensure the State's interest in maintaining the stability of the social and political order is met, "first, by providing legal frameworks and legal legitimacy for *government* and government acts and, secondly, by maintaining the integrity of the *legal order* itself – the ideological conditions upon which legal domination depends."[207] Courts generally meet those expectations.

Shapiro has demonstrated in a comparative study that the governing authorities seek to maintain or increase their legitimacy through the courts and that courts have largely been subservient to the political sovereign. When governments acquired control over new territories, as in colonial situations, they used to establish an effective judicial system to serve as a source of legitimacy for their rule, so "conquerors" use courts as one of their many instruments for controlling conquered territories. Shapiro defined the role of the courts as "a particular form of social control, the recruiting of support for the regime."[208] That legitimacy is usually attributed through the exercise of judicial review, which is the power of the court to

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[207] R. Cotterrell, *The Sociology of Law* (Butterworths, London, 1984), p. 234. See also at p. 245; M. Shapiro (n 148), pp. 17-28; E. Benvenisti (n 121), p. 174; E. Benvenisti (n 195), note 63 and accompanying text; E. Benvenisti, 'National Courts and the "War on Terrorism"' in A. Bianchi (ed), *Enforcing International Law Norms against Terrorism* (Hart Publishing, Oxford, 2004), p. 318.

[208] M. Shapiro (n 148), p. 297. Shapiro perceives the prime historical and political function of courts as the one of *social control*: courts are the means by which the state rules *through* law. D. Caron 'Towards A Political Theory of International Courts and Tribunals' (2007) 24 Berkeley Journal of International Law 401, p. 407. Empirical studies, from the fields of sociology of the law and political science, suggest that courts systematically support State's policies. See for example, R. Dahl, 'Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker' (1957) Journal of Public Law 6, pp. 279-295 (show that the court is in fact a part of "the dominant national alliance"); J.D. Casper, 'The Supreme Court and National Policy Making' (1976) 70 American Political Science Review 1, pp. 50-63; R. Shamir, 'Landmark Cases and the Reproduction of Legitimacy: The Case of Israel's High Court of Justice' (1990) 24 Law & Society Review 3, p. 781.

veto a statute or an administrative act or policy.[209] According to Cotterrell, the court was accorded competence to exercise judicial review over the political branches, and the level of independence required for the judiciary's authority in the eyes of the public, precisely in order to provide this legitimating effect. It is a concession[210], or a pact,[211] between the State and the judiciary . Benvenisti describes judicial independence and judicial review competence as "two components of a 'deal' between the court and the other branches of government".[212] Moreover, the courts accept this restriction on their powers, as it protects them from confrontation with the government or with public opinion, which may make them reluctant to demand scrutiny over international law.

In certain constitutional system as in the US and UK, the doctrine of *ultra vires* allows courts to ensure that the executive obeys the law, otherwise their actions will be declared by the courts as void. However, the extent of judicial supervision of administration under the doctrine of *ultra vires* will depend on the judges' implementation of their discretion in interpreting the law and establishing the facts.[213] Exposing legal limitations that are imposed on judicial review and the general principles under which they are applied, shows that judicial review, which might appears at first to be an effective safeguard against excessive State authority, becomes seen as another tool to legitimize the regime's political goals:

> The doctrine ends, in practice, with a judiciary that will occasionally intervene against the most openly illegal conduct of local authority but exercise very little supervision over the massive decretory power of central government.[214]

While national courts grant legitimacy to the government and its policies, at the same time, the judiciary has to maintain its reputation as an independent institution in order to be perceived as legitimate in the eyes of the general public. Thus, the court within the State's democratic system is required to balance these two conflicting vectors: the institutional

[209] R. Cotterrell (n 207), pp. 17-28.

[210] *Ibid*, pp. 232-236.

[211] T.M. Franck, *Political Questions/Judicial Answers: Does the Rule of Law Apply to Foreign Affairs?* (Princeton University Press, Princeton, 1992), pp. 10-12. Franck describes "Marshall's readiness to bargain away some ill-defined degree of judicial review over foreign affairs." (p. 11).

[212] E. Benvenisti (n 152), p. 427. In 1994, Benvenisti argued that apparently "this 'deal' does not appear to include the granting of judicial discretion in the sphere of foreign affairs."

[213] M. Shapiro (n 148), p. 116.

[214] *Ibid*, p. 118.

necessity of any government "to rely on the court as a legitimizing agent"[215], and the need for the courts' to be seen as independent. Shamir's argument is that courts, in order to legitimize State policies, must first secure their own legitimacy as being independent. They do so through the rare landmark cases in which they rule against the interest of the State. These exceptional decisions are usually not significant for their merits, as their impact in reality is often negligible,[216] but rather for the reinforcement of the legitimacy of courts, and the attribution of the necessary semblance of impartiality. After establishing their own legitimacy as an institution which is not seen as linked to any political interests, their statutes can be then used to legitimate all the other majority of cases in which similar policies are often approved.

[215] E. Benvenisti (n 195), p. 275.

[216] "By occasionally overruling or annulling governmental policies in some 'landmark cases', the juridical apparatus asserts its independence from the polity…. [A]ntigovernment court decisions are often both painful for the government and discomforting for the judiciary. However, a by-product is that they often bring about a legitimating effect. Landmark decisions in which the jurisdiction of the court is reasserted also reinforce the legitimacy of the court as an independent institution. Consequently, such decisions enhance the legitimacy of the government in general." R. Shamir (n 207), p. 782-783. See also M. Shapiro (n 148), p. 124.

2. Case Study No. 1: The Israeli High Court of Justice

The present case study examines the functional role of the Israeli High Court of Justice, and its application of Article 43 of the 1907 Hague Regulations in judicial review cases. The first section describes the jurisdiction of the Israeli High Court of Justice over the Occupied Palestinian Territories (OPT) and its policy of justiciability; the second section provides a legal analysis of Art. 43 of the Hague Regulations in order to set a normative basis for evaluating the High Court of Justice case law; finally, through the 4 stages deconstruction technique, described above, the legitimating role of the Israeli High Court of Justice is revealed.

2.1 The jurisdiction of the Israeli High Court of Justice over the Occupied Palestinian Territories and its policy of justicibility

The Israeli Supreme Court, sitting as the High Court of Justice, has the authority to hear matters "in which it deems it necessary to grant relief for the sake of justice and which are not within the jurisdiction of another court."[217] Thus, it has no jurisdiction over civil and criminal cases, but is competent to review the legality of decisions and acts of the State, its agencies, and the armed forces.[218]

[217] Article 15(c) of the Israeli Basic Law: the Judiciary (28 February 1984). Article 15(d) lists among its operational authority the competent 1) to make orders for the release of persons unlawfully detained or imprisoned. (2) to order State and local authorities and the officials and bodies thereof, and other persons carrying out public functions under law, to do or refrain from doing any act in the lawful exercise of their functions or, if they were improperly elected or appointed, to refrain from acting; (3) to order courts and bodies and persons having judicial or quasi-judicial powers under law… to hear, refrain from hearing, or continue hearing a particular matter or to void a proceeding improperly taken or a decision improperly given. The Basic law is available at: <http://www.knesset.gov.il/laws/speciaL/eng/basic8_eng.htm> (accessed 4 May 2011).

[218] In the Israeli domestic legal structure the High Court of Justice exercises exclusive jurisdiction. Its jurisdiction is exercised as first and last instance. The procedure is initiated by a petition directly filed by individuals or NGOs. In general, the panel is composed of three justices, but for petitions of particular importance a larger panel of justices up to 15 may preside.

Israel, which established a military government over the territories it occupies from the moment the occupation began,[219] accepted almost immediately also the judicial review competence of its highest judicial body over the acts of the military commander in the OPT. Since the start of the military occupation in 1967 Palestinian residents and non-governmental organizations (NGOs) filed petitions to the High Court of Justice, in which they challenged the legality of Israeli operations in the OPT. Yet, it was not evident whether the High Court of Justice is competent to exercise extraterritorial jurisdiction over acts committed beyond the sovereignty of the State of Israel, and whether foreigners, particularly Palestinians, would have standing before this Israeli judicial institution.[220] In the early cases, as no challenge on

[219] 'Proclamation Regarding Law and Administration (The West Bank Area) (No. 2) – 1967' (7 June 1967) '*Collection Proclamation, Orders and Appointments of the I.D.F. Command in the West Bank Area* (Hebrew and Arabic) reproduced in (1971) 1 Israel Yearbook on Human Rights, established the military government while keeping in force local law as required by Article 43 of the Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) 2 AJIL Supplement 90-117 (1908) (hereinafter: the Hague Regulations of 1907): "(2). The law that existed in the region on June 7, 1967 will remain in effect, to the extent that it contains no contradiction to this proclamation or to any proclamation or order issued by me, and with the revisions ensuing from the establishment of the Israel Defense Force's regime in the region." (3)(a). All authority of government, legislation, appointment and administration pertaining to the region or its residents will now be exclusively in the hand of the military commander and will be exercised only by him or by someone appointed by him for this purpose or by someone acting on his behalf." Article 35 of Military Proclamation No. 3 stated that "the military courts and their directors should adhere to the Geneva Convention of 12 August 1949 concerning the protection of civilian during war and regarding all matters relating to judicial procedure. If there is a contradiction between this order and the above-mentioned convention then the regulation of the convention will take precedent." Only four months later this provision was replaced by Order Concerning Security Provision (amendment 9 to Military Proclamation 3) (Order No. 144) (22 Oct. 1967). New Article 35 regulated a completely different issue and stated that– "if an accused was sentenced to a term in prison, the time of detention should be reduced from the sentence." The State denied the *de jure* application of the Geneva Conventions of 1949, recognizing only its *de facto* applicability, and declaring it will observe its humanitarian provisions. For the Israeli position, based on its interpretation of Article 2 of the Fourth Geneva Convention of 1949, and the rejection of this position by the international community, including the International Court of Justice (ICJ), see *Legal Consequences on the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) ICJ Rep 2004, paras. 90-101 (hereinafter: *The ICJ Advisory Opinion on the Wall*). At the same time, however, the applicability of the Hague Regulations of 1907 was never contested.

[220] "The Supreme Court of Israel is not an International forum. … [I]t is not self-evident that the Court's power of review extends to actions carried out by the military in areas that are not part of Israeli sovereign territory and in which the Israeli legal system does not apply." D. Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (State University of New York Press, Albany, 2002), p. 19.

jurisdiction was voiced by the State as a matter of policy,[221] the High Court of Justice review over State acts in the OPT was a *fait accompli*.[222] Later, the High Court of Justice ruled that since military commanders are public servants who belong to the executive branch of the state, and they "fulfil public duties according to law", they are subjected to the constitutional jurisdiction of the High Court of Justice, even if the acts were committed in the OPT[223]. The official position of the State not to contest the High Court of Justice's jurisdiction, as expressed by the State legal advisor at that time, Meir Shamgar, was to prevent arbitrariness by the army and to preserve the rule of law. Yet, it also recognized this role that was explained "by the wish to intensify ties between the local residents and the Israeli military system, encouraging them to have faith in the Israeli system."[224] This decision was not based solely on genuine respect for international humanitarian law and the rule of law. It was the best way to legitimize the policy of the government and the actions of the army in the eyes of its society, and the international community –both of which are accorded great importance by the Israeli High Court of Justice.[225] The interest of the State to rely on the High Court of Justice as a legitimating agency was probably among the factors that lead to court's "activism" and its remarkable objection to apply non justiciability doctrines.[226]

2.2 Article 43 of the 1907 Hague Regulations: A normative analysis

The rationale of the law of military occupation is that it is a temporary situation, which lasts until a political agreement is reached. During this period, the occupant does not enjoy sovereign rights over the territories it occupies; as stated by Oppenheim, for instance, "there is

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[221] M. Shamgar, 'Legal Concepts and Problems of the Israeli Military Government - The Initial Stage' in M. Shamgar (ed), *Military Government in the Territories Administrated by Israel 1967-1980, The Legal Aspect,* (The Harry Sacher Institute for Legislative Research and Comparative Law, The Hebrew University, Jerusalem, 1982), p. 13, 43. E. Benvenisti (n 121), p. 181 and fn 113.

[222] See for example HCJ 337/71, *The Christian Society for the Holy Places v Minister of Defense*, (1971) 26(1) PD 574 (English summary in (1972) 2 Israel Yearbook on Human Rights 354 (hereinafter: *The Christian Society* case).

[223] HCJ 302/72, *Abu Hilou at al. v Government of Israel*, (1972) 27(2) PD 169, p. 176.

[224] M. Negbi, *Justice under Occupation: the Israeli Supreme Court versus the Military Occupation in the Occupied Territories* (Cana Publishing House, Jerusalem, 1981), p. 16 (in Hebrew) cited in E. Benvenisti, *The International Law of Occupation* (2nd edn, Princeton University Press, Princeton, 2004), p. 119.

[225] E. Benvenisti (n 121), p. 181. See also D. Kretzmer (n 220), p. 20; R. Shamir (n 207), p. 795.

[226] For a detailed discussion see below in chapter 3 and 4.

not an atom of sovereignty in the authority of the Occupying Power."[227] At the same time, the Occupying Power is responsible for administering the local life of the population under its control, maintaining it as it was prior the occupation as closely as possible, and for providing security. For this purpose, and for the duration of the occupation, the military commander centralises in his hands all governmental powers: legislative, judicial, and enforcement authorities. However, in exercising these powers the Occupying Power should refrain from introducing changes that could influence the outcome of a future political settlement, as reflected, for example, by the prohibition under international humanitarian law on the transfer of populations into the occupied territory.[228]

2.2.1 The law of military occupation – a background

The law of belligerent military occupation (*Occupatio bellica)* was introduced in the 19th century, in the wake of the Napoleonic wars. [229] It was perceived as a transitional legal status, a by-product of a war, "defined in contraposition to *debellatio*".[230] At the time, wars were perceived as legitimate means to achieve national and political objectives. According to the *debellatio* doctrine*,* when the former sovereign was completely defeated during a war, i.e., his national institutions have disintegrated and none of his allies continue to challenge the enemy – sovereignty transferred to the hands of the victorious party.[231] There was a clear separation between the public and private spheres, government and civilians, which was applicable also during wars. Wars were fought between armies, and the people, or their interests, were left out[232].

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[227] L. Oppenheim, 'The Legal Relations between an Occupying Power and the Inhabitants' (1917) 33 Law Quarterly Review 363, p. 364 cited in Y. Dinstein, *The International Law of Belligerent Occupation* (Cambridge University Press, Cambridge, 2009), p. 49.

[228] M. Sassòli, A. Bouvier and A. Quintin (n 91), pp. 231-232; A. Roberts, 'Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967' (1990) 84 American Journal of International Law 1, pp. 46-47; A. Roberts, 'What is a Military Occupation?' (1984) 55 The British Yearbook of International Law 1, pp. 249-305.

[229] N. Bhuta**,** 'The Antinomies of Transformative Occupation' (2005) 16 European Journal of International Law 4, p. 725.

[230] *Ibid*., p. 725.

[231] In these cases the law of military occupation, which does not confer sovereign rights - was inapplicable. E. Benvenisti (n 224), p. 92; A. Roberts (n 228), *op. cit.*, pp. 267-268.

[232] "I conduct war with French soldiers, not with the French citizens." Statement attributed to King William of Prussia on August 11, 1870, cited in E. Benvenisti (n 224), p. 27.

The Hague Regulations were drafted at the end of 19th century in the context of this legal and political environment. Occupations did not last long, and were merely a transitory legal system. The law of military occupation provided a legal framework that was concerned more with safeguarding the interests of the sovereign, than those of the individual. Indeed, it protected, first and foremost, the security interests of the occupying forces and of the ousted government – i.e., it preserved their bases of power and property. It was assumed that the temporary enemy military government could cohabit with the local population, with minimal interaction between the two. As put by Benvenisti,

> the occupant was expected to fulfil a positive role by filing the vacuum created by the ousting of the local government, and by maintaining its bases of power until the conditions for the latter's return were mutually agreed upon.[233]

Another important factor influencing the law of military occupation at that time was the role of the State within the predominant *laissez-faire* political and economical doctrine, which implied minimal intervention in economic and social life. Thus, the law was designed to enable the continuation of civil life and the requirement of security of the armed forces for a short period until the political agreement is reached, while the role of the military government was mainly to safeguard the *status quo* and not to positively interfere in civil life, as "it was not expected at that time that the occupant would have any self interest in regulating those social functions."[234]

The post-1939–1945 War international legal order, established by the UN Charter, outlawed the doctrine of *debellatio*.[235] No acquisition of new territories could any longer be made through the use of force.[236] Furthermore, human rights law and the right to self-

[233] *Ibid*, p. 28.

[234] *Ibid*, p. 10. See also: "[T]he occupant was not expected, during the anticipated short period of occupation to have pressing interest in changing the law to regulate the activity of the population, except for what was necessary for the safety of it forces." (p. 14).

[235] A. Klafkowski, 'Les Formes de Cessation de l'état de Guerre en Droit International' in Académie de Droit International de la Haye, *Recueil des Cours*, Vol. 149 (Martinus Nijhoff Publishers, Leiden, 1976), p. 268.

[236] See Article 2(4) of the United Nations Charter; 'The Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations' UNGA Res. 2625 (XXV) (24 October 1970) UN Doc A/8028 (1970), accordingly: "The territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter. The territory of a State shall not be the object of acquisition by another State resulting

determination have emerged along with contemporary political theory of the welfare state. After 1945, attention shifted to the rights of the indigenous population. This brought new perceptions of the role of the law of military occupation in relation to the individual, as demonstrated in the Fourth Geneva Convention adopted on 1949, and the two Additional Protocols of 1977.[237] The civilian population became a subject of the law applicable during armed conflicts with the emphasis on their protection. The 1949 Geneva Conventions explicitly define that no annexation could influence the rights granted by the Fourth Convention.[238] As of today, the interests of the indigenous population are more important than those of the exiled government.

Political and economic doctrines have also changed. States have become increasingly involved in economic activities, the regulation of the markets, and social welfare. Consequently, the occupant had new interests in the resources of the land it occupied.

> The modern occupant is no longer the impartial trustee of the ousted government or the indigenous private interest, as it was envisaged in the Hague Regulations. Rather, it is usually an interested party, with short and long-term objectives, and with the effective capability to implement those objectives.[239]

At the same time, it seems that these instruments still favour the *status quo* over the "development" one (*see below*).[240] Commentators have observed that contemporary occupations have changed their nature. They are no longer a mere outcome of an armed conflict.[241] State practice has shown that contemporary occupations endure considerably longer. At the same time, as control over these territories involves major political and economic interests resulting from control over foreign land and resources, and do have

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from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal." This has been recognized by the ICJ as a rule of customary law. See, e.g., *The ICJ Advisory Opinion on the Wall* (n 219), para. 87.

[237] C. Stahn, *The Law and Practice of International Territorial Administration: Versailles to Iraq and Beyond* (Cambridge University Press, Cambridge, 2008), pp. 116-117. See especially Articles 27/50/56. Article 154 of the Fourth Geneva Convention of 1949 affirmed, in addition, the continue applicability of the Hague Regulations of 1907.

[238] Article 47 of the Fourth Geneva Convention of 1949. "This formulation is a reflection of the general conception of the Fourth Geneva Convention: to provide humanitarian treatment of civilian persons under occupation, without reference to the mode of governance in those territories." E. Benvenisti (n 224), p. 99.

[239] *Ibid*, p. 210.

[240] *Ibid*, p.105; M. Sassòli, A. Bouvier and A. Quintin (n 91), p. 231.

[241] Roberts indentified at least 17 categories of different kinds of occupations. See A. Roberts (n 228).

"pejorative connotation"[242], most occupants do not recognize them as occupied and avoid applying the law of military occupation. In some cases, the territories were either unilaterally annexed, in violation of international law, or a puppet government or state was established. However, since the 1990s, international legal organs have been increasingly engaged in a serious enforcement of the law of military occupation. The ICJ applied the law of military occupation to the OPT, and it established, in the case of *D.R. Congo v. Uganda* (2005) that Uganda has been an Occupying Power in the region of Ituri, based on Article 42 of the Hague Regulations - a fact that was recognized also in the Lubanga case of the Pre-Trial Chamber of the ICC in 2007. The International Criminal Tribunal for the former Yugoslavia (ICTY) dealt with several cases concerning occupation during the conflicts in the Balkans.[243] The European Court of Human Rights (ECtHR) in the *Loizidou* case stated that the northern part of Cyprus has been occupied by Turkish troops. This was reaffirmed in later cases.[244] The Eritrea/Ethiopia Claims Commission stated that there had been an occupation.[245] Most significant was UN Security Council Resolution 1483 (May 2003), which called for the application of the law of military occupation to the situation in Iraq. National courts were also requested to deal with situations of occupation.[246] The Israeli High Court of Justice has provided the most developed jurisprudence in the field of the law of military occupation.

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[242] E. Benvenisti (n 224), p. 212.

[243] *Prosecutor v Blaskic*, (Judgment, Trial Chamber) ICTY IT-95-14 (3 March 2000). In *Prosecutor v Naletilic* (Judgment, Trial Chamber) ICTY IT-98-34-T (31 March 2003), paras. 210-223 and 587, the Court established if an occupation occurred according to Article 42 of the Hague Regulations of 1907, and several provisions of the Hague Regulations of 1907 were mentioned. (para. 616) <http://www.icty.org/x/cases/naletilic_martinovic/tjug/en/nal-tj030331-e.pdf> (accessed 22 November 2010).

[244] *Loizidou v Turkey* (Merits) European Court of Human Rights No. 15318/89 (18 December 1996), p. 2223, § 16 in *Reports of Judgments and Decisions* 1996-VI, "16. Turkish armed forces of more than 30,000 personnel are stationed throughout the whole of the occupied area of northern Cyprus, which is constantly patrolled and has checkpoints on all main lines of communication". See more recently, *Takis Demopoulos and Others v Turkey* (Judgment) European Court of Human Rights No. 46113/99 (1 March 2010), § 4.

[245] Western Front, Aerial Bombardment and Related Claims—Eritrea's Claims 1, 3, 5, 9–13, 14, 21, 25, and 26, Eritrea/Ethiopia, Partial Award of the Eritrea-Ethiopia Claims Commission, Ad hoc—PCA Optional Rules for Arbitrating Disputes Between States (adapted) (19 December 2005) ICGJ 356 (PCA 2005).

[246] See, e.g., UK and US cases related to the UK occupation of Iraq: R *(on the application of Al-Skeini) v Secretary of State for Defence*, (2005) (Application for Judicial Review) EWCA (Civ) 1609 (21 December 2005); R *(on the application of Al-Skeini) v Secretary of State for Defence*, [2007] UKHL 26 (13 June 2007); R (on the application of Al-Jedda) (FC) (Appellant) v Secretary of State for Defence (Respondent) [2007] UKHL 58 (12 December 2007). Cyprus - Judgment of the 'TRNC' Constitutional Court in case No. 3/2006: *National*

Although doubts have been raised concerning the adequacy of the law of military occupation and the Hague Regulations in their application to contemporary occupations, it is commonly accepted that the law of military occupation should be adapted to contemporary situations through the application of the existing legislation, which is sufficiently flexible.[247] This was also the position of the Israeli High Court of Justice.[248] At the heart of the debate is which is the proper interpretation that should be attributed, and which, at the end of the day, is to be defined in light of the political perception of the role of the Occupying Power – should it preserve the *status quo* as a trustee, or introduce changes for the benefit of the local population/its own interests? Where does the proper balance lie?

2.2.2 Art. 43 of the 1907 Hague Regulations

Art. 43 of the 1907 Hague Regulations, "the cornerstone of the law of occupation in the 20th century",[249] was recognized by the Nuremberg tribunals as constituting a customary rule[250]. Although it was drafted more than 100 years ago, in the first positive instrument of

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Unity Party v TRNC Assembly of the Republic (First and Last instance) (D 3/2006) (21 June 2006), ILDC 499 (TCc 2006). It discusses (paras. 30-32) the rules of immovable private properties in a territory under military occupation and cited different articles of the Hague Regulations of 1907 as well as authors' contributions. Finally it ruled that it was not contrary to the Constitution nor to international law to make restitution of possession and to pay compensation to Greek-Cypriot right owners. This case was later brought before the ECtHR which in 2010 rendered its judgment: *Takis Demopoulos and Others v. Turkey* (Judgment) European Court of Human Rights No. 46113/99 (1 March 2010). These cases concern the legality of a legal mechanism established by the Turkish Republic of Northern Cyprus to decide claims for compensation for property abandoned by the Greek Cypriots who fled from Northern Cyprus.

[247] C. Greenwood, 'The Administration of Occupied Territories' in E. Playfair (ed), *International Law and the Administration of Occupied Territories* (Clarendon Press, Oxford, 1992), p. 263.

[248] HCJ 393/82, *Jami'at Ascan al-Mu'aliman Altauniya Almahduda Almasauliya Cooperative Society v The Military Commander in the West Bank*, (1983) 37(4) PD 785 (hereinafter: *The Jami'at Ascan* case) (Excerpted in English in 14 Israel Yearbook on Human Rights 301 (1983), para. 22: "[T]he fact that the Hague Regulations were drafted in light of short occupation does not prevent the development of interpretation regarding the scope of the authority of the military commander in long term occupation, with the flexible and broad framework created by Art. 43."

[249] E. Benvenisti (n 224), p. 9. The article states: "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."

[250] See 'Judicial Decisions: International Military Tribunal (Nuremberg) Judgment and Sentences' (1947) 41 American Journal of International Law 1, pp. 248–249; *The ICJ Advisory Opinion on the Wall* (n 219), para 89.

international law regulating the law of military occupation, today it still constitutes the basic legal structure defining the scope of the occupying power's authority in occupied territories, and indeed represents the overriding philosophy of the law of military occupation. As a matter of principle, it limits the power of the occupier, whose government is of temporary nature, and promotes the maintenance of *the status quo*, while, at the same time, granting the Occupying Power the authority to introduce changes when required. However, its exact scope, and the search for the appropriate balance between the *status quo* approach and one that allows the introduction of new legislation and institutions (the "development" approach), are still at the heart of contemporary academic debates.[251]

Article 43 does not confer sovereignty rights- One aspect of Article 43 which enjoys consensus is that it is well established that occupation does not confer sovereignty rights.[252] The authority that had "*in fact* passed into the hands of the occupant"[253] is an irregular situation; namely, it is a "temporary state of affairs pending a peace agreement",[254] which does not confer upon the occupier sovereignty over the territories it occupies.

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[251] The academic debate was recently revived following the occupation of Iraq in 2003 by the US and the UK, and the emerging presence of peace keeping missions. See, e.g., M. Sassòli, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers' (2005) 16 European Journal of International Law 4, pp. 661-694; M. Sassòli, 'Article 43 of the Hague Regulations and Peace Operations in the Twenty-First Century' (Program on Humanitarian Policy and Conflict Research at Harvard University, June 2004) (paper presented for Informal High-Level Expert Meeting on Current Challenges to International Humanitarian Law, Cambridge, June 25-27 2004); A. Roberts, 'Transformative Military Occupation: Applying the Laws of the War and Human Rights' in M.N. Schmitt and J. Pejic (eds), *International Law and Armed Conflict: Exploring the Fault Lines: Essays in Honour of Yoram Dinstein* (Martinus Nijhoff Publishers, Leiden, 2007), pp. 439-495; N. Bhuta (n 229), p. 735-739 and Y. Dinstein, 'Legislation Under Article 43 of the Hague Regulations: Belligerent Occupation and Peace building' (Program on Humanitarian Policy and Conflict Research at Harvard University - Occasional Paper Series, Fall 2004) <http://www.hpcrresearch.org/pdfs/OccasionalPaper1.pdf> (accessed 20 May 2011).

[252] "Among the two issues dealt with in the Article there is one which was not contested … this is the notion that the occupation does not confer upon the occupant sovereignty over the occupied territory." E. Benvenisti (n 224), p. 8; M. Sassòli, *Ibid*, p. 663.

[253] Article 43 of the Hague Regulations of 1907.

[254] "The assumption that, the occupant's role being temporary, any alteration of the existing order in occupied territories should be minimal, has been at the heart of the provisions on military occupation in the laws of war. Three aspects of the law relating to the occupied territories exemplify this requirement: the prohibition of annexation, the rules regarding the occupants' structure of authority and the rule regarding the maintenance of existing legislation in Occupied Territories." A. Roberts (n 251), p. 442.

Structure and scope - The structure of the occupier's' authority consists of two elements: the authority to restore and ensure public order and civil life, and the authority to legislate.[255] The term "public order and safety" as it appeared in the English version of the Article, was in fact translated from the original text in French - '*l'ordre et la vie publics*'. As the original French text encompasses a broader meaning, and in light of the legislative history, the English version should be understood as "public order and civil life".[256] According to Sassòli, this would be in line with the basic premise of international humanitarian law whereby, if necessary, all functions of government must be provisionally assumed by the Occupying Power in order to guarantee normal life for the local population.[257] "*Restore"* refers to re-establishing the pre-occupation condition of civilian life and security. This fits the concept of maintaining the *status quo*. At the same time, "*ensure"* indicates the responsibility of the Occupying Power for the future – as long as the occupation lasts. During this period, the Occupying Power is under an obligation to guarantee that the dynamic civil life (including its social and economic dimensions), will go on. This obligation is, however, one of means and not of result, as indicated by "as far as possible".[258] Thus, the authority granted to the Occupying Power reflects a balance required while controlling an occupied territory, a balance between safeguarding the *status quo* and introducing necessary new/long-term changes to ensure the continuity of civil life and safety.

"All the measures in its power": limited by international human rights law - The ICJ in the *Wall advisory opinion* affirmed that human rights law applies also in a situation of occupation. In the Congo case, it reaffirmed this in the context of a short-term occupation and established that the obligation "to take all the measures in its *power* to restore and ensure…" of Article 43 is limited by the obligation to respect international human rights law:

> The Court thus concludes that Uganda was the Occupying Power in Ituri at the relevant time. As such, it was under an obligation, according to Article 43 of the Hague Regulations of 1907, to

[255] Originally, in the Brussels Declaration, the content of Article 43 was formulated in two separated closes and therefore it is proposed to read each one independently: "the ensuing of syntactic amalgamation of Brussels Articles II and III into a single Article 43 was not designed to disturb the substantive duality of the concepts involved". Y. Dinstein (n 227), p. 90.

[256] *Ibid*, p. 89.

[257] See M. Sassòli (n 251), pp. 663-664.

[258] The basic feature of an occupation is its temporary nature. *Ibid,* p. 664 and see E. Benvenisti (n 224), p. 6; and G. Von Glahn, *Law among Nations: An Introduction to Public International Law* (5th edn, Macmillan, New York, 1986), p. 686. See also Y. Dinstein (n 227), p. 90.

> take all the measures in its power to restore, and ensure, as far as possible, public order and safety in the occupied area, while respecting, unless absolutely prevented, the laws in force in the DRC. This obligation comprised 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 such violence by any third party.[259]

Yet, as Sassoli points, an occupying power could derogate from certain human rights obligations as allowed by human rights law in cases in which the life of the (occupied) nation is threaten, in order to restore and maintain public order.[260]

The authority to legislate -

i. Basic principle – the local law remains in force

Article 43 of the Hague Regulations imposes a general obligation on the Occupying Power to respect, unless absolutely necessary, the law that was in force prior to the occupation. This rule prevents the Occupying Power from extending its own legal system over the occupied territories and "from acting as a sovereign legislator".[261] This represents the *status quo* approach.

ii. Scope of authority: "Unless absolutely prevented"

The authority to legislate is not limited to issues related to public order and civil life.[262] It includes, for example, the security needs of the army of occupation. However, as observed by many commentators, the precise scope of the authority granted by Article 43 is unclear.[263] One of the main causes of its vagueness is the terms "unless absolutely necessary." Since the occupier is almost never absolutely prevented from respecting local law, in the technical sense

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[259] *The ICJ Advisory Opinion on the Wall* (n 219), para. 178. On the applicability of human rights law in military occupation see – A. Roberts (n 251), pp. 589-601and M. Sassòli (n 251), pp. 666-667. Yet, both the US and Israel deny that international human rights law binds an occupying power with respect to the population of an occupied territory. See for example, UN Human Rights Committee, 'Concluding Observations of the Human Rights Committee: Israel 21/08/2003' UN doc CCPR/CO/78/ISR (21 August 2003), para. 11.

[260] M. Sassòli (n 251), p. 667.

[261] *Ibid*, p. 668.

[262] E.H. Schwenk, 'Legislative Power of the Military Occupant under Article 43, Hague Regulations' (1944-1945) 54 Yale Law Journal 2, p. 400.

[263] M. Sassòli (n 251), p. 663.

of the word, this term has no meaning of its own.[264] Therefore, its interpretation will be based on the conception that the occupier holds *vis-à-vis* its own role – passive guardian of the *status quo* or active ambassador of social and economic reforms. Indeed, as State practice has shown, Article 43 has proved to be "an extremely convenient tool for the occupant: if it wished, it could intervene in practically all aspects of life; if it was in its interest to refrain from action, it could invoke the 'limits' imposed on its power".[265]

The scope of interpretation given by scholars to this term also varies. It ranges from "military necessity",[266] "necessity."[267], through "reasonable test",[268] down to, simply "sufficient justification."[269] Most authors agree that not only the interests of the army of occupation but also those of the local population should be taken into account when considering whether to preventing the application of local laws.[270] Benvenisti proposes a case-by-case analysis, in which the different interests and alternatives should be considered.[271]

iii. Article 64 of Geneva Convention IV

A clarification of Article 43 is found in Article 64 of the Fourth Geneva Convention. Article 64, paragraph 1 reaffirms the fundamental principle of Article 43 by stating that local criminal law remains in force. As an exception to the general rule, Article 64, paragraph 1 lays down two specific conditions under which the Occupying Power may suspend/repeal local criminal

[264] E. Benvenisti (n 224), p. 13. See also E.H. Schwenk (n 262), p. 397 and E. Feilchenfeld, *The International Economic Law of Belligerent Occupation* (Carnegie Endowment for International Peace, Washington, 1942), p. 89.

[265] E. Benvenisti (n 224), p. 11.

[266] M. Greenspan, *The Modern Law of Land Warfare* (University of California Press, Berkley, 1959), p. 224; M. Bothe, 'Occupation, Belligerent' in R. Bernhardt (ed), *Encyclopedia of Public International Law* (1997), iii, p. 765, Oppenheim and Kelzen, also see military necessity and the safety of the Occupying Power as the sole justification, under Article 43, to introduce changes in existing laws. L. Oppenheim (n 227), p. 365; H. Kelsen (n 108), p. 73.

[267] Y. Dinstein (n 227), p. 109. Dinstein proposed a "litmus test" to examine the sincerity of the OP's intentions in introducing a new legislation – whether in its own legal system a similar law exist. Yet, as it was recognized by several authors, this test seems to be of little relevance. E. Benvenisti (n 224), pp.15-16; A. Roberts (n 228), p. 94.

[268] M.S McDougal and F.P Feliciano, *Law and Minimum World Public Order: Transitional Coercion and World Public Order* (Yale University Press, New Haven, 1961), p. 767.

[269] E. Feilchenfeld (n 264), p. 89.

[270] M. Sassòli (n 251), p. 674, fn 80.

[271] E. Benvenisti (n 224), p. 16.

law: If the local law constitutes a threat to security, or if it is an obstacle to fulfilling the Convention. The provision thereby elaborates and clarifies the term "unless absolutely prevented," which appears in Article 43, with regard to penal legislation. According to the International Committee of the Red Cross commentary of Article 64, these two exceptions

> are of a strictly limitative nature. The occupation authorities cannot abrogate or suspend the penal laws for any other reason - and not, in particular, merely to make it accord with their own legal conceptions.[272]

Article 64, paragraph 2 then provides a more detailed regulation of the authority of the Occupying Power to legislate, which is generally authorized in Article 43.[273] The International Committee of the Red Cross commentary indicates that

> Article 64 expresses, in a more precise and detailed form, the terms of Article 43 of the Hague Regulations, which lay down that the Occupying Power is to respect the laws in force in the country 'unless absolutely prevented'.[274]

It sets out three conditions under which such legislation is authorized: For the application of the Convention, to maintain order, and for its own safety.[275] However this authority may be exercised only when it is essential to achieve any of these conditions.

At first glance, it appears that Article 64 deals merely with criminal law. It is titled "Penal Legislation: General Observations"; its first provision explicitly refers to penal legislation; and Article 66 refers to "the penal legislation promulgated by virtue of the second paragraph Article 64". Indeed, some authors read Article 64 as referring only to penal law[276]. Yet, while in its first provision, Article 64 indeed explicitly refers to penal legislation, this reference is missing from its second provision. Therefore, Article 64 paragraph 2 can be read

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[272] J. Pictet (n 115), p. 336.

[273] Article 64(2) of the Fourth Geneva Convention of 1949 states: "The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power."

[274] J. Pictet (n 115), p. 335.

[275] For details on each category see Y. Dinstein (n 227), pp. 112-116 and M. Sassòli (n 251), pp. 673-678.

[276] D. Kretzmer (n 220), p. 125; M. Greenspan (n 266), p. 226.

as including the authority to enact all kinds of legislation, not restricted to criminal law. According to the drafting documents and to Benvenisti, the fact that in Article 64, paragraph 2 the term penal does not appear is no mere coincidence: "Article 64 should be read as demanding respect for existing *penal* laws, but permitting modifications in *all* types of law"[277]. Sassòli also maintains there "are good reasons" to refer to Article 64, paragraph 2, not only when dealing with penal legislation.[278] Furthermore, the International Committee of the Red Cross commentary states that:

> The reason for the Diplomatic Conference making express reference only to respect for penal law was that it had not been sufficiently observed during past conflicts; there is no reason to infer *a contrario* that the occupation authorities are not also bound to respect the civil law of the country, or even its constitution."[279]

The commentary also gives examples of the legislative authority under Article 64, paragraph 2 which are not linked to penal law, such as child welfare, labour, food, hygiene, and public health.

In order to avoid an absurd result, this interpretation entails also the authority to repeal non-penal laws.[280] Thus, it seems that Article 64, which is a "more precise, albeit less restrictive formulation of when an Occupying Power is 'absolutely prevented' from applying existing local legislation"[281] is in fact a *lex specialis* rule applying to Article 43 – it imposes fewer restrictions, and therefore favours a more permissive approach to making changes in legislation (mainly concerning legislation for applying the Geneva Conventions), while providing more detailed guidelines on legislative powers than the "unless absolutely

[277] E. Benvenisti (n 224), pp. 101-102.

[278] M. Sassòli (n 251), p. 670. Also Dinstein adhere to this view – "Logic dictates that Article 64 should be construed as applicable, if only by analogy, to every type of law (including civil or administrative legislation)." Y. Dinstein (n 227), p. 111. Yet, he argues that the three categories provided by Article 64(2) of the Fourth Geneva Convention of 1949 for introducing legislation are non exhaustive. (p. 116).

[279] J. Pictet (n 115), p. 335.

[280] M. Sassòli (n 251), p. 670; Y. Dinstein (n 227), p. 111.

[281] M. Sassòli, *Ibid*, pp. 670-671. See also E. Benvenisti (n 224), p. 102: "it seems that the latter formula conveys a more positive approach towards legal changes."

prevented" formulation of Article 43 of the Hague Regulations.[282] Benvenisti's conclusion is that "the Hague Regulations were replaced, at least with respect to the prescriptive powers of the occupant, by the new Geneva rules".[283]

2.2.3 Prolonged military occupation

Although the basic philosophy behind the law of military occupation is that it is a temporary situation, modern occupations have well demonstrated that "*rien ne dure comme le provisoire*".[284] A significant number of post-1945 occupations have lasted more than two decades, such as the occupations of Namibia by South Africa[285] and of East Timor by Indonesia[286], as well as the ongoing occupations of Northern Cyprus by Turkey[287] and of

[282] Article 154 of the Fourth Geneva Convention of 1949 provides that the provisions of the Convention are supplementary to the Hague Regulations of 1907. As Article 43 of the Hague Regulations of 1907 sets out a general obligation, which is promulgated in a more precise manner in Article 64, the provisions of the Convention are *lex specialis* rules which are prior in their application to *legi generali*. See J. Pictet (n 115), p.614: "when a state is a party to the Fourth Geneva Convention of 1949 it is almost superfluous to enquire whether it is also bound by the forth Hague Convention of 1907." Thus, as Benvenisti observes it seems that "the Hague Regulations were replaced, at least with respect to the prescriptive power of the occupant, by the new Geneva rules"; and E. Benvenisti (n 224), p. 103.

[283] E. Benvenisti (n 224), p. 103. However, he remarks that these provisions have not been perceived as innovative by international law scholars and municipal courts and Article 43 continues to provide the legal basis for the occupant's legislative power. (p. 106). The High Court of Justice in Israel would apply only Article 43 as being customary law directly applicable before domestic Israeli courts, unlike treaty law.

[284] Cited in A. Roberts (n 228), p. 47.

[285] The presence of South Africa in Namibia after its international mandate there was terminated by the United Nations in 1966 was viewed as an occupation. See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) ICJ Rep 1971. It came to an end after elections in Namibia in November 1989. See A. Roberts (n 228), pp. 49-50.

[286] From December 1975 to October 1999. For all UN documents see UN website 'The Question of East Timor' <http://www.un.org/peace/etimor99/docs.html> (accessed 5 May 2011).

[287] Since 29 July 1974. UNGA Res. 33/15 (9 November 1978) UN Doc A/RES/33/15; UNGA Res. 34/30 (20 November 1979) UN Doc A/RES/34/30. The European Court of Human Rights ruled that Turkey exercised effective overall control of northern Cyprus through the presence of its military troops and therefore it "falls within the "jurisdiction" of Turkey within the meaning of Article 1 of the Convention and therefore entails the respondent State's responsibility under the Convention." *Cyprus v Turkey* (Judgment) European Court of Human Rights No. 25781/94 (10 May 2001), para 80; see also *Loizidou v Turkey* (Judgment) European Court of Human Rights No. 15318/89 (18 December 1996), paras. 56-57; and *Cyprus v Turkey*, § 77. See also *Takis Demopoulos*

Western Sahara by Morocco.[288] The Israeli occupation of the Palestinian territories, which is the longest in all occupation's history, has already entered its fifth decade.[289]

Prolonged military occupation contains special circumstances that can not be ignored. The longer the occupation lasts, the more the Occupying Power would have to be involved in different aspects of civil life, in order to maintain the welfare of the local population and to adapt to evolving circumstances. Thus, it may be obliged to introduce long-term changes to civilian infrastructure and services, and also in the local institutions dealing with health, education, and so on. Indeed, all authors agree that "it would be wrong, and even at times illegal, to freeze the legal situation and prevent adaptations when an occupation is extended".[290] As Roberts put it:

> Decisions may have to be taken about such matters as road construction, higher education, water use… although they involve radical and lasting change, cannot be postponed in-definitely... Nor can the setting up of political institutions be postponed indefinitely without creating the theoretical possibility that the law on occupations could be so used as to have the effect of leaving a whole population in legal and political limbo: neither entitled to citizenship of the occupying state, nor able to exercise any other political rights except of the most rudimentary character[291].

As prolonged military occupation does not fit the basic assumption of temporality and maintenance of the *status quo*, it has to be examined whether the law of military occupation as legislated in the Hague Regulations, the Geneva Conventions, and their first additional protocol is a legal framework applicable to this situation, or whether these kinds of occupations constitute a special category of occupation, requiring different legislation. Most writers state categorically the law is flexible enough to be adapted to prolonged occupations. Roberts argues that even if lengthy occupations give rise to special problems and "do expose

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and Others v. Turkey (Decision on Admissibility, Grand Chamber) European Court of Human Rights No. 46113/99, § 96.

[288] Since December 1975. UNGA Res. 34/37 (1 November 1979) UN Doc A/RES/34/37 and UNGA Res. 35/19 (11 November 1980) UN Doc A/RES/35/19. See E. Benvenisti (n 224), pp. 151-153.

[289] For other examples, see A. Roberts (n 228), pp. 50-51.

[290] E. Benvenisti (n 224), p. 147; "Sooner or later, a prolonged military occupation faces the need to adopt legislative measures in order to let the occupied country evolve." See also M. Sassòli (n 251), p. 679; Y. Dinstein (n 227), p. 120.

[291] A. Roberts (n 228), p. 52.

certain inadequacies in a body of law essentially intended for much briefer and more precarious periods of foreign military control"[292], the law is nevertheless flexible enough to be capable of being applied in situation of prolonged occupation.[293] Dinstein argues that in an occupation that endures for many years, the military government must be given more flexibility in the application of its legislative power, and proposes a "litmus test" to examine the scope of this flexibility. [294] Kolb also sustains that the exception of Article 43 must be interpreted more broadly, the longer an occupation endures[295]. At the same time the risk of abuse of a possible extension of the Occupying Power's authority should not be ignored, "as it is the Occupying Power that decides whether a legislative act is necessary, and its interpretation is not subject to revision during the occupation".[296] Roberts is well aware of the danger of the use and abuse of the authority, and therefore concludes that some of the authorities should be limited, while others are extended.[297] As for Benvenisti, he proposes that since an extension could, in effect, "grant the occupant almost all the powers a modern sovereign government would wield",[298] the solution of adapting to changing circumstances lies in encouraging the participation of the indigenous population and the ousted government – i.e., to delegate to them as many powers as possible and to consult with them on major initiatives that involve long-term changes. This fits well with one of the major criticisms against the extension of the authority of the Occupying Power, which views allowing the Occupying Power to decide on the appropriate changes as part of a colonial vision – i.e., the one who is in control knows what is best for the local population, despite this not being the case, both because the Occupying Power, in most cases, comes from a different cultural, political, and economical background, and because it is motivated by its own interests in introducing modifications. [299]

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[292] *Ibid*, p. 273.

[293] "The laws of war treaties that govern occupations contain some scope for variations…" *Ibid*, p. 51.

[294] Y. Dinstein (n 227), p. 120.

[295] R. Kolb, *Ius in Bello – Précis de Droit International des Conflits Armés* (2e éd., Helbing & Lichtenhahn/ Bruylant, Bâle/Bruxelles, 2009), p. 186.

[296] M. Sassòli (n 251), p. 674.

[297] "In a prolonged occupation there may be strong reasons for recognizing the powers of an occupant in certain specific respects: for example, because there is a need to make drastic and permanent changes in the economy or the system of government. At the same time, there may be strong reasons for limiting the occupier's powers in other respects". A. Roberts (n 228), p. 53.

[298] E. Benvenisti (n 224), p. 147.

[299] D. Kretzmer (n 220), p. 59.

2.3 The role of the High Court of Justice in applying Art. 43 of the Hague Regulations: Deconstructing the legal argument

The High Court of Justice has been applying and interpreting Article 43 since the early 1970s through to today, and it provides us with a rare possibility to examine the role of a court in applying international humanitarian law over the long term, as well as the consequences of its jurisprudence. In the first cases rendered in the 1970s and early 1980s, the High Court of Justice was forming its interpretation of Article 43 of the Hague Regulations within the context of prolonged military occupation – a term that first appears in 1972, only five years after the occupation started. Its judges were shifting between a restrictive and a broad interpretation; the doctrine was set in 1983 by Justice Barak in the precedent-setting ruling, the *Jami'at Ascan* case. His broad interpretation was to become a cornerstone of a new approach, allowing almost unlimited possibility for changing the law and introducing long-term changes.

This section deconstructs the High Court of Justice's jurisprudence in which it applied Article 43 in order to reveal its functional role. While relocating the cases in their political context, it deconstructs the interpretation given to Article 43, reveals the policy that stands behind the establishment the facts, and describes the legal tests applied. Finally it observes the jurisprudence's outcome over the long-term, finding that it enabled the execution of the colonial project and the installation of a segregatory regime in the OPT.

2.3.1 Interpretation

i. "Prolonged military occupation"

At first, the High Court of Justice did not hold a unified stand *vis-à-vis* the interpretation of Article 43 and the role of the Occupying Power. The High Court of Justice was called upon to interpret Article 43 of the Hague Regulations for the first time in March 1972, in a case that dealt with the legislative authority of the military commander to amend a local Jordanian labour law. [300] The military order introduced a novel procedure to appoint arbitrators to the arbitration council mandated to solve labour disputes of Palestinian civilians. According to the local Jordanian labour law of 1960, two of these appointments should have

[300] *The Christian Society* case (n 222).

been done by the association of the employers and the employee. Yet, as it had never been established, in order to make this council operative, the military commander amended the law and introduced a new procedure instead. The petitioners claimed that the military commander should respect the local law in force and that this legislation was beyond its authority according to Article 43. In its ruling, the High Court of Justice first established that the French version of Article 43 is the authoritative one, and it ruled that the term *safety* should have been translated more precisely as *civil life*[301], which was interpreted as "the whole commercial, economic and social life". The majority further ruled that in a situation of prolonged occupation, in which life does not stand still, the military government does not "fulfil its obligation vis-à-vis the local population if the legislation is frozen and [the military government] refrains from adapting it to contemporary time."[302] As for the statutory limit enacted in Article 43, the High Court of Justice ruled that fulfilling the obligation to restore and ensure the welfare of the civilian population in prolonged occupations is the appropriate meaning that should be given to "unless absolutely prevented".

Thus, five years after the beginning of the occupation, the High Court of Justice had already stripped the limit imposed by Article 43 - *unless absolutely prevented* – to become simply the need to fulfil its obligation towards the local population, due to the special circumstances of prolonged occupation: The Occupying Power may introduce almost all changes to the local law as far as its intention is to adapt the law to the changing needs of the local population. This authority is only limited by the *dominant factor test*: As long as the dominant consideration to change the legislation was for the benefit of the local population, and not the Occupying Power's own political interests, it is within the Occupying Power's competence to change it.[303]

The dissenting opinion of Justice Cohn represents an opposite position toward the authority of the Occupying Power. In his view the obligation under Article 43 to restore and ensure civil life is not to introduce innovations, but to guarantee the maintenance of life as it was prior to the occupation:

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[301] The High Court of Justice referred to Schwenk, and interestingly, added: "If I may comment on the English translation proposed by Schwenk himself, it also has flaws. In his translation of *sauf empêchement absolu* as *unless prevented*, he omitted one word: *absolutely*"- *The Christian Society* case (n 222), p. 581.

[302] *Ibid,* p. 582.

[303] As observed by Kretzmer, "being 'absolutely prevented' from changing local law means only that the law may not be changed unless there is a need to change it, and that the need is to be judged by the duty to endure public order and civil life." D. Kretzmer (n 220), p. 63.

> This is not to reform the universe into the kingdom of heaven, and to impose on the occupied territories ideal public order and life....the authority is to restore the same public order and life that prevailed there earlier and to ensure their existence in the future.[304]

The dissenting Judge ended its opinion by stating that, in this case, an excess of the Occupying Power's authority is manifest, as even in the Occupying Power's own State, in Israel, this modern and advanced legislation does not exist.[305] Indeed, as Dinstein has well observed:

> [the] Occupied Territories are not a laboratory for experiments in law reform. Moreover, an Occupying Power must realize that any step taken by it is looked upon with suspicion by the civilian population.[306]

According to the majority view, as long as the dominant factor is the interest of the local population the Occupying Power may introduce far-reaching changes, while the dissenting view is that the Occupying Power has a more modest role over the territories it occupies, namely, aiming at maintaining civil life as it was before the occupation. Kretzmer identifies these two views as the "benevolent occupant" and "maintenance" approaches.[307] To borrow Benvenisti's terms, they reflect two opposite rationales of the law of military occupation – status quo v. changes.

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[304] *The Christian Society* case (n 222), p. 558. This approach was adopted in one more case, in which the High Court of Justice accepted a petition on the basis of violation of Article 43 of the Hague Regulations of 1907 relating to the connection of East Jerusalem to an Israeli supplier of Electricity: D. Kretzmer (n 220), p. 64.

[305] Dinstein takes this argument and formulates it as the "litmus test". Y. Dinstein, 'The Legislative Power in Administrated Territories' (1972) 2 Tel Aviv University Law Review 505, pp. 511 (in Hebrew).

[306] Y. Dinstein, 'The Israeli Supreme Court and the Law of Belligerent Occupation: Article 43 of the Hague Regulation' (1995) 25 Israeli Yearbook on Human Rights 1, p. 11. Other scholars also criticized this ruling. See for example: "[t]he answer lies in a development of machinery for bringing about an end to the conflict which produced the occupation, not in trying to turn a body of law designed to ensure that a military regime observes basic standards of humanity into a device for establishing a liberal democracy or other long term solution." C. Greenwood (n 247), p. 266; E. Benvenisti (n 224), pp. 146-148.

[307] See D. Kretzmer (n 220), p. 59.

The next relevant case, the first *Jerusalem District Electricity Company* case (December, 1972), follows the above majority reasoning.[308] In this case, at issue was the electricity supply in the Palestinian city of Hebron. The military commander enacted an order granting the concession to an Israeli company. In its decision the High Court of Justice ruled that the military commander had the authority to introduce such legislation as the "welfare of the local population" requires an adequate supply of electricity, which the local supplier of electricity could not provide:

> [t]here is no reasonable way to provide for the existing needs today without infrastructure investments…The action of the military commander regarding the subject of this petition is not in breach of Art. 43 of the Hague Regulations. On the contrary, this action fulfils the obligation of the government to look after the economic welfare of the local population.[309]

However, the High Court of Justice's decision was not yet a consensus one. In a very similar case, the Second *Jerusalem District Electricity Company* case (1981), which dealt with the same issue only in a different zone, the High Court of Justice ruled the opposite way.[310] Here, the High Court of Justice stated that the changes that the military commander wanted to introduce were too far-reaching, as they involved political considerations beyond the economic or technological advantages, which may not be in the interest of the local population. Indeed, it is perfectly possible that "the civilian population under belligerent occupation may prefer to have less electricity and enjoy more independence from the military government."[311] Making them dependent on an electricity supplier originating with the Occupying Power probably does not represent their political interest.[312]

The two electricity cases represent two sharply differing judicial attitudes to assessing the interests of the local population, and the political consequences involved.[313] In the second

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[308] HCJ 256/72, *Electricity Company for Jerusalem District v Minister of Defense*, (1972) 27(1) PD 124 (hereinafter: *The First Electricity* case).

[309] *Ibid*, p. 138.

[310] HCJ 351/80, *Electricity Company for Jerusalem District v the Minister of Energy and Infrastructure et al*, (1981) 35(2) PD 673.

[311] Y. Dinstein (n 306), p. 12.

[312] E. Playfair, 'Playing on Principles? Israel's Justification for its Administrative Acts in the Occupied West Bank' in E. Playfair (ed), *International Law and the Administration of Occupied Territories* (Clarendon Press, Oxford, 1992), pp. 205, 216-220.

[313] D. Kretzmer (n 220), pp. 66-68.

case, the High Court of Justice was ready to accept that a political outcome may not be in the interests of the Palestinian population, and proceeded to void the authority of the military commander. This proved to be the last time that this would happen.

By 1983, the doctrine was set, and the "benevolent occupant" approach was confirmed. The *Jami'at Ascan* case dealt with the authority of the military government to introduce a long-term development project – a complex system of roads that would connect Israel to the West Bank – and the authority to expropriate private land for this aim.[314] Dinstein rephrased the legal question as follows:

> Can an occupier create permanent facts on the ground, which can provoke fears of a "length annexation" by linking transportation routes of the occupied territory to traffic routes in the occupying country?[315]

The petitioners, whose land was to have been expropriated for this purpose,[316] claimed that this plan was beyond the authority of the military government for two reasons: first, the roads were not being constructed to serve the local population of the West Bank, but rather Israeli transportation needs: Israelis residents coming from Israeli cities such as Tel Aviv to the West Bank and Jerusalem; and second, long-term projects introducing permanent changes that would endure after the occupation ends were beyond the authority of the military commander. The State's position was that the road planning was initiated for the benefit of the local population, who had been using a very old road system, which no longer answered their current needs. The respondent in the case recognized that the planning would also serve Israelis, but claimed that as the primary use of the roads would be for the local population of the OPT, it was not illegal.

In this precedent-setting ruling, Justice Barak fixed the doctrine that frames the authority of Israel as Occupying Power in the context of its prolonged military occupation. It can be summarized as follows: the military commander's duty to ensure public order and civil life as a "modern and civilized state of the 20th century" requires the introduction of long-term

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[314] *The Jami'at Ascan* case (n 248), para. 1-4. For details on the roads, see D. Kretzmer (n 220), p. 96.

[315] Y. Dinstein, 'The Maintenance of Public Order and Life in the Administered Territories' (1984) 10 Tel Aviv Law Review 405, p. 409 (in Hebrew).

[316] Apparently the expropriation of private law was done through Article 43 and local law. Article 52 of the Hague Regulations of 1907 deals with actions taken for security reasons, while this expropriation was for the benefit of the local population.

projects that may involve permanent changes. These can be introduced for two reasons: security interests, or the benefit of the local population. While the military commander may not be guided by national economic or social interests of his own country alone, these can be secondary considerations, which would be assessed through the dominant factor test. The limit on its authority is only that it is not acting as a sovereign power.

> [T]he fact that the Hague Regulations were drafted in the context of short occupation does not prevent the development of interpretation regarding the scope of the authority of the military commander in long-term occupation, within the flexible and broad framework created by Article 43.[317]

Justice Barak follows the reasoning first set out in 1972 in the *Christian society* case, whereby civil life encompasses all aspects of modern life – economic, social, education, health, transport, etc. As the military commander must provide for the changing needs of the local population, it can (and should) develop industry, agriculture, commerce, education, and introduce permanent changes.[318] Justice Barak further developed this obligation pointing out that the responsibility of the military government towards the population is one of a "modern and civilized state of the 20th century".[319] Unlike the 19th century, when the Hague Regulations were adopted, this responsibility is not framed within a *laissez-faire* doctrine that demands minimum intervention in social and economical affairs – a doctrine that had led to the static approach of the Hague Regulations towards the military government's responsibility concerning these interests – instead it is a responsibility within a welfare state. Thus, Justice Barak explicitly rejected the *status quo* approach, and ruled that in situations of prolonged military occupation the interests of the civilian population deserve supplementary investments in all domains of life. This interpretation was to pave the way for implementing the State colonial designs, including the introduction of long-term changes and development projects "under the guise of measures taken for the good of the local population".[320]

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[317] *The Jami'at Ascan* case (n 248), para. 22.

[318] "Long term investment that could bring to permanent changes that could exist after the end of the occupation, are authorized, if they are for the benefit of the local population, without changing the fundamental institutions of the occupied region. This may well reflect the balance between the need of the Occupying Power that is responsible for the long-term interest of the local population, and takes into consideration the dynamics of life, and between the natural restrictions imposed on the military government as being temporary." (para. 27).

[319] *The Jami'at Ascan* case (n 248), para 21.

[320] D. Kretzmer (n 220), p. 59.

ii. The two axes of Art. 43: Security and humanitarian considerations

The High Court of Justice's jurisprudence is largely based on the following famous quotation of Professor Dinstein:

> *The Hague Regulations* revolve around two main axes: one – ensuring the legitimate security interests of the occupier in territory held under belligerent occupation; the other – ensuring the needs of the civilian population in the territory held under belligerent occupation. [321]

The High Court of Justice repeated this phrase in all the cases in which it applied Article 43. In fact it replaced the actual wording of Article 43, which imposes the obligation to restore and ensure *l'ordre et la vie publics*, while respecting the local law unless absolutely necessary. For the High Court of Justice two interests would justify the introduction of changes and new legislation: the security needs of the Occupying Power (security consideration) and the welfare of the local population (humanitarian consideration).

- The first axe: security

According to Article 43, the military commander is responsible for providing the security in the area. In *Jami'at Ascan*, Justice Barak pointed out that it was curious that the authorities did not mention the security need to build these roads and instead relied exclusively on the needs of the local population. He questioned why they did not rely on the security argument as well.[322] Professor Dinstein, soon after the decision, also made the same criticism.[323] Both Justice Barak and Professor Dinstein were in fact advising the State: If the Occupying Power's good intentions for the local population may be suspected – why not simply reply on security arguments? This criticism did not fall on deaf ears. In most cases dealing with the authority set in Article 43 that followed *Jami'at Ascan,* the State based its claims on security considerations. Thus, instead of having an Article 43 that authorizes changes for security needs of the Occupying Power forces, *when absolutely necessary*, the court transformed Art.43 to a provision that permits changes for security reasons, and this term has been

[321] Y. Dinstein (n. 305) p. 509. See also in Labour law case, *The First Electricity Company* case (n 308), *The Jami'at Ascan* case (n 248), p. 794, HCJ 10356/02 *Hass v IDF Commander in West Bank*, (2004) 58(3) PD 443 (hereinafter: *The Hass* case), para. 8; *The Mara'abe* case (n 2), para. 18.

[322] *The Jami'at Ascan* case (n 248), para. 15.

[323] Y. Dinstein, (n 305), p. 507.

extended to include all kinds of situations. This responsibility was broadly interpreted as applying to Israeli armed forces, the State of Israel, and all persons present in the OPT.[324] It also includes the obligation to secure Israeli settlements, even if they were established in violation of international humanitarian law.[325] This interpretation remains highly contested. It contradicts the ICJ Advisory Opinion according to which measures taken to strengthen illegal settlements are themselves illegal.[326] If the goal is the protection of human life and not the policy of colonialism, then the settlers could be settled within the border of Israel, where their security is guaranteed.[327] While the legality of the settlements was a fundamental factor for determining the legality of the Wall by the International Court of Justice, the High Court of Justice persistently avoided addressing this issue[328], ruling that this question is *irrelevant*, and further that "[T]he military commander is authorized to construct a separation fence in the area for the purpose of defending the lives and safety of the Israeli settlers in the area" [329]. Thus, the High Court of Justice provided that the term "security" of Art. 43 includes the protection of the inhabitants in those illegal places. The High Court of Justice's selective application of international humanitarian law on that point enabled the State to administrate the settlers through the use of the security element of Article 43.

As a matter of routine, different needs have been legally translated as a security issue. The military commander is not protecting the security of the settlers, as a mere reflection of their rights to life and to security. He is responsible more broadly to *secure* the

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[324] "[I]n exercising his authority pursuant to the law of belligerent occupation, the military commander must 'ensure the public order and safety'. In this framework, he must consider, on the one hand, considerations of state security, security of the army, and the personal security of all who are present in the *area*. On the other hand, he must consider the human rights of the local Arab population." *The Mara'abe* case (n 2), para. 18.

[325] "It is not relevant whatsoever to this conclusion to examine whether this settlement activity conforms to international law…. Even if the military commander acted in a manner that conflicted the law of belligerent occupation at the time he agreed to the establishment of this or that settlement – and that issue is not before us, and we shall express no opinion on it – that does not release him from his duty according to the law of belligerent occupation itself, to preserve the lives, safety, and dignity of every one of the Israeli settlers. The ensuring of the safety of Israelis present in the area is cast upon the shoulders of the military commander." *Ibid*, paras. 19-20.

[326] *The ICJ Advisory Opinion on the Wall* (n 219), para. 120.

[327] Y. Shany, 'Capacities and Inadequacies: a Look at the Two Separation Barrier Cases' (2005) 38 Israel Law Review 230, at p. 243; D. Kretzmer, 'The Advisory Opinion: The Light Treatment of International Humanitarian Law' (2005) 99 (1) American Journal of International Law, p. 97.

[328] More on that, see chapter 3.

[329] *The Mara'abe* case (n 2), para. 19.

implementation of the entire scope of their individual human rights. As settlers are also citizens of a democratic State, whose individual rights must be guaranteed, Article 43, through its security element, has been used as a legal tool to *enable* that large spectrum of Jewish needs ("human rights") in the name of security. Thus, fulfilment of the settlers' individual rights in the OPT, a clear political choice, is transformed in court room into a question of security, which shall be provided by international humanitarian law. When the High Court of Justice accepted the State's position and transformed a pure political choice into a security one, it enabled the State, through the application of the security element of Article 43, to carry out its colonial designs. See Justice Barak in 2005:

> We have reached the conclusion that the considerations behind the determined route are security considerations. It is not a political consideration which lies behind the fence route at the Alfei Menashe enclave [= a settlement], rather the need to protect the well-being and security of the Israelis (those in Israel and those living in Alfei Menashe, as well as those wishing to travel from Alfei Menashe to Israel and those wishing to travel from Israel to Alfei Menashe).[330]

Or President Beinisch in 2009:

> We ruled many times that the freedom of movement is a basic individual right, and that there is a duty to put all efforts in order to ensure its exercise also in the territories held by Israel under belligerent occupation.[331]

Many other cases illustrate the interpretation given to the scope of *security* under the responsibility of the military commander. In *Hass* and *Bethlehem*, the freedom of movement, property rights, and freedom of religion of the Jewish settlers and the Palestinians were at issue. The Court's ruling was that both populations, both being *local,* are to have equal protection of their human rights.[332] At the same time, the inherent reality is that the settlers

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[330] *Ibid*, para. 101.

[331] HCJ 2150/07, *Abu Safiya v Minister of Defence*, (2009) (unpublished), para. 3. English synopsis is available at: <http://elyon1.court.gov.il/files_eng/07/500/021/m19/07021500.m19.htm> (accessed 3 May 2011) (hereinafter: *The Road 443* case).

[332] The inhabitants of the area have a constitutional right to freedom of religion and worship. This is the case for the Arab inhabitants and it is also the case for the Jewish inhabitants who live there *The Hass* case (n 321), para 15; HCJ 1890/03*, Municipality of Bethlehem v Ministry of Defense*, (2005) 59(4) PD 736, para. 19 (hereinafter: *The Bethlehem* case): "[A]fter we have examined the nature and intensity of the violation to the freedom of

have an overwhelming need that required protection: namely, their security. Therefore, the initial authority to expropriate Palestinian private land in order to enlarge a road built exclusively to enable settlers to have access to a holy place situated in the middle of a Palestinian neighbourhood was based on Article 43, for security reasons. Then, the restriction of the right of movement of the Palestinians on that road was balanced with the realization of the freedom to worship of the Jewish population, while completely ignoring the illegality of the settlers' presence there. This is a horizontal balance, based on Israeli constitutional law, which is practiced in Israel in the context of conflicting rights between two equal rights-holding communities. Naturally applying this legal test is completely irrelevant in the OPT as these two communities are not equal in any way: it is the minority that dominates militarily the majority and their entire legal status and set of rights is completely different.[333] Moreover, because of the Court's inherent bias towards its own community, it has mostly been the rights of the Palestinians, the rights of an occupied people, which were restricted in favour of the fulfilment of all kinds of rights of Jewish settlers, while the security argument was always at issue.

At first, these *security* needs were mainly these of the settlers. With time, however, that interpretation would be enlarged to include more generally all Israelis, as illustrated by the case *Road 443* (2009). Road 443 is a highway that connects the two Israeli cities of Tel Aviv and Jerusalem. Although mostly built within the OPT, it is estimated that the majority of the 40,000 drivers a day which use the road are Israelis residing in Israel. According to the High Court of Justice, the freedom of movement of Israelis not resident in the OPT on road 443 must be guaranteed by the military commander as a security matter:

> [T]he population that had been using Road 443 [include]… Israeli citizens who are not residing in the Region, but have been using this road as a traffic route from the centre of Israel to Jerusalem. The obligation of the military commander to guarantee public order and safety under Article 43 of the Hague Regulations is broad. It does not protect only 'protected persons', but all

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movement in this case, we have reached the conclusion that the solution chosen by the respondents within the framework of the new order does indeed guarantee the essence of the realization of the freedom of worship without violating the essence of the freedom of movement. The respondent's decision within the framework of the new order succeeds in preserving the 'essence' of both of these two liberties of equal weight, and this is therefore a reasonable balance that does not justify any intervention."

[333] A. Gross, 'Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?' (2007) 18 European Journal of International Law 1, p. 19.

> the population present in the Region in any given time, including Israeli communities' residents and Israeli citizens who do not reside in the OT.[334]

Thus, the High Court of Justice ruled that Israeli citizen are entitled to move within the OPT freely. In the exercise of their individual liberties, the military commander is under the obligation, according to Article 43, to ensure their security. For that purpose, the freedom of movement of the Palestinians may be limited in a proportional way.[335] The general context of the occupation and the preliminary question of the legitimacy of the Israeli use of its resource, their right to exercise their freedom of movement there, is completely absent from the ruling, although it was raised by the petitioners. While the High Court of Justice ruled that Israeli freedom of movement in the OPT has to be guaranteed, it in fact recognizes that the Israeli population have the right to benefit from OPT resources. The fulfilment of their right shall be *balanced* with the right of the Palestinians to use that road in the name of security: the military commander's own balance resulted in a total ban on Palestinian use of that road for almost a decade.[336]

Another security concern that may legitimately restrict Palestinians' rights is the security of the State of Israel itself: Palestinian cars using a road connecting the West Bank to Israel may be used by terrorists. Thus, the military commander may consider a "fear of infiltration of terrorists to Israel as a result of traffic of Palestinian cars on the road".[337] Ironically, while most of the roads' land in the OPT were expropriated for security reasons in order to protect the settlers, once built, they become a security threat to Israel. The solution of this threat, in the long run, has been the restriction of Palestinians' presence into defined and closed zones.

- The second axe: the welfare of the "local population"

In 1972, in the first Electricity case, the High Court of Justice ruled that "the residents of Kiryat Arba [a Jewish settlement] should be regarded as having been added to the local population, and they are also entitled to an adequate supply of electricity."[338] This ruling provided for the first time the legal basis to administrate the illegal presence of the colonizers.

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[334] *The Road 44*3 case (n 331), para. 20.

[335] *Ibid*, para 3 (Opinion of President Beinish,); (Justice U. Vogelman, paras. 27-36 of the majority opinion).

[336] Military Order on Traffic (Road 443) (West Bank) – 2008, (19 June 2008) (on file with the author).

[337] *The Road 443* case (n 331), para. 23.

[338] *The First Electricity* case (n 308), p 138.

Since, the extensive jurisprudence of the High Court of Justice, the *local population* or the *population of the Region* have been constantly referred to as including the Jewish settlers. Consequently, the "humanitarian element" of Article 43 came to protect also the interests of the occupier and not only of the occupied people as it was originally designed. That interpretation had two implications. First, the equilibrium of Article 43, which balances humanitarian needs (of the occupied people) with security considerations (of the occupying forces) represents a shift in favour of the occupier and its population. The protection granted in the humanitarian element, which was intended to protect the people originally occupied, has now to be shared with the people of the occupying force. Thus, the interest of the original local population has to be restricted not only by the endless security concerns of the Israeli army, Israel, and the settlers (see the "security element" above), but, in addition, also with the well-being of the Jewish settlers.

Second, and more far reaching, in 1972 the High Court of Justice provided the State with a legal tool to administer the settlers. The State was given the authority, through the fiction of the military commander government, to issue whatever legislation was required to provide the settlers with an Israeli environment within the OPT, to facilitate their lives there. This was done without any need to do it through a *de jure* annexation of the land (and more critically, its native people). The High Court of Justice enabled it to be done while using international humanitarian law, via military orders. These enactments are going to regulate each detail of the needs of everyday life in the course of the next 40 years. Yet, as these orders are not regularly published in any official gazette, the massive legislation project has been obscured.[339]

2.3.2 Fact finding: The "dominant factor" test

To reveal whether the military government acted for security reasons or the welfare of the local population, the court establishes the *dominant factor test:* as long as the security concerns or the welfare of the local population were the dominant consideration, even if other considerations were also taken in account, it is deemed to be acting within its authority. The

[339] S. Weill, 'Reframing the Legality of the Israeli Military Courts –Military Occupation or Apartheid?' in A. Baker & A. Matar (eds), *Threat - Palestinian Political Prisoners in Israel* (Pluto Press, London, 2011), pp. 141-142.

military government cannot operate solely for the benefit of its own country's national economic and social interest. It must be guided by either security needs or the concerns of the welfare of the local population.[340] According to the *dominant factor test*, while the Occupying Power's own State interests may not be the dominant factor that led to the change introduced, it can legitimately be an additional consideration, as long as either security needs or concerns for the welfare of the local population are the dominant one.[341]

How does the court detect which consideration was the dominant one? This is a fact-finding issue that involves assessment of the evidence. When security concerns are raised, the High Court of Justice, as a matter of principle, attributes special weight to the claims of the State and the armed forces. The presumption is that the agency is acting in good faith.

> We have no reason not to give this testimony less than full weight, and we have no reason not to believe the sincerity of the military commander…our long-held view is that we must grant special weight to the military opinion of the official who is responsible for security.[342]

Another presumption is that the Court does not replace the agency's professional assessment. As a rule, in such a dispute on professional military questions, in which the court does not have any expertise of its own, the court will give considerable weight to the professional opinion of the military authorities, which has the professional expertise and the responsibility

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[340] Justice Barak in *The Jami'at Ascan* case (n 248) framed that test. The limit on the military government's authority is that its authority is not one of a sovereign. However long it might be, it is a temporary one. Therefore, it cannot introduce permanent changes in the political, administrative or judicial institutions. The judge draws maximum and minimum standards within which the Occupying Power can exercise its discretion: as a minimum standard, the occupier has to assume its responsibility as the *de facto* government *vis-à-vis* the local population in prolonged military occupation (see above). As a maximum standard, stands the fact that it is not the sovereign but only a government of temporary nature. See *The Jami'at Ascan* case (n 248), p. 795; HCJ 2056/04, *Beit Zourik Village Council v The Government of Israel*, (2004) 58(5) PD 807, para 27 (hereinafter: *The Beit Sourik* case).

[341] "The transportation needs of the *local population* have increased. The conditions of the roads must not be kept frozen. Therefore, the military government was authorized to make a roads planning that considers actual and future developments … the fact that this planning was done in collaboration with Israeli authorities is not illegal, as long as it was done [as dominant consideration] for the benefit of the local population." *The Jami'at Ascan* case (n 248), para. 36.

[342] *The Beit Zourik* case (n 340), paras. 28, 47.

for security.[343] As the intentions presented by the State are difficult to challenge as a matter of evidence and as State agencies are attributed a greater weight for their versions of the facts through the presumption that State agencies "tell the truth", it becomes almost impossible to challenge the State's arguments.

Moreover, the *dominant factor* test allows political aims to be considered, as long as they are secondary, collateral. Thus, the High Court of Justice could adopt the State's position, that the *dominant factor* was for security or welfare of the local population, without having the necessity to completely camouflage the too obvious political aims, and to risk appearing to legitimize an absurd position. The High Court of Justice does not need to establish that the political aims were absent, just that these were not the dominant ones. With the legal evidentiary presumptions in favour of the State, this has not been too difficult. In almost all the cases the court's conclusion is that the *dominant factor* was not political but were relating to security concerns,[344] even in the Road 443 case. Here, the expropriation of the land was legitimized by the High Court of Justice in the Askan case in the 1980s, because it established that the dominant factor for doing it was for the benefit of the local population. The High Court of Justice approved the State's position on the basis that the benefit for its own population was only a secondary concern.

> Although at the heart of the project lies the interest of the local population, the defendants do not ignore the fact that the planning project is linked to Israel, and represent a common project. It will serve not only the *population of the Region*, but also the Israeli residents and the traffic between Judea and Samaria and Israel.[345]

In its 2009 ruling, even when Palestinians have been completely prevented from using that road for almost a decade, and Road 443 became an Israeli-only road as was the case with many other roads in the OPT, the High Court of Justice was still not prepared to see this situation as a consequence of a political decision.

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[343] *The Bethlehem case* (n 332), para. 19; HCJ 390/79, *Duikat v Government of Israel,* (1979) 34(1) PD 1, p. 10 (English summary in (1979) 9 Israel Yearbook on Human Rights, p. 345) (hereinafter: *The Elon Moreh* case); HCJ 7015/02 *Ajuri v The Commander of IDF Forces in the West Bank*, (2002), 56(6) PD 352, p. 375 (hereinafter: *The Ajuri* case); *The Hass* case (n 321), p. 458.

[344] I am aware of only two cases in which the dominant factor was challenged by the High Court of Justice.

[345] *The Jami'at Ascan* case (n 248), para. 5.

> We do not have a reason to doubt the position of the military commander according to which he exercised its authority for security considerations, based on his responsibility to ensure security and order.[346]

Thus, through the evidentiary presumptions in favour, the security argument provided an effective legal tool to justify different measures taken to introduce far-reaching changes for securing illegal settlements and their fluid traffic connections to Israel, all at the massive expense of the safeguard of the Palestinians' rights (such as property rights, right to free movement, and so on).

2.3.3 Legal assessment: Introducing the proportionality test

The High Court of Justice introduced to its international humanitarian law analysis the "proportionality test", which is taken from Israeli administrative law.[347] This domestic legal test has no roots in international humanitarian law, but was imported into the international humanitarian law analysis through the High Court of Justice application of Israeli administrative law to the acts of the army in the OPT, and it became an integral part of it. The proportionality test enabled the court to provide remedies to the Palestinian individuals in extreme cases without having to challenge the entire policy, as the Wall cases well illustrate.

The legal argument to legitimize the Wall was set by Justice Barak in *Beit Zourik* (2004). After establishing that, in principle, the construction of the Wall is within the authority of the military commander according to Article 43 of the Hague Regulations as it was constructed for security reasons, and not political ones, based on the assessment that the court has no reason to doubt the claim of the military commander, the High Court of Justice reviews the specific segment's route planned and constructed, in light of the proportionality test. While the High Court of Justice was ready to annul segments of the Wall when the authority of the commander was not exercised in a proportionate manner, it will not reveal the

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[346] *The Road 443* case (n 331), para. 26 (unofficial translation). On the merits the court ruled that the military commander exceed its authority (which it did exercised for security reasons) because of the result of its decision (and not because of the its nature). As the total ban led to a situation in which the road serves only the occupying force' population – a situation that could not be approved in the initial expropriation in the 1980s – the authority to issue a total ban is unlawful. While the dominant factor test is fine, the court is declaring the authority as unlawful as a result of a different test - the "result" test.

