THE LAW AND THE OCCUPIED PALESTINIAN TERRITORIES: THE ROLE OF THE ISRAELI HIGH COURT OF JUSTICE

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Résumé:

Depuis le début de l'occupation militaire israélienne des territoires palestiniens en 1967, la Haute Cour de Justice israélienne a été saisie à de nombreuses reprises par divers requérants et a rendu des centaines de décisions dans lesquelles elle a appliqué le droit international humanitaire (DIH), d'une manière sans précédent. En règle générale, les juridictions nationales des Etats démocratiques peuvent assumer différents rôles lorsqu'elles traitent des questions juridiques liées à des conflits armés. Ces rôles sont fonction de leur position institutionnelle au sein de leur propre système politique. Cet article analyse d'une manière critique les différents rôles de la Haute Cour de justice israélienne dans son application du DIH, et les évalue à la lumière des principes fondamentaux de la primauté du droit. Comme le montre l'article, le rôle fonctionnel de la cour israélienne peut être caractérisé comme une combinaison d'attitudes mitigées.

Abstract :

Since the beginning of the military occupation of the Palestinian Territories petitioners have been addressing the Israeli High Court of Justice in an unprecedented manner, and that Court has rendered hundreds of decisions in which it has applied international humanitarian law (IHL). Generally, national courts of democratic states can assume different roles while adjudicating cases dealing with issues arising out of armed conflicts, depending on their institutional position within their domestic governmental system. This article critically analyses the different functional roles of the Israeli High Court of Justice in its application of IHL, and assesses them in light of the core principles of the rule of law. As the article shows, the functional role of the Israeli court can be characterized as a combination of mixed attitudes.

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Introduction

In June 1967 Israel has established a military government over the Occupied Palestinian Territories (OPT)[2]. Israel accepted almost immediately also the judicial review competence of its highest judicial body over the acts of the military commander in the OPT, and the Israeli High Court of Justice has rendered since hundreds of decisions in which it has applied international humanitarian law (hereinafter: IHL).[3] At the early years of the occupation 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. In the first cases, as no challenge on jurisdiction was voiced by the State as a matter of policy,[4] the High Court of Justice's review over State acts in the

[2] '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 (hereinafter: the Hague Regulations). 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. 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, paragraphs 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. See also TIGROUDJA (H.), "La Cour suprême israélienne et la protection des personnes en temps de conflit", *Revue générale de droit international* public, 2009/3, tome 113, pp. 555-588. On the applicability of international law in the Israeli legal system see: KRETZMER (D.), *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories*, Albany, State University of New York Press, 2002, pp. 31-42; DINSTEIN (Y.), *The International Law of Belligerent Occupation*, Cambridge, Cambridge University Press, 2009, pp. 20-30.

[3] 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". 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. 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. See Article 15(c) of the Israeli Basic Law: the Judiciary (28 February 1984). Article 15(d) lists among its operational authority the competence 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>.

[4] SHAMGAR (M.), "Legal Concepts and Problems of the Israeli Military Government - The Initial Stage" *in* SHAMGAR (M.) (ed.), *Military Government in the Territories Administrated by Israel 1967-1980, The Legal Aspect*, Jerusalem, The Hebrew University, The Harry Sacher Institute for Legislative Research and Comparative Law, 1982), pp. 13, 43.

OPT was a *fait accompli*.[5] 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[6].

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."[7] This decision was not based solely on genuine respect for IHL 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.[8] 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.

National courts of democratic states can assume different roles while adjudicating cases dealing with issues arising out of armed conflicts. They can variously serve as a legitimating agency of the state; avoid exercising jurisdiction on the grounds of extra-legal considerations; defer the matter back to the other branches of government; enforce the law as required by the rule of law; or develop the law, and introduce an ethical judgment beyond the positive application of the law. National courts define their own role as enforcing organs of IHL depending on their institutional position within their domestic governmental system.[9] Within this general framework, the article analyses the different roles of the Israeli High Court of Justice in its application of IHL, and assesses them in light of the core principles of the rule of law.[10] As the article shows, the functional role of the Israeli court can be

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

[6] HCJ 302/72, *Abu Hilou at al. v Government of Israel*, (1972), at p. 176.