[347] For a definition of the proportionality test see the *Mara'abe* case (n 2), at para. 30.

political intention that stood behind the Wall as a whole. In none of the Wall cases was the authority challenged, nor was the more general policy that has been advanced through these security measures revealed. Thus, instead of reviewing the legality of the entire policy, the High Court of Justice reduced the legal question to an issue of proportionality of each segment of the route detached from the general political context. Thus, while each segment of the Wall, stripped from its entire context, is reviewed, the political intention of the *de facto* annexation is easier to ignore. Here lies the divergence between the ICJ and the Israeli High Court of Justice on the legality of the Wall. Unlike the ICJ, Justice Barak chose not to review the legality of the Wall in its entire route – even though a petition of this nature was pending before the court – but to render a precedent ruling in the *Beit Zourik* case, which was challenging a specific segment of the Wall.[348] This strategy, which would be followed in dozens of Wall cases, made it easier for the court to close its eyes and deny the *de facto* annexation made through the route of the Wall, although "the debate in Israel clearly demonstrates that the government did indeed have political intentions in setting the barrier's route",[349] and to legitimate the State's action. With this de-contextualized approach, the High Court of Justice provided legal justification for the construction of the Wall as a matter of principle, and supported the State's political plan to create a *de facto* border, annexing

[348] A general petition on the legality of the Wall was pending before the court. Yet, when the flow of petitions concerning the Wall, which were at the centre of attention of the international community in light of the GA request form the ICJ to pronounce itself on the legality of the Wall, arrived before the High Court of Justice, Justice Barak took two decisions: (1) One chosen case will provide the precedent (2) all the Wall cases would be reviewed by the senior Judges, Justices Barak, Chechin and Benish. S. Arieli and M. Sfard, *The Wall of Folly* (Yediot Sfarim, Tel Aviv, 2008), pp. 157-160 (in Hebrew). The ICJ, on the other hand stated that the military commander has no authority to build the Wall in the route chosen as it amounts to *de facto* annexation (political consideration), and it aims at protecting the settlements which are illegal. *The ICJ Advisory Opinion on the Wall* (n 219), paras. 118-121.

[349] D. Kretzmer (n 327), p. 92; "Strong evidence for this was recently provided by Zipi Livni, a minister in the Sharon government, in an interview published in the daily *Haaretz*. Ms. Livni stated: In the future conception of Israel's security, the construction of the fence is supposed to transfer 85 to 90 percent of the area to the Palestinians who live beyond the fence. If Israel places itself around the fence in order to provide security for the settlement blocs, this should make life easier for the Palestinians, even at the price of harming villages in proximity to the fence. When the dilemma is between the life of an Israeli citizen who lives in a settlement and the difficulty that we are causing the Palestinian villager in working his land, due to the construction of the fence, my moral choice is clear." G. Alon, 'I'll Take Existence' *Haaretz* (20 September 2004) cited in D. Kretzmer (n 220), fn. 32.

territories beyond the Green Line.[350] With respect to the proportionality test two points now need to be highlighted.

i. The political choices of the proportionality test

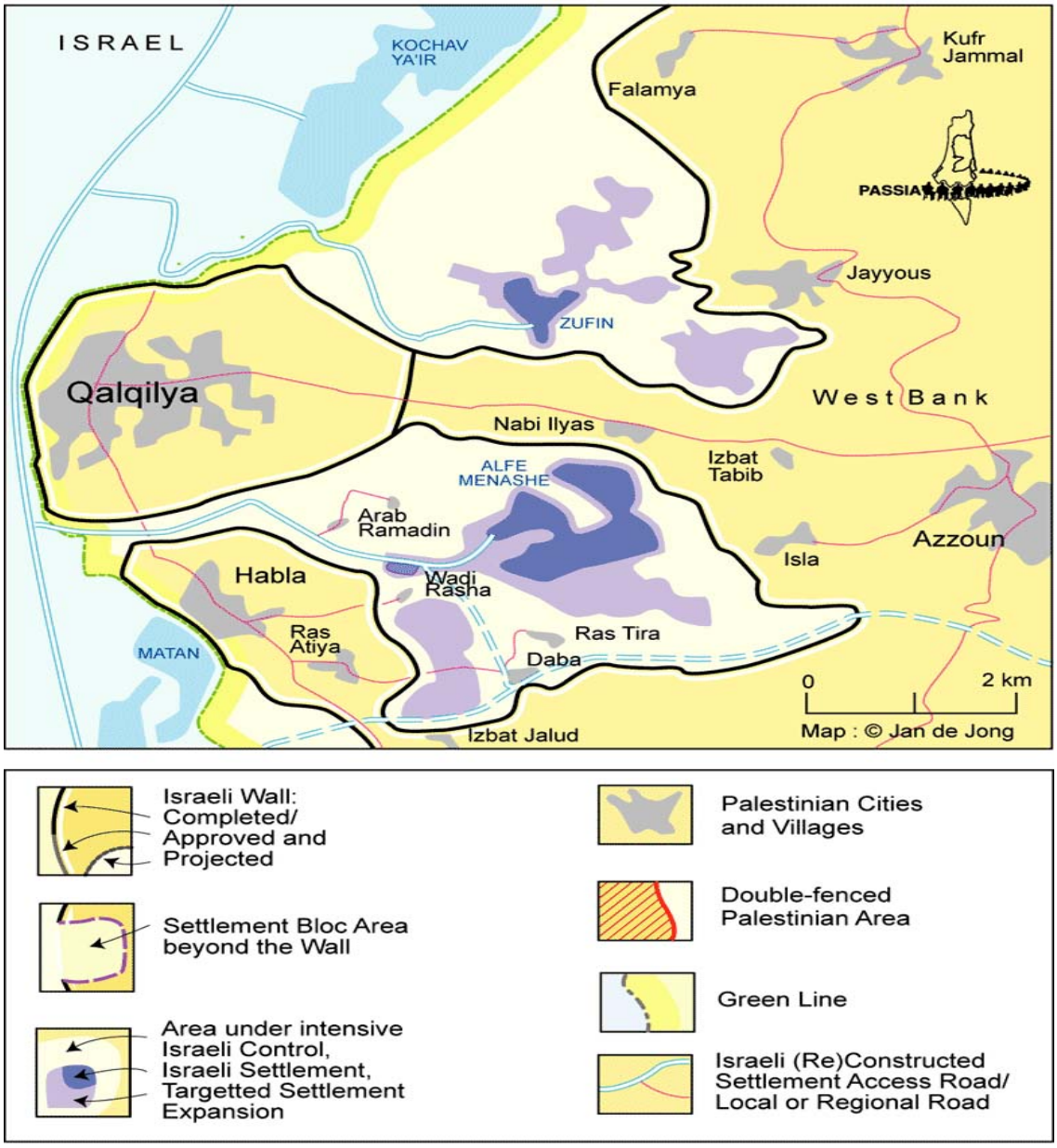
The choice of the facts that will enter the balance test is a political choice of the court. That construction will necessarily influence the outcome and general narrative of the court. *The Mara'abe* case (2005) illustrates clearly that the balance test is a policy choice as a matter of fact-finding. In this famous Wall case, the High Court of Justice found that the military commander has the authority to build a wall according to Article 43, for security reasons, yet, the route chosen in that specific area was illegal, as it was not proportional. While a similar precedent had been set previously, in June 2004 in *Beit Zurik* discussed above, the importance of that ruling lies in its timing: it was the first delivered after the ICJ's advisory opinion. There, Justice Barak provides an extensive analysis of the different opinions of both courts and attempts to explain their origin. In that context the judge notes that "the difference between the factual bases upon which the courts relied is of decisive significance." (paragraph 68). This sentence could not be formulated any better. Indeed, in order to better understand the ruling and the prism under which the lack of proportionality was found, it is necessary to go back to facts and, more precisely, to examine which of these facts were put in to the proportionality balance, and which were left outside as being not relevant for the case.

The settlement Alfei Menashe, which has a population of approximately 5,700, is situated a few kilometres east of the Green Line, close to the Palestinian city of Qalqiliya (with a population of 40,000). The Wall in the area surrounds the settlement and created three enclaves: Qalqiliya an enclave in the north; Habla, an enclave to the south; and five Palestinian villages with a total population of approximately 1,200, who found themselves

[350] This recalls the strategy used by the High Court of Justice to review the legality of the settlements. As The High Court of Justice did not review the legality of the whole route of the Wall it was not ready to review in principle the legality of the settlement in light of Article 49 (6) of the Fourth Geneva Convention of 1949 through different avoidance doctrines (see next chapter). However, it was ready to review the legality of specific requisition orders that involved private property rights, and to examine whether the expropriation of the land it was carry out for security reasons, as required by Article 52 of the Hague Regulations of 1907. Again, the Court used the *dominant consideration* test, and was ready to accept that the settlements were necessary for the security of the State of Israel. See HCJ 606/78, *Ayyub v Ministry of Defense*, (1978) 33 (2) PD 113, 121. An English summary is available at: (1979) 9 Israel Yearbook on Human Rights, p. 337 (hereinafter: *The Beit-El* case). *The Elon Moreh* case (n 343), p. 17. In that case the political intentions were exposed almost despite it: the settlers were part of the proceedings and declared that this was an ideology settlement.

trapped on the Israeli side with the settlement. A close look at the map reveals that for the protection of Alfei Menashe and its connection road to Israel, a city of more then 40,000 people, which is entirely situated in the West Bank, became totally encircled by a eight-metre high wall and a 50-metre wide barbed-wire fence.

The Wall (Qalqilya) December 2003



The High Court of Justice opened its judgment by finding the *security* of the settlers in the Alfei Menashe and their freedom of movement justified a construction of the wall, as a measure to be taken under Article 43: "It is not a political consideration which lies behind the fence route at the Alfei Menashe enclave, rather the need to protect the "well being and security of the Israelis." (paragraph 101). In this case, it means that the "well being and security of the Israelis" is achieved through a *de facto* imprisonment of more than 42,000 Palestinians in the city of Qalqilya and the other surrounding villages. After establishing the general authority to build security walls, the court proceeded to examine the question whether that authority had been exercised proportionately: for while the court legitimizes the general authority of the military commander in light of international humanitarian law, the High Court of Justice still may invalidate its decision in light of Israeli administrative law, as being not proportionate. Indeed, even to an unprofessional observer, it may appear as a disproportionate decision. And, indeed, the High Court of Justice found it to be disproportionate. Yet, as surprising as it may appear from a simple look on the map, the court's finding, which strengthens its reputation as an independent judiciary after the ICJ advisory opinion, dealt merely with an almost insignificant part of the route of the wall, where five small villages (a total of 1,200 inhabitants) were trapped within "the Israeli side" of the wall; the city of Qalqilya and its 40,000 inhabitants were not included in the proportionality text of the High Court of Justice. The balance test was conducted between the settlement of Alfei Menshe (5,700 inhabitants) and the five small Palestinian villages, (1,200 inhabitants).[351] A more reasonable description of the facts would dictate a different balance: can the needs of a small number of settlers be guaranteed by the extent of the imprisonment of more than 42,000 persons in the Palestinian city of Qalqilya behind an eight-metre wall, which have only two exits controlled by the army that can be, and are, easily blocked? This proportionality issue

[351] The relevant facts are described in para 75: "The Alfei Menashe enclave is an 11,000 dunam area (see the appendix to this judgment). It includes Alfei Menashe (population 5,650) and five Palestinian villages (Arab a-Ramadin (population approximately 180); Arab Abu Farde (population approximately 80); Wadi a-Rasha (population approximately 180); Ma'arat a-Dara (population approximately 250) and Hirbet Ras a-Tira (population approximately 400); total population of the five villages is approximately 1,200). The enclave is located on the "Israeli" side of the separation fence. The enclave and Israel are territorially contiguous, meeting at highway 55. Exit from the enclave into the *area*, by car and foot, is through one crossing ("crossing 109") to Qalqiliya. This crossing is open at all hours of the day. The separation fence also includes three gates (the Ras a-Tira gate; the South Qalqiliya gate; and the Habla gate). At first, we shall discuss petitioners' arguments and the state's response in detail. Then, we shall examine the arguments and the answers to them according to the standards determined in *The Beit Sourik* case".

remained somehow camouflaged, although it is the dominant political factor. The Court's remedy to move the wall's route in this specific segment in order to relocate these already abandoned 5 small Palestinian villages, within the "Palestinian side" of the wall, had a negligible impact on the ground. At the same time, the complete encirclement in the West Bank of a Palestinian city of 40,000 people, with only two or three gates to exit and enter, which become a huge cage, absent from the balance of proportionality, became indirectly legitimized by the court.

This is how the *security* of 5,700 settlers in Alfei Menashe and their freedom of movement was legitimated by the High Court of Justice, at the price of severe restriction of the right of movement of 40,000 people. This fact was simply not put into Barak's balancing test. However, and even more astonishing, the situation in Qalqiliya is not absent from the Court's ruling. It is described in detail, just not in the sections "relevant" to the case. The story of Qalqiliya appears as an *Obiter*, under a section of the ruling entitled "The Advisory Opinion of the International Court of Justice at the Hague and *The Beit Sourik Case"*. Here, the High Court of Justice cited parts of the UN reports written by Professors Dugard and Ziegler, who constructed the factual basis for the ICJ's ruling.[352] Justice Barak's aim was to show how the two courts had two different fact-finding processes. Among other examples appears the example of Qalqiliya. Thus, Qalqiliya is not portrayed in this ruling as a relevant fact of the actual petition, but, in the *Obiter*, to illustrate that facts that lay before the ICJ were lacking the security lens.[353]

The fact that such an extreme situation as the Qalqiliya enclave could be legitimized while ruling on the disproportionality of a negligible part of the wall is related also to the legal procedure: the petitioners in this case were these five small villages trapped in the Israeli side. Therefore, the court could ignore the northern enclave created, in the name of the relevant

[352] "The report states that the Palestinians living in the enclaves are facing some of the harshest consequences of the barrier's construction and route. Thus, for example, the city of Qalqiliya is encircled by the barrier, with entrance and exit possible from only one gate. Thus the town is isolated from almost all its agricultural land. The villages surrounding it are separated from their markets and services." (para. 40); "…almost completely imprisoned by the winding route of the wall, including 40,000 residents of Qalqiliya." (para. 45).

[353] And here Justice Barak explains that: "It was not mentioned that Qalqiliya lies two kilometers from the Israeli city of Kfar Saba; that Qalqiliya served as a passage point to Israel for suicide bomber terrorists, primarily in the years 2002-2003, for the purpose of committing terrorist attacks inside of Israel; the Trans-Israel highway (highway 6) [built beyond the green line] *whose users must be protected*, passes right by the city." (para 68).

facts. This shows how human rights lawyers came to doubt whether petitioning the High Court of Justice serves more the interest of the State, even when they won their cases.[354]

ii. The proportionality test's structural bias

The bias of the proportionality test manifests itself in two ways. First, the proportionality test is measured within a colonial prism: the democratic social and political rights of the Israelis that should be guaranteed at the level of Western developed States are balanced against the occupied, native people, deprived of civil rights, whose humanitarian needs as guaranteed by international humanitarian law are provided with a minimum set of rights until the occupation ends. Thus, Alfei Menashe's Jewish residents need to have a protection over all kinds of rights as freedom of movement, property, social rights, and so on, according to Israeli democratic standards. The rights of Palestinians, on the other side of the balance, are those of an occupied people, deprived of any political rights, subordinated to the grant of rights by an occupying army. This is why the restriction on the freedom of movement of thousands of Palestinians become not only possible but also *proportional*. Second, in all proportionality balances there is an implicit bias, an implicit principle, according to which the protection of the rights of Israelis is more important; the equilibrium of the balance is initially shifted to prevail over another population. Otherwise, we could imagine the balance being done the other way round. Yet, because of this inherent bias, changing the positions of the balance is imaginable. (I am not referring only to whether the court would have to find proportional the imprisonment of 40,000 Israelis in order to secure the movement of 5,700 Palestinians in Israel, or even in the West Bank. Even to find proportional to limit the movement of 5,700 settlers for a guarantee of movement of 40,000 Palestinians in the West bank does not seem feasible).

This inherent bias is well present in the *Road 443* case (2009). The proportionality test was defined as the following: whether the freedom of movement and the "security military need" to secure for the Israelis use of the road may be achieved in a less draconian way than imposing a total ban on Palestinian use. In other words, may the commander achieve the same security need, that of guaranteeing that 40,000 Israelis could continue to use that road on a

[354] M. Sfard, 'The Price of Internal Legal Opposition to Human Rights Abuses' (2009) 1 Journal of Human Rights Practice 1, p. 37-50; Al Haq, *Legitimising the Illegitimate?* (Al-Haq Organisation, 2010), fn 106 and accompanying text <http://www.alhaq.org/index.php?option=com_zoo&task=item&item_id=95&Itemid=218> (accessed 3 May 2011).

daily basis in total security, in another way?[355] Thus, not only is the preliminary question of the legitimacy of the Israeli use of that road taken for granted, but also the implicit assumption is that the protection of their right of movement in the OPT (portrayed as a security issue) should be entirely protected. It is only the right of movement of the Palestinians, which had a direct impact on their possibilities to have education, health, and access to work, as described in the ruling, which is to be restricted in the *balancing*. The proportionality test does not even consider limiting the Israeli use of the OPT resources: it is all a question of how far the Palestinians' rights may be restricted. The remedy delivered by the court and its implementation only reinforces the observation that the High Court of Justice deferred to the military commander the responsibility to find another *proportionate* solution, which enables him to *de facto* keep the situation essentially intact.[356]

2.3.4 Political de-contextualization

The Palestinians are rarely described as a national group. The term *Palestinians* is in most cases used to describe individuals who committed terror attacks. Both Palestinians in the Occupied Territories and the ones who became Israeli citizens in 1948 are labelled *Arab,* while the settlers are referred to as *Israeli* or *Jewish*.

> The Hague Convention authorizes the area commander … to ensure the needs of the local population in the area under belligerent occupation. The local population for this purpose includes both the Arab and Israeli inhabitants.[357]

> [The] respondent has the duty to defend the population – Arab and Jewish – in the territory under his military control.[358]

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[355] The proportionality test was an obiter in the case, as the court found that the authority was denied, nevertheless most of the ruling of the case was dedicated to it (para. 36).

[356] The High Court of Justice ruled that a total ban was beyond the authority of the military commander. The judgment came into effect five months from the date it was given, in order to allow the military commander to determine the necessary security arrangements, while leaving him a wide margin of discretion. See A. Harel, 'Despite Court Ruling, Palestinian Use of Route 443 Likely to be Limited' *Haaretz* (10 May 2010) <www.haaretz.com/print-edition/news/despite-court-ruling-palestinian-use-of-route-443-likely-to-be-limited-1.289321> (accessed 3 May 2011).

[357] *The Hass* case (n 321), para. 8.

[358] HCJ 4219/02, *Gusin v The Commander of IDF Forces in the Gaza Strip*, (2002) 56(4) PD 608, p. 611.

The de-stigmatization of colonizers into *Jewish* and the de-nationalization of the Palestinians into *Arabs* strips them from the political and legal context of the occupation. The two national groups, the occupied and the occupiers, living in the same place become equal: Jews and Arabs are supposedly entitled to the same treatment.[359] Yet there is no bigger illusion than that. Their legal status is not equal in any way, and international humanitarian law was never intended to protect a community the presence of which is illegal. The utopian situation, before the outbreak of the second *intifada* and the terror acts that have been committed since, was described by Judge Levy:

> Previously, the benefit of road 443 was shared by Israelis and Palestinians altogether. Palestinian cars were using that road for long years… no apartheid nor segregation existed but a situation of *sharing*. [emphasis added].[360]

2.3.5 Policy outcome in the long term: From Occupation to Apartheid

i. *De facto* annexation of land via Article 43 and the physical separation of population

The result over the long term of the High Court of Justice's legal construction is well illustrated in *Jami'at Ascan* (1983) and *Road 443* (2009).[361] The legal basis to expropriate the land on which road 443 was build was Article 43, justified by its humanitarian element – to build a modern traffic route for the benefit of the local population. This expropriation was legitimized by the High Court of Justice in *Jami'at Ascan* in 1983. Since then, road 443 has become one of the most important traffic routes connecting the centre of Israel to Jerusalem, almost entirely used by Israelis living in Israel. In the wake of the Second Intifada in 2000, following several attacks on Israeli vehicles, Palestinians were increasingly prevented from using this road for security reasons. By 2002 the prohibition has become absolute, and road 443 turned into an "Israelis-only road".[362] The absolute ban on travel for Palestinian vehicles

[359] *Ibid*, p. 16.

[360] *The Road 443* case (n 331), para.3 (Dissenting opinion Justice Levy).

[361] For background see: The Association for Civil Rights in Israel (ACRI), 'Ban on Palestinian Movement on Route 443: Background Information' (June 2009) <http://www.acri.org.il/pdf/route443Aug09.pdf> (accessed 3 May 2011).

[362] "I made Route 443 an Israelis-only road," he said with satisfaction, while insisting it had been his decision. "I ordered all the exits serving Palestinians to be barricaded." - IDF commander of the Ramallah region, Colonel

became statutory on August 2007 through the issue of a military order.[363] Before that it was implemented through *de facto* physical obstacles – iron gates, concrete blocks, or checkpoints. Thus, the occupied land that was expropriated 20 years earlier in order to build a modern and developed system of roads for the benefit of the *local population* has come to serve only the Occupying Power's population, as a matter of privilege, not of necessity.

In 1983, in *Jami'at Ascan*, Justice Barak concluded that the planning of the roads system was a professional one that took into consideration the local population's need as the dominant consideration while the need of Israeli citizens was only secondary. Justice Barak did not doubt the sincerity of the State's position:

> The military administration is not authorized to plan and build road systems in areas that are in military custody, if these are nothing other than a 'service path' to the sovereign country… our conclusion – which we have reached without reservation or doubt – is that Israel's considerations and civilian needs were not at the basis of the road plan.[364]

As Dinstein predicted in the early 1970's, "professed humanitarian concern may camouflage a hidden agenda, and it may be prudent to guard the inhabitants from the bear's hug of the Occupying Power".[365] Indeed, this precedent-setting ruling paved the way for the expropriation of the land required for the construction of large number of roads and highways, which ultimately come to serve only Israelis.[366] The High Court of Justice consistently chose not to doubt the position of the State, even though

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Gal Hirsch, cited in see O. Shelah and R. Drucker, *Boomerang – the Failure of Leadership in the Second Intifada* (Keter Publishers, Tel Aviv, 2005), p. 31.

[363] Security Provisions Order No. 378 (West Bank) – 1970. Order concerning transportation and traffic (Road 443) (West Bank) 2007 dated 28 April 2007. The order was in force for one year and was extended for another year on 19 June 2008. Interestingly, the military order was issued only after the petition of Association of Civil Rights in Israel was filed. See *The Road 443* case (n 331), para. 7.

[364] *The Jami'at Ascan* case (n 248), p. 813.

[365] Y. Dinstein (n 305), p. 511, Y. Dinstein (n 227), pp. 120-121.

[366] Throughout the West Bank, additional roads – main roads and key arteries – that have always served the local population have been expropriated from the local residents and designated for the sole use of Israelis. A case regarding another road that has been closed to local residents is pending. HCJ 3969/06, *Mayor of the Village of Deir Samit et al. v Commander of IDF Forces in the West Bank*, cited in *The Road 443* case (n 331), para. 97 (petition). Available in English at: <http://www.acri.org.il/pdf/road443petition.pdf> (accessed 3 May 2011). See also B'Tselem, *Forbidden Roads: The Discriminatory West Bank Road Regime* (B'Tselem, August 2004).

> one needs a certain amount of naïveté to believe that this council [composed of officials appointed by the military government to carry out the planning process] is concerned exclusively with the good of the West Bank residents, rather than the political objectives of the government of Israel.[367]

Today, it appears the choice for Justice Barak in 1983 not to doubt the genuine intentions of the State was not a neutral one. It was a political choice with legal consequences. Indeed, the political intentions of the State in the 1980s to build highways that would integrate the West Bank and Israel was not a hidden agenda.[368] Settlements cannot exist in isolation – they need to be connected to each other and to Israel. As the UN reported in 2007:

> A network of 1,661km of roads links settlements, military areas and other infrastructure in the West Bank with Israel. Some roads have been newly built, while others have resulted from upgrading pre-existing primary roads. *Via* these roads Israelis move freely between the West Bank settlements and Israel. Palestinian access on to this network is restricted by a closure regime consisting of approximately 85 checkpoints, 460 roadblocks and a permit system for Palestinian vehicles…these measures have enforced the status of certain West Bank roads as almost exclusively for Israeli / settler use, thereby, creating a 'sterile' traffic flow for Israelis.[369]

In March 2007, the Association of Civil Rights in Israel (ACRI) petitioned the High Court of Justice on behalf of six villages located near road 443, urging the court to order the road opened to their free movement. In their petition, ACRI stated that denying the Palestinians their right to use the road, and restricting it to the use of Israelis only, was contradicting the High Court of Justice ruling in *Jami'at Ascan,* according to which the roads should serve the local population. For the first time, ACRI raised the argument that the State policy amounted

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<http://www.btselem.org/english/publications/index.asp?TF=05&image.x=30&image.y=11> (accessed 3 May 2011).

[367] D. Kretzmer (n 220), p. 70.

[368] See for example the explanation to a plan for highways prepared by the World Zionist Organization cited in D. Kretzmer (n 220), p. 94.

[369] United Nations, Office for the Coordination of Humanitarian Affairs, *The Humanitarian Impact on Palestinians of Israeli Settlements and Other Infrastructure in the West Bank* (July 2007), p. 58. For a detailed map on the "Roads primarily for Israeli use", see p. 59.

to an exercise of *apartheid*.[370] The State claimed that this was a lawful separation measure for security reasons and not an illegal discrimination. On December 2009, the High Court of Justice rendered its judgment, recognizing explicitly the right of thousands of Israelis, not living in the West Bank, to be protected by Article 43 while using OPT resources. The benefit of the Palestinian local population, which initially legitimized the expropriation of their land to build them a road, which over the years became to be used only by Israelis, was ignored. Although the court ruled that an eight-year total ban on Palestinian use was an *ultra vires* decision,[371] and demanded the military commander to find a more proportional solution, it nevertheless ruled that the Israelis residing within the green line have the right to use that road, and while using it, they become themselves entitled to benefit from the protection of Article 43, on the expense of the right of the Palestinians to use their own resources. This mockery of international humanitarian law shows how the *de facto* annexation of the land and OPT resources function over the long run.

Similarly, the Wall cases, discussed above in the section on proportionality, indicate the same result in the court and State use of Article 43 as legitimating *de facto* annexation. The construction of the security element of Article 43, composed of a broad (and distorted) interpretation of the term security that includes the entire needs of settlers, along with the technique establishing that the *dominant factor* motivating the State is security considerations and not political motivations, along with the introduction of the proportionality test to de-contextualize the political impact of the Wall, were all used to legitimize the findings in a string of cases dealing with the expropriation of land and the construction of the Wall.

Palestinians and settlers do not live in the same places, nor physically share the public common good. Once the land is expropriated for settlement construction or for paving settler-only roads, then, for security reasons, the access of Palestinians to these zones is restricted or entirely prohibited by military orders or physical barrier, or both. As for September 2011, 522

[370] *The Road 443* case (n 331), paras. 97-98 (petition).

[371] On the merits the majority opinion held that the military commander was not authorized under to Article 43 to impose a complete ban on the traffic of Palestinian vehicles on the road, as it makes the road used solely for Israeli traffic rather than to serve the needs of the local population. "The situation resulting from the sweeping travel ban on the villages' residents is that it is no longer a road that serves the local population, but a 'service road' of the occupying state. An arrangement with such a result exceeds the military commander's authority, and contravenes international law on belligerent occupation". *The Road 443* case (n 331), para. 26.

roadblocks and checkpoints obstruct Palestinian movement in the West Bank.[372] Thus, for the sake of the security of the settlers, Palestinians have been slowly limited to live in delimited and closed areas, their freedom of movement in the West Bank thereby becoming very restricted.

ii. Apartheid legislation via Article 43

In the course of the past 40 years, through the use of international humanitarian law, the High Court of Justice has enabled a population to be kept under a military regime without any civil rights, while, on the other hand, through the misuse and a selective application of the same law, to administrate the illegal presence of the settlers in the OPT. Although international humanitarian law prohibits the transfer of the occupier's own population to OT, the High Court of Justice has persistently avoided addressing this issue. In ruling that the settlers are a part of the *local population* for the purpose of Art. 43, it subjected them to the regime of Article 43, which authorizes the introduction of military legislation "for the benefit of the local population" [373]. By providing this interpretation as early as in 1972, the High Court of Justice has conferred upon the State an effective legal tool that enable it to carry out the settlement policy and administrate the presence of settlers in the OPT, without having to enact extraterritorial legislations.

Over the longer term this had resulted not only in the establishment of a colonialist regime, which is official policy of the State, but also a segregated legal regime in the OPT. The High Court of Justice's interpretation of Article 43, according to which the settlers make up a part of the local population, effectively introduced two "local populations", the occupied and the colonizers, and opened the door to installing two set of laws over two separated populations: The desired conditions of living of the Jewish local population, in accordance with the political and economic norms of the Western world, required a

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[372] For a recent update see, UN Office for the Coordination of Humanitarian Affairs in the occupied Palestinian territory, *Movement and Access in the West Bank* (September 2011) <http://www.ochaopt.org/documents/ocha_opt_MovementandAccess_FactSheet_September_2011.pdf> (accessed 22 October 2011).

[373] See Articles 49(6) of the Fourth Geneva Convention of 1949, Article 85(4)(a) of Additional Protocol I of 1977 and Article 8(2)(b)(viii) of the Rome Statute. However, the High Court of Justice persistently avoided addressing this issue (see further discussion on that point below, at pp. 199-203), ruling recently that this question is *irrelevant*. The *Mara'abe* case (n 2), para. 19.

completely different kind of legislation, while the Palestinians, as an occupied population, were deprived of any civil rights.

Israeli citizens would have been discouraged from living in settlements, had they been subjected to the same territorial legal regime that was applied to the Palestinians (i.e., the law of belligerent occupation, pre-Israeli occupation Jordanian law, and Israeli military orders). Thus, different legal methods have been employed by different legal institutions to provide the settlers with a legal environment and living conditions similar to those in Israel, without amounting to a *de jure* annexation of the land, and more importantly, of four million Palestinians. Some of these sophisticated legal manoeuvres exclude Jewish settlers from the applicable territorial legal regime in the OPT. For example, Israeli nationals are excluded from the jurisdiction of the military courts, and consequently, from the military criminal code and rule of procedure that is territorially applicable;[374] At the same time, the High Court of Justice has insisted on including the settlers as a part of the territorial *local population*. This was done in order to subject them to the regime of Article 43, which authorizes the introduction of military legislation "for the benefit of the local population". This kind of legislation became one of the main legal methods to provide the settlers in the OPT with an Israeli legal environment.

The military legislation enacted for the settlements and the settlers regulated their legal environment in a way to match the one in Israel (as many of these orders explicitly incorporated Israeli legislation). By virtue of that legislation settlers were excluded from local law, which would have otherwise applied. A separate administration was established through local and regional councils.[375] The settlements also had their own courts. Through the extension of the jurisdiction of the Court of Domestic Affair in 1983 by a military order,[376] these became competent to apply 29 Israeli laws, regulations of the military authorities concerning the administration of the local council, and regulations enacted by the council. In addition, Rabbinical Courts were established by military order 981 from April 1982 to regulate the personal status of the Jewish population.

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[374] This was done through a policy directed from the Ministry of Justice. The military police and prosecution authorities do not submit cases involving Israeli citizens to the military court system, but defer them to Israeli civil authorities. S. Weill (n 339), pp. 136,140-141.

[375] Military Order n. 783 of 25 March 1979 established local council for the administration of urban settlements.

[376] E. Benvenisti (n 224), p. 138; A. Rubinstein, 'The Changing Status of the 'Territories': From Escrow to Legal Mongel' (1988) 8 Tel Aviv University Studies in Law, pp. 77-78; R. Shehadeh, *Occupier's Law - Israel and the West Bank* (Institute for Palestine Studies, Washington DC, 1985), pp. 88-93.

Other enactments deal with detailed needs of everyday life, which could not be provided for through the extraterritorial application of the entire corpus of Israeli law. The case of Radio 2 is illustrative of this point. [377] In this case, the military commander simply copied the Israeli statutory regulations on radio services into a military order he issued, in order to grant a Israel Radio a concession to broadcast in the settlements. This is not a famous High Court of Justice precedent-setting ruling, but just one of many other examples that exist as a matter of routine.

The High Court of Justice has repeatedly stated that the Israeli settlements are "controlled by the law of belligerent occupation. Israeli law does not apply in this area… the lives of the settlers are arranged, mainly, by the security legislation of the military commander."[378] Yet, one must refer to the broader picture. In addition to attributing the military commander the authority to legislate for settlers, based on a distorted application of international humanitarian law, the High Court of Justice facilitated a situation whereby two *local populations* would live on the same territory with completely distinct legal statuses and sets of rights in other ways. It has allowed the extraterritorial applicability of Israeli Constitutional law to settlers as Israeli citizens on a personal basis[379] and the extraterritorial jurisdiction of Israeli civilian courts on civil matters. Israeli tort and contract laws were extended to matters involving Israeli nationals in the occupied territories.[380] Also the Israeli Parliament has enacted other laws explicitly providing for their extraterritorial applicability, in a further attempt to secure an Israeli environment for the settlers.[381] And, the High Court of

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[377] HCJ 8555/07, *Gush Shalom v Minister of Communication*, (2008) (unpublished).

[378] HCJ 6339/05, *Matar v The Commander of IDF Forces in the Gaza Strip*, (2005) (unpublished); The same idea is expressed in *The Hass case* (n 321), p. 455, *The Mara'abe* case (n 2), para 18. In the *Shaer* case the petitioner, an Israeli-Jewish national, claimed that the military commander was not competent to arrest him as his authority applied only to the Palestinian population. The court rejected this claim, and ruled that regarding the security of the region the commander's authority applying to all the residents of the Region. According to the High Court of Justice, the assumption that the military commander's authority applied selectively to only a section of the residents of the Region "is, evidently, contradicting basic norms". HCJ 2612/94, *Shaer v The Military Commander* (1994) 48(3) PD 675, p. 679 (hereinafter: *The Shaer* case).

[379] "This jurisdiction [of the Israeli constitutional law] is personal... It is the fruit of a view by which the state's Basic Laws regarding human rights apply to Israelis found outside the state, who are in an area under its control by way of belligerent occupation" - HCJ 1661/05 *Gaza Coast Regional Council v The Knesset* (2005), 59(2) PD 481, para .80 (hereinafter:*The Gaza Coast Regional Council* case*)*. See also The *Mara'abe* case (n 2), para. 21. *The Hass* case (n 321), p. 461.

[380] Those decisions were taken by the Ministry of Justice and the High Court of Justice. See E. Benvenisti (n 224), pp.129-133.

[381] See several examples below at notes 682, 683 and accompanying text.

Justice ruled in a complete distortion of the law that the extension of Israeli laws to the occupied territories was compatible with international humanitarian law as the law of occupation does not govern the extension of laws by the occupant's government to its citizens in the occupied territories.[382]

In the Road 443 ruling, Israel's highest court explicitly divided the people living under its control into *categories*:

> [The population] can be divided to three categories: Residents of the villages, who are Protected Persons as defined by the Fourth Geneva Convention [= Palestinians]; The second, residents who live in Israeli communities in the Region [=settlers[383]]. These residents are part of the local population, even if they are not Protected Persons. In addition to these two groups, Israeli citizens who are not residing in the Region[384].

Normally, when a court is explicitly dividing people into different categories - each subject to a different legal regime – the alarm bells ought to be ringing. Yet, President Beinisch held in her separate opinion in *Road 443* that the comparison made by the petitioners between preventing the traffic of Palestinians on road 443 and the crime of *apartheid* was so radical that it should not have been raised at all. However, had the majority opinion not only provided a description of each population category, but also an analysis of the legal status of each category and their resulting rights, the comparison with *apartheid* would not seem so radical as it may appear at first glance. In fact, Adam Roberts' warning that the law of military occupation could potentially pave the way for a kind of *apartheid*[385] has been realized over the years with the active contribution of the High Court of Justice. The High Court of

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[382] The High Court of Justice reviewed the legality of the Income Tax Ordinance (Amendment No. 32) Law-1978, which expanded its application over Israelis residents in the Region: HCJ *K.P.A Co. v State of Israel*, (1984) 38 (1) PD 813, p. 819.

[383] Interesting also to mention is the fact that the High Court of Justice does not use the word *settlements*, which may have a bad connotation, but the word *communities* (*hityashvout* in Hebrew), which signifies in the Israeli Zionist national narrative the positive and constructive movement of the Jewish population in the land of Israel that brought to its development.

[384] *The Road 443* case (n 331), para. 20.

[385] A. Roberts (n 228), p. 52: "the law on occupations could be so used as to have the effect of leaving a whole population in legal and political limbo: neither entitled to citizenship of the occupying state, nor able to exercise any other political rights except of the most rudimentary character.... the law on occupations might provide, paradoxically, the basis for a kind of discrimination that might bear comparison with apartheid."

Justice's refusal to apply Art. 49 (6) of the Fourth Geneva Convention, coupled with the misuse of Article 43 as protecting also the settlers, has given rise to a legal framework that enables the creation of a segregated legal regime. Doing it under the cloak of lawful international humanitarian law measures has enabled the State to establish two separate legal regimes without opting for a *de jure* annexation, and, on the other hand, without explicitly appearing as an *apartheid* system. It has been simply done by the apparent application of the law of military occupation – legitimated by the High Court of Justice, and indirectly by the international community, that highly esteems the High Court of Justice's judicial review.

3. Case Study No. 2 : The Serbian War Crimes Chamber

The second case study examines the function of the Serbian War Crimes Chamber in adjudicating war crimes committed during the Balkan wars and, more generally, the role of a national court in exercising its competence over former government officials in criminal cases[386]. The case study analyzes the first two decisions of the War Crimes Chamber (WCC), which reflect more generally the ability and willingness of the court to apply international humanitarian law in its particular post-conflict context. This analysis offers an insight into the functioning of the WCC – how it applied international humanitarian law, referred to international jurisprudence and established the facts in light of the post-conflict national narrative – in one case where it was free from any political pressure, and, in another case, where it had to face considerable political constraints.

3.1 Background on the Court

The WCC is one of the few domestic courts in the world to prosecute its own nationals for war crimes committed in a conflict that ended just a few years before its creation. In 1993, as a reaction to atrocities in the wars in the former Yugoslavia, unprecedented in Europe since World War II, the Security Council established the ICTY to try those responsible for such crimes.[387] The ICTY Statute in Art 9 establishes its jurisdiction with primacy over the national jurisdictions. However, the Statute did not limit the responsibility of national jurisdictions to

[386] This case study is largely based on a field research I did in the Belgrade WCC during September 2007 and on an article I co-authored with Ivan Jovanovic, head of the war crimes domestic trials unit at the OSCE. (S. Weill and I. Jovanovic, 'National War Crimes Prosecution in Post-Conflict Era and Pluralism of Jurisdictions: the Experience of the Belgrade War Crimes Chamber' in A. Nollkaemper, C. Ryngaert and E. Kristjánsdóttir (eds.), *Importing International Law in Post-Conflict States: The Role of Domestic Courts* (Intersentia, Antwerp, in press), p. 241-268.

[387] See the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 established pursuant to UN Security Council Resolution 827 (25 May 1993), UN Doc S/Res/827 (1993) (hereinafter: the ICTY Statute).

repress international crimes committed during the armed conflict.[388] During the conflicts in the 1990s and the Milošević regime, and in the first years after the overthrowing of Milosevic in October 2000, trials for war crimes in Serbia were rare exceptions and impunity was almost a political and social norm[389]. As State officials were behind many of the crimes, they were more involved in covering up such crimes than in prosecuting them. Ten years after the ICTY was created, as a result of internal political changes, along with strong external pressures the Serbian War Crimes Chamber was established within the District Court of Belgrade.[390] On 1 July 2003 the Serbian Parliament, adopted the Law on Organisation and Competence of Government Authorities in War Crimes Proceedings ('War Crimes Law').[391] This Law set up the War Crimes Chamber and the War Crimes Prosecutor's Office, and established their jurisdiction. The War Crimes Chamber is a specialised department established within the District Court in Belgrade in 2003.

A number of factors made the Serbian government decide, at the end of 2002, to initiate domestic prosecution of war crimes. These include important economic and diplomatic pressure from the European Union relating to the potential accession to the EU and economic assistance, and the US conditioning of financial and international political support to Serbia.[392] Internally, after the fall of Milošević an active civil society in Serbia played an important role in raising public to support accountability for war crimes. Moreover, it was within Serbia political interest to improve its image abroad and to send signals of commitment to the rule of law and break up with the Milosevic regime. In addition, in supporting domestic trials, it was hoped that these could substitute trials before the ICTY. According to the ICTY

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[388] 'It was not the intention of the Security Council to preclude or prevent the exercise of jurisdiction by national courts'. Report of the UN Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993) (3 May 1993) UN Doc S/25704, para 64.

[389] The few trials in Serbia were to a large extent assessed as being below the acceptable standards and inappropriately low sentences. See Report by the OSCE Mission to Serbia and Montenegro, 'War Crimes before Domestic Courts' (Belgrade, October 2003) <www.osce.org/documents/fry/2003/11/1156_en.pdf> (accessed 22 October 2011).

[390] For additional background see M.S. Ellis, 'Coming to Terms with Its Past - Serbia's New Court for the Prosecution of War Crimes' (2004) 22 Berkeley Journal of International Law, p. 165-194.

[391] Law on Organisation and Competence of Government Authorities in War Crimes Proceedings, *Official Gazette of the Republic of Serbia [no. 67/2003*, with subsequent amendments in *Official Gazette 135/2004, 61/2005, 101/2007* < www.osce.org/documents/fry/2005/11/18508_en.pdf > (hereinafter: The War Crimes Law).

[392] For example, the US, which financed a new building for organised crime trials, conditioned its support by requesting that this new infrastructure had to be used for war crimes trials as well.

completion strategy[393] transfer of indictments against low-level accused and incomplete investigations to the national courts in the former Yugoslavia would be effected on the condition that there is a credible domestic legal system with well-trained staff and proper legislation.[394]

The model that was chosen for prosecuting war crimes in Serbia was the establishment of a national specialised judicial chamber and prosecutor's office.[395] The international community, mainly the OSCE Mission to Serbia, US Embassy in Belgrade, and independent international experts, exerted a decisive influence on the final outcome of the creation of these specialised judicial agencies in Serbia.[396] It was a compromise made in order to strengthen independence and competence of such institutions, while preserving them within the parameters of the existing structure of the national judiciary and criminal legislation. The participation of international judges and prosecutors in trials, as suggested by international experts, was rejected by the Serbian authorities. The government wanted to demonstrate that the Serbian judiciary was capable of handling such cases in line with international standards with its own human resources. One of the arguments against inclusion of international staff in the court or in the prosecution office was that such internationalised structure could be perceived as another ICTY-like court and be seen as imposed justice, prompting animosity among the public in Serbia.

The WCC judges have been selected among the regular criminal law judges in Serbia, and they have been assigned to the WCC for a renewable term of four years.[397] There are

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[393] Ninth Annual Report of the International Criminal Tribunal for the Former Yugoslavia submitted to the UN General Assembly, Fifty-seventh Session, UN Doc A/57/379 – S/2002/985 (2002); UNSC Res. 1503 (28 August 2003) UN Doc S/RES/1503 (2003), para 6.

[394]Statement by Ms. Carla del Ponte, ICTY Chief Prosecutor, to the OSCE Permanent Council (Vienna, 4 November 2003) PC.DEL/1278/03. Available online at <http://www.osce.org/pc/13283> (accessed 3 January 2010).

[395] Some authors classify the WCC as a 'court established by a state with international support'. R. Cryer, H. Friman, D. Robinson, E. Wilmshurst, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, Cambridge, 2007), pp. 161-162. Other courts that have been dealing with war crimes are either hybrid (Sierra Leone, Cambodia, Kosovo, or, previously, East Timor), or domestic courts with international presence (Bosnia and Herzegovina), or they are regular national courts without exclusive jurisdiction (such as in Croatia, Montenegro, Macedonia).

[396] OSCE Mission to Serbia and Montenegro, 'Strategy on Support to the National Judiciary in Conducting War Crimes Trials' (Belgrade 11 April 2003) (on file with the author). A detailed account of the drafting process is provided by the then Executive Director of IBA. M.S. Ellis (n 390), pp. 165-184.

[397] The War Crimes Law (n 391), Articles 10(2) and (3).

eight judges on the WCC, and the Chamber sits in trial panels of three professional judges. The War Crimes Prosecutor's Office (WCPO) of the Republic of Serbia is a specialised prosecutorial office. The WCPO is headed by the War Crimes Prosecutor, elected in 2003 directly by the Serbian Parliament, unlike other prosecutors in the country who were, at the time, appointed by the government.[398] The War Crimes Law include specific provisions obliging all state bodies and institutions to provide information and documents or render any other assistance to the War Crimes Prosecutor at his request.[399] This special status of the WCPO, especially prompted by the participating international experts, was to provide for a prosecutor with wide competencies and a strong independent position.[400]

Jurisdiction

The War Crimes Chamber and the War Crimes Prosecutor's Office have the exclusive jurisdiction in Serbia over war crimes, whenever they have been committed[401], and the WCC can try persons for any crime within its *ratione materiae* jurisdiction committed in the wars in the former Yugoslavia, regardless of nationality of the victim or the perpetrator.[402] Serbia is a party to the 1949 Geneva Conventions and their Additional Protocols. The applicability of international law is set by the 2006 Serbian Constitution. International law is defined by the Constitution to be a part of the internal legal order and superior to national laws. Treaties, however, according to the Serbian Constitution of 2006, cannot overrule any constitutional provision. [403] The Constitution confirms the direct applicability of international law, and therefore treaties do not need to be endorsed via domestic legislation in order to have a legal effect.[404] The applicable criminal code in trials before the Serbian court for war crimes

[398] The War Crimes Law (n 391), Articles 4(4) and 5(1).

[399] *Ibid*, Article 7.

[400] See M.S. Ellis (n 390), p 180.

[401] The War Crimes Law (n 391), Article 3.

[402] *Ibid*, Articles 2(1), 4(1) and 9(1).

[403] Constitution of the Republic of Serbia (adopted 30 September 2006, entered into force 8 November 2006), Article 16(2) and Articles 194(4) and (5). The same provision existed in the former constitution of the Federal Republic of Yugoslavia (in force from 1992 to 2003) and the Constitutional Charter of Serbia and Montenegro (from 2003 to 2006).

[404] Article 142(2) of the Constitution of the Republic of Serbia states that the courts shall adjudicate "on the basis of the Constitution, law, ratified international treaties and generally accepted rules of international law." Article 1(2) of The Law on Judges (2008), applicable as of January 2010, also authorises judges to render decisions by applying "ratified treaties and generally accepted rules of international law."

committed in the Balkan wars in the 1990s is the Criminal Code of the Federal Republic of Yugoslavia ('FRY Criminal Code') from 1992, which was in force at the time the crimes were committed.[405] There are fourteen international crimes from the FRY Criminal Code falling under the jurisdiction of the WCC, but the most frequently applied is the offence of War Crimes against Civilians (Article 142 FRY Criminal Code).[406] The definition of the crime in Article 142 begins with a chapeau and continues with an exhaustive list of underlying acts of commission.[407] The chapeau reads: 'Whoever, in violation of the rules of international law in time of war, armed conflict or occupation ... orders ... or commits' any of the enumerated underlying acts. It contains the key condition that, in order to convict a person it has to be proved that a criminal act listed in the provision was committed in violation of the rules of international law applicable during armed conflict. The prosecution and the court have to examine and find a violation of an international humanitarian law rule in order to apply Article 142. The chapeau requirement of Article 142 does not only simply allow for the use of international law as a source of norms; it actually requires courts to rely on international law and to introduce it into the case as a part of the elements of the crime. It has therefore been portrayed as a 'dynamic reference to international law by national criminal law provisions'.[408]

[405] Criminal Code of the Federal Republic of Yugoslavia, *Official Gazette of the FRY* Nos. 35/92, 37/93, 24/94, 61/01. Upon the creation of the State Union of Serbia and Montenegro, in 2003, this code is transformed into the Basic Criminal Code of the Republic of Serbia, *Official Gazette of the Republic of Serbia* No. 39/03, but the content of the provisions relevant for this analysis remained the same.

[406] Other crimes in Chapter XVI of the FRY Criminal Code include genocide (Article 141), war crimes against the sick and wounded, war crimes against prisoners of war, and different violations of international humanitarian law such as marauding, use of prohibited means of warfare, destruction of cultural and historical monuments, misuse of international emblems and others.

[407] Such underlying acts includes, i.a, subjecting civilian population to killings, torture, inhuman treatment, biological experiments, immense suffering or violation of bodily integrity or health, forcible prostitution or rape, intimidation and terror, taking of hostages, unlawful deportation or displacement, unlawful arrests and confinement, forced labor, attacks on objects protected by international law, indiscriminate attacks upon civilian objects etc.

[408] H. Kreicker, 'National Prosecution of Genocide from a Comparative Perspective' (2005) 5 International Criminal Law Review 313, pp. 313-328.

3.2 The role of the Serbian War crimes Chamber in prosecuting war crimes

Within its first six years of operation, the WCC rendered judgments in 25 cases involving 64 defendants, out of which 12 judgments, concerning 41 defendants, are final.[409] By November 2010, the prosecution office raised indictments against 114 persons. In addition, investigations have been opened against at least 110 individuals, most of them Serbs.[410] The following part analyzes the two first decisions rendered by the WCC and aims at decrypting the WCC role in applying international humanitarian law. This is assessed in consideration of two aspects: (1) its objective ability to apply international humanitarian law: whether the judges have the necessary expertise and knowledge of international humanitarian law (including treaty law and international customary law as well as international and national court decisions and academic writings); and (2) its subjective willingness to enforce international humanitarian law: whether the court equally enforces the law without applying double standards, and whether the judicial system is independent, i.e., to what extent local or international political interests influence the judicial decision making.

3.2.1 The case of Anton Lekaj

Anton Lekaj, a Kosovar Albanian and a member of the former Kosovo Liberation Army (KLA), was the first person tried by the WCC to be convicted in a final decision. He was found guilty of war crimes against a civilian population during the armed conflict in Kosovo and, on 18 September 2006, sentenced to thirteen years in prison.[411] This first case was a relatively easy one, not only because the WCC was judging 'the enemy' and not its own

[409] See generally <www.tuzilastvorz.org.rs/html_trz/index_eng.htm> (accessed 18 November 2010). The figure of final verdicts also includes two trials that had started before the time the WCPO and WCC established, but later represented by the WCPO at the re-trial.

[410] Of the total number of 114 accused, 91 of them (80% of the total number of accused) are ethnic Serbs. As of beginning of November 2010, there have been 9 first instance trials, with 50 defendants before the War Crimes Chamber. Interview with Trial Monitors of the OSCE Mission to Serbia (Belgrade, 17 November 2010).

[411] War Crimes Chamber of the Belgrade District Court, *Anton Lekaj*, (Judgment) Case No. K.V. 4/05, 1st Instance Verdict (18 September 2006) (in Serbian, unofficial translation in English on file with the author) (hereinafter: *The Lekaj Judgment*). The ruling was confirmed by the Serbian Supreme Court on 5 April 2007.

national for committing war crimes, and thus not encumbered by domestic political inconvenience, but also because the factual and procedural issues were rather simple.

On 7 July 2005 Anton Lekaj was accused of committing unlawful confinement, rape, inhuman treatment, torture, and murder, between 12–15 June 1999, in the region of the city of Đakovica in Kosovo, during the armed conflict. According to the indictment, Lekaj, along with other KLA members, captured thirteen non-Albanian civilians (twelve Roma and a Serb) in the middle of a wedding parade and confined them for four days and nights in a basement of a hotel, where they were tortured and sexually assaulted. According to the 1992 FRY Criminal Code, which was in force at the time the alleged acts were committed, the prosecution had to prove that the alleged criminal acts were listed in Article 142 of the Code (War Crimes against Civilians), and that they were committed in violation of a rule of international law applicable during armed conflict. Thus, the accusations were based on both the national criminal code and on international humanitarian law.[412]

i. The qualification of the conflict and the applicable treaty law

The WCC based its jurisdiction on Art. 3 of the War crimes Law that grants jurisdiction over war crimes committed anywhere in the former Yugoslavia, regardless of the nationality of the accused or of the victim.[413] As a starting point, the WCC defined the nature of the conflict. An accurate qualification of the conflict is of major importance as the applicable international humanitarian law treaty law depends on this preliminary determination. The WCC found that in the period relevant to the facts, 12–16 June 1999, two armed conflicts existed – a non-international armed conflict between the KLA and the FRY and Serbian police forces, and an international armed conflict between NATO and the armed forces of the FRY.[414] This analysis of the facts, which fragments the conflict into its components, follows the doctrine of international humanitarian law which recognises that two types of conflicts may exist simultaneously, or that a conflict may be of a mixed character. In such a situation, the law of international armed conflicts

[412] International rules mentioned in the indictment included provisions from the Fourth Geneva Convention of 1949 and both Additional Protocols of 1977: Article 2(1) of the Fourth Geneva Convention of 1949 (definition of intl. armed conflict), Article 3 of the Fourth Geneva Convention of 1949 (non intl. armed conflict) and Article 27(1) and (2) of the Fourth Geneva Convention of 1949. Article 51 (protection of the civilian population), Article 75 (fundamental guarantees) and Article 76 (protection of women) of the Additional Protocol I of 1977, Article 4(1) and (2)(a ,e) and Article 13 of the Additional Protocol II of 1977.

[413] *The Lekaj Judgment* (n 411), p. 43.

[414] *Ibid*, p. 8.

apply to the fighting between the armed forces of two states and the law of non-international armed conflicts to the fighting between the government and rebel forces.[415] Yet, while the WCC rightly assessed that the armed conflict in Kosovo was composed of two parallel conflicts, it failed to properly apply the relevant legal framework consequent to this finding. The WCC simultaneously applied to Lekaj's alleged crimes both sets of laws[416] – an impossible situation according to international humanitarian law. An act can be in nexus either to an international armed conflict or to a non-international armed conflict, but not to both at the same time. A more accurate ruling would have been to qualify the acts of Lekaj as being part of the non-international armed conflict and consequently to apply merely the law applicable to such type of conflict.

In order to avoid the task of qualifying the conflict, the WCC could have referred solely to customary law rules that are applicable to both kinds of armed conflicts. Yet, although customary international law may be relied upon by Serbian courts in establishing the content of international norms that were violated, by virtue of the chapeau of Article 142 FRY Criminal Code, the WCC did not make any reference to this source of law – not in this case and not in any other. In this regard, the WCC differs from the approach taken by the ICTY, which had not made an explicit qualification of the conflict since the intervention of NATO. In the two first ICTY judgments rendered on Kosovo, the Limaj and Haradinaj cases, the ICTY dealt only with what it considered as a non-international armed conflict, as the facts were relating to events that took place in 1998, before NATO's bombing campaign.[417] It was only in 26 February 2009 in the Milutinovic case, that the ICTY rendered a judgment dealing with crimes committed after the beginning of the international armed conflict. In this case the Chamber established that there was

[415] See, eg, M. Sassòli, 'The Legal Qualification of the Conflicts in the Former Yugoslavia: Double Standards or New Horizons for International Humanitarian Law?' in W. Tieya and S. Yee (eds), *International Law in the Post-Cold War World: Essays in Memory of Li Haopei* (Routledge, London, 2001), p. 314.

[416] The WCC applies simultaneously Article 27 of the Fourth Geneva Convention of 1949, the Additional Protocol I of 1977, the Additional Protocol II of 1977 and Article 3 of the Fourth Geneva Convention of 1949. The Supreme Court of Serbia upheld such an approach when confirming the Lekaj's conviction. Supreme Court of Serbia, *Anton Lekaj* (Appeals Judgment) Case No. Kž. I RZ 3/06 (26 February 2007) (in Serbian), p. 7

[417] The ICTY case *Prosecutor v Haradinaj et al.*, (Judgment, Trial Chamber)?! ICTY IT-04-84-T (3 April 2008) concerns crimes allegedly committed in Kosovo between 1 March and 30 September 1998. On the basis of the evidence before it, the ICTY Trial Chamber found that a non-international armed conflict existed in Kosovo from and including 22 April 1998 onwards. The case of Limaj include crimes committed during May-July 1998. During this period the Trial Chamber found the existence of a non international armed conflict. See *Prosecutor v Limaj et al.*, (Judgment, Trial Chamber) ICTY IT-03-66-T (30 November 2005), para. 173.

an armed conflict starting in 1998, continuing into 1999, and ending with the cessation of the NATO bombing, but without qualifying it in further detail. As the ICTY indictment did not charge grave breaches of the Geneva Conventions, but only violations of customary law applicable to all conflicts, there was no need for the ICTY to determine whether the armed conflict was internal or international.[418]

ii. Protected persons status

As the acts of Lekaj are linked to a non-international armed conflict, the special protected persons regime, regulated in Article 4 of the Fourth Geneva Convention is not applicable. Yet the WCC first finding is that the victims, FRY nationals from Kosovo, are protected persons:

> "Such acts of the defendant constitute grave breaches of international humanitarian law as the defendant was a belligerent of the armed conflict (member of the KLA), while the victims were civilians who have not directly taken part in the hostilities, and who were under the status of protected persons pursuant to the Fourth Geneva Convention on protection of civilians during war of 12 August 1949 …."[419]

The legal status of protected persons grants enemy nationals special protection during international armed conflict. With the aim of adapting the law to the specific conflict in Bosnia, and to include as many civilians as possible under the special protection regime, the ICTY in the Tadic case, after qualifying the conflict as international, interpreted the definition of protected persons in a broad manner; it ruled that the nationality requirement should be interpreted as an allegiance test.[420] When the WCC ruled that civilians of Kosovo, who were FRY nationals, were protected persons, it seemed to apply the Tadic allegiance test without explicitly mentioning it. Indeed, the WCC stated on several occasions that the victims had been loyal to the adverse party of the armed conflict.[421] By using the term 'loyal', the WCC

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[418] *Prosecutor v Milutinovic et al.*, (Judgment, Trial Chamber) ICTY IT-05-87 (26 February 2009), para. 1217.

[419] P. 26 of the judgment.

[420] *Prosecutor v Tadic*, (Judgment, Appeals Chamber) ICTY IT-94-1-A (15 July 1999) (hereinafter: *The Tadic* case), paras. 166 and 168. Likewise*, Prosecutor v Delalić et al. (Čelebići case),* (Judgment, Appeals Chamber) ICTY IT-96-21-A (20 February 2001), paras. 73 and 98; *Prosecutor v Blaskic*, (Judgment, Appeals Chamber) ICTY IT-95-14-A (29 July 2004)*,* para. 634.

[421] "The victims were civilians [..] who did not represent any real threat to the safety of the defendant and other KLA members. The only reason for their treatment in such manner was their ethnicity [..] under the assumption

appeared to implicitly assert that the allegiance, and not the nationality test, is the legal test applicable to determine who is a protected person. As the allegiance test had been applied only by the ICTY, and not without criticism,[422] it would have been appropriate had the WCC elaborated on this issue and provided an explicit stance on this question.

iii. Conviction

The WCC found that the acts of Lekaj that included rape, murder, torture, and illegal detention violated both the rules of international armed conflict and non-international armed conflict.[423] Although this finding is not accurate, and only the rules of non- international armed conflict apply, i.e common Article 3 of the Geneva Conventions and Additional Protocol II, the final result remained the same, as Lekaj's acts were all illegal according to the law of non-international armed conflict, and therefore complied with the requirement of Article 142 of the FRY Criminal Code.

iv. Final remarks

The trial of Lekaj was handled relatively fast, without encountering internal political obstacles. The Belgrade Humanitarian Law Centre, which monitors the war crimes trials and represents the victims in most cases, was at first criticizing the fact that the case was held before a Serbian court and not before a court in Kosovo. At the same time, at the end of the trial it concluded that a fair trial was conducted, and the main problem encountered was a number of witnesses from Kosovo refusing to testify in Belgrade.[424] Indeed, it may not be a coincidence that the first convict of the WCC was an Albanian from Kosovo in a case in which the victims were Serbs. As the WCC has jurisdiction over crimes regardless the nationality of the perpetrator, this choice contributed to legitimatize its function within its society, before rendering

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that they collaborated with Serbs [..] and hence KLA members considered them *disloyal* to them." *The Lekaj Judgment* (n 411), p. 39.

[422] See M. Sassòli and L.M. Olson, 'The Judgment of the ICTY Appeals Chamber on the Merits in the Tadic Case' (2000) 82 International Review of the Red Cross 839, p. 741.

[423] The WCC mentions Article 3(1) and Article 27 (1) and (2) of the Fourth Geneva Convention of 1949, Articles 51, 75 and 76 of the Additional Protocol I of 1977, Article 4 (1) and (2) and Article 13 of the Additional Protocol I of 1977. *The Lekaj Judgment* (n 411), p. 39.

[424] Humanitarian Law Center press release, 'The Trial to Anton Lekaj was Fair Although Conducted Before a Non-Jurisdictional Court' (23 September 2006) <http://www-old.hlc-rdc.org/index.php/en/public-informationoutreach/press-releases/167-suenje-antonu-lekaju-je-bilo-pravino-mada-se-odvijalo-pred-nenadlenim-sudom-> (accessed 23 October 2011).

war crimes convictions against Serbians - which is today still politically and emotionally very sensitive.

3.2.2 The Scorpions case

Unlike Lekaj, the Scorpions case was a trial with significant political overtones, as it had the potential of bringing up the matter of Serbia's involvement in the Srebrenica genocide.[425] The WCC certainly did not ignore this fact. The case dealt with war crimes committed in July 1995 against civilian prisoners brought from Srebrenica to a place near the town of Trnovo in south-east Bosnia. The arrest of the accused in Serbia followed immediately upon the release of a video that documented the shooting of prisoners from Srebrenica by members of the paramilitary unit 'Scorpions' in a very brutal manner.[426] The video had been filmed by one of the members of the Scorpions, and ten years later, in 2005, it was screened for the first time before the ICTY. Reactions in Serbia to the screening of the video were immediate. The footage was aired on most of the television stations across the Balkans as well as around the world and had a strong impact on Serbian public opinion. Serbian authorities arrested the paramilitary members shown in the video, including the Scorpions' commander, and their trial commenced on 20 December 2005.

The video became the key evidence in the criminal trial of the Scorpions in Belgrade, but not only there. Between 2005 and 2007, this video evidence was at the centre of major international proceedings before two international jurisdictions – the ICTY and the ICJ – in cases relating to the genocide committed in Srebrenica. These cases raised not only complex legal questions, but also significant political issues. Hence, the Scorpions case represents a particular legal situation, in which different international and national jurisdictions dealt with similar facts, and provides us with a rare opportunity to examine their interplay. The next part presents the international courts' findings relating to the Scorpions unit that were rendered before the Belgrade court's ruling, so the WCC's decision could be assessed in light of them.

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[425] On 2 August 2001 Bosnian Serb Army General Radislav Krstic was the first person to be convicted of genocide by the ICTY. The Appeals Chamber ruled that Krstic should have been convicted only of aiding and abetting genocide, but it confirmed the finding that genocide had taken place in Srebrenica.

[426] The video footage shows six prisoners first brought by the truck, disembarked by the Scorpions members and then led up a hill and into a clearing where they are shot from behind, two by two, by the Scorpions. The entire version of the film is available at: <www.bosniafacts.info/web/trnovo_execution_video.php> (accessed 12 September 2009).

i. The Scorpions video before the ICTY and the ICJ

The Scorpions video was screened for the first time on 1 June 2005 before the ICTY Trial Chamber of the Milošević trial, during the cross examination of a defence witness. Carla Del Ponte, the ICTY Chief prosecutor at that time, describes the screening:

> The film Shows a Serbian Orthodox priest blessing members of the paramilitary unit known as the Scorpions … which was affiliated with the Serbian Ministry of the Interior…The monitors showed the six young prisoners led up a hill and into a clearing with tall grass. Two by two, they were shot from behind….[427]

By showing the video, the prosecution strategy aimed to prove that the Scorpions had taken active part in the Srebrenica massacres, and to establish that they had acted as de facto agents of the Serbian Ministry of the Interior.[428] If the control of Serbia over the Scorpions was proven, Milošević could be held criminally responsible for committing the genocide in Srebrenica through the doctrine of command responsibility and/or his participation in a joint criminal enterprise as a co-perpetrator.[429] The ICTY Chief Prosecutor affirmed that the prosecution had obtained the necessary evidence to establish, according to the overall control test,[430] the link between the Scorpions and the central command in Belgrade. She referred

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[427] C. Del Ponte & C. Sudetic, *Madame Prosecutor: Confrontations With Humanity's Worst Criminals and the Culture of Impunity* (Other Press, New York, 2009), p. 322. See also p. 32138 of the transcript of the hearing in the

Prosecutor v Slobodan Milošević, ICTY IT-02-54 *"Kosovo, Croatia and Bosnia"* on 1 June 2005 (hereinafter: The Milošević transcript): "M. Nice [ICTY prosecutor]: I'm suggesting this film shows Scorpions executing prisoners from Srebrenica. Mr. Stevanovic [defense witness]: I am upset, I have to say that this is one of the most monstrous images I have ever seen on a screen. Of course I have never seen anything like this in live." Available at: <http://icr.icty.org/LegalRef/CMSDocStore/Public/English/Transcript/NotIndexable/IT-02-54/TRS2375R0000127803.doc> (accessed 23 October 2011).

[428] The Milošević Transcript, *Ibid*, pp. 40251, 40260, 40267.

[429] *Prosecutor v Slobodan Milošević,* (Amended indictment, Bosnia and Herzegovina) ICTY IT-02-54-T (22 November 2002), para. 32. For further analysis see E. van Sliedregt, 'Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide' (2007) 5 Journal of International Criminal Justice 1, pp. 184-207.

[430] The ICTY set the 'overall control' test to establish which organ constitutes a de facto state agent in *The Tadic* case (n 420)*,* para. 160. This test differs from the test established by the International Court of Justice.

especially to the secret minutes of the FRY Supreme Defence Council.[431] The minutes and other secret files were provided to the ICTY by the Serbian authorities on condition that they would remain confidential and used only at the trial before the ICTY. Therefore, the ICTY had afforded this evidence protective measures for 'national security criteria', according to Article 54 bis of the ICTY rules of procedures, in a confidential decision of 5 June 2003.[432] As Milošević died on March 2006, a few months before the close of the hearings in his trial, a final ruling on this question was never rendered. Since, the evidence has remained in ICTY's files without having been made public.[433]

In parallel, the International Court of Justice (ICJ) had to determine whether Serbia bore state responsibility for genocide in Bosnia and Herzegovina. Bosnia presented the video of the Scorpions to the court in January 2006:

> There was no denial of the fact of the relocation of the "Scorpions" to Trnovo. The Applicant during the oral proceedings presented video material showing the execution by paramilitaries of six Bosnian Muslims, in Trnovo, in July 1995. [434]

The applicants aimed to prove the de facto link between the unit and the Serbian state to attribute the acts of the Scorpions, including the massacres at Srebrenica, to the FRY according to the principles of state responsibility. Unlike the ICTY, the ICJ applied the effective control test to define who was a de facto state agent, as it had already established in the Nicaragua case.[435] Bosnia requested the ICJ to call upon Serbia and Montenegro, to produce 'the

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[431] C. Del Ponte & C. Sudetic (n 427), pp. 173, 202, 357. This was also affirmed by Florence Hartmann, a former spokesperson of the ICTY Office of the Prosecutor, in F. Hartmann**,** *Paix et Châtiment. Les guerres Secrètes de la Politique et de la Justice Internationales* (Flammarion, Paris, 2007), pp.103-104, 114-122.

[432] F. Hartmann, *Ibid*, p. 122. On 14 September 2009 Florence Hartmann was convicted of contempt of the Tribunal by the ICTY for revealing these facts. *The Case against Florence Hartmann*, (Judgment on Allegations of Contempt) ICTY IT-02-54-R77.5 (14 September 2009).

[433] Yet, the ICTY Chamber found that there were prima facie evidence to establish Milošević's responsibility in committing genocide. *Prosecutor v Slobodan Milošević*, (Decision on Motion for Judgment of Acquittal, Trial Decisions) ICTY IT-02-54-T (16 June 2004).

[434] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment), ICJ Report 2007, p. 43, para 289 <www.icj-cij.org/docket/files/91/13685.pdf> (accessed 10 September 2009) (hereinafter: *The ICJ Genocide* case).

[435] In *The ICJ Genocide* case, the Court tried to reconcile its previous *Nicaragua* judgment and the ICTY *Tadic* judgment, by stating that the test applicable to determine state's responsibility (effective control) can differ from

"redacted" sections of documents of the Supreme Defence Council of the Respondent, i.e. sections in which parts of the text had been blacked out so as to be illegible'.[436] The ICJ refrained from doing so, arguing that Bosnia 'has extensive documentation and other evidence available to it, especially from the readily accessible ICTY records'.[437] Judge Al Khasawneh in his dissenting opinion labelled this reasoning as " worse than its failure to act", and he added that "it is a reasonable expectation that those documents would have shed light on the central questions of intent and attribution"[438]. Also Kandic points out that it is not clear why the ICJ did not engage in revealing all the necessary evidence.[439] On 26 February 2007, the ICJ held in its judgment that the act of genocide at Srebrenica could not be attributed to the FRY as, among other things, it had not been proven that the Scorpions were acting under its effective control.[440]

It remains unknown whether the evidence held by the ICTY would have satisfied the ICJ's effective control test and established the status of the Scorpions as de facto agents of the FRY (and whether this finding would have resulted in establishing the responsibility of the FRY for the Srebrenica genocide). At the same time, according to Carla Del Ponte and Florence Hartmann, the former spokesperson of the ICTY Prosecutor's Office, the protection provided to the FRY's Defence Council minutes on a national security basis by the ICTY was related also to the fact that at the same time the ICJ was dealing with the Genocide case. While the Serbian government accepted to provide the evidence related to the trial of Milosevic, one of Serbia's main concerns was that if it were found by the ICJ to be responsible for genocide, the compensation that it could be required to pay would destroy the country's economy. Therefore, the Serbian government wanted insurance that the evidence

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the one that determines individual criminal responsibility (overall control) (*Ibid*, paras. 402-405). This approach was previously rejected by the ICTY in *The Tadic* case (n 420), para. 104. See also A. Cassese, 'On the Use of Criminal Law Notions in Determining State Responsibility for Genocide' (2007) 5 Journal of International Criminal Justice 4, pp. 875-887; M. Sassòli and L.M. Olson, 'Prosecutor v. Tadic (Judgment), Case No. IT-94-a-A. 38 ILM 1518 (1999)' (2000) 94 American Journal of International Law 3, p. 575.

[436] *The ICJ Genocide* case (n 434), paras. 44, 205.

[437] *Ibid*, para. 206.

[438] Dissenting opinion of Judge Al Khasawneh, para. 35. See also Dissenting opinion of Judge Mahiou, para. 56.

[439] "Why the ICJ did not engaged in a thorough investigation, of the status of the Scorpions, why it did not deal with these papers which contain the data [..] why the judges did not look for additional evidence providing the participation of the MUP of Serbia in Trnovo" ; Humanitarian Law Center, 'Regional Debate on the Judgment by the ICJ on Genocide' (Transcript) (29 June 2007), p. 37.

[440] *The ICJ Genocide* case (n 434), para. 395.

could not be used in the ICJ proceeding.[441] This revelation well illustrates that political pressures bring international courts too to make compromises, and that fact-finding is not merely a neutral task of revealing the truth, but often involves political decisions.[442] Such pressures at international level, which can be fairly expected to be even more influencing on the national jurisdiction, frame the limits of the rule of law within the international legal order, and demonstrate the deficiency of the potential impact of these international jurisdictions on the Belgrade court. This deficiency occurred not only because of the factual background that remains blurred following the ICTY protective measures, but, more troublingly, because of the international jurisdictions' divergence on the doctrinal level. Both international jurisdictions were required to rule if the paramilitary unit was a *de facto* State organ of the FRY. The Belgrade WCC would be required to rule on the same issue. As remarkable as it may be perceived far away from the Hague, each international jurisdiction applied a different legal test to establish whether the Scorpions are a *de facto* state organ. As a result, the legal message sent from the Hague is that the legal test to determine *de facto* state organ depends on the jurisdiction that is required to apply it. Which of these tests is supposed to be applied by the national court in Belgrade? As this answer was not provided by The Hague, Belgrade could simply choose the test that brought about the more convenient political result.

ii. The Scorpions case before the Belgrade WCC

On 10 April 2007, less than two months after the ICJ rendered its judgment, the WCC convicted four members of the Scorpions, including their commander, but found no link between the Scorpions to the FRY, as it was claimed by the victims.[443] In the indictment it was alleged that the crime had taken place on 16 or 17 July 1995, that the accused, Slobodan Medic, commander of the Scorpions unit, had received an order by his superior from the

[441] See C. Del Ponte & C. Sudetic (n 427), p. 356-357 and F. Hartmann (n 431), p.159-162.

[442] M. Shapiro (n 148), p. 42.

[443] War Crimes Chamber of the Belgrade District Court, *Slobodan Medić et al. (Scorpions case)*, (Judgment) Case No. K.V. 6/2005 (10 April 2007) (hereinafter: *The Scorpions* case). Slobodan Medic, the commander of the Scorpions, and Branislav Medic, were sentenced to 20 years in prison. One of the accused who pleaded guilty, was sentenced to 13 years, and the last one, convicted for aiding and abetting, was sentenced to five years imprisonment, the minimum sentence prescribed for war crimes In 2008, the Supreme Court reduced the term of imprisonment of Branislav Medić from 20 to 15 years. For criticism on the level of punishments see B. Ivanišević, 'Against the Current—War Crimes Prosecutions in Serbia (2007)' International Center for Transitional Justice (2008), p. 17 (hereinafter: The ICTJ report).

Army of Republika Srpska to execute the prisoners, and that the prisoners who were shot had been brought from Srebrenica. However, in its ruling, the WCC portrayed the acts documented in the video as an isolated incident, while the broader context of the war and the massacres in Srebrenica, was totally lacking. The WCC ruled that it could not establish if the unit had received an order from a higher command from Republika Srpska, the exact date of the commission of the crime, and whether the victims arrived from Srebrenica, although the victims' family members who testified confirmed that all the victims had been from Srebrenica and that they had disappeared shortly after Serbian forces had entered the town on 11 July 1995. Unlike the ICTY, which qualified the conflict in Bosnia in some of its judgments as international, whereas in others did not qualify it at all, the WCC qualified the conflict in Bosnia in 1995 as a non-international armed conflict.[444] In its conclusion it also ruled that the Scorpions had been subordinated only to the army of the Bosnian Serb entity Republika Srpska, and clearly established that the army of Republika Srpska had no connection with the FRY, without specifying what legal test it applied in reaching this conclusion. According to the court, no proof was shown that pointed at the formation, organization and function, as well as status or belongings of the Scorpions unit, on the basis of what it could have been determined that the unit Scorpions was formed as a special unit of the Ministry of the Interior of Serbia.[445] While an accurate legal analysis would have required a reference to one of the doctrines, especially, given the possibility that future ICTY ruling will bring to new findings, it referred only to whether the evidence was reliable:

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[444] See *The Scorpions* case, *Ibid*, para. 13.3. After establishing in *Tadic* that the FRY exercised overall control over the army of Republika Srpska, the ICTY qualified the conflict in Bosnia as an international armed conflict. In *Milošević*, the ICTY prosecution also qualified the conflict as an international armed conflict, see *Prosecutor v Milošević,* (Second Amended indictment) ICTY IT-02-54-T (22 November 2002). Yet, the ICTY qualification of the conflict as international was not without contestation See T. Meron, 'Classification of Armed Conflict in the Former Yugoslavia, Nicaragua's Fallout' (1998) 93 American Journal of International Law 2, pp. 237-239; See also M. Sassòli and L.M. Olson (n 435), p.575.

[445] *The Scorpions* case, *Ibid*, para. 13.4. According to the Belgrade Humanitarian Law Center, 'in reaching its Decision the Trial Chamber was clearly influenced by political rather than judicial reasons'. This is reflected in its intention to adjust its position to that of Serbia's authorities with respect to the genocide in Srebrenica in the context of the International Court of Justice decision'. Humanitarian Law Center, 'War Crimes Trials in Serbia' (December 2007), pp. 7-8 (hereinafter: War Crimes Trials in Serbia) <www.hlc-rdc.org/uploads/editor/War%20Crimes%20Trials%20in%20Serbia%20Report.pdf> (accessed 12 September 2009).

> There have been no written proofs shown to the Court as an official act, to point at the formation, organization and function, as well as status or belongings of this unit, on the basis of what it could have been determined that the unit "Scorpions" was formed as a special unit of MUP of Serbia… None of the authority organs who mentioned the link between the "Scorpions" and the MUP of Serbia delivered to the Court any official documents whether the original or not, but only operative information… the Court couldn't establish any link between the "Scorpions" and the MUP of Serbia in this specific period.[446]

iii. Final remarks

Although it convicted four Serbs originally from Croatia, members of the paramilitary unit "Scorpions"[447], the WCC ruled that being under the sole command of the army of *Republika Srpska*, no link between the paramilitary unit Scorpions and the state of Serbia could be established. The Scorpions' crimes were portrayed as an isolated act, lacking any reference to the broader context of this time and place – the ongoing Srebrenica genocide.[448] According to the Belgrade Humanitarian Law Center, the victims, who gave testimonies, confirmed that all the victims were from Srebrenica and that they had disappeared shortly after Serbian forces entered

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[446] Paragraph 13.4 of the WCC decision. According to the Belgrade Humanitarian Law Center "The Trial Chamber accepted [..] that the Scorpions unit is considered to be a paramilitary formation. Such an allegation is contrary to the evidence, primarily the documents of the ICTY, which were presented as evidence before the Trial Chamber, the statement of witness Tomislav Kovač, a former Minister of Interior of the Republika Srpska, who did not dispute the claim that he and his colleagues signed telegrams and reports describing the Scorpions unit as a MUP Serbia Unit or a unit of the Department of Internal Affairs of the Republic of Serbia. [..] In reaching its Decision the Trial Chamber was clearly influenced by political rather than judicial reasons. This is reflected in its intention to adjust its position to that of Serbia's authorities with respect to the genocide in Srebrenica in the context of the International Court of Justice Decision." War Crimes Trials in Serbia, *Ibid*, pp. 7-8.

[447] *The Scorpions* case (n 443). Slobodan Medic, the commander of the Scorpions, and Branislav Medic, were sentenced to 20 years in prison. One of the accused who pleaded guilty, was sentenced to 13 years, and the last one, convicted as an accomplice, was sentenced to five years imprisonment, the minimum sentence prescribed for war crimes In 2008, the Supreme Court reduced the term of imprisonment of Branislav Medić from 20 to 15 years. For critics on the level of punishments, see The ICTJ report (n 443), p. 17, fn 56; War Crimes Trials in Serbia (n 445), p. 7.

[448] On 2 August 2001 Bosnian Serb Army General Radislav Krstic was the first person to be convicted of genocide by the ICTY. According to the Trial chamber it had been proved "beyond any reasonable doubt that a crime of genocide was committed in Srebrenica." The Appeals Chamber ruled that Krstic should have been convicted only of aiding and abetting genocide, but it confirmed the finding that genocide had taken place in Srebrenica.

the town on 11 July 1995 and "the position of the Trial Chamber can only be explained by political motives whose objective is to separate the execution of the six Bosniak civilians from the killing of 8,000 Bosniaks from Srebrenica in the period from July 11 to July 19, 1995"[449]. In this case, although the convicts are Serbs, the WCC ruling was in line the political interest of the State, as it did not engaged in connecting their acts with the broader context of genocide that was ongoing at that time and place, nor establishing any linkage with the central command in Belgrade. At the same time, the national court was not operating in a legal vacuum. On the contrary, the international jurisdictions themselves, the ICJ and ICTY, provided the legal tools on doctrinal and factual level to reach this politically convenient ruling.

3.3 Patterns and Trends

The deconstruction of these cases reveals that both serve the interest of the State well. In easy cases, such as the Lekaj case, the WCC legitimizes its institutional function in the eyes of its own society and the international community. This legitimacy is an important interest of Serbia in its post-conflict era. At the same time, in hard cases, such as the Scorpions', the court cannot establish direct involvement of the prior government in the commissioning of the Genocide in Srebrenica. This also fits the interest of the government: some of the officials are still in the same positions as before the change of regime and, more generally, the society, has not yet accomplished the revision of its national historical narrative and maintains a high level of sensitivity on this issue.

3.3.1 The ability of the WCC to enforce international law

The Lekaj and Scorpions cases reveal two observations related to the capacity of the WCC to apply international law as required by rule of law doctrine. First, it can be noticed that the level of international humanitarian law expertise of the judges is falling short. In the Serbian legal framework, in which the WCC is explicitly required by the Serbian criminal code to apply international law in order to convict alleged war criminals, knowledge of international

[449] War Crimes Trials in Serbia (n 445), p. 7; see also The ICTJ report (n 443), p. 16, fn 93. It is interesting to note that another domestic court was dealing with the Scorpions video. In 2005 the Court of Zagreb, one of the four specially designated courts in Croatia for war crimes cases, tried Slobodan Davidovic, a Serb from Croatia, who was one of the members of the Scorpions shown in the footage. He was sentenced for the same crime to 14 years of imprisonment.

law is a fundamental requirement from a domestic perspective. Yet, as demonstrated in Lekaj, international treaty law is not accurately applied and references to international jurisprudence and customary law are lacking. At the same time, judges seriously engage in referring to international treaty law, although not always explicitly or accurately, and perceive it as an authoritative legal framework. Such application of international law is a matter of lack of skills and of a legal tradition that often sees international law merely as a required referencing formality, rather than a result of a negative stance towards international law or the ICTY, on whose experience and evidentiary material the WCC relies a lot.[450] Therefore, this problem can be resolved by improving skills and knowledge of the legal practitioners and by developing a legal culture in which judgments address not only factual, but also legal questions.

A second observation relates to the capacity of the court to reconcile political goals with valid international legal arguments. National courts in post conflict situation are supposed to combat impunity and international law is supposed to provide them a neutral framework to effectuate this task. At the same time political choices made by the judges while interpreting the law or establishing the facts are an integral part of the international rule of law as long as the positive law is not distorted and the legal framework is respected. [451] While both international and local courts may be influenced by political pressure and interests, as the Scorpions case may demonstrate, the striking difference between them is their material capacity to incorporate these political goals into the legal framework of international law. For example, it can be argued (although not affirmatively confirmed) that the ICTY and the ICJ relied on two distinct control doctrines in order to reach a desired conclusion in light of the evidence at their disposal. At the same time, each jurisdiction provided an extensive legal argument in support of their political choice. In contrast, the WCC relied almost exclusively on fact-finding and did not develop any legal justification on a doctrinal level. While the WCC's final conclusion is predictable as a matter of policy, the absence of doctrinal argumentation seems to be related to the judges' professional deficiency, as the court could have easily relied on the ICJ ruling to attain the result it opted for. Yet, having relied on a poor legal basis, the apologist role of the court is more evident.

[450] S. Weill and I. Jovanovic (n. 386), p. 264.

[451] M. Koskenniemi (n 20) pp. 590-596.

3.3.2 The willingness of the WCC to apply international law

In a post-conflict society, rule of law reform needs to be capable of serving justice at all sides of the conflict – however unpalatable politically. It is fundamental that the law is enforced in an equal manner without having national interests prevail that could lead to a double standards application. Having said that, one should be conscious of the limits of the court as a state institution. When the legislative framework promotes equal enforcement of international law – as it does in the case of Serbia – it is fundamental to observe whether international law is enforced in equal manner irrespective of who is the victim and perpetrator, or whether the courts use double standards in their application of international law. In the case of the latter, does the double standard phenomenon result from institutional deficiency of the judiciary and lack of independency, or from a policy of restraint of the courts that is, to a certain extent, predictable and inevitable in order to safeguard their legitimacy at the domestic level? The trial of Lekaj, in which the court was judging the conduct of what the majority in Serbia perceived as the enemy side, was handled relatively fast, without encountering internal political obstacles. Having in mind that only a few cases were completed in several years – as a number of them being remanded for re-trial by decisions of the previous Supreme Court of Serbia, which were considered by many observers as dubious[452] – it may not be a mere coincidence that the first conviction of the WCC confirmed on appeal was an Albanian from Kosovo in a case in which the victims included a Serb. While this choice could be perceived as a double standards attitude exercised by the court, its motivation could have related to legitimate institutional considerations: this first case could contribute to the perception of legitimacy of the court within Serbian society – a legitimacy that needed to be acquired in order to secure its future institutional function, as war crimes convictions against Serbs are still politically and emotionally very sensitive.

At the same time, the Scorpions case well portrays the limits of the Belgrade court. Although the WCC convicted four Serbian members of the paramilitary unit Scorpions, the WCC ruling was in line with the political interest of the state, as it did not engage in

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[452] There are reports suggesting that the decisions of the Supreme Court in quashing several first instance convictions against Serb defendants went against facts established at the trial in an attempt to avoid taking unpopular responsibility to confirm convictions of Serbs. The ICTJ Report (n 443), pp.18-19 and fn 80; Human Rights Watch, 'Unfinished Business Serbia's War Crimes Chamber' (HRW Report, 28 June 2007), pp. 30-31 <www.hrw.org/en/reports/2007/06/28/unfinished-business> (accessed 24 October 2010).

connecting the defendants' acts with the broader context of genocide that was ongoing at the time and place, nor establish any link with the command in Belgrade. The Scorpions' crimes were portrayed as an isolated act, lacking any reference to the ongoing Srebrenica genocide.[453] Yet, the outcome of the ruling was predictable and it seems that such restrictions on the rule of law are still inevitable. In the Balkans' post conflict political context, as it would have probably been in any other place, it is hardly imaginable that a national court would reach a ruling that would engage such a far-reaching outcome as a link to the commission of genocide in opposition to the state's official narrative. National courts of democratic states with a long tradition of judicial independency have developed different self-restraint doctrines, such as the act of state doctrine or the political question doctrine (see in the next chapter), in order to avoid rendering rulings on issues with colossal political consequences. Emerging democratic states in a post-conflict era have to deal on a daily basis with sensitive issues of reconciliation and to surmount numerous economic obstacles and other difficulties. Their courts are supposed to take these fragilities into account, probably more and certainly not less that any other court in a stable and powerful state. Therefore, in post-conflict societies, the judiciary alone cannot provide the required justice reform unless it is supported by other mechanisms that reinforce its local position.

4. Concluding Observations

As this chapter shows, the courts legitimize States' acts and policies even if this involves a distortion of the law. It is suggested that this kind of application of international humanitarian law must remain outside the valid choices available under the rule of law. Misuse of international law by national jurisdictions may have far-reaching negative consequences beyond the specific facts of the case over the long term as this promotes development of bad law, which runs the risk of being cited and adopted by other national jurisdictions. Given that political objectives are to a certain degree irresistible, the following chapters proposes other ways, which may be more acceptable from the rule of law perspective, to address these political constraints.

[453] As the NGOs observing the trial reported: "the position of the Trial Chamber can only be explained by political motives whose objective is to separate the execution of the six Bosniak civilians from the killing of 8,000 Bosniaks from Srebrenica in the period from July 11 to July 19, 1995." War Crimes Trials in Serbia (n 445), p. 7, fn 82; see also The ICTJ report (n 443), p. 16, fn 80.

CHAPTER III

Avoiding the Application of the Law

> International law dealing with the army's duties toward civilians during an armed conflict has been discussed, for example, by the international criminal tribunals for the former Yugoslavia and Rwanda. These courts have examined the legal aspects of the conduct of armies. … Why do those questions, which are justiciable in international courts, cease to be justiciable in national tribunals?
>
> *Justice Barak, Israel High Court of Justice*[454]

Access to court is a constitutional right in democratic states, and an important pillar of the international rule of law. Although "[t]here is always a legal norm according to which the dispute can be solved",[455] judges in domestic courts in common law states have developed avoidance doctrines, which would permit them to refrain from exercising competence despite jurisdiction being otherwise established, which results in shielding states from judicial scrutiny before domestic courts. These include the US "act of state" doctrine, which was labelled by Lord Nicholls a "self-denying principle"[456] and the "political question" doctrine, better known in the UK as the *Butts* non-justiciability principle. Similarly, also domestic doctrines on immunity, such as the UK act of State and combat immunity, serves to achieve an equivalent goal.[457] A common feature is that all are based on the principles of equality

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[454] HCJ 769/02, *The Public Committee against Torture in Israel et al. v The Government of Israel et al*., (2006), para. 53 (In English at <http://elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.pdf> (accessed 20 October 2011)) (hereinafter: *The Targeted Killings* case).

[455] *Ibid.*, para. 48

[456] *R v Bow Street Metropolitan Stipendiary Magistrate Ex parte Pinochet Ugarte (No.1)* (1998) 3 WLR 1456 (HL 1998), p. 117 (hereinafter: *The Pinochet No.1* case) <http://www.bailii.org/uk/cases/UKHL/1998/41.html> (accessed 15 March 2011).

[457] However, the international rule on State immunity is of a different nature. Unlike the act of state or the political question doctrines, State immunity is not a domestic judge-made rule on justiciability (or admissibility) but an international law procedural rule that limits courts' jurisdiction, which is based on the founding principle of equality of nations set in the UN Charter. See A. Bianchi, 'Serious Violations of Human Rights and Foreign States' Accountability Before Municipal Courts' in L. Vohrar (ed), *Man's Inhumanity to Man. Essays in Honour of Judge Antonio Cassese* (Kluwer Law International, The Hague/London/Boston, 2003), p. 164. For a further discussion on international State immunity and domestic immunity doctrines, see Chapter 5.

between sovereign states and comity between nations, and guarantee the need for a nation to speak in "one voice" not to "embarrass" the executive in its conduct of foreign affairs.[458]

Through the application of avoidance doctrines, or their rejection, courts design their own role in applying international humanitarian law. Following the courts' decision to avoid enforcement of international humanitarian law, the legal question remains outside the realm of justice and is left to the political arena. Recourse to avoidance doctrines may be justified in light of the difficulty to assess evidence in foreign affair cases and to apply legal standards on policy questions, as well as the question of expertise of judges in these matters and the institutional fear of judges that a decision will be ignored by the executive.[459] However, they usually also serve political goals, which are not always made public. It thus allows courts to decline jurisdiction, and provides an avenue for judicial deference to the executive branch in questions involving matters of international humanitarian law –often referred to by courts, in this preliminary stage of the proceedings, not as a branch of law but as *foreign policy* - a category referred to as "highly suspect" by Professor Thomas M. Franck Franck.[460] When courts choose not to pronounce on the legality of a state's action, or to denounce its possible illegality, they do not confer explicit legitimacy upon the executive nor grant legal justification to its acts, but they shields the state from judicial review and allows it to pursue its political objectives without limitations imposed by law. Therefore, when a case is declared by the court as non-justiciable, it may appear that the judiciary is not only deferring to the political branch, it is also implicitly condoning the action. Deeper examinations of cases in which these doctrines are not applied – through their rejection or by defining their exceptions – support this assumption. Study has shown that a court is more likely to render a decision on the merits in cases involving foreign relations or military affairs, when the case results in a finding in favour of the State.[461]

The following chapter discusses in part 1 the origin and development of two of those avoidance techniques – the act of state and the political question doctrines - and demonstrates, in part 2, through case studies, how these doctrines are applied and which policy purposes are achieved.

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[458] J. Davis, *Justice across Borders: The Struggle for Human Rights in U.S. Courts* (Cambridge University Press, Cambridge, 2008), p. 140.

[459] T.M. Franck (n 211), pp. 45- 60.

[460] *Ibid*, p. 8.

[461] J. Yates and A. Whitford, 'Presidential Power and the US Supreme Court' (1998) 51 Political Research Quarterly 2, pp. 539-550.

1. The Construction of Avoidance Doctrines

1.1 The US act of state doctrine

> The act of state doctrine depends on public policy as perceived by the courts.[462]

The act of state doctrine is a justiciability doctrine developed by judges in US courts and applied in the courts of other common law states.[463] In its traditional formulation the doctrine precludes courts from inquiring into the validity of the public acts of a foreign sovereign power committed within its own foreign territory. The classical definition in American jurisprudence w as formulated by Justice Fuller in *Underhill v. Hernandez* (1897):

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on these acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.[464]

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[462] *The Pinochet No.1* case (n 456), (Lord Steyn, para. 4).

[463] I. Brownlie, *Principles of Public International Law* (7th edn, Oxford University Press, New York, 2008), p. 504; A. Cassese, *International Law* (2nd edn, Oxford University Press, New York, 2005), p. 99. In *Habib v Commonwealth of Australia* (2010) FCAFC 12 (25 February 2010) (hereinafter: *The Habib* case), the court recognised its applicability in Australia. As a matter of terminology a distinction should be made between the US and the UK act of state. The British act of state relates to the non-justiciable nature of the Crown's acts abroad ("An action done outside the jurisdiction by the Crown in exercise of the royal prerogative can give no rise to a claim. The plea of act of state does not make an unlawful act lawful: it prevents the courts from having cognisance of it"). See *Nissan v Attorney General*, (1970) AC 179; (1969) 1 All England Law Reports 629, para. 235 (hereinafter: *The Nissan* case).

[464] *Underhill v Hernandez*, 168 U.S. 250 (1897), p. 252 (hereinafter: *The Underhill* case). See also from the same period *Oetjen v Central Leather Co.*, 246 U.S. 297 (1918), p. 303-304 (hereinafter: *The Oetjen* case). The roots of that doctrine are found in England as early as 1674, *Blads v Bamfield*, 3 Swan 603, 604 (1674); *Duke of Brunswick v King of Hanover*, (1848) 2 HLC 1, p. 22: "if it be a matter of sovereign authority we cannot try the fact whether it be right or wrong [..]. No court in this country can entertain questions to bring sovereigns to account for their acts done in their sovereign capacities abroad." The leading English case is *Luther v Sagor*, (1921) 3 K.B. 532, 548. For a detailed historical review see M. Zander, 'The Act of State Doctrine' (1959) 53 The American Journal of International Law 4, pp. 826, 828-833; M. Bazyler, 'Abolishing the Act of State Doctrine' (1986) 134 University of Pennsylvania Law Review 325, pp. 331- 344.

The modern notion of act of state doctrine emerged from three other US Supreme Court cases rendered between 1964 and 1976, most notably the case of *Banco Nacional de Cuba v. Sabbatino*.[465] These were civil cases that dealt with the nationalisation of American assets by Cuba in the aftermath of the Cuban revolution. Nonetheless, the principles enunciated in *Sabbatino* have been cited in all the cases in which the act of state doctrine has been invoked, which were not necessarily expropriation cases – whether in the US or around the world. More recently, in *Kirkpatrick,* the US Supreme Court ruled that the act of state doctrine "requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid".[466]

The doctrine has its roots in "sound policy reasons"[467]. Based on the traditional assumption that the nation should speak in one voice – that of the State - in matters concerning foreign affairs,[468] the act of state doctrine is designed to avoid embarrassing the executive in its conduct of foreign relations and to reflect the proper distribution of powers between the judicial and political branches of Government. Originally, the doctrine was founded on the principles of comity,[469] while in recent formulations there was a shift in focus from the notions of sovereignty and the dignity of independent nations to concerns related to preserving the relationships between branches of government in a system of separation of powers.[470] However, the separation of powers rationale has been criticised in legal academia,

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[465] *Banco Nacional de Cuba v Sabbatino*, 376 U.S. 398 (1964) (hereinafter: *The Sabbatino* case). *Sabbatino* is the landmark case from contemporary jurisprudence on the act of state doctrine that provides its formulation and interpretation in the US (§443(a) *Restatement [Third] of Foreign Relations Law of the United States*). The two cases that followed *Sabbatino* are *First National City Bank v Banco Nacional de Cuba*, 406 U.S. 759 (1972) (hereinafter: *The First National City Bank* case) and *Alfred Dunhill of London, Inc. v Republic of Cuba*, 425 U.S. 682 (1976).

[466] *Environmental Tectonics Corp. v W. S. Kirkpatrick Inc.,* 110 S.Ct. 701 (1990), p. 707 (hereinafter: *The Environmental Tectonics* case).

[467] *The Sabbatino* case (n 465) (Dissenting opinion of Judge White).

[468] For the origin of this concept see L. Collins, 'Foreign Relations and the Judiciary' (2002) 51 International and Comparative Law Quarterly 3, pp. 485-510. R. Falk (n 5), p. 92 (questioning why the "national interest" is necessarily that the nation would speak in one voice).

[469] *The Underhill* case (n 464).

[470] See, e.g.: "The act of state doctrine embodies the purely prudential concern that judicial inquiry into the validity of a foreign nation's sovereign acts may interfere with Executive and Congressional foreign policy efforts." *The Sabbatino* case (n 465), *op. cit.*: "courts are required to decline to exercise jurisdiction over cases that may embarrass or impede the political branches of government in their conduct of foreign affairs." *The Environmental Tectonics* case (n 466), p. 1058. In *Sabbatino* the US Supreme Court stated that the doctrine

and was identified "more as an excuse than a reason for the judicial disinclination to implement international norms."[471] In fact, this rationale could lead to the opposite conclusion: the avoidance doctrine itself violates the separation of power principle since the policy choice over the scope of jurisdiction belongs to the legislative and not to individual judges.[472] Indeed, the application of the act of state doctrine may actually violate the separation of powers between the executive, legislative, and judicial branches of a government that requires courts to decide cases independently from the executive or legislative branches. For if the court automatically follows the pronouncement of the executive, it thereby allows the executive to replace the court in its role of deciding in a judicial matter.

Scope of application

Sabbatino did not lay down "an inflexible and all-encompassing rule"[473] for the application of the doctrine. Instead it established a number of factors to be considered on a case-by-case basis, leaving a margin of appreciation for the court to decide on the matter. Thus, to what extent should a domestic court suspend its normal application of international law in order to avoid conflict with relevant executive policy is based on a balance test taking into consideration the following factors: (1) *International consensus on the international rule at issue*: "[T]he greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice". Professor Falk, in support of this factor, argued that any invalidation of a foreign act of State by a domestic court based upon a non-consensus rule of international law would be more a political decision than an authoritative judicial

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"arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations. The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere." *The Sabbatino* case (n 465), p. 423.

[471] E. Benvenisti (n 121), pp. 174-175. See also 'Judicial Enforcement of International Law Against the Federal and State Governments' (1991) 104 Harvard Law Review 6, pp. 1285-1287.

[472] M. Bazyler (n 464), p. 337.

[473] *The Sabbatino* case (n 465), p. 428.

opinion.[474] (2) *The impact on foreign relations*: where the impact on foreign relations of the international issues presented is minimal, the justification for application of the act of state doctrine is weak and it is more appropriate for the judiciary to render a decision in the case.[475] (3) *The continued existence of the government*: if the government which perpetrated the challenged act of state is no longer in existence "the danger of interference with the Executive's conduct of foreign policy is surely much less than the typical case where the act of state is that of the current foreign government."

These "Sabbatino factors" have been systematically considered by US courts and other national courts. In parallel, exceptions to the application of the doctrine have been developed, so courts could avoid the application of the doctrine and exercise their normal competence in certain cases. The exceptions precluding the applicability of the doctrine include the following two situations.

Exceptions: (i) Deference to State position

One of the first exceptions to the act of state doctrine is known as is the Bernstein exception, after the name of the case.[476] Bernstein, a German Jew, brought a claim after World War II before a US court to recover properties that had been expropriated by the Nazis. The second Circuit refrained from exercising its jurisdiction over the claim because of the act of state doctrine. After Bernstein obtained a letter from the State Department declaring that it was the Executive's policy to relieve American courts from the restraints of the act of state doctrine in cases involving Nazi expropriation, the Second Circuit changed its initial decision. Since then, the "Bernstein exception" has meant that when the State informs a court by letter that it has no objection to a decision on the merits, the courts are prevented from applying the act of state doctrine.[477] In the First National City Bank case, Justice Rehnquist found the directive from the Executive sufficient to prevent application of the act of state doctrine. He referred to the separation of powers argument of Sabbatino as the rationale for the application of the doctrine and stated that the only purpose of the doctrine

[474] R. Falk (n 5), p. 75.

[475] "Some aspects of international law touch much more sharply on national nerves than do others; the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches." *The Sabbatino* case (n 465), p. 428; See also *Doe v Unocal Corp.*, 110 F. Supp. 2d. 1294 (C.D. Cal. 2000), p. 354.

[476] *Bernstein v N.V. Nederlandische - Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375 (2d Cir. 1954).

[477] M. Bazyler (n 464), pp. 369-370.

was to prevent embarrassment to the executive. Thus, the different result of the application of the doctrine (Sabbatino) and its non-application (City Bank) "is primarily attributable to the different positions taken by the Executive in the two cases."[478]

This exception has been widely criticised by judges and scholars. Justice Brennan in *City Bank* stated that accepting immediately the state's position according to "the Bernstein exception" would be to renounce the court's role in the separation of powers doctrine and allow politics to rule.[479] Falk stated that intervention in international law cases "is itself a deprecation of the commitment to international law. The prestige of international law in domestic courts is undermined if its application depends upon a prior political authorization."[480] To date, this exception has not been validated by the Supreme Court and its continuing authority is doubtful.[481] However, the Executive continues to direct the judiciary through amicus briefs,[482] and lower courts were instructed by the Supreme Court in the Sosa case to give serious weight to the state's position in relations to the application of the act of state doctrine.[483]

(ii.) Flagrant human rights and humanitarian law violations

While the enforcement of the act of state doctrine may legitimated in certain situations, it has been argued that an exception to the doctrine should be made where there is a flagrant

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[478] *Ibid*, p. 340.

[479] See *The First National City Bank* case (n 465), pp. 790-793 (Justice Brennan dissenting): "The '*Bernstein*' exception relinquishes the function to the Executive by requiring blind adherence to its requests that foreign acts of state be reviewed. Conversely, it politicizes the judiciary. For the Executive's invitation to lift the act of state bar can only be accepted at the expense of supplanting the political branch in its role as a constituent of the international law-making community [..] Thus, it countenances an exchange of roles between the judiciary and the Executive […] The consequence of adopting the '*Bernstein*' approach would only be to bring the rule of law both here at home and in the relations of nations into disrespect. Indeed, the fate of the individual claimant would be subject to the political considerations of the Executive Branch. Since those considerations change as surely as administrations change, similarly situated litigants would not be likely to obtain even-handed treatment [..]. No less important than fair and equal treatment to individual litigants is the concern that decisions of our courts command respect as dispassionate opinions of principle. Nothing less will suffice for the rule of law. Yet the '*Bernstein*' approach is calculated only to undermine regard for international law."

[480] See also R. Falk (n 5), pp. 93, 136-137.

[481] It had intentionally avoided *The Sabattino* case ("This Court has never had occasion to pass upon the so-called Bernstein exception, nor need it do so now").

[482] M. Bazyler (n 464), p. 370.

[483] *Sosa v Alvarez-Machain at al.*, 542 U.S. 692 (2004) (hereinafter: *The Sosa* case).

violation of international law. [484] In this spirit, the Restatement (Third) of Foreign Relations Law of the United States (Revised) states:

> a claim arising out of an alleged violation of fundamental human rights, for instance, a claim on behalf of a victim of torture or genocide, would (if otherwise sustainable) probably not be defeated by the act of state doctrine, since the accepted international law of human rights is well established and contemplates external scrutiny of such acts.[485]

Recent decisions have developed this exception, even if on the merits the courts have proved more reluctant. A line of US cases established that *jus cogens* violations and other flagrant violations of human rights and humanitarian law should not be barred by the act of state doctrine, because these kind of acts can not be seen as sovereign acts of the state. This position was first developed in cases dealing with torture. In *Filártiga* (1980) the court held that the act of state doctrine does not apply to acts of torture under colour of law as this can not be an official act of state.[486] Similarly, in *Marcos*, the Court of Appeals that ruled that the alleged acts of torture and rape can not be seen as official acts:

> Because nations do not, and cannot under international law, claim a right to torture or enslave their own citizens, a finding that a nation has committed such acts … should have

[484] This could be seen as a formulation of the "consensus exception" formulated in *The Sabbatino* case, see G. Fox, 'Re-examining the Act of State Doctrine: An Integrated Conflicts Analysis' (1992) 33 Harvard International Law Journal 2, p. 531; M. Halberstam, 'Sabbatino Resurrected: The Act of State Doctrine in the Revised Restatement of U.S. Foreign Relations Law' (1985) 79 American Journal of International Law 1, pp. 85–86. See also Justice White in his dissenting opinion in *The Sabbatino* case (n 465), p. 444: "These cases [prior decisions of the Court] do not strongly imply or even suggest that the Court would woodenly apply the act of state doctrine and grant enforcement to a foreign act where the act was a clear and flagrant violation of international law."

[485] American Law Institute, 'Restatement of Foreign Relations Law of the United States' (1987), para. 443 cited, *inter alia*, by Lord Steyn in *The Pinochet No.1* case (n 456), p. 117.

[486] "We doubt whether action [of torture] by a state official in violation of the Constitution and laws of the Republic of Paraguay, and wholly ratified by that nation's government, could properly be characterized as an act of state." *Filartiga and Filartiga v Pena-Irala*, 630 F.2d 876 (2d Cir 1980), para. 39 (hereinafter: *The Filartiga* case).

> no detrimental effect on the policies underlying the act of state doctrine. Accordingly, the Court need not apply the act of state doctrine in this case.[487]

This position was reaffirmed in the context of alleged war crimes in *Karadic*[488], and more recently in *Rio*,[489] where the Court of Appeal also found that racial discrimination, being *jus cogens*, can not constitute official sovereign acts, and precluded the applicability of the act of state doctrine.[490] In March 2007, an Australian Federal court extended the exception to the act of state doctrine to include a grave infringement of human rights such as detention at Guantánamo Bay for more than five years without valid charges.[491]

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[487] Cited in *Doe v Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997), pp. 894–895 (hereinafter: *The Unocal I* case).

[488] "We doubt that the acts of even a state official, taken in violation of a nation's fundamental law and wholly ratified by that nation's government, could properly be characterized as an act of state." *Kadic v Karadzic*, 70 F.3d 232 (2d Cir. 1995), p. 250 (hereinafter: *The Kadic v Karadzic* case) <http://www.uniset.ca/other/cs5/70F3d232.html> (accessed 2 January 2012). See for other example: *Linder v Portocarrero*, 963 F.2d 332 (11th Cir. 1992), p. 336; *Flatow v Islamic Republic of Iran*, 999 F. Supp. 1 (D.D.C. 1998), p. 24; *Xuncax v Gramajo*, 886 F. Supp. 162 (D. Mass. 1995), p. 1859 (hereinafter: *The Xuncax* case); *Forti v Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987), p. 1541.

[489] This case involved illegal acts committed by the PNGDF during the civil war in Bougainville *Sarei et al. v Rio Tinto, PLC and Rio Tinto Limited*, 221 F. Supp 2d 1116 (CD Cal 2002), para. 161: "Where the commands do not involve acts of *legitimate* warfare … neither it nor the purported acts of torture, rape and pillage can be deemed official acts of state."

[490] "Acts of racial discrimination are violations of *jus cogens* norms [..] because '[i]nternational law does not recognize an act that violates *jus cogens* as a sovereign act,' the alleged acts of racial discrimination cannot constitute official sovereign acts, and the district court erred in dismissing these claims under the act of state doctrine." *Sarei et al. v Rio Tinto, PLC and Rio Tinto Limited*, 456 F.3d 1069 (9th Cir. 2006), para. 67 (hereinafter: *The Sarei 2006* case).

[491] *Hicks v Ruddock et al.*, (2007) F.C.A. 299 (8 March 2007), para. 91 (hereinafter: *The Hicks* case): "In *Kuwait Airways*, a clear acknowledged breach of international law standards was considered sufficient for the court to lawfully exercise jurisdiction over the sovereign act of the Iraq State. In that case, the clear breach of international law was the wrongful seizure of property. It is clear in the case before me that the deprivation of liberty for over five years without valid charge is an even more fundamental contravention of a fundamental principle, and is such an exceptional case as to justify proceeding to hearing by this Court."

1.2 The US political question doctrine

The political question doctrine requires abstention from the court "in issues of political delicacy in the field of foreign affairs".[492] Henkin defined political questions as "some issues which prima facie and by usual criteria would seem to be for the courts, will not be decided by them but, extra-ordinarily, left for political decision"[493]. In US academic literature, two approaches to the political doctrine can be identified. The *classical* formulation of the doctrine is a constitutionally based theory focusing on the principle of separation of powers.[494] Under this view of the doctrine, judicial abstention is required by the constitution: it is a doctrine rooted in the text and structure of the Constitution. For Wechsler, the main scholar who represents that approach, the courts had no basis for abstaining except where the Constitution could be interpreted as requiring them to abstain.[495] However, as "deciding whether a matter has in any measure been committed by the Constitution to another branch of government ... is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution"[496], some scholars have

[492] M.N. Shaw, *International Law* (5th edn, Cambridge University Press, Cambridge, 2003), p. 169. See also *The Oetjen* case (n 464), para. 302: "The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative — 'the political'— departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision;" *The Kadic v Karadzic* case (n 488), pp. 248–249: "We do not read *Filartiga* to mean that the federal judiciary must always act in ways that risk significant interference with United States foreign relations. To the contrary, we recognize that suits of this nature can present difficulties that implicate sensitive matters of diplomacy historically reserved to the jurisdiction of the political branches"; *The Tel-Oren* case (n 174), p. 803: "Questions touching on the foreign relations of the United States make up what is likely the largest class of questions to which the political question doctrine has been applied."

[493] L. Henkin, 'Is There a 'Political Question' Doctrine?' (1976) 85 Yale Law Journal 5, p. 599. "The foreign relations of the United States have provided a second group of leading cases commonly cited as instances of judicial abstention because the issues were political… They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." (p. 600).

[494] D. Cole, 'Challenging Covert War: The Politics of the Political Question Doctrine' (1985) 26 Harvard International Law Journal 1, p. 164.

[495] "The only proper judgment that may lead to an abstention from decision is that the Constitution has committed the determination of the issue to another agency of the government than the courts." H. Wechsler, 'Toward Neutral Principles of Constitutional Law' (1959) 73 Harvard Law Review 1, p. 9.

[496] *Baker v Carr*, 369 U.S. 186 (1962), p. 211 (hereinafter: *The Baker* case).

questioned whether a separate doctrine is needed[497]. In his famous critic, Henkin made an important distinction between questions in which the court lacks jurisdiction because the matter was confined by the constitution to the executive, and (political) questions left to the executive's deference as being non-justiciable. Henkin argued that the cases in which the doctrine has been applied based on the separation of power rationale often involved implicit merits determinations by the courts:

> Failure to maintain the distinction between the ordinary respect of the courts for the substantive decisions of the political branches, and extra-ordinary deference to those branches' determination that what they have done is constitutional, has aggravated confusion and controversy as to whether, and why, and when, such extra-ordinary judicial deference is called for… [498]

The *prudential* stand, or the *functional* theory, in contrast, argues that courts should apply the political question doctrine in order to avoid cases that may undermine its institutional legitimacy. This stance, represented by Alexander Bickel, is based on notions of expediency. Unlike the classical view of the doctrine, the prudential political question doctrine holds that courts have the discretion to use this tool in order to protect their legitimacy and to avoid conflict with the political branches in controversial cases even when the Constitution does not contemplate such a delegation. Clear factor for applying this view are lacking – it is a policy that should be applied by the judges as matter of wisdom:

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[497] T.M. Franck (n 211).

[498] L. Henkin (n 493), p. 600. According to Henkin, and also Wechsler, while approaching the political question, which he justifies only through (prudent) interpretation of the Constitution, relates only to what Henkin calls "the extra-ordinary" sense of the term. "Neither Wechsler nor Bickel was addressing the ordinary respect which courts must pay to the constitutional authority of the political branches; both, I believe, were discussing the "political question" doctrine as a basis for extra-ordinary judicial abstention. For Wechsler the courts had no basis for, and no business, abstaining except where the Constitution could fairly be interpreted as requiring them to abstain. And he did indeed read several constitutional provisions as, extra-ordinarily, committing issues finally and exclusively to the political branches, denying the courts even their usual task of scrutinizing the actions of the political branches for alleged constitutional infirmity." (p. 602). Similarly, Wayne McCormack, noted that "a decision to allow one political branch to have the final say on an issue ... is itself an interpretation of constitutional law;" and that "The political question doctrine is nothing other than a subterfuge for masking explicit review on the merits of particular claims that come before a court." W. McCormack, 'The Political Question Doctrine- Jurisprudentially' (1993) 70 University of Detroit Mercy Law Review 793, pp. 798, 822.

> There is something different about it, in kind, not in degree, from the general 'interpretive process'; something greatly more flexible, something of prudence, not construction and not principle.[499]

While Bikel's prudential stance "did not try to 'domesticate' his prudential concerns into guidelines"[500], the US Supreme Court in the precedent setting decision *Baker v. Carr*, privileged the view that "judicial action must be governed by standard, by rule …. [L]aw pronounced by the court must be principled, rational, and based upon reasoned distinction."[501] Therefore, in order to avoid any appearance of arbitrariness in the application of the political question doctrine, the Court set the modern rules of non-justiciability on political question grounds, through a list of six factors that should be evaluated on a "case-by-case" basis:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[502]

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[499] A.M. Bickel, 'The Supreme Court, 1960 - Term Foreword: The Passive Virtues' (1961) 75 Harvard Law Review 1, p. 46. See also A.M. Bickel, *The Least Dangerous Branch – The Supreme Court at the Bar of Politics* (Yale University Press, New Haven/London, 1962), p.184; F.W. Scharpf, 'Judicial Review and the Political Question: A Functional Analysis' (1966) 75 Yale Law Journal 517, pp. 538-539, 548-549, 566-583. Henkin, quite cynically noted: "[Bikel] would probably support abstention whenever he and the courts agreed that abstention was 'wise,' in the public interest most broadly conceived." L. Henkin (n 493), p. 603.

[500] L. Henkin (n 493), p. 603.

[501] *Vieth v Jubeliler*, 541 U.S. 267 (2004), p. 278. Indeed, according to Shapiro and Sweet, courts, in order to achieve their institutional legitimacy, must be perceived as neutral and independent, and therefore, "if courts are political, that fact needs to be hidden by the judges themselves." M. Shapiro and A. Stone Sweet (n 149), p. 6.

[502] *The Baker* case (n 496), p. 217. The Court instructed that each case requires "a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action." (pp. 211–212).

The Supreme Court's guidelines leave a wide margin of discretion for courts to decide to abstain for policy reasons. While Jack Goldsmith has well observed that Baker's discussion of the prudential factors gave courts a discretionary tool "to abstain whenever they decide, based on an independent analysis of U.S. foreign relations, that an adjudication would harm U.S. foreign relations or the political branches' conduct of those relations"[503], the US Supreme Court preferred to underline the separation of powers principle as the rationale for the political question doctrine, declaring that "non justiciability of a political question is primarily a function of separation of powers".[504] This rational, however, may be debated. If the Constitution attributes discretion to the executive in foreign affairs issues that may not be reviewed by the judiciary branch– then this is not an issue of abstention but of Constitutional interpretation concerning courts' jurisdiction. The abstention doctrine becomes relevant in situations in which the courts have competence to review the acts of the executive (as an expression of the rationale of separation of power), but they choose not to exercise it because it is a political question, that should be handled by political branches for policy concerns. In this context the separation of power principle, will, on the contrary, dictate a legal review instead of abstention. American literature observed the Court's inconsistent application of the political question doctrine in cases involving U.S. foreign policy[505]. Jonathan I. Charney propose a middle approach and concludes that this trend

[503] J.L. Goldsmith, 'The New Formalism in United States Foreign Relations Law' (1999) 70 University of Colorado Law Review 4, pp. 1395, 1402. Other scholars, critical of the courts' treatment of foreign relations cases, has called for abandonment of the doctrine. See, T.M. Franck (n 211), pp. 4-5; H. Hongju Koh, *The National Security Constitution: Sharing Power After the Iran-Contra Affair* (Yale University Press, New Haven, 1990), pp. 158, 221-224.

[504] *The Baker* case (n 496), p. 210. See also *The First National City Bank* case (n 465), pp. 785–793 - (Judge Brennan dissenting) (noting that the act of state doctrine, as articulated in *The Sabbatino* case, is equivalent to the political question doctrine); *Trajano v Marcos*, 878 F.2d 1439 (9th Cir. 1989) (hereinafter: *The Trajano* case) ("The act of state doctrine is the foreign relations equivalent of the political question doctrine"). See also *Credit Suisse v United States Dist. Ct.*, 130 F.3d 1342 (9th Cir. 1997), p. 1346; *The Tel-Oren* case (n 174), p. 803. Yet, one should be cautious when using this argument, for it is not an issue of lack of jurisdiction.

[505] J.I. Charney, 'Judicial Deference in Foreign Relations' (1989) 83 American Journal of International Law 4, p. 805. For further critics on the non consistence application of the doctrine see R.L. Brown, 'When Political Questions Affect Individual Rights: The Other Nixon v United States' (1993) Supreme Court Review 125, pp. 152-153; M.E. Tigar, 'Judicial Power, The 'Political Question Doctrine', and Foreign Relations' (1969-1970) 17 UCLA Law Review [i], pp. 1135, 1146, 1163.

> may reflect a purely political approach by the courts, or the application of a normative rule derived from the constitutional relationship between the courts and the political branches - but it most likely reflects a combination of the two[506].

The emerging exceptions: from political to legal questions?

The US Supreme Court noted in *Baker* that not every case touching foreign relations involves a non-justiciable political question, and that the determination should be done on a case-by-case basis[507], leaving thus a large margin of discretion to courts – a discretion that been gradually expanded to include review over international humanitarian law issues. In *Karadic*, the Court of Appeals of the Second Circuit followed that line, ruling that "the doctrine is one of political questions, not one of political cases".[508] In *Koohi v. United States*, the Ninth Circuit stated that "the fact that an action is 'taken in the ordinary exercise of discretion in the conduct of war' does not put it beyond the judicial power" and ruled that military decisions, whether taken in peace or war time, can be reviewed by the court if a citizen was injured.[509] The post September 11 jurisprudence has largely contributed to that growing tendency. The US Supreme Court in *Hamdi* (2004) rejected the government's separation of powers argument and made clear that the Constitution's allocation of war powers to Executive does not exclude the courts from every dispute connected to it:

> We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens.[510]

And indeed, two years later in *Hamdan* not only that the US Supreme Court exercised its competence and did not avoid the case, which required far reaching legal determinations related to the war on terror, such as the qualification of the conflict and the applicability of the Geneva Conventions to the non State armed group, questions avoided and deferred to the State until that date, but it ruled on the merits that there was a violation of international humanitarian law.[511]

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[506] J.I. Charney, *Ibid*, p. 805.

[507] *The Baker* case (n 496), p. 211.

[508] *The Kadic v Karadzic* case (n 488), p. 249.

[509] *Ibrahim v Titan Corp.*, 976 F.2d 1328 (9th Cir. 1992), p. 1332.

[510] *Hamdi v Rumsfeld*, 542 U.S. 507 (2004), p. 536.

[511] For a deeper discussion on the *Hamdan* case, see below at pp. 229-235. See also: "Abstaining from questions involving formal sovereignty and territorial governance is one thing. To hold the political branches have the

1.3 The UK Non-justiciability principle

> The court cannot enter the forbidden areas, including decisions affecting foreign policy.[512]

According to Zinger, in English courts, the rationale of "embarrassment" has gained no substantial ground, and the doctrine has been rather seen as a comity principle between nations with respect to sovereign immunity.[513] In the UK, the concept of non-justiciability applies to both (1) domestic and (2) foreign executive acts.

(1) Concerning the former, which is comparable to the US political question doctrine, domestic executive acts include executive functions under the "Royal Prerogative" in issues involving foreign and military affairs, such as concluding treaties, making war, mobilising the armed forces, recognition of governments, and the attribution of diplomatic immunity.[514] In English courts the certificate of the Secretary of State is conclusive in these matters in order to avoid the embarrassment of a conflict of opinion.[515] However, judicial review over the prerogative power has evolved. In this regard it is necessary to refer to the landmark decision in *Council of Civil Service Unions v. Minister for the Civil Service*, which established that the mere fact that a power derived from the Royal Prerogative did not necessarily exclude it from the scope of judicial review. At the same time, the House of Lords did accept that there were certain areas which remain outside the area of justiciability such as "the most important prerogative powers concerned with control of the armed forces and with foreign policy."[516]

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power to switch the Constitution on or off at will is quite another. The former position reflects this Court's recognition that certain matters requiring political judgments are best left to the political branches. The latter would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say 'what the law is." *Boumediene v Bush*, 553 U.S. 723 (2008), p.765 (hereinafter: *The Boumediene* case).

[512] *The Abbasi* case (n 18), para. 106.

[513] M. Singer, 'The Act of State Doctrine of the United Kingdom: An Analysis, with Comparisons to United States Practice' (1981) 75 American Journal of International Law 2, pp. 291, 296.

[514] See, for example, *R v Foreign Secretary ex p. Everett*, (1989) 1QB 811, p. 820.

[515] I. Brownlie (n 463), pp. 49-50.

[516] *Council of Civil Service Unions v Minister for the Civil Service*, (1985) AC 374, p. 398 (hereinafter: *The CCSU case)*: "It is not an answer to a claim for judicial review to say that the source of the power of the Foreign Office is the prerogative. It is the subject matter that is determinative." See also *The Abbasi case* (n 18), para. 106.

The controlling factor in considering whether a particular exercise of prerogative power was subject to review was "not its source but its subject matter."[517] Generally, prerogative decisions involving government policy are not justiciable "as taking one course rather than another does not normally involve questions to which, if disputed, the judicial process is adapted to provide the right answer."[518] As stated by Lord Justice Richards "the courts no longer have the same inhibitions about addressing public international law. Similarly, recent cases show that the forbidden areas of foreign policy and the like are much narrower than one might have thought, and that the *CCSU* case has opened up very considerable scope for judicial review in these fields".[519] As an example of "the forbidden areas in a classic form" he gives the Campaign for Nuclear Disarmament case[520] in which the claim sought to persuade the High Court to declare that the State would be acting in breach of customary international law were it to take military action against Iraq without a further Security Council resolution:

> I was the junior member of the three-judge court and expressed the view that no doubt the Government had access to expert legal advice and was able to form a reasoned judgment on the legal issue.... In another passage in my judgment I said it was 'unthinkable that the national courts would entertain a challenge to a Government decision to declare war or to authorise the use of armed force against a third country'. (paras. 10-11).

Further, in *R. v Jones and Others*, protestors against the war in Iraq were charged with various criminal offences. In their defence they argued that they had been acting to prevent the commission of the crime of aggression. The House of Lords ruled that aggression is not a crime under domestic law and therefore could not serve as a defence for the protestors. Among other considerations that led the Court to this ruling was the argument that the crime of aggression would take national courts into areas where, under well established rules, they would be very reluctant to embark on a review of powers or to adjudicate on rights arising from transactions between sovereign nations on the plane of international law.

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[517] *Ibid,* p. 407.

[518] *Ibid*, p. 411.

[519] Lord Justice Richards, 'The International Dimension of Judicial Review' The 2006 Gray's Inn Reading (7 June 2006), para. 7 (hereinafter: Lord Justice Richards) <http://www.judiciary.gov.uk/NR/rdonlyres/20280D8D-B2EF-4234-99E8-22ECC14747DA/0/richardslj07062006.pdf> (accessed 22 October 2011).

[520] *R (Campaign for Nuclear Disarmament) v Prime Minister and Others*, (2002) EWHC 2777 (Admin).

> A charge of aggression, if laid against an individual in a domestic court, would involve determination of his responsibility as a leader but would presuppose commission of the crime by his own state or a foreign state. Thus resolution of the charge would (unless the issue had been decided by the Security Council or some other third party) call for a decision on the culpability in going to war either of Her Majesty's Government or a foreign government, or perhaps both if the states had gone to war as allies. But there are well established rules that the courts will be very slow to review the exercise of prerogative powers in relation to the conduct of foreign affairs and the deployment of the armed services, and very slow to adjudicate upon rights arising out of transactions entered into between sovereign states on the plane of international law.[521]

(2) Concerning foreign states, the non-justiciability principle, which corresponds in certain aspects to the US act of state doctrine, dictates that English courts, in general, would not inquire into the validity of acts done in a sovereign capacity.[522] It was formulated in *Buttes Gas & Oil v Hammer*, which ruled that courts should abstain in any case in which a court has "no judicial or manageable standards by which to judge [the] issues."[523] However, the extent of the doctrine is open to question.

The UK public policy exception

British judges have developed the "public policy exception". In *Oppenheimer* (1976) the House of Lords refused to recognise racially discriminatory Nazi laws, stating that a law of

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[521] *R v Jones (Appellant)*, (2006) UKHL 16, para. 30. See also *R v Jones (Appellant)*, (2005) EWHC 684 (Admin) where the court examined if the crime of aggression capable of being a crime within the meaning of section 3 of the Criminal Law Act 1967, and if so, whether non-justiciable doctrines are applicable in criminal trials.

[522] The US and the UK act of state are two distinct doctrines. This was emphasised by the House of Lords in *The Pinochet No.1* case (n 456): "[the non justiciability principle is] referred to as "the Act of State" doctrine, especially in the United States. But Act of State is a confusing term. It is used in different senses in many different contexts. So it is better to refer to non-justiciability." Thus, while the Act of state doctrine in as the US version is known in the UK as the *Buttes* non-justiciability principle (see below), the British Act of state, relates to the non-justiciability principle over the Crown's acts abroad (*The Nissan* case (n 463), p. 235): "An action done outside the jurisdiction by the Crown in exercise of the royal prerogative can give no rise to a claim. The plea of act of state does not make an unlawful act lawful: it prevents the courts from having cognisance of it").

[523] "These are not issues upon which a municipal court can pass. Leaving aside all possibility of embarrassment in our foreign relations (which it can be said not to have been drawn to the attention of the court by the executive) there are [..] no judicial or manageable standards by which to judge these issues [..] the court would be in a judicial no-man's land." *Buttes Gas and Oil Co. v Hammer (No. 3*), (1982) AC 888 UKHL, pp. 931, 938.

this sort constitutes "so grave infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all."[524] This obiter was the principal basis of the key decision in *Kuwait Airways No. 4* (2000), in which the English Court of Appeals recognised for the first time that the public policy exception to the act of state doctrine encompasses acts in clear breach of international law – in this case, the unlawful use of force.[525] While according to Martin Davies, there was formerly very little authority to support the existence of a public policy exception of this kind,[526] the House of Lords affirmed this ruling in 2002 and Lord Nicholls described the public policy exception as "well established in English law"[527]. Lord Steyn saw the public policy exception as a natural development of the reasoning in *Oppenheimer* and held that:

> the Court of Appeal was right to extend the public policy exception beyond human rights violations to flagrant breaches of public international law. It does not follow, however, that every breach of international law will trigger the public policy exception.[528]

Also Lord Hope stated that:

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[524] *Oppenheimer v Cattermole (Inspector of Taxes)*, (1976) AC 249 UKHL, p. 277-278. The context of the dispute was not the applicability of the act of state doctrine, but whether Mr Oppenheimer had, by reason of German nationality law, lost the right to double taxation relief in England which was available to those of dual British and German citizenship.

[525] *Kuwait Airways Corporation v Iraqi Airways Company*, (2000) EWCA Civ 284, paras. 317-323, 372. Following Iraq's invasion in Kuwait in 1990 and its purported annexation, both of which were condemned by the UN Security Council (UNSC), the Iraqi forces seized 10 commercial aircraft belonging to Kuwait Airways Corporation (KAC). Then, Iraq adopted a domestic enactment that dissolved KAC and transferring all its property worldwide. The Court held that it was entitled to refuse recognition of the Iraqi resolution, because it was in breach of clearly established principles of international law, most notably UNSC resolutions.

[526] M. Davies, 'Kuwait Airways Corp v Iraqi Airways Co. – The Effect in Private International Law of Breach of Public International Law by a State Actor' (2001) 2 Melbourne Journal of International Law 2, fn 50. See also J.M. Carruthers and E.B. Crawford, 'Kuwait Airways Corporation v. Iraqi Airways Company' (2003) 52 International and Comparative Law Quarterly 3, pp. 761-774.

[527] *Kuwait Airways Corporation v Iraqi Airways Company & Anor*, (2002) UKHL 19, para. 18 (hereinafter: *The Kuwait Airways* case).

[528] *Ibid*, para. 114.

> It is clear that very narrow limits must be placed on any exception to the act of state rule... But it does not follow… that the public policy exception can be applied only where there is a grave infringement of human rights,[529]

And concluding that:

> The golden rule is that care must be taken not to expand its [i.e., the public policy exception] application beyond the true limits of the principle. These limits demand that, where there is any room for doubt, judicial restraint must be exercised.[530]

Thus, while caution has to be exercised when faced with an allegation that a foreign sovereign state was in breach of its international obligations, the decisions of the House of Lords in *Kuwait Airways* established that an English court may find a case justiciable in relation to what it conceived to be a foreign state's clear breach of international law, particularly in the context of human rights. In *R. (on the application of Abbasi) v Secretary of State for Foreign and Commonwealth Affairs*, a few months after the House of lords rendered its decision in the Kuwait case, the English Court of Appeal, dealing with its first Guantanamo case, stated that "where fundamental human rights are in play, the courts of this country will not abstain from reviewing the legitimacy of the actions of a foreign sovereign state".[531] Interestingly in a later Guantanamo case rendered in Australian the Judge noticed that:

> Their Lordships twice expressed deep concern that in apparent contravention of fundamental principles of law, Mr Abbasi may be subject to indefinite detention by the United States authorities with no opportunity to challenge the legitimacy of his detention before any recognised court or tribunal. Their Lordships referred to what appeared to be 'a clear breach of a fundamental human right'. This latter expression echoes the language in *Kuwait Airways*.[532]

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[529] *Ibid*, paras. 138-139.

[530] *Ibid*, para. 140. *The Kuwait Airways* case (n 527) was described by O'Keefe as "reflective of the English courts' commendable move in recent times towards a more direct engagement, where English law permits, with the UK's international engagements" concluding that "The House of Lords' ruling is part of that process of refinement." Oxford Reports on International Law in Domestic Courts, Analysis of O'Keefe (30 November 2006), online at <http://www.oxfordlawreports.com > (accessed 8 January 2011).

[531] *The Abbasi* case (n 18), para. 53.

[532] *The Hicks* case (n 491), para. 78.

1.4 Concluding observations

In practice, courts in different states function in a similar way; they avoid politically sensitive cases through the application of self developed doctrines. The Kuwait case, as the other exceptions established, demonstrated the power of the court to rule upon actions of foreign governments which violate international law. Thus, having set the avoidance doctrine and its exception, the courts can decide with full discretion which to apply. The doctrines attempt to provide a legalistic appearance in form of guideline and list of considerations to be taken in account. However, this choice would inevitably be political and not legal, as both are equally possible from a legal point of view. Thus, depending on different legal traditions and relations with the executive, the constitutional structure and the claim under review, the court may avoid exercising competence on a case or avoid the application of the avoidance doctrine.

2. A Contextual Analysis of Case Studies

While courts engaged in establishing factors and guiding tests for the application of an avoidance doctrine or its exception it is not always possible to predict when courts would render a judgment on its merits or to abstain on non-justiciability grounds, as extra-legal considerations are involved in that decision[533]. This section presents case studies that illustrate how courts from different jurisdictions apply avoidance doctrines, and aim at exposing the policy goals which are served through their application or rejection in an attempt to draw more general tendencies related to the judiciary's willingness to apply and enforce international humanitarian law as required by the rule of law. The first case study examines the application of the act of state and the political question doctrines by US federal courts in Alien Tort Statute cases that deal with international humanitarian law and reveals a policy of double standards application, which is based to a large extent on the state's position whether to enforce the law or not. The second case study shows how courts from different states provide different positions on whether the policy of targeted killings is a justiciable question, illustrating that the application of the avoidance doctrine is a policy choice of courts and not a a normative obligation through which they define their role in enforcing international humanitarian law over their own government. On the other hand, as the third case study shows, there are issues that national courts from different states prefer to always avoid, such as the question of legality of the Israeli settlements, as the Israeli High Court of Justice jurisprudence and the Billin case in Canada well illustrate.

[533] Other characterisations may help in predicting as the general attitude of the court and its judges as being more "active" or "prudential;" the traditional relations between the executive and the court; to what extent deference to state position is the norm; the legitimacy of the court in its society – a case can be decided in a different manner according to the political atmosphere present at the time the ruling is rendered. If the NGOs have mobilized public opinion is it well possible that it will influence the court decision.

2.1 Case Study No. 1: The use of avoidance doctrines in Alien Tort Statute cases

2.1.1 Background

Since the revival of the Alien Tort Statute in 1980 with the Second Circuit's landmark decision in *Filártiga*, US courts directly apply international law, including international humanitarian law. Enacted in 1789, the Alien Tort Statute grants federal courts in the United States jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States"[534]. Yet, for 200 years the Alien Tort Statute was largely dormant until 1980 when a Court of Appeals for the Second Circuit rendered a decision on the merits in *Filártiga*. Since then, dozens of claims have been filed in different US Federal courts.[535] Alien Tort Statute litigation has flourished, evolving to encompass, in addition to "historical justice cases" against former foreign dictators, claims against non-state actors – most notably, private corporations and military companies.[536] Recent rulings of the

[534] 'US Code - Section 1350: Alien's action for tort' (28 U.S.C. § 1350) (hereinafter: The Alien Tort Statute)

[535] Between 2001 and 2007 40 decisions were rendered by courts of appeals and 107 by district courts. J. Davis (n 458), p. 128.

[536] The Court of Appeals of the second Circuit held in 1995 for the first time that war crimes may be asserted against non-state actors under the Alien Tort Statute. See *The Kadic v Karadzic* case (n 488), pp. 232, 244. This ruling opened the door to bring suits against corporations and private military companies. By 2004, more than 80 cases had been brought against corporations. For example, in *Khulumani v Barclay National Bank, Ltd.*, 504 F.3d 254 (2d Cir. 2007), the court accepted jurisdiction over corporations' liability for aiding and abetting the South African apartheid regime. See A. Clapham, 'Extending International Criminal Law beyond the Individual to Corporations and Armed Opposition Groups' (2008) 6 Journal of International Criminal Justice 2, p. 899. More recently, see the cases of *Presbyterian Church of Sudan et al. v Talisman Energy Co.*, 582 F.3d 244 (2nd Cir. 2009), pp. 254-255; *Abdullahi v Pfizer, Inc*., 562 F.3d 163 (2d Cir. 2009), p. 173 (hereinafter: *The Abdullahi* case) and *Sinaltrainal v Coca-Cola Co.*, 578 F.3d 1252 (11th Cir. 2009), pp. 1266-1267 (Kate identified four kinds of litigations against cooperation: (1) cases in which multinational were accomplice to human rights violations committed by a state known to have a poor human rights record in order to pursue their economical interests (as *Wiwa v Royal Dutch Petroleum Co.*, 226 F.3d 88 (2nd Cir. 2000); (2) Corporate cases alleging the commission/complicity of war crimes (*Corrie v Caterpillar, Inc.,* 403 F. Supp. 2d 1019 (W.D. Wash. 2005), On appeal: *Corrie v Caterpillar, Inc.*, 503 F.3d 974 (9th Cir. 2007); (3) labour-related case (*Aldana v. Del Monte Fresh Produce*, 416 F.3d 1242 (11th Cir. 2005); and (4) relatively new attempts to sue for environmental damage (*Flores v Southern Peru Copper Corp.*, 406 F.3d 65 (2nd Cir. 2003), and *The Abdullahi* case (n 536), K. Gallagher, 'Civil Litigation and Transitional Business – An Alien Tort Statute Primer' (2010) 8 Journal of International Criminal Justice 3, pp. 750, 752-754. However, a new trend seems to limit jurisdiction *ratione*

Courts of Appeals of the Second and Eleven Circuits, however, indicate that the actual trend seems to limit the reach of the Alien Tort Statute litigation, through, for instance, questioning jurisdiction over corporations[537] and the development of the obligation to exhaust local remedies "in appropriate cases".[538] These limits may be attributed also to a shift in the nature of the defendants in the ATS cases– from cases against dictators, as in the early *Filártiga* and *Marcos* cases, to litigation against political and economical powerful defendants – US private companies, US officials and allied States.

Not surprisingly, when cases started to go against the interests of the US Department of State, as reflected in their *amicus* briefs, courts have relied more and more on avoidance doctrines. In fact, this restrictive attitude has been carried out under apparent direction from the US Supreme Court. In *Sosa* (2004), the first Supreme Court ruling on the Alien Tort Statute, it used a prudent language concerning its applicability urging lower courts to be more restrained.[539] More specifically, referring to deference to the State the Supreme Court notes in a footnote:

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persona over corporations (see below). For cases against private military companies see *Xe Services Alien Tort Litig.*, 665 F. Supp. 2d 569 (E.D.Va. 2009), pp. 584-585 (*The Blackwater* case) and *Ibrahim v Titan Corp.*, 556 F. Supp. 2d 1(D.D.C. 2007); *Saleh at al. v Titan Corp. et al.*, 580 F.3d 1 (DC Cir. 2009) (hereinafter: *The Titan* case) <http://ccrjustice.org/ourcases/current-cases/saleh-v-titan> (accessed 20 October 2011).

[537] On 11 September 2009, the Court of Appeals for the District of Columbia ruled in *The Titan* case, *Ibid*, that claims of torture and war crimes could not be brought against private military contractors because they are not state actors. In *Royal Dutch* the Second Cir. followed this reasoning and ruled that corporations are not liable under international law (*Kiobel v Royal Dutch Petroleum*, 621 F.3d 111 (2nd Cir. 2010). This question has been appealed to the US Supreme Court – In *Titan* Plaintiffs' petition for writ of certiorari in the U.S. Supreme Court was submitted in 26 April 2010 and on 4 October 2010 the US Supreme Court invited the State to file a brief expressing its views on the matter.

[538] In Rino, the 9th Circuit held that the district court shall consider whether Sarei had exhausted his local remedies before filing his action in the United States: "Where the "nexus" to the United States is weak, courts should carefully consider the question of exhaustion." *Sarei et al. v Rio Tinto, PLC and Rio Tinto Ltd.*, 550 F.3d 822 (9th Cir. 2008), p. 823.

[539] "For over two decades now, unelected federal judges have been usurping this lawmaking power by converting what they regard as norms of international law into American law. Today's opinion approves that process in principle, though urging the lower courts to be more restrained." *The Sosa* case (n 483) (Judge Scalia - concurring), p.13. For an analysis of *Sosa*, see N. Norberg, 'The US Supreme Court Affirms the Filartiga Paradigm' (2006) 4 Journal of International Criminal Justice 2, pp. 387-400.

> Another possible limitation that we need not apply here is a policy of case-specific deference to the political branches. For example, there are now pending in federal district court several class actions seeking damages from various corporations alleged to have participated in, or abetted, the regime of apartheid that formerly controlled South Africa. ... The Government of South Africa has said that these cases interfere with the policy embodied by its Truth and Reconciliation Commission… The United States has agreed… In such cases, there is a strong argument that federal courts should give *serious weight* to the Executive Branch's view of the case's impact on foreign policy.[540]

Recalling *Sabbatino*, the Supreme Court nuanced the act of state doctrine, pointing out that the "collateral consequences" could

> itself [be] a reason for a high bar to new private causes of action for violating international law, for the potential implications for the foreign relations of the United States of recognizing such causes should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs. … Since many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences, they should be undertaken, if at all, with great caution.[541]

A 2004 survey of Alien Tort Statute cases found that approximately four in five cases brought under the Alien Tort Statute since 1980 have been dismissed on the basis of different avoidance doctrines.[542] Thus, once jurisdiction under the Alien Tort Statute is established, suits for civil damages for serious violations of international humanitarian law committed abroad face an important barrier of avoidance doctrine to overcome, including the political question doctrine, *forum non conveniens*, the act of state doctrine, and rules on sovereign immunity. Alien Tort Statute cases have therefore provided an important jurisprudence on these avoidance doctrines.

In international humanitarian law Alien Tort Statute cases courts tends not to upset the US State Department. It appears that the application of avoidance doctrines in Alien Tort Statute cases is more a matter policy directed by the State, than being a normative implementation of neutral factors. The main argument of the State for courts to avoid

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[540] *The Sosa* case (n 483), p. 733, fn 21.

[541] *Ibid*, p. 2744.

[542] K.L. Boyd, 'Universal Jurisdiction and Structural Reasonableness' (2004) 40 Texas International Law Journal 1, pp. 46-58.

adjudicating sensitive cases is that based on the separation of powers constitutional principle; accordingly, the courts should not interfere with foreign relations of the state for which the executive is responsible. A close examination of Alien Tort Statute cases and the relations between the court and the executive reveals an opposite reality – it is the court which is used by the government to conduct its foreign affairs. Through a "double standard" guidance to the court, which depends on the nationality of the respondent, and which is more often than not respected by the judiciary, the State aims at keeping its reputation as a world wide human rights defender and at the same time to shield its own officials and allies from judicial scrutiny.

How does it work? When judges are concerned about the implications of an Alien Tort Statute case over US foreign relations they can invite the Department of State to submit their views on the question. In some cases, the State intervenes and submits a Statement of Interest on its own initiative.[543] Interestingly, landmark Alien Tort Statute cases, in which the court did not avoid the exercise of its jurisdiction, were in fact reflecting the State Department's position. The litigation in *Filártiga,* the famous first torture case brought to court under Alien Tort Statute which succeeded, was supported by the State. The Department of State and Department of Justice submitted a joint *amicus* brief expressing their support for adjudication stating (in 1980!) that "an individual's fundamental human rights are in certain situations

[543] See, for example, in the cases of Marcos (fn 431) and *The Kadic v Karadzic* case (n 488). However, it is not always the case. According to Jeffrey Davis, of 22 cases in which the State Department under the Bush Administration intervened, only in seven cases it was asked to do so. The other cases in which it intervened were on its own initiative. He furthermore found out that of a total of 77 decisions issued by the circuit courts of appeal in Alien Tort Statute cases, the executive has intervened in 17 cases, and at district level, in 20 out of 156 cases – while the Bush administration intervened the most so far: out of a total of 37 cases in which the US participated, 22 were during the Bush administration (five of the six cases in appeals) (See J. Davis (n 458), pp. 113-118, 125). According to A.N. Schupack: "The courts have frequently invited the executive branch to participate in these cases by filing a statement of interest; the executive branch, however, has only selectively become involved." It has communicated its position that an Israeli leader should enjoy immunity for his official acts, and it has opined that Caterpillar should not be held liable for its sale of bulldozers to Israel. It has also intervened to prevent the attachment of certain Iranian assets, and it designates certain countries as state sponsors of terrorism. At the same time, the executive branch did not intervene in suits against the PA and PLO to argue that such suits were counter to U.S. policy. Nor did it intervene to argue against the abrogation of Iran's sovereign immunity. In addition, both President Clinton and President Bush signed into law statutes that plaintiffs have used to sue terrorists and their supporters." A.N. Schupack, 'The Arab-Israeli Conflict and Civil Litigation against Terrorism' (2010) 60 Duke Law Journal 207, at p. 245.

directly enforceable in domestic courts".[544] In *Marcos*, the Department of State under the Reagan Administration did not ask for the act of state doctrine to be applied because of the "very barbarousness of certain of the alleged acts".[545] The Clinton Administration supported the two first precedent cases against non-state actors. It supported the proceedings against Karadzic, head of the Republika Srpska for war crimes committed during the armed conflict in Bosnia, although the Dayton agreements were being negotiated at the time the State's statement of interest was submitted to the court.[546] Here, the Administration did not perceive the proceedings as an obstacle for peace (as it was later proclaimed in *Sarei* by the Bush administration in the context of peace agreements negotiated in Papua New Guinea). In *Unocal*, one of the first corporation cases, in which the plaintiffs alleged they had suffered human rights abuses including coerced labor, forced removal of villagers, murder, rape, and torture during the construction of a gas pipeline by Myanmar military, abuses for which and US company Unocal Corporation and French Total were alleged to be complicit, the State Department supported the plaintiffs in its statement of interest submitted in 1997 to the district court. However, when the case was held before the court of appeals, the administration, this time under Bush, modified its position in the brief submitted in 2003, questioning whether US courts have jurisdiction in extraterritorial cases.[547] The current tendency of courts to restrain the applicability of the ATS is directly linked the Bush administration's opposition to Alien Tort Statute cases. Studies have shown that the Bush administration intervened in 22 Alien Tort Statute cases – all of which were in support of the defendants.[548]After Supreme Court precedent *Sosa* the Bush administration concentrated its

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[544] Brief for the United States as *Amicus Curiae* in *The Filartiga* case (n 486), p. 3. Interestingly during the Bush administration the State department will claim that while the Bush positions was that the Alien Tort Statute does not apply extraterritorially.

[545] Brief for the United State as *Amicus Curiae* in *The Trajano* case (n 504), p. 4. Yet, the State did not recognize jurisdiction *ratione materia. Republic of the Philippines v Marcos*, 806 F.2d 344 (2nd Cir. 1986), (refusing to apply act of state doctrine). Summarized in (1987) 81 American Journal of International Law 417.

[546] *The Kadic v Karadzic* case (n 488), p.?!.

[547] Brief for the United State as *Amicus Curiae*, , *Doe v Unocal Corp.*, 395 F.3d 978 (9th Cir. 2003), p. 2. (hereinafter: *The Unocal II* case). Finally, the parties reached a confidential settlement in which Unocal agreed to compensate the plaintiffs, and the case was closed on 13 April 2005. The case's documents are all available at: <http://www.earthrights.org/legal/doe-v-unocal> (accessed 20 October 2011).

[548] According to Beth Stephens, this attitude is consistent with the Bush administration's multiple efforts to eliminate judicial review over the Executive since 11 September 2001: "The Bush administration's opposition to human rights litigation coincides with the filing of lawsuits against politically powerful defendants: corporations,

attack against Alien Tort Statute cases on five bases: political question doctrine, act of state doctrine, foreign officials entitled to sovereign immunity, and two other lines related to denial of jurisdiction– extraterritorial jurisdiction and subject matter.[549]

It should however be noted that courts have not always deferred to the state position whether to apply an avoidance doctrine. An example that is repeatedly cited in academic literature and case law to illustrate this claim is the *Sarei* case[550]. Though, that case merits a closer observation. The claim was against a private company that allegedly committed human rights violations in respect of the operation of a copper mine in Papua New Guinea. Following the district court request for guidance from the State Department, the State Department filed a statement of interest, in which it reported that continued adjudication of the claims "would risk a potentially serious adverse impact on the peace process, and hence on the conduct of our foreign relations" and that Papua New Guinea, a "friendly foreign state" had "perceive[d] the potential impact of this litigation on US-Papua New Guinea relations, and wider regional interests, to be "very grave".[551] The Court of Appeals, while citing the Supreme Court decision in Sosa, recognized the "serious weight" that should be attributed "to the Executive Branch's view of the case's impact on foreign policy", but did not accept the State position. The Court recognized *jus cogens* violations to be an exception to those justifying the application of the act of state doctrine.[552] This is an extremely important statement that could have had an important impact on the ground effect, if the case had not been dismissed on comity grounds.

From double standards application – to a unified position?

When former dictators were found liable for gross violations of international law, the State Department's interest of promoting its own image of human right defender around the world was best served by letting the court to perform its normal function, as reflected in the US *amicus curiae* brief it submitted in *Filártiga*:

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foreign government officials and the US government itself … although couched in terms of separation of powers the campaign seeks to protect allies from accountability for egregiously wrongful behaviour." B. Stephens, 'Upsetting Checks and Balances: the Bush Administration's Efforts to Limit Human Rights Litigation' (2004) 17 Harvard Human Rights Journal 169, p. 179.

[549] J. Davis (n 458), p. 127.

[550] *The Sarei 2006* case (n 490).

[551] Cited in the Judgment of the United States Court of Appeal, *Ibid*, para. 12.

[552] *Ibid*, para. 60.

> A refusal to recognize a private cause of action in these circumstances might seriously damage the credibility of our nation's commitment to the protection of human rights.[553]

More recently, this has occurred in a brief signed by Professor Koh in the name of the Obama administration submitted to the Supreme Court in the Samantar case:

> The United States condemns grave human rights abuses of the kind alleged in the complaint in this case, and it has a strong foreign policy interest in promoting the protection of human rights.[554]

On the other hand, such litigation could be counterproductive, no matter how grave the violation is, if it is addressed to US allies, as it was submitted by the Bush administration in a case involving allegations of forced labour against an American oil corporation, Unocal, and the Myanmar military for human rights violations allegedly perpetrated during the construction of an oil pipeline:

> Although often asserted against rogues and terrorists, these claims are without bounds, and can easily be asserted against allies of our Nation.... This Court's approach to the Alien tort Statute bears serious implications for our current war against terrorism, and permits claims to be easily asserted against our allies in that war.[555]

Thus, a selective application of the Alien Tort Statute emerges, one that follows the prevailing political interest of the State in the particular case. However, with the growing quantity of litigation, also "easy cases", which previousely could have lead to the application of the law, became politically sensitive, as these raise the fear of establishing precedents that could be implement against US's officials or allies. Therefore it may be expected that the

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[553] Brief for the United States as *Amicus Curiae* in *The Filartiga* case (n 486), pp. 22-23.

[554] Brief for the United State as A*micus Curiae* supporting Affirmance at <http://www.scotusblog.com/wp-content/uploads/2010/01/08-1555_us-amicus-supporting-affirmance.pdf> (accessed 20 October 2011). The US Supreme court rendered a decision in line of the State position on issue of immunity. See also Memorandum for the United States submitted to the Court of Appeals for the Second Circuit in *The Filartiga* case (n 486), reprinted in (1980) 19 ILM 585.

[555] Brief for the United States of America as *Amicus Curiae* at p. 2-4 (filed 8 May 2003), *The Unocal II* cited in 'Department of Justice Position in 'Unocal'' (2003) 97 American Journal of International Law 3, p. 704.

government, and the courts as consequence, will avoid the enforcement of ATS cases altogether – which from the rule of law perspective may a better choice if the law can not be enforced in an equal way. This new tendency may be observed in the proceedings of the *Samantar* case. That case dealt with allegations of torture and extrajudicial killings said to be committed by the former Somali Prime Minister. The respondents, who were persecuted by the Somali government during the 1980s, filed a damages action alleging that the defendant exercised command and control over the military forces committing the abuses; that he knew or should have known of these acts; and that he aided and abetted in their commission. The US Supreme Court was asked to determine whether a foreign state's immunity under the Foreign Sovereign Immunities Act extends to an individual acting in his official capacity on behalf of a foreign state and whether an individual who is no longer an official of a foreign state at the time a suit is filed retains this immunity.[556] Of interest are the briefs submitted to the Supreme Court by the Zionist Organization of America and the Kingdom of Saudi Arabia, both in support of the defendant, and without any link to Somalia nor to the case, apart from their own narrow interest in preventing exception to State immunity.[557] Saudi Arabia stated that it is an ally state of the US and that the allegations against it and its officials in the involvement of the 11 September attack were "fabricated":

> Saudi Arabia has been and is a pivotal ally of the United States. … in light of the possibility that litigation in U.S. courts will be used as a means to harass or embarrass Saudi Arabia and its officials in other matters (even as the political branches of the United States work toward even stronger diplomatic and economic ties with Saudi Arabia), Saudi Arabia retains a strong interest in the issues of sovereign immunity raised here.[558]

The briefs of the Zionist Organization of America stated that:

> The decision of the Fourth Circuit that permits civil lawsuits to be brought against current and former government officials notwithstanding the immunity that their governments have under the Foreign Sovereign Immunities Act will, if not reversed by this Court, encourage the

[556] *Samantar v Yousuf*, 130 S.Ct. 2278 (2010) (hereinafter: *The Samantar* case). See Brief for the United States supporting Affirmance at <http://www.scotusblog.com/case-files/cases/samantar-v-yousuf/> (accessed 20 October 2011).

[557] Both at <http://www.scotusblog.com/case-files/cases/samantar-v-yousuf/> (accessed 20 October 2011).

[558] Brief of the Kingdom of Saudi Arabia as *Amicus Curiae* in Support of Petitioner (7 December 2009), pp. 2-3.

institution of many unfounded lawsuits in United States courts against present and former government officials of the State of Israel.[559]

Thus, in the eyes of the above parties, which submitted their briefs, while the Supreme Court was deciding a case concerning a Somali dictator for allegedly having committed grave violations of international law, it should not neglect the consequences of its ruling for ally states. The US Administration, "while having strong interest in promoting Human Rights", had made it clear that it is up to the executive and not the judiciary to decide on immunity issues, and the Supreme Court ruled accordingly: while the Foreign Sovereign Immunities Act (FSIA) of 1976 was found to be inapplicable to current or former officials of foreign nations being applicable only to states, common law immunity – which defer the definition of its scope to the State - could be asserted.

A contextual analysis of the subsequent international humanitarian law Alien Tort Statute cases shows how doctrines of non-justiciability are applied in double standard mode in accordance with the State's position, in three categories of cases: cases against US officials (section 2.1.2) ; cases against US allies (section 2.1.3) and cases against *other* third States' officials (section 2.1.4).

2.1.2 Alien Tort Statute cases against US officials

According to a survey conducted by Davis, when Alien Tort Statute cases are brought against US officials they typically fail because of a variety of avoidance doctrine and defences that allow the judges to dismiss the case at preliminary stages of the proceedings. For example, Davis found that in all the cases against US officials in which the political question doctrine was raised the case was dismissed on this ground. [560] Most of the cases against US officials dealing with the "War on Terror" were dismissed on immunity grounds. Other

[559] Brief of the Zionist Organization of America, The American Association of Jewish Layers and Jurists, Agudath Israel of America, and the Union of Orthodox Jewish Congregations of America in Support of Petitioner (7 December 2009), p. 2.