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

[8] See also KRETZMER (D.), *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories*, *op. cit.*, p. 20; SHAMIR (R.), "Landmark Cases and the Reproduction of Legitimacy: The Case of Israel's High Court of Justice" (1990) 24 *Law & Society Review* 3, p. 795.

[9] See WEILL (S.), *The Application of IHL by National Courts*, Oxford, Oxford University Press, *to be published*, 2014.

[10] On the emerging concept of the international rule of law see: NOLLKAEMPER (P.A.), *National Courts and The International Rule of* Law, Oxford, Oxford University Press, 2011; CHESTERMAN (S.), "An International Rule of Law?" (2008) 56 *American Journal of Comparative Law*, pp. 331-361; CRAWFORD (J.), "International Law and the Rule of Law" (2003) 24 *Adelaide Law Review* 3, pp. 3-12; 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, pp. 1-12. See also in French: CORTEN (O.), "L'Etat de droit en droit international : quelle valeur juridique ajoutée", *in L'Etat de droit*

characterized as a combination of mixed attitudes. Sometimes it holds an apologist role, in other cases a normative, activist, or an avoiding one.

I. – The apologist role of the Israeli High Court of Justice

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."[11]

The following section demonstrates how through the use of the law of military occupation, the Palestinian population have been kept under a military regime without any civil right, while, on the other hand, through the misuse and a selective application of the same law, a distinct legal system has been created for the Israeli settlers, who live on the same territory. The Court has legitimatized the creation of that segregated legal regime, and has actively contributed to its formation by providing the State with the necessary legal tools required to design and implement it.

1. The law of military occupation

The law of military occupation imposes a general obligation on the Occupying Power to respect, unless absolutely necessary, the law that was in force prior to the occupation (Art. 43 of the 1907 Hague Regulations). This rule prevents the Occupying Power from extending its own legal system over the occupied territories and from acting as a sovereign legislator. Article 43 of the 1907 Hague Regulations, "the cornerstone of the law of occupation in the 20th century",[12] was recognized by the Nuremberg tribunals as constituting a customary rule[13]. Although it was drafted more than 100 years ago, in the first positive instrument of international law regulating the law of military occupation,

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en droit international, Colloque de Bruxelles de la Société française pour le droit international (2008), Paris, éditions Pedone, 2009, pp. 11-40.

[11] COTTERELL (R.), *The Sociology of Law*, London, Butterworths, 1984, p. 234; See also at p. 245; SHAPIRO (M.) Shapiro, *Courts*: *A* Comparative *and Political Analysis* (The University of Chicago Press, Chicago, 1981), pp. 17-28; BENVENISTI (E.), 'National Courts and the "War on Terrorism"', *in* BIANCHI (A.) (ed.), *Enforcing International Law Norms against Terrorism*, Oxford, Hart Publishing, 2004, p. 318. For Critical legal researches on the Israeli High Court of Justice serving as a legitimating agency for Israeli's policy in the West Bank and Gaza see KRETZMER (D.), *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories*, *op. cit.* ; SHAMIR (R.), 'Landmark Cases and the Reproduction of Legitimacy: The Case of Israel's High Court of Justice', *loc. cit.*, p. 781.

[12] BENVENISTI (E.), *The International Law of Occupation*, *op. cit.*, 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".

[13] 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*, *op. cit.*, paragraph 89.

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. The authority of the military commander to legislate or to introduce new changes is limited to maintaining public order and civil life, and security needs.[14] However, its exact scope is still at the heart of contemporary academic debates.[15] At the heart of the debate 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?

Prolonged military occupation contains special circumstances that can not be ignored.[16] 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".[17]

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[14] SCHWENK (E.H.), 'Legislative Power of the Military Occupant under Article 43, Hague Regulations' (1944-1945) 54 *Yale Law Journal* 2, p. 400. 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". 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": DINSTEIN (Y.), *The International Law of Belligerent Occupation, op. cit.*, p. 90. According to Sassòli, 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: SASSOLI (M.), "Legislation and Maintenance of Public Order and Civil Life by Occupying Powers", (2005) 16 *European Journal of International Law* 4, p. 661, at pp. 663-664.