[560] "Clearly courts have granted broad deference to the US government in cases challenging abuse committed in the exercise of US foreign policy. …plaintiffs are more successful to overcome the political question doctrine when it is asserted by a non US government defendant, or by the US government as an amicus party." J. Davis (n 458), p. 102, fn 384. These cases are not limited to international humanitarian law but include also human rights violations.

doctrines used are the State Secret and political question.[561] To date, Alien Tort Statute plaintiffs have not yet succeeded in overcoming these barriers and to reach a ruling on the merits.[562]

A number of cases have sought to challenge the legality of the treatment of the detainees held by US forces in Guantanamo and Abu Ghraib in the context of the so-called "War on Terror". The conduct alleged in these cases, if proven, amount to torture. These include, as described in one of the cases "hooding, forced nakedness, housing in cages, deprivation of food, forced body cavity searches, subjection to extremes of heat and cold, harassment in the practice of their religion, forced shaving of religious beards, placing the Koran in the toilet, placement in stress positions, beatings with rifle butts, and the use of un-muzzled dogs for intimidation."[563] While the US has failed to conduct criminal investigations for theses allegations against anyone up the chain of command,[564] the victims launched civil claims for damages based on different causes of actions including the Alien Tort Statute. The first cases analysed in this section– *Rasul v. Rumsfeld* (that on appeal became *Rasul v. Myers*)

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[561] See, for example, *El-Masri v United States*, 479 F.3d 296 (4th Cir. 2007), pp. 300, 313 (dismissing plaintiff's complaint on the basis of the invocation of the state-secrets doctrine by the United States without considering whether his allegations that he was detained and interrogated "pursuant to an unlawful policy and practice ... known as 'extraordinary rendition'." See also *Mohamed v Jeppessen Dataplan, Incinclud.*, 579 F.3d 943 (9th Cir. 2009) (dismissing on the basis of the state-secrets doctrine a suit against a Boeing subsidiary for its role in the extraordinary rendition programme of the CIA).

[562] In one of the cases against a State's contractor a settlement was achieved. Blackwater Worldwide, a private company that operated in Iraq, was sued for war crimes committed during the armed conflict in Iraq. The US government submitted its response to Blackwater's motion on 8 October 2009, stating that if the contractors committed the alleged conduct, they were not acting as US employees and therefore they were not entitle to immunity. On 21 October 2009, a few days after the US government submitted its response to Blackwater's motion to dismiss, the District Court for the Eastern District of Virginia rendered a memorandum opinion based on the state position, accordingly the claim does not raise "non justiciable political question" as the allegations can not be attributed to the government. *The Blackwater* case (n 536). 6 January 2010, a confidential settlement was concluded.

[563] *Rasul v Rumsfeld*, 414 F. Supp. 2d 26 (D.D.C. 2006), p. 26 (hereinafter: *The Rasul 2006* case).

[564] K. Gallagher, 'Universal Jurisdiction in Practice: Efforts to Hold Donald Rumsfeld and Other High-Level United States Officials Accountable for Torture' (2009) 7 Journal of International Criminal Justice 5, pp. 1098-1099. In the absent of domestic accountability criminal complaints were filed in Germany, France and Spain, on the basis of universal jurisdiction. See also CCR website <http://ccrjustice.org/case-against-rumsfeld> (accessed 20 October 2011).

and *Re: Iraq* and *Afghanistan Detainees Litigation*[565] - were both dismissed on immunity grounds and they seem to accurately reflect the general attitude of US courts in addressing such questions.

Rasul v. Rumsfeld

In this case four former Guantanamo detainees, UK nationals, were seeking damages for their arbitrary detention and torture. The complaint was based on several causes of actions – violations of Alien Tort Statute, the Geneva Conventions, the Fifth and Eighth Amendments to the U.S. Constitution and the Religious Freedom Restoration Act. In a memorandum opinion issued on 6 February 2006, the District Court of Columbia dismissed the Alien Tort Statute and Geneva Conventions claims on immunity ground - being barred by the Federal Employees Liability Reform and Tort Compensation Act of 1988 (FTCA), known as the "Westfall Act".[566] Under this Act, federal government officials may not be held liable for damages for acts carried out within the scope of their employment, which is defined by the Restatement (Second) of Agency as conduct "of the same general nature as that authorized, or incidental to the conduct authorized",[567] leaving "serious crimes" beyond that scope.[568]

It could have been reasonable to expect a court to hold that acts of torture, which are illegal under US federal and international humanitarian and human rights law, would fall outside of the scope of official employment. For example, in another Alien Tort Statute case –

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[565] *Re Iraq and Afghan Detainees Litigation*, 479 F. Supp. 2d 85 (D.D.C. 2007).(hereinafter: *The Re Iraq Litigation*).

[566] *The Rasul 2006* case (n 563) (Order Granting Motion to Dismiss on International and Constitutional Claims). For the other claims that were dismissed as well see: B. Fassbender, 'Can Victims Sue State Officials for Torture? Reflections on Rasul v. Myers from the Perspective of International Law' (2008) 6 Journal of International Criminal Justice 2, pp. 347-369.

[567] Restatement (Second) of Agency, pp. 228-230. The FTCA provides the exclusive remedy for torts by officials committed within the scope of their employment: upon certification by the Attorney General that the defendant employee was acting within the scope of his employment any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States. It mandates that the US be the defendants instead of the individual officials, and that a plaintiff must first submit an administrative claim to the appropriate government agency and have it denied before filing suit at court. To define whether an act falls within the scope of employment, a four-factor test drawn from the Restatement is applied: (a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; (c) it is actuated, at least in part, by a purpose to serve the master, and (d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.

[568] J.A. Menon, 'Guantanamo Torture Litigation' (2008) 6 Journal of International Criminal Justice 2, p. 331.

against a foreign official – the court held that torture does not constitute an "official act" as it is in violation of state law.[569] However, the District Court of Columbia and the Court of Appeals preferred a wide interpretation of the *Restatement*. Both instances held that the alleged acts of torture that include "interrogation techniques such as the use of stress positions, intimidation by the use of dogs, twenty-hour interrogation sessions, shaving of detainees' facial hair, isolation in darkness and silence and the use of 'mild non-injurious physical contact'"[570] (which has to be assumed as true at this stage of the proceedings) fall within the scope of the State's officials employment because these were "incidental to the conduct authorized".[571] Moreover, the first instance judge notes that "torture is a foreseeable consequence of the military's detention of suspected enemy combatants" emphasizing that "the heightened climate of anxiety, due to the stresses of war and pressures after September 11 to uncover information leading to the capture of terrorists, would naturally lead to a greater desire to procure information and, therefore, more aggressive techniques for interrogations." The Court also found that the defendants were acting "to further the interests of their employer, the United States" and that the plaintiffs have not "proffered any evidence that would lead this court to believe that the defendants had any motive divorced from the policy of the United States to quash terrorism around the world."[572] The Court of Appeals followed this line and stated that:

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[569] The U.S. District Court for the Northern District of California rendered a default judgment against Liu Qi, Mayor of Beijing, for his role in the torture of Falun Gong. Both the Chinese government and State Department submitted statements urging that the case be dismissed. The State Department stated, among other things, that the suit risked interfering with the U.S. Government's relations with China, and raised the possibility of retaliatory suits by other countries against U.S. officials. The court held that Liu Qi did not enjoy sovereign immunity under the Foreign Sovereign Immunities Act, because Liu Qi acted outside the scope of his authority as torture was in violation of Chinese law. *Doe v Lui Qi*, 349 F. Supp. 2d 1258 (N.D. Cal 2004), p. 1287. Although the State demand the dismiss of the case for Act of State doctrine and political question grounds, the judge rendered a declaratory judgment, justifying it on the fact that the US SIO opened by stating that it had repeatedly complain to China regarding it policy towards Falun Gong. Thus the court assumed that a declaratory judgment, could not have an influence on foreign relations.

[570] *Rasul v Myers*, 512 F.3d 644 (D.C. Cir. 2008), p. 4 (hereinafter: *The Rasul v Myers* case).

[571] *The Rasul 2006* case (n 563), p. 33. See also the ruling of the Court of Appeals: "The defendants respond that "[w]here high-level military officials are charged with winning the war on terror, and specifically with detaining and obtaining information from suspected terrorists, the officials' policies on detention and interrogation, and their supervision of the implementation of those policies, is at least 'incidental' to those duties." *The Rasul v Myers* case (n 570), p. 657.

[572] *The Rasul 2006* case (n 563), pp. 34-36.

> While it may generally be unexpected that seriously criminal conduct will arise 'in the prosecution of the business', here it was foreseeable that conduct that would ordinarily be indisputably 'seriously criminal' would be implemented by military officials responsible for detaining and interrogating suspected enemy combatants.[573]

Thus, in order to accord immunity to state officials, US courts went as far as to rule that torture committed by the US officials is "incidental" and "foreseeable", explicitly establishing that torture is to be expected of the United States during detention of suspected enemy combatants. Having found that the FTCA is applicable, the courts of both instances affirmed that neither the claims based on Alien Tort Statute nor the Geneva Conventions can be raised because the plaintiffs had failed to exhaust their administrative remedies as required by the FTCA.[574]

Re: Iraq and *Afghanistan Detainees Litigation*

The same immunity was granted in the *Re: Iraq* and *Afghanistan Detainees Litigation*. In this case, a group of Iraqi and Afghani citizens claimed that they had been tortured and abused by US military officials in Iraq and Afghanistan. Their claim was based on the Alien Tort Statute and the Geneva Conventions, stating that the Westfall Act does not applies to intentional torts that violate *jus cogens* norms. The Court rejected this claim and ruled that there was no per se rule that violations of *jus cogens* norms of international law were never within the scope of employment. Thus, it held that the defendants were entitled to immunity for Alien Tort Statute claims pursuant to the FTCA, as the acts of detaining and interrogating enemy aliens were within the defendants' scope of employment, and torture was either of the same general nature that they were authorized to perform or incidental to authorized conduct.

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[573] *The Rasul v Myers* case (n 570), p. 661. The Court of Appeals dismissed the plaintiffs' appeal against the decision of the District Court. It affirmed that the Westfall Act makes the Federal Tort Claims Act the exclusive remedy for any damages action for torts committed by a federal official "while acting within the scope of his office or employment" – as it had been in this case.

[574] However, the co-counsel for the plaintiffs, Jaykumar A. Menon, raised a view that any claim by Guantanamo detainees under the FTCA is likely to be futile as the FTCA does not waive sovereign immunity for "any claim arising in a foreign country", nor for certain "intentional torts." Therefore "the Court's ultimate ground of dismissal – failure to exhaust remedies under the FTCA – [is] somewhat misleading. Instead of using the Westfall scope of employment analysis for its intended purpose (namely, determining who should be liable, an employee or the 'boss'), the Court has used it to deny liability altogether." J.A. Menon (n 568), p. 340.

Consequently, the defendants were entitled to immunity for the alleged international law violations even if these amount to *jus cogens* violations.

In addition to invoking the Alien Tort Statue as the authority for a cause of action for alleged violations of Geneva Convention IV, the plaintiffs also asserted that the treaty itself provides a private right to sue.[575] Unlike the Court in *Rasul* that dealt with both claims under the immunity defence, here the court ruled that Geneva Convention IV is not self-executing and it can not be judicially enforced via private lawsuits in federal courts.

Vance and Ertel v. Rumsfeld

In the case of *Vance and Ertel v. Rumsfeld* the plaintiffs, who alleged torture, were US citizens, and indeed – at least at first instance level – the decision on motion to dismiss resulted in a different outcome, while distinguishing it from *Rasul* and *Re. Iraq*[576]. The avoidance doctrines raised by the state were dismissed and on its role during times of war the Court declared:

> [W]e are not convinced that dismissing the claim of these two *American citizens* is a proper exercise of judicial authority. Instead, we believe 'a state of war is not a blank check' for the President or high-ranking government officials *when it comes to the rights of the American citizens*… When an American citizen sets out well-pled allegations of torturous behaviour by executive officials abroad, we believe that courts are not foreclosed from denying a motion to dismiss such allegations at the very first stage of the trial process.[577]

This case may indicate that the court is more reluctant to apply avoidance doctrines when it deals with the protection of fundamental rights during armed conflict of its own citizens – a trend which has been clearly established in foreign courts dealing with Guantanamo torture

[575] The plaintiffs referred to Articles 3, 27, 31, 32, 118 and 119 of the Fourth Geneva Convention of 1949 as self-executing provisions and rely principally on the decision in *Jogi v Voges*, 425 F.3d 367 (7th Cir. 2005), to validate this contention. See *The Re Iraq Litigation* (n 565), para. 57.

[576] *Vance and Ertel v Rumsfeld et al.,* 694 F. Supp. 2d 957 (N.D. Ill. 2010), p. 23 (hereinafter: *The Vance* case)

[577] *The Vance case*, *Ibid*, pp. 31-33. See in contrast *The Targeted Killings* case (n 454). Here, it also dealt with an American citizen, which led the court to state strong statement, yet, as it involves a policy still ongoing, with major future impact, it refrained from exercising jurisdiction.

cases, as discussed in the last case study.[578] Yet, this case has to be read within a more general context: it is among the very rare cases in which the court of first instance agreed to proceed to examine the allegations of torture against US officials on the merits, and the decision to reject the motion to dismiss is currently before the US Court of Appeals for the Seventh Circuit.[579] A long way is still awaiting the litigation.

While courts may avoid rendering a judgment, they may nonetheless explicitly disapprove of the government's policy. See for example the expressions of Judge Urbina, who ruled in order to provide immunity to state officials, that torture is incidental and foreseeable:

> Most disturbing, however, is [the plaintiffs'] claim that executive members of the United States government are directly responsible for the depraved conduct the plaintiffs suffered over the course of their detention. In essence, the plaintiffs assert that their captors became the beasts they sought to suppress.
>
> [in footnote:] It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties ... which makes the defense of the Nation worthwhile." As Mahatma Ghandi stated, '[w]hat difference does it make ... whether the mad destruction is wrought under the name of totalitarianism or the holy name of liberty and democracy?'[580]

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[578] However, see the Supreme Court landmark *Guantanamo habeas corpus* cases (*Rasul v Bush*, 542 U.S. 466 (2004) (hereinafter: *The Rasul v Bush* case) and *The Boumediene* case (n 511)), in which the court ruled that the right to *habeas corpus* (first at statutory level and later at constitutional level) extends extraterritoriality to aliens. In *Rasul* the Supreme Court found that, because the habeas statute drew "no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee's citizenship." (p. 481). See G. Fletcher, 'Citizenship and Personhood in the Jurisprudence of War: Hamdi, Padilla and the Detainees in Guantánamo Bay' (2004) 2 Journal of International Criminal Justice 4, pp. 953-966. Yet the lower courts still make distinction between the right to habeas corpus and the prohibition of torture – a distinction which is hard to defend form an international law stand – as torture constitutes a *jus cogens* violation.

[579] Another similar ruling was rendered by U.S. District Judge Jeffrey S. White of the District Court of Northern California in the case brought by Padilla. On 12 June 2009 Justice White allowed a lawsuit against former Justice Department official John Yoo to go forward, based on the fact that Yoo wrote official memos justifying "coercive interrogation" of detainees including Padilla (*Padilla v Yoo*, 633 F. Supp. 2d 1005 (N.D. Cal. 2009)). The White decision is now under review in the Ninth Circuit Court.

[580] *The Rasul 2006* case (n 563), p. 27, fn 1.

And in *Re. Iraq*, as observed by Erin Culbertson and Dinah Shelton:

> While this court felt compelled to dismiss the action, it expressed considerable sympathy for the plaintiffs throughout the opinion, for example by referring to the 'horrifying torture allegations' in the 'lamentable' case, and by providing considerable detail as to the abuse inflicted.[581]

This trend may be a signal to the government that while courts are still cautious about ruling on the merits against State's acts committed during the conduct of war, because of the US legal tradition to confine all issues relating to foreign relations to the Executive, in the future, if courts decide to adopt a more active attitude in international humanitarian law issues, their stance may change.

The Agent Orange Litigation: Avoiding avoidance doctrines

In *Agent Orange Litigation*[582] the plaintiffs, Vietnamese nationals and the Vietnam Association for Victims of Agent Orange/Dioxin, who suffered from health problems caused by exposure to herbicides, sued a number of corporations that produced and supplied the US government with chemical herbicides that contained dioxin, alleged to cause serious human health and environmental consequences, and which were used by the US armed forces during the war in Vietnam. The plaintiffs relied on a long list of domestic statutes and international law references, most notably international humanitarian law, claiming that the defendants were engaged in a conspiracy with the United States in violation of international law to manufacture, sell and supply these toxic herbicides to the United States government for use as chemical weapons in Vietnam during the period of 1961–1975.[583]

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[581] Oxford Reports on International law in Domestic Courts, Analysis of Erin Culbertson and Dinah Shelton (21 July 2008), online at <http://www.oxfordlawreports.com > (accessed 8 January 2011).

[582] *Re 'Agent Orange' Product Liability Litigation*, 373 F Supp 2d 7 (EDNY 2005) (hereinafter: *The Re 'Agent Orange'* case).

[583] Including The Alien Tort Statute (n 534); 'Torture Victim Protection Act (28 U.S.C. § 1350); 'War Crimes Act' (18 U.S.C. § 2441) (The acts described allegedly constitute war crimes in violation of the Alien Tort Statute, TVPA, customary international law, the common law of the United States, the common law of the State of New York, the laws of Vietnam, and international treaties, agreements, conventions and resolutions; the Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (adopted 16 June 1925, entered into force 8 February 1928) 26 U.S.T. 571; Article 23 of the Hague Regulations of 1907; The Fourth Geneva Convention of 1949; Agreement for the

Preliminary issues raised by the defendants argued were (1) that corporations acting as government contractors are immune under the government contractor defence (which protects government contractors from product liability claims if they can demonstrate that they followed the government's instructions); (2) the claim was a non-justiciable political question and that the court should defer to the Executive's determination at the time that the actions were lawful. In support of the defendants' preliminary claims the Bush administration filed a Statement of Interest supporting Defendants' motion to dismiss the claims under the Alien Tort Statute as non-justiciable political questions because those claims require an inquiry into executive judgments relating to the prosecution of a war. The Bush administration claimed that the case raised non-justiciable political questions that would require the Court to pass upon the validity of the President's decisions regarding combat tactics and weaponry during a time of armed conflict. Such judicial review would entrench upon the Executive's Commander-in-Chief authority, and run foul of basic principles of separation of powers and the political question doctrine. It stated that allowing the claim to proceed would interfere with the relationship with Vietnam, and that this litigation could open the US courts to all nation's past and future enemies. In addition, the State argued that the court should give deference to the Executive's interpretation of the relevant treaties and customary international law accordingly the US's use of chemical herbicides in Vietnam did not violate any applicable rules of international law.

The court found the State position on non-justiciability to be "not persuasive", and contrary to the government's stand it ruled that the claims were justiciable. It also ruled that the corporations were not immune as the contractor defence was inapplicable to allegations of war crimes. In defining its role the court took a remarkably active position:

> Justiciability is not eliminated because of possible interference with executive power even in wartime … given the importance of international law today in preventing abuse by nations and individuals, and the importation of that law into ruling federal law, the political question doctrine does not bar this suit… It raises issues that courts are structured and empowered to decide—the nature and applicability of substantive international law and

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Prosecution and Punishment of the Major War Criminals of the European Axis and Charter of the International Military Tribunal at Nuremberg (adopted and entered into force 8 August 1945) 82 U.N.T.S 280; the United Nations Charter; UNGA Res. 2603-A (16 December 1969) UN Doc A/RES/2603(XXIV)A; Customary international law.

> domestic tort law.… What international law is and how it applies present questions of the meaning of substantive law, and the interpretation of these questions is a task entrusted to the courts. That judicial power can not be frustrated by the overly broad preemption doctrine espoused by defendants.[584]

On the question of deferral the Court also took a firm position:

> The President of the United States has no power to violate international law or to authorize others to do so. The Nuremberg decisions made it clear that a head of state and those responding to his orders are bound by international law... The government's further contention that the courts should defer to the executive's interpretation of international law insofar as it suggests that the executive's statement of the law is controlling, is rejected, even though the courts will often be influenced by the executive's interpretation since its expertise in international law is substantial.

Thus the Court rejected the defendants' non-justiciability and immunity claims, and took a very active stand on the appropriate role of the judiciary in adjudicating cases dealing with decisions and acts performed during armed conflict, in firm opposition to the views of the state. Seemingly, this represents a landmark decision on avoidance doctrines. Yet, these claims must be put in context: on the merits, the court rejected the plaintiffs' claims and ruled that international humanitarian law, at that time, did not prohibit the use of this kind of weapon. In deciding to exercise its competence the court in fact legitimized the State's use of herbicides in Vietnam prior to 1975. Now the important question to examine is if on the merits the finding had been different, and the court was to rule that the government had used an illegal weapon and committed a war crime, would the judge be equally willing to exercise its judicial function in such an active manner? Would the judge still rely so heavily on Second World War precedents including the Eichmann case, the Nuremberg trials, and responsibility of Hitler as commander?[585] The answer to these questions remains unknown. However, as argued by Jeff Yates and Andrew Whitford, when the State has not violated the law, courts

[584] *The Re 'Agent Orange'* case (n 582), para. 183.

[585] In *The Re 'Agent Orange'* case, *Ibid*, para. 216, the court refers to the superior order defense and states, while referring to Hitler's orders not been defense at Nuremberg, that spraying of herbicides being an orders of the President, can not serve a defense. It referred also to the Eichmann case.

will be more willing to judge the case.[586] Quite surprisingly an echo of this reflection may be found in the judgment itself, where the Court cites Louis Michael Seidman:

> a court cannot 'decide whether there is a textually demonstrable commitment or judicially manageable standards without first taking a peek at the very merits it purports to be avoiding. In effect, the Court says that it must first decide the merits in order to avoid deciding the merits…'[587]

Prof. Thomas M. Franck in his book "Political questions judicial answers" provides other examples of federal courts taking an "active position" when their ruling on the merit is in favour of the state, as, for example, the Holtzman litigation that challenged the legality of US bombing in Cambodia during the Vietnam War. The Second Circuit ruled that this was a non-justiciable political question, but then, as observed by Frank, the court "went on to say: 'we can not resist…' examining congressional appropriations that would legitimate the president's actions." Another illustration is the case dealing with missing persons in Vietnam, whose relatives sought an order to compel the president to intensify efforts to find them according to a domestic US act. While the court "dutifully intoned that 'conduct of foreign policy' is 'an area traditionally reserved to the political branches'", the judge nevertheless determined that the president had wide discretion in its discharge.[588] The jurisprudential effect of these rulings, according to Franck, is to "leave unclear whether the courts will take jurisdiction in such cases, examining and determining the extent of the president prerogatives and discretion, or whether they wash their hands of the duty 'to say what the law is' whenever the foreign policy talisman is invoked".[589]

In conclusion, Prof. Thomas Franck notes that:

> the jurisprudence has a powerful whiff of hypocrisy: judges say they will abstain but fail to do so. Judges proclaim the separation of powers but almost always decide in favor of the

[586] J. Yates and A. Whitford (n 461), pp. 539-550.

[587] *The Re 'Agent Orange'* case (n 582), para. 156 (citing L.M. Seidman, 'This Essay is Brilliant/This Essay is Stupid: Positive and Negative Self-Reference in Constitutional Practice and Theory' (1998) 46 UCLA Law Review [i] 501, pp. 501, 528–530).

[588] T.M. Franck (n 211), pp. 27-30, discussing *Smith v Reagan*, 844 F.2d 195 (4th Cir. 1988). *Holtzman v Schlesinger*, 361 F. Supp. 553 (E.D.N.Y 1973); *Holtzman v Schlesinger*, 484 F. 2d 1307 (3d Cir. 1973). These cases do not deal specifically with ATS, but with the application of other laws in the context of armed conflict.

[589] T.M. Franck, *ibid*, p. 30.

government in a process where the players – the government and those challenging its actions – appear not to be playing on a level field.[590]

2.1.3 Alien Tort Statute cases against US allies

Different avoidance doctrines used in cases involving US officials have been used in a similar manner to avoid jurisdiction in cases involving the responsibility of officials from US ally states. This section illustrates this through three different cases dealing with violations allegedly committed by Israel, and represents generally the typical attitude of the courts' when close ally states are the subject of litigation. Official immunity serves as the first avoidance method, with, in addition, the political question and the act of state doctrines.

In *Ya'alon*,[591] the plaintiffs sued the Israeli General Moshe Ya'alon, a former head of Israeli army intelligence, under the Alien Tort Statute and the Torture Victim Protection Act of 1991 for war crimes and extrajudicial killing for the shelling of a UN compound in Qana, Lebanon, in 1996 in which more than 100 Palestinian civilian refugees were killed. During the proceedings the Israeli government submitted a letter to the court stating that Ya'alon's actions were within the course of his official duties. The appellants argued that the FSIA does not apply to former government officials,[592] and that even if it does, a fundamental violation of international law can never be within the scope of official authority. The Circuit Court, however, found that Ya'alon was immune from suit under the FSIA and affirmed that an individual can qualify as an agent for purposes of the FSIA.[593] The Circuit Court also rejected the plaintiffs' claim that the FSIA does not apply to foreign officials once they have left office. In addition, it declined to create a *jus cogens* exception to the FSIA in the absence of specific congress authorization,[594] although other courts in cases against other states, such as the Philippines, had recognized violations of *jus cogens* norms as an exception to FSIA

[590] *Ibid*.

[591] *Belhas v Ya'alon*, 515 F.3d 1279 (D.C. Cir. 2008) (hereinafter: *The Balhas* case).

[592] *Ibid,* p. 1286.

[593] This finding was overruled by the US Supreme Court two years later in the *Samantar* case in which the Court held that the FSIA does not grant immunity to individuals, although it left open the question of whether officials were entitled to common-law immunity. *The Samantar* case (n 556), pp. 2292–2293 (holding that a Somali official was not entitled to immunity for his official acts under the FSIA).

[594] *The Balhas* case (n 591), pp. 1287–1288.

immunity.[595] While courts have found the FSIA inapplicable in suits against certain states' officials based on violations of *jus cogens* norms, it granted immunity to Israeli officials and it seems that other federal courts are also unlikely to recognize a *jus cogens* exception in cases against close ally states.

In *Matar v. Dichter*,[596] the former director of the General Security Services was sued for planning and directing the commission of a war crime in the targeted killing of Saleh Shehadeh. The complaint, filed in December 2005, alleged that by committing war crimes and other violations of international law, Dichter was liable for damages pursuant to the Alien Tort Statute. The State Department expressed the view that the FSIA grants sovereign immunity to countries, not to individuals, yet Dichter was still entitled to common law immunity which the FSIA did not displace. The Court of the Second Circuit ruled, in accordance with the US State Department's position, that even if the FSIA is not applicable, former officials are still entitled to common law immunity as long as their acts were within their official capacity. It recognizes immunity of former foreign officials for "acts performed in his official capacity": an immunity "based on acts—rather than status—does not depend on tenure in office".[597]

In allocating common law immunity to Dichter the Court recognized that the allegations of war crimes were performed within Dichter's official capacity, as explicitly confirmed by the State of Israel. It is interesting to note that this is exactly how the court of first instance distinguished this case from the ones in which a *jus cogens* violation did waive an official's immunity:

> none of the cases cited by Plaintiffs involve a situation where, as here, the foreign government has expressly ratified the defendant's actions and affirmed that the defendant was acting pursuant to his official duties.[598]

Oddly, the court ruled that to shield state officials from accountability for war crimes a mere declaration of the government that these were executed as a part of an official policy is

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[595] *Hilao v Estate of Marcos*, 25 F.3d 1467 (9th Cir. 1994), p.1472; *Chuidian v Philippine National Bank*, 912 F.2d 1095 (9th Cir. 1990), p. 1106.

[596] *Matar v Dichter*, 500 F. Supp. 2d 284 (S.D.N.Y. 2007) (hereinafter: *Matar (district court)* case). On appeal *Matar v Dichter*, 563 F.3d 9 (2nd Cir. 2009).

[597] *Matar v Dichter* 563 F.3d 9 (2nd Cir. 2009), *Ibid*, pp. 13-15.

[598] *Matar (district court)* case (n 596), p. 296.

enough. Would this rationale be applicable to all states? Not always. It depends. In the case of *Siderman de Blake v. Argentina*, for example, the Circuit Court stated that "[i]nternational law does not recognize an act that violates *jus cogens* as a sovereign act."[599]

In addition to immunity, in *Matar v. Dichter*, the US's position was that the case should be dismissed on political question grounds. The district court was ready to follow this approach and to dismiss the case on those grounds. In doing so, the court adopted a strikingly deferential attitude: The plaintiff's referral to *Kadic* was labelled as "misplaced" for the simple reason that in *Kadic* the State Department had "expressly disclaimed any concern that the political question doctrine should be invoked … the opposite is true here, as the State Department had advocated forcefully for the dismissal of this action".[600]

The *Corrie v. Caterpillar*[601] case was dismissed on purely political question grounds, although in this case it was not an Israeli official who was sued, but a private US company that supplied bulldozers to the Israeli army, which were allegedly used to commit war crimes. As the United States government had paid for the bulldozer as part of its aid to Israel and as the executive and legislative branches had approved the US policy of selling weapons and other goods to Israel the Court found that this case formed part of the non-justiciable political question doctrine; furthermore, the court found that the act of state doctrine applied because the plaintiffs were asking the court to pass judgment on official military acts of Israel.[602]

In contrast with these cases, which involve the responsibility of Israel, in many other suits courts have imposed liability on the Palestinain Authority, Palestinaian Liberation

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[599] Siderman de Blake v. Republic of Argentina, 965 F.2d 699 (9th Cir. 1992), at p. 718-719.

[600] *Matar (district court)* case (n 596), p. 302.

[601] *Corrie v Caterpillar, Inc.* (n 536).

[602] On appeal, the Ninth Circuit first held that the political question doctrine is a "jurisdictional limitation imposed on the courts by the Constitution," not just a prudential doctrine adopted "by the judiciary itself." (*Ibid*, p. 981). The court then applied the Baker factors, and found that the case did present a political question: "The decisive factor here is that Caterpillar's sales to Israel were paid for by the United States [..] [T]hese sales were financed by the executive branch pursuant to a congressionally enacted program calling for executive discretion as to what lies in the foreign policy and national security interests of the United States [..] Allowing this action to proceed would necessarily require the judicial branch of our government to question the political branches' decision to grant extensive military aid to Israel. It is difficult to see how we could impose liability on Caterpillar without at least implicitly deciding the propriety of the United States' decision to pay for the bulldozers which allegedly killed the plaintiffs' family members."

organization and Iran for acts of terrorism.[603] As pointed by Adam N. Schupack, in civil cases involving the Israeli-Arab conflict the courts have not applied the political question doctrine in a uniform fashion:

> Suits against the PA, PLO, and Iran have resulted in large judgments, while courts have dismissed suits against Israel, Israeli leaders, and Caterpillar. […][T]his contrast represents an injustice that undermines the legitimacy of such suits and the notion that litigants who are victims of Israeli actions can rely upon U.S. courts to dispense justice.[604]

2.1.4 Alien Tort Statute cases against other third States' officials

The case that probably represents the best a situation in which a US court attributed compensation for victims during an ongoing armed conflict is the *Kadic* case.[605] It was a suit brought by Bosnian nationals against Radovan Karadic, the leader of the Bosnian Serb entity, for committing, inter alia, war crimes during the armed conflict in Bosnia and Herzegovina. Not only did the Second Circuit Court not avoid rendering a ruling (indeed, it rendered a ruling in a particularly sensitive period of an ongoing conflict when peace agreements were being negotiated)[606], it also engaged in analysis of what were then innovative international humanitarian law issues, such as whether a violation of Common Article 3 of the Geneva Conventions constitutes a war crime as well as whether the court may exercise jurisdiction over non-state actors under the Alien Tort Statute.[607] The Court opened the section of its ruling in which it discussed justiciability with the following statement:

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[603] A.N. Schupack (n 543), pp. 207, 214-228. The cases mentioned include also case sued under the Anti Terrorist Act 1990.

[604] *Ibid*, p. 245.

[605] *The Kadic v Karadzic* case (n 488).

[606] The case was argued on 20 June 1995 and decided on 13 October 1995, while the Dayton Peace agreement were signed on December 1995. Karadzic was served with the Plaintiffs' complaint on two occasions during visits to NYC for negotiations at the UN. See T.R. Posner, 'Kadic v. Karadzic, 70 F. 3d 232 (June 18, 1996)' (1996) 90 American Journal of International Law 4, p. 659. See how the court opens its ruling: "Most Americans would probably be surprised to learn that victims of atrocities committed in Bosnia are suing the leader of the insurgent Bosnian-Serb forces in a United States District Court in Manhattan."

[607] *The Kadic v Karadzic* case (n 488), pp. 242-244.

> We recognize that cases of this nature might pose special questions concerning the judiciary's proper role when adjudication might have implications in the conduct of this nation's foreign relations. We do not read *Filártiga* to mean that the federal judiciary must always act in ways that risk significant interference with United States foreign relations. To the contrary, we recognize that suits of this nature can present difficulties that implicate sensitive matters of diplomacy historically reserved to the jurisdiction of the political branches."[608]

The Court then considered whether, even though the jurisdictional threshold is satisfied, other considerations "relevant to justiciability weigh against permitting the suits to proceed". Before addressing the political question and act of state doctrines in this particular case it emphasised that "[N]ot every case "touching foreign relations" is non-justiciable, and that: "[T]he doctrine 'is one of "political questions," not one of "political cases." When the Court move to examine the *Baker factors* it cited as a reference a case against the PLO.[609] As for the act of state doctrine the Court stated that it "doubt[s] that the acts of even a state official, taken in violation of a nation's fundamental law … could properly be characterized as an act of state". Finally, the Court emphasised that in this case the Statement of Interest of the State Department the United States has "expressly disclaimed any concern that the political question doctrine should be invoked to prevent the litigation of these lawsuits", thereby enabling it to reject the non-justiciability claims. It is beyond the scope of this section to examine why the Clinton Administration found that there are no implications to foreign relations that impeded this case from proceeding, when the same administration had been negotiating with the defendant the Dayton Agreements.[610] Whatever the interest of the US State Department, it may be reasonably assumed that without that consent the court would have abstained from delivering a ruling in such a sensitive period.

The preferable approach to whether or not to avoid a case is to be widely cited in future cases:

> [The court should] weigh carefully the relevant considerations on a *case-by-case basis*. This will permit the judiciary to act where *appropriate*…[611].

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[608] *Ibid*, p. 249.

[609] "The department to whom this issue has been 'constitutionally committed' is none other than our own — the Judiciary." *Klinghoffer v PLO*, 937 F.2d 44 (2nd Cir. 1991), p. 49.

[610] *Ibid*.

[611] *The Kadic v Karadzic* case (n 488), p. 249.

In this way, since the revival of the Alien Tort Statute in 1980, US federal courts have acted when it was deemed *appropriate*. As result two contradictory trends coexist in the jurisprudence – one "abdicationist", the other activist. While "often a court will treat the political question doctrine as applicable to a case for reasons that fail to distinguish it from similar litigation in which judges felt entitled to decide without deferring to the doctrine",[612] opposing jurisprudence has developed that allows courts to rely on the convenient jurisprudence to decide on a *state by state* basis whether it is *appropriate* to adjudicate and to apply international humanitarian law or whether it is *appropriate* to avoid rendering justice, most often in accordance with the US State position.

2.1.5 Concluding observations

Analysis of the international humanitarian law Alien Tort Statute cases shows how domestic doctrines of non-justiciability and immunity are applied, under the directive of the state, in double standard mode, and demonstrates that when a court applies the Alien Tort Statute cases in favour of the victims, it was also in accordance with the State's position. Because of the contradictory interests of the State – its willingness to promote its own image as defender of human rights and humanitarian violations in the world, and at the same time the need to ensure that its own officials and allies will not be accountable for the same violations – and the tendency of US courts to defer international humanitarian law issues to the executive, probably because of its tradition to "speak in one voice" in foreign relations issues, a selective application of the avoidance doctrines (and of the Alien Tort Statute) emerges, one that follows the State's direction.

[612] T.M. Franck (n 211), p. 8.

2.2 Case Study No. 2: The US and Israeli targeted killing cases

The different roles and positions of the courts regarding their exercise of competence in conduct of hostility cases is well illustrated in targeted killing cases decided before the US District Court and the Israeli High Court of Justice.

2.2.1 The targeted killing case (US Court)

The United States has adopted a secret policy of targeted killings since the attacks of 11 September 2001, in which it has used drones and airstrikes for targeted killings in Afghanistan, Iraq, and allegedly also in other territories[613]. During the 2010 annual meeting of the American society of international law, the US Department of State legal advisor, M. Harold Koh, affirmed that the Obama Administration "is committed to ensuring that the targeting practices … are lawful".[614] In his speech, Koh offered legal justifications for targeted killings. These were based both on the US's right to self-defence and on international humanitarian law, applicable in the armed conflict with *al-Qaeda*, the Taliban, and associated forces. Philip Alston, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, who conducted a study on targeted killings, noted in his report that these justifications do not address "some of the most central legal issues including: the scope of the armed conflict in which the US asserts it is engaged, the criteria for individuals who may be targeted and killed, the existence of any substantive or procedural safeguards to ensure the legality and accuracy of killings, and the existence of accountability mechanisms."[615]

Shortly after, on 30 August 2010, the American Civil Liberties Union and the Center for Constitutional Rights filed a suit in the name of Nasser Al-Aulaqi against President

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[613] Council of Europe, 'Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States' (2007) Rapporteur Mr. Dick Marty, Doc. 11302 Rev., paras. 58-64; Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, Addendum, Study on Targeted Killings, UN Doc A/HRC/ 14/24/Add.6 (28 May 2010), pp. 7-8 (hereinafter: UN Study on Targeted Killings). See for a general discussion on the legality of targeted killings see: R. Chesney, 'Who May Be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force' (2011) Yearbook of International Humanitarian Law (forthcoming).

[614] H. Hongju Koh, 'The Obama Administration and International Law' U.S. Department of State (25 March 2010), online at <http://www.state.gov/s/l/releases/remarks/139119.htm> (accessed 20 October 2011).

[615] UN Study on Targeted Killings (n 613), para. 22.

Obama and others challenging their decision to authorize the targeted killing of his son, a US citizen, in Yemen, before the US District Court for the District of Columbia. They claimed that the US policy of targeted killing violates the Constitution and international law,[616] and asked the court to declare that according to US constitutional law and international law, the US government is prohibited from carrying out the targeted killing of citizens where no armed conflict exists.[617] The State asked to dismiss the case because of different avoiding doctrines including lack of standing, political question and state secrets privilege, basing itself on the separation of power rational and the Court's incapacity to evaluate military issues :

> The particular relief plaintiff seeks would constitute an *ex ante* command to military and intelligence officials that could interfere with lawful commands issued by the President, who is constitutionally designated as Commander-in-Chief of the armed forces and constitutionally responsible for national security…Enforcement of such orders would necessarily require the Court to supervise inherently predictive judgments by the President and his national security advisors as to when and how to use force overseas against that organization. Courts are not equipped to superintend such questions…
> the very determination of whether and in what circumstances the United States' armed conflict with al-Qaeda might extend beyond the borders of Iraq and Afghanistan is itself a non-justiciable political question .[618]

The U.S. District Court of Columbia granted the government's motion to dismiss on the grounds that the father of al-Awlaki lacks standing and that the claims were political questions and therefore not justiciable. The Court was in the position that the questions posed require both "expertise beyond the capacity of the Judiciary" and the need for "unquestioning

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[616] All the documents related to this case are available at: <http://www.ccrjustice.org/targetedkillings> (accessed 20 October 2011).

[617] The cause of actions were based on the constitution violation of the Fourth and Fifth Amendments, protecting the right to life and the due process, and the ATS, through which the claimant refer to international human rights and humanitarian law accordingly there is a prohibition to kill outside of an armed conflict "without judicial process in circumstances in which they do not present concrete, specific, and imminent threats to life or physical safety, and where there are means other than lethal force that could reasonably be employed to neutralize any such threat." Complaint for Declaratory and Injunctive Relief (30 August 2010), p. 10 <http://ccrjustice.org/files/Al-Aulaqi%20v.%20Obama%20Complaint.pdf> (accessed 20 October 2011).

[618] Opposition to Plaintiff's Motion for preliminary Injunction and Memorandum in Support of Defendants' Motion to Dismiss, pp. 19, 22 <http://ccrjustice.org/files/15(1)-Al-Aulaqi%20USG%20PI%20Opp%20&%20MTD%20Brief_09-25-10.pdf> (accessed 20 October 2011).

adherence to a political decision by the Executive" and an assessment of "strategic choices directing the nation's foreign affairs [that] are constitutionally committed to the political branches."[619] Ruling that it is a non-justiciable political question, the court of first instance left outside the realm of the law enforcement the question of the legality of a targeted killing of an American citizen, who challenged a violation of his constitutional rights.

> Because these questions of justiciability require dismissal of this case at the outset, the serious issues regarding the merits of the alleged authorization of the targeted killing of a U.S. citizen overseas must await another day or another (non-judicial) forum. [620]

Even the Court itself felt uneasy with result: "it does not appear that any court has ever – on political question doctrine grounds – refused to hear a US citizen's claim that his personal constitutional rights have been violated as a result of US government action taken abroad."[621] Perhaps, as this case involved politically sensitive and complex questions, institutionally a lower level court could not decide otherwise. While it was ready to acknowledge that it is a "drastic measure" for the US to employ lethal force against one of its own citizens abroad, even if that citizen is an active part of a terrorist group, it only expressed its discontentment from its own judgment:

> To be sure, this Court recognizes the somewhat unsettling nature of its conclusion – that there are circumstances in which the Executive's unilateral decision to kill a US citizen overseas is "constitutionally committed to the political branches" and judicially unreviewable.[622]

Attorney Pardiss Kebriaei from the Center of Constitutional Rights, who represented the victim in this case, commented that:

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[619] *Al-Aulaqi v Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010), pp. 76–77 (hereinafter: *The US Targeted Killing* case), <http://www.ccrjustice.org/files/2010.12.07_Al-Aulaqi%20Decision_0.pdf> (accessed 20 October 2011).
See also at p. 80: "Because decision-making in the realm of military and foreign affairs is textually committed to the political branches, and because courts are functionally ill-equipped to make the types of complex policy judgments that would be required to adjudicate the merits of plaintiff's claims, the Court finds that the political question doctrine bars judicial resolution of this case."

[620] *The US Targeted Killing* case, *Ibid*, p. 4. For the discussion on the political question doctrine see pp. 65-80.

[621] *Ibid*, p. 74.

[622] *Ibid*, p. 78.

> The court's holding on the political question doctrine is indeed "unsettling". ... The court refused to hear a claim on behalf of a US citizen under threat of death by his own government that his personal constitutional rights have been violated – exactly what the court itself acknowledges it appears no court has ever done.[623]

2.2.2 The targeted killing case (Israeli High Court of Justice)

The Israeli High Court of Justice has responded differently to the question of the justiciability of targeted killings and more generally its willingness to review conduct of hostilities issues. In 2000, Israel made public a policy of "targeted killings" of alleged terrorists in the Occupied Palestinian Territories, which was justified as preventive acts.[624] The targets have included members of various groups, including Fatah, Hamas, and Islamic Jihad, who, according to the State, were involved in attacks against Israeli civilians.[625] Means used for targeted killings include drones, snipers, missiles shooting from helicopters, killings at close range, and artillery.

The legality of the Israeli policy of targeted killing in the OPT was challenged before the High Court of Justice in 2002. The petitioners submitted that by the end of 2005 close to 300 members of alleged terrorist organizations had been killed by targeted killings and approximately 150 civilians who were close to the location killed during those acts. Hundreds of others have been wounded[626]. The petitioners' claim was that the targeted killing policy is illegal as it violates international humanitarian and human rights law – both the rights of those targeted, and the rights of innocent civilians caught in the targeted killing zone. A

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[623] 'Court Dismisses Targeted Killing Case On Procedural Grounds Without Addressing Merits' Center for Constitutional Rights (CCR) (7 December 2010) <http://ccrjustice.org/newsroom/press-releases/court-dismisses-targeted-killing-case-procedural-grounds-without-addressing-> (accessed 20 October 2011).

[624] E.g., 'Press Briefing by Colonel Daniel Reisner, Head of the International Law Brach of the IDF Legal Division' (15 November 2000) <http://www.mfa.gov.il/MFA/MFAArchive/2000_2009/2000/11/Press%20Briefing%20by%20Colonel%20Daniel%20Reisner-%20Head%20of> (accessed 20 October 2011).

[625] O. Ben-Naftali and K. Michaeli, 'We Must Not Make a Scarecrow of the Law: A Legal Analysis of the Israeli Policy of Targeted Killings' (2003) 36 Cornell International Law Journal 233, pp. 247-250.

[626] *The Targeted Killings* case (n 454), para. 1. According to the Israeli NGO Btselem, between 2002 and May 2008 at least 387 Palestinians were killed as a result of targeted killing operations. Of these, 234 were the targets, while the remainder were collateral casualties <http://old.btselem.org/statistics/english/Casualties.asp> (accessed 21 October 2011).

considerable part of the State's response was dedicated to preliminary arguments, claiming that the policy of targeted killings employed by the army is a non-justiciable issue.

> [T]he IDF combat activity in the framework of the combat events occurring in the *area*, which are of operational character *par excellence*, are not justiciable … the dominant character of the issue is not legal, and the attribute of judicial restraint requires that the Court refrain from stepping down into the combat zone and from judging the operational acts *par excellence* which are occurring in that zone…clearly, the subject's status as "nonjusticiable" does not mean that means of supervision and control on the part of the executive branch itself are not employed on this issue ... the units of the army have been instructed by the Attorney General and the Military Advocate General to act on this issue, as in others, strictly according to the provisions of international law regarding laws of conflict, and they comply with that instruction.[627]

In the Targeted killings ruling Judge Barak discusses in length the role of non justiciability doctrines in the Israeli legal system. He distinguishes between two types of non justiciability: normative and institutional. The normative non justiciablity claims that there are no legal standards for deciding a case. According to Barak this type of non justiciability has no basis as "there is always a legal norm according to which the dispute can be solved". Barak provides the simple example that if there is no law prohibiting a behaviour – than it is legal, likewise, if the legal framework establish that a certain domain is under the Executive discretion – than this is the legal norm that would resolve the issue. In contrast, the institutional non-justiciability claims that the dispute should not be decided in a Court according to the law as a matter of policy:

> That non-justiciability deals with the question whether the law and the Court are the appropriate framework for deciding in the dispute. The question is not whether it is possible to decide in the dispute according to the law, in Court. The answer to that question is in the affirmative. The question is whether it is desirable to decide in the dispute – which is normatively justiciable – according to legal standards, in Court. That type of non-justiciability is recognized in our law.[628]

[627] *The Targeted Killings* case (n 454), para. 47.

[628] *Ibid*, paras. 48-49.

Probably in line with Bikel' s propositions, the Israeli High Court did not provide a clear list of factors to be applied and recognized that there is not a consensus about the scope of the institutional non-justiciability doctrine. More specifically concerning the targeted killing case, Justice Barak rejected the State's non-justiciability claim on four grounds. The first ground was that as the Israeli High Court tends not to apply non-justiciability doctrine where it might prevent the review over basic rights, such as the right to life.[629] Second, according to Justice Barak, the court may apply the non-justiciability doctrine when the dominant character of the disputed question is political or military, but when its dominant character is legal, the doctrine is inapplicable. In this case, Barak found that although the judgement is likely to have political or military implications he determined that the question whether the "State policy of preventive strikes which cause the death of terrorists and at times of nearby innocent civilians" is a question of legal character.[630] The third ground advanced by Justice Barak is that if international courts are entitled to review the legality of the conduct of armies, national courts should be competent to perform that same examination. When Justice Barak asks, "Why do those questions, which are justiciable in international courts, cease to be justiciable in national tribunals?",[631] he may be hinting to the government that while it claims non-justiciability, it should in fact agree that it is preferable that an Israeli jurisdiction rather than an international one review the question. Lastly, Barak noted that according to international customary law the conduct of the army performing "preventive acts which cause the deaths of terrorists and of innocent bystanders" required an *ex post* examination, which must be objective. Therefore the court concluded that "in order to intensify that character, and ensure a maximum of that required objectivity, it is best to expose that examination to judicial review",

[629] *Ibid*, para. 50: "The petition before us is intended to determine the permissible and the forbidden in combat which might harm the most basic right of a human being – the right to life. The doctrine of institutional non-justiciability cannot prevent the examination of that question."

[630] *Ibid*, paras. 51, 52: "The questions disputed in the petition before us are not questions of policy. Nor are they military questions. The question is whether or not to employ a policy of preventative strikes which cause the deaths of terrorists and at times of nearby innocent civilians. The question is – as indicated by the analysis of our judgment – legal; the question is the legal classification of the military conflict taking place between Israel and terrorists from the *area*; the question is the existence or lack of existence of customary international law on the issue raised by the petition; the question is of the determination of the scope of that custom, to the extent that it is reflected in §51(d) of *The First Protocol*; the question is of the norms of proportionality applicable to the issue. The answers to all of those questions are of a dominant legal character."

[631] *Ibid*, para. 53.

while mentioning that this judicial review "is not a review instead of the regular monitoring by the army officials, who perform that review in advance"[632].

2.2.3 Concluding observations

Interestingly, the reasoning in the Israeli and the American decisions could have each lead to the opposite result in these specific cases, as in the American case the claim involves an allegation of a violation constitutional right of a US citizen[633], and in Israel the case was challenging a policy of general nature and not a concrete case, which was previously ruled to be non justiciable[634]. Yet, in fact, their decisions reflect their different attitudes in adjudicating conduct of hostilities cases and their internal institutional policy on this matter.[635] Courts avoid or adjudicate cases in a way that correspond to their relation with the government and the degree independency *vis-à-vis* the political branches. The willingness to exercise competence differ therefore from jurisdiction to jurisdiction, and is not related to the legal question itself, whether there are "judicial standards" to apply or not – because, as shown here, while in one jurisdiction the issue is not justiciable, in another it is. These cases well illustrate that avoidance doctrines have no definite borders although courts set "neutral" factors for their applications. Different courts will have different application, while the decision of the court is motivated by a policy choice and not a legal one.

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[632] *Ibid*, para. 54.

[633] See, for example, *The Hicks* case (n 491) and *The Habib* case (n 463) and the *Amnesty International Canada v Canada (Minister of National Defence)*, (2008) FC 336, (2008**)** 4 FCR 546. (hereinafter: *The Amnesty* case). In these cases the claims were based on violations of the constitution, and the courts ruled that avoidance doctrines cannot be applied.

[634] See HCJ 4481/91 *Bargil v. The State of Israel* (1993) 47(4) PD 210. *(Hereinafter: The Bargil* case) challenging the legality of the settlements policy.

[635] See also *El-Shifa Pharmaceutical Industries Company v United States*, 402 F. Supp. 2d 267 (D.D.C. 2005) and *El-Shifa Pharmaceutical Industries Company v United States,* 559 F.3d. 578 (D.C. Cir. 2009). (finding that questions regarding the legality of targeting decisions involving military attacks ordered by the President were immune from judicial review under political question doctrine).

2.3 Case Study 3: The legality of Israeli Settlements in the OPT

2.3.1 The Israeli High Court of Justice

A variation of avoidance doctrines have been employed over the years by the Israeli High Court of Justice in order to avoid review of one of the most politically sensitive question in Israel, and maybe the state's most evident violation of international humanitarian law– the legality of the settlements in light Article 49 (6) of the Fourth Geneva Convention[636].

When the first series of cases dealing with settlements were brought before the court in the early 70s, the High Court of Justice was ready to review the legality of the requisition orders issue by the military commander in light of Art. 52 of the Hague Regulations, but not the more general legality of the settlement policy. It was ruled that Article 49 (6) of the Forth Geneva Convention did not consist a customary rule, and therefore it could not be directly enforced by Israeli courts.[637] During these early cases that the High Court of Justice formed its policy: while it would not review the legality of the settlements in principle in light of Article 49(6) of the Fourth Geneva Convention, as it established that it was not a custom and therefore not enforceable by Israeli courts, it was ready to defend the property rights of the petitioners and to review the legality of the requisition orders in light of Articles 46 and 52 of the Hague Regulations – which, were recognized at that time, to be customary law, following Prof. Dinstein's guidance[638]. In the *Beit El* case Justice Witkon noted that property rights are justiciable:

> I am not impressed by that argument whatsoever . . . . it is clear that issues of foreign policy – like a number of other issues – are decided by the political branches, and not by the judicial branch. However, assuming . . . that a person's property is harmed or expropriated

[636] The illegality of the Israeli Settlements was declared by a large number international bodies: the International Court of Justice, the International Committee of the Red Cross, the European Court of Justice and the UN General Assembly.

[637] The Israeli legal system is a dualist systems: while international treaty law must be endorsed by parliament legislation in order to be enforced by a domestic court, customary law become directly a part of the law of the land, insofar there is no other contradicting legislation. The Geneva Conventions of 1949 were ratified by Israel in 1951 but the Israeli Parliament has never adopted an endorsing legislation of the Convention. Therefore only international humanitarian law customary law may be enforced by Israeli domestic courts.

[638] *The Beit-El* case (n 350); *The Elon Moreh* case (n 343).

> illegally, it is difficult to believe that the Court will whisk its hand away from him, merely since his right might be disputed in political negotiations.[639]

In *Alon Moreh* Justice Landau equally recognized that:

> A military government wishing to impinge upon the property right of an individual must show a legal source for it, and cannot except itself from judicial supervision over its acts by arguing non-justiciability.[640]

Thus, during this short period the High Court of Justice rendered judgments on merits in cases that questioned the legality of the requisition orders, through which the state obtain the (temporary) possession of the land to built the settlements, avoiding to rule on the legality of the settlements themselves. The High Court of Justice completely disregarded whether the construction of exclusive Israeli civil communities on an occupied land, over which the Israeli legal regime is extra territorially applied, was legal, and the legality of the Israeli government's encouragement of its own population to do a voluntary transfer to these communities established on occupied land through, through, for example, the allocation of tax reductions, in light of Article 49 (6) of the Fourth Geneva Convention was not reviewed. Already in the 70s the decision not to review the settlement policy was not only a question of whether Article 49 (6) is customary and enforceable in Israeli domestic courts, but, more importantly, a question that the court preferred not to enforce*:*

> [T]his court must refrain from considering this problem of civilian settlement in an area occupied from the viewpoint of international law…however, I agree that the petitioners' complaint is generally justiciable, since it involves property rights of the individual…[641]

The message sent to the government in these cases is clear – while the High Court of Justice will not prevent the execution of the settlements' policy by the application of article 49 (6), it was nevertheless willing to review the requisition orders that infringed the Palestinian

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[639] *The Beit-El case* (n 350), p. 124.

[640] *The Elon Moreh case* (n 343), p. 15.

[641] Justice Landau at p. 128, cited at *Bil'in (Village Council) and Yassin at al. v Green Park International, Inc. et al.*, (2009) QCCS 4151, para. 269 (hereinafter: *The Bil'in Canadian case*).See also *The Elon Moreh* case (n 343), pp. 4-5 cited in *The Bil'in Canadian case*, para. 281. *The Beit El* case (n 350), p. 124.

property rights[642]. Consequently, quite courageously, in *Elon Moreh* the court ordered for the first (and last time) the dismantle of a settlement (that was rebuild near-by shortly after) because it found that the requisition order was illegal, as it was issued for mainly political, and not military, reasons. Not surprisingly this was the last case of this series of cases. In the aftermath of Alon Moreh Israel changed its policy and declared that from now the settlements would be built only on public – and not private – land.[643] This fact is completely irrelevant for assessing the (il)legality of the settlement according to international humanitarian law. But from a domestic perspective this enable the state to pursue its policy, as the Israeli High Court of Justice indicated that it would not review the legality of the general policy, but will only protect private rights issue. From the moment the state accepted this limit imposed by the court – the court has continue to respect the limits it imposed on itself not to review the settlment policy until today.

In the following case the avoidance doctrine used by the High Court of Justice was standing. As the state declared that the settlements are built on public land, petitions would lack personal injury, which will allow the court to deny standing. The case of Arayeiv, in which the petitioner questioned whether construction of settlements on public land is in violation of Art. 55 of the Hague Regulations, accordingly the Occupying Power has the duty to administrate public property in accordance to the rules of usufruct, i.e., the Occupying Power can enjoy the fruits of the land, but can not change its capital nature, was dismissed by the High Court of Justice for that reason. More than 10 years later, in 1991, the Israeli pacifist movement Peace Now filed a petition that directly questions the legality of the policy of the settlements policy. This time the High Court of Justice rejected the petition both because of the lack of standing and concrete property dispute as well as the political nature of the settlement question, which makes it non justiciable.[644] This argument was already raised in the early cases in the 70s, but as these petitions were dealing with concrete dispute of private property right, the High Court of Justice nevertheless accepted to deal with the petitions as an exception to the general rule that the issue of the settlement is a political question.

In 1993, the Bargil case, which challenged the legality of the settlements policy, was rejected on the grounds of lack of standing and it being a 'political question' making the case non-justiciable. Justice Shamgar set the non justiciability test: when the dominate character of the

[642] Years later, the same policy will be applied by the High Court of Justice in the Wall cases.

[643] D. Kretzmer (n 220), p. 89.

[644] *The Bargil* case (n 634). Cited in *The Bil'in Canadian case* (n 641), para. 264.

disputed question is political or military, it is appropriate to prevent adjudication, however, when that character is legal, the doctrine of non-justiciability should not apply.

> The standard applied by the court is a legal one, but public law issues also include political aspects, within the different meanings of that term. The question which must be asked in such a case is, generally, what is the *predominant* nature of the dispute. As explained, the standard applied by the court is a legal one, and this is the basis for deciding whether an issue should be considered by the court, that is, whether an issue is predominantly political or predominantly legal. In the case before us, it is absolutely clear that the predominant nature of the issue is political, and it has continued to be so from its inception until the present.[645]

Justice Goldberg followed the same reasoning:

> In my opinion, the crux of the matter is whether this dispute should properly be determined by the court, *notwithstanding* our ability to rule on it as a matter of law. In other words, does this case fall into the category of the few cases where this Court will deny a petition for lack of institutional justicity. I believe that we must answer this question in the affirmative. This is not not because we lack the legal tools to render a judgment, but because a judicial determination, which does not concerns individual rights, should defer to a political process of great importance and significant.[646]

Recently, the question of the legality of the settlements has been revived through the petitions filed to the Israeli High Court of Justice concerning the legality of the Wall. While for the ICJ in its Advisory Opinion on the Wall examining the legality of the settlements was a fundamental factor for determining the illegality of the Wall[647], the High Court of Justice in contrast, persistently avoid addressing this issue, ruling that the legality of the settlement is an *irrelevant* question.[648]

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[645] *The Bargil* case (n 634) - Justice Shamgar, para. 5 (Cited partly in *The Bil'in Canadian case* (n 641), para. 262).

[646] *The Bargil* case (n 634), p. 11.

[647] *The ICJ Advisory Opinion on the Wall* (n 219), para. 120.

[648] *The Mara'abe* case (n 2), para. 19: "The military commander is authorized to construct a separation fence in the area for the purpose of defending the lives and safety of the Israeli settlers in the area. It is not relevant whatsoever to this conclusion to examine whether this settlement activity conforms to international law or defies it, as determined in the Advisory Opinion of the International Court of Justice at the Hague." See also HCJ

Today, in light the International Committee of the Red Cross customary law study and the Rome Statute it is possible that the determination of whether Art. 49 (6) is a custom will differ.[649] At the same time, it is not probable that an Israeli court will engage in such a finding for policy reasons. As David Kretzmer notes:

> Given the political controversy over the settlements, the High Court of Justice was reluctant to deal with the issue. It was especially reluctant to address general argument that challenged the government's entire settlement policy...The argument based on Art. 49 (6) of the Fourth Geneva Convention is a general argument of principle; its acceptance could have provoked a major confrontation with the government.[650]

2.3.2 The Quebec Superior Court, Canada

The Palestinian village of Bil'in is situated in the Israeli-Occupied West Bank, about 12km west of Ramallah and 5km north of Jerusalem. Starting in the 1980s, and more significantly in 1991, 56% of Bil'in's land was expropriated by the State of Israel to build the settlement of Modi'in Illit. Modi'in Illit is Israel's largest West Bank settlement in terms of population, and is planned to accommodate 150,000 residents. As the village of Bil'lin could not find redress before Israeli courts[651], it decided to file a civil action in Canada against the

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8414/05, *Yassin, Bil'in Village Council Chairman v The State of Israel, et al* (2007), para. 28 (English ruling at <http://elyon1.court.gov.il/files_eng/05/140/084/n25/05084140.n25.htm> (accessed 21 October 2011) (hereinafter: *The Israeli Bil'in Wall* case).

[649] See J.M. Henckaerts and L. Doswald-Beck (n 89), Rule 130, p. 462 ("States may not deport or transfer parts of their own civilian population into a territory they occupy") and Articles 8(2)(b)(viii) of the Rome Statute ("The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory").

[650] D. Kretzmer (n 220), p. 78.

[651] To date, the legal path of the village of Bil'in in Israel had already gone through four petitions, three of which dealt with the legality of the constructions conducted in the settlement of Modi'in Ilit from a domestic planning law perspective. HCJ 143/06, HCJ 3998/06, HCJ 1526/07. The HCJ ruled, *inter alia,* that the local council of the settlement Modi'in Ilit provided construction permits for the building company although the plans were not yet authorized by the planning authorities, thus important construction were illegal. Yet, although the High Court of Justice awarded unusual high coasts for the petitioners, it found that the late approval retroactively cured the defects. Adv. Sfrad, the lawyer who represented Bil'in, stated that it was "a retroactive clearance of the biggest illegal construction that ever occurred in the West Bank." S. Arieli and M. Sfard (n 348), p. 357. In all these

Canadian companies and their director building new neighborhoods in the settlement of Modi'in City on Bil'in's land. On 7 July 2008, Bili'n Village Council and its elected head, Ahmed Yassin (hereafter together "Bil'in"), have brought a suit before the Superior Court of Québec against the Canadian companies Green Park International, Inc., Green Mount International, Inc. and Annette LaRoche, the companies' sole director (together the "Defendants"), all domiciled in Quebec.[652] In the complaint, Bili'n claims the defendants by "illegally constructing residential or other buildings and marketing and selling condominium units and /or other built up areas on the land, to the civilian population of the State of Israel on the municipal lands of Bili'n"[653], aided, abetted, assisted and conspired with the State of Israel in carrying out an illegal purpose, that is, the transfer of the Occupying Power own population into the territories it occupies in violation of Art. 49(6) of the Fourth Geneva Convention of

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cases, the Canadian Green Park Inc. Company was a respondent. Following their request The Green Park Inc. Company became a respondent also in *The Israeli Bil'in Wall* case (n 648) in 2.2.2006 as they claim to be the private owner of the land, while the state claimed that it is "state land" (*The Israeli Bili'n Wall* case (n 581), paras. 23 and 39). The Green Park Inc. Company are one of the defandends in the claim submitted in Canada, see below. The Canadian judgment briefly describes those High Court of Justice petitions in paras. 33- 54. A forth case challenged the legality of the Wall. Many other Palestinian communities traced by the Wall filed petitions to the Israeli High Court of Justice on its legality, yet Bil'in is one of the rare cases in which the Israeli High Court of Justice ruled in favor of the petitioners and declared that the Wall's route is illegal and needs to be changed. The Ruling is based on the fact that the route of the Wall was intended to include territory for future expansion of the settlement Modi'in Illit – as the East Mattityahu neighbourhood, to be build by the Canadian companies – a consideration that was found to be illegal by the High Court of Justice (The Ruling is based on the fact that the route of the Wall was intended to include territory for future expansion of the settlement Modi'in Illit – including the East Mattityahu neighbourhood, to be build by the Canadian companies. See *The Israeli Bil'in Wall* case (n 648), paras. 35, 41). The construction of the Wall in Bili'n commenced in 2005. When Israel planned the Wall in Bili'n, it drew its route around its main West Bank settlements, with room for their expansion. Five years ago, the villagers began organizing almost daily demonstrations against the Wall and the settlement being built on their land. The people of Bil'in have received support from other Palestinian, Israeli and international peace activists, and it became the symbol of the non-violent resistance against the Israeli occupation. *The Israeli Bil'in Wall* case (n 648); HCJ 8414/05, *Yassin, Bil'in Village Council Chairman v The State of Israel, et al*, (15 December 2008) - Decision on contempt of the court, in which the petitioners were awarded coasts, for the delay in executing the ruling.

[652] Amended Complaint (7 July 2008) and 'Second Further Amended and Particularized Motion Introducing a Suit (Article 110 Code of Civil Procedure)' (12 June 2009).

[653] *Ibid*, para. 9.

1949.[654] In addition, as the State of Israel contracts with private firms to build homes and others structures in the settlements, these firms, through soliciting, marketing, and selling these properties to Israeli civilians, aid and assist the State in committing a war crime, as defined by Arts. 85 (4) (a) of Additional Protocol I and Art. 8 (2)(b)(viii) of the Rome statute[655]. As all these international law provisions have been incorporated into Canadian domestic law the defendants' acts are in violation of international and Canadian domestic law.[656] It was noted by Bili'n in its Action that Canada's official position on the Israeli settlements in the Palestinian West Bank is that these are illegal,[657] in line with the International Court of Justice,[658] various UN Security Council and General Assembly Resolutions, and Statements by the High Contracting Parties to the Geneva Conventions on the issue.[659]

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[654] Article 49(6) of the Fourth Geneva Convention of 1949 states "The Occupying Power shall not deport or transfer parts of its civilian population into the territory it occupies." According to Pictet's authoritative Commentaries on the Geneva Conventions, this section was specifically adopted to prevent the colonial acquisition by an occupier of the occupied land through populisation. J. Pictet (n 115), p. 283.

[655] The Rome Statute explicitly prohibits "The transfer, *directly or indirectly*, by the Occupying Power of parts of its own civilian population into the territories it occupies [..]."

[656] The Geneva Conventions of 1949 and their Additional Protocols provisions are incorporated in the Geneva Convention Act of 1985, (R.S.C., 1985, c. G-3) and the Rome Statute is incorporated in the Canadian Crimes Against Humanity and War Crimes Act of 2000, (S.C. 2000, c. 24). See Article 85(4)(a), Schedule V, Protocol 1 of the Geneva Conventions Act: "The following shall be regarded as grave breaches of this Protocol, when committed wilfully and in violation of the Conventions or the Protocol: (a) the transfer by the occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of article 49 of the fourth convention;" Section 6(1)(c) of the Canadian Crimes Against Humanity and War Crimes Act (S.C. 2000, c. 24) which provides that: "Every person who, either before or after the coming into force of this section, commits outside Canada (c) a war crime, is guilty of an indictable offense and may be prosecuted for that offense in accordance with section 8".

[657] *The Action* (n 652), para. 22(a).

[658] *The ICJ Advisory Opinion on the Wall* (n 219), para. 120.

[659] UNSC Res. 904 (18 March 1994) Un Doc S/RES/904; UNSC Res. 465 (1 March 1908) UN Doc S/RES/465; UNSC Res. 452 (20 July 1979) UN Doc S/RES/452; UNSC Res. 446 (22 March 1979) UN Doc S/RES/446 and also UNGA Res. ES-10/6 (9 February 1999) UN Doc A/RES/ES-10/6; UNGA Res. ES-10/14 (8 December 2003) UN Doc A/RES/ES-10/14; UNGA Res. 61/118 (15 January 2007) UN Doc A/RES/61/118; 'Conference of High Contracting Parties to the Fourth Geneva Convention: Declaration' (Geneva, 5 December 2001) <http://unispal.un.org/UNISPAL.NSF/0/8FC4F064B9BE5BAD85256C1400722951> (accessed 21 October 2011).

For the civil claim to succeed Bili'n had to establish that the above violations amount to a civil wrong in Quebec. Indeed, violations of international law that are classified as crimes in domestic law automatically also classify as civil wrongs. In addition to showing that the violations amounted to civil wrongs in Quebec, the complaint went on to plead that the acts complained of amounted to a common law tort under Canadian federal law. For this purpose, Bili'n argued that the Defendants knowingly inflicted reasonably foreseeable losses by their acts, or at least that they either willfully or negligently aided, abetted or assisted Israel in pursuing an illegal purpose. Finally, it was argued that as the matters at issue are not justiciable before the Israeli courts, and because the Defendants are domiciled in Québec, the Superior Court of Québec was the appropriate forum. The remedies Bili'n demanded included permanent injunction and punitive damages. Bili'n also asked the Court to declare the conduct of the defendants contrary to the international and Canadian laws mentioned, and to remove from the Bili'n lands "all building structures, equipment and material and to return the lands to the condition that they were in prior to the building construction".[660] The Defendants filed a series of preliminary motions, demanding the immediate dismiss of the action claiming no cause, immunity, *res judicata*, standing and *forum non conveniens*.

On September 18, 2009, the Superior Court of Québec rendered its ruling on jurisdiction and rejected all preliminary claims raised by defendants but the last one, choosing to follow the High Court of Justice attitude and to avoid rendering justice on the issue of Israeli settlement in the OPT. The choice of the court is of no surprise. Interestingly, an attentive reader of the judgment could predict the outcome of this ruling already in the first lines of the 67 pages, in which the judge cite the UN Secretary General Ban Ki Moon, statement from February 2007:

> The Palestinian people still yearn for the freedom and dignity denied them for decades. The Israeli people yearn for long term security. Neither can achieve their legitimate demands without a settlement of the conflict. Today, we are at a critical juncture in efforts to move beyond crisis management and renew efforts towards genuine conflict resolution.[661]

By citing a political body, and not an legal authority as the ICJ, the judge seems to determine its role: issues related to the Israeli Palestinian conflict are of political and not legal nature.

[660] *The Action* (n 652), para. 35.

[661] *The Bil'in Canadian case* (n 641), p. 4.

The judiciary should avoid ruling on these issues that should remained under the auspice of a "conflict resolution".

On the merits, the Quebec Superior Court accepted, for the first time in Canada, that the commission of a war crime constitutes a civil wrong in Canadian law. [662] In addition, the Court held that a person (including a legal person) may also commit a civil wrong by knowingly participating in a war crime in a foreign country.

> In theory, a person would therefore commit a civil fault pursuant to art. 1457 C.C.Q. by knowingly participating in a foreign country in the unlawful transfer by an occupying power of a portion of its own civilian population into the territory it occupies, in violation of an international instrument which the occupying power has ratified. Such a person would thus be knowingly assisting the occupying power in the violation of the latter's obligations and would also become a party to a war crime, thereby violating an elementary norm of prudence.[663]

However, the Court chose to exercise its discretion to decline jurisdiction over the case on the grounds of *forum non conveniens*, on the basis that the Israeli High Court of Justice is in a better position to hear the case.

> This is one of those exceptional situations where the Superior Court is compelled to decline jurisdiction on the basis of forum non conveniens, as the plaintiffs have selected a forum having little connection to the Action, in order to inappropriately gain a juridical advantage over the defendants, and where the relevant connecting factors, considered as a whole, clearly point to the High Court of Justice as the logical forum and the authority in a better position to decide.[664]

The Court's self restraint policy is predictable as a matter of policy vis-à-vis Israel, an allied state. Indeed it is highly questionable whether a Canadian court could be engaged in such a legal adventure. Yet, the court's legal reasoning is incorrect with respect to several issues.

The Canadian court reached this conclusion "based on the overall consideration of various and variable relevant factors, none of which is individually determinant". The factors

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[662] *Ibid*, para. 175.

[663] *Ibid*, para. 176. For an analysis see J. Yap, 'Corporate Civil Liability for War Crimes in Canadian Courts: Lessons from *Bil'in (Village Council) v. Green Park International Ltd.*' (2010) 8 Journal of International Criminal Justice 2, pp. 631-648.

[664] *The Bil'in Canadian case* (n 641), para. 335.

it examined include considerations linked to the location (as the residence of parties and witness, the location of the evidence and the defendants' assets), the applicable law, and ethical considerations as the interest of justice and "shopping forum"[665]. Seemingly the most dominant factor for reaching the Court's conclusion was the "applicable law" factor, as the Court examined that consideration over more than 14 pages, through an unprecedented analysis of a foreign court's jurisprudence.[666] The Canadian court reviewed and cited in an expanded manner, rarely done before, several settlement cases rendered by the Israeli High Court of Justice from the early 70s up to date, in order to establish whether the Israeli High Court of Justice enforces Art. 49(6) of the Fourth Geneva Convention. The Plaintiffs argued Israeli courts refuse to adjudicate on the basis of Article 49(6) of the Fourth Geneva Convention, and as they will not apply that provision to this dispute, it renders Israeli forums to be inappropriate and manifestly inconsistent with public order as understood by international relations. The Canadian Court, however, ruled that

> The High Court of Justice would not refrain to adjudicate on a politically controversial matter if it were properly brought before the court.[667]

Establishing that

> [T]he High Court of Justice has not applied Article 49(6) of the Fourth Geneva Convention, not because of its unwillingness to adjudicate on its alleged violations by reason of the political significance of the matter, but either because it was unnecessary to do so or because… it had not been incorporated into domestic law of Israel.[668]

And concluded that "the factor of applicable law clearly favours declining jurisdiction in favour of the High Court of Justice".[669]

The appropriate forum should be the court to which the parties and the cause of action have the most significant connection, and therefore that forum is in a better position to render a judgment and provide remedies over the dispute. Therefore, for the Canadian court to

[665] *Ibid*, p. 43.

[666] *Ibid*, paras. 242-289.

[667] *Ibid*, para. 282.

[668] *Ibid*, para. 288.

[669] *Ibid*, para. 304.

decline jurisdiction it must be established that the Israeli forum can render a judgment on the subject matter. However, it is clearly not the case.

(1) As shown, Israeli courts would not, and can not, enforce Article 49 (6) of the Fourth Geneva Convention, which is the core legal argument of the Action. For the Canadian court to establish that the Israeli High Court of Justice would not, and could not, review the legality of the settlements in light of Art. 49 (6) of the Fourth Geneva Convention, it is required not only to examine the legal arguments provided by the Israeli High Court of Justice, and to analyze the internal logic of each avoidance doctrine that have been used, as the Canadian court did, but to understand the political environment in which the High Court of Justice operates. These domestic political conditions prevent any possible adjudicating on the settlement issue. Decrypting these conditions is not an easy task for a foreign court, but is nevertheless necessary to reach the correct legal conclusion.

(2) The Canadian court erred in ruling that the Israeli High Court of Justice is in better position to hear the case, simply because under Israeli law, the High Court of Justice is not competent to hear this kind of cases. The Israeli Supreme Court, the highest judicial body in Israel, sitting as the High Court of Justice, has the authority to hear matters "in which it deems it necessary to grant relief for the sake of justice and which are not within the jurisdiction of another court."[670] The High Court of Justice is therefore competent to review the legality of decisions and acts of the State, its agencies and the armed forces, but it lacks jurisdiction over civil disputes between private parties and it cannot grant civil remedies.[671]

(3) According to Art. 43 of the 1907 Hague Regulations, the West Bank should be governed by the courts and laws that were in force prior to the occupation, i.e., Jordanian law,

[670] Article 15(c) of the Israeli Basic Law of the Judiciary 1984. Article 15(d) lists among its operational authority the competence (1) to issue orders for the release of persons unlawfully detained or imprisoned (2) to order State and local authorities and the officials and bodies thereof, and other persons carrying out public functions under law, to do or refrain from doing any act in the lawful exercise of their functions or, if they were improperly elected or appointed, to refrain from acting (3) to order courts and bodies and persons having judicial or quasi-judicial powers under law… to hear, refrain from hearing, or continue hearing a particular matter or to void a proceeding improperly taken or a decision improperly given. The High Court of Justice exercises an exclusive jurisdiction, and functions as first and last instance.

[671] It was explicitly ruled by the Canadian court that the Defendants are private actors acting on their own behalf and not as agents of the State of Israel. (paras. 24-31).

and, in addition, by more recent legislations enacted by the military commander.[672] Military Proclamation No. 2 of 7 June 1967, endorsed the principle reflected in Article 43 of the Hague Regulations, and preserved the law and court system existing in the OPT prior to the occupation.[673] This is the case for civil law also following the Oslo Accords.[674] Therefore, normally, the district court in Ramallah should have jurisdiction over a civil case that involves a Palestinian plaintiff and a foreign company operating in the West Bank, if the defendants are not Israeli. The applicable civil law is Jordanian law and PA legislations. From the stand of Israeli law, if a civil claim originates in the OPT, beyond the territorial jurisdiction of the State of Israel, Israeli civil courts can nevertheless exercise their jurisdiction as if the claim originated in Israel. According to the Israeli rules of civil procedure, Israeli courts are entitled to render judgments on merits in civil cases, if they exercise (a) personal jurisdiction over the defendant (the service of process was effected), (b) local jurisdiction (venue) and (c) jurisdiction over the subject matter[675]. In order to facilitate these jurisdictional requirements for claims originating in the OPT, several amendments in Israeli laws and regulations were introduced. For personal jurisdiction, the service of judicial documents in the OPT could be made according to the ordinary civil procedure rules as it is inside Israel:[676]

[672] Since the establishment of the Palestinian Authority, in certain zones also the legislation of the PA came into force. The 1995 the interim agreement transferred several powers, including legislative authorities to the PA, according to three areas of control that were established. See Article XIII, Section 1 of the 'Israeli–Palestinian Interim Agreement on the West Bank and the Gaza Strip' (Washington DC, 28 September 1995). Only with respect to criminal matters, the occupying power is competent to establish military courts (Articles 64 and 66 of the Forth Geneva Convention of 1949).

[673] IDF, 'Proclamation Regarding Law and Administration (Proclamation No. 2)'(7 July 1967).

[674] Article III, provision 1 of Annex IV of the 1995 Interim Agreement states that the Palestinian courts and judicial authorities have jurisdiction in all civil matters except from actions against the State of Israel, its organs and agents (sub provision 3) and actions in which one of the party is Israeli. Yet, under certain circumstances, defined in sub provision 2, the Palestinian courts would still have jurisdiction" if the subject matter of the action is an ongoing Israeli business situated in the Territory" or "the subject matter of the action is real property located in the Territory". (Territory means "West Bank territory except for Area C" that include the municipal territory of the settlements, see Article 1.1(a) of Annex IV.)

[675] M. Karayanni, 'Choice of Law under Occupation: How Israeli Law Came to Serve Palestinian Plaintiffs' (2009) 5 Journal of Private International Law 1, p. 43.

[676] Israeli Rules of Civil Procedure (Service of Documents in the Administered Territories) of 1969.

> The practical meaning of this holding was that any defendant present in the OPT was as much subject to Israeli courts' personal jurisdiction authority as any defendant present in Israel itself.[677]

As the West Bank was not *de jure* annexed to Israel, it has not been under the local jurisdiction of any Israeli district court. Therefore, in order enlarge the local jurisdiction of Israeli district courts over the West Bank, in 1979 the Israeli Minister of Justice introduced an amendment to the venue provisions, granting local jurisdiction to the Jerusalem District Court.[678] Thus, according to Israeli law, in the case of Bil'in, the Jerusalem District Court could exercise jurisdiction if the defendants are present in Area C, and it is possible to effect the service of summons. Not surprisingly, conflict of jurisdiction between Israeli and Palestinian courts is normally resolved according to the interest of the Israeli side. Although the Occupied Territories have been traditionally considered as jurisdictional entities separate from the State of Israel, they have been always controlled by it. As Michael M. Karayanni puts it:

> The expectations and interests of the Israeli party are decisive. Because of Israeli control, it is the Palestinian party that must ultimately adjust.... when Israeli settlements interests were implicated Israeli conflicts doctrine determined Israel as the appropriate adjudicative and prescriptive jurisdiction, but where the interests were those of the local Palestinian population Israeli conflicts doctrine decreed that should be adjudicated in OPT courts according to OPT law.[679]

The territorial and personal expansion of Israeli law to the West Bank is in violation of international humanitarian law. According to the law of military occupation, the occupying power is prevented from extending its own legal system over the territories it occupies. As it was explicitly stated by the ICJ in its Advisory Opinion on the Wall, Israeli settlements in the OPT have been established in breach of international humanitarian law[680]. It violates also general principles of public international law, including the illegality of any territorial acquisition resulting from the threat or use of force and the prohibition to exercise colonialism. Therefore, as

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[677] M. Karayanni (n 675), p. 21.

[678] Today it is legislated in Rule 6 of the Israeli CPR (1984).

[679] M. Karayanni (n 675), pp. 27 and 30.

[680] *The ICJ Advisory Opinion on the Wall* (n 219), para. 120.

Israel's extension of its own domestic civil law and courts' jurisdiction over the West Bank is illegal from an international law stand, would it be adequate for a Canadian court to decline jurisdiction in favor of that jurisdiction? Wouldn't this be "manifestly inconsistent with public order as understood by international relations"?

2.3.3 Concluding observations

The decision by the Canadian court provides us with another illustration how a national court functions when it is required to apply international humanitarian and criminal law: it can function as an active agent of the international legal order, which enforces international law, or to refrain from doing so by applying doctrines such as standing or justiciability, in order not to interfere into policies and international affairs of its own government or into third states' sovereignty.[681] Through the application of the forum non conveniens doctrine, the judge denied jurisdiction to the Canadian Court, thus preventing it from deciding if the Plaintiffs are entitled to damages due to the alleged violation of Article 49(6) of the Fourth Geneva Convention. The appeal against the court decision was rejected, and as this action cannot be heard before Israeli courts, the victims are once again left without redress.

In Israel, the settlement question is probably a typical case for a domestic judiciary to applying avoidance doctrines –delivering a ruling on the settlement policy, the court risk to loose its legitimacy in the eyes of the Israeli society, the executive may not respect the judgment and the legislator would probably overruled its judgment, as the legislator, and not only the executive, have been always involved in the settlements policy. To provide Jewish residents the same socio-economic environment as in Israel, the Israeli Parliament legislated several enactments that apply as a matter of personal and extraterritorial jurisdiction. These include laws regulating civil life such as fiscal laws, the law on Elections to the Knesset and the National Insurance law[682]. The most significant extraterritorial legislation was through the extension of validity of the Emergency Regulations law (West Bank and Gaza – Criminal Jurisdiction and Legal Assistance) of 1984. Art. 6B added nine laws which extended to

[681] See *The Bil'in Canadian case* (n 641), para. 317: "[t]he Plaintiffs indirectly seek the essential finding that it [the State of Israel] is committing a war crime, thereby effectively by passing Israel's absolute immunity to any judicial proceeding. In Canada as in England, the scope of State immunity extends to gross violations of international human rights."

[682] E. Benvenisti (n 224), p. 129-133.

Israelis resident in the OPT. Today it contains 17 laws.[683] Israelis resident are defined in Art. 6B as "a person whose place of residence is in the Region and who is an Israeli citizen, or who is entitled to immigrate to Israel under the law of Return 1950, and had his residence been in Israel that person would have been included under the same expression" [the last phrase meaning Jews who reside the Region but are not Israelis]. The extension of Israeli laws to the occupied territories was approved by the High Court of Justice.[684]

Within Israel political environment it seems that no matter what avoidance doctrine or legal justification is employed: Israeli courts are not willing to enforce Article 49 (6) of the Forth Geneva Convention and they avoid dealing with that issue. When international humanitarian law enforcement is avoided in such a systematic way by national jurisdictions, from the rule of law enforcement perspective only one avenue remains available: an international court.

[683] The 17 laws listed in the annex of Regulation 6B of the 'Law for Amending and Extending the Validity of Emergency Regulations (West Bank – Jurisdiction in Offenses and Legal Aid)' - 2007, and which apply extraterritoriality to the OPT are the following laws: Entry to Israel Law, 1952; Defense Service Law [Combined Version], 1986; Bar Association Law, 1961; Income Tax Ordinance; Population Registry Law, 1965; Work Service in Time of Emergency Law, 1967; National Insurance Law [Combined Version], 1968; psychologists Law, 1977; Registering Equipment and Mobilizing it for the Israel Defense Force, 1987; Traffic Ordinance and Traffic Regulations, 1961; State Health Insurance Law, 1994; the Hague Convention Law (Returning Abducted Children), 1991; Inheritance Law, 1965; Adoption of Children Law, 1981; Legal Competence and Guardianship Law, 1962; Surrogate Motherhood Agreements (Approval of Agreement and Status of Newborn) Law, 1996. For an unofficial translation see <http://nolegalfrontiers.org/en/israeli-domestic-legislation/isr1> (accessed at 18 January 2012).

[684] See *The Shaer* case (n 378).

Chapter IV

The Normative Application of International Humanitarian Law

It can be seen that the approach of the courts has been very far from insular or narrow. There has been a readiness to tackle issues arising across the world and involving complex and sensitive questions of public international law. (...) [M]y chosen focus has been on foreign affairs and military conflict. In those fields there are, inevitably, certain forbidden areas – areas where the courts themselves have accepted that it is not appropriate for them to intervene. But that should not be allowed to obscure the fact that modern judicial review is operating in a way that exposes ministers and their officials to close and effective judicial scrutiny, to which the human rights legislation has given additional impetus.[685]

Lord Justice Richards (UK)

Judicial branches of government, although charged with the duty of standing between the government and individuals, are often too deferential to the executive in time of peace. How then would the same judges act in a time of crisis? The role of the courts in time of crisis is less than glorious.[686]

Lord Justice Steyn (UK)

These stances, which come from two judges working in the same court, appear to be somewhat in contradiction with one another. They do, however, reflect the same contemporary reality: a growing trend of exercise of judicial review over "forbidden areas", traditionally avoided, in which domestic courts demonstrate a growing determination and engagement to exercise their role as "law enforcer" as required by the international rule of law also for violations in time of armed conflict. Yet, as this trend is rather novel,[687] change cannot be expected to be achieved overnight. It is a process in which courts need to establish

[685] Lord Justice Richards (n 519), p. 10.

[686] J. Steyn, 'Guantanamo Bay: The Legal Black Hole' Twenty-seventh F.A. Mann Lecture - British Institute of International and Comparative Law (25 November 2003).

[687] See, for example, E. Benvenisti (n 121), p. 183.

their own legitimacy within their societies as well as a margin of independence *vis-à-vis* the authorities. Therefore, while courts are increasingly willing to exercise their competence over questions of international humanitarian law, and choose not to avoid them as they have traditionally done, they are still reluctant to overturn a decision by the executive on the merits and would tend to show significant deference to the executive to determine remedies.

This chapter examines cases in which the judiciary moves away from the traditional tendency to avoid jurisdiction in armed-conflict-related issues, and progressively, with the use of deference techniques, starts to exercise its judicial competence as "international humanitarian law enforcer". Here, the independence of the courts has a predominant role which overrides their role of legitimatisation discussed in chapter 2: courts exercise their role of independent institutions that apply international humanitarian law and, if required, impose limits on the executive and offer protection against governmental abuse of power in accordance to the rule of law principles.

1. The Role of National Courts in Limiting the Political Branches in Judicial Review Cases

1.1 The deference technique: from avoidance to normative application

Exercising judicial review through the use of deferral techniques allows the judiciary to redefine its role as law enforcer in armed conflict issues – not to be absent from this field of application, while not acting beyond its institutional capacities – and without confronting the other branches of the government, but dialoguing with them. In light of their redefinition of their role, the borders of their institutional limits are modified, as is the public demand for scrutiny during armed conflict –interrelated factors that may have positive consequences for the future normative application of international humanitarian law in States in which a traditional independence of the judiciary *vis-à-vis* the political branches exists.

The theoretical framework of analysis in this chapter is based on Prof. Benvenisti's "ladder theory", which indentifies that judicial review over the State may result in five gradual judicial responses[688]. The first three stages of those judicial responses include referral

[688] Professor Benvenisti proposes that the judicial review process be considered as being composed of two layers. The first or "institutional tier" examines whether the State was authorised by the law – constitution, statutes, or administrative regulations – to perform the act under review. Whether "the authorizing" legal source include also international humanitarian law rules, not transformed into domestic law, depends on the

techniques. Further up the ladder, the court effects a constitutional review in the following way:

Referral techniques:

(1) A Court clarifies the considerations that need to be taken in account in the exercise of the State's discretion, and will refer the matter back to the executive for reconsideration of its action in light of the court's assessments;

(2) A Court triggers a judicial dialogue with the legislative branch while it refers the issue to it, seeking clarification of the scope of authorisation granted;

(3) A Court refers the matter to the legislative, but this time it imposes limitations on legislative discretion or requires the legislature to explicitly depart from an international law obligation.

Constitutional review: Courts enter the domain of their most significant authority, namely that of limiting other branches of the executive.

(4) The court would declare a part of a provision to be unconstitutional, but will allow the legislator to accommodate the law with constitutional limits;

(5) the most interventionist step will declare a law to be unconstitutional and beyond the legislator's authority, and therefore invalid.

Benvenisti concludes that according to any prevailing political resistance to judicial intervention, it can be anticipated that courts will climb up or down the judicial review ladder, seeking to share with the political branches responsibility for the outcome.[689] As the theoretical framework shows, the normative role of the court is manifested through a gradual

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constitutional framework that regulates the relations between the international and national law of each State. In the second, or "substance tier," courts examine the facts of the specific case under review and determine whether the State has exercised its authority within the boundaries set in the authorising law. Here the court may be required to balance policy considerations. Less controversial, in the sense of being less interventionist in the democratic process, will be for the courts to declare a State's act to be illegal under the first layer, because determining the institutional authority to act is "a question that is no doubt the domain of the courts." E. Benvenisti (n 195), p. 257. While intervening in policy considerations – here the courts are usually more reluctant, and, if they do intervene, they tend to offer a detailed justification for their intervention. In the context of the war on terror judicial review cases Prof. Benvenisti identifies three justifications for their authority to intervene are advanced by courts: a constitutional formal explanation, a consideration based on the special role of the court to protect vulnerable groups, and as being expert balancer and better equipped than the political branch to resolve conflicts between liberty and security.

[689] *Ibid*, p. 280.

degree of intervention and deference to the State. This gradualist approach offers the courts the practical possibility to adjudicate international humanitarian law cases despite their fragile position *vis-à-vis* the executive and public opinion during armed conflict. It enables courts to review the legality of the acts of the State, but, if necessary, because of institutional concerns, to defer the remedy or to exercise discretion in applying the law to the political branches. Thus, through deference techniques they have been starting to apply international humanitarian law instead of avoiding it. However, on the merits the decision still remains in the hands of the executive. As Lord Justice Richards observed at the end of his lecture on UK modern judicial review:

> A cynic might say in the light of these cases that things have not changed greatly since the days when the prerogative powers in relation to the conduct of foreign affairs were not susceptible to judicial review at all. The courts have asserted a jurisdiction to intervene but all the claims to which I have referred have failed.[690]

Indeed, it may well seem so not only to cynics. However, in the long run, the fact that courts assert jurisdiction and reject the traditional avoidance techniques is a turning point in national courts' function and application of international humanitarian law. Moreover, it may represent a point of no return: once a national court has exercised its jurisdiction over armed conflict issues it is not expected that in future cases it would avoid them. Thus, even if today, on the merits, courts' rulings may have a similar result as when it avoided them, because of the important deferral to the executive, this move should not be underestimated. Once the gate of judicial review is open, courts start a process in which they establish their legitimacy and independency, in the same way as has been done for domestic matters (such as human rights protection during peacetime), and their "climbing" further up the "ladder" of judicial review is thus only a matter of time.

The following part examines that process in the application of international humanitarian law by national courts and the extent of the discretion attributed to the State seen through the lens of the ladder theory, in two kinds of cases: those involving the protection of individuals (detention and torture) and those concerning the conduct of hostilities. Through that analysis, the positive and negative outcomes of the deference technique are highlighted.

[690] Lord Justice Richards (n 519), p. 7.

1.2 Preliminary issues

1.2.1 The duration of the conflict and the timing of the review

Benvenisti identifies two types of wars: "full scale military conflicts", such as the 1939–1945 War, and prolonged and low-intensity struggles, such as against terrorist threats. He argues that the needs of the executive to rely on courts as an agent of legitimacy and the institutional need of the judiciary to be independent from government, must take a "back seat" during short and intense crises. In contrast, when the conflict has been prolonged, including situation of enduring occupation, these factors become relevant again – on the one hand, the State would need to rely on the courts as legitimating agency in their exercise of judicial review and on the other, courts would be more willing to review a State's act and to safeguard their institutional independency and reputation.[691]

The timing of the review is an important factor for courts to be willing to exercise jurisdiction for another reason. First stages of armed conflicts are typically characterised by a strong sense of patriotism and unity of the State in support of the executive. As courts are State institutions, and judges are State citizens, they are an integral part of this position. This may explain in part the fact that "State interests are attributed particular weight during wars."[692] However, when the review is carried out months or years after the facts (which frequently happens when a case is heard before a second or third instance), the period of time that elapsed and the public opinion that has been formed during this time through NGOs, academic and media reports on international humanitarian law violations, may have an impact on the Court's willingness to exercise its jurisdiction. Once the conflict becomes protracted it will be easier for a court to exercise its jurisdiction. It may make it more likely, institutionally, to rule against the State, a situation that is barely imaginable during the initial stages of an intense conflict.

1.2.2 The type of violation under review

International humanitarian law regulates both the conduct of hostilities (methods and means of warfare) and the protection of civilians and individuals *hors de combat*. Yet, when

[691] E. Benvenisti (n 207), pp. 309-318.

[692] *Ibid*, p. 309. See more generally the critic of American Legal Realism, above at note 165.

enforcement of the law by court is at issue, courts are less willing to exercise their jurisdiction over conduct of hostilities issues. Violations related to individual rights in specific cases are more readily adjudicated. Courts usually refrain from pronouncing on warfare means and methods, which may have an impact on future armed conflict, which is seen as being not only under the exclusive discretion of the State, but completely outside the realm of judicial review and law enforcement.[693] One factor that explains this tendency is the endorsement of international human rights law within domestic law, facilitating the access to court and the development of local political culture in support of its legal enforcement. Following the human rights law movement of the last 50 years, and its manifestation in domestic law and international jurisprudence, national courts have developed their own important jurisprudence related to human rights, and have become their guardians.[694] This allows judicial intervention, from a practical and policy standpoint, and indeed the courts have an established domestic position in which they are empowered to limit the State in human rights violations. That human rights jurisprudence has become gradually applicable also in a situation of armed conflict, we can see from the Guantanamo Bay-related cases discussed below.

1.2.3 The application international humanitarian and human rights law

The first step in the correct application of international humanitarian law is to qualify the conflict. An accurate qualification of the conflict is of major importance as the applicable international humanitarian law treaty and customary law depends on this preliminary determination. It is, though, a task that is not always carried out by national courts, or rather one that is not always done accurately. The most remarkable example is probably from adjudication of cases related to the "war on terror". While a vast academic literature

[693] See, for example, to British Act of State doctrine, which prevents English courts from considering a claim of an alien regarding the acts of the UK on foreign soil on behalf of the Crown. F.A. Mann, *Foreign Affairs in English Courts* (Oxford University Press, Oxford, 1986), pp. 184-190. While the European Court of Human Rights in *The Al Skeini* case (*Al-Skeini and others v The United Kingdom*, (Judgment) ECtHR No. 55721/07 (7 July 2011) (hereinafter: *The Al-Skeini* case) ruled on the extraterritorial application of UK Human Rights Act, it seems that international humanitarian law claims on conduct of hostilities (assuming that these can be invoked before UK courts) can still be barred by the British Act of State doctrine. An exception to this trend is the High Court of Justice jurisprudence discussed below.

[694] E. Benvenisti (n 195), fn. 52 and accompanying text.

attempted to define the scope of this "war", its qualification and thus applicable law,[695] different Western jurisdictions, such as Australia, Canada or the UK[696], which have been involved in reviewing legal questions related to detainees in Guantanamo completely ignored the applicability of international humanitarian law and the question of the qualification of the conflict.[697] Contrary to academic writers, international courts and UN bodies, which have been examining in length the relations between international humanitarian law and international human rights law during armed conflict (i.e., their mutual application during armed conflict, their extraterritorial application, and their interplay),[698] national courts have been less attentive to the distinction between these branches, their relations, and their respective impact. Indeed, courts do not always address both branches of law, even if they are applicable. In most of the cases, courts treat only human rights law, as endorsed by their own constitutional system. This is because access to court is guaranteed more effectively through human rights domestic acts. Moreover, politically and institutionally, these are less controversial for the court to enforce. This was the case in most of the Guantanamo cases as

[695] To mention only a few: M. Sassòli, 'La Guerre contre le Terrorisme, le Droit International Humanitaire et le Statut de Prisonnier de Guerre' (2001) 39 Canadian Yearbook of International Law 211, pp. 211-252; M. Sassòli, 'Use and Abuse of the Laws of War in the 'War Against Terrorism'' (2004) 22 Law and Inequality: A Journal of Theory and Practice, pp. 195-221; L. Condorelli and Y. Naqvi, 'The War against Terrorism and *Jus in Bello*: Are the Geneva Conventions Out of Date?' in A. Bianchi (ed), *Enforcing International Law Norms against Terrorism* (Hart Publishing, Oxford, 2004), pp. 25-37; C. Greenwood, 'International Law and the 'War against Terrorism'' (2002) 78 International Affairs 2, pp. 301-317. For a resources list see M. Sassòli, A. Bouvier and A. Quintin (n 91), pp. 129, 131-132.

[696] *The Hicks* case (n 491), the *Khadr* cases (n 760 and n 767) and *the Abbasi* case (n 18) - all discussed below.

[697] The only case that the author was able to identify which explicitly attempted to qualify the "war on terror" was *The Hamdan* case of the US Supreme Court (n 16), whose outcome remains highly questionable: "The United States Supreme Court found in *Hamdan v Rumsfeld* that the military commissions set up in Guantánamo violated precisely those judicial guarantees prescribed by common Article 3 to the Four Geneva Conventions of 1949. Yet the court left open the question whether Hamdan, arrested in Afghanistan when the country was still occupied by the United States and its allies, should rather be covered, as I would submit by the law of international armed conflicts." M. Sassòli, 'Transnational Armed Groups and International Humanitarian Law' (Program on Humanitarian Policy and Conflict Research at Harvard University - Occasional Paper Series, Winter 2006), p. 20.

[698] See, for example, C. Droege, 'The Interplay between International Humanitarian Law and International Human Rights Law in Situation of Armed Conflict' (2007) 40 Israel Law Review 2, pp. 310-355; F. Hampson, 'The Relationship between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Body' (2008) 90 International Review of the Red Cross 871, pp. 549-572. *The ICJ Advisory Opinion on the Wall* (n 219), para. 106.

discussed below.[699] Yet, for a correct application of international law, there are situations in which this is necessary to rely on both branches: international humanitarian law and international human rights law. Useful examples include the rules on detention during international armed conflict and the right to life and liberty in armed conflicts of a non-international character. [700] The only national court which the author observed that explicitly discusses the mutual application of international humanitarian law and human rights law and their relations is the Israeli High Court of Justice. While the official position of the State of Israel is that human rights treaties do not apply in the Occupied Palestinian Territories, at first when the question of the applicability of international human rights law in the OPT arose before the High Court of Justice "it was left open, and the Court was willing, without deciding the matter, to rely upon the international conventions."[701] The explicit doctrinal framework was set in 2006 in the targeted killing case in which the High Court of Justice declared that

[699] *The Hamdan* case (n 16) is in fact a remarkable exception in the context of American jurisprudence and application of international humanitarian law. See D. Weissbrodt and N.H. Nesbitt, 'The Role of the United States Supreme Court in Interpreting and Developing Humanitarian Law' (2011) 95 Minnesota Law Review 4, pp. 1411-1423 <http://minlr.stereointeractive.com/files/2011/04/WeissbrodtNesbitt_PDF.pdf > (accessed 22 October 2011).

[700] International humanitarian law of international armed conflict dictates a special legal regime for the detention of combatants (the prisoners of war statute defined in the Third Geneva Convention) and the detention of civilians (a number of non derogable procedural or administrative guarantees as, for example, Articles 46 and 78 of the Forth Geneva Convention of 1949). On the other hand, international human right allows the derogation from the right to liberty in cases of hostilities, which threaten the life of the nation (Article 4 of the International Covenant on Civil and Political Rights). In case of conflict between norms is it generally accepted that it is not the most protective rule which is applicable, but the most specifically detailed (*lex specialis*). Therefore courts should be attentive to perform the right analysis and to refer to both branches of the law. For the Guantanamo cases, if, for instance, the detainees were to be defined as prisoners of war, they could have been held in detention without any criminal procedure until the end of hostilities. For other relevant situations in non-international armed conflict see M. Sassòli and L.M. Olson, 'The Legal Relationship between International Humanitarian Law and Human Rights Law where It Matters: Admissible Killing and Internment of Fighters in Non International Armed Conflict' (2008) 90 International Review of the Red Cross 871, p. 599.

[701] *The Mara'abe* case (n 2), para. 27. For the Israeli State position see, State of Israel, 'International Covenant on Civil and Political Rights - Second Periodic Report' (20 November 2001), UN Doc CCPR/C/ISR/2001/2 (2001), para. 8.

international humanitarian law is the *lex specialis* law applicable during armed conflict, and when there is a *lacuna* in that law, it can be supplemented by human rights law.[702]

2. Case Study No. 1: The Protection of Individuals in Detention

For the protection of individual rights, usually of their own nationals, courts from different jurisdictions have found a prudent but practical way to deal with "forbidden areas". Because of the protracted nature of conflict and of the allegations concerning violations of the international rules of detention, which is a subject directly linked to the protection of individuals' rights afforded in all Western democracies, the issue has been too fundamental to avoid. At the same time, however, as it involves major *foreign policy* (or international humanitarian law) issues, courts have chosen to handle this situation by affirming their competence to review the State's act (thereby rejecting non-justiciability claims), but they have been cautious in granting a remedy on the merits and have referred this decision back to the executive. The following section examines jurisprudence from different jurisdictions related to detention in which the State's call for the court to avoid exercising its competence was rejected, and courts engaged to a variety of degrees in decisions limiting the power or actions of the States concerned.

2.1 Step one: The Abbasi case (UK House of Lords, 2002)

> Where fundamental human rights are in play, the courts of this country will not abstain from reviewing the legitimacy of the actions of a foreign sovereign state. [703]

In step one of the judicial review ladder the Court functions as the following: (a) it rejects the non-justiciability claims, and progressively departs from the traditional "one voice" (that of the government) approach, which is a major step towards the application of international humanitarian law by national courts; (b) sends explicit or implicit signals of their disapproval of State policy; and (c) on the merits, it still refers the matter back to the State's sole discretion.

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[702] *The Targeted Killings* case (n 454), para 18. Since, this position is cited as a matter of evidence. See, for example, "where there is a lacuna in the laws of armed conflict [..] it is possible to fill it by resorting to international human rights law." HCJ 6659/06, *A and B v The State of Israel*, (2008), para. 9.

[703] *The Abbasi* case (n 18), para. 53.

The Abbasi case is probably the most significant illustration of this "first step" judicial review. Rendered by the House of Lords in 2002, it was among the first "war on terror" cases dealt with by a High Court of a US' allied State. Abbasi, a British national, was captured by US forces in Afghanistan during the armed conflict there. In January 2002, he was brought to Guantanamo Bay. By the time of his appeal before the House of Lords he had been held captive for eight months without access to a court or any other form of tribunal, or even to a lawyer. He sought judicial review over the UK's decision not to afford him diplomatic protection, and for the court to compel the UK foreign office to make representations on his behalf to the US. Abbasi claimed that his fundamental right not to be arbitrarily detained was being infringed and that the State owed him a duty under English public law to take positive steps to redress this violation.

i. Rejecting two non-justiciability claims

The first non-justiciability claims raised by the UK was that the relief sought by the claimants was founded on the assertion that the US government was acting unlawfully, and as English courts should not examine the legitimacy of action taken by a foreign sovereign State – in this case the legality of the detention of prisoners at Guantanamo – the claim was not justiciable as "for the court to rule on that assertion would be contrary to comity and to the principle of State immunity"[704]. Although the State recognized that in *Oppenheimer* and *Kuwait* the House of Lords had established exceptions to the non-justiciability principle, these exceptions were relevant only "in exceptional circumstances" and were not applicable in this case. However, in contrast to the State's position and contrary to a widespread view that the English court would avoid jurisdiction over a case that involved serious violations committed by an allied State, at the beginning of an ongoing conflict, to which the UK was a party, the House of Lords founds that the non-justiciability principle is not applicable because of the importance of the right of *habeas corpus*.

> Albeit that caution must be exercised by this court when faced with an allegation that a foreign state is in breach of its international obligations, this court does not need the statutory context in order to be free to express a view in relation to what it conceives to be a clear breach of international law, particularly in the context of human rights.[705]

[704] *Ibid*, paras. 28-57. This claim corresponded to the US Act of State doctrine, see above at Chapter 3, p. 147-154.

[705] *The Abbasi* case (n 18), para. 57.

The second non-justiciability claim was that the conduct of the UK Secretary of State in his decision not to render diplomatic assistance to Mr. Abbasi, was a question that could not be reviewed by a court, as it was a decision based on foreign policy considerations entirely confined to the political branch.[706] This claim was also rejected by the court on the grounds that the law of judicial review has developed and included "the invasion of areas previously immune from review, such as the exercise of the prerogative."[707] In this context, the Court stated that the issue of justiciability depends, not on general principle, but on subject matter and suitability in the particular case: "It is not an answer to a claim for judicial review to say that the source of the power of the Foreign Office is the prerogative. It is the subject matter that is determinative."[708] Here, the citizen's legitimate expectation that his request will be considered, and that in that consideration all relevant factors will be thrown into the balance can be reviewed by the court.

ii. Deferring to the State's discretion

On the merits, however, the court was less affirmative, deferring entirely to the executive's judgment: "whether to make any representations in a particular case, and if so in what form, is left entirely to the discretion of the Secretary of State". And with regard to the right to *habeas corpus*, the Court declared that it can offer no direct remedy as "the United States Government is not before the court, and no order of this court would be binding upon it", and that the respondent in this case, the UK, "has no direct responsibility for the detention."[709]

iii. Sending explicit signals of disapproving the policy

While the remedy was entirely deferred to the State by granting it a very broad margin of discretion, at the same time, the Court openly questioned the legality of the detention in Guantanamo in what was, at that time, an unprecedented manner:

[706] *Ibid*, paras. 68-106. This claim corresponds to the US political question doctrine, see above at Chapter 3, p. 154-159.

[707] *The Abbasi* case (n 18), para. 80.

[708] *Ibid*, para. 106.

[709] *Ibid*, para. 67.

> In apparent contravention of fundamental principles recognised by both jurisdictions and by international law, Mr Abbasi is at present arbitrarily detained in a 'legal black-hole'… What appears to us to be objectionable is that Mr Abbasi should be subject to indefinite detention in territory over which the United States has exclusive control with no opportunity to challenge the legitimacy of his detention before any court or tribunal.[710]

Moreover, the House of Lords directly addressed US courts, in a remarkable attempt to dialogue and guide the American judges, who were supposed to rule on the right of *habeas corpus* of British citizens detained in Guantanamo:

> On the face of it we find surprising the proposition that the writ of the United States courts does not run in respect of individuals held by the government…
> It is important to record that the position may change when the appellate courts in the United States consider the matter.[711]

Even if the litigation did not succeed, most cynics, including the present author, would recognize that the House of Lords went far beyond its usual prudent line in declaring that Abbasi was arbitrarily detained and in labelling Guantanamo Bay a "legal black-hole".[712] The importance of *Abbasi* lies in two aspects. First, because the House of Lords did not avoid exercising its competence to review the case and it expanded the exceptions previously established in two "easy cases" –*Oppenheimer* ("grave infringement of human rights" committed during the 1939–1945 War) and *Kuwait* ("breaches of clearly established principles of international law" during the Iraqi invasion of Kuwait) - to include violation of the right of *habeas corpus* during the ongoing armed conflict between the US, UK, and their allies with Afghanistan – a situation far less politically convenient than the two other precedents. Even if the Court proved to be still reluctant to intervene on the merits, once it exercises its competence and rejects the application of avoidance doctrines, the results on the merits may also be different in the future. Second, its decision not to avoid judicial review in this case allowed the House of Lords, if not to render a remedy on the merits, to engage in an audacious judicial dialogue with US courts on the policy of detention in Guantanamo Bay

[710] *Ibid*, paras. 64, 66.

[711] *Ibid*, paras. 15, 66. See also para. 18: "There have been widespread expressions of concern, both within and outside the United States, in respect of the stand taken by the United States government in cases such as *Hamdi*."

[712] *Ibid*, para. 64.

during the early days of the "war on terror". It is difficult to estimate the weight of this call and its influence on US jurisdiction. When the decision in the Abbasi case was rendered by the House of Lords in 2002 the question was still pending before the US Court of Appeals for the District of Columbia Circuit. A year later, on 11 March 2003, the US Court of Appeals did not follow the House of Lords' stance, and dismissed the claimants' action. The US Supreme Court overruled the lower court's decision in *Rasul* v. *Bush* in 2004[713]. While *Abbasi* was mentioned in several *amici curiae* briefs submitted to the Court, in its ruling the Supreme Court did not made any reference to *Abbasi*. It is quite possible that this may indicate that in the eyes of the American judiciary that the House of Lords went beyond the limits of the usual comity between States' respective judicial institutions. At the same time, as noted by a commentator, the influence of Abbasi's decision over the destiny of the British detainees in Guantanamo can not be overestimated: "headline-grabbing statements on the arbitrary detention and ill treatment of those individuals detained in Guantanamo set the tone of public debate."[714] And Philippe Sands, counsel in *Abbasi* for the plaintiff, notes:

> The Court's judgment added great authority to those who were relying on international law to challenge the conditions of the Guantanamo detainees. … To a significant extent the judgement of the Court of Appeal has set the tone for British public opinion on the issue of Guantanamo.[715]

By January 2005, following diplomatic pressure, *Abbasi* and the three other British citizens still detained at Guantanamo were transferred to UK custody.[716] It can reasonably be assumed that *Abbasi* was among the factors that influenced that decision.

[713] See, *Al Odah v United States*, 321 F.3d 1134 (D.C. Cir. 2003) and *The Rasul v Bush* case (n 578).

[714] C.R.G. Murray, 'The Ripple Effect: Guantanamo Bay in the United Kingdom's Courts' (2010) 1 Pace International Law Review Online Companion 9, p. 42.

[715] P. Sands, 'The "Political" and the "Legal:" Comments of Professor Tushnet's Paper' (2007) 3 International Journal of Law in Context 4, pp. 319, 322.

[716] C.R.G. Murray (n 714), p. 25.

2.2 Step 2: The Hamdan case (US Supreme Court, 2004)

> "We have assumed... that Hamdan is a dangerous individual whose beliefs, if acted upon, would cause great harm and even death to innocent civilians... But in undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction".[717]

In this category the Court (a) rejects the avoidance doctrines; (b) declares the State's action to be illegal under international humanitarian law and domestic law; and (c) defers to the executive the possibility to seek from the legislative branch an approval for derogating from international humanitarian law.

i. Facts and previous proceedings

Hamdan, a Yemeni national, was captured in 2001 in Afghanistan during the armed conflict between the US and Afghanistan. In 2002, Hamdan was transferred to the military detention camp at Guantanamo Bay, and In July 2003, he was deemed eligible by the US President to be prosecuted before the military commissions, which had been established by the same President.[718] A year later he was charged with conspiracy, *inter alia* to commit attacks on civilians. Hamdan filed a petition for *habeas corpus* claiming that being prosecuted before military commissions rather than facing a court martial would violate US domestic law – the Uniform Code of Military Justice (UCMJ) and the Third Geneva Convention. More specifically, Hamdan claimed that the military commissions lacked authority to try him on

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[717] *The Hamdan* case (n 16), p. 72.

[718] The White House, 'Military Order - Detention, Treatment, and Trial of Certain Non-citizens in the War Against Terrorism' (13 November 2001) <http://georgewbush-whitehouse.archives.gov/news/releases/2001/11/20011113-27.html> (accessed 22 October 2011). This was enact pursuant to US Congress' 'Authorization for Use of Military Force, § 2(a), Public Law 107-40, 115 Stat. 224' (enacted 18 September 2001) (hereinafter: *AUMF*), authorizing the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." The commission rules were then regulated in US Department of Defense, 'Military Commission Order No. 1' (31 August 2005) <http://www.defense.gov/news/Sep2005/d20050902order.pdf> (accessed 22 October 2011). After the US Supreme Court granted a writ of certiorari in this case, Congress enacted the Detainees Treatment Act of 2005.

two bases: (1) conspiracy to commit a war crime is an offense that is not a violation of the law of war; and (2) the military commission procedures violate basic rules of military and international law, such as the principle that a defendant should have access to the evidence against him.

On 8 November 2004, the District Court for the District of Columbia granted the petition in part. It ruled that the third Geneva Convention is judicially enforceable; and that, as long as Hamdan's prisoner of war status is in doubt, he must be tried by court-martial. In addition, the first instance court ruled that the prosecution before military commission violates both the Third Geneva Convention and the UCMJ. On 15 July 2005, the Court of Appeals reversed the District Court opinion. It held that the Congress had authorized the establishment of the military commissions through the Authorization for Use of United States Armed Forces (AUMF). It further ruled that the Geneva Conventions do not confer enforceable rights before US courts, and even if they did, the third Geneva Convention does not apply to *al-Qaeda* and its members as these failed to comply with the requirements of Article 4.

ii. Rejecting the State's request to abstain

Before the Supreme Court, the State claimed that the Court should abstain and await the final outcome of ongoing military proceedings before entertaining review on those proceedings.[719] Moreover, it pointed out that "abstention is especially appropriate here because the armed conflict against Al Qaeda remains ongoing."[720] The US Supreme Court rejected the State's motion to dismiss until the ongoing proceedings before the commissions were over as being "unpersuasive":

> Hamdan and the Government both have a compelling interest in knowing in advance whether Hamdan may be tried by a military commission that arguably is without any basis in law and operates free from many of the procedural rules prescribed by Congress for courts-martial--rules intended to safeguard the accused and ensure the reliability of any conviction. While we

[719] "All of the reasons that this court has held abstention to be appropriate in similar circumstances counsel, a fortiori, against interlocutory review of this petition. Considerations of separation of powers, deference to military proceedings, avoiding abstract questions and unnecessary decisions all favour deferring judicial review, including review by this court until after the commission proceedings run their course." - Brief for the Respondents in Opposition No. 05-184 (September 2005), p. 23 <http://www.law.georgetown.edu/faculty/nkk/documents/HamdanBrief.opp.pdf> (accessed 22 October 2011).

[720] Brief for Respondents No. 05-184 (September 2005), p. 7 <http://www.hamdanvrumsfeld.com/HamdanSGmeritsbrief.pdf> (accessed 22 October 2011).

> certainly do not foreclose the possibility that abstention may be appropriate in some cases seeking review of ongoing military commission proceedings (such as military commissions convened on the battlefield), the foregoing discussion makes clear that, under our precedent, abstention is not justified here.[721]

As observed by one commentator,

> "to reach the merits was a notable assertion of judicial authority…. [T]he Court could readily have gone the route of abstention, as did the D.C. Circuit below, in a well-ploughed tradition of avoiding the merits in cases involving sensitive issues of national security."[722]

iii. On the merits: declaring a State act illegal in light of international humanitarian law

On the merits, the Supreme Court ruled that the procedures of the commissions set by the President violate, *inter alia*, Common Article 3 of the Geneva Conventions.[723] In so ruling, the Court rejected the position of the State in several aspects. First, the State's qualification of the armed conflict as being international and its position that the Geneva Conventions do not apply to the armed conflict with *al-Qaeda* were both rejected, as was its stance that these assessments should be deferred. [724] The US Court of Appeals accepted the

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[721] *The Hamdan* case (n 16), p. 25. Note that Justice Scalia, with whom Justice Thomas and Justice Alito join, dissented, states that he would abstain from exercising the court's equity jurisdiction as requested by the State.

[722] P.J. Spiro, 'Hamdan v. Rumsfeld. 126 S.Ct.2749' (2006) 100 American Journal of International Law 4, p. 892.

[723] The Court further ruled that the procedural rules of the commissions (such as the non-disclosure of evidence to the defence and the trial in *absentia*) violate Article 36 of the UCMJ, which requires that the rules of procedures must be uniformed insofar as practical to the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts. While the Court was ready to defer to the State the determination that it is "impracticable to apply the rules and principles of law that govern the trial of criminal cases in the United States district courts" to Hamdan's Commission, the Court ruled that "nothing in the record demonstrates that it would be impracticable to apply court-martial rules here [..] The jettisoning of so basic a right cannot lightly be excused as 'practicable'." *The Hamdan case* (n 16), p. 61.

[724] Then President Bush determined, in a memorandum to the Vice-President and others on 7 February 2002, that the armed conflict with *al-Qaeda* was not a non-international armed conflict, because the conflict was "international in scope." According to the State, as Al Qaeda is not a High Contracting Party to the Geneva Convention, according to Common Article 2 to the Four Geneva Conventions of 1949 do not apply to the conflict between the US and Al Qaeda. See G. Bush, 'Memorandum on Humane Treatment of al Qaeda and Taliban Detainees' (7 February 2002) <http://www.washingtonpost.com/wp-srv/nation/documents/020702bush.pdf> (accessed 22 October 2011). The State was also of the position that "the

State's position and ruled "the President's decision to treat our conflict with the Taliban separately from our conflict with al Qaeda is the sort of political-military decision constitutionally committed to him. To the extent there is ambiguity about the meaning of Common Article 3 as applied to Al Qaeda and its members, the President's reasonable view of the provision must therefore prevail."[725] The Supreme Court, however, did not accept that the qualification of the conflict and the applicability of the Geneva Conventions to the conflict between al-Qaeda and the US, merited deference to the Executive. This was seen as a legal question that a court can and should examine. Thus, these questions, traditionally under the sole discretion of the State, not only were these reviewed by the Supreme Court, but the State position was rejected: the Court ruled that Common Article 3 of the Geneva Conventions was applicable to members of *al-Qaeda*. [726]

Second, the Court notably rejected the long-run position of the State, echoed in *Johnson v. Eisentrager* whereby the Geneva Conventions are not judicially enforceable in domestic courts and that these legal instruments can not be invoked by individuals.[727] Although Common Article 3 was not directly enforced, but applied through its domestic incorporation in Article 21 of the UCMJ, which set the obligation to respect the "law of war", the Court

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decision whether the Geneva Convention applies to a terrorist network like Al Qaeda is [..] solely for the executive." *Writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit* (February 2006), p. 38.

[725] *Hamdan*, decision of the Court of Appeals for the District of Columbia Circuit, 415 F. 3d 33 (2005), p. 15-16 (citation omitted).

[726] *The Hamdan* case (n 16), p. 67: "The Court of Appeals thought, and the Government asserts, that Common Article 3 does not apply to Hamdan because the conflict with al Qaeda, being international in scope does not qualify as a conflict not of an international character [..] That reasoning is erroneous." As observed by E. Benvenisti (n 195), fn. 73: "until the *Hamdan* decision deference to executive treaty interpretation was near absolute, based on the theory that the President has both the constitutional responsibility for, and special competency in, foreign affairs." For a critic position of this judicial position: "The *Hamdan* decision represents a remarkable and troubling departure from these longstanding precedents. Instead of deferring to the executive branch's reasonable interpretations, the Court adopted its own barely reasonable interpretations in order to invalidate the President's existing system of military commissions." J.G. Ku and J.C. Yoo (n 176), pp. 143, 179. On the doctrine of deference, see also R.M. Chesney, 'Unravelling Deference: *Hamdan*, the Judicial Power, and Executive Treaty Interpretations' (2006) 92 Iowa Law Review 1723-1782. C.M. Vázquez, 'The Military Commissions Act, the Geneva Conventions, and the Courts: A Critical Guide' (2007) 101 American Journal of International Law 1, pp. 73-98. At p. 78 Vasquez notes that *Hamdan* shows that it is "the province of the judiciary to interpret treaties."

[727] H. Hongju Koh (n 62), pp. 2350, 2363.

nevertheless relied on the Geneva Conventions to determine the legality of the military commissions established by the President. [728] Thus, without deciding more generally whether the Geneva Conventions are judicially enforceable in the absence of implementing legislation, the fact that the Court relied on the Geneva Conventions to guarantee their rights, is novel.[729] Enforcing the Geneva Conventions, even via domestic legislation was not commonly done, until Hamdan. Interestingly, John Yoo shows how *Eisentrager* was decided when a similar legislation, incorporating the "law of war", existed:

> When *Eisentrager* was decided, the statutory predecessor to Article 21 contained exactly the same language regarding "the law of war." Thus, when the *Eisentrager* Court held that the Geneva Conventions were not judicially enforceable, military commissions were *already bound* by statute to comply with the laws of war.[730]

Third, in opposition to the State's position, the Court ruled that the standards set by Common Article 3 are not met by the commissions, because these do not constitute a "regularly constituted court" and they fail to provide the "judicial guarantees which are recognized as indispensable by civilized peoples." The Court ruled that the requirements of Common Article 3 of the Geneva Conventions must be understood to incorporate at least the trial protections recognized by customary international law, as laid down in Article 75(4)(e) of Additional Protocol I. Interestingly the Court refers to the Protocol's terms as reflecting customary international law, making it binding upon the US, even though it has not ratified the protocol,

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[728] Article 21 of the UCMJ states that: "The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that *by statute or by the law of war may be tried* by military commissions, provost courts, or other military tribunals." The Court ruled that it did not need to decide whether the Geneva Conventions of 1949 can be directly enforce by a US court, since Article 21 of the UCMJ authorizes trial by military commission only "with respect to offenders or offenses that . . . by the law of war may be tried by military commissions" and since the Court has the authority to enforce the UCMJ, and the Geneva Conventions of 1949 are "part of the law of war" referenced in Article 21, the Court concluded that it had the authority to apply the Conventions. See also D. Sloss, 'When Do Treaties Create Individually Enforceable Rights? The Supreme Court Ducks the Issue in *Hamdan* and *Sanchez-Llamas*' (2006-2007) 45 Columbia Journal of Transnational Law 20, p. 45; H. Hongju Koh (n 62), p. 2363.

[729] D. Weissbrodt and N.H. Nesbitt (n 699), p. 1339.

[730] J.G. Ku and J.C. Yoo (n 176), p. 110.

and apparently also enforceable before US courts. Yet, the Court did not clarify why Additional Protocol I is applicable in a non-international armed conflict.

iv. Deferring to the legislative branch

While the court ruled that the structure and procedure of the military commissions were illegal, the Court still used the referral technique by emphasizing that the State can seek Congress' approval for derogating from the requirements of international law:

> Congress has denied the President the legislative authority to create military commissions of the kind at issue here. Nothing prevents the President from returning to Congress to seek the authority he believes necessary…[731]

> at least absent express statutory provision to the contrary, information used to convict a person of a crime must be disclosed to him.[732]

Nevertheless the Court sent an important signal: the court may eventually resort to an ultimate response – the review of the constitutionality of a future Congress' military commission act.[733]

v. Follow-up

Following the US Supreme Court's decision in *Hamdan*, the US Congress passed the *Military Commissions Act of 2006*, which created new military commission procedures stripping the courts of habeas corpus jurisdiction with respect to non-US citizens determined by the executive to be enemy combatants. The Act declared that: "A military commission established under this chapter is a regularly constituted court … for purposes of common Article 3 of the Geneva Conventions" and, provided that the Conventions could not be invoked. [734] In 2006, Benvenisti wrote that "it is not clear whether the Court will respond to

[731] *The Hamdan* case (n 16), (Opinion of Justice Breyer). See also E. Benvenisti (n 195), fn 23 and accompanying text.

[732] *The Hamdan* case (n 16), p. 72.

[733] "Because Congress has prescribed these limits, Congress can change them, requiring a new analysis consistent with the Constitution." *Ibid*, p. 164.

[734] US Congress, 'Military Commissions Act' (hereinafter: The MCA) passed by the US Senate on 28 September 2006 and by the US House of Representatives on 29 September 2006, §§ 950 j(b) and 948 (b) (f) and (g), reproduced in M. Sassòli, A. Bouvier and A. Quintin (n 91), Vol. III, Case Study No. 265, p. 2380.

this challenge by climbing one of the two final, constitutional, rungs of the judicial review ladder". It did - though on another question. In Boumediene the constitutionality of the Military Commissions Act of 2006 was reviewed by the Supreme Court and declared non-constitutional. The question was whether the Military Commissions Act of 2006, which deprived federal courts of jurisdiction over Guantanamo *habeas corpus* actions, violated the Suspension Clause of the Constitution.[735] The Court held the petitioners have the constitutional privilege of *habeas corpus*. Being detained in Guantanamo, they are not barred from invoking the Suspension Clause's protections, and that Section 7 of the Military Commissions Act of 2006 (MCA) violated that provision by supplanting federal habeas corpus jurisdiction with a constitutionally insufficient substitute.[736] The Court noted that in *Hamdan* it had stated that "[n]othing prevent[ed] the President from returning to Congress to seek the authority he believes necessary", and it made clear that "nothing in that opinion can be construed as an invitation for Congress to suspend the writ".

[735] The MCA (28 U.S.C. § 2241(e) (2006). The Clause says: "The privilege of the writ of Habeas Corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." Article I, § 9(2) of the Constitution of the United States of America (adopted 17 September 1787). This case did not rely on international humanitarian law.

[736] *The Boumediene* case (n 511), pp. 793-795.

2.3 Step 3: The Torture case (Israeli High Court of Justice, 1999)

At this stage the Court (a) declares the State's action to be illegal under international and constitutional law and (b) defers to the executive the possibility to seek from the legislative branch an approval through the derogation clause of the Constitution.

> A democracy must sometimes fight with one hand tied behind its back. Even so, a democracy has the upper hand. The rule of law and the liberty of an individual constitute important components in its understanding of security. At the end of the day, they strengthen its spirit and this strength allows it to overcome its difficulties.[737]

i. Background

In 1987, the General Security Service (GSS) was officially mandated by the Israeli government to use a "moderate degree of physical pressure" during interrogations of suspects involved in terrorist activities. This authorization was provided by the Landau Commission, an official Commission headed by former President of the Supreme Court, Moshe Landau.[738] The authorization of using a "moderate degree of physical pressure" during interrogations was

[737] HCJ 5100/94, *Public Committee Against Torture in Israel v the State of Israel*, (1994) 53(4) PD 817, para. 39 (in English at <http://elyon1.court.gov.il/files_eng/94/000/051/a09/94051000.a09.pdf> (accessed 22 October 2011) (hereinafter: *The Torture* case). This decision has been often referred to as a landmark decision by judges, academics and states officials. See for example: "In a landmark ruling, the Court maintained that as a democracy, Israel must wage its war against terrorism with self-restraint due to the need to safeguard human rights." Israeli Ministry of Foreign Affairs, 'Judgments of the Israel Supreme Court: Fighting Terrorism within the Law' (2 January 2005), p. 24 <http://www.mfa.gov.il/NR/rdonlyres/599F2190-F81C-4389-B978-7A6D4598AD8F/0/terrorirm_law.pdf> (accessed 22 October 2011). However, a critic points out the limited scope of this ruling for the Court which did not examine all the interrogation methods but only five, and for not obliging the State to disclose the secret guidelines. A. Imesis, ''Moderate' Torture on Trial: Critical Reflections on the Israeli Supreme Court Judgment Concerning the Legality of the General Security Service Interrogation Methods' (2001) 5 International Journal of Human Rights 3, pp. 71, 73.

[738] 'Commission of Inquiry into the Methods of Investigation of the GSS Regarding Hostile Terrorist Activities' (October 1987). For excerpts of the official English translation see – (1989) 23 Israel Law Review, p. 146. The first part of the Landau Commission report was published, while its second part, in which the methods of interrogation that could be practiced were described, remains confidential. In its report ("the Landau report") the commission stated that "the exertion of a moderate degree of physical pressure cannot be avoided" and that without the use of physical methods of interrogation "an effective interrogation is impossible." At the same time the detailed guidelines of the approved methods remained secret.

justified through the illustration of the "ticking bomb" paradigm: a bomb is about to explode and to cause the death of civilians, and the detainee has the information on the location of the bomb. The paradigm assumes that only by using physical interrogations will the information necessary to detonate the bomb and to save innocent lives be revealed. Its legal basis was found in the necessity defence, a doctrine borrowed from criminal law, according to which under certain conditions of necessity, imminence, and proportionality one's criminal responsibility can be exempted. The Landau Commission introduced the necessity defence as a general legal authorization given in advance to carry out physical interrogations. This resulted, according to B'tselem, to the use of physical methods amounting to torture against 850 persons a year.[739]

ii. Declaring the illegality of a State act in light of international and domestic law

In 1999, 13 years after the secret torture guidelines were issued by the State commission, the Court delivered an important precedent in which it outlawed certain methods of interrogations that had been used against Palestinian detainees, claimed by the petitioners to amount to acts of torture. The Court ruled that these interrogations methods were illegal because they were practiced solely on the basis of the governmental directives, without an authorizing law. In its decision the Court stated that as interrogation inevitably infringes on an individual's freedom, "in a country adhering to the rule of law, interrogations are not permitted in absence of clear statutory authorization."[740] Moreover, the Court made clear that the statutory authorization must adhere to the requirements of Israeli constitutional law (the Basic Law: Human Dignity and Liberty)[741]. The High Court of Justice further ruled that the "necessity defense" could not constitute a source of prior authorization to use physical means during interrogations, thus rejecting the State position.[742] In an absence of any other authorizing law, according to the general regulations applicable to law enforcement officers,

[739] B'Tselem, 'Routine Torture: Interrogation Methods of the General Security Service' (B'Tselem, February 1998), pp. 5, 16 <http://www.btselem.org/publications/summaries/199802_routine_torture> (accessed 22 October 2011).

[740] *The Torture* case (n 737), para. 18.

[741] Basic laws are constitution-like provisions which enjoy a higher normative status than regular laws. Since 1995 following the High Court of Justice precedent, *Bank Hamizrahi Hameuchad Ltd. et al. v Migdal Kfar Shitufi*, Israeli courts have the authority to review the constitutionality of laws in light of the Basic Laws. Article 8 set a derogation close.

[742] *The Torture* case (n 737), paras. 23, 35.

interrogators are competent to perform only *reasonable* interrogation. In that context the High Court of Justice mentioned, while referring to international law, that

> a reasonable investigation is necessarily one free of torture, free of cruel, inhuman treatment, and free of any degrading conduct whatsoever. There is a prohibition on the use of 'brutal or inhuman means' in the course of an investigation…This conclusion is in accord with international treaties, to which Israel is a signatory, which prohibit the use of torture "cruel, inhuman treatment" and "degrading treatment." These prohibitions are absolute… The use of violence during investigations can lead to the investigator being held criminally liable.[743]

iii. Deference to the legislative

The legal basis for declaring the methods of interrogations illegal was the fact that the investigators were acting without an authorizing law. This situation could be legalized:

> If the state wishes to enable General Security Service investigators to utilize physical means in interrogations, it must enact legislation for this purpose… In such legislation, the legislature, if it so desires, may express its views on the social, ethical and political problems of authorizing the use of physical means in an interrogation… Granting GSS investigators the authority to apply physical force during the interrogation of suspects suspected of involvement in hostile terrorist activities, thereby harming the suspect's dignity and liberty, raises basic questions of law and society, of ethics and policy, and of the rule of law and security. These questions and the corresponding answers must be determined by the legislative branch. This is required by the

[743] *The Torture* case (n 737), para. 23 (citations omitted). This is the only paragraph in which international law is mentioned. Unlike other cases in which the High Court of Justice refers to international humanitarian law or human rights law provisions, the ruling is based entirely on domestic constitutional law. This is odd as the petitioners, Palestinians from the OPT, benefit from the protection of the Fourth Geneva Convention of 1949 and human rights law and not from Israeli constitutional law. The extraterritorial application of Israeli constitutional law over Palestinians has never been recognized (it was recognized only for Israelis in the OPT, see *The Gaza Coast Regional Council case* (n 379), para. 80. Interestingly in this case the acts of the investigators, and not the rights of the petitioners, are under review in light of the constitution. This is somewhat similar to *The Amnesty* case (n 633) before Canadian court, which explicitly rejected that point. It ruled that even if the Canadian Officials are bound by the Constitution, it still does not necessary imply that it is applicable extraterritoriality in Afghanistan and that it provides a protection for the victims. It ruled that foreign detainees cannot enjoy the extraterritorial application of the Canadian constitution, and that any allegation of torture should be based on the applicable law, which is international humanitarian law. See *Amnesty International v Canada*, (2008) FCA 401, (2009) 4 F.C.R. 149, para 36.

principle of the separation of powers and the rule of law, under our understanding of democracy.[744]

With this, the Court deferred the possibility of codifying torture instead of preventing it, in defiance of the absolute prohibition in international law – an absolute prohibition that was recognized by the High Court of Justice itself.[745] At the same time, signals were sent throughout the judgment that this legislation could be constitutionally reviewed by the High Court of Justice in light of the Israeli constitutional law.[746]

iv. Deference to the executive

While the High Court of Justice ruled that the necessity defence can not constitute an authorizing law in advance to use technique of interrogation involving physical pressure, it recognized that this defence is available in course of a criminal trial: "if a General Security Service investigator, who applied physical interrogation methods for the purpose of saving human life, *is criminally indicted***,** the necessity defense is likely to be open to him in the appropriate circumstances".[747] Moreover, the High Court of Justice went one step further in allowing an important deference to the Executive, which would result in upholding the very

[744] *The Torture* case (n 737), para. 37.

[745] *Ibid,* para. 23.

[746] *Ibid,* para. 39: "(the authorizing) legislation may be passed, provided, of course, that the law "befit[s] the values of the State of Israel, is enacted for a proper purpose, and [infringes the suspect's liberty] to an extent no greater than required." (This corresponds to derogation close as set in Article 8 of the Basic Law: Human Dignity and Liberty.") As Israeli constitutional legislation sets a derogation clause, it does not correspond to the absolute international prohibition to torture, which reflects a *jus cogens* norm (*Prosecutor v Furundžija*, (Judgment, Trial Chamber) ICTY IT–95–17/1-T (10 December 1998), paras. 137-138, 153 (hereinafter: *The Furundžija* case); Article 2(2) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 U.N.T.S 85, that allows no exceptions).

[747] *The Torture* case (n 737), para. 34. While the prohibition to use torture is absolute according to human rights treaty law (State responsibility), the criminal defence of necessity is available for individuals by the 1998 ICC Statute in Article 31(1)(d). See A. Eser, 'Grounds for Excluding Criminal Responsibility' in O. Triffterer (ed), *Commentary on the Rome Statute of the ICC: Observers' Notes, Article by Article* (Nomos Verlagsgesellschaft, Baden-Baden ,1999), pp. 863-878. A. Eser, 'Defences in War Crimes' (1994) 24 Israel Yearbook on Human Rights, pp. 201-234; Yet, one must recognize that the conditions of the defence in practice seem hardly possible to be fulfilled. See, e.g., P. Gaeta, 'May Necessity be Available as a Defense for Torture in the Interrogation of Suspected Terrorists?' (2004) 2 Journal of International Criminal Justice 3, pp. 785, 789- 790.

same practice in the next decade. The High Court of Justice ruled that "[t]he Attorney-General can establish guidelines regarding circumstances in which investigators shall not stand trial, if they claim to have acted from 'necessity'."[748] Thus, on the one hand, the High Court of Justice affirmed that the "necessity defence" cannot serve as a legal authorization to use torture methods.[749] However, on the other, it deferred to the State's Attorney General, who stands at the head of the prosecution office and serves as the State's legal advisor, the authority to define the circumstances in which interrogators shall not be prosecuted, when they claim to have used a prohibited method of torture due to "necessity". Allowing the head of the State prosecution, who is also the legal advisor of the government, to decide on the circumstances that the necessity defence would apply in advance would necessarily lead to a more flexible application of the defence. As it was designed by law in the criminal code, it is a judge during the criminal procedure who should decide whether the defence applies in a given situation, and not the prosecution.[750] Second, and more importantly, only when examined *ex post* during a criminal trial is it possible to evaluate the circumstances and the facts. Giving an authorization in advance provides a wider margin of manoeuvre for abuses. If investigators know that they would have to face criminal trials in which, in order to be exempted from criminal responsibility, they bear the burden to prove that the necessity defence should apply, it seems that they may then be more careful with their acts. When it is an authorization in advance it has the opposite effect. By deferring to the State's Attorney-General the discretion to decide when investigators shall not be prosecuted, the Court upheld a legal construction that in fact results in the same practice: What the Court explicitly ruled to be illegal was subsequently legitimised by the very same ruling.[751]

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[748] *The Torture* case (n 737), para. 38.

[749] *Ibid*, para. 37: "The principle of 'necessity cannot serve as a basis of authority."

[750] Although I am aware, as Prof. Yuval Shany puts it, of "the unsatisfactory record of domestic courts [..] in protecting the basic human rights of enemy combatants in times of conflict", I think that only a judge could decide during a criminal trial *ex post* if the defence should be applied. See Y. Shany, 'The Prohibition Against Torture and Cruel, Inhuman and Degrading Treatment and Punishment: Can the Absolute be Relativized under Existing International Law?' (2007) 56 Catholic University Law Review 837, at p. 847.

[751] Consequently, Israel is using the Court's decision to justify its use of torture in interrogations. See, for example, State of Israel, 'Fourth Periodic Report to Committee against Torture' (2 November 2006) Un Doc CAT/C/ISR/4, paras. 146-147 <http://www2.ohchr.org/english/bodies/cat/docs/CAT.C.ISR.4.doc> (accessed 22 October 2011).

v. The Follow up: From deferring to legitimizing?

The Torture case provides an example of the possible shift from a "normative application" function of a court towards an apologetic stand, due to the possible outcomes of the deferral technique in the long term, deriving from the misuse of the discretion allocated to the State by the Court.[752] With that deference, the Court opened the door for the *slippery slope* which would see the use of physical methods, torture and ill-treatment continue over the next decade, despite being courageously declared illegal by the Court. NGOs reports and dozens of victim's testimonies confirm the continuing practice of torture after the Court's landmark decision, while the "necessity defence" has continued to be a way to obtain *a priori* authorisation for using illegal interrogation methods.[753] For example, in its May 2007 report Public Committee Against Torture in Israel describes in detail nine cases of human "ticking bombs". These hard testimonies collected in 2004-2006, shows how Palestinian detainees might find themselves tortured after being labelled as "ticking bomb" without having any effective legal review over this practice.[754] Moreover, not only did the High Court of Justice landmark decision not prevent illegal interrogations it even led to the *de facto* institutionalisation of interrogators' immunity from prosecution under the auspices of the High Court of Justice ruling.[755] Over the years, the authorities have rejected hundreds of requests to open criminal investigations for allegations of torture and cruel, inhuman and degrading treatment during interrogations of Palestinians. According to the Public Committee Against Torture in Israel not a single case among the 621 complaints submitted from 2001

[752] For more discussion on that point, see below at p. 264-265.

[753] See B. Shoughri-Badarneh, 'A Decade after the High Court of Justice "Torture" Ruling, What's Changed?' in A. Baker and A. Matar (eds), *Threat: Palestinian Political Prisoners in Israel* (Pluto Press, London, 2011), pp. 114-123; Y. Ginbar, 'Celebrating' a Decade of Legalised Torture in Israel' <http://projects.essex.ac.uk/ehrr/V6N1/Ginbar.pdf> (accessed 22 October 2011). See also, for instance: "While acknowledging the importance of the September 1999 Supreme Court decision [..] allegations continue to be received concerning the use of interrogation methods by the ISA against Palestinian detainees that were prohibited by the September 1999 ruling of the Supreme Court." (UN CAT, 20029, at para.6(c)). Public Committee Against Torture in Israel, 'Ticking Bombs - Testimonies of Torture Victims in Israel' (30 May 2007), p. 90 (hereinafter: *Public Committee against Torture*) <http://www.stoptorture.org.il/en/node/69> (accessed 22 October 2011).

[754] *Public Committee against Torture*, *Ibid*, p. 12-90.

[755] For instance, in the case of Medhat Tareq Muhammad the High Court of Justice held that: "[..] the Attorney General and State Attorney decided that the forms of interrogation which were applied fall under the 'defence of necessity', and therefore the interrogators bear no criminal liability in this case for the forms of interrogation applied by them." Crim App 4705/02, *Anon v State of Israel* (Decision of 30 December 2002), para 1.

until September 2009 has been criminally investigated.[756] Complaints submitted to the authorities are reviewed by a GSS agent whose recommendations not to open a criminal investigation are always accepted by the high-ranking attorney in charge of the cases at the Ministry of Justice and by the State Attorney General.[757] In 2009, three major human rights organisations filed a contempt of court motion to the High Court of Justice, against the Israeli government and the GSS, for their responsibility for the policy that grants *a priori* permission to use torture in interrogations, in violation of the 1999 judgment. It was claimed that the pattern of shielding alleged torturers – as demonstrated by the systematic rejections of hundreds of complaints – demands the intervention of the High Court of Justice. However, this petition was rejected on the grounds that the Court does not address general policies in contempt procedures and recommended the submission of individual cases.[758] Since then, three individual cases have been submitted, of which one was rejected on procedural grounds and the other two remain pending.[759]

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[756] Public Committee Against Torture in Israel, 'Israel – Briefing to the Human Rights Committee Jerusalem' (June, 2010), para. 25. See also, Public Committee Against Torture in Israel, 'OMCT - World Organisation Against Torture Israel – Briefing to the UN Committee Against Torture' (Jerusalem & Geneva, April 2009)<http://www2.ohchr.org/english/bodies/cat/docs/ngos/PCATI_OMCT_Israel42.pdf> (accessed 22 October 2011).

[757] Public Committee Against Torture in Israel, 'Accountability Denied: The Absence of Investigation and Punishment of Torture in Israel' (December, 2009), p. 93 <http://www.stoptorture.org.il/files/Accountability_Denied_Eng.pdf> (accessed 22 October 2011).

[758] Public Committee Against Torture in Israel, 'High Court of Justice Rejected the Contempt of Court Petition Filed by PCATI and Other Organizations' (6 July 2009), <http://www.stoptorture.org.il/en/node/1460> (accessed 22 October 2011).

[759] A recent High Court of Justice petition demanding the opening of investigations for alleged torture and ill-treatment in the cases of 13 former detainees was rejected on the grounds that the procedure for complaints had changed during the proceedings and the authority to investigate such cases was transferred, following the submission of the petition, to the Ministry of Justice, from the AG's office, without clear instructions about the changes or the current form of the complaints procedure. HCJ 6138/10, *HaMoked v Attorney General*, (Judgment of 12 January 2011). Another recent High Court of Justice petition submitted by PCATI on behalf of six human rights organisations and 10 Palestinians who were subjected to torture or other forms of ill-treatment, demanding criminal investigations in these cases, remains pending before the Court, HCJ 1265/11, *PCATI et al. v Attorney General*, (pending) (hearing set for January 2012). I wish to thank PCATI for providing this information.

2.4 Highest on the ladder: The Khadr cases (Canadian Supreme Court, 2008 /2010)

The deference required by the principle of comity 'ends where clear violations of international law and fundamental human rights begin'.[760]

In this stage the Court (a) rejects the avoidance doctrines; (b) declares the State's action to be ultimately illegal under constitutional law; and (c) defers only the decision on the appropriate remedy to the executive.

Khadr, a Canadian citizen, was arrested by US forces in Afghanistan before his 16th birthday, and had been detained since 2002 in Guantanamo Bay. His legal action involved a number of litigations, including two cases before to the Canadian Supreme Court. The first Supreme Court ruling of 2008 addressed the involvement of Canadian officials in his illegal detention in Guantanamo, and the second case, from 2010, requested his repatriation to Canada. In both cases, the highest court of Canada affirms the significance of international law, and at the same time it chose a practical way of intervention in this sensitive domain of foreign relations: after declaring the State officials' acts as unconstitutional, in the 2010 case it granted the government with the entire discretion for how to proceed for the remedy.

2.4.1 Canada (Justice) v. Khadr (2008)

In 2003, Canadian officials interrogated Khadr in Guantanamo Bay and shared the information obtained with US authorities. Faced with criminal charges before US military commissions and for the purpose of his defence, Mr. Khadr sought before Canadian courts an order to disclose all documents in the possession of the Canadian Crown under Section 7 of the Canadian Charter of Rights and Freedoms, including the interviews conducted in 2003. The Minister of Justice opposed the request, arguing that the Charter does not apply outside Canada. The claim was based on the Supreme Court precedent in *Hape,* that ruled that in accordance to the principle of comity between nations, Canadian officials operating abroad are required to comply with local law, and therefore the Canadian Charter does not apply extraterritorially. Yet, as an exception to this principle, the Court also established that if

[760] *R. v Hape*, (2007) 2 SCR 292, 2007 SCC 26, para. 52, cited in *Canada (Justice) v Khadr,* (2008) 2 SCR 125, 2008 SCC 28, para. 18 (hereinafter: *The Khadr 2008* case) <http://www.canlii.org/en/ca/scc/doc/2008/2008scc28/2008scc28.pdf> (accessed 22 October 2011).

Canada is participating in a process that violates Canada's binding obligations under international law, the Charter will apply to the extent of that participation. Therefore, in order to decide if Canadian officials were bound by the Charter, the question pending before the court was whether the process at Guantanamo Bay at the time that Canadian officials held the interviews and handed them over to US officials was a process that violated Canada's binding obligations under international law.

i. Rejecting avoidance doctrines

The State raised the non-justiciability claim "whether it is appropriate for a Canadian court to pronounce on the legality of the process at Guantanamo Bay under which Mr. Khadr was held at the time that Canadian officials participated in that process."[761] The Court ruled that it was not an question that needed to be addressed in this case as "the United States Supreme Court has considered the legality of the conditions under which the Guantanamo detainees were detained" and held that "the detainees had illegally been denied access to *habeas corpus* and that the procedures under which they were to be prosecuted violated the *Geneva Conventions*"[762]. In fact, the Canadian Court enlarged the exception of *Kuwait* based on the same reasoning. In *Kuwait airlines*, the UK House of Lords defined the non-justiciability exception when it is "a clear breach of international law." In that case, it was the UN Security Council, which had recognized the Iraqi invasion of Kuwait as a clear breach of the law. In *Khadr,* the exception to the comity between states is based on a ruling of the State's domestic court: as the US Supreme Court declared the detention in Guantanamo as violating international law - Canadian courts (and maybe, more generally a third State's courts), can base themselves on that declaration of illegality, for the purpose of rejecting a non-justiciability claim, without violating the comity principle between nations.

ii. On the merits: Declaring the illegality of State act in light of international and constitutional law

Based on US Supreme court rulings in *Rasul* and *Hamdan* the Canadian Supreme Court found that the conditions under which Khadr was held in Guantanamo were in violation of international law. Then, the court held that the participation of Canadian official in the "Guantanamo Bay process" constituted a "clear violation of Canada's international human

[761] *The Khadr 2008* case, para. 21.

[762] *Ibid*.

rights obligations", and that this was "contrary to Canada's binding international obligations."[763] The Court therefore found that the *Canadian Charter of Rights and Freedoms* was applicable:

> We conclude that the principles of international law and comity that might otherwise preclude application of the *Charter* to Canadian officials acting abroad do not apply to the assistance they gave to U.S. authorities at Guantanamo Bay. Given the holdings of the United States Supreme Court, the *Hape* comity concerns that would ordinarily justify deference to foreign law have no application here. The effect of the United States Supreme Court's holdings is that the conditions under which Mr. Khadr was held and was liable for prosecution were illegal under both U.S. and international law at the time Canadian officials interviewed Mr. Khadr and gave the information to U.S. authorities. Hence no question of deference to foreign law arises. The *Charter* bound Canada to the extent that the conduct of Canadian officials involved it in a process that violated Canada's international obligations. [764]

The US Supreme court decisions had a decisive impact on the Canadian Court. These cases were the legal authority to confirm that international law was violated during the detention process of Khadr – an assessment which is required for the application of the Canadian Charter extraterritoriality. In fact, the US Supreme Court rulings in 2004 (*Rasul*) and 2006 (*Hamdan*) enabled the Canadian Supreme Court in 2008 to apply extraterritorially (and perhaps retroactively) the *Canadian Charter* to the acts of Canadian officials in Guantanamo Bay in 2003 – a decision that imposed a remarkable limitation on the executive's authority.[765]

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[763] *Ibid*, paras. 21, 25; Interestingly the Court do not refer to international humanitarian law violations, as it should be expected, but to *Human Rights* or *international law* violations.

[764] *Ibid*, para. 26.

[765] For an opposite conclusion see *The Amnesty* case on Afghan detainees (n 633). There, the court of first instance ruled in March 2008 (before *The Khadr 2008* case) that protection under the Canadian Charter of Rights and Freedoms do not extend to Afghan detainees and did not apply to the conduct of Canadian forces in Afghanistan. An appeal against the decision was rejected in the Federal Court of Appeal in December 2008. In the appeal, which uphold the lower court's finding, the court distinguished between Khader and the Canadian forces in Afghanistan: "Khadr stands therefore as a case where a Canadian citizen obtained disclosure of documents held in Canada and produced by Canadian officials for a breach of his rights under section 7 of the Charter by Canadian officials participating in a foreign process that violated Canada's international human rights obligations. The factual underpinning of this decision is miles apart from the situation where foreigners, with no attachment whatsoever to Canada or its laws, are held in CF detention facilities in Afghanistan." *Amnesty*

iii. Deferring the remedy to the executive

After finding that the Canadian constitution applies in Guantanamo, the Court ordered the Canadian government to disclose to *Khadr* the transcripts of the interviews and records of the information given to U.S. authorities. Yet, the Court deferred the decision of what evidence to disclose to the State, pointing out that this disclosure is subject to the balancing of national security and other considerations as whether this disclosure "would be injurious to international relations or national defence or national security, and whether the public interest in disclosure outweighs in importance the public interest in non-disclosure."[766] At that point that balance is to be performed by the State,

2.4.2 Canada (Prime Minister) v. Khadr (2010)[767]

In another series of litigation, Khadr requested his repatriation to Canada. This was sought as a remedy for Canada's violation of his constitutional right under Section 7 of the *Charter.* The lower courts held that under the special circumstances of this case, Canada had a duty to protect Khadr under Section 7 of the *Charter* and ordered the government to request his repatriation.

i. Rejecting avoidance doctrines

The Canadian government submitted that its decision not to request the repatriation of Mr. Khadr falls directly within the prerogative powers of the Crown to conduct foreign relations and argues that under the Constitution of Canada courts have no power to intervene in this field. The Court thus had to consider whether the remedy that Khadr sought – a repatriation request from Canada to the US government –was inappropriate because such an order to the government would touch upon the Crown prerogative power over foreign affairs. The Supreme Court accepted the government's position that the decision not to request Mr. Khadr's repatriation was made in the exercise of the prerogative over foreign relations, yet it concluded that the judiciary possesses a power to review matters of foreign affairs in order to ensure their constitutionality:

International Canada and BCCLA v Canada (Chief of the Defence Staff) (2008) FCA 401, (2009) 4 FCR 149, paras. 13-14 (hereinafter: *The BCCLA* case).

[766] *The Khadr 2008* case (n 760), para. 41.

[767] *Canada (Prime Minister) v Khadr*, (2010) SCC 3, (2010) 1 SCR 44 (hereinafter: *The Khadr II* case) <http://scc.lexum.org/en/2010/2010scc3/2010scc3.html> (accessed 22 October 2011).

> In exercising its common law powers under the royal prerogative, the executive is not exempt from constitutional scrutiny. It is for the executive and not the courts to decide whether and how to exercise its powers, but the courts clearly have the jurisdiction and the duty to determine whether a prerogative power asserted by the Crown does in fact exist and, if so, whether its exercise infringes the *Charter* or other constitutional norms.[768]

At the same time the Court mentions that while doing so courts must remain "sensitive to the fact that the executive branch of government is responsible for decisions under this power, and that the executive is better placed to make such decisions within a range of constitutional options."[769]

ii. On the merits: Declaring the illegality of a State act and deferring the remedy to the executive

On the merits, the Supreme Court declared that Canada had infringed Mr. Khadr's constitutional rights. At the same time, it decided that the lower courts' remedy ordering the government to request Khadr repatriation gave "too little weight to the constitutional responsibility of the executive to make decisions on matters of foreign affairs in the context of complex and ever-changing circumstances, taking into account Canada's broader national interests."[770] Given concerns about lack of detailed information of any negotiations between Canada and the US that may have taken place and the need to respect the separation of powers between the courts and the executive, the Court ruled that it would be more appropriate to leave it to the government to "decide how best to respond to this judgment" and to provided only a declaratory relief.[771] As in the previous case, once again the Court declared that the executive had exceeded its authority, yet, the remedy remained deferred to its discretion.

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[768] *Ibid*, para. 36 (case references omitted).

[769] *Ibid*, para. 37.

[770] *Ibid*, para. 39.

[771] *Ibid*, para. 39. See para. 46: "In this case, the evidentiary uncertainties, the limitations of the Court's institutional competence, and the need to respect the prerogative powers of the executive, lead us to conclude that the proper remedy is declaratory relief."

iii. Follow-up to the decision

The follow-up to the Supreme Court's decision was that the executive made a request for the US government not to make use of any evidence received as a result of the interrogations of Khadr in 2003–2004 in which Canadian officials participated, in the prosecution of Khadr before the military commission. The commission process continued in the summer, and Khadr then pleaded guilty to a reduced charge and was sentenced to an agreed-upon eight years. The Canadian government did not go along with the proposed remedy of asking for Khadr's return prior to trial. There was a further case in the Federal Court that led to a new order to the government to make that request, but the government successfully appealed that to the Federal Court of Appeal in mid-2010.[772] On 23 October 2010, Khadr pleaded guilty before a US Military Commission.[773] The US and Canada submitted a diplomatic note to Khadr in which it was agreed that after serving one year in Guantanamo, his request to be transferred to Canada to serve his remaining time there would be approved.[774]

[772] Information given by Peter Carver, Centre of Constitutional Studies, University of Alberta, Canada, in an electronic interview (28 December 2010): "Mr. Justice Zinn of the Federal Court made the decision against the government in May 2010. In July 2010, a single Justice of the Federal Court of Appeal granted a stay of Justice Zinn's order pending the government's appeal, and made comments suggesting they had a strong appeal case. There hasn't yet been a decision on the appeal (and I don't know whether events in the U.S. have impacted on the case's going ahead)." The Federal Court decisions can be found under 'Khadr' at the Court's public website at <http://decisions.fca-caf.gc.ca/en/> (accessed 22 October 2011).