[15] 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., SASSOLI (M.), *"Legislation and Maintenance of Public Order and Civil Life by Occupying Powers", loc. it.*, pp. 661-694; SASSOLI (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; ROBERTS (A.), "Transformative Military Occupation: Applying the Laws of the War and Human Rights", *in* SCHMITT (M.N.) & PEJIC (J.) (eds.), *International Law and Armed Conflict: Exploring the Fault Lines: Essays in Honour of Yoram Dinstein*, , Leiden, Martinus Nijhoff Publishers, 2007, pp. 439-495; BHUTA (N.), "The Antinomies of Transformative Occupation", (2005) 16 *European Journal of International Law* 4, pp. 735-739; 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.

[16] See generally, ROBERTS (A.), "Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967" (1990) 84 *American Journal of International Law* 1; ROBERTS (A.), "What is a Military Occupation?" (1984) 55 *The British Yearbook of International Law* 1, pp. 249-305.

[17] BENVENISTI (E.), *The International Law of Occupation, op. cit.*, p. 147. See also SASSOLI (M.), "Legislation and Maintenance of Public Order and Civil Life by Occupying Powers", *loc. cit.*, p. 679; DINSTEIN (Y.), *The International Law of Belligerent Occupation, op. cit.*, p. 120.

2. The interpretation of Article 43 of the Hague Regulations provided by the HCJ

2.1 Prolonged military occupation

In the first cases rendered in the 1970s and early 1980s, the High Court of Justice was forming the interpretation of Article 43 of the Hague Regulations, and more generally the role of the Occupying Power, within the context of a *prolonged military occupation* – a term that first appears in 1972, only five years after the occupation started.[18] In 1983 Justice Barak in the *Jami'at Ascan* case ruled that the military commander is under the duty to ensure public order and civil life as a modern and civilized state of the 20th century . 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 as required by doctrines of welfare State.[19]

Thus, the High Court of Justice 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. It ruled that new laws and long-term changes can be introduced for two reasons: (1) the security needs of the Occupying Power (security consideration), or (2) the welfare of the local population (humanitarian consideration). With this interpretation 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 prevented. [20]

2.2 The Security consideration

At first, this term has been broadly interpreted as to include the obligation to secure Israeli settlements, even if they were established in violation of IHL. 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 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, in the name of security. Thus, fulfilment of the settlers' individual rights in the OPT, a clear political choice, is

[18] For the early cases see: *The Christian Society case* (1971); HCJ 256/72, *Electricity Company for Jerusalem District v Minister of Defense*, (1972) (hereinafter: *The First Electricity case*); HCJ 351/80, *Electricity Company for Jerusalem District v the Minister of Energy and Infrastructure and al*, (1981). Recent decisions of the Israeli High Court of Justice are available online at: < http://elyon1.court.gov.il/eng/home/index.html>.

[19] HCJ 393/82, *Jami'at Ascan al-Mu'aliman Altauniya Almahduda Almasauliya Cooperative Society v The Military Commander in the West Bank, (1983)*, excerpted in English in 14 *Israel Yearbook on Human Rights* 301 (1983) (hereinafter: The *Jami'at Ascan case*), at paragraphs 21 and 27.

[20] See n 13.

transformed in court room into a question of security, which shall be provided by the rules of international law of military occupation.

> "*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*".[21]

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*. 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…including Israeli communities' residents and Israeli citizens who do not reside in the OT*"[22].

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 to ensure their security. For that purpose, the freedom of movement of the Palestinians may be limited in a proportional way. 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, is completely absent from the ruling.

Ironically, while most of the roads' land in the OPT were expropriated for security reasons in order to protect the settlers, once built, they became a security threat to 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 has now to consider a "fear of infiltration of terrorists to Israel as a result of traffic of Palestinian cars on the road".[23] The solution of this threat, in the long run, has been the restriction of Palestinians' presence into defined and closed zones.

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[21] HCJ 2150/07, *Abu Safiya v Minister of Defence*, (2009) (hereinafter: *The Road 443* case).
[22] HCJ, *The Road 443* case (2009), paragraph 20.

[23] HCJ, *The Road 443* case (2009), paragraph 23.

2.3 The 'welfare of the local population'

The second legitimate consideration according to which the Occupying Power may introduce new laws and other changes is "the welfare of the *local population*". In 1972, High Court of Justice ruled that the settlers should be regarded as having been added to the local population.[24] This ruling provided for the first time the legal basis to administrate the illegal presence of the colonizers. 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, the State of Israel