[773] *United States of America v Khadr*, (Stipulation of Facts) (13 October 2010). <http://www.cbc.ca/news/pdf/omar-khadr-charges.pdf> (accessed 22 October 2011). For a full overview of the Khadr cases <http://www.law.utoronto.ca/faculty_content.asp?itemPath=1/3/4/0/0&contentId=1617> (accessed 22 October 2011).

[774] United States Department of State, 'Memorandum for Michael L. Bruhn – Executive Secretary – Department of Defence' (24 October 2010).
<http://www.law.utoronto.ca/documents/Mackin/Khadr_Diplomatic_Notes.pdf> (accessed 22 October 2011).

3. Case Study No. 2: Judicial Review Over Conduct of Hostilities (Israeli High Court of Justice)

Since 2000, the beginning of the second intifada, Israel has been engaged in an armed conflict against Palestinian armed groups, in addition to the ongoing situation of occupation, qualified by Justice Barak as an international armed conflict.[775] This led to a new situation in which a petitioner addressed the court in an unprecedented manner during hostilities to challenge the legality of the conduct of the armed forces.[776] The Israeli High Court of Justice could have chosen a prudent way of holding that the actions of the armed forces during fighting were not justiciable. But, on the contrary, the Israeli highest court has developed a very active view of its role and did not refrain from exercising jurisdiction over issues related to the conduct of hostilities, even when the hostilities were actually taking place. Here is Justice Barak declaring that hostilities must be fought within the rule of law and not outside of it:

> The military operations of the army are not conducted in a legal vacuum. There are legal norms — some from customary international law, some from international law enshrined in treaties to which Israel is a party, and some from the basic principles of Israeli law — which provide rules as to how military operations should be conducted.[777]

> This combat is not taking place in a normative void. It is being carried out according to the rules of international law, which provide principles and rules for combat activity. The saying, "when the cannons roar, the muses are silent," is incorrect. Cicero's aphorism that laws are silent during war does not reflect modern reality.[778]

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[775] *The Targeted Killings* case (n 454), para. 18.

[776] For an analysis see D. Kretzmer, 'The Supreme Court of Israel: Judicial Review during Armed Conflict' (2005) 47 German Yearbook of International Law 392, pp. 425-435; G. Raguan, 'Adjudicating Armed Conflict in Domestic Courts: The Experience of Israel's Supreme Court' (2010) 13 Yearbook of International Humanitarian Law pp. 61-95. Example of cases are, HCJ 3451/02, *Almandi v The Minster of Defense,* (2002) 56(3) PD 30 (hereinafter: *The Almandi* case); HCJ 3114/02, *Barake v The Minister of Defense*, (2002) 56(3) PD 11 (hereinafter: *The Barake* case).

[777] HCJ 4764/04, *Physicians for Human Rights v The Commander of IDF Forces in Gaza,* (2004) 58(5) PD 385, para. 7 (hereinafter: The *Rafah* case).

[778] *The Almandi* case (n 776), para. 9.

Moreover, the Court maintains that its role in a democracy is to guarantee the upholding of the rule of law - it has to enforce the law against the other branches of the State, whether legislative or executive:

> [E]ven when the cannons speak, the military must uphold the law. The power of society to stand against its enemies is based on its recognition that it is fighting for values that deserve protection. The rule of law is one of these values. ... [T]he position of the State of Israel is a difficult one. Our role as judges is also not easy. … This is the price of democracy. It is expensive, but worthwhile. It strengthens the State. It provides a reason for its struggle. Our work, as judges, is hard. But we cannot escape this difficulty, nor do we wish to do so.[779]

In sum, there is no activity conducted by the executive that is precluded from the Court's scrutiny in all times, including during war. As the Court sees itself as an "essential part" of the "democratic triangle" (Legislature-Executive-Judiciary), and as it understands its role as the "main guardian of the rule of law",[780] the court applies almost no standing requirement, non-justiciability doctrine, or any other avoidance doctrine. By doing so, the Israeli High Court of Justice can serve as an example of a judiciary that perceives international humanitarian law as a normative and binding law and not as a foreign policy matter, which should be enforced by the court as it is required to do by the rule of law. The following part provides examples of this jurisprudence and highlights the consequences of the deference techniques employed by the High Court of Justice.

3.1 Expedited review - petitions to the court during real time combat

> Even in a time of combat, the laws of war must be upheld. Even in a time of combat, everything must be done in order to protect the civilian population[781]

Not only was the Israeli High Court of Justice ready to confront legal issues related to conduct of hostilities, which are typically avoided by other jurisdictions as being under the discretion

[779] *The Ajuri* case (n 343), para. 41.

[780] Y. Mersel, 'Judicial Review of Counter-Terrorism Measures: the Israeli Model for the Role of the Judiciary during the Terror Era' (2006) 38 New York University Journal of International Law and Politics 12, p. 96.

[781] *The Barake* case (n 776), p. 16.

of the executive, it was willing to so even during ongoing combat. In *Physicians for Human Rights v. The Commander of the IDF Forces in the West Bank* the petition was submitted during "Operation Defensive Wall", which took place in Jenin in 2002. As the court mentions in the beginning of its decision:

> The petitions before us were filed yesterday and today, during the height of IDF combat activities in the areas of the Palestinian Authority, in the context of "Operation Defensive Wall."[782]

Petitioners claimed that the Israeli Defence Forces violated international humanitarian law by firing upon medical teams, preventing the evacuation of the wounded and the sick to hospitals, preventing the removal of bodies for the purposes of burial, and preventing the supply of medical equipment to hospitals. The State explained that, in light of the brief period at its disposal to prepare a response, and especially in light of the fact that combat continued even as the petitions were being heard, it was not possible to investigate the petitioner's claims regarding these specific events. Although the Court was "unable to express a position regarding the specific events mentioned in the petition" the judges "see fit to emphasize" that combat forces must fulfil the rules of humanitarian law pertaining to the care of the wounded, the sick, and the removal and burial of bodies. It ordered that the army shall instruct the combat forces, "down to the level of the lone soldier in the field" which will prevent, to the extent possible, and even in severe situations, incidents which are inconsistent with the rules of humanitarian law.

A remarkable case, which further illustrates the readiness of the court to review the acts of the army in real time, is *Rafah* (2004) - the petition was filed and heard in the course of ongoing hostilities.[783] In that case, petitioners requested the court to examine if the army was complying with various humanitarian obligations to which it is subject under international humanitarian law, including the protection of medical teams, evacuation of the wounded, the obligation of burying the dead, etc.[784] The petition was filed on the evening of 20 May 2004,

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[782] HCJ 2936/02, *Physicians for Human Rights v The Commander of the IDF Forces in the West*, (2002), 56(3) PD 3, para. 1.

[783] *The Rafah case* (n 777).

[784] For example, see para. 4 where the petitioners argued that the army should allow medical teams and ambulances to reach the wounded in Rafah in order to evacuate them; that the evacuation should take place without prior coordination with the humanitarian centre; that the transport of medical equipment between Rafah

two days after active combat had started in the area of Rafah in the Gaza Strip, and the duty judge set a hearing for the next morning, ordering the government to submit its position.[785] In the hearing, the State Counsel was accompanied by the officer responsible for humanitarian affairs in the battle zones. While combat was ongoing, the officer was in telephone contact with the ground forces and provided the Court with details of ongoing attempts to resolve the humanitarian concerns. The State asked that the petition be denied on justiciability grounds, emphasising that "extensive military operations are continuing in the area. … In this situation, great caution is required when the court exercises judicial review of the activities of the security forces. The activity lies on the border of the sphere of institutional justiciability."[786] This position was clearly rejected by Justice Barak, who found no institutional obstacle to reviewing the legality of the conduct of Israeli military: the conduct of hostilities, regulated by international humanitarian law, entitles the court to review whether the army comply with that law. The fact that there were ongoing operations did not exempt it from review:

> Indeed, all the military operations of every army are subject to the rules of international law governing these operations…. The purpose of the petition is to direct the immediate conduct of the army. Our judicial review is prospective. It is exercised while the military activity is continuing ... [the merits] have been resolved without endangering the lives of soldiers or the military operations. Subject to this restriction, this case is no different from other cases where this court examines the legality of military operations…. Indeed, we do not substitute our discretion for that of the military commander's, as far as it concerns military considerations. That is his expertise. We examine the results on the plane of the humanitarian law. That is our expertise.[787]

With the court pressure and guidance to the authorities many of the claims were solved or mitigated and the important issues were resolved during the hearing. The ruling was rendered after the end of combat thus it was somewhat irrelevant to the facts. Having succeeded to mediate between the sides, the court could have refrained from delivering a judgment. But it

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and the hospitals outside it should be allowed; that medical teams or civilians involved in the evacuation of the dead or wounded should not be harmed or threatened and that the electricity and water supply to the neighbourhood of A-Sultan should be renewed and the supply of food and medicine. The court in its ruling addresses Articles 27, 55, 56 and 59 of the Fourth Geneva Convention of 1949.

[785] D. Kretzmer (n 776), p. 430.

[786] *The Rafah case* (n 777), para. 5.

[787] *Ibid*, paras. 7-9.

did not. The High Court of Justice delivered a very detailed decision of several pages in length, in which it described how the dispute was resolved. Recalling that the State has to comply with the law and declaring that the court is supervising the State's acts also during combat, it provides in its decision legal guidance to consider in future cases.

The importance of these cases is manifested by the fact the court does not avoid the case, but assumes its role as the keeper of the rule of law also during combat.[788] Having said that, the court's review is still situated at the bottom of the *judicial ladder*: The court is entirely deferring to the State the responsibility to find a solution within the frame of law – but which is defined by the court. Professor Kretzmer defines the court's role as a mediating role between the civilians and the army during the conduct of hostilities, which results in a restraining influence on the authorities, concluding that courts probably can not do much more in these circumstances.[789] Although it is not interfering in the operation itself, importantly, it is recalling that the State's acts are under the scrutiny of the court, and that the State must observe the law, and that the State shall provide solutions that comply with the rules of international humanitarian law.

3.2 The Israeli Targeted Killing case: from deferring to legitimizing?

> Why do those questions, which are justiciable in international courts, cease to be justiciable in national tribunals?[790]

As discussed in Chapter 3, the Israeli High Court of Justice was willing to exercise its competence in the Targeted Killing case, which deals with an issue related to conduct of hostilities and questions the legality of a general policy.[791] On the merits, the High Court of

[788] Similarly, more recently, a case submitted during intense hostilities during Operation Cast Lead in the Gaza Strip, which concerned the delay in evacuating Palestinian casualties and claims that medical personnel and ambulances were being attacked by the Israeli armed forces. HCJ 201/09, *Physicians for Human Rights v Prime Minister of Israel*, (2009). The High Court of Justice rejected the non-justiciability claim, and the ruling, in which the High Court of Justice found that the army had taken the necessary steps according to the humanitarian obligations applicable, was delivered while the operation was still ongoing.

[789] "The presence of the Court 'at the front' certainly facilitate amelioration of humanitarian concerns that the military might ignore if not forced to confront them." D. Kretzmer (n 776), p. 434.

[790] Justice Barak in *The Targeted Killings* case (n 454), para. 53.

[791] On the rejection of the non justiciability claims in that case, which challenges a general policy related to conduct of hostilities, see above at Chapter 3, p. 194-200.

Justice ruled that the targeted killings policy could not be categorically defined as legal or illegal. The legality of the tactic should be determined on a case-by-case basis, with one of the questions to be examined being whether it complied with the principle of proportionality. High Court of Justice President, Justice Barak, emphasized that the question of proportionality was a difficult one and it draws a spectrum of two extreme cases, which represent the easy legal and illegal ones:

> Achieving that balance is difficult. Here as well, one must proceed case by case, while narrowing the area of disagreement. Take the usual case of a combatant, or of a terrorist sniper shooting at soldiers or civilians from his porch. Shooting at him is proportionate even if as a result, an innocent civilian neighbour or passerby is harmed. That is not the case if the building is bombed from the air and scores of its residents and passersby are harmed.[792]

The Court provided two further instructions. First, that civilians taking a direct part in hostilities could not be attacked if a less harmful means could be employed, and second, the High Court of Justice deferred to the State the responsibility to conduct independent investigations after a targeted killing operation in order to examine the legality of the action, and to pay compensation to innocent victims in appropriate cases.[793]

The Follow-up of the targeted killing case: From normative application to legitimizing State illegal practice?

The example of the obviously un-proportionate targeted killing case, cited above, brought by President Barak resembled to an astonishing degree to another case that was pending before the court - the targeted killing of Shehadeh.[794] In that case, on 22 July 2002, around midnight, an Israeli Air Force plane dropped a one-ton bomb on a residential neighbourhood in Gaza City of the al-Daraj' neighbourhood, one of the most densely populated residential areas in the world. The military objective of this operation was to kill Hamas' military leader in the Gaza Strip, Salah Shehadeh, who at that time was in his house with his family. As a result of the operation, Shehadeh and 14 civilians were killed, most of

[792] *The Targeted Killings* case (n 454), para. 46.

[793] *Ibid*, para. 40. For more details see A. Cassese, 'On Some Merits of the Israeli Judgment on Targeted Killings' (2007) 5 Journal of International Criminal Justice 2, p. 339.

[794] O. Ben-Naftali, 'A Judgment in the Shadow of International Criminal Law' (2007) 5 Journal of International Criminal Justice 2, p. 330.

them children and infants, and 150 people were injured, about half of them severely. The houses in the vicinity were either destroyed or damaged. Seven members of the Matar family, whose neighbouring house was totally destroyed, were among the casualties. A few months after the targeted killing of Salah Shehadeh, 'Yesh Gvul' (an Israeli non-governmental organization) addressed a request to open a criminal investigation against the planners and executers of the operation to the Israeli Military Advocate General, and, after receiving a negative answer, to the State Advocate General, who had the authority to review that decision. After being denied again, Yesh Gvul and five well-known Israeli authors filed on 30 September 2003 a petition with the Israeli High Court of Justice demanding that the Court review both authorities' decision not to open a criminal investigation in the affair of Salah Shehadeh.[795] As the petition questioning the legality of the army's policy of targeted killings had been pending before the same court, and as the decision in the Shehadeh petition depended on the outcome of a ruling on the legality of this policy, the Court decided to suspend the Shehadeh petition until it had rendered that decision in December 2006. On 17 June 2007, the Court held a hearing in Shehadeh. The Court did not decide whether the aerial bombing of a building such as that of Shehadeh could constitute *prima facie* evidence of a violation of the laws of armed conflict, for which those responsible could be held criminally liable, thus requiring the opening of a criminal investigation. In fact it did not review on the merits the decisions of the military and civil prosecution authorities not to open an investigation.

Instead, the Court deferred that decision to the State, instructing it to establish an objective and independent body "in the spirit of the guidelines set down by the Court in the principled ruling on the Targeted Killings case".[796] The State-established committee was

[795] HCJ 8794/03, *Yoav Hess and others v The Judge Advocate General*, (2008) (hereinafter: *The HCJ Schehadeh case* cse) <http://www.adh-geneva.ch/RULAC/pdf_state/HCJ-decision-8794-03-1-.pdf> (accessed 22 October 2011). The State's position was that a debriefing carried out by the defence authorities found that the collateral damage was caused because of an intelligence failure and therefore was not anticipated by the decision-makers. The Attorney General adopted this position, and decided that there was no reason to order the opening of a criminal investigation regarding these facts. See also <http://www.mfa.gov.il/mfa/government/communiques/2002/findings+of+the+inquiry+into+the+death+of+salas+sh.htm> (accessed 22 October 2011). For more details, see Adalah, 'Israeli Military Probes and Investigations Fail to Meet International Standards or Ensure Accountability for Victims of the War on Gaza'- Briefing Paper (January, 2010); S. Weill, 'The Targeted Killing of Salah Shehadeh: from Gaza to Madrid' (2009) 7 Journal of International Criminal Justice 3, pp. 617–631.

[796] *The HCJ Schehadeh* case (n 795), para.8.

composed mainly of former military and security officials, which lacks the elementary powers needed to conduct a criminal investigation.[797] It was mandated to function in accordance with the law that applies to the conduct of a military debriefing, meaning that all the testimonies and evidence are classified.[798] That legal saga, which went on for more than eight years, ended with the State committee's decision not to open an investigation, while the evidentiary basis for their decision remains essentially unknown.[799] Thus, the Targeted Killings case enabled the state to be shielded from judicial scrutiny. Instead of reviewing the military commander's decision in a concrete targeted killings case, the court deferred that review to another body, the structure, nature, and mandate of which were entirely determined by the State: the very entity whose actions were to be investigated.

The follow up to *The Targeted Killing* is another illustration, like *The Torture* case, of the deficiency of the deferral technique. It highlights the possible risk of its implementation - that instead of promoting the normative application of the law, as achievable within the institutional limits of courts, in form of a compromise and deference to the executive, it will lead to an apologist transformation of the court's ruling by the misuse of the discretion allocated to the State.

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[797] On 23 January 2008, the commission was appointed by the Prime Minister. It was composed of three members, two of them former Military Generals and another a former official from the security services Brig. General (Res.) Zvi Inbar, formerly the Military Advocate General and the Knesset Legal Counsel was appointed head of the commission; with him were appointed as members of the commission Maj. General (Res.) Iztchak Eitan, formerly the head of the IDF Central Command and Mr Iztchak Dar, who formerly held a large number of operative positions in the General Security Service (GSS), amongst others as the Head of the Service's Israeli and Foreign Interests Section.

[798] Announcement from the State Attorney's Office to the High Court of Justice (4 February 2008), para. 8 (file with the author).

[799] The Commission's report was published in February 2011. Prime Minister's Office, 'Salah Shehadeh - Special Investigatory Commission' (27 February 2011) <http://www.pmo.gov.il/PMOEng/Communication/Spokesman/2011/02/spokeshchade270211.htm> (accessed 22 October 2011).

3.3 Top of the judicial review ladder: The Human Shield case

The human shield case is an important one in which the court put a limit on State practice without providing any deference to the State on the matter.[800] In this case, the petitioners claimed that the army's use of Palestinian civilians as human shields and/or as hostages was illegal according to international humanitarian law and constitutes a grave breach of the Geneva Conventions.[801] The High Court of Justice was requested to set an urgent hearing on this petition, since "the army is still inside some of the Palestinian cities or their vicinity, and is operating in the West Bank" and its "policy of using human beings during its activities in the West Bank has not yet ceased".[802] The Petitioners sought a temporary injunction ordering the State to stop using individuals as "human shields" or as hostages during the military actions in the West Bank until a final decision is given on the petition. The hearing was set two weeks later. In response to the request for a temporary injunction, the State declared that the army has decided to immediately issue an order to the forces in the field, accordingly the armed forces are absolutely forbidden to use civilians as a means of 'living shield' to protect soldiers from attack or to hold Palestinian civilians as "hostages" (to hold civilians as a means to pressure others) and to use civilians in situations where they might be exposed to danger to life or limb.[803] The question under review before the court was then reduced to situations in which, as formulated by the State, Palestinian residents *assist* Israeli armed forces. More specifically, under review remained the "early warning" procedure according to which, during the arrest of wanted persons, Israeli soldiers could seek assistance from Palestinian civilians to give the suspect prior warning in order to

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[800] HCJ 3799/02, *Adalah – The Legal Center for Arab Minority Rights in Israel v The Military Commander of Central Command*, (2005) <http://elyon1.court.gov.il/files_eng/02/990/037/a32/02037990.a32.HTM> (accessed 22 October 2011) (hereinafter: *The Human Shield* case). R. Otto, 'Neighbours as Human Shields? The Israel Defense Forces' "Early Warning Procedure" and International Humanitarian Law' (2004) 86 International Review of the Red Cross 856, pp. 771-787.

[801] *The Human Shield* case, *Ibid*, paras. 64-80 (Petition). English translation of the petition is available at: <http://www.adalah.org/eng/features/humshields/3799petition-eng.pdf> (accessed 22 October 2011). Other Articles of the Fourth Geneva Convention of 1949 which prohibit the use of human shield mentioned were 3, 8, 27, 28, 47 and 51, and Article 51(7) of the Additional Protocol I of 1977.

[802] *Ibid*, p. 2.

[803] *The Human Shield* case (n 800), para. 3 and Response on behalf of the Respondents to the Request for a Temporary Injunction, para. 2, unofficial translation available at: <http://www.adalah.org/eng/features/humshields/3799response2-eng.pdf> (accessed 22 October 2011).

avoid a possible injury to the suspect or to those with him during the arrest as long as two conditions were met: (i) the civilian gave his consent to assist; and (ii) the commander determined that the act poses no danger to the civilian. On 18 August 2002, following the death of a Palestinian civilian in course of a similar action, a temporary interlocutory injunction, ordering respondents to refrain from using Palestinian civilians for any military acts was issued. However, after the State issued specific rules for the early warning procedure,[804] in January 2003, the court limited the injunction and permitted the Israeli army's use of the "early warning" order.

While the court and the sides agreed the use of human shield is prohibited, the question before the court was whether this procedure was illegal if the local civilian gives his consent, and no damage for him is foreseen. The High Court of Justice ruled that the "early warning" procedure contradicts international humanitarian law.[805] Citing Regulation 23(b) of *The Hague Regulations* and Article 51 of the Fourth Geneva Convention the court ruled that civilian population can not to be used for the military needs of the occupying army. Then, based on the principles of distinction and the duty to distance innocent local residents from the zone of hostilities, the Court concluded that a civilian can not be brought, even with his consent, into a zone in which combat activity is taking place. Also, the court stated that according to Article 8 of the Fourth Geneva Convention protected persons cannot renounce in part or in entirely their rights pursuant to humanitarian law, and, in any case, it was difficult to judge when the consent is given freely, and when it was the result of pressure. It ends by recalling that it can not be entirely predicted if this act will not harm the person, and in this context the court uses a larger approach to the notion of danger than the immediate physical danger of damage from gunfire, but "also the wider danger which a local resident who 'collaborates' with the occupying army can expect."[806]

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[804] In December 2002, the Israeli army introduced 'Operational Order - Prior Warning,' which allowed the army to seek "assistance" from civilians provided that two conditions were met: (i) the civilian did not "refuse to assist" and (ii) the commander in the field determined that the act posed no danger to the civilian. This order was approved by then-Attorney General and current Supreme Court Justice Elyakim Rubenstein.

[805] *The Human Shield* case (n 800), para. 25.

[806] *The Human Shield* case (n 800), para. 24. For more details on the judgment, see M.N. Schmitt, 'Human Shields in International Humanitarian Law' (2009) 47 Columbia Journal of Transitional law 292, at p. 311-322.

Follow-up

A month after the ruling was delivered, the State asked the High Court of Justice to grant a second hearing to reconsider its decision, claiming, *inter alia*, that this new precedent would have a harmful impact on the army's functioning.[807] The State's motion was rejected. The High Court of Justice found that there was no legal basis to hold another hearing before an expanded panel of the High Court of Justice stating that:

> It is the duty of the army which holds a territory in a belligerent occupation to protect the life and dignity of a local resident. To place this resident, who is caught in the middle of a battlefield, in a position where he has to choose whether or not to acquiesce to the army's request to pass a warning to a wanted gunman is to place him in an impossible position. The choice itself is immoral and impairs the dignity of man.

Following the High Court of Justice's decision, the army proceeded to modify its orders.[808] Yet, despite these official proclamations and the High Court of Justice's decisions, Israeli and international experts and organisations, have affirmed that the use of 'human shields' continues unabated:

> The Israeli military is consistently violating these prohibitions by continuing its use of Palestinian citizens as human shields. In fact, these practices have become systematic: routinely, the soldiers force protected civilians to perform military tasks for them. Despite Adalah's numerous letters to the Military Advocate General, which contain detailed information on the victims who were used as such, there has not been any independent investigation or prosecution against those responsible for committing such crimes.[809]

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[807] HCJ 10739/05, *Minister of Defense, et. al. v Adalah, et. Al* (2006). See also Adalah, 'News Update: Supreme Court Rejects State's Motion to Rehear Human Shields Case' (8 March 2006) <http://www.adalah.org/eng/humanshields.php> (accessed 22 October 2011).

[808] Israeli Ministry of Foreign Affairs, 'The Operation in Gaza - Factual and Legal Aspects' (29 July 2009), paras. 227-228 <http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Hamas+war+against+Israel/Operation_in_Gaza-Factual_and_Legal_Aspects.htm> (accessed 22 October 2011) (hereinafter: The Israeli Ministry of Foreign Affairs).

[809] Adalah, 'Update Report: On the Israeli Military's Continued Use of Palestinian Civilians, including Minors, as Human Shields' (July 2009) <http://www.adalah.org/newsletter/eng/jul09/Rana_Human_Shields_update_report_Englsih_july_2009.pdf> (accessed 22 October 2011). In 2007, B'Tselem documented twelve such cases. B'Tselem, 'Human Shields'

In 2007, B'Tselem documented 12 such cases. In the aftermath of Operation Cast Lead in the Gaza Strip during December 2008 to January 2009, several allegations of use of Palestinians as human shield were raised in the Goldstone report.[810] The State of Israel in reaction published several reports, in one of which it was noted:

> IDF's rules of engagement strictly prohibit the use of civilians as human shields. Moreover, the Israel Supreme Court has ruled that use of civilians in any capacity for the purpose of military operations is unlawful, including the use of civilians to call terrorists hiding in buildings. Following this judgement, this latter practice has also been proscribed by IDF orders. The IDF is committed to enforcing this prohibition. The IDF took a variety of measures to teach and instil awareness of these rules of engagement in commanders and soldiers.[811]

Though several allegations of use of Palestinians as 'human shields' were raised by the Goldstone report, only one case was brought before an Israeli court.[812] In that "human shield" case two soldiers were convicted of 'excess of authority' and 'conduct unbecoming' for forcing a nine-year old Palestinian boy to open bags suspected of being booby-trapped.[813] Despite the gravity of the use of children as human shields, both soldiers, who were convicted of these charges, were sentenced only to a three-month probation period and a demotion of their rank. It is worth noting that this sentence is particularly astonishing compared to the prison sentence imposed in another looting case, in which the convict may have indeed "harmed the 'combat moral code' of the IDF", yet he did not endanger life of a nine-year-old

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<http://www.btselem.org/english/human_shields/timeline_of_events.asp> (accessed 22 October 2011) (hereinafter: *B'Tselem Human Shields*).

[810] During Operation Cast Lead the Goldstone report describes several cases in which the use of Palestinian civilians as human shields allegedly occurred. See Human Rights Council, 'Human Rights in Palestine and Other Occupied Arab Territories - Report of the United Nations Fact-Finding Mission on the Gaza Conflict' (25 September 2009) UN Doc A/HRC/12/48, pp. 218-227 (hereinafter: *The Goldstone report*). For allegations related to human shield see *The Goldstone report*, pp. 218-230.

[811] Israeli Ministry of Foreign Affairs (n 808), paras. 227-228.

[812] For the allegations raised see, *The Goldstone report* (n 810), pp. 218-230; Public Committee Against Torture in Israel and Adalah, 'Exposed: The Treatment of Palestinian Detainees During Operation Cast Lead' (June 2010), pp. 10-13.

[813] IDF MAG CORPS, 'Indictment Filed in Connection with 'Cast Lead' - Military Advocate for Operational Affairs' (11 March 2011) <http://www.mag.idf.il/164-3952-en/Patzar.aspx?SearchText=human%20shields%20gaza> (accessed 22 October 2011).

child. In an attempt to justify this lenient ruling the Deputy Military Advocate for Operational Affairs stated that the court gave weight to "the personal circumstances of the defendants and their contribution to Israel's national security" and that by using a child as a human shield "the defendants did not seek to humiliate or degrade the boy."[814] It was affirmed by the authorities that sufficient evidence was found in another case that involved a senior army commander.[815] Yet, whilst Israel recognizes that the use of "human shields" amounts to a war crime,[816] and insists that "disciplinary proceedings are reserved for less serious offenses"[817], the senior army commander in this case was indeed subject to disciplinary proceedings, instead of conducting a criminal trial, for reasons that remain unknown.[818] Similarly, in October 2007, the Military Advocate General decided not to prosecute the military commander of the West Bank, Brigadier-General Yair Golan, who ordered the use of the 'Early Warning' procedure in five cases. Instead, he was subjected to a soft disciplinary sanction.[819]

4. Concluding Observations

i. Individual rights v. Conduct of hostilities cases

Courts are less willing to intervene in conduct of hostilities issues. The growing trend of exercising judicial review can be observed especially in cases dealing with the protection of individual rights, usually of their own nationals, during protracted conflicts. In this kind of

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814 IDF MAG CORPS, 'Investigating the Gaza Operation - an interview with Deputy Military Advocate for Operational Affairs' (9 March 2011) <http://www.mag.idf.il/163-4544-en/patzar.aspx> (accessed 22 October 2011).

815 The State of Israel, 'Gaza Operation Investigations: Second Update' (July 2010), para. 37 <http://www.mfa.gov.il/NR/rdonlyres/1483B296-7439-4217-933C-653CD19CE859/0/GazaUpdateJuly2010.pdf> (accessed 22 October 2011) (hereinafter: The State of Israel 'Gaza').

816 IDF MAG CORPS, 'Human Shields – Legal Framework' <http://www.law.idf.il/592-1521-en/Patzar.aspx> (accessed 22 October 2011).

817 The State of Israel 'Gaza' (n 815), p. 6, fn 13.

818 Israel Defence Forces, 'IDF Military Advocate General Takes Disciplinary Action, 6 Jul. 2010 Indicts Soldiers Following Investigations into Incidents during Operation Cast Lead' (6 July 2010) <http://idfspokesperson.com/2010/07/06/idf-military-advocate-general-takes-disciplinary-action-6-jul-2010-indicts-soldiers-following-investigations-into-incidents-during-operation-cast-lead/> (accessed 22 October 2011).

819 See, for further information, *B'Tselem Human Shields* (n 809).

cases, courts may apply in addition, or instead, international human rights law applicable during armed conflicts, most usually as endorsed by national constitutional law and providing a more easy access to court. It is proposed that although, on the merits courts are still reluctant, they are nevertheless willing not to avoid cases in which individual rights are involved. It is hoped that this trend will be enlarged to include in the future also other kind of international humanitarian law violations, such as violations related to conduct of hostilities, a trend that has, remarkably, been led by the Israeli High Court of Justice. The Israeli High Court of Justice is among the very rare national courts that has been willing to exercise its jurisdiction during actual fighting, as shown by the post-second intifada jurisprudence. An Israeli commentator has identified several factors that lead to this activism, concluding that the Israeli experience can probably not be relevant to other jurisdictions:

> The unique Israeli situation of a prolonged military occupation along Israel's borders has undoubtedly contributed to its Supreme Courts extraordinary jurisprudence. Coupled with procedural aspects of the Israeli Supreme Court's jurisdiction and its permissive rules of standing and justiciability, these characteristics can account for the active approach taken by the Court in relation to other countries.[820]

Indeed, the Israeli Palestinian conflict is a prolonged conflict, a fact that has certainly lead to flexible procedural requirements for standing and justiciability. Yet, although all conflicts and societies possess unique circumstances, if it is agreed that the international rule of law should apply beyond these particularities then all Courts should gradually exercise their review on international humanitarian law issues, even during ongoing armed conflict. Other Western courts were similarly requested to exercise their jurisdiction "during real time". For example, a Canadian court needed to rule on the application of the Canadian Charter over the Canadian forces operations in Afghanistan as part of ISAF concerning transfer of detainees to local authorities suspected of committing torture. The Court did not avoid the case, as was requested by the State.[821] Seemingly, the willingness of the court alone to exercise review

[820] G. Raguan (n 776), p. 65.

[821] Canadian forces have been serving in Afghanistan, first as part of Operation Enduring Freedom in 2001, and subsequently also as part of Canada's contribution to the NATO-led International Security Assistance Force (ISAF). On February 2007, Amnesty International, through a judicial review claim sought to prevent Canadian forces part of ISAF from transferring Afghan detainees to the custody of the Afghan National Directorate of Security following allegations of torture. In November 2007, the Federal Court of Canada rejected the non-justiciability claim given that the application for judicial review was framed entirely in terms of the Charter. See,

had an influence on State policy: in parallel with the November 2007 decision, which rejected the motion to dismiss, the Canadian government halted the transfer of detainees to Afghan custody.[822] Interestingly, human right jurisprudence may influence that process, as the recent decision of the European Court of Human Rights in the *Al Skeini* case shows. According to the British Act of State doctrine, English courts are prevented from considering a claim of an alien regarding the acts of the UK on foreign soil on behalf of the Crown. Yet, the European Court of Human Rights in Al-Skeini ruled that the European Convention of Human rights extraterritoriality applied and bound the UK forces in Iraq, resulting in access to UK court through the UK domestic Human Rights Act.[823] The claim in *Al-Skeini* was that the UK failed to comply with its procedural obligation to investigate killings of civilians by the armed forces, and interestingly, because of the special circumstances of the armed conflict, the European Court of Human Rights ruled that that obligation should be interpreted in a flexible manner.[824]As noted by a commentator:

> it is only if flexibility is added to the substantive application of human rights treaties extraterritoriality that the preliminary question of applicability will cease being a vehicle for judicial avoidance.[825]

Naturally, not only flexibility but also international humanitarian law should be taken in account while observing the obligations of UK forces in Iraq during its occupation.

The Amnesty case (n 633), para. 91. On the merits, the court ruled a month later, that protection under the Canadian Charter of Rights and Freedoms does not extend to Afghan detainees and did not apply to the conduct of Canadian forces in Afghanistan, thus rejecting the case. An appeal to the Supreme Court was rejected.

[822] *The Amnesty case* (n 633). S. Hendin, 'Extraterritorial Application of Human Rights: the Differing Decisions of Canadian and UK Courts' (2010) 28 Windsor Review of Legal and Social Issues 57, p. 67.

[823] " [..] the use of force by a State's agents operating outside its territory may bring the individual thereby brought under the control of the State's authorities into the State's Article 1 jurisdiction." *The Al-Skeini* case (n 694), "[..] the United Kingdom assumed authority and responsibility for the maintenance of security in South East Iraq. In these exceptional circumstances, the Court considers that the United Kingdom, through its soldiers engaged in security operations in Basrah during the period in question, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention." (para. 148).

[824] *Ibid*, paras. 168-177.

[825] M. Milanovic, 'Al-Skeini and Al-Jedda in Strasbourg' (2012) 23 European Journal of International Law, p. 12 (forthcoming) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1917395> (accessed 22 October 2011).

As petitioners address courts more and more during actual combat, because of growing domestic legislation that avails access to the courts, the training of specialised lawyers and other professionals such as journalists, diplomats and academics, public opinion's demand for scrutiny represented by local and international NGOs and the development of a less cautious jurisprudence of a number of leading courts, which are cited across jurisdictions, it can be reasonably expected that this emerging trend of reviewing conduct of hostilities will keep expanding.[826]

ii. The positive and negative role of deferral techniques from the rule of law perspective

The deferral techniques allowed an important transition from the avoidance doctrines sphere toward judicial review, opening the gate towards the exercise of the most significant role of courts from the rule of law perspective: enforcer of international humanitarian law through its normative application. As has been shown, judicial review does not mature always to judicial responses beyond deferring the matter to the State's discretion. In some cases, courts may only send signals that it does not approve the policy. Yet, this serves a very important purpose: it rejects the non-justiciability claims, which were traditionally accepted in situations of armed conflicts, and it affirms that the review is within the courts' competence. Sometimes, only the fact that the court exercises a review has influenced State policies, even when entire deference was awarded. Such an example is *Abbasi* and its influence on the UK policy, and perhaps even on US Supreme Court decisions in *Rasul*. Another example is from the High Court of Justice expedited review cases during "real time", which demonstrate the restraining influence on the armed forces despite the fact that on the merits a complete deference was given to the State.[827] The State was more cautious in applying the humanitarian obligations as requested by the law, than it would have done if these cases were avoided. While deferring, judges' signals and declaration may prepare the ground for future litigation in which the court will "climb up" the rungs of the judicial ladder. Thus, deference is a mid-

[826] For an analysis on the special features of the Israeli system's jurisdiction and accessibility and the Israeli Palestinian conflict, questioning its possibility of influencing other jurisdictions, see G. Raguan (n 776), pp. 86-90. (For example: "The Israeli Court's jurisprudence is intrinsically linked to Israel's long-term military occupation in the West Bank and Gaza Strip [..]. The great distances between the battlefield and the courtroom, such as the one between American, British or Canadian courts and Iraq or Afghanistan, affects the perception of justiciability." (p. 87).

[827] D. Kretzmer (n 776), p. 434: "The presence of the Court 'at the front' may certainly facilitate amelioration of humanitarian concerns that the military might ignore if not forced to confront them".

way, allowing the State to act according to legal standards, which, if violated again in the future, the Court could more legitimately intervene. This was illustrated in *Hamdan* and the follow-up *Baumediene* case, and this may be one of the reasons that torture legislation was not introduced in Israel, because of the strong signals sent by the High Court of Justice that this legislation will be unconstitutional. Thus the positive aspect of the deference is that it reinforces courts' positions and their possibility to exercise jurisdiction over international humanitarian law issues, traditionally avoided as seen as political matters, and will allow future climbing of the ladder of judicial review.

Yet, the danger with the deferral technique is that at the end of the day, if the State misuses the discretion allocated by the judiciary, the courts instead of representing their role as limiting abuses the law, may be instead facilitating the State's illegal policy. In the long run, deference may lead to the court as being an apologist to the State. This was clearly shown in the follow-up decisions in the torture and targeted killing landmark cases. While deference may be required at first judicial review cases in order to establish the courts' position and own legitimacy in reviewing such cases, in future, once the position is assumed, court should start avoiding using that tool. Yet, this is not easy, as these cases do involve sensitive and complex issues. For example, the non-compliance of the State of Israel with the human shield ruling – the only case of my study in which no deference was allocated, is a clear red light. What is obviously beyond the scope of this research is to analyse the effect of the State's non-compliance with the judiciary's decision on the regime of that State. Yet, it may provide an indication of the court's institutional limits within the State in which it operates and its willingness to render similar decisions in the future in light of its necessity to keep itself an authority and reputation that must be respected.

Chapter 5

Judicial Activism

> Domestic judges are not called upon to amend and change international law. Their true mandate is to apply the law conscientiously and objectively. Private, subjective preferences and wishes should not determine the substance of a decision which the judge is entrusted with giving.[828]

That stance is supported by at least one leading national court, as argued by Lord Hoffmann:

> the ordering of competing principles according to the importance of the values which they embody is a basic technique of adjudication. But the same approach cannot be adopted in international law, which is based upon the common consent of nations. It is not for a national court to 'develop' international law by unilaterally adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other states.[829]

The Vienna Convention on the Law of Treaties acknowledges that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose (Art. 31(1)). State practice, which establishes the agreement of the parties regarding its interpretation, is a factor to be taken into account (Article 31 (3) (b)). When national judges interpret an international humanitarian treaty rule beyond these directives in the name of ethical values courts operate as agents of

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[828] *Public sitting held on Tuesday 12 September 2011, at 10 a.m., at the Peace Palace, President Owada presiding, in the case concerning Jurisdictional Immunities of the State* (*Germany v Italy*: Greece intervening) CR 2011/17 (Prof. C. Tomuschat, Oral Submission before the International Court of Justice for Germany), p. 21 (hereinafter: *Oral Submission before the International Court of Justice for Germany*) <http://www.icj-cij.org/docket/files/143/16677.pdf> (accessed 23 October 2011).

[829] *Jones v Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) and others*, (2006) UKHL 26; ILDC 521 (UK 2006), para. 76 (hereinafter: *The Jones* case).

natural law.[830] Similarly, if courts are to name for the first time a new customary rule, which does not correspond to a general practice,[831] their identification may be "activist" or utopian.

For a ruling to be "activist" and not apologetic, it will usually be in opposition to the position of the State: a decision that may appear as activist risks becoming apologetic if it in fact reflects the wishes of the government. Also, an "activist" decision distinguishes itself from a decision, which, although being in favour of a notable cause, is no more than a normative application of the law, as for example the *Filartiga case*. Universal civil jurisdiction for international crimes may be characterized as a utopian stand, yet in the US, when courts recognize such a jurisdiction and attribute compensation, they merely apply domestic law, the Alien Tort Statute. Arguably, within their normative application of the law, some courts would tend to favour the rights of individuals (by, for instance, attributing responsibility to private corporations), while others would prefer to represent a more restrictive attitude in line with the State's position. However, as long as there is no distortion and misuse of the law, these are decisions within the framework of normative application, in which each court has a certain margin of interpretation as described in the previous chapter.

From the international rule of law perspective, "activist" decisions of national courts pose a problem that is particular to the international legal order and the way international rules are established. Domestically, in common law legal traditions, courts are entrusted with developing the law, and the jurisprudence of higher courts is binding upon lower courts. In these political structures, the checks and balances of the branches of government function according to that modality, and the authority to develop laws attributed to courts is a result of an overall constitutional structure shaped by the governmental organization of a State. When dealing with international rules, however, the situation is quite different. It is hard to justify how a court of a country, with its own specific political, legal, and professional constraints shall be entrusted to create new rules for the entire international community. Moreover, it is highly questionable whether a national court, when adjudicating between two litigating parties, and which chooses to develop instead of just applying the law appropriate to that particular case, has the capacity to take into consideration the global consequences of its ruling, for these may go far beyond the particular interests of the adverse parties. Indeed, how

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[830] On natural law as opposed to positivism see P. Daillier and A. Pellet (n. 5), p. 103-108.

[831] According to Article 38(1)(b) of the International Court of Justice Statute the Court shall apply international custom, *as evidence of a general practice accepted as law.*

can such a court adequately take into account the range of different particularities that make up the international legal system? As stated by Professor Tomuschat:

> Judges cannot be front-runners, they have no mandate to act as legislative bodies with a view to promoting political goals. International law derives its authority from consensus in the international community. Rightly, Article 38 of the Statute of the Court provides that customary rules are based on 'a general practice accepted as law'[832].

"Activist" decisions, which are usually against the State's position, typically trigger a significant political or legal response. The case of Judge Baltasar Garzon in Spain is an extreme example of an activist decision which resulted in far-reaching consequences. Following a petition filed by family members and associations representing victims of the Franco regime before the Audiencia Nacional on 14 December 2006, Judge Garzón opened a criminal investigation into allegations of crimes against humanity committed during the Spanish civil war and the Franco regime. He ordered that exhumations and other preliminary steps be taken to ascertain facts. On 16 October 2008, he delivered a decision assuming jurisdiction over the case. While the jurisdiction was over specific crimes such as 'illegal detentions', as they also amounted to crimes against humanity, the judge found that they were not subject to prescription and that the Spanish 1977 Amnesty Law of 15 October 1977, which affords amnesty for Franco-era crimes, was not applicable. [833] The Judge interpreted the Amnesty Law as not applying to serious crimes, such as crimes against humanity. The non-applicability of the Amnesty Law to crimes against humanity was based, *inter alia,* by the obligation to investigate crimes under international law as well as by international jurisprudence such as the Inter-American Court of Human Rights cases o*f Barrios Altos* of Peru, decided on 14 March 2001, and *Masacre de Mapiripán* of Colombia, decided on 5 September 2005. It was also supported by the Spanish Constitution and jurisprudence of the Supreme Court, which has determined that international law shall provide the interpretation for the enforcement of crimes against humanity.

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[832] *Oral Submission before the International Court of Justice for Germany* (n 828), p. 22.

[833] Audiencia Nacional, *Juzgado Central de Instrucción No. 5*, Diligencias Previas Proc. Abreviado 399/2006 V (Judgment of 16 October 2008). Jurisdiction was assumed, inter alia, over crimes committed by Franco and his high command during the war and the post-war period in respect of 'crimes against the state,' which under Articles 23.2, 23.4 and 65.1 of the Ley Organica Judicial corresponds to the jurisdiction of the Audiencia Nacional, carried out in the context of and connected to crimes against humanity.

This decision did not pass unnoticed: not only was the jurisdiction denied on appeal,[834] Judge Garzón was indicted under Spain's prevarication law which allows judges to be prosecuted for unjust judgments[835] and he was suspended from his judicial functions.[836] The criminal trial of Judge Garzón was scheduled to start in Spain on 24 January 2012. While Garzón's interpretation went beyond the purpose of the Spanish Amnesty Law, it is difficult, though, to justify that far-reaching reaction, and probably even the Amnesty law itself, in light of the fact that Spanish courts have consistently affirmed, while adjudicating cases based on universal jurisdiction, that amnesties granted by third States in order to prevent accountability of international crimes are not binding for Spanish courts.[837] Spain's practice suggests that Franco's crimes shall be only prosecuted in third States based on universal jurisdiction.

"Activist" decisions in opposition to the position of the State are extremely rare. The last chapter of my research is therefore not supported by a large number of case studies as it was in the previous chapters. It focuses on a single case which represents an activist decision of a national court in opposition to the State's stance and that dealt with an issue related to international humanitarian law: the Italian Ferrini case. I seek to show why the Ferrini decision is activist (or utopian), and the problematic consequences of the decision, not only to the specific parties who were litigating before the Italian Court of Cassation, but to the international order more globally – consequences that a national judge can not always anticipate.

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[834] Audiencia Nacional, Sala de lo Penal, *Juzgado Central de Instruccion No. 5*, Pleno, Diligencias Previas Proc. Abreviado 399/2006 V, Auto (2 December 2008).

[835] The complaint was filed by 'Manos Limpias,' a right wing political organisation on 26 January 2009 before the Criminal Chamber of the Supreme Court of Spain. Judge Garzón was indicted in April 2010 for Crime of prevaricación, alleging the abuse of his judicial authority by opening the inquiry into the Franco-era crimes. The crime of prevaricación is defined in Article 446 of the Spanish Criminal Code: 'The judge or magistrate who, knowingly, dictates an unjust sentence or resolution". On 24 March 2011 Judge Garzón brought a case to the European Court of Human Rights challenging the lawfulness of his criminal prosecution, allegation violation of articles 6, 7, 8 10 and 18 of the European Convention of Human Rights, available at: <http://www.interights.org/userfiles/Garzon_ECHR_Application_final_full.pdf> (accessed 23 October 2011).

[836] Unanimous Decision of the Spanish General Council of the Judiciary, 14 May 2010. See D. Makosky, 'Spain Judicial Panel Suspends Judge Garzon over Franco Probe' *Jurist.org* (14 May 2010) <http://jurist.org/paperchase/2010/05/spain-judicial-panel-suspends-judge-garzon-over-franco-probe.php> (accessed 23 October 2011).

[837] See decision of the Central Investigative Court nº 5 of the Audiencia Nacional of 1 September 2000 (indictment of Miguel Angel Cavallo); decision of 20 September 1998 of the Central Investigative Court nº 6 (Pinochet case).

1. The Italian Ferrini case[838]

> Si la Corte Soprema avait agi différemment, en accordant même dans ce cas limite l'immunité de juridiction à l'Allemagne, elle aurait pour ainsi dire prêté la dernière main à la réalisation d'une situation de déni de justice absolu, en bouchant la dernière issue qui s'offrait encore aux victimes…. Si elle a pris la décision retenue, au péril d'exposer l'Italie à la réaction négative d'un Etat ami, c'est d'abord parce que celle-ci lui paraissait cohérente avec les évolutions les plus contemporaines du droit international ; c'est ensuite parce qu'elle garantissait un droit d'accès à la justice à toutes les victimes de crimes nazis encore en attente de réparation.
>
> Professor Pierre-Marie Dupuy in the name of the State of Italy before the International Court of Justice, September 2011[839]

The Ferrini case is probably among the best examples of an activist decision that municipal courts have produced. The innovative conclusions reached in *Ferrini* and consequent Italian decisions led Germany to initiate proceedings before the International Court of Justice challenging the Italian courts' violation of the principle of sovereign immunity—*Jurisdictional Immunities of the State, Germany v Italy*, Application, 23 December 2008.

The Italian Court of Cassation in *Ferrini* in 2004 allowed Italian victims of Nazi international crimes to claim reparations from Germany, by abrogating Germany's State immunity and holding that Italian courts had jurisdiction to hear a claim directed against Germany for *acta iure imperii* because of the nature of the crimes which amount to a violation of *jus cogens*. Ferrini was deported during World War II from Italy to Germany where he was compelled to work for Germany. On 23 September 1998, Mr Ferrini brought a civil claim for reparations against Germany at the Arezzo Tribunal in Italy. Based on State immunity, this

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[838] *Ferrini v Germany*, (Appeal Decision) Italian Court of Cassation, Civil section unit, No. 5044/4 of 6 November 2003 registered 11 March 2004 in 87 Rivista diritto internazionale (2004) 539. (hereinafter: *The Ferrini* case). Among many others, see A. Bianchi, 'Italian Court of Cassation Ruling on Immunity from Suit for Damages for Deportation and Forced Labor during World War II (Comment to Decision)' (2005) 99 American Journal of International Law 1, pp. 242-248; P. De Sena and F. De Vittor, 'State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrini Case' (2005) 16 European Journal of International Law 1, pp. 89-112; C. Focarelli, 'Denying Foreign State Immunity for Commission of International Crimes: The Ferrini Decision' (2005) 54 International Comparative Law Quarterly, pp. 951-958; A. Gattini, 'War Crimes and State Immunity in the Ferrini Decision' (2005) 3 Journal of International Criminal Justice 1, pp. 224-242.

[839] *Oral Submission before the International Court of Justice for Italy* (n 19), pp. 57-58.

claim was rejected in the Arezzo tribunal as was a subsequent appeal in Florence. Before the Italian Court of Cassation, Ferrini raised the claim that immunity from jurisdiction may not be granted to a foreign State when the alleged violation is of *jus cogens* rules related to the protection of fundamental human rights. The Italian Court of Cassation reversed the ruling of the lower courts and decided that Germany cannot enjoy State immunity before Italian tribunals for reparation claims which arise from international crimes recognized as *jus cogens*. This ruling is innovative on a number of issues relating to the exercise of competence of Italian courts. First, it rejected the non-justiciability claim, which was applied by the same court in a different case with a similar claim. Second, the court did not refrain from exercising its jurisdiction because of Germany's State immunity, creating a new exception to the rule of immunity for a civil suit arising from *jus cogens* violations. Third, the court stated (though as an *obiter dictum*) that the principle of universal jurisdiction shall be applicable to civil claims for jus cogens' violations. Lastly, by allowing the claim of reparation to be pursued, it implicitly conferred on individuals the right of reparation.[840] Indeed, Italy has pointed out very clearly before the ICJ that its judges had abrogated Germany's immunity because of the specific issue at stake: the reparation of Italian victims of World War II and their access to justice, for otherwise justice would be prevented for them.[841] Yet, the right of individuals to claim reparations for international humanitarian law violations before domestic courts is a controversial issue both within academic literature and State practice. Moreover, even if such right is established, it could be barred under international law because of the waiver accorded in the peace settlements by the state of nationality of the claimant.

Indeed, until Ferrini, almost all individual reparation claims for serious international humanitarian law violations before national courts were rejected because of doctrines of non-

[840] R. Bank and E. Schwager, 'Is there a Substantive Right to Compensation for Individual Victims of Armed Conflict against a State under International Law?' (2006) 49 German Yearbook of International Law 367, p. 380.

[841] See two examples among many others: "The analysis of the relevant facts [..] [shows that] the issue of immunity is inextricably linked with the issue of reparation. Italian forced labourers and victims of the massacres perpetrated by the German Reich after 1943 have never received effective reparation for the grave injuries suffered. [..] It is against the background of this situation that the lifting of Germany's immunity must be assessed…under the circumstances of the present case Italian courts were entitled to deny immunity to Germany." *Case Concerning Jurisdictional Immunities of the State* (*Germany v Italy*) (Counter-Memorial of Italy) (22 December 2009), para. 2.45 (hereinafter: *The Counter-Memorial of Italy*) <http://www.icj-cij.org/docket/files/143/16648.pdf> (accessed 23 October 2011); "It stands to reason that there exists a close interconnection between the rule of immunity, on the one hand, and the substantive rule indicating to whom reparation is due". *Oral Submission before the International Court of Justice for Germany* (n 828), para. 32.

justiciability, State immunity, the fact that individual claims were waived by a peace agreement, or because international humanitarian law does not grant the right to a remedy directly to individuals but only to States.[842] What situates Ferrini as an activist decision is the fact that the decision rejected all these arguments, although each of them has solid contrary State practice, and in opposition to the stance of the Italian government.[843] The following part discusses each of these issues independently.

1.1 Justiciability

In Ferrini the court first addressed the question of non-justiciability. It attempted to distinguish this case from the *Markovic* case rendered by the same court two years earlier.[844] *Markovic* concerned a civil claim against Italian officials for their responsibility for NATO's aerial bombing operation, in which the Belgrade radio station was targeted – arguably a non-military objective – and which resulted in the death of a number of civilians on 23 April 1999 during the armed conflict between NATO and the Federal Republic of Yugoslavia. Under these circumstances, the Italian Court of Cassation ruled that the methods chosen in the conduct of war operations was 'act of government', i.e., a political, non-justiciable

[842] E.C. Gillard, 'Reparation for Violations of International Humanitarian Law' (2003) 85 International Review of the Red Cross 851, p. 537.

[843] Ferrini is going to become the position of the Italian government only before international jurisdictions. As argued by A. Ciampi, "The Italian Government's position at the diplomatic level has constantly been to dissociate itself from the courts' assertion of jurisdiction over the FRG in relation to the facts of WWII, in an effort not to damage bilateral relations." A. Ciampi, 'The Italian Court of Cassation Asserts Civil Jurisdiction over Germany in a Criminal Case Relating to the Second World War: The *Civitella* case' (2009) 7 Journal of International Criminal Justice 3, p. 607. *Ferrini* was rendered contrary to the Italian State position. It is only before the ICJ that the ruling of the Court became the official position of the State. If this decision is upheld by the ICJ, we can see an interesting phenomenon in which not only States are involved in the development of international law but so too are individuals and in a very direct manner by bringing their arguments before domestic tribunals, which accept it, even in opposition to the Executive's stance, and which must be respected by the State because of the rule of law.

[844] *Presidency of the Council of Ministers v Marković and ors*, Italian Court of Cassation, Application for preliminary order on jurisdiction, no 8157, (2002). Available at: <http://www.oxfordlawreports.com> (accessed 23 October 2011) (hereinafter: *The Marković* case).

question.[845] In order to reconcile that case with the bold willingness of the court to exercise competence in *Ferrini*, the court stated that establishing civil or criminal responsibilities in cases that involve war crimes allegations perpetrated during military operations were not excluded from review, as the protection of fundamental rights were part of Italian law via Article 10 of the Constitution. While *Markovic* similarly dealt with a war crime civil allegation (though against Italian officials) the court concluded, quite oddly, in Ferrini that 'it is evident that the principles contained in that decision [i.e. Markovic] cannot be taken into consideration in the present case'. However, although the court noted that it is evident that both cases differ, it is hard to see on what basis it can sustain this affirmation, and why the question of justiciability leads to two opposing conclusions. As noted by Germany, "these 'explanations' do not explain anything" [846]; instead the court's tendency to apply a double standard is apparent.

> [in *Markovic*] Corte di Cassazione was of the view that judicial review of acts of war was precluded *a limine* before ordinary civil courts, thus applying an Act of State doctrine. It is highly inconsistent to change direction a fairly short time later, affirming the jurisdiction of Italian courts in a case brought against Germany. Obviously, the Corte di Cassazione applies a double standard. It protects its own armed forces against any reparation claim, but it dismisses any defence of lack of jurisdiction when a case is filed involving the military activities of a foreign nation.[847]

After being denied in Italy, Markovic argued before the European Court of Human Rights that his right to access to a court to determine his civil rights, as provided for by Article 6(1) of the

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[845] Critics of this ruling argued that the court should have distinguished between the political decision of the government, such as the decision to engage in military operations – which is non-justiciable, and the *jus in bellum* choice of methods of warfare in the course of the military operations, which should be justiciable as these are not "political" decisions and international humanitarian law provides judicial standards to assess their legality. See M. Frulli, 'When Are States Liable Towards Individuals for Serious Violations of Humanitarian Law? The *Marković* Case' (2003) 1 Journal of International Criminal Justice 2, pp. 411-412.

[846] *Case Concerning Jurisdictional Immunities of the State* (*Germany v Italy*) (Memorial of the Federal Republic of Germany) (12 June 2009), para. 58 <http://www.icj-cij.org/docket/files/143/16644.pdf> (accessed 23 October 2011) (hereinafter: *The Memorial of Federal Republic of Germany*). See also Andrea Gattini: "It is hard to see why, in the minds of the supreme judges, the plaintiffs in Marković could not in any case have made an even tenuously plausible argument that the conduct of the Italian government amounted to a crime." A. Gattini (n 838), p. 229; A. Bianchi (838), p. 245.

[847] *The Memorial of Federal Republic of Germany* (n 846), para. 57.

1950 Convention for the Protection of Human Rights and Fundamental Freedoms, had been violated. But the non-justiciability claim was affirmed by the European Court of Human Rights.[848]

The apparent double standards exhibited by the Italian court, which became also the position of the Italian government in later procedures before international fora – the European Court of Human Rights and ICJ – is well evidenced by Italy's argument based on the right of victims to have access to a court. Regarding *Ferrini*, where the victim was Italian and the responsible State was Germany, Italy argued before the ICJ that 'access to justice is a fundamental guarantee of respect for the rule of law in modern democracies. International rules on State immunity from jurisdiction cannot but be balanced against respect for this principle.'[849] On the other hand, before the European Court of Human Rights, it supported the non-justiciability of 'political acts of state', a domestic doctrine developed by judges, which has been recognized as prevailing over the right to access the court, and this in a case in which the responsibility could have been attributed to Italy.[850]

The logical consequence of Ferrini, which was decided after Markovic, is that if Mr. Markovic decides to sue Italy before a Serbian court, Italy's immunity should be abrogated. Would Italy accept to be sued before a foreign court as a consequence of its own judiciary's decision?

1.2 State Immunity

When reparation cases have been submitted before other courts than the alleged wrongdoer State, such as the courts in the State of the victims or a third State's courts[851] – these category of claims have been mainly rejected because of State immunity vis-à-vis the exercise of jurisdiction by judicial bodies of other countries, deriving from the principle of sovereign equality (UN Charter, Article 2 (1)). Unlike avoidance doctrines such as the non-

[848] *Marković et al. v Italy*, (Judgment on Merits) European Court of Human Rights No.1398/03 (14 December 2006) (hereinafter: *The European Court of Human Rights Marković* case).

[849] *The Counter-Memorial of Italy* (n 841), para. 4.101.

[850] Justiciability is one of the obstacle that claimer need to surmount. See also *El-Shifa Pharmaceutical Industries v U.S.*, U.S. Court of Appeals for the District of Columbia, 27 March 2009 (where the court dismissed a claim for compensation of the damage sustained by a factory in Sudan through an US air strike as being a "political question").

[851] These category of cases include for example ATS claims before US courts.

justiciability of political questions, immunity is not a rule developed by domestic judges, and although immunity precludes jurisdiction and achieves the same result as non-justiciability doctrines, they differ in their nature and origin. Immunity is a procedural rule defined and developed by customary international law.[852] While non-justiciability doctrines are a domestic procedural judge-made law, which are applicable not only for international law matters, the rules on immunity derive directly from customary international law, and are applicable only to cases involving questions of international law.

When the Italian Court of Cassation dealt with the immunity claim of Germany it was done through direct application and interpretation of international law: at the beginning of its decision the court held that the customary international law principle of State immunity as well as the norms that define international crimes are part of the Italian legal system by virtue of Article 10 of the Italian Constitution. Then court stated that there is no doubt that the acts committed were performed as *iure imperii*, as an expression of Germany's sovereign power, as they took place in the course of an armed conflict. The question that the court examined is whether according to international law a State is immune from jurisdiction in a case in which the act under review constitutes an international crime and 'violates universal values that transcend the interests of individual states'. The Court's two main arguments to abrogate Germany's State immunity from jurisdiction in civil actions arising out of violations of *jus cogens* were: (1) the hierarchy of norms argument, and (2) the argument based on the coherency of norms within the international legal order and the need to adapt the rules of immunity to contemporary international law.

The court attempted to define the relation between two international law rules: a procedural rule on immunity, and the extent of its application in case of a violation of a substantive, peremptory norm of international law. According to the first argument, States responsible for violations of *jus cogens* norms are not entitled to sovereign immunity because

[852] On immunity as "the subjection of an independent State to proceedings in another country relating to a dispute about its exercise of governmental power," see H. Fox, *The Law of State Immunity* (Oxford University Press, New York, 2002), p. 11; A. Bianchi (n 457), p. 164. It may be of interest, though, to investigate whether domestic judge-made non-justiciability doctrines such as political question and act of State have evolved to become a customary international rule, which restricts the competence of national courts to adjudicate cases because of the international law principle of comity and sovereign equality (not because of the domestic rationales of separation of power or the need to speak in one voice – which are only relevant at domestic level). The avoidance rule of subsidiarity applicable in universal jurisdiction criminal cases, which is entirely based on international principles such as comity, complementarity and exhaustion of local remedies, is among this kind of "international" avoidance doctrine.

of the hierarchical supremacy of the former norms. Non-derogable norms stand at the peak of the international legal system and take precedence over all other norms, and therefore create an exception to the applicability of immunity norms that are not of a non-derogable nature. A counter argument raised by academic literature is that as *jus cogens* norms are norms of substance while rules on immunity are procedural norms, at the theoretical level there can not be a conflict of rules between the two, and therefore a hierarchy theory is irrelevant, as both norms are independently applicable and do not influence each other.[853] Moreover, according to the position of the Germany there is no comprehensive special regime that is applicable in cases of violations of *jus cogens* norms and an exception to State immunity due to the breach of a *jus cogens* rule cannot be inferred.[854]

The court then proceeded to its second argument, one based on the need for a consistent international legal order that takes into account contemporary developments of international criminal law. For that purpose, the court first established that the Germans' acts of deportation and forced labour constituted international crimes according to Article 6(b) of the 'Charter of the International Military Tribunal in Nuremberg', which defined war crimes as including 'deportation to slave labour', and consequent treaty and customary development of international criminal law.[855] The Court mentions *inter alia* the UN Convention of the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, and the principle of universal jurisdiction codified by the Geneva Conventions. As observed by Gattini, the Court employs the concept of international crime 'not less than nine times',[856] before concluding that the lack of functional immunity of the State organ for criminal responsibility must lead also to abrogation of State immunity. The Court's navigation between criminal, civil, individual, and State responsibilities has led several authors to criticise the failure of the court to distinguish between different concepts of responsibilities and their corresponding rules.[857] However, Professor Dupuy firmly refuted these critics in the following terms:

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[853] A. Bianchi (n 838), p. 247.

[854] *Oral Submission before the International Court of Justice for Germany* (Prof. R. Kolb) (n 828), p. 50. See also *The Memorial of Federal Republic of Germany* (n 846), para. 87.

[855] The court notes that deportation and forced labour was defined later as an "international crime" by Articles 2 of the Statute of the International Criminal Tribunal for the Former Yugoslavia; by Article 3 of the Statute of the International Criminal Tribunal for Rwanda.

[856] A. Gattini (n 846), p. 229.

[857] *Ibid*, p. 230; A. Bianchi (n 838), pp. 245-246.

> la Cour suprême relève, l'un après l'autre, les indices révélateurs du fait que les crimes de déportation et de soumission des prisonniers de guerre et populations civiles au travail forcé aussi bien que les massacres de populations civiles constituent des atteintes au droit impératif, et elle le fait en partant des premiers travaux de la Commission du droit international relatifs à ces crimes, en 1950, jusqu'aux développements les plus contemporains du droit international pénal. Nous y voilà, le droit international pénal, non pas du tout parce que le juge italien confondrait crimes individuels et crimes d'Etat, comme certains l'ont dit trop vite, mais parce que le droit international pénal atteste l'importance éminente pour la communauté internationale des valeurs bafouées par de telles actions.[858]

According to the Italian Court of Cassation, customary rules on immunity must be interpreted in light of other contemporary international criminal rules, as all norms belong to one legal system that should be coherent and consistent.[859] According to the Court, customary international law can be correctly understood only in relation to other norms that form an integral part of the same legal system. Similarly the Italian government before the ICJ submitted that:

> Respect for inviolable human rights has by now attained the status of a fundamental principle of the international legal system…. [T]he emergence of this principle cannot but influence the scope of the other principles that traditionally inform this legal system, particularly that of the "sovereign equality" of States, which constitutes the rationale for the recognition of state immunity from foreign civil jurisdiction.[860]

According to the Court the coherency of the legal order as a whole dictates that as the international community has made it clear that in the repression of international crimes which violate *jus cogens* norms, functional immunity may no longer be invoked by State's officials. By the same token, immunity shall not apply to States that abrogate their civil responsibility, as there would be no reason to uphold the immunity of the State while denying the immunity of its organs in respect of the same acts. Moreover, with respect to Article 41 of the Draft Articles on International Responsibility of States, which requires States not to provide assistance for the maintenance of situations that originated from *jus cogens* violations and

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[858] *Oral Submission before the International Court of Justice for Italy* (n 19), pp. 59-60.

[859] *The Ferrini* case (n 838), para. 9.

[860] *The Counter-Memorial of Italy* (n 841), para. 9.2.

imposes the obligation to use legitimate means to bring about the end of the illicit acts, the abrogation of immunity is demanded. Thus, the Court ruled that jurisdictional immunity of foreign States is not an absolute rule of international law – it is subject to limitations and must be interpreted taking into account developments in contemporary international law. One of these exceptions is for violations of *jus cogens.*

As far as State practice of other national courts is concerns, the Italian court stands alone with its reasoning. For example, in the *Shimoda case* of 1963 victims of the nuclear bombing of Hiroshima and Nagasaki claimed reparation. While the judgment of the Tokyo District Court clearly stated that the use of the atomic bomb was in violation of international humanitarian law,[861] the court ruled, *inter alia*, that sovereign immunity precluded proceedings against the US before Japanese courts. In 1992, a district court recognized in the *Princz* case, that by violating *jus cogens* norms of the law of nations Germany's sovereign immunity under the FSIA was impliedly waived: 'A foreign state that violates these fundamental requirements of a civilized world thereby waives its right to be treated as a sovereign.'[862] However, the US Court of Appeals dismissed this interpretation and the claim, ruling that it lacked jurisdiction because of State immunity.[863] Similarly, Asian victims of sexual slavery during World War II, the so called 'comfort women' brought a claim against Japan in the United States based on the Alien tort Statute. However the case was rejected on grounds of State immunity.[864]

The Italian Court of Cassation mainly based itself on the Greek *Distomo* case (1997), which is among the rare example of compensation granted to individual claimants for injury suffered during the Second World War by a national court – yet that case was ultimately overruled. In that litigation the victims of the Distomo killings directly brought their claim against Germany for compensation before a Greek court and the court ruled that sovereign

[861] Citing a number of treaties as the Convention (II) with Respect to the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land (adopted 29 July 1899, entered into force 4 September 1900 and Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (adopted 17 June 1925, entered into force 8 February 1928).

[862] *Princz H. v Federal Republic of Germany*, 813 F. Supp. 22 (D.D.C. 1992), p. 26.

[863] *Ibid.*

[864] *Hwang Geum Joo v Japan*, 172 F.Supp. 2d 52 (D.D.C. 2001). After the Supreme Court had granted a writ of certiorari, the case was again dismissed on the basis of the political question doctrine, 413 F.3d 45 (2005). See also the later ruling of the House of Lords: *The Jones* case (n 829), paras. 45-64. See also the French decision in *Bucheron* (16 December 2003), 108 RGDIP 259 (2004) and in Canada *Bouzari v. Iran*, Court of Appeal of Ontario (30 June 2004), 128 ILR 586 – upholding State immunity.

immunity could not be invoked in connection with violations of a rule of *jus cogens*. In its ruling, which was upheld in May 2000 by the Greek Supreme Court, the court of first instance held that a Greek court could exercise jurisdiction over civil claims related to World War II crimes on the grounds that a country that committed war crimes must be deemed to have waived its sovereign immunity. [865] Yet, the judgment could not be enforced in Greece because of the denial of consent of the Ministry of Justice to enforce the judgement against German State property in Greece. Then, in a parallel case, the Greek Special Supreme Court, empowered to decide cases involving the interpretation of international law, ultimately ruled that the law had been wrongly interpreted.[866] The case went on to Strasbourg on the grounds that the claimants were being deprived of a remedy, contrary to Article 6(1) of the Convention, where the European Court of Human Rights held, applying *Al-Adsani*, that international law does not allow an exception to State immunity for civil claims resulting from international crimes. The European Court did, though, recognize the possibility that customary international law might develop in this direction in the future.[867] Quite surprisingly, the legal saga did not end there. After *Ferrini*, on 2 May 2005, the Court of

[865] Greece's Court of First Instance of Leivadia in the *Prefecture of Voiotia case* in 1997. *Prefecture of Voiotia v Federal Republic of Germany*, (Judgment) Hellenic Supreme Court No. 11/2000 (4 May 2000), published in (2001) 49 Nomiko Vima 212, pp. 212–229.

[866] *Federal Republic of Germany v Miltiadis Margellos*, (Judgment), Supreme Special Court No. 6/2002 (17 September 2002). Later Italy will render a ruling to enforce the decision in Italy. For a discussion see, A. Gattini, 'To What Extent are State Immunity and Non-Justiciability Major Hurdles to Individuals' Claim for War Damages?' (2003) 1 Journal of International Criminal Justice 2, pp. 356-362.

[867] *Kalegoropoulou v Greece and Germany*, European Court of Human Rights No. 50021/00 (12 December 2002), p. 10: "les requérants semblent affirmer que le droit international relatif aux crimes contre l'humanité est si fondamental qu'il constitue une norme de *jus cogens* qui l'emporte sur tous les autres principes de droit international, y compris le principe de l'immunité souveraine. Toutefois, la Cour ne juge pas établi qu'il soit déjà admis en droit international que les Etats ne peuvent prétendre à l'immunité en cas d'actions civiles en dommages intérêts pour crimes contre l'humanité qui sont introduites sur le sol d'un autre Etat. [...] Cela est au moins vrai dans la situation du droit international public actuelle, telle que la Cour l'a constaté dans l'affaire *Al-Adsani* précitée, ce qui n'exclut pas un développement du droit international coutumier dans le futur." See also, *Al-Adsani v United Kingdom*, (Judgment) European Court of Human Rights No. 35763/97 (21 November 2001), para. 66 (hereinafter: *The Al-Adsani* case): "The Court, while noting the growing recognition of the overriding importance of the prohibition of torture, does not accordingly find it established that *there is yet* acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages for alleged torture committed outside the forum State."

Appeal of Florence declared the Greek *Distomo* decision as being enforceable in Italy. This decision was confirmed by the Court of Cassation in May 2008.

In *Ferrini* the Court of Cassation also referred to the US judgments based on the 1996 amendment of the Foreign Sovereign Immunity Act in order to demonstrate similar State practice. However, this jurisprudence, unlike *Ferrini*, is based on specific domestic legislation, which apparently, on its own, has not changed customary law.[868] Quite the opposite – the exception to State immunity for certain terrorist acts committed by States that are listed as States that sponsor terrorism by the US Government, shows that singling out certain States demonstrates that Congress deliberately excluded any kind of automaticity for a more general *jus cogens* exception.[869]

While international criminal law has clearly established that functional immunity shall not waive the individual criminal responsibility of officials who commit international crimes, the corresponding rule for civil liability of States has not been established. In fact, *Ferrini* along with the 1997 Greek case, which was overruled, are the only cases that provide the practice of waiving State immunity in civil claims before national courts. Not only is other national practice lacking but subsquent case-law has also ruled the other way, while specifically referring to Ferrini. The House of Lords went as far as to formulate it as: 'one swallow does not make a rule of international law'.[870] Professor Christian Tomuschat, arguing for Germany before the ICJ, mentioned the 'splendid isolation' of the Italian Court of Cassation seven years after *Ferrini*.[871]

While utopian discourses are usually very captivating, one must not forget that the same court was ready to deny the exact same justice and access to reparation for victims of international crimes in *Markovic*, which indicate that utopian discourses are not applied equally in all circumstances, thereby opening the door to political preference. Indeed one of the main problems in the Italian argument is the double standards apparent in its willingness to render justice to certain victims of war.

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[868] In 1996, Congress amended the FSIA to allow civil suits of victims of terrorist acts as torture, extrajudicial killing, aircraft sabotage, and hostage-taking against those States which have been listed by the US government as sponsoring terrorism (Act 28 U.S.C. § 1605(a)(7)). As noted by Gattini, "The undeniable political flavour of such a choice hardly makes it a model and greatly diminishes the value of US judicial practice." A. Gattini (n 846), pp. 229-230.

[869] *The Memorial of Federal Republic of Germany* (n 846), paras. 66-70.

[870] *The Jones* case (n 829), para. 22.

[871] *The Memorial of Federal Republic of Germany* (n 846), para. 67.

State immunity at domestic level

As shown, with the exception of Italy, suing a foreign government before the national courts of the victims or any other third State court would be barred by State immunity. Therefore, bringing a case before the domestic courts of the respondent government may be a more feasible option. Yet, also here a claimant may encounter all kinds of obstacles related to immunity introduced by domestic legislations and doctrines, which exempt the responsibility of the State from any damage that has been caused by their security forces in armed conflict.[872] In the UK, for example, the Act of State doctrine prevents courts from reviewing Acts of the Crown beyond the sovereign territory of the UK, and the principle of 'combat immunity' prevents courts from adjudicating disputes that arise during actual fighting.[873] In the United States, the 1948 Federal Tort Claims Act establishes that no claim may be brought that arises 'out of the combatant activities of the military or naval forces'.[874] Also, the Act ban 'any claim arising in a foreign country'.[875] Claims based on the violation of constitutional rights may be brought directly against the responsible officials under the *Bivens* rule.[876] Yet, it should be then demonstrated that the alleged misconduct must have violated 'clearly established rights … of which a reasonable person would have known'.[877] Moreover, by virtue of the Westfall Act (1988) (28 U.S.C. § 2679), the US State – which is generally immune[878] - may be substituted as the defendant in any action where one of its employees is sued for damages. Thus, claims regarding armed conflicts reparation have almost no chance to succeed in the US. In Israel, the Civil Wrongs Act extended the definition of 'acts of war' and

[872] See for example the rule in Germany accordingly war damages are not covered by the ordinary regime of State responsibility. "[a]ccording to the understanding and the overall system of the German law in force at the time the act was committed (1944) the military acts during war in a foreign State, which are attributable under international law to the German Reich, did not fall within the scope of state liability for official act as enshrined [in the legislation at that time in force]" - the German *Distomo* case, BGHZ 155, 279 (English translation at 42 ILM 1030 (2003).

[873] See *Bici v Ministry of Defence*, (2004) EWHC 786 (QB), paras. 84-93.

[874] 28 U.S.C. § 2680 (j).

[875] 28 U.S.C. § 2680 (k).

[876] *Bivens v Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 397 (1971).

[877] On the different US official immunity in the US see Chapter 3, above at p. 178-191.

[878] *United States v Lee*, 106 U.S. 196 (1882); *United States v Mitchell*, 463 U.S. 206, 212 (1983) ("It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction.")

grants immunity to the State against civil claims brought by subjects of a State enemy of Israel and persons active in or members of a terrorist organization. Moreover, it sets serious procedural limitations on Palestinians' ability to bring claims against Israel. [879]

Introducing exceptions to State immunity, which touches on the nerve centre of the international legal order, and the basic concepts of equality of States, is an activist task for a national court reviewing responsibilities of third States. Instead, in order to effectively developed the right of remedy for armed conflict damages, national courts could be more assertive in attributing responsibility on their own State by avoiding to applying self developed immunity doctrine such as 'The King Can do no wrong' or by interpreting strictly immunity legislation exempting the responsibility of the forum State.

1.3 Universal jurisdiction for civil claims deriving from *jus cogens* violations

The Court referred to the ICTY *Furundžija* case, citing that 'the victim [of torture] could bring a civil suit for damage in a foreign court',[880] which with the other developments of international criminal law, most notably the principle of criminal universal jurisdiction, leads the court to conclude that 'there can be no doubt that the principle of universality of jurisdiction also applies to civil suits relating to such crimes.'[881] The statement of the Court that there is no doubt as to universal civil jurisdiction is a strong one, which is not actually supported by general State practice, quite the opposite, as explicitly stated by UK, Canadian, and European Court of Human Rights jurisprudence![882] It is true that the US has recognized

[879] In 2005, Amendment 7 to the Law exempted the state from liability for damages caused to particular categories of persons, encompassing a broad group of persons. These persons are defined as: (1) a citizen of an 'Enemy State', unless he or she is legally in Israel; (2) an activist or member of a terrorist organization; and (3) anyone who incurred damage while acting as an agent for or on behalf of a citizen of an enemy state, or an activist or member of a terrorist organization. For the procedural obstacles see S. Weill and V. Azarov, 'Israel's Unwillingness to Prosecute International Crimes' (FIDH, September 2011), Annex 4.

[880] *The Furundžija* case (n 746), para. 155.

[881] Yet, the ICTY case referred specifically to the crime of torture. See P. de Sena and F. De Vittor (n 838), p. 97.

[882] In *Bouzari* before Canada's Court of Appeal for Ontario in 2004, Bouzari had attempted to claim damages for torture that had occurred in Iran in 1993 and 1994. His claim was barred under Canada's State Immunity Act 1985. The Court stated that although the prohibition against torture constitutes a rule of *jus cogens*, that norm does not encompass the civil remedy sought by Bouzari: "[87] The motion judge found that prohibition of torture is a rule of *jus cogens*. For the purpose of this appeal, no one, including the Attorney General of Canada, questions this conclusion. Rather the question is the scope of that norm. In particular, does it extend to a

(albeit through national legislation) the Alien Tort Statute, which provides US courts with the jurisdiction to decide on civil suits brought by foreigners against other foreigners for reparation in cases of violations of international law. Yet, it is doubtful whether this unique national practice, contested even within the US, establishes a more general practice.

The Italian court's declaration that civil suits for *jus cogens* violations are entitled to universal jurisdiction was in fact an *obiter*, as in this case the crimes were committed, at least in part, on Italian soil and the victims were Italian nationals. Oddly, the Italian Court of cassation distinguished other jurisprudence that did apply State immunity to civil claims resulting from international crimes such as the *Al-Adsani* or the Canadian *Houshang Bouzari* cases by stating that these decisions relate to cases in which the crime had been committed outside of the *forum* State, while in Ferrini the crimes were committed on Italian soil. However, it seems that this statement is not consistent with the rest of the judgment as it specifically pointed to the universality of the acts, and not to the fact that these were committed on the territory.[883] Another argument of the court was the fact that the alleged crimes were partly committed on Italian soil thus triggering the 'tort exception' to State sovereignty. However, the argument appears not to be applicable to a situation of armed conflict. Moreover, although this argument may serve the court to distinguish this case from other contradictory ones as the *Al-Adsani* case and *Bouzari*, in fact it has little relevance for the court's reasoning if it is based on the hierarchy of *jus cogens* norms that preclude the applicability of procedural rules.

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requirement to provide the right to a civil remedy for torture committed abroad by a foreign state? [94] [..] [A]s a matter of practice, states do not accord a civil remedy for torture committed abroad by foreign states. The peremptory norm of prohibition against torture does not encompass the civil remedy contended for by the appellant." See also *The Jones* case (n 829), paras. 22-27, that was rendered after *Ferrini*: ("there is no evidence that states have recognised or given effect to an international law obligation to exercise universal jurisdiction over claims arising from alleged breaches of peremptory norms of international law, nor is there any consensus of judicial and learned opinion that they should." (para. 27).

[883] For a criticism of this, see A. Cassese (n 463), pp. 106-108; A. Gattini (n 866), pp. 356-362 A. Bianchi (n 838), pp. 246-247.

1.4 Do individuals have a right to a remedy for international humanitarian law violations that is enforceable before domestic courts?

While the obligation of the State to provide remedies for international humanitarian law violations is well established, who the beneficiaries of such a right are – and whether they include individuals – has been at a centre of a legal debate since the late 1990s. This section examines that question while presenting the different legal texts and State practice on the issue. While no position is taken on whether today such a right has been emerging in light of recent State practice and the development of the right to a remedy in other branches of law such as human rights law and international criminal law, it will be, nevertheless, clearly demonstrated that during World War II, when the facts of Ferrini occurred, no such a right existed.

1.4.1 The obligation of State to provide reparation for serious violation of international humanitarian law

Already in 1928 the Permanent Court of International Justice stated in the *Chorzów Factory case (Merits)* that:

> It is a principle of international law, and even a general conception of the law, that any breach of an engagement involves an obligation to make reparation … Reparation is the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself.[884]

This principle was codified by the International Law Commission in Article 31 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, which provides that 'the responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.' More specifically for international humanitarian law, the obligation upon the State to make reparations for violations of international humanitarian law is set in Article 3 of the 1907 Hague Convention IV and Article 91 of 1977 Additional

[884] *Case Concerning the Factory at Chorzów (Germany v Poland)*, (1927) Permanent Court of International Justice (ser. A) No. 9 (26 July 1927), p. 27.

Protocol I.[885] The International Committee of the Red Cross customary law study identified in rule 150 that 'A State responsible for violations of international humanitarian law is required to make full reparation for the loss or injury caused.'[886]

The different forms of reparation include *restitution, compensation, and satisfaction,* and may also include measures of rehabilitation of victims and guarantees of non-repetition.[887] Restitution should, 'whenever possible, restore the victim to the original situation', as it was before the armed conflict. It refers to 'restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property'.[888] Sassòli points that the restitution of real estate in post-conflict peace settlements is a particularly sensitive because it can trigger displacements of the people to whom the property was given during the conflict.[889] Where restitution is not possible, or in cases in which restitution is possible but involves a disproportionate burden compared with the benefit deriving from restitution instead of compensation,[890] States shall provide *compensation.* According to Article 20 of the Basic Principles on the Right to a Remedy, compensation should be provided for any 'economically assessable damage, as appropriate and proportional' to the circumstances, including physical or mental harm; lost opportunities, including employment, education and social benefits; material damages and loss of earnings; moral damage; and costs required for legal or expert assistance. *Satisfaction* repairs immaterial harm. According to Article 22 of the Basic Principles on the Right to a Remedy, 'Satisfaction should include, where applicable, any or all

[885] Article 3 of Hague Convention IV Concerning the Laws and Customs of War of 1907 states: "A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces". Article 91 of the Additional Protocol I of 1977 reproduces the same obligation.

[886] J.M. Henckaerts and L. Doswald-Beck (n 89), p. 540.

[887] See M. Sassòli, 'Reparation' in V. Chetail (ed), *Post-Conflict Peacebuilding: A Lexicon* (Oxford University Press, Oxford, 2009), pp. 281-283; Article 35 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (UNGA Res. 56/83) (12 December 2001) UN Doc A/RES/56/83 (hereinafter: The Draft Articles on State's Responsibility); Articles 19, 20 of The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Humanitarian Law and Serious Violations of Human Rights (UNGA Res. 60/147) (16 December 2005) UN Doc A/RES/60/147 (hereinafter: The Basic Principles on the Right to a Remedy).

[888] The Basic Principles on the Right to a Remedy*, Ibid*, Article 19.

[889] M. Sassòli (n 887), p. 281.

[890] The Draft Articles on State's Responsibility (n 887), Article 35(b).

elements of a whole array of measures', such as verification of facts; public and full disclosure of the truth; the search for the disappeared; assistance in recovering, identifying, and reburying the bodies; an official declaration or judicial decision restoring the dignity, reputation, and rights of the victim; public apologies; legal and administrative sanctions against the persons liable for the violations; commemorations and tributes to the victims; and the inclusion of an account of the violations in teaching materials.

1.4.2 Are individuals the beneficiaries of the State obligation to provide reparation?

i. International humanitarian law treaty law

Article 3 of Hague Convention IV, which reflect norms of customary international law, requires States to pay compensation for violations of international humanitarian law. Yet, it does not specify whether only States or also individuals may be beneficiaries of these rights or the mechanism for reviewing claims for compensation. As the Convention applies between contracting parties and does not explicitly recognize individuals as direct beneficiaries of compensation, because traditionally individuals have not been direct subjects of international law, and because international law conferred upon States the right to exercise diplomatic protection of their nationals,[891] this provision has been traditionally interpreted as dealing with inter-State relations, thus imposing an obligation on a State to pay remedies to the 'injured' State, and not directly conferring a right to individuals.[892] This position was somewhat affirmed by the International Committee of the Red Cross's

[891] "By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure in the person of its subjects, respect for the rules of international law." *Mavrommatis Palestine Concessions (Greece v U.K.*), (1924) Permanent Court of International Justice (ser. A) No. 2 (30 August 1924), p.12.

[892] A.V. Freeman, 'Responsibility of States for Unlawful Acts of their Armed Forces' in Académie de Droit International de La Haye, *Recueil des Cours*, Vol. 88 (Martinus Nijhoff Publishers, Leiden, 1955), p. 333; P.A. Nollkaemper (n 18), p. 781, M. Sassòli (n 887), p. 284, R. Dolzer, 'The Settlement of War-Related Claims: Does International Law Recognize a Victim's Private Right of Action? Lessons after 1945' (2002) 20 Berkeley Journal of International Law, p. 296; C. Tomuschat, 'Reparation in Favour of Individual Victims of Gross Violations of International Human Right and Humanitarian Law' in M. G. Kohen and L. Caflisch (eds), *Promoting Justice, Human Rights and Conflict Resolution through International Law* (Graduate Institute of International Studies, Geneva, 2007), pp. 576-577; M. Frulli (n 845), p. 421 (claiming that while international humanitarian law treaty law has been recognized as conferring rights only upon states, a customary rule conferring that right also upon individuals is emerging).

commentaries on the four Geneva Conventions. According to Articles 51, 52, 131, and 148 respectively of the four Geneva Conventions, States cannot absolve themselves or other States of any liability incurred in respect of grave breaches of the Conventions. With respect to these provisions the commentary says:

> As regards material compensation for breaches of the Convention, it is inconceivable, at least as the law stands today, that claimants should be able to bring a direct action for damages against the State in whose service the person committing the breach was working. Only a State can make such claims on another State, and they form part, in general, of what is called "war reparations".[893]

Article 91 of Additional Protocol I, adopted in 1977, reproduces the same obligation as Article 3 of the Hague Convention IV of 1907. The fact that the article was accepted by the Conference in 1977 without much debate as a mere restatement of customary international law supports the interpretation that Article 91 does not intend to confer a new right to individuals to claim compensation.[894] It should be noted, however, that this interpretation is not relevant in non-international armed conflicts, in which the victims are usually the nationals of the wrongdoing State. Here, direct reparation to the individuals, the beneficiary of the rule, could be sought, relying on international human rights and domestic law, which confers a right to remedy upon the victims, where their rights under these instruments have been violated.[895]

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[893] J. Pictet (n 115), p. 603. See also at p. 211: "The Convention does not give individual men and women the right to claim compensation. The State is answerable to another contracting State and not to the individual." However, Sassòli mentions that State practice after World War II waived reparation for armed aggression and grave violations of humanitarian law after a violation had occurred and the claim had arisen (M. Sassòli (n 887), p. 285). But see the International Committee of the Red Cross position in the drafting process of the Basic principle discussed below: "article 3 of the Hague Convention of 18 October 1907 (currently part of customary law) required States to compensate individuals for violations," in 'The Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law', Note by the High Commissioner for Human Rights, UN Doc E/CN.4/2003/63 (27 December 2002), Annex 1, para. 50.

[894] *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts* (Geneva, 1974-1977), Vol. III, 347; Vol. IX. 355 s., p. 397; L. Zegveld, 'Remedies for Victims of Violations of International Humanitarian Law' (2003) 85 International Review of the Red Cross 851, p. 506; C. Tomuschat, 'Reparation for Victims of Grave Human Rights Violations' (2002) 10 Journal of International and Comparative Law, p. 179; M. Frulli (n 845), p. 416.

[895] M. Sassòli (n 887), p. 284.

A leading opponent of this traditional position is Frits Kalshoven, whose position that Article 3 does confer individual rights for reparation was based on the drafting history of Article 3 of the Hague Convention IV, suggesting that States intended to attribute such a right to enemy or neutral civilians who were involved in a direct contact with the offender.[896] Yet, this position raised in the 1990s does not seem to represent the State practice that followed the drafting of Article 3 – such as the post-World War I and II peace agreements, which were negotiated between States. All were based on the assumption that not the individuals but the victorious States were to be the beneficiaries of the reparations, and this has been the interpretation given to Article 3 by national courts until the late 1990s, as discussed below.

ii. Draft Articles on State Responsibility (2001)

The Draft Articles on State Responsibility deal with the legal consequences of international wrongful acts between States, and do not include the rights of individuals in the secondary rights regime. The beneficiary is the injured State.[897] Thus, on the inter-state level every violation of international humanitarian law gives rise to an obligation upon a State to

[896] F. Kalshoven, 'State Responsibility for Warlike Acts of the Armed Forces: From Article 3 of the Hague Convention IV of 1907 to Article 91 of Additional Protocol I and Beyond' (1991) 40 International and Comparative Quarterly 4, pp. 830-834; F. Kalshoven, 'Some Comments on the International Responsibility of States' in W. Heinegg and V. Epping (eds.), *International Humanitarian Law Facing New Challenges* (Springer, Berlin, 2007), p. 212; Expert Opinions by F. Kalshoven, C. Greenwood and E. David in the *Prisoner-of-War Cases* submitted to the Tokyo High Court (1997), published in H. Fujita/I. Suzuki/K. Nagano (eds), *War and the Rights of Individuals: Renaissance of Individual Compensation* (Nippon Hyoron-sha Co. Ltd. Publishers, Tokyo, 1999), pp. 31-71. Similarly, see R. Pisillo-Mazzeschi, 'Reparation Claims by Individuals for State Breaches of Humanitarian Law and Human Rights: An Overview' (2003) 1 Journal of International Criminal Justice 2, p. 341; R. Pisillo-Mazzeschi, 'International Obligations to Provide for Reparations' Claims?' in A. Randelzhofer, C. Tomuschat (eds), *State Responsibility and the Individual, Reparation in Instances of Grave Violations of Human Rights* (Martin Nijhoff Publishers, The Hague, 1999), pp. 149-172; (holding that an authoritative confirmation of the right to remedy is found in the Basic Principles on the Right to a Remedy, which provides that victims should have a right to adequate, effective, and prompt reparation that is enforceable in the domestic legal order).

[897] Artcile 33(1) of the Draft Articles on State's Responsibility states that: " The obligations of the responsible State set out in this Part may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach". On the Draft Articles on State's Responsibility and reparations see D. Shelton, 'Righting Wrongs: Reparations in the Articles on State Responsibility' (2002) 96 American Journal of International Law 833, at p. 833; M. Sassòli (n 90), p. 401.

make reparation to the injured State, and this structure corresponds to the traditional understanding of Article 3 of Hague Convention IV. The Draft Articles recognize in Article 33(2) that the international responsibility of a State 'is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State' – thus leaving the possibility for individuals to invoke a right to remedy, if it is so established by a primary rule.[898] The commentary on Draft Article 33 in paragraph 3 mentions human rights law as an example of this parallel situation, in which the obligation of States to provide a remedy for wrongful acts is established both *vis-à-vis* the injured State and directly to the individual.[899] This led academics to argue that when international humanitarian law confers directly an individual right (as, for example, in a situation of occupation or detention),[900] then in analogy to primary-secondary rights structure established by the Draft Articles, individuals shall have the right to remedy if their primary international humanitarian law right was violated.[901] Yet, this assumption is valid only if the doctrine of primary and secondary rights, which had been explicitly recognized by the Draft Articles at level of interstate relations, and by specific human rights treaties, can be imported to international humanitarian law. In this regard, the commentary on the Draft Articles clearly mentions that 'it will be a matter for the particular primary rule to determine whether and to what extent persons or entities other than States are entitled to invoke responsibility on their own account.'[902] International humanitarian law does not

[898] The Draft Articles on State's Responsibility (n 887), Commentary of Article 33(2), p. 95, para. 4: "In cases where the primary obligation is owed to a non-State entity, it may be that some procedure is available whereby that entity can invoke the responsibility on its own account and without the intermediation of any State. ... It will be a matter for the particular primary rule to determine whether and to what extent persons or entities other than States are entitled to invoke responsibility on their own account."

[899] "For instance, a State's responsibility for the breach of an obligation under a treaty concerning the protection of human rights may exist towards all the other parties to the treaty, but the individuals concerned should be regarded as the ultimate beneficiaries and in that sense as the holders of the relevant rights. Individual rights under international law may also arise outside the framework of human rights."

[900] In *Hamdan*, the US Supreme Court recognized that Common Article 3 of the Geneva Conventions of 1949 conferred an individual right, which may be invoked in court. Similarly the jurisprudence of the Israeli High Court of Justice recognized several articles related to the law of military occupation as conferring a direct right for individual. Also Professor Sassòli suggests that war victims are direct beneficiaries of international humanitarian law obligations, which are often formulated in a human right-like manner (M. Sassòli (n 90), pp. 419-420).

[901] See for example, R. Pisillo-Mazzeschi (n 896), pp. 341-342.

[902] The Draft Articles on State's Responsibility (n 887), Article 33, Commentary 4.

provide any details in its primary rule 'whether and to what extent persons or entities other than States are entitled to invoke responsibility on their own account.' On the contrary. While the protection of individuals through humanitarian law has become more and more developed on the level of primary rights, this has not been true for secondary procedural rights.[903] Thus under international humanitarian law, a violation of a 'primary right' (an international humanitarian law rule whose beneficiary is directly an individual) will not necessarily give rise to a 'secondary right' (a right to a remedy), and the situation is still that the existence of an individual right is not dependent on the international procedural capacity to assert this right.[904] Therefore, the more feasible possibility for an individual to claim reparation would be to identify the parallel human rights rules and to claim reparations on the basis of a human rights violation.

iii. The Basic Principles on the Right to a Remedy (2005)

The Basic Principles on the Right to a Remedy are not a binding text, yet its legal authority may be significant insofar as it reflects existing treaty and customary international law, as stipulated in paragraph 7 of the preamble:

> *Emphasizing* that the Basic Principles and Guidelines contained herein do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law.

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[903] "A sketchy survey of the available practice shows that primary rights in international humanitarian law does not necessarily translate into secondary rights as a consequence of their breach" – L. Zegveld (n 894), p. 507; C. Tomuschat (n 892), p. 577.

[904] On the distinction between a cause of action (a violation of a primary right deriving from international humanitarian law) and the right of action (the procedural possibility to bring a case before a court and to claim reparation for violation as secondary right), the Permanent Court of International Justice held in the *Peter Pázmány University* case, there is no general rule that a primary right always comes with a procedural capacity to bring an action in the case of a violation of such primary right: "It is scarcely necessary to point out that the capacity to possess civil rights does not necessarily imply the capacity to exercise those rights oneself" – *Appeal from a Judgment of the Hungaro-Czechoslovakl Mixed Arbitral Tribunal*, (Judgment) Permanent Court of International Justice Series A/B, No. 61 (15 December 1933). See also C. Tomuschat, 'Individual Reparation Claims in Instances of Grave Human Rights Violations: The Position under General International Law' in A. Randelzhofer/C. Tomuschat (eds), *State Responsibility and the Individual* (Kluwer Law International, The Hague, 1999), p. 13; R. McCorquodale, 'The Individual and the International Legal System' in M.D. Evans (ed), *International Law* (Oxford University Press, Oxford, 2003), p. 307.

According to Article 11 of the Basic Principles, the right to a remedy include the victim's right to (a) equal and effective access to justice; (b) adequate, effective and prompt reparation for harm suffered; and (c) access to relevant information concerning violations and reparation mechanisms. Yet, the victim's right to these remedies is limited to 'as provided for under international law' [905] and therefore the guidelines can not be seen as establishing a new norms or rights but refer back to existing international humanitarian treaty and customary law.

iv. Post-World War II peace agreements

Clearly, the peace agreements in the aftermath of World War II do not point to a recognition of an individual right to a remedy for an international humanitarian law violation. In the peace agreements concluded with Germany in the aftermath of World War II, the Victorious Allied Powers, convening in Potsdam, decided that war reparations should be made according to the classical inter-State scheme. Thus, the entire process of reparation was based on the understanding that compensation would be effected within the framework of inter-State relationships. Indeed, 'approximately 95% of all claims were regulated by lump-sum agreements with the respective home state of the victims, which received money and distributed it under own discretion without there being the intent to provide full coverage for every individual damage.'[906] Similarly, the San Francisco Peace Treaty of 1951 recognized Japan's obligation to pay reparations to the states invaded during the war and the determination of the exact reparations was left to following bilateral agreements, which did not allow claims by individuals.[907]

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[905] The Basic Principles on a right to a Remedy (n 887), Articles 11, 15 and 18.

[906] R. Hofmann and F. Riemann, 'Compensation for victims of war :Background Report' 17 March 2004 (International Law Association), p.1-49 (hereinafter: ILA Background Report).

[907] "Even if we assume, however, as the appellants contend, that the 1951 Treaty (1951 Treaty of Peace between Japan and the Allied Powers, 3 U.S.T. 3169) does not of its own force deprive the courts of the United States of jurisdiction over their claims, it is pellucidly clear the Allied Powers intended that all war-related claims against Japan be resolved through government-to-government negotiations rather than through private tort suits. Indeed, Article 26 of the Treaty obligated Japan to enter "bilateral" peace treaties with non-Allied states "on the same or substantially the same terms as are provided for in the present treaty," which indicates the Allied Powers expected Japan to resolve other states' claims, like their own, through government-to-government agreement." The *Hwang Geum Joo et al. v Japan,* 367 U.S. App. D.C. 45 (D.C. Cir. 2005) (hereinafter: *The Comfort Women* case).

> As the agreements with Germany, the agreements with Japan clearly show that the characteristics of traditional interstate settlements which allows waiving of responsibility through the discretion of the state and the exclusion of individual claims was the general State practice in that time…Overall, the post-war reparation agreements with Japan showed clear characteristics of classic interstate settlements with lump-sum payments that the recipient state would distribute, while excluding individual claims.[908]

Legally, according to the mechanism of diplomatic protection, States may waive the rights of their nationals in bilateral agreements.[909] However, Gattini and Sassòli point out that a settlement can not condone a *jus cogens* violations.[910] According to Articles 51, 52, 131, and 148 respectively of the four Geneva Conventions: 'No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of [grave] breaches [to the Conventions].' While the International Committee of the Red Cross commentary clarifies that this excludes waiving reparation for war crimes,[911] D'Argent demonstrates through the preparatory work that these provisions intended to exclude only the possibility of war criminals being exempted from criminal liability in cases in which States had waived reparation.[912]

As for the significance of the peace agreements in the case of Ferrini: by virtue of Article 77 (4) of the Peace Treaty of 10 February 1947, Italy waived on behalf of its nationals any right to request compensation from Germany and German nationals in relation to damages occurred during World War II.[913] In this context, Germany before the ICJ argued that:

> By claiming that individual suits can be entertained by Italian courts, the Corte di Cassazione now seeks to topple the fundamental determinations made in Potsdam. Its intention is to open up

[908] ILA Background Report (n 906), p. 11-12. See also R. Dolzer (n 892), pp. 310-335. H.N. Scheiber, 'Taking Responsibility: Moral and Historical Perspectives on the Japanese War-Reparations Issues' (2002) 20 Berkeley Journal of International Law 233, pp. 235-238. According to the Background paper: "The reparation regime after World War I was firmly grounded on the view that reparations were inter-state matters. The determination of individual damages was only part of a larger effort to calculate the inter-state obligations to pay reparation."

[909] M. Sassòli (n 887), p. 284.

[910] M. Sassòli, *Ibid*; A. Gattini (n 866), p. 366.

[911] J. Pictet (n 115), p. 603.

[912] P. D'Argent, *Les Réparations de Guerre en Droit International Public* (Bruylant, Brussels, 2003), pp. 771–774.

[913] The agreement is valid with relation to the FRG, even if it was not a party to the Peace Treaty, by virtue of the Bonn Agreement of 2 June 1961 between the Italy and the FRG.

> a second level of reparation, reparation in each and every individual case, alongside the collective mode of settlement agreed upon by the Victorious Powers which, in 1945, acted as trustees of the entire group of States that had declared war on Germany, among them also Italy.[914]

It is hard to see how more then 50 years after the agreements, national courts can today re-examine their validity.[915] As stated by Gattini, in the context of settlement with Japan: 'At this point, this complex settlement cannot be put in jeopardy because of change in overall political conditions.'[916] Allowing national courts to review settlements would destroy the entire architecture of the peace settlement that received definite approval, and would amount to 'the overthrow of a legally consolidated situation under international law.'[917]

Post-war settlements need to stabilize the relations of former belligerent states, to re-establish friendly relations and recover internal societies, which often suffer from economic destruction. A variety of interests are negotiated and finally compromised. If 50 years later, individuals could ask national courts to review their validity, peace agreements, the cornerstone of conflict resolution, would be jeopardized – a fact that may impose additional difficulties to reach a post-conflict era. As proposed, political pressure for including reparations should be done during the settlements negotiation, and not decades later through the courts.[918] Moreover, if post-war peace settlements could be reviewed by the courts, it may lead to forum shopping and even contradictory rulings, which would lead to a 'legal disorder.'[919]

v. National case law

National case law dealing with claims for reparations war crimes in the aftermath of the Second World War followed this line and were almost all rejected. Cases submitted

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[914] *Oral Submission before the International Court of Justice for Germany* (n 828), p. 35.

[915] But see the interpretation given by the Italian Court of Cassation in the *Civitella* case (October 2008), in which the court dismissed the argument that the action of Italian nationals was foreclosed by the 1947 Treaty or the Bonn Agreement. See A. Ciampi (n 843), p. 612.

[916] A. Gattini (n 866), p. 364.

[917] *Ibid*, p. 366.

[918] *Ibid*, pp. 365-366.

[919] "As a result of such undermining of the principle of State immunity, legal proceedings before the courts would *not settle disputes* but would instead *create new disputes* and legal disorder." *Oral Submission before the International Court of Justice for Italy* (n 19), p. 18.

before the courts of the alleged wrongdoing State were mainly rejected on the basis that Article 3 of Hague Convention IV does not confer an individual right to reparation but only upon the injured State. In this category of cases the jurisprudence comes mainly from Japanese and German courts.

Japanese courts

The Japanese Courts confirmed in a number of cases that Article 3 of the 1907 Hague Convention IV does not provide a right to individual victims of international humanitarian law violations to bring claims for compensation in domestic courts. In the *Shimoda* case, the plaintiffs, survivors of the atomic bombs in Hiroshima and Nagasaki claimed that signing the 1951 Peace Treaty with the US, in which the Japanese government had waived their right to seek compensation from the US, obliged the government itself to pay them the compensation, which had been wrongfully waived by the agreements. While the judgment clearly stated that the use of the atomic bomb was a clear violation of international humanitarian law,[920] the court nevertheless supported the argument of the Japanese government and ruled that individuals had no right to remedy under international law.

> It is an established principle of international law that when a belligerent causes damage to the other belligerent by illegal acts of hostility in international law, the belligerent must compensate the other belligerent for the damage.[921]

More recently, in 1998, the Tokyo District court stated in the *Filipino "Comfort Women" case*:

> throughout its close examination of texts and the drafting process of Article 3 of the Hague Convention, the Court has been unable to recognize the alleged rule of customary international law that provides individual residents in an occupied territory the right to claim compensation

[920] The court relied on a number of treaties as the Convention Respecting the Laws and Customs of War and Land of 1899, Declaration prohibiting aerial bombardment of 1907, the Hague Draft Rules of Air Warfare of 1922-1923, and Protocol prohibiting the use in war of asphyxiating, deleterious or other gases and bacteriological methods of warfare.

[921] *Shimoda et al. v The State,* Tokyo District Court (7 December 1963) (translated in (1964) 8 The Japanese Annual of International Law, p. 231). On the case see R. Falk, 'The Shimoda Case: A Legal Appraisal of the Atomic Attacks on Hiroshima and Nagasaki' (1965) 59 American Journal of International Law 4, pp. 759-793. Y. Tanaka and R. Falk, 'The Atomic Bombing, The Tokyo War Crimes Tribunal and the Shimoda Case: Lessons for Anti-Nuclear Legal Movements' (2009) 44 The Asia-Pacific Journal 3.

directly against the occupying State for damages resulting from a violation of the Hague Regulations committed by members of the occupying forces. In addition, throughout its careful survey of all records of the case, the Court was unable to find any rule of customary international law apart from Article 3 of the Hague Convention that provides the principle mentioned above.[922]

German Courts

The Italian Military Internees case: After *Ferrini*, a similar case on forced labour during World War II was brought to the German Federal Constitutional Court. It held in June 2004 that an individual right to reparation did not exist at the time of World War II under either domestic or international law and it therefore dismissed the complaint. However, interestingly, while the court was not ready to confer an individual right deriving from Article 3 of the Hague Convention, it was ready to recognize such a right based on domestic legislation. However, it ruled that even if the inter-State regime of State responsibility for wrongful acts does not preclude the possibility of a domestic system to allow individuals to claim remedies, this, however, 'does not allow the inference of a rule or assumption according to which a State violating international law must grant claims to injured persons on the basis of its domestic law.'[923]

[922] *Filipino "Comfort Women"* case, Tokyo District Court (9 October 1998). The comfort women cases refer to several claims of compensation of women who during the Japanese occupation of China, Korea and the Philippines during WWII, were forced to perform sexual slavery. All the claims based on Article 3 of the Hague Convention IV of 1907 were rejected. Only one decision in 1998 attributed damages to Korean women on the basis of a constitutional obligation to apologize and compensate for the harm done under Japanese occupation. However, this ruling was reversed on appeal in March 2001 by the Hiroshima High Court. 15 Asian women brought a suit against Japan under the Alien Tort Statute before US courts. It was rejected on grounds of State immunity: *Hwang Geum Joo v Japan*, 172 F.Supp. 2d 52 (D.D.C. 2001). And on appeal it was dismissed on the basis of the political question doctrine: 413 F.3d 45 (2005).

[923] "Article 3 of the 1907 Hague Convention, as a principle, does not establish an individual compensation claim, but only codifies the general basic rule of international law (comp. Article 1 of the 2001 ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts) regarding the liability to pay compensation between States party. This secondary claim for compensation, however, exists only in the international law relation between the States concerned. Insofar, it differs from the concerned individuals' primary right to respect for the prohibitions of international humanitarian law, which exists in the international law relation between an occupying State and the population living in the territory occupied. The basic principle of diplomatic protection does not categorically preclude a violating State's domestic law from granting an individual claim to an individual injured, in addition to the international law claims of the individual's home State [..]. That this is not precluded, however, "does not allow the inference of a rule or assumption according to which a State violating

On November 2006, the German Federal High Court of Justice examined in *35 citizens of the Former Federal Republic of Yugoslavia v Germany* the question whether individuals have the right to directly claim compensation for violations of international humanitarian law before a domestic court.[924] The facts of the case dealt with the incident involving NATO's bombing of a bridge at Varvarin, Serbia, on 30 May 1999, in which ten people were killed and 30 others injured, all civilians. Thirty-five victims and relatives of this bombing, all citizens of the former Federal Republic of Yugoslavia, claimed compensation from Germany in a German court. The claimants directly based their right for remedies for the alleged international humanitarian law violations on Article 3 of Hague Convention IV and Article 91 of Additional Protocol I. The court held that under these provisions individuals have no right to compensation against a foreign State for violations of international humanitarian law; rather it is a State that needs to bring a claim for violations. Although the court mentions the developments in international law since the 1939–1945 War according to which the individual constitutes 'at least … a partial subject of international law', this does not confer rights from all treaties. In particular, the court states that 'the rule still applies that, irrespective of a primary claim by the affected people for the observance of international law, the country of nationality is still basically only entitled to a secondary claim for compensation for the unlawful acts of a foreign State against its citizens.' The court further stated that this was undoubtedly the state of the law when the Hague Convention IV was adopted in 1907 and has remained unchanged by Additional Protocol I. Furthermore, the court rules that under customary international law no other rule has evolved as supported by Draft Articles on the Responsibility of States for Internationally Wrongful Acts, which explicitly discuss the right of States to invoke the responsibility of other states for internationally wrongful acts. The

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international law must grant claims to injured persons on the basis of its domestic law." *Associazione Nazionale Reduci dalla Prigionia dall'Internamento e dalla Guerra di Liberazione and Others v Germany*, (Joint Constitutional Complaint) BVerfG, 2 BvR 1379/01 (28 June 2004), paras. 38, 39 (hereinafter: *The Italian Military Internees* case). Similarly, see also the same case before the European Court of Human Rights: *Associazione Nazionale Reduci dalla Prigionia dall'Internamento e dalla Guerra di Liberazione and Others v Germany*, (Decision as to the Admissibility) European Court of Human Rights No. 45563/04 (4 September 2007), in which Germany was not attributed responsibility for the damage caused by the German Reich, the European Court of Human Rights unanimously stated that, according to the Hague Convention of 1907 or the Additional Protocol I of 1977, there is no individual right for compensation for war crimes (hereinafter: *The European Court case on the Italian Military Internees)*.

[924] *35 citizens of the Former Federal Republic of Yugoslavia v Germany*, (Appeal Judgment) BGHZ 166, 384; III ZR 190/05 (2 November 2006).

court recognizes that there is a trend 'that has been developing since 1945, i.e., to recognition of the exercise of rights by individual people, in international law literature', but the court also observes that at this stage it is an utopian position 'no more than the statement of an *ideal* in the area of international humanitarian law, to be achieved in the future but not yet incorporated in the practice of international law.'[925] It further mentions that 'only futuristic goals' can be derived from the proposal of the Basic Principles and Guidelines for the Legal protection and Remedy of the Rights of Victims of Violations of International Human Rights Law or International Humanitarian Law) and that it is too general to provide a 'dynamic' interpretation of Article 91 of Additional Protocol I.

Other jurisdictions

Other jurisdiction had ruled in a similar way. In the *Goldstar case* in 1992 relating to the intervention by the US in Panama, a US Court of Appeals found that Article 3 of 1907 Hague Convention IV did not provide a private right of action.[926] The Italian Court of Cassation in *Markovic,* a case that also dealt with reparation claims for alleged violation of international humanitarian law committed in Serbia by the NATO forces, was of the opinion that 'the legislation that gave effect to the instruments of international law on which the applicants relied did not expressly afford injured parties a right to claim reparation from the State for damage sustained as a result of a violation of the rules of international law.'[927]

The only jurisdiction that I found that explicitly applied Article 3 as conferring an individual right upon individuals is Greece.[928] Having rejected Germany's claim of immunity, the Court determined that the claim could be based on Article 3 of 1907 Hague Convention IV and Article 46 of the 1907 Hague Regulations, and found that in the absence of a rule of international law prohibiting this, the claims could be made by individuals and not necessarily by their State. Nonetheless, another case is worth mentioning. The Israeli

[925] See also: "There was a tendency in international law towards the recognition that individuals may *enforce* individual rights. For the field of international humanitarian law, this was however not more than the articulation of an idealized expectation as to the development of international law. There was also no evidence for such a development in international or foreign court decisions."

[926] *Goldstar (Panama) S.A. v. United States*, 967 F. 2d. 965, 968-969 (4th Cir. 1992).

[927] See in *The Marković* case (n 844), para. 106.

[928]Greek Court of First Instance of Leivadia, Prefecture of Voiotia (30 October 1997). However, as discuss above the litigations were prevented from being enforced due to state immunity.

High Court of Justice in the Targeted Killing case (2006) stated, basing itself on Article 3, that in appropriate cases in which civilians are damaged during a targeted killing operation, they should be compensated.[929]

vi. Ad hoc mechanism and other practices since the 1990s

More recent State practice, which attributes individual reparations for the violation of international humanitarian law, has led to a trend, significantly lead by academics, who seek to establish, in light of the developing position of the individual and the right to remedy established in human rights law, and which is developing in the sphere of international criminal law, the individual right to remedy also for international humanitarian law violations.[930]

The 2005 International Committee of the Red Cross customary study identities that, 'There is an increasing trend in favour of enabling individual victims of violations of international humanitarian law to seek reparation directly from the responsible State…Reparation has been provided directly to individuals via different procedures, in particular via mechanisms set up by inter-State agreements, via unilateral State acts such as national legislation or reparation sought by individuals directly before national courts.'[931] Mostly, however, the mechanisms allowing victims of breaches of international humanitarian law to claim remedies were ad hoc mechanisms established by specific agreements, such as the Eritrea-Ethiopia Claims Commission and the special mechanisms set in Bosnia-Herzegovina and Kosovo,[932] or, exceptionally, by a resolution of the UN Security Council.

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[929] *The Targeted Killing* case (n 454), para. 40: "In appropriate cases it is appropriate to pay compensation as a result of harm caused to an innocent civilian (*see [..]* §3 of *The Hague Regulations*; §91 of *The First Protocol*)."

[930] As observed by Professor Gaeta, "despite the expansion and development of international law, and in more recent times, of international criminal law, victims of serious violations of international humanitarian law are still not considered to be entitled to reparation under international law". P. Gaeta, 'Are Victims of Serious Violations of International Humanitarian Law Entitled to Compensation?' in O. Ben-Naftali (ed), *International Human Rights and Humanitarian Law* (Oxford University Press, Oxford, 2011), p. 307.

[931] J.M. Henckaerts and L. Doswald-Beck (n 89), p. 541. See also: 'Report on the Protection of War Victims' (Geneva, June 1993), Section 4.3 (1993) International Review of the Red Cross 296, pp. 391-445, in which the International Committee of the Red Cross recommended that a procedure shall be set to provide reparation for damage inflicted on the victims of violations of international humanitarian law "so as to enable them to receive the benefits to which they are entitled."

[932] 'General Framework Agreement for Peace in Bosnia and Herzegovina' (Paris, 14 December 1995), Annex 7: Agreement on Refugees and Displaced Persons (reproduced in 35 ILM 136 (1996)). 'Regulation No. 1999/23 of

The United Nations Compensation Commission (UNCC) established in 1991 by UN Security Council Resolution 687, concerned claims for compensation for damage as a result of the Iraq invasion of Kuwait.[933] It was the first time that the UN empowered individuals to assert claims through the reparation regime established in the aftermath of the armed conflict. As has been observed: 'The UNCC has been faced with over 2.6 million claims seeking a total of nearly $350 billion in compensation, which almost all came from individual claimants. Given the limited resources the Commission has at its disposal it was clear that it could in the end only provide…"rough" justice for the claimants as a whole, rather than "precise"' justice in each individual.'[934] Another example is the Eritrea-Ethiopia Claims Commission (EECC) established by the Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea of 12 December 2000. This Commission has the competence to decide claims arising out of violations of international humanitarian law, and it reviewed approximately 400,000 claims submitted by individuals of the two States.[935]

As far as individual criminal responsibility for war crimes is concerned, the mechanism evolved from ad-hoc mechanisms to a permanent court – the ICC. According to the Rome Statute, victims have the direct possibility to have a remedy from the perpetrator as set by Article 75(2) of the Rome Statute stating that: 'The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.' Such an order can be requested by the victim who is entitled to apply to the court. Article 79 provides for the establishment of a trust fund for the benefit of the victims of crimes within the jurisdiction of the Court and their

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15 November 1999 on the Establishment of the Housing and Property Directorate and the Housing and Property Claims Commission'.

[933] N. Wühler, 'The United Nations Compensation Commission' in A. Randelzhofer/C. Tomuschat (eds), *State Responsibility and the Individual* (The Hague et al, 1999), pp. 213- 229; A. Gattini, 'The UN Compensation Commission: Old Rules, New Procedures on War Reparations' (2002) 13 European Journal of International Law 1, pp. 161-181. V. Heiskanen, 'The United Nations Compensation Commission' (2002) 296 Recueil des Cours, p. 390.

[934] ILA Background Report (n 906), p.18.

[935] L. Zegveld (n 894), p. 522. See also N. Klein 'State Responsibility for International Humanitarian Law Violations and the Work of the Eritrea Ethiopia Claims Commission So Far' (2005) 47 German Yearbook of International Law, pp. 261-264.

families. Nonetheless this mechanism is available only to victims of crimes prosecuted by the ICC.[936]

Reports of International Commission of Inquiries seem to adopt the position that individuals do a have right for remedy. In the Darfur report it was stated that gross breaches of human rights impose an obligation on States of which the perpetrators are nationals to make reparation.[937] The UN Fact Finding Mission to Gaza recommended that: 'The international community needs to provide an additional or alternative mechanism of compensation by Israel for damage or loss incurred by Palestinian civilians during the military operations.'[938] The ICJ, in the *Opinion on the Wall*, affirmed that Israel has the obligation to make reparation for the damage caused to all natural and legal persons concerned.[939]

Even if international humanitarian law does not attribute a direct right to a remedy for victims of international humanitarian law violations, national courts still have a major role in enforcing international humanitarian law in the context of civil suits. That role will be affected through domestic legislation that provides a right to remedy for victims of individual/State's acts, which were committed in violation of the law (when in international humanitarian law is among the provisions of national law). The right for remedy is thus not attributed directly by international humanitarian law, but through national tort legislation. Examples for such cases are the US ATS cases and the Bilin Canadian case discussed above in Chapter 3.

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[936] L. Zegveld, 'Victims' Reparation Claims and International Criminal courts - Incompatible Values?' (2010) 8 Journal International Criminal Justice 1, pp. 86-92. On a possible impact of the development of the right to a remedy in international criminal law over the right of individual *vis-à-vis* a state for international humanitarian law violation, see P. Gaeta, (n 930), pp. 321-322.

[937] 'Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, pursuant to Security Council resolution 1564 of 18 September 2004' (Geneva, 25 January 2005), paras. 598, 601. According to P. Gaeta (n 930), p. 320 the commission "clearly wanted to refer also to serious violations of international humanitarian law."

[938] *The Goldstone report* (n 810), p. 403.

[939] *ICJ Opinion on the Wall* (n 219), para. 152. The rules of military occupations were specifically recognized as conferring individual rights by the German Constitutional Court in *The Italian Military Internees* case (n 923).

1.4.3 The question of intertemporal law[940]

Whether or not in light of these mechanisms and recent practices an individual right for international humanitarian law violations that can be enforced by national court has emerged, as a number of authors suggest,[941] it is beyond doubt that during World War II such a right did not exist. As Professor Tomuschat has noted 'the notion that individual might derive direct claims from a violation of international humanitarian law is a child of our time and in any event does not go back beyond the emergence of the human rights movement.'[942] Similarly, the International Law Association Committee on Compensation for Victims of War, which had been seized to examine whether a right to remedy has emerged, recognized such a right in its 2010 resolution according to which: 'Victims of armed conflict have a right to reparation from the responsible parties.'[943] However, it explicitly mentioned in the commentary to this resolution that a right to remedy emerged since the 1990s and that there is no doubt that during World War II, an individual right to reparation was not recognised:

> The proliferation of State practice shows that modern international law recognizes the entitlement of the individual to reparation for the violation of international law during armed conflict from the beginning of the 1990s onwards. Consistent with the concept of intertemporal law, an individual right to reparation has not been recognised for violations

[940] The doctrine of intertemporal law (=non retroactivity) has its origin in the *Island of Palmas* case: "A juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled." *United States v the Netherlands*, 2 R.I.A.A. 829 (4 April 1928) (hereinafter: *Island of Palmas* case).

[941] See, for example, P. Gaeta (n 930); L.T. Lee, 'The Right of Victims of War to Compensation' in R. St. J. Macdonald (ed), *Essays in Honour of Wang Tieya* (Martinus Nijhoff, Dordrecht, 1993), p. 489; E.C. Gillard (n 842), p. 536; F. Kalshoven (n 896), p. 827; L. Zegveld (n 894), p. 506; R. Pisillo-Mazzeschi (n 896), p. 342; R. Hofmann, 'Victims of Violations of International Humanitarian Law: Do They Have an Individual Right to Reparation against States under International Law?' in P.M. Dupuy, B. Fassbender, M.N. Shaw and K.P. Sommermann (eds), *Common Values in International Law – Essays in Honour of Christian Tomuschat*, (N.P. Engel Verlag, Kehl, 2006), p. 357.

[942] C. Tomuschat (n 892), p. 576.

[943] Article 6 of International Law Association Resolution 2/2010, 'Reparation for Victims of Armed Conflict' adopted at the 74th Conference of the International Law Association (The Hague, The Netherlands, 15-20 August 2010).

> of international law committed prior to that time. In particular, it is not recognized for violations of international law committed during World War II. [944]

This was reaffirmed in 2007 by the European Court of Human Rights:

> there was no legal provision, whether of an international or of a domestic character, supporting the applicants' claims against the Federal Republic of Germany. … neither international public law nor domestic law recognised claims for compensation for forced labour at the time … [945]

Germany, therefore pointed before the ICJ that:

> … the entire reparation regime was founded on the premise that reparation should be sought and made exclusively in a global manner on an inter-State level. This premise underlay not only the Potsdam Agreement of 1945 and the Peace Treaty with Italy, but also the two 1961 Agreements between Germany and Italy. A reparation regime of that kind cannot be subverted retroactively. [946]

Good public policy considerations support the conclusion that individuals shall not claim individually reparation before national courts. As Italian post-*Ferrini* litigation shows,[947] there

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[944] International Law Association, 'Report of the International Committee on Compensation for Victims of Armed Conflict, 'Draft Declaration of International Law Principles on Compensation for Victims of War (Substantive issues)'' (Rio De Janeiro, 2008), p. 13. See also International Law Association, 'Report of the International Committee on Compensation for Victims of Armed Conflict, 'Draft Declaration of International Law Principles on Compensation for Victims of War Armed Conflict (Substantive issues)'' (The Hague, 2010), p. 14: "It is remarkable that these judgements (*Ferrini* and *Distomo*) stemming from events that took place during World War II have strongly been influenced by post-war developments in international human rights law and by the modern view on the right to reparation. This collides with the concept of intertemporal law, according to which no individual right to reparation could arise at the time when the violations of international law were committed, as no such individual right was at that time recognized by the majority of States."

[945] *The European Court case on the Italian Military Internees* (n 923), para. 4.

[946] *The Memorial of Federal Republic of Germany* (n 846), p. 12.

[947] In May 2008, in the *Maietta* and the *Mantelli* cases, the Italian Court of Cassation held that immunity of foreign States is abrogated with respect to crimes against humanity (the court ruled that when a conflict arises between the customary rule of state immunity from foreign courts and the principle of protection of fundamental human rights, the latter must prevail, including the victims' judicially enforceable right to seek reparation. It expressly invoked the principle that human rights must be protected by granting individuals access to means of judicial protection for compensation of damages caused by these crimes). See A. Ciampi (n 843), p. 604. In

is the risk of a dramatic increase in the number of lawsuits in the courts of the States that allow effective access to court. Many other cases were filed by Italian citizens who were also victims of forced labour in Germany. Currently about 80 cases are pending, with almost 500 plaintiffs.[948] In post-conflict situations, thousands or even millions of claims may be brought to courts, which do not have the material capacities to deal with such a quantity of cases. Also, legal procedures do not necessarily bring justice and equal distribution of reparation. In most of the cases access to justice depend to a certain degree on social standing: 'National courts are likely to award very large sums of money to a very small number of victims – usually the most educated and well informed.'[949] Sassòli points out the fact that in all legal systems the concept of reparation presupposes that violations are exceptional. Yet when violation has become the rule, it may be possible that the concept of reparation could not be applied. Situations dealing with individual claims in courts may lead to even more injustice related to the legal procedure, such as lack of access to courts and difficulties in gathering evidence, and more substantial reparation for wealthy victims who can afford the services of better lawyers.[950]

Peace settlements negotiated at the end of the war take into account, as far as reparation is concerned, the material ability of the sides to execute them, while it is put in a more global historical context of recognition of responsibility and apology, which are not less important in a post-war society. However, a national judge adjudicating between two litigating parties may not take into account the complexity of the war recovery, the social project that need to accompany it, and the global perspective on the historical events.[951] Indeed, sometimes the reparation of an individual victims have to be compromised with the post-conflict recovery prospective, in which often the responsible State is in a harsh economic

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Mantelli, the court states that it would be *paradoxical* for the international legal system, which allows the exercise of civil jurisdiction vis-à-vis foreign States in the event of violation of contractual obligations, to exclude it when faced with much graver violations, such as those which constitute crimes against humanity. "To state the contrary would mean to use a merely procedural rule to achieve an aim of paramount injustice." *The Counter-Memorial of Italy* (n 841), para. 4.73. The Italian Supreme court even order Germany to pay compensation as "civil responsible party" ("responsabile civile") in a criminal proceeding against one of the German soldiers who had participated in a massacre in the Italian village of Civitella.

[948] *Oral Submission before the International Court of Justice for Germany* (n 828), p. 17.

[949] E.C. Gillard (n 842), p. 549.

[950] M. Sassòli (n 887), p. 288.

[951] P. De Greiff, 'Justice and Reparations' in P. De Greiff (ed), *The Handbook of Reparations* (Oxford University Press, Oxford, 2006), pp. 454–466.

situations, and the burden will pose also on innocent civilians.[952] Conventional agreements permit injured nations to have reparation, and, on the other hand, permit the responsible nation to survive and thereby also to be able to pay the reparation. If every individual brought an individual claim before a judicial body, such an overall assessment is impossible. Thus, it seems that preference should be given to establishing ad hoc mechanisms and special conventional regimes that may attribute a role for the individual victims, and which take the material possibility of reparation into account. Nonetheless, these are not perfect solutions. As pointed by Sassòli:

> Mass compensation programmes inevitably reopen past wounds, including those of the victims. When either those who are supposed to be its beneficiaries, or those who must finance it, perceive reparation as being unfair it may even contribute to creating new tensions and conflicts. For the sake of those who are to finance reparation, the process should go hand in hand with an educational account of historical facts.[953]

2. When Activism Appears in Court: The Role of National Judges

> It should also be reiterated that in the international community it does not fall to domestic courts to develop the law. Judicial bodies may follow the views held and practices observed as they change over time. But they need broad political support for their moves. They cannot push ahead with reformist ideas. In that regard, the Corte di Cassazione stands on shaky ground. Its case law lacks solid support – any support outside the Italian borders.[954]

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[952] Sassòli mentions two cases: "After World War I, Germany's situation revealed the negative consequences that reparations can have, not only on the country's economy, but also on the international financial system and the resurgence of armed conflicts more generally. In a similar way, reparations by Iraq through the UN Compensation Commission, financed through the "oil-for-food" programme, have shown that reparations may have catastrophic humanitarian consequences for innocent people." M. Sassòli (n 887), p. 289.

[953] M. Sassòli, *Ibid*, p. 283. See also Report of the Secretary-General, 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (23 August 2004) Un Doc S/2004/616, para. 54: "Material forms of reparation present perhaps the greatest challenges [..]. Difficult questions include who is included among the victims to compensate, how much compensation is to be rewarded, what kinds of harm are to be covered, how harm is to be quantified, how different kinds of harm are to be compared and compensated and how compensation is to be distributed."

[954] *The Memorial of Federal Republic of Germany* (n 846), p.71.

The ICJ is about to rule on whether national courts can develop a new rule in order to achieve utopian goals? In the pending case *Germany v. Italy* the ICJ will decide whether national judges are required to apply existing international law or, in relevant circumstances as required by *justice*, may also be an active contributor to the elaboration of international law and competent to render activist rulings. Thus, the ICJ will need to decide not only the fate of State immunity in civil law cases arising from *jus cogens* violations, but more generally the function of national courts within the international legal order and the role of national courts in applying international law.[955] In fact, the role of national judges is to be judged by international judges, as Professor Dupuy stated in the opening of his Oral submission before the ICJ:

> il est une façon simple de caractériser l'affaire qui nous réunit : il s'agit d'un juge qui en juge un autre… Il en résulte que la Cour internationale de Justice, même si elle ne peut statutairement prétendre à être tout à fait la Cour constitutionnelle d'un ordre juridique international comme placé au-dessus des Etats nationaux et de leurs droits, est tout de même conduite, de plus en plus souvent, à vérifier que les juges internes, devenus ainsi fréquemment les «juges de droit commun» du droit international, appliquent ce droit correctement.[956]

A close reading of the Italian position before the ICJ shows that the utopian policy considerations were an explicit factor in arriving at the Italian ruling:

> Italian judges, facing such a blatant and long-lasting denial of reparation in violation of all relevant rules of international law, could not simply turn down victims' claims by recognizing the principle of State immunity. Clearly, the judges had the feeling that by applying a purely procedural principle in the face of the gravity of crimes for which no reparation has yet been

[955] For a similar view, raised in 2005 just after Ferrini, long before the ICJ proceedings: "This terrain [State immunity] is one where the strain between conservatism and innovation-which marks the contemporary epoch of international law-is most evident [..]. To argue in favour or against the immunity of foreign states and their organs before municipal courts for alleged egregious violations of international human rights and humanitarian law is tantamount to taking a stance on a variety of issues that remain controversial, including… What role should domestic courts play in adjudicating claims involving issues of international law." A. Bianchi (n 838), pp. 247-248.

[956] "Ce n'est pas la première fois que le juge international juge des Etats à travers leurs juridictions internes. C'est, à dire vrai, *de plus en plus* fréquent! [..] on peut compter jusqu'à dix affaires portées devant votre prétoire depuis douze ans, soit en moyenne près d'une par an!" *Oral Submission before the International Court of Justice for Italy* (n 19), p. 51. For the list of cases, see there in foot note 54.

> made, they would create a typical situation of denial of justice. Had Italian courts granted immunity they would have put a full stop to the entire question of reparation to thousands of victims. They would have effectively denied any possibility for these claims to achieve any objective. On the contrary, *they had very serious justifications* for setting aside the immunity of Germany and verifying whether the claims were substantiated on the merits.[957]

Judges who do their normal job and apply the law to the facts of the case that is before them, do not need "*good reasons*"[958] or "*very serious justifications"* to legitimise their ruling. Although not detached from recent developments in international law that favour the interest of persons over that of States in situations of gross violations of human rights and humanitarian law, the Italian Court of Cassation introduced a new practice, in order to render justice and to make international rules coherent and meaningful. As argued by Germany:

> The judges slipped into the role of legislators, wishing to remedy the structural weakness of international law, to wit, that it lacks a complete set of remedies. It may indeed be desirable to improve the effectiveness of international law by complementing the enforcement mechanisms. Yet, this is what international law is still about at the present stage of its development.[959]

Thus, the court will have to decide whether, as Germany pointed out:

> the Corte di Cassazione wishes to revolutionize the system of operation and enforcement of international law, decreeing that, where there appears to be a lacuna in the available array of remedies, domestic judges should simply fill in that gap - and this is wrong. [960]

Or whether the position of the Italian Court is the one defended by Professor Dupuy:

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[957] *The Counter-Memorial of Italy* (n 841), para. 6.16.

[958] *Ibid*, para. 6.17.

[959] *The Memorial of Federal Republic of Germany* (n 846), p. 13. See also A. Gattini: "changing or developing the content of the rule, judicial activism alone is not sufficient and, to date, the position of the governments on our issue has been quite inflexible." A. Gattini (n 838), pp. 241-242.

[960] *Oral Submission before the International Court of Justice for Germany* (n 828), pp. 25-26. See also *The Memorial of Federal Republic of Germany* (n 846), para. 62: "Processes of legal change must be in consonance with the general movement of the system of international law in its entirety. It cannot be denied that in the field of sovereign immunity, in particular, domestic courts have played a considerable role, given the nature of the subject-matter. But judges are not legitimated to place themselves at the forefront of processes of change."

> cette affaire manifeste à la fois la noblesse et la difficulté de la fonction de juger. Dans un droit international général dont les évolutions successives dépendent du concours de la volonté des Etats, le juge, interne comme international, n'est plus seulement « la bouche de la loi » tel que le définissait Montesquieu. Pour reprendre les termes de Sir Hersch Lauterpacht en 1958, cités trente ans plus tard par Mme Rosalyn Higgins au début de son cours général à l'Académie de La Haye : 'the judge does not "find rules" but he makes choices … between claims which have varying degrees of legal merits.'[961]

Indeed, as long as the judge 'makes choices between claims which have varying degrees of legal merits' the judge performs his or her task within the normative application scale, which allows a certain amount of discretion. Yet, while a judge chooses a stance that goes beyond that legitimate 'normative application' scale, and enters the twilight zone of utopia, that choice is no longer an implementation of a legal rule, but the execution of a moral value.

[961] *Oral Submission before the International Court of Justice for Italy* (n 19), p. 62.

Conclusion

The period between 1949, the drafting of the Fourth Geneva Convention, to the adoption of the Rome Statute and the creation of the ICC based on the complementary principle of jurisdiction in 1998, can be characterized as the codification years in modern times of international humanitarian law, in which the legislative process of the law had matured and its enforcement mechanisms had been set. In parallel with international legal codification, a vertical influence of international legislation into domestic legislation can be observed. The Rome Statute and the principle of complementarity accelerated the "domestication" of international crimes.[962] With legislation codified on the international level and a growing tendency to endorse it at national level, it is not surprising that a process of judicial enforcement process has been emerging - one in which national courts have been actively involved.

This relatively new process, which became apparent especially since the 1990s, is due to a number of factors. To mention a few, Benvenisti and Downs observed that national courts have started to assume more and more their role as enforcing organs of the international legal order as a consequence of the post-Cold War international order: "accelerating globalization have altered the assessment of national courts about what the primary threats to the domestic order are and what strategies they will need to adopt in order to cope with them".[963] Apart from globalization, other important developments that have contributed to that trend have been the creation of active international jurisdictions in the 1990s and the emergence of a strong civil society and legally professional NGOs, which became active actors in the international sphere, calling for accountability and respect of international humanitarian law, and initiating legal procedures before national courts. These codification and enforcement processes reflect the growing support that the international rule of law, as a political

[962] See K. Dörmann and R. Geiβ (n 111), p. 718.

[963] E. Benvenisti and G.W. Downs (n 167), p.61. This change in national courts attitude happened in the last 15 years; in 1993, in a previous article (n 121) Benvenisti observed that national courts continued to defer to their executive branches with respect to the conduct of foreign affairs and to ignore the prescription of theorists that they concentrate on the broader goals of ensuring compliance with international norms and promoting a global rule of law .

framework to govern international relations, has been given by State practice, international organizations and schools of thought, as shown in the first chapter of the thesis.

The international rule of law subordinates the relations of States (and other subjects of international law) to the law, thereby ensuring, structurally, that no abuses of authority and other arbitrary power occur. That concept is characterized by several principles, which are generally accepted as forming the core of the international rule of law. These include the existence of a body of normative rules, which were procedurally adequately created; that the law is equally applicable to all its subjects and that all subjects are equal before the law, and, lastly, it has to be effectively and equally enforced by an independent, impartial, and accessible judiciary. A system governed by the rule of law should be distinguished from the question of compliance with the law: in case of violation, the rule of law dictates the triggering of the competence of a court. Courts have a major role: these bodies, which are required to be independent, impartial, and accessible, are in fact entrusted to guarantee the basic ideas of the rule of law, namely, the equality of all subjects before the law, and the effectiveness of the law in governing relations between its subjects.

In this regard, the international enforcement mechanism of international humanitarian law, composed of both national and international courts, is not different from any other judicial system enforcing any other branch of law; moreover, when dealing with the law of armed conflict, the need for enforcement may be even greater faced with the need to restrict the State's exercise of power during these violent times within the defined limits codified by the law of armed conflict, and to guarantee that no abuse of power occurs because of the tragic consequences of non-compliance. Domestic courts of democratic States are in a good institutional position to enforce international humanitarian law. Practically, as access to evidence and testimony is possible relatively easily and the domestic infrastructure of the investigation and judicial authorities are available and function as a manner of routine, procedures may be held rapidly and without high costs. Moreover, national rulings have a strong impact on domestic society – these are not seen as external pressures or interventions – and, as the trials are held in the country, their outreach and the positive effect in the long run are better guaranteed. Most importantly, national courts of democratic states, structurally enjoy an important degree of independence *vis-à-vis* the executive, which can be exercised also during armed conflicts. As observed by Benvenisti and Downs, "national courts know that their executive is firmly tied to the national constitution from which it cannot exit and which the courts have the responsibility and sole authority to protect, for the benefit of the

domestic population. Judges in national courts are relatively more independent than judges in international tribunals, and enjoy broader public support for their decisions."[964]

At the same time, international humanitarian law's weakest element remains the lack of its enforcement by the judiciary. Traditionally, the conduct of wars has been left to the entire discretion of the executive and its professional agencies, which most often conceal the information from the public domain. This prevents public opinion from being formed effectively and the influence over decision-making and the public demand to provide judicial scrutiny over armed conflict issues remains weak. The combination of these factors, with other socio-psychological ones that favour unity and support to the State, all of which typically emerge in time of crisis and violence, lead to a weakening of the democratic system, since it is normally based on checks and balances, including through the role of the judiciary.

However, as practice shows, times are changing, and as the case studies clearly demonstrate, more and more international humanitarian law cases are coming before national courts. This is so especially in prolonged armed conflicts and situations of occupation, in which the emergency and insecurity that brought a society in the first place to renounce judicial scrutiny, slowly become the routine, and then the habitual domestic democratic public interest of checks and balances regain their natural place. This process has been marked especially with regard to violations of individual rights and less with regard to conduct of hostilities cases. However, it can be noticed that petitioners address courts more and more while combat is ongoing because of growing domestic legislation that allows access to the courts; the training of specialised lawyers, journalists, diplomats and academics; public opinion's demand for scrutiny led by NGOs; and the development of a less cautious jurisprudence of a number of leading courts, which are cited across jurisdictions. Thus, it can be reasonably expected that this emerging trend of reviewing conduct of hostilities will keep expanding. From a rule of law perspective, it has been hoped that the practice of courts would gradually replace the diplomatic enforcement of international law, and that their application of

[964] E. Benvenisti and G.W. Downs (n 167), p. 68. Yet, on their disadvantage see J. E. Alvarez, 'Crimes of States/Crimes of Hate: Lessons from Rwanda', (1999) 24 Yale Journal of International Law 365, at p.375: "By comparison to national courts, international tribunals are perceived to enjoy certain advantages: they are less destabilizing to fragile governments, are less likely to cede to 'short-term objectives of national politics,' can count on the expertise of jurists who are better qualified and able to progressively develop international law, are more impartial …and can render more uniform justice". See also A. Cassese, 'On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law', (1998) 9 European Journal of International Law 2, at p. 5-7.

international humanitarian law will contribute to the process of bringing the international community to be governed exclusively by the international rule of law.

Within this general framework the thesis examines the functional role of courts in their application of international humanitarian law, through the deconstruction of case law from different national jurisdictions.[965] It proposes a methodology to assess to what extent their function correspond to the principles set by the international rule of law, namely:

- Independency and impartiality: Are courts misusing the law in order to maintain the State's position and to legitimize the State's illegal acts?[966] To what extent do judges defer their decision to the State? What facts are provided, and how are these assessed? Do courts use presumptions in favour of the State? Do courts perform the same level of judicial activism or self-restraint that corresponds to their legal tradition, as in the context of judicial review of administrative decisions? Can an evolution in the willingness of courts to assert an independent position and to strengthen their authority in international humanitarian law cases be identified?[967] Is this evolution linear?

- Access: do judges employ doctrines that limit the admissibility of cases such as doctrines on the non-justiciability of political questions or the standing of the parties, which limits the right of action of individuals and/or the competence of the court to enforce international humanitarian law rules. Can a new tendency be observed, in which courts attempt to extend the exceptions of the application of these traditional doctrines, in order to justify their exercise of jurisdiction over the case, or, explicitly reject their application in light of the key principles of the rule of law, such as the right to access a court?[968]

- Effectiveness: the effective application of international humanitarian law depends on two distinct issues. First, international humanitarian law norms shall be valid within the domestic legal system. Here, subjective factors relating to the willingness of judges to apply

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[965] The *structural* requirements necessary to enable courts to apply international humanitarian law within domestic jurisdictions (such as the validity of international humanitarian law at domestic level, the rules on standing and independency of judges) were not under review in this work. I focused entirely on the *functional* role of courts in international humanitarian law cases (see above, p. 63-64).

[966] See the the Israeli High Court of Justice in its application of Art. 43 of the Hague Regulations (see above, p. 79-126).

[967] See for example the case study on the Guantanamo cases (see above, p. 224-248).

[968] For an implicit, yet strong example, see the US Supreme Court in Hamdan: "*Buried* in a footnote of the opinion [in *Eisentrager*], however, is this *curious* statement suggesting that the Court lacked power even to consider the merits of the Geneva Convention". *The Hamdan* case (n 16), p. 63 (emphasis added).

international humanitarian law and to identify it as a valid norm within their competence of application are involved. For example, judges may provide for a restrictive or broadening interpretation to the constitution that defines the validity of international law within domestic systems; to domestic laws that incorporate international humanitarian law in a way that refer back to the international norm and allow its direct application; to the hierarchy of norms in case of conflict between domestic and international humanitarian law norms; and to the identification of customary rules directly applicable in domestic systems. Second, the content of the norm shall be applied effectively, i.e., the interpretation of the law would be done in accordance to its purpose and intention of the drafters as required by Article 31 of the Vienna Convention on the Law of Treaties. This is related to the subjective willingness of the judges to effectively apply the law and to objective factors such as the skills of the judges and their knowledge of international humanitarian law including treaty and customary law, international and national courts' jurisprudence and academic writings.[969]

- Equality: to what extent are the function of the court and the interpretation provided of the law performed in an equal manner toward all its subjects? Does it depend on which subjects are litigating before the court, and factor such as their nationality or rank and position? Can a double standards mode be identified?[970]

In light of these core principles, four functional roles of the courts in their application of international humanitarian law have been identified. These vary from apology to judicial activism.

The apologist role of States, as the second chapter shows, is manifested through the court legitimating States' illegal acts and policies even if this involves a misuse or a distortion of the law. The Israeli case study illustrated how a court, which seriously addresses international humanitarian law and is characterized by holding a high level of knowledge of the law of

[969] The most pertinent example of lack of skills discussed in my study cases is the Belgrade war crimes chamber. As for the subjective unwillingness of a court to apply an international humanitarian law norm, see for example US courts, which provide the best example of a situation in which international humanitarian law is a valid norm with US domestic laws according to its constitution, yet judges do not directly enforce it, due to different versions of the self-executing doctrine developed in part by the State and endorsed by the court (see, for example, the version of the non-enforcement nature of international humanitarian law by court in *Johnson* v. *Eisentrager,* 339 US 763 (1950), at 789, n. 14).

[970] Double standards attitude may be observed in the case studies relating to the Italian Court of Cassation (see *Ferrini* and *Markovic*) and US federal courts in their application of the Alien Tort Statute.

military occupation, which it has been applying over for more than 40 years, nevertheless provided a misinterpretation of Article 43 of the Hague Regulations, which goes clearly against the purpose of the law in order to facilitate Israel's illegal settlement policy. The Serbian case study, on the other hand, shows how the same role of legitimating the State is achieved by a far less sophisticated court, whose professional competences are new, and seem not be at the level required for a correct application of the law.

It is argued that the apologist application of international humanitarian law must remain outside the valid choices available under the rule of law: it violates all founding principles of the rule of law related to the judiciary's function. First, it runs completely contrary to the fundamental requirement that the judiciary be independent and impartial. Serving as a legitimating agency for the State's illegal actions, the court is not maintaining its neutral position necessary to found its legitimacy, based on a "triadic structure", which is two litigating parties and a third neutral body serving a conflict resolver. This founding structure is dissolved and the court becomes no more than the executive's long arm, which in times of conflicts may be as dangerous as lethal arms. In addition, the right to access a court can not be fulfilled in a meaningful manner, as the rule of law requires access to court, in which justice is done. Similarly the demand that the law would be effectively applied is not fulfilled. The law must guide the behaviour of its subjects upon which all subjects shall rely. For this reason, the rule of law's founding principle is that the law will comply with certain procedural rules, such as being published, not being retroactive, but being sufficiently clear and settled. If at court judges provide a distorted interpretation of the law to justify the State's act, whether it is related also to their lack of skills or not, the law is not anymore effective in the sense that it does not provide for a reliable source upon which subjects can base their choices of action and legitimate expectation of how the society shall be governed. This also violates the basic principle of equality.

Given that the law imposed on courts a margin of interpretation allowing political manoeuvre only to a limited extent, and given that further political objectives may be in certain situations irresistible, especially during ongoing hostilities, in which total independence of courts is not realistic and maybe even not desired, the study identifies other functional ways for courts, which may be more acceptable from the rule of law perspective, to address these political constraints. The third chapter discussed the avoiding role of courts, developed by courts to deal exactly with this kind of situations. Policy considerations, mainly related to their own institutional position within their domestic governmental system and concerns of non compliance with their decisions, may lead courts to have no option but to

have recourse to this option: they choose avoid exercising competence and enforcing the law and leave the issue to be resolved by political actors. Courts avoid or adjudicate cases in a way that corresponds to their relation with the government and the degree independency *vis-à-vis* the political branches. The willingness to exercise competence differs therefore from jurisdiction to jurisdiction, and is not related to the legal question itself – because, as shown in the case studies, while in one jurisdiction the issue is not justiciable, in another it is.

Is the use of avoidance doctrines a deficiency in the function of the international rule of law or a predictable self-restraint policy within the rule of law framework? From the international rule of law perspective the avoiding role of courts remains highly problematic as it violates several of its basic conceptions, most notably the right to access to court and the requirement of a legal system to enforce the law in an equal and effective manner. Through the use of avoidance doctrine developed by judges, the court denies a party access to court, and consequently the law is not enforced and alleged violations remain not accountable. While courts have established factors for the application of an avoidance doctrine it has not always been possible to predict when courts would render a judgment on its merits, as extra-legal considerations are often involved. This entails that the law and the avoidance doctrines are often applied in a double standards mode, in breach of the equality principle, which most often corresponds to the State position, as was clearly demonstrated through the ATS case studies.

Having said that, the positive aspect of the avoiding role of courts is that, unlike while exercising an apologist role, courts do not produce distorted jurisprudence, which risks being cited by other jurisdictions. Thus, in cases in which the court is not sufficiently independent and does not possess a strong enough position to apply the laws governing armed conflicts, it may be preferable to avoid exercising its competence, in order to prevent a situation in which it would distort the law. In both situations, whether performing an apologetic or avoidance function, the State would be able to pursue its acts, even if these are in violation of international humanitarian law. In the later case, however, the State would not enjoy the legal aura provided by a court in a democratic society. Thus, for example, it may preferable that Israeli courts avoid ruling on whether Art. 49(6) of the Fourth Geneva Convention has been violated through the Israeli settlement policy, than to issue a decision that will, in a complete distortion of the law, rule that the law was respected. While avoiding exercising competence on this question, Israeli courts do not provide a legal justification for the illegal act and leave the issue to be decided in the political sphere. NGOs could then advance the argument that the law has been violated and maybe gain public support, which is more difficult to achieve if a

court with a good reputation like the Israeli High Court of Justice had approved the illegal policy.

Therefore, it seems that recourse to such avoidance doctrines shall be justified during a transition phase. Once courts establish a firm institutional position that enables them to apply international humanitarian law, whether it is in support or against the position of the State, the recourse to avoidance doctrines shall be denied. This is because for an international society to be governed by the international rule of law, the role of the courts should be directed toward the *normative application* mode.

As shown through the case studies in Chapter 4, in the forming process of courts' position within their own society to reinforce their authority to apply the law of armed conflict upon the executive, courts developed a nuanced and gradual way to do it, in form of an open dialogue with the other legislative and executive branches, through the deference technique. The judiciary moves away from the traditional tendency to avoid jurisdiction in armed-conflict-related issues, and progressively, with the use of deference techniques, starts to exercise its judicial competence as an international humanitarian law enforcer. Thus, the deference techniques open the gate to the normative application of international humanitarian law by courts and enable courts to slowly abandon previous patterns of functions concerning the law applicable during armed conflicts. Still, courts are at the beginning of the application of this relatively new mode, which is mainly applicable for human rights violations and less for conduct of hostilities, as demonstrated in the fourth chapter.

The deferral techniques allowed an important transition from the avoidance doctrines sphere toward judicial review. While cases, previously seen as touching *forbidden area*, entered the sphere of judicial review, courts may well decide to climb up the challenge in the future. To turn back to the way of avoiding is less expected. Yet, the follow-up to the Israeli High Court of Justice *Torture* and *Targeted Killing* cases, well illustrate the deficiency of the deferral technique: instead of promoting the normative application of the law, as achievable within the institutional limits of courts, in form of a compromise and deference to the executive, it will lead to an apologist transformation of the court's ruling by the misuse of the discretion allocated to the State. Thus, optimally, courts should slowly abandon this technique and instruct the State explicitly and unequivocally what the law says and the legal consequences of the wrongdoing of the State.

Naturally, also within the "normative application" role legal choices are motivated also by political preference. Indeed, international humanitarian law was drafted by States to govern the use of force during armed conflicts, and an important degree of discretion was left

to accommodate the necessity needs of the armed forces, and therefore positive law itself provides a margin of discretion. Yet this is not to be confused with a position that positive limits do not exist, and all positions can be endorsed due to the indeterminacy of the law.

As stated by Judge Higgins, a judge 'makes choices between claims which have varying degrees of legal merits'[971]. Yet, as the last chapter shows, a judge may choose a stance that goes beyond that legitimate 'normative application' scale, rendering an "activist" decision: this is when a national courts interpret a rule beyond its purpose and the intention of the drafters in the name of ethical values. This mode of function does not correspond to the rule of law principles for very similar reasons as the apological mode as far as it concerns the issue of effective application of the law. Whether State policy or ethical values, as long that they are beyond the purpose and intention of the law, they are both similarly undermining the formal rule of law.

As the research shows, the functional role of the courts is a combination of contradictions; of mixed attitudes – sometimes they hold an apologist role, in other cases a normative, activist, or an avoiding one. Seemingly, national courts are in the process of defining their own role as enforcing organs. It is hoped that this work will serve as a tool for future analysis, such as revealing the factors that lead courts to choose any of the categories, and especially what the necessary conditions are for reaching their optimal functional role from the standpoint of the international rule of law. Some hypotheses, consisting of legal and extra-legal factors in this regard, include:

(1) National courts will not be able to derive jurisdiction from international law beyond the competence accorded to them by the national constitutional framework. Therefore the validity of international humanitarian law within domestic system and the competence of courts to apply it must be guaranteed at national level. Most importantly - can international humanitarian law be directly applied; what is the rank of international law in case of conflict with a domestic rule; may courts repeal domestic legislation contradicting international alw as being unconstitutional?

(2) The traditional independence and activism of courts in a given country. How successful were they in limiting the State with regard to other branches of law? As observed by scholars, because of the special nature of international law, and more specifically the law applicable during armed conflict, too much independence is not necessarily a guarantee of a

[971] See above at note 961.

better enforcement of the international humanitarian law; courts have to take into account political concerns and consequences of their ruling.

(3) Is there an active and independent civil society and media that could influence public opinion and demand judicial scrutiny over international humanitarian law issues?

(4) The importance of the interests of their country that may be jeopardized; seemingly it would be easier for courts to deliver a ruling against the State for past violations, as human rights violations, which do not have impact on future policies.

(5) The national courts' contribution as part of a global legal system – have international tribunals and institutions already reviewed the same issue/context. For example, the exercise of universal jurisdiction over crimes that originated in the Balkans or Rwanda were more easily prosecuted after the establishment of the international *ad hoc* tribunals, as authoritative legal analysis on the subject was provided, and this served as a legal guidance for national courts. Moreover, also politically, it had been easier for national courts to function where their decisions are subsequent to international courts' decisions.

(6) What is the level of the court and the objective capacities and skills of the judges with regard to international humanitarian law? Beyond treaty law, are judges familiar also with international humanitarian law jurisprudence, customary law and academic writings?

(7) The existence of a national international humanitarian law legal expertise: do private and military lawyers, State prosecution attorneys, NGO legal advisors, use international humanitarian law in their claims? Are they enough familiar with international humanitarian law rules, and how can they procedurally rely on them within the particularity of each domestic system? Is education in the domain of international humanitarian law available in universities, through professionals' training courses, International Committee of the Red Cross teaching projects, and the like?

In the process of forming a legal and political environment for the international community based on the international rule of law, national courts' jurisprudence have still a long way to go; yet experience in recent years can point to a shift in the right direction, which may allow rather optimistic predictions for the future. The Israeli judge, Judge Hechin, cited in the introduction of this work, observed that "the road is long before [international law] will turn into a legal system of full standing; as a legal system whose norms can be enforced

against those who violate them"[972]. Ironically, his view was expressed in a separate opinion of a ruling delivered by a national court, in which, not only was international humanitarian law enforced, it was enforced in opposition to the State's position.

[972] See above at note 2.

Bibliography

1. PRIMARY SOURCES

1.1. International sources

Treaties

Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.

Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare. Geneva, 17 June 1925.

Charter of the United Nations. San Francisco, 26 June 1945.

Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949.

Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949.

Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.

Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.

Convention for the Protection of Human Rights and Fundamental Freedoms. Rome, 4 November 1950.

Convention for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, 14 May 1954.

International Covenant on Civil and Political Rights. New York, 16 December 1966.

Vienna Convention on the Law of Treaties. Vienna, 23 May 1969.

Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction. Opened for Signature at London, Moscow and Washington, 10 April 1972.

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I). Geneva, 8 June 1977.

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II). Geneva, 8 June 1977.

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. New York, 10 December 1984.

Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction. Paris, 13 January 1993.

Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, established pursuant to UNSC Res. 827 (25 May 1993).

Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994 (Adopted by UNSC Res. 955 (1994) of 8 November 1994).

Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction. Oslo, 18 September 1997.

The Rome Statute of the International Criminal Court. Rome, 17 July 1998.

Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, 26 March 1999.

Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III). Geneva, 8 December 2005.

Convention on Cluster Munitions. Dublin, 30 May 2008.

Peace agreements

'Israeli–Palestinian Interim Agreement on the West Bank and the Gaza Strip' (Washington DC, 28 September 1995).

'General Framework Agreement for Peace in Bosnia and Herzegovina' (Paris, 14 December 1995), Annex 7: Agreement on Refugees and Displaced Persons.

Jurisprudence

- **Permanent Court of International Justice**

Mavrommatis Palestine Concessions (Greece v U.K.), (1924) Permanent Court of International Justice (ser. A) No. 2, 30 August 1924.

Case Concerning the Factory at Chorzów (Germany v Poland), (1927) Permanent Court of International Justice (ser. A) No. 9, 26 July 1927.

Appeal from a Judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal, (Judgment) Permanent Court of International Justice Series A/B, No. 61, 15 December 1933.

- **International Court of Justice**

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion), 21 June 1971.

Legal Consequences on the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion), 9 July 2004.

Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro), (Judgment) 26 February 2007.

Case Concerning Jurisdictional Immunities of the State (*Germany v Italy*) (Memorial of the Federal Republic of Germany), 12 June 2009.

Case Concerning Jurisdictional Immunities of the State (Germany v Italy) (Counter-Memorial of Italy), 22 December 2009.

- **European Court of Human Rights**

Al-Adsani v United Kingdom, (Judgment) European Court of Human Rights No. 35763/97, 21 November 2001).

Al-Skeini and others v The United Kingdom, (Judgment) European Court of Human Rights No. 55721/07 (7 July 2011).

Associazione Nazionale Reduci dalla Prigionia dall'Internamento e dalla Guerra di Liberazione and Others v Germany, (Decision as to the Admissibility) European Court of Human Rights No. 45563/04 (4 September 2007).

Brecknell v The United Kingdom, (Judgment) European Court of Human Rights No. 32457/04 (27 November 2007).

Cyprus v Turkey, (Judgment) European Court of Human Rights No. 25781/94 (10 May 2001).

Fevzi Saygili v Turkey, (Judgment) European Court of Human Rights No. 74243/01 (8 January 2008).

Golder v the United Kingdom, (Judgment) European Court of Human Rights No. 4451/70 (21 February 1975).

Gulsenoglu v Turkey, (Judgment) European Court of Human Rights No. 16275/02 (29 November 2007).

Kalegoropoulou v Greece and Germany, European Court of Human Rights No. 50021/00 (12 December 2002).

Khatsiyeva and Others v Russia, (Judgment) European Court of Human Rights No. 5108/02 (17 January 2008).

Klass and Others v Germany, (Judgment) European Court of Human Rights No. 5029/71 (6 September 1978).

Loizidou v Turkey, (Merits) European Court of Human Rights No. 15318/89 (18 December 1996)

Marković et al. v Italy, (Judgment on Merits) European Court of Human Rights No.1398/03 (14 December 2006).

Takis Demopoulos and Others v Turkey, (Decision on Admissibility, Grand Chamber) European Court of Human Rights No. 46113/99 (1 March 2010).

- **International Criminal Tribunal for the Former Yugoslavia**

Prosecutor v Blaskic, (Judgment, Trial Chamber) International Criminal Tribunal for the Former Yugoslavia case No. IT-95-14 (3 March 2000).

Prosecutor v Blaskic, (Judgment, Appeals Chamber) International Criminal Tribunal for the Former Yugoslavia case No. IT-95-14-A (29 July 2004).

Prosecutor v Delalić et al., (Judgment, Appeals Chamber) International Criminal Tribunal for the Former Yugoslavia case No. IT-96-21-A (20 February 2001).

Prosecutor v Furundžija, (Judgment, Trial Chamber) International Criminal Tribunal for the Former Yugoslavia case No. IT–95–17/1-T (10 December 1998).

Prosecutor v Haradinaj et al., (Judgment, Trial Chamber) International Criminal Tribunal for the Former Yugoslavia case No. IT-04-84-T (3 April 2008).

Prosecutor v Limaj et al., (Judgment, Trial Chamber) International Criminal Tribunal for the Former Yugoslavia case No. IT-03-66-T (30 November 2005).

Prosecutor v Slobodan Milošević, (Amended indictment, Bosnia and Herzegovina) International Criminal Tribunal for the Former Yugoslavia case No. IT-02-54-T (22 November 2002).

Prosecutor v Slobodan Milošević, (Decision on Motion for Judgment of Acquittal, Trial Decisions) International Criminal Tribunal for the Former Yugoslavia case No. IT-02-54-T (16 June 2004).

Prosecutor v Slobodan Milošević, International Criminal Tribunal for the Former Yugoslavia case No. IT-02-54 *"Kosovo, Croatia and Bosnia"* (transcript of the hearings on 1 June 2005).

Prosecutor v Milutinovic et al., (Judgment, Trial Chamber) International Criminal Tribunal for the Former Yugoslavia case No. IT-05-87 (26 February 2009).

Prosecutor v Naletilic (Judgment, Trial Chamber) International Criminal Tribunal for the Former Yugoslavia case No. IT-98-34-T (31 March 2003).

Prosecutor v Tadic, (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeal Chamber) International Criminal Tribunal for the Former Yugoslavia case No. IT- 94-1 (2 October 1995).

Prosecutor v Tadic, (Judgment, Appeal Chamber) International Criminal Tribunal for the Former Yugoslavia case No. IT-94-1-A (15 July 1999).

The Case against Florence Hartmann, (Judgment on Allegations of Contempt) International Criminal Tribunal for the Former Yugoslavia case No. IT-02-54-R77.5 (14 September 2009).

United Nations documents

- **General Assembly**

'Draft Declaration on Rights and Duty of States', UNGA Res. 375 (IV) (6 December 1949) UN Doc A/RES/375(IV).

'Question of chemical and bacteriological (biological) weapons', UNGA Res. 2603-A (16 December 1969) UN Doc A/RES/2603(XXIV)A.

'Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations', UNGA Res. 2625 (XXV) (24 October 1970) UN Doc A/8028 (1970).

'The Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations' UNGA Res. 2625 (XXV) (24 October 1970) UN Doc A/8028 (1970).

‘UN Basic Principles on the Independence of the Judiciary’, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by UNGA Res. 40/32 (29 November 1985) and UNGA Res. 40/146 (13 December 1985).

‘Question of Cyprus’, UNGA Res. 33/15 (9 November 1978) UN Doc A/RES/33/15.

‘Question of Cyprus’, UNGA Res. 34/30 (20 November 1979) UN Doc A/RES/34/30.

‘Question of Western Sahara’, UNGA Res. 35/19 (11 November 1980) UN Doc A/RES/35/19.
‘Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory’, UNGA Res. ES-10/6 (9 February 1999) UN Doc A/RES/ES-10/6.

‘Draft Articles on Responsibility of States for Internationally Wrongful Acts’ (UNGA Res. 56/83) (12 December 2001) UN Doc A/RES/56/83.

‘Illegal Israeli actions in Occupied East Jerusalem and the rest of the Occupied Palestinian Territory’, UNGA Res. ES-10/14 (8 December 2003) UN Doc A/RES/ES-10/14.

‘The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Humanitarian Law and Serious Violations of Human Rights’ (UNGA Res. 60/147) (16 December 2005) UN Doc A/RES/60/147.

‘Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and the occupied Syrian Golan’, UNGA Res. 61/118 (15 January 2007) UN Doc A/RES/61/118.

‘The rule of law at the national and international levels ‘, UNGA Res. 61/39 (18 December 2006) UN Doc A/RES/61/39.

‘The rule of law at the national and international levels’, UNGA Res. 62/70 (8 January 2008) UN Doc A/RES/62/70.

‘The rule of law at the national and international levels’, UNGA Res. 63/128 (15 January 2009) UN Doc A/RES/63/128.

‘The rule of law at the national and international levels’, UNGA Res. 64/116 (15 January 2010) UN Doc A/RES/64/116.

- **Security Council**

'Territories occupied by Israel', UNSC Res. 452 (20 July 1979) UN Doc S/RES/452.

'Territories occupied by Israel', UNSC Res. 446 (22 March 1979) UN Doc S/RES/446.

'Territories occupied by Israel', UNSC Res. 465 (1 March 1980) UN Doc S/RES/465.

'Resolution on measures to guarantee the safety and protection of the Palestinian civilians in territories occupied by Israel', UNSC Res. 904 (18 March 1994) Un Doc S/RES/904.

'International Criminal Tribunal for the former Yugoslavia and International Criminal Tribunal for Rwanda', UNSC Res. 1503 (28 August 2003) UN Doc S/RES/1503 (2003).

'Protection of civilians in armed conflict', UNSC Res. 1674 (28 April 2006) UN Doc S/RES/167.

Other

- **Institut de Droit International**

Institut de Droit International, 'Resolution on the Activities of National Judges and the International Relations of the States' (Milan 1993).

- **International Law Association**

International Law Association Resolution 2/2010 'Reparation for Victims of Armed conflict' adopted at he 74th Conference of the International Law Association (The Hague, The Netherlands, 15-20 August 2010).

- **American Law Institute**

American Law Institute, 'Restatement of Foreign Relations Law of the United States' (1987).

1.2 National Sources

National Legislation

- Canada -

Geneva Convention Act of 1985, (R.S.C., 1985, c. G-3)

Crimes Against Humanity and War Crimes Act of 2000, (S.C. 2000, c. 24).

- Israel -

Proclamation Regarding Law and Administration (Proclamation No. 2) (7 July 1967).

Security Provisions Order No. 378 (West Bank) (1970).

Israeli Basic Law: the Judiciary (28 February 1984).

Emergency Regulations (West Bank – Criminal Jurisdiction and Legal Assistance) (Amendment and Extension of Validity Law) (2007).

Military Order on Traffic (Road 443) (West Bank) – 2008, (19 June 2008).

- Serbia -

The Criminal Code of the Federal Republic of Yugoslavia, *Official Gazette of the FRY* Nos. 35/92, 37/93, 24/94, 61/01.

Basic Criminal Code of the Republic of Serbia (*Official Gazette of the Republic of Serbia* No. 39/03.

Constitution of the Republic of Serbia (adopted 30 September 2006, entered into force 8 November 2006).

'Law on Organisation and Competence of Government Authorities in War Crimes Proceedings', *Official Gazette of the Republic of Serbia No. 67/2003*, with subsequent amendments in *Official Gazette of the Republic of Serbia Nos. 135/2004, 61/2005, 101/2007*.

- US -

US Constitution, Article VI, clause 2.

Alien Tort Statute, 28 U.S.C. § 1350 (1789).

Torture Victim Protection Act, 28 U.S.C. § 1350 (1991).

War Crimes Act, 18 U.S.C. § 2441 (1996).

Authorization for Use of Military Force, § 2(a), Public Law 107-40, 115 Stat. 224' (18 September 2001).

Military Order - Detention, Treatment, and Trial of Certain Non-citizens in the War Against Terrorism' (13 November 2001). Available at: <http://georgewbush-whitehouse.archives.gov/news/releases/2001/11/20011113-27.html>.
Military Commission Order No. 1 (31 August 2005). Available at: <http://www.defense.gov/news/Sep2005/d20050902order.pdf>.
Military Commissions Act, 28 U.S.C. § 2241(e) (2006).

National Jurisprudence

- Australia -

Habib v Commonwealth of Australia (2010) FCA 12.
Hicks v Ruddock et al., (2007) F.C.A. 299.

- Canada -

Amnesty International Canada v Canada (Chief of the Defence Staff), (2008) FCA 401, (2009) 4 FCR. 149.
Amnesty International Canada v Canada (Minister of National Defence), (2008) FC 336, (2008**)** 4 FCR 546.
Bouzari v Iran, Court of Appeal of Ontario (2004), 128 ILR 586.
Bil'in (Village Council) and Yassin at al. v Green Park International, Inc. et al., (2009) QCCS 4151.
Canada (Justice) v Khadr, (2008) 2 SCR 125, 2008 SCC 28.
Canada (Prime Minister) v Khadr, (2010) SCC 3, 2010 1 SCR 44.
R. v Hape, (2007) 2 SCR 292, 2007 SCC 26.

- France -

Bucheron, 16 December 2003, 108 *RGDIP* 259 (2004).

- Germany-

35 citizens of the Former Federal Republic of Yugoslavia v Germany, (Appeal Judgment), German Federal Supreme Court BGHZ 166, 384; III ZR 190/05 (2 November 2006).
Associazione Nazionale Reduci dalla Prigionia dall'Internamento e dalla Guerra di Liberazione and Others v Germany (The Italian Military Internees Case), Constitutional Court, BVerfG, 2 BvR 1379/01 (28 June 2004)**.**
Distomo Case, Constitutional Court, BVerfG, 2 BvR 1476/03, 15 February 2006.

- Greece –

Prefecture of Voiotia v Federal Republic of Germany, (Judgment) Hellenic Supreme Court No. 11/2000 (4 May 2000), published in (2001) 49 Nomiko Vima 212, pp. 212–229.

Federal Republic of Germany v Miltiadis Margellos, (Judgment), Supreme Special Court No. 6/2002 (17 September 2002).

- Israel -

A and B v The State of Israel, HCJ 6659/06 (2008).

Abu Safiya v Minister of Defence, HCJ 2150/07 (2009).

Abu Hilou at al. v Government of Israel, HCJ 302/72 (1972).

Adalah – The Legal Center for Arab Minority Rights in Israel v The Military Commander of Central Command, HCJ 3799/02 (2005).

Anon v State of Israel, Crim App 4705/02 (2002).

Ayyub v Ministry of Defense, HCJ 606/78 (1978).

Ajuri v The Commander of IDF Forces in the West Bank, HCJ 7015/02 (2002).

Almandi v The Minster of Defense, HCJ 3451/02 (2002).

Barake v The Minister of Defense, HCJ 3114/02 (2002).

Beit Zourik Village Council v The Government of Israel, HCJ 2056/04 (2004).

The Christian Society for the Holy Places v Minister of Defense, HCJ 337/71 (1971) (Excerpted in English in (1972) 2 Israel Yearbook on Human Rights 354).

Duikat v Government of Israel, HCJ 390/79 (1979). (Excerpted in English in 9 Israel Yearbook on Human Rights, 1979, p. 345).

Electricity Company for Jerusalem District v Minister of Defense, HCJ 256/72 (1972).

Electricity Company for Jerusalem District v the Minister of Energy and Infrastructure et al, HCJ 351/80 (1981).

Gush Shalom v Minister of Communication, HCJ 8555/07 (2008).

Gusin v The Commander of IDF Forces in the Gaza Strip, HCJ 4219/02 (2002).

Jami'at Ascan al-Mu'aliman Altauniya Almahduda Almasauliya Cooperative Society v The Military Commander in the West Bank HCJ 393/82, (1983). (Excerpted in English in 14 Israel Yearbook on Human Rights, 301).

HaMoked v Attorney General, HCJ 6138/10 (2011).

Hess v IDF Commander in West Bank, HCJ 10356/02 (2004).

Hess et al. v The Judge Advocate General, HCJ 8794/03 (2008).

K.P.A Co. v State of Israel (1984) 38 (1) PD 813.

Mara'abe et al. v Israel Prime Minister et al., HCJ 7957/04 (2005).

Matar v The Commander of IDF Forces in the Gaza Strip, HCJ 6339/05 (2005).

Minister of Defense, et. al. v Adalah, et. Al, HCJ 10739/05 (2006).

Municipality of Bethlehem v Ministry of Defense, HCJ 1890/03 (2005).
Physicians for Human Rights v The Commander of the IDF Forces in the West, HCJ 2936/02 (2002).
Physicians for Human Rights v The Commander of IDF Forces in Gaza, HCJ 4764/04 (2004).
Physicians for Human Rights v Prime Minister of Israel, HCJ 201/09 (2009).
Public Committee Against Torture in Israel v the State of Israel, HCJ 5100/94 (1999).
Public Committee against Torture in Israel et al. v The Government of Israel et al., HCJ 769/02 (2006).
Public Committee against Torture in Israel et al. v Attorney General, HCJ 1265/11 (pending).
Shaer v The Military Commander, HCJ 2612/94 (1994).
Yassin, Bil'in Village Council Chairman v The State of Israel, et al, HCJ 8414/05 (2007).

- Italy -

Ferrini v Germany, Corte Suprema di Cassazione, sezioni unite civili, Appeal decision, no 5044/4 (11 March 2004).
Presidency of the Council of Ministers v Markovic and others, Corte Suprema di Cassazione, Application for preliminary order on jurisdiction, no 8157; (8 February 2002).
Repubblica federale di Germania v. Amministrazione regionale of Vojotia, Corte Suprema di Cassazione, sezioni unite civili, no. 14199 (6 May 2008).

- Japan -

Shimoda et al. v The State, Tokyo District Court (7 December 1963).
Filipino "Comfort Women" case, Tokyo District Court (9 October 1998).

- United Kingdom -

Bici v Ministry of Defence, (2004) EWHC 786 (QB).
Buttes Gas and Oil Co. v Hammer (No. 3), (1982) AC 888 UKHL.
Council of Civil Service Unions v Minister for the Civil Service, (1985) AC 374.
Duke of Brunswick v King of Hanover, (1848) 2 HLC 1.
Jones v Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) and others, (2006) UKHL 26.
Kuwait Airways Corporation v Iraqi Airways Company, (2000) EWCA Civ 284.
Kuwait Airways Corporation v Iraqi Airways Company & Anor, (2002) UKHL 19.
Luther v Sagor, (1921) 3 K.B. 532.
Nissan v Attorney General, (1970) AC 179 UKHL.
Oppenheimer v Cattermole (Inspector of Taxes), (1976) AC 249 UKHL.
R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs (2002) EWCA Civ 1598 (2003) UKHRR 76 CA.

R (Campaign for Nuclear Disarmament) v Prime Minister and Others, (2002) EWHC 2777 (Admin).
R v Bow Street Metropolitan Stipendiary Magistrate Ex parte Pinochet Ugarte (No.1) (1998) 3 WLR 1456 (HL 1998).
R v Foreign Secretary ex p. Everett, (1989) 1QB 811.
R (on the application of Al-Skeini) v Secretary of State for Defence, (2005) (Application for Judicial Review) EWCA (Civ) 1609.
R (on the application of Al-Skeini) v Secretary of State for Defence, (2007) UKHL 26.
R v Jones (Appellant), (2005) EWHC 684 (Admin).
R v Jones (Appellant), (2006) UKHL 16.
R (on the application of Al-Jedda) (FC) (Appellant) v Secretary of State for Defence (Respondent) (2007) UKHL 58.

- United States -

Abdullahi v Pfizer, Inc., 562 F.3d 163 (2d Cir. 2009).
Al-Aulaqi v Obama, 727 F. Supp. 2d 1 (D.D.C. 2010).
Al Odah v United States, 321 F.3d 1134 (D.C. Cir. 2003).
Aldana v. Del Monte Fresh Produce, 416 F.3d 1242 (11th Cir. 2005).
Alfred Dunhill of London, Inc. v Republic of Cuba, 425 U.S. 682 (1976).
Argentine Republic v Amerada Hess Shipping Corp., 488 U.S. 428, 440-42 (1989).
Baker v Carr, 369 U.S. 186 (1962).
Banco Nacional de Cuba v Sabbatino, 376 U.S. 398 (1964).
Belhas v Ya'alon, 515 F.3d 1279 (D.C. Cir. 2008).
Bernstein v N.V. Nederlandische - Amerikaansche Stoomvaart-Maatschappij, 210 F.2d 375 (2d Cir. 1954).
Bivens v Six Unknown Federal Narcotics Agents, 403 U.S. 388, 397 (1971).
Boumediene v Bush, 553 U.S. 723 (2008).
Chuidian v Philippine National Bank, 912 F.2d 1095 (9th Cir. 1990).
Corrie v Caterpillar, Inc., 403 F. Supp. 2d 1019 (W.D. Wash. 2005)
Corrie v Caterpillar, Inc., 503 F.3d 974 (9th Cir. 2007).
Credit Suisse v United States Dist. Ct., 130 F.3d 1342 (9th Cir. 1997).
Doe v Unocal Corp., 963 F. Supp. 880 (C.D. Cal. 1997).
Doe v Unocal Corp., 110 F. Supp. 2d. 1294 (C.D. Cal. 2000).
Doe v Unocal Corp., 395 F.3d 978 (9th Cir. 2003).
Doe v Lui Qi, 349 F. Supp. 2d 1258 (N.D. Cal 2004).
El-Masri v United States, 479 F.3d 296 (4th Cir. 2007).
El-Shifa Pharmaceutical Industries Company v United States, 402 F. Supp. 2d 267 (D.D.C. 2005).
El-Shifa Pharmaceutical Industries Company v United States, 559 F.3d. 578 (D.C. Cir. 2009).

Environmental Tectonics Corp. v W. S. Kirkpatrick Inc., 110 S.Ct. 701 (1990).
Filartiga and Filartiga v Pena-Irala, 630 F.2d 876 (2d Cir 1980).
First National City Bank v Banco Nacional de Cuba, 406 U.S. 759 (1972).
Flatow v Islamic Republic of Iran, 999 F. Supp. 1 (D.D.C. 1998).
Hamdi v Rumsfeld, 542 U.S. 507 (2004).
Hamdan v Donald H. Rumsfeld et al., 548 U.S. 557 (2006).
Hilao v Estate of Marcos, 25 F.3d 1467 (9th Cir. 1994).
Holtzman v Schlesinger, 361 F. Supp. 553 (E.D.N.Y 1973).
Holtzman v Schlesinger, 484 F. 2d 1307 (3d Cir. 1973).
Hwang Geum Joo v Japan, 172 F.Supp. 2d 52 (D.D.C. 2001).
Hwang Geum Joo et al. v Japan, 367 U.S. App. D.C. 45 (D.C. Cir. 2005).
Ibrahim v Titan Corp., 976 F.2d 1328 (9th Cir. 1992).
Ibrahim v Titan Corp., 556 F. Supp. 2d 1(D.D.C. 2007).
Johnson v Eisentrager, 339 U. S. 763 (1950.
Kadic v Karadzic, 70 F.3d 232 (2d Cir. 1995)
Khulumani v Barclay National Bank, Ltd., 504 F.3d 254 (2d Cir. 2007).
Kiobel v Royal Dutch Petroleum, 621 F.3d 111 (2nd Cir. 2010).
Klinghoffer v PLO, 937 F.2d 44 (2nd Cir. 1991).
Matar v Dichter, 500 F. Supp. 2d 284 (S.D.N.Y. 2007).
Matar v Dichter, 563 F.3d 9 (2nd Cir. 2009).
Oetjen v Central Leather Co., 246 U.S. 297 (1918).
Padilla v Yoo, 633 F. Supp. 2d 1005 (N.D. Cal. 2009).
Presbyterian Church of Sudan et al. v Talisman Energy Co., 582 F.3d 244 (2nd Cir. 2009).
Princz H. v Federal Republic of Germany, 813 F. Supp. 22 (D.D.C. 1992).
Princz H. v Federal Republic of Germany, 26 F.3d 1166 (D.C.Cir. 1994).
Rasul v Bush, 542 U.S. 466 (2004).
Rasul v Myers, 512 F.3d 644 (D.C. Cir. 2008).
Rasul v Rumsfeld, 414 F. Supp. 2d 26 (D.D.C. 2006).
Re 'Agent Orange' Product Liability Litigation, 373 F Supp 2d 7 (EDNY 2005).
Re Iraq and Afghan Detainees Litigation, 479 F. Supp. 2d 85 (D.D.C. 2007).
Saleh at al. v Titan Corp. et al., 580 F.3d 1 (DC Cir. 2009).
Samantar v Yousuf, 130 S.Ct. 2278 (2010).
Sarei et al. v Rio Tinto, PLC and Rio Tinto Limited, 221 F. Supp 2d 1116 (CD Cal 2002).
Sarei et al. v Rio Tinto, PLC and Rio Tinto Limited, 456 F.3d 1069 (9th Cir. 2006).
Sarei et al. v Rio Tinto, PLC and Rio Tinto Ltd., 550 F.3d 822 (9th Cir. 2008).
Sosa v Alvarez-Machain at al., 542 U.S. 692 (2004).
Tel Oren v Libyan Arab Republic, 726 F.2d 774 (D.C.Cir. 1984).

Underhill v Hernandez, 168 U.S. 250 (1897).

United States v Khadr, (Stipulation of Facts) (13 October 2010).

Vance and Ertel v Rumsfeld et al., 694 F. Supp. 2d 957 (N.D. Ill. 2010).

Wiwa v Royal Dutch Petroleum Co., 226 F.3d 88 (2nd Cir. 2000).

Xe Services Alien Tort Litig., 665 F. Supp. 2d 569 (E.D.Va. 2009).

Xuncax v Gramajo, 886 F. Supp. 162 (D. Mass. 1995).

- Serbia -

Supreme Court of Serbia, *Anton Lekaj* (Appeals Judgment) Case No. Kž. I RZ 3/06 (26 February 2007) (in Serbian).

War Crimes Chamber of the Belgrade District Court, *Anton Lekaj* (Judgment), Case No. K.V. 4/05, 1st Instance Verdict (18 September 2006).

War Crimes Chamber of the Belgrade District Court, *Slobodan Medić et al. (Scorpions case)* (Judgment), Case No. K.V. 6/2005 (10 April 2007).

- Spain -

Audiencia Nacional, *Juzgado Central de Instrucción No. 5*, Diligencias Previas Proc. Abreviado 399/2006 V (Judgment of 16 October 2008).

Audiencia Nacional, Sala de lo Penal, *Juzgado Central de Instruccion No. 5*, Pleno, Diligencias Previas Proc. Abreviado 399/2006 V, Auto (2 December 2008).

Other

Bush, G., 'Memorandum on Humane Treatment of al Qaeda and Taliban Detainees' (7 February 2002), pp. 1-2 Available at: <http://www.washingtonpost.com/wp-srv/nation/documents/020702bush.pdf>.

Henkin, L. et al., *Amicus Brief of Law Professors in Support of the Petitioner in the Hamdan case (Geneva – Enforceability*) (6 January 2006). Available at: <http://www.hamdanvrumsfeld.com/HamdanvRumsfeldAmicusBriefofLawProfessorsLouisHenkinetal.pdf>.

2. SECONDARY SOURCES

2.1 Books and Article

Allott, P., *Towards the International Rule of law: Essays in Integrated Constitutional Theory* (Cameron May, London, 2007).

Arieli, S. and Sfard, M. *The Wall of Folly* (Yediot Sfarim, Tel Aviv, 2008).

Balkin, J.M., 'Deconstructive Practice and Legal Theory' (1987) 96 Yale Law Journal 743, pp. 743-786.

Balkin, J.M., 'Deconstruction' in D. Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (Blackwell Publishing, Oxford, 1999), pp. 367-374.

Barak, A., 'Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy' (2002-2003) 116 Harvard Law Review 19, pp. 19-162.

Barak, A., *The Judge in a Democracy,* (Princeton University Press, New Jersey, 2006).

Batros B. and Webb P., 'Accountability for Torture Abroad and the Limits of the Act of State Doctrine Comments on Habib v. Commonwealth of Australia', (2010) Journal of International Criminal Justice 8, pp. 1153-1174.

Bazyler, M., 'Abolishing the Act of State Doctrine' (1986) 134 University of Pennsylvania Law Review 325, pp. 325-398.

Beaulac, S., 'The Rule of Law in International Law Today' in G. Palombella and N. Walker (eds), *Relocating the Rule of Law* (Hart Publishing, Oxford, 2009), pp. 197-223.

Ben-Naftali, O., 'A Judgment in the Shadow of International Criminal Law' (2007) 5 Journal of International Criminal Justice 2, pp. 322-331.

Ben-Naftali, O. and Michaeli, K., 'We Must Not Make a Scarecrow of the Law: A Legal Analysis of the Israeli Policy of Targeted Killings' (2003) 36 Cornell International Law Journal, pp. 233-292.

Benvenisti, E., 'Judges and Foreign Affairs: A Comment on the Institute de Droit International's Resolution on 'The Activities of National Courts and the International Relations of their State'' (1994) 5 European Journal of International Law 1, pp. 423-439.

Benvenisti, E., 'Judicial Misgivings Regarding the Application of International Norms: An Analysis of Attitudes of National Courts' (1993) 4 European Journal of International Law 2, pp. 159-183.

Benvenisti, E., 'National Courts and the "War on Terrorism"' in A. Bianchi (ed), *Enforcing International Law Norms against Terrorism* (Hart Publishing, Oxford, 2004), pp. 308-325.

Benvenisti, E., 'Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts' (2008) 102 American Journal of International Law 2, pp. 241-274.

Benvenisti, E., *The International Law of Occupation* (2nd edn, Princeton University Press, Princeton, 2004).

Benvenisti, E., 'United We Stand: National Courts Reviewing Counterterrorism Measures' in A. Bianchi and A. Keller (eds), *Counterterrorism: Democracy's Challenge* (Hart Publishing, Oxford, 2008). Available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=965638>, pp. 1-33.

Benvenisti, E. and Downs, G.W., 'National Courts, Domestic Democracy, and the Evolution of International Law' (2009) 20 European Journal of International Law 1, pp. 59-72.

Bhuta**,** N., 'The Antinomies of Transformative Occupation' (2005) 16 European Journal of International Law 4, pp. 721-740.

Bianchi, A., 'Italian Court of Cassation Ruling on Immunity from Suit for Damages for Deportation and Forced Labor during World War II (Comment to Decision)' (2005) 99 American Journal of International Law 1, pp. 242-248.

Bianchi, A., 'Serious Violations of Human Rights and Foreign States' Accountability Before Municipal Courts' in L. Vohrar (ed), *Man's Inhumanity to Man. Essays in Honour of Judge Antonio Cassese* (Kluwer Law International, The Hague/London/Boston, 2003), pp. 149-182.

Bickel, A.M., *The Least Dangerous Branch – The Supreme Court at the Bar of Politics* (Yale University Press, New Haven/London, 1962).

Bickel, A.M., 'The Supreme Court, 1960 - Term Foreword: The Passive Virtues' (1961) 75 Harvard Law Review 40, pp. 40-244.

Bothe, M., 'Occupation, Belligerent' in R. Bernhardt (ed), *Encyclopedia of Public International Law* (1997), iii, pp. 763-765.

Boyd, K. Lee, 'Universal Jurisdiction and Structural Reasonableness' (2004) 40 Texas International Law Journal 1, pp. 1-58.

Bradly Wendel, W., 'Legal Advising and the Rule of Law' in K. Tranter et al. (eds), *Reaffirming Legal Ethics – Taking Stock and New Ideas* (Routledge, Abingdon, 2010), pp.45-56

Brown, R.L., 'When Political Questions Affect Individual Rights: The Other Nixon v United States' (1993) Supreme Court Review 125, pp. 125-155.

Brownlie, I., *Principles of Public International Law* (7th edn, Oxford University Press, New York, 2008).

Brownlie, I., *The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations* (Martinus Nijhoff Publisher, The Hague, 1998).

Caron, D., 'Towards A Political Theory of International Courts and Tribunals' (2007) 24 Berkeley Journal of International Law, pp. 401-422.

Carruthers, J.M. and Crawford, E.B., 'Kuwait Airways Corporation v. Iraqi Airways Company' (2003) 52 International and Comparative Law Quarterly 3, pp. 761-774.

Carty, A., 'The Continuing Influence of Kelsen on the General Perception of the Discipline of International Law' (1998) 9 European Journal of International Law 2, pp. 344-354.

Casper, J.D., 'The Supreme Court and National Policy Making' (1976) 70 American Political Science Review 1, pp. 50-63.

Cassese, A., 'Implementation of International Rules within National Systems' - Chapter 12 - in *International Law* (2nd edn Oxford University Press, New York, 2005), pp. 220-232.

Cassese, A., *International Criminal Law* (Oxford University Press, Oxford, 2003).

Cassese, A., *International Law* (2nd edn, Oxford University Press, New York, 2005).

Cassese, A., 'On Some Merits of the Israeli Judgment on Targeted Killings' (2007) 5 Journal of International Criminal Justice 2, pp. 339-345.

Cassese, A., 'On the Use of Criminal Law Notions in Determining State Responsibility for Genocide' (2007) 5 Journal of International Criminal Justice 4, pp. 875-887.

Cassese, A., *Violence and Law in the Modern Age* (Princeton University Press, Princeton, 1988).

Charlesworth, H., 'Comment' (2003) 24 Adelaide Law Review 13, pp. 13-14.

Charney, J.I., 'International Criminal Law and the Role of Domestic Courts' (2001) 95 American Journal of International Law 1, pp. 120-124.

Charney, J.I., 'Judicial Deference in Foreign Relations' (1989) 83 American Journal of International Law 4, pp. 805-813.

Chesney, R.M., 'Unravelling Deference: *Hamdan*, the Judicial Power, and Executive Treaty Interpretations' (2006) 92 Iowa Law Review pp. 1723-1782.

Chesney, R., 'Who May Be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force' (2011) Yearbook of International Humanitarian Law (forthcoming).

Chesterman, S., 'An International Rule of Law?' (2008) 56 American Journal of Comparative Law, pp. 331-361.

Chesterman, S., 'The Rule of Law', in Max Planck Encyclopedia of Public International Law, online at <www.mpepil.com>.

Chetail, V., 'The Contribution of the International Court of Justice to International Humanitarian Law' (2003) 85 International Review of the Red Cross, p. 235-269.

Ciampi, A., 'The Italian Court of Cassation Asserts Civil Jurisdiction over Germany in a Criminal Case Relating to the Second World War: The *Civitella* case' (2009) 7 Journal of International Criminal Justice 3, pp. 597-615.

Clapham, A., 'Extending International Criminal Law beyond the Individual to Corporations and Armed Opposition Groups' (2008) 6 Journal of International Criminal Justice 2, pp. 899-926.

Cole, D., 'Challenging Covert War: The Politics of the Political Question Doctrine' (1985) 26 Harvard International Law Journal 1, pp. 115-188.

Collins, L., 'Foreign Relations and the Judiciary' (2002) 51 International and Comparative Law Quarterly 3, pp. 485-510.

Condorelli, L. and Naqvi, Y., 'The War against Terrorism and *Jus in Bello*: Are the Geneva Conventions Out of Date?' in A. Bianchi (ed), *Enforcing International Law Norms against Terrorism* (Hart Publishing, Oxford, 2004), pp. 25-37.

Cornell, D., 'Violence of the Masquerade: Law dressed up as Justice' (1990) 11 Cardozo Law Review, pp. 1047-1064.

Cotterrell, R., *The Sociology of Law* (Butterworths, London, 1984).

Crawford, J., 'International Law and the Rule of Law' (2003) 24 Adelaide Law Review 3, pp. 3-12.

Cryer, R., Friman, H., Robinson, D., Wilmshurst, E., *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, Cambridge, 2007).

D'Amato, A., 'Is International Law Coercive?' (2008) Northwestern University School of Law Paper Series, pp. 1-36.

D'Argent, P., *Les Réparations de Guerre en Droit International Public* (Bruylant, Brussels, 2003).

Dahl, R., 'Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker' (1957) Journal of Public Law 6, pp. 279-295.

Daillier, P. and Pellet, A., *Droit International Public* (7ème éd, L.G.D.J., Paris, 2002).

Davies, M., 'Kuwait Airways Corp v Iraqi Airways Co. – The Effect in Private International Law of Breach of Public International Law by a State Actor' (2001) 2 Melbourne Journal of International Law 2, pp. 523-534.

Davis, J., *Justice across Borders: The Struggle for Human Rights in U.S. Courts* (Cambridge University Press, Cambridge, 2008).

De Greiff, P., 'Justice and Reparations' in P. De Greiff (ed), *The Handbook of Reparations* (Oxford University Press, Oxford, 2006), pp.451-477.

De Sena, P. and De Vittor, F., 'State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrini Case' (2005) 16 European Journal of International Law 1, pp. 89-112.

Del Ponte, C. & Sudetic, C., *Madame Prosecutor: Confrontations With Humanity's Worst Criminals and the Culture of Impunity* (Other Press, New York, 2009).

Denza, E., 'The Relationship between International and National Law' in M.D. Evans (ed), *International Law* (2nd edn, Oxford University Press, New York, 2006), pp. 423-446.

'Department of Justice Position in 'Unocal'' (2003) 97 American Journal of International Law 3, pp. 703-706.

Derrida, J., 'The Force of Law: The Mystical Foundation of Authority' (1990) 11 Cardozo Law Review 920, pp. 920-1046.

Dicey, A.V., *Introduction to the Study of the Law of the Constitution* (10th edn, Macmillan, London, 1959).

Dicey, A.V., *Introduction to the Study of the Law of the Constitution* (Macmillan, London, 1885).

Dinstein, Y., 'Legislation Under Article 43 of the Hague Regulations: Belligerent Occupation and Peace building' (Program on Humanitarian Policy and Conflict Research at Harvard University - Occasional Paper Series, Fall 2004), pp. 1-18.

Dinstein, Y., *The International Law of Belligerent Occupation* (Cambridge University Press, Cambridge, 2009).

Dinstein, Y., 'The Israeli Supreme Court and the Law of Belligerent Occupation: Article 43 of the Hague Regulation' (1995) 25 Israeli Yearbook on Human Rights 1, pp. 1-20.

Dinstein, Y., 'The Legislative Power in Administered Territories' (1972) 2 Tel Aviv University Law Review, pp. 505-511 (in Hebrew).

Dinstein, Y., 'The Maintenance of Public Order and Life in the Administered Territories' (1984) 10 Tel Aviv Law Review, pp. 405-412 (in Hebrew).

Dolzer, R., 'The Settlement of War-Related Claims: Does International Law Recognize a Victim's Private Right of Action? Lessons after 1945' (2002) 20 Berkeley Journal of International Law, pp. 296-341.

Dörmann, K. and Geiβ, R., 'The Implementation of Grave Breaches into Domestic Legal Orders' (2009) 7 Journal of International Criminal Justice 4, pp. 703-721.

Droege, C., 'The Interplay between International Humanitarian Law and International Human Rights Law in Situation of Armed Conflict' (2007) 40 Israel Law Review 2, pp. 310-355.

Dutli, M.T., 'The ICRC Advisory Service on International Humanitarian Law' in M. Bothe (ed), *Towards a Better Implementation of International Humanitarian Law* (Arno Spitz, Berlin, 2001), pp. 223.

Dworkin, R., *A Matter of Principle* (Mass: Harvard University Press, Cambridge, 1985).

Ellis, M.S., 'Coming to Terms with Its Past - Serbia's New Court for the Prosecution of War Crimes' (2004) 22 Berkeley Journal of International Law, pp. 165-194.

Eser, A., 'Defences in War Crimes' (1994) 24 Israel Yearbook on Human Rights, pp. 201-234.

Eser, A., 'Grounds for Excluding Criminal Responsibility' in O. Triffterer (ed), *Commentary on the Rome Statute of the ICC: Observers' Notes, Article by Article* (Nomos Verlagsgesellschaft, Baden-

Baden, 1999), Article 31. pp. 863-878.

Evans, M., 'International Wrongs and National Jurisdiction' in M. Evans (ed), *Remedies in International Law: the Institutional Dilemma* (Hart Publishing, Oxford, 1998), pp. 173-190.

Falk, R., 'Casting the Spell: The New Haven School of International Law' (1995) 104 The Yale Law Journal 7, pp. 1991-2008.

Falk, R., *The Role of Domestic Courts in the International Legal* (Syracuse University Press, Syracuse, 1964).

Falk, R., 'The Shimoda Case: A Legal Appraisal of the Atomic Attacks on Hiroshima and Nagasaki' (1965) 59 American Journal of International Law 4, pp. 759-793.

Falk, R., *Human Rights Horizons: The Pursuit of Justice in a Globalizing World* (Routledge, New York, 2000)

Fassbender, B., 'Can Victims Sue State Officials for Torture? Reflections on Rasul v. Myers from the Perspective of International Law' (2008) 6 Journal of International Criminal Justice 2, pp. 347-369.

Finnis, J., *Natural Law and Natural Rights* (Oxford University Press, New York, 1980).

Fletcher, G., 'Citizenship and Personhood in the Jurisprudence of War: Hamdi, Padilla and the Detainees in Guantánamo Bay' (2004) 2 Journal of International Criminal Justice 4, pp. 953-966.

Focarelli, C., 'Denying Foreign State Immunity for Commission of International Crimes: The Ferrini Decision' (2005) 54 International Comparative Law Quarterly, pp. 951-958.

Fox, G., 'Re-examining the Act of State Doctrine: An Integrated Conflicts Analysis' (1992) 33 Harvard International Law Journal 2, pp. 521-570.

Fox, H., *The Law of State Immunity* (Oxford University Press, New York, 2002).

Franck, T.M., *Fairness in International Law and Institutions* (Oxford University Press, New York, 1995).

Franck, T.M., *Political Questions/Judicial Answers: Does the Rule of Law Apply to Foreign Affairs?* (Princeton University Press, Princeton, 1992).

Frulli, M., 'When Are States Liable Towards Individuals for Serious Violations of Humanitarian Law? The *Marković* Case' (2003) 1 Journal of International Criminal Justice 2, pp. 406-427.

Fuller, L., *The Morality of Law* (Yale University Press, New Haven, 1964).

Gaeta, P., 'Are Victims of Serious Violations of International Humanitarian Law Entitled to Compensation?' in O. Ben-Naftali (ed), *International Human Rights and Humanitarian Law* (Oxford University Press, Oxford, 2011), pp. 305-327.

Gaeta, P., 'May Necessity be Available as a Defense for Torture in the Interrogation of Suspected Terrorists?' (2004) 2 Journal of International Criminal Justice 3, pp. 785-794.

Gallagher, K., 'Civil Litigation and Transitional Business – An Alien Tort Statute Primer' (2010) 8 Journal of International Criminal Justice 3, pp. 745-767.

Gallagher, K., 'Universal Jurisdiction in Practice: Efforts to Hold Donald Rumsfeld and Other High-Level United States Officials Accountable for Torture' (2009) 7 Journal of International Criminal Justice 5, pp. 1087-1116.

Gasser, H.P., 'International Committee of the Red Cross (ICRC)' in Max Planck Encyclopedia of International Law, online at <www.mpepil.com>.

Gattini, A., 'The UN Compensation Commission: Old Rules, New Procedures on War Reparations' (2002) 13 European Journal of International Law 1, pp. 161-181.

Gattini, A., 'To What Extent are State Immunity and Non-Justiciability Major Hurdles to Individuals' Claim for War Damages?' (2003) 1 Journal of International Criminal Justice 2, pp. 348-367.

Gattini, A., 'War Crimes and State Immunity in the Ferrini Decision' (2005) 3 Journal of International Criminal Justice 1, pp. 224-242.

Gillard, E.C., 'Reparation for Violations of International Humanitarian Law' (2003) 85 International Review of the Red Cross 851, pp. 529-553.

Ginbar, Y., 'Celebrating' a Decade of Legalised Torture in Israel', pp. 169-187. Available at: <http://projects.essex.ac.uk/ehrr/V6N1/Ginbar.pdf>.

Graig, P.P., 'Formal and Substantive Conceptions of the Rule of law: An Analytical Framework' in *Public Law* (1997), pp. 467-487.

Greenspan, M., *The Modern Law of Land Warfare* (University of California Press, Berkley, 1959).

Greenwood, C., ‘International Law and the ‘War against Terrorism’’ (2002) 78 International Affairs 2, pp. 301-317.

Greenwood, C., ‘The Administration of Occupied Territories’ in E. Playfair (ed), *International Law and the Administration of Occupied Territories* (Clarendon Press, Oxford, 1992), pp. 241-266.

Gross, A., ‘Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?’ (2007) 18 European Journal of International Law 1, pp. 1-35.

Halberstam, M., ‘Sabbatino Resurrected: The Act of State Doctrine in the Revised Restatement of U.S. Foreign Relations Law’ (1985) 79 American Journal of International Law 1, pp. 68-91.

Hampson, F., ‘The Relationship between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Body’ (2008) 90 International Review of the Red Cross 871, pp. 549-572.

Harel, A., ‘Despite Court Ruling, Palestinian Use of Route 443 Likely to be Limited’ *Haaretz* (10 May 2010). Available at: <www.haaretz.com/print-edition/news/despite-court-ruling-palestinian-use-of-route-443-likely-to-be-limited-1.289321>.

Hartmann**,** F., *Paix et Châtiment. Les Guerres Secrètes de la Politique et de la Justice Internationales* (Flammarion, Paris, 2007).

Hayek, F.A., *The Political Idea of the Rule of Law* (National Bank of Egypt, Cairo, 1955).

Hazan, P., *La Justice Face a la Guerre* (Stock, Paris, 2000).

Henckaerts, J.M. and Doswald-Beck, L., *Customary International Humanitarian Law - Volume I: Rules* (Cambridge University Press, Cambridge, 2005).

Hendin, S., ‘Extraterritorial Application of Human Rights: the Differing Decisions of Canadian and UK Courts’ (2010) 28 Windsor Review of Legal and Social Issues, pp. 57-86.

Henkin, L., *How Nations Behave: Law and Foreign Policy* (Columbia University Press, New York, 1979).

Henkin, L., ‘Is There a ‘Political Question’ Doctrine?’ (1976) 85 Yale Law Journal 5, pp. 597-625.

Higgins, R., 'The ICJ and the Rule of Law' - Speech to the United Nations University (11 April 2007). Available at: <http://www.unu.edu/events/files/2007/20070411_Higgins_speech.pdf>.

Higgins R., 'The Changing Position of Domestic Courts in the International Legal Order' - Speech at the First International Law in Domestic Courts Colloquium, The Hague, 17 March 2008, p. 1-12.

Hofmann, R., 'Victims of Violations of International Humanitarian Law: Do They Have an Individual Right to Reparation against States under International Law?' in P.M. Dupuy, B. Fassbender, M.N.

Shaw and K.P. Sommermann (eds), *Common Values in International Law – Essays in Honour of Christian Tomuschat*, (N.P. Engel Verlag, Kehl, 2006), pp. 341-359.

Imesis, A., ''Moderate' Torture on Trial: Critical Reflections on the Israeli Supreme Court Judgment Concerning the Legality of the General Security Service Interrogation Methods' (2001) 5 International Journal of Human Rights 3, pp. 71-96.

International Committee of the Red Cross – Advisory Service on International Humanitarian Law, 'What is International Humanitarian Law?' (July 2004). Available at: <http://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf>.

International Committee of the Red Cross – Advisory Service on International Humanitarian Law, 'The Model Law - Geneva Conventions (Consolidation) Act Legislation for Common Law States on the 1949 Geneva Conventions and their 1977 and 2005 Additional Protocols' (31 August 2008). Available at: <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/geneva-conventions-protocols-model-law-310808>.

International Committee of the Red Cross, 'National Implementation of International Humanitarian Law – Biannual Update, January - July 2009' (2009) 91 International Review of the Red Cross 875, pp. 627-642.

International Committee of the Red Cross, 'The International Committee of the Red Cross (ICRC): Its Mission and Work (Adopted by the Assembly of the ICRC on 19 June 2008)' (2009) 91 International Review of the Red Cross 874, pp. 399-413.

Israeli Ministry of Foreign Affairs, 'Judgments of the Israel Supreme Court: Fighting Terrorism within the Law' (2 January 2005), pp. 1-106.

‘Judicial Decisions: International Military Tribunal (Nuremberg) Judgment and Sentences’ (1947) 41 American Journal of International Law 1, pp. 172-333.

‘Judicial Enforcement of International Law Against the Federal and State Governments’ (1991) 104 Harvard Law Review 6, pp. 1269-1288.

Kalshoven, F., ‘State Responsibility for Warlike Acts of the Armed Forces: From Article 3 of the Hague Convention IV of 1907 to Article 91 of Additional Protocol I and Beyond’ (1991) 40 International and Comparative Quarterly 4, pp. 827-858.

Kalshoven, F., Greenwood, C. and David, E. in the *Prisoner-of-War Cases* submitted to the Tokyo High Court (1997), published in H. Fujita/I. Suzuki/K. Nagano (eds), *War and the Rights of Individuals: Renaissance of Individual Compensation* (Nippon Hyoron-sha Co. Ltd. Publishers, Tokyo, 1999).

Karayanni, M., ‘Choice of Law under Occupation: How Israeli Law Came to Serve Palestinian Plaintiffs’ (2009) 5 Journal of Private International Law 1, pp. 1-48.

Kelsen, H., *General Theory of Law and State*, trans A. Wedberg (Mass: Harvard University Press, Cambridge, 1949).

Kelsen, H., *Law and Peace in International Relations* (Mass: Harvard University Press, Cambridge, 1942).

Kelsen, H., *Principles of International Law* (Rinehart & Company, New York, 1952).

Kennedy, D., *A Critique of Adjudication (fin du siècle)* (Mass: Harvard University Press, Cambridge, 1997).

Kennedy, D., ‘The Turn to Interpretation’ (1985) 58 Southern California Law Review 251, pp. 251-276.

Kleffner, J.K., *Complementarity in the Rome Statute and National Criminal Jurisdictions* (Oxford University Press, Oxford, 2008).

Koh, H. Hongju, ‘International Law as Part of Our Law’ (2004) 98 American Journal of International Law 1, pp. 43-57.

Koh, H. Hongju, 'Setting the World Right' (2006) 115 The Yale Law Journal, pp. 2350-2379.

Koh, H. Hongju, *The National Security Constitution: Sharing Power After the Iran-Contra Affair* (Yale University Press, New Haven, 1990).

Koh, H. Hongju, 'Transnational Public Law Litigation' (1991) 100 The Yale Law Journal 8, pp. 2347-2402.

Koh, H. Hongju, 'Why Do Nations Obey International Law?' (1997) 106 The Yale Law Journal 8, pp. 2599-2659.

Koh, H. Hongju, 'Why Transnational Law Matters' (2006) 24 Penn State International Law Review 4, pp. 745-754.

Kolb, R., *Ius in Bello – Précis de Droit International des Conflits Armés* (2e éd., Helbing & Lichtenhahn/Bruylant, Bâle/Bruxelles, 2009).

Koskenniemi, M., 'The Politics of International Law', (1990) 1 European Journal of International Law, pp. 4-32

Koskenniemi, M., *From Apology to Utopia – The Structure of International Legal Argument'* (Cambridge University Press, New York, 2005).

Koskenniemi, M., 'International Legal Theory and Doctrine', in Max Planck Encyclopaedia of International Law (2008), available at www.mpepil.com.

Koskenniemi, M., 'The Politics of International Law – 20 Years Later', (2009) 20 European Journal of International Law 1, pp. 7-19.

Koskenniemi, M., 'What is International Law For?' in Evans, M. (ed), *International Law* (Oxford University Press, 3rd edition, 2010), pp.32-53.

Koskenniemi, M., *The Politics of International Law* (Hart Publishing, Oxford, 2011).

Kreicker, H., 'National Prosecution of Genocide from a Comparative Perspective' (2005) 5 International Criminal Law Review 313, pp. 313-328.

Kretzmer, D., 'The Advisory Opinion: The Light Treatment of International Humanitarian Law' (2005) 99 American Journal of International Law 1, pp. 88-102.

Kretzmer, D., *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (State University of New York Press, Albany, 2002).

Kretzmer, D., 'The Supreme Court of Israel: Judicial Review during Armed Conflict' (2005) 47 German Yearbook of International Law, pp. 392-455.

Ku, J.G. and Yoo, J.C., 'Hamdan V. Rumsfeld: The Functional Case for Foreign Affairs Deference to the Executive Branch' (2006) 23 *Constitutional Commentary*, pp. 179-226.

Kumm, M., 'International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model' (2003) 44 Virginia Journal of International Law, pp. 19-32.

Lee, L.T., 'The Right of Victims of War to Compensation' in R. St. J. Macdonald (ed), *Essays in Honour of Wang Tieya* (Martinus Nijhoff, Dordrecht, 1993), pp. 489-496.

Leiter, B., 'American Legal Realism' in D.M. Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (2nd edn, Blackwell, Oxford, 2010), pp. 249-266.

Mann, F.A., *Foreign Affairs in English Courts* (Oxford University Press, Oxford, 1986).

Marmor, A., 'The Ideal of the Rule of Law' in D. Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (2nd edn, Wiley-Blackwell, Oxford, 2010), pp. 666-674.

McDougal, M.S. & Reisman, W.M., 'International Law in Policy-Oriented Perspective' in R.St. J.

MacDonald & J. Douglas (eds), *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (Martinus Nijhoff, Boston, 1983), pp. 103-129.

Melzer, N., *Interpretative Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* (ICRC, Geneva, 2009).

Menon, J.A., 'Guantanamo Torture Litigation' (2008) 6 Journal of International Criminal Justice 2, pp. 323-345.

Meron, T., 'Classification of Armed Conflict in the Former Yugoslavia, Nicaragua's Fallout' (1998) 93 American Journal of International Law 2, pp. 236-242.

Mersel, Y., 'Judicial Review of Counter-Terrorism Measures: the Israeli Model for the Role of the Judiciary during the Terror Era' (2006) 38 New York University Journal of International Law and Politics 12, pp. 67-120.

Milanovic, M., 'Al-Skeini and Al-Jedda in Strasbourg' (2012) 23 European Journal of International Law, (forthcoming). Available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1917395>.

Murray, C.R.G., 'The Ripple Effect: Guantanamo Bay in the United Kingdom's Courts' (2010) 1 Pace International Law Review Online Companion 9, pp. 15-40.

Negbi, M., *Justice under Occupation: the Israeli Supreme Court versus the Military Occupation in the Occupied Territories* (Cana Publishing House, Jerusalem, 1981) (in Hebrew).

Nollkaemper, P.A., 'Internationally Wrongful Acts in Domestic Courts' (2007) 101 American Journal of International Law 760, pp. 760-799.

Nollkaemper, P.A., *National Courts and The International Rule of Law* (Oxford University Press, Oxford, 2011).

Norberg, N., 'The US Supreme Court Affirms the Filartiga Paradigm' (2006) 4 Journal of International Criminal Justice 2, pp. 387-400.

O'Keefe, R., 'The Grave Breaches Regime and Universal Jurisdiction' (2009) 7 Journal of International Criminal Justice 4, pp. 811-831.

Onuf, N., *International Legal Theory: Essays and Engagements, 1966-2006* (Routledge, New York, 2008)

Oppenheim, L., 'The Legal Relations between an Occupying Power and the Inhabitants' (1917) 33 Law Quarterly Review 363, pp. 363-370.

Otto, R., 'Neighbours as Human Shields? The Israel Defense Forces' "Early Warning Procedure" and International Humanitarian Law' (2004) 86 International Review of the Red Cross 856, pp. 771-787.

Pictet, J. (ed), *Commentary: Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (ICRC, Geneva, 1958).

Pisillo-Mazzeschi, R., 'Reparation Claims by Individuals for State Breaches of Humanitarian Law and Human Rights: An Overview' (2003) 1 Journal of International Criminal Justice 2, pp. 339-347.

Pisillo-Mazzeschi, R., 'International Obligations to Provide for Reparations' Claims?' in A. Randelzhofer, C. Tomuschat (eds), *State Responsibility and the Individual, Reparation in Instances of Grave Violations of Human Rights* (Martin Nijhoff Publishers, The Hague, 1999), pp. 149-172.

Playfair, E., 'Playing on Principles? Israel's Justification for its Administrative Acts in the Occupied West Bank' in E. Playfair (ed), *International Law and the Administration of Occupied Territories* (Clarendon Press, Oxford, 1992), pp. 205-238.

Posner, T.R., 'Kadic v. Karadzic, 70 F. 3d 232 (June 18, 1996)' (1996) 90 American Journal of International Law 4, pp. 658-663.

Raguan, G., 'Adjudicating Armed Conflict in Domestic Courts: The Experience of Israel's Supreme Court' (2010) 13 Yearbook of International Humanitarian Law, pp. 61-95.

Raz, J., *The Authority of Law* (Oxford University Press, Oxford, 1979).

Raz, J., 'The Rule of Law and Its Virtue' (1977) 93 The Law Quarterly Review 2.

Raz, J., 'The Politics of the Rule of law', (1990) 3 Ratio Juris, pp. 331–339.

Reisman, W.M., *Nullity and Revision: The Review and Enforcement of International Judgments and Awards* (Yale University Press, Yale, 1971).

Reisman, W.M., 'The View from the New Haven School of International Law' (1992) 86 American Society of International Law Proceedings, pp. 118-125.

Rigaux, F., 'Hans Kelsen on International Law' (1998) 9 European Journal of International Law 2, pp. 325-343.

Roberts, A., 'Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967' (1990) 84 American Journal of International Law 1, pp. 44-103.

Roberts, A., 'Transformative Military Occupation: Applying the Laws of the War and Human Rights' in M.N. Schmitt and J. Pejic (eds), *International Law and Armed Conflict: Exploring the Fault Lines: Essays in Honour of Yoram Dinstein* (Martinus Nijhoff Publishers, Leiden, 2007), pp. 439-495.

Roberts, A., 'What is a Military Occupation?' (1984) 55 The British Yearbook of International Law 1, pp. 249-305.

Rosenne, S., *The Law and Practice of the International Court, 1920-2005*, Vol. II Jurisdiction (4th edn, Martinus Nijhoff, Leiden, 2006).

Rubinstein, A., 'The Changing Status of the 'Territories': From Escrow to Legal Mongel' (1988) 8 Tel Aviv University Studies in Law, pp. 59-79.

Sampford, C., 'Legal Ethics in a Post-Westphalian World: Building the International Rule of Law and other Tasks' in K. Tranter et al. (eds), *Reaffirming Legal Ethics – Taking Stock and New Ideas* (Routledge, Abingdon, 2010), pp. 73-95.

Sampford, C., 'Reconceiving the Rule of Law for a Globalizing World' in S. Zifcak (ed), *Globalisation and The Rule of Law* (Routledge, London, 2005), pp. 9-31.

Sandoz, Y., *The International Committee of the Red Cross as Guardian of International Humanitarian Law* (ICRC, Geneva, 1998), Available at: <http://www.icrc.org/eng/resources/documents/misc/about-the-icrc-311298.htm>.

Sands, P., 'The "Political" and the "Legal:" Comments of Professor Tushnet's Paper' (2007) 3 International Journal of Law in Context 4, pp. 319-322.

Sassòli, M., 'Article 43 of the Hague Regulations and Peace Operations in the Twenty-First Century' (Program on Humanitarian Policy and Conflict Research at Harvard University, June 2004), pp. 1-26.

Sassòli, M., 'La Guerre contre le Terrorisme, le Droit International Humanitaire et le Statut de Prisonnier de Guerre' (2001) 39 Canadian Yearbook of International Law 211, pp. 211-252.

Sassòli, M., 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers' (2005) 16 European Journal of International Law 4, pp. 661-694.

Sassòli, M., 'Reparation' in V. Chetail (ed), *Post-Conflict Peacebuilding: A Lexicon* (Oxford University Press, Oxford, 2009), pp. 279-290.

Sassòli, M., 'State Responsibility for Violations of International Humanitarian Law' (2002) 84 International Review of the Red Cross 846, pp. 401-434.

Sassòli, M., 'The Legal Qualification of the Conflicts in the Former Yugoslavia: Double Standards or New Horizons for International Humanitarian Law?' in W. Tieya and S. Yee (eds), *International Law in the Post-Cold War World: Essays in Memory of Li Haopei* (Routledge, London, 2001), p. 307 ss.

Sassòli, M., 'Transnational Armed Groups and International Humanitarian Law' (Program on Humanitarian Policy and Conflict Research at Harvard University - Occasional Paper Series, Winter 2006), pp. 1-50.

Sassòli, M., 'Use and Abuse of the Laws of War in the 'War Against Terrorism'' (2004) 22 Law and Inequality: A Journal of Theory and Practice, pp. 195-221.

Sassòli, M., Bouvier, A. and Quintin, A., *How Does Law Protect in War?* (3rd ed., Geneva, ICRC, 2011).

Sassòli, M. and Olson, L.M., 'Prosecutor v. Tadic (Judgment), Case No. IT-94-a-A. 38 ILM 1518 (1999)' (2000) 94 American Journal of International Law 3, pp. 571-578.

Sassòli, M. and Olson, L.M., 'The Judgment of the ICTY Appeals Chamber on the Merits in the Tadic Case' (2000) 82 International Review of the Red Cross 839, pp. 733-769.

Sassòli, M. and Olson, L.M., 'The Legal Relationship between International Humanitarian Law and Human Rights Law where It Matters: Admissible Killing and Internment of Fighters in Non International Armed Conflict' (2008) 90 International Review of the Red Cross 871, pp. 599-627.

Scharpf, F.W., 'Judicial Review and the Political Question: A Functional Analysis' (1966) 75 Yale Law Journal 517, pp. 517-598.

Scheiber, H.N., 'Taking Responsibility: Moral and Historical Perspectives on the Japanese War-Reparations Issues' (2002) 20 Berkeley Journal of International Law 233, pp. 233-249.

Schlag, P., 'A Brief Survey of Deconstruction' (2005) 27 Cardozo Law Review 741, pp. 741-752.

Schmitt, M.N., 'Human Shields in International Humanitarian Law' (2009) 47 Columbia Journal of Transitional Law 2, pp. 292-338.

Schupack, A.N., 'The Arab-Israeli Conflict and Civil Litigation against Terrorism' (2010) 60 Duke Law Journa, pp. 207-248.

Schwenk, E.H., 'Legislative Power of the Military Occupant under Article 43, Hague Regulations' (1944-1945) 54 Yale Law Journal 2, pp. 393-416.

Sfard, M., 'The Price of Internal Legal Opposition to Human Rights Abuses' (2009) 1 Journal of Human Rights Practice 1, pp. 37-50.

Shamir, R., 'Landmark Cases and the Reproduction of Legitimacy: The Case of Israel's High Court of Justice' (1990) 24 Law & Society Review 3, pp. 781-806.

Shamgar, M., 'Legal Concepts and Problems of the Israeli Military Government - The Initial Stage' in M. Shamgar (ed), *Military Government in the Territories Administrated by Israel 1967-1980, The Legal Aspect,* (The Harry Sacher Institute for Legislative Research and Comparative Law, The Hebrew University, Jerusalem, 1982), pp. 13.

Shany, Y., 'Capacities and Inadequacies: a Look at the Two Separation Barrier Cases' (2005) 38 Israel Law Review, pp. 230-246.

Shany, Y., 'The Prohibition Against Torture and Cruel, Inhuman and Degrading Treatment and Punishment: Can the Absolute be Relativized under Existing International Law?' (2007) 56 Catholic University Law Review, pp. 837-849.

Shapiro, M., *Courts*: *A Comparative and Political Analysis* (The University of Chicago Press, Chicago, 1981).

Shapiro, M., 'Political Jurisprudence' (1964) 52 Kentucky Law Journal, pp. 294-345.

Shapiro, M. and Stone Sweet, A., *On Law, Politics and Judicialization* (Oxford University Press, Oxford, 2002).

Shaw, M.N., *International Law* (5th edn, Cambridge University Press, Cambridge, 2003).

Shehadeh, R., *Occupier's Law - Israel and the West Bank* (Institute for Palestine Studies, Washington DC, 1985).

Shelah, O. and Drucker, R., *Boomerang – the Failure of Leadership in the Second Intifada* (Keter Publishers, Tel Aviv, 2005).

Shelton, D., 'Righting Wrongs: Reparations in the Articles on State Responsibility' (2002) 96 American Journal of International Law, pp. 833-856.

Shklar, J.N., 'Political Theory and the Rule of Law' in A.C. Hutchinson & P. Monahan (eds), *The Rule of Law: Ideal or Ideology* (Carswell, Toronto, 1987), pp. 1-16.

Shoughri-Badarneh, B., 'A Decade after the High Court of Justice "Torture" Ruling, What's Changed?' in A. Baker and A. Matar (eds), *Threat: Palestinian Political Prisoners in Israel* (Pluto Press, London, 2011), pp. 114-123.

Singer, M., 'The Act of State Doctrine of the United Kingdom: An Analysis, with Comparisons to United States Practice' (1981) 75 American Journal of International Law 2, pp. 283-323.

Sloss, D., 'When Do Treaties Create Individually Enforceable Rights? The Supreme Court Ducks the Issue in *Hamdan* and *Sanchez-Llamas*' (2006-2007) 45 Columbia Journal of Transnational Law, pp. 20-113.

Spiro, P.J., 'Hamdan v. Rumsfeld. 126 S.Ct.2749' (2006) 100 American Journal of International Law 4, pp. 888-895.

Stahn, C., *The Law and Practice of International Territorial Administration: Versailles to Iraq and Beyond* (Cambridge University Press, Cambridge, 2008).

Stephens, B., 'Upsetting Checks and Balances: the Bush Administration's Efforts to Limit Human Rights Litigation' (2004) 17 Harvard Human Rights Journal, pp. 169-206.

Steyn, J., 'Guantanamo Bay: The Legal Black Hole' Twenty-seventh FA Mann Lecture, British Institute of International and Comparative Law (25 November 2003), pp. 1-14.

Tamanaha, B.Z., *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, Cambridge, 2004).

Tomuschat, C., 'Individual Reparation Claims in Instances of Grave Human Rights Violations: The Position under General International Law' in A. Randelzhofer/C. Tomuschat (eds), *State Responsibility and the Individual* (Kluwer Law International, The Hague, 1999), pp. 1-25.

Tomuschat, C., 'Reparation for Victims of Grave Human Rights Violations' (2002) 10 Journal of International and Comparative Law, pp. 157-184.

Tomuschat, C., 'Reparation in Favour of Individual Victims of Gross Violations of International Human Right and Humanitarian Law' in M. G. Kohen and L. Caflisch (eds), *Promoting Justice, Human Rights and Conflict Resolution through International Law* (Graduate Institute of International Studies, Geneva, 2007), pp. 569-590.

Van Panhuys, H. F., 'In the Borderland between the Act of State Doctrine and Questions of Jurisdictional Immunities', (1964) 13 The International and Comparative Law Quarterly 4, pp.1193-1213.

Vazquez, C.M., 'The Four Doctrines of Self-Executing Treaties' (1995) 89 American Journal of International Law 4, pp. 695-723.

Vázquez, C.M., 'The Military Commissions Act, the Geneva Conventions, and the Courts: A Critical Guide' (2007) 101 American Journal of International Law 1, pp. 73-98.

Villiger, M.E., 'Domestic Courts and the International Rule of Law – the Perspective of the European Courts of Human Rights' presented at *The First International Law in Domestic Courts (ILDC) Colloquium*, University of Amsterdam. Available at: < http://www.jur.uva.nl/aciluk/object.cfm/24A0465F-1321-B0BE-A477AEC5C2BEDC6B>.

Villiger, M.E., 'Non-Retroactivity of the Convention' in *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers, Leiden-Boston, 2009).

Von Glahn, G., *Law among Nations: An Introduction to Public International Law* (5th edn, Macmillan, New York, 1986).

Warbrick C., 'International Law in English Courts: Recent Cases' , (2003) 52 The International and Comparative Law Quarterly 3 , pp. 815-824

Watts, A., 'The Importance of International Law' in M. Byers (ed), *The Role of Law in International Politics* (Oxford University Press, Oxford, 2000), pp. 5-16.

Watts, A., 'The International Rule of Law' (1993) 36 German Yearbook of International Law 15, pp. 15-45.

Wechsler, H., 'Toward Neutral Principles of Constitutional Law' (1959) 73 Harvard Law Review 1, pp. 1-35.

Weill, S., 'Reframing the Legality of the Israeli Military Courts –Military Occupation or Apartheid?' in A. Baker & A. Matar (eds), *Threat - Palestinian Political Prisoners in Israel* (Pluto Press, London, 2011), pp. 136-148.

Weill, S., 'The Targeted Killing of Salah Shehadeh: from Gaza to Madrid' (2009) 7 Journal of International Criminal Justice 3, pp. 617–631.

Weill, S. and Jovanovic, I., 'National War Crimes Prosecution in Post-Conflict Era and Pluralism of Jurisdictions: the Experience of the Belgrade War Crimes Chamber' in A. Nollkaemper, C. Ryngaert and E. Kristjánsdóttir (eds.), *Importing International Law in Post-Conflict States: The Role of Domestic Courts* (Intersentia, Antwerp, in press), pp. 241-268.

Weissbrodt, D. andNesbitt, N.H., 'The Role of the United States Supreme Court in Interpreting and Developing Humanitarian Law' (2011) 95 Minnesota Law Review 4, pp. 1339-1423.

Yap, J., 'Corporate Civil Liability for War Crimes in Canadian Courts: Lessons from *Bil'in (Village Council) v. Green Park International Ltd.*' (2010) 8 Journal of International Criminal Justice 2, pp. 631-648.

Yates, J. and Whitford, A., 'Presidential Power and the US Supreme Court' (1998) 51 Political Research Quarterly 2, pp. 539-550.

Yoo, J.C., 'Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution' (1999) 99 Columbia Law Review 8, pp. 2218-2258.

Zander, M., 'The Act of State Doctrine' (1959) 53 The American Journal of International Law 4, pp. 826-852.

Zegveld, L., 'Remedies for Victims of Violations of International Humanitarian Law' (2003) 85 International Review of the Red Cross 851, pp. 497-527.

Zegveld, L., 'Victims' Reparation Claims and International Criminal courts - Incompatible Values?' (2010) 8 Journal International Criminal Justice 1, pp. 79-111.

Zolo, D., 'Hans Kelsen: International Peace through International Law' (1998) 9 European Journal of International Law 2, pp. 306-324.

2.2 Reports

United Nations

- Secretary-General

Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993) (3 May 1993) UN Doc S/25704.

Report of the Secretary-General, 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (23 August 2004) UN Doc S/2004/616.

Report of the Secretary-General 'In Larger Freedom: Towards Development, Security and Human Rights for All' (21 March 2005) UN Doc A/59/2005.

Report of the Secretary-General 'Uniting Our Strengths: Enhancing United Nations Support for the Rule of Law' (14 December 2006) UN Doc A/61/636.

Report of the Secretary-General, 'Strengthening and Coordinating United Nations Rule of Law Activities' (6 August 2008) UN Doc A/63/226.

Report of the Secretary-General, 'Annual Report on Strengthening and Coordinating United Nations Rule of Law Activities' (17 August 2009) UN Doc A/64/298.

- Human Rights Council

Human Rights Council, 'Human Rights in Palestine and Other Occupied Arab Territories - Report of the United Nations Fact-Finding Mission on the Gaza Conflict' (25 September 2009) UN Doc A/HRC/12/48.

Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, Addendum, 'Study on Targeted Killings', UN Doc A/HRC/14/24/Add.6 (28 May 2010).

- Human Rights Committee

Human Rights Committee, 'Concluding Observations of the Human Rights Committee: Israel 21/08/2003' UN doc CCPR/CO/78/ISR (21 August 2003).

- Other

'Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, pursuant to Security Council resolution 1564 of 18 September 2004' (Geneva, 25 January 2005).

'The Rule of Law Coordination and Resource Group - Joint Strategic Plan 2009–2011', United Nations Rule of Law (February 2009).

United Nations Office for the Coordination of Humanitarian Affairs in the occupied Palestinian territory, *The Humanitarian Impact on Palestinians of Israeli Settlements and Other Infrastructure in the West Bank* (July 2007).

United Nations Office for the Coordination of Humanitarian Affairs in the occupied Palestinian territory, *Movement and Access in the West Bank* (September 2011).

Regional organizations

Council of Europe, 'Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States' (2007) Rapporteur Mr. Dick Marty, Doc. 11302 Rev.

OSCE Mission to Serbia and Montenegro, 'Report on War Crimes before Domestic Courts' (Belgrade, October 2003).

OSCE Mission to Serbia and Montenegro, 'Strategy on Support to the National Judiciary in Conducting War Crimes Trials' (Belgrade 11 April 2003).

ICRC

'Report on the Protection of War Victims' (Geneva, June 1993), in 33 International Review of the Red Cross, (1993) Special Issue n. 296, pp. 391-419 .

'The Rule of Law at National and International Level,' United Nations, General Assembly, 65th Session, Sixth Committee, on Agenda Item 85, Statement by the ICRC (New York, 14 October 2010).

State reports and statements

'Commission of Inquiry into the Methods of Investigation of the GSS Regarding Hostile Terrorist Activities' (October 1987).

'Press Briefing by Colonel Daniel Reisner, Head of the International Law Brach of the IDF Legal Division' (15 November 2000). Available at: <http://www.mfa.gov.il/MFA/MFAArchive/2000_2009/2000/11/Press%20Briefing%20by%20Colonel%20Daniel%20Reisner-%20Head%20of>.

State of Israel, 'International Covenant on Civil and Political Rights - Second Periodic Report' (20 November 2001), UN Doc CCPR/C/ISR/2001/2 (2001).

State of Israel, 'Fourth Periodic Report to Committee against Torture' (2 November 2006) Un Doc CAT/C/ISR/4.

Israeli Ministry of Foreign Affairs, 'The Operation in Gaza - Factual and Legal Aspects' (29 July 2009). Available at: <http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Hamas+war+against+Israel/Operation_in_Gaza-Factual_and_Legal_Aspects.htm>.

Israel Defence Forces, 'IDF Military Advocate General Takes Disciplinary Action, 6 Jul. 2010 Indicts Soldiers Following Investigations into Incidents during Operation Cast Lead' (6 July 2010).

The State of Israel, 'Gaza Operation Investigations: Second Update' (July 2010), pp. 1-40. Available at: <http://www.mfa.gov.il/NR/rdonlyres/1483B296-7439-4217-933C-653CD19CE859/0/GazaUpdateJuly2010.pdf>

Prime Minister's Office, 'Salah Shehadeh - Special Investigatory Commission' (27 February 2011). Available at: <http://www.pmo.gov.il/PMOEng/Communication/Spokesman/2011/02/spokeshchade270211.htm.

IDF MAG CORPS, 'Investigating the Gaza Operation - an interview with Deputy Military Advocate for Operational Affairs' (9 March 2011). Available at: <http://www.mag.idf.il/163-4544-en/patzar.aspx>.

IDF MAG CORPS, 'Indictment Filed in Connection with 'Cast Lead' - Military Advocate for Operational Affairs' (11 March 2011)

NGO Reports and media release

Association for Civil Rights in Israel (ACRI), 'Ban on Palestinian Movement on Route 443: Background Information' (June 2009). Available at: <http://www.acri.org.il/pdf/route443Aug09.pdf>.

'Court Dismisses Targeted Killing Case On Procedural Grounds Without Addressing Merits' Center for Constitutional Rights (CCR) (7 December 2010). Available at: <http://ccrjustice.org/newsroom/press-releases/court-dismisses-targeted-killing-case-procedural-grounds-without-addressing->.

Adalah, 'Israeli Military Probes and Investigations Fail to Meet International Standards or Ensure Accountability for Victims of the War on Gaza'- Briefing Paper (January, 2010), pp. 1-17.

Adalah, 'Update Report: On the Israeli Military's Continued Use of Palestinian Civilians, including Minors, as Human Shields' (July 2009), pp. 1-5.

Al-Haq, *Legitimising the Illegitimate?* (Al-Haq Organisation, 2010).

B'Tselem, 'Forbidden Roads: The Discriminatory West Bank Road Regime' (B'Tselem, August 2004).

B'Tselem, 'Routine Torture: Interrogation Methods of the General Security Service' (B'Tselem, February 1998), pp. 1-50.

Humanitarian Law Center, 'The Trial to Anton Lekaj was Fair Although Conducted Before a Non-Jurisdictional Court' (23 September 2006). Available at: <http://www-old.hlc-rdc.org/index.php/en/public-informationoutreach/press-releases/167-suenje-antonu-lekaju-je-bilo-pravino-mada-se-odvijalo-pred-nenadlenim-sudom->.

Humanitarian Law Center, 'War Crimes Trials in Serbia' (December 2007), pp. 1-18.

Humanitarian Law Center, 'Regional Debate on the Judgment by the ICJ on Genocide' (Transcript) (29 June 2007).

Human Rights Watch, 'Unfinished Business Serbia's War Crimes Chamber' (HRW Report, 28 June 2007), pp. 1-33.

Ivanišević, B., *Against the Current—War Crimes Prosecutions in Serbia* (2007) International Center for Transitional Justice (2008), pp. 1-55.

Public Committee Against Torture in Israel, 'Accountability Denied: The Absence of Investigation and Punishment of Torture in Israel' (December, 2009), pp. 1-98.

Public Committee Against Torture in Israel, 'Israel – Briefing to the Human Rights Committee Jerusalem' (June, 2010), pp. 1-47.

Public Committee Against Torture in Israel, 'OMCT - World Organisation Against Torture Israel – Briefing to the UN Committee Against Torture' (Jerusalem & Geneva, April 2009), pp. 1-24.

Public Committee Against Torture in Israel, 'Ticking Bombs - Testimonies of Torture Victims in Israel' (30 May 2007), pp. 1-99.

Public Committee Against Torture in Israel and Adalah, 'Exposed: The Treatment of Palestinian Detainees During Operation Cast Lead' (June 2010), pp. 1-49.

Weill, S. and Azarov, V., 'Israel's Unwillingness to Prosecute International Crimes' (FIDH, September 2011), pp. 1-28.

2.3 Other documents

International Law Association, 'Report of the International Committee on Compensation for Victims of Armed Conflict, 'Draft Declaration of International Law Principles on Compensation for Victims of War (Substantive issues)'' (Rio De Janeiro, 2008), pp. 1-31.

International Law Association, 'Report of the International Committee on Compensation for Victims of Armed Conflict, 'Draft Declaration of International Law Principles on Compensation for Victims of War Armed Conflict (Substantive issues)'' (The Hague, 2010), pp. 1-30.

Lord Justice Richards, 'The International Dimension of Judicial Review' The 2006 Gray's Inn Reading (7 June 2006), pp. 1-10.

Oxford Reports on International Law in Domestic Courts, Analysis of O'Keefe (30 November 2006). Available at : <http://www.oxfordlawreports.com >.

Oxford Reports on International law in Domestic Courts, Analysis of Erin Culbertson and Dinah Shelton (21 July 2008). Available at : <http://www.oxfordlawreports.com >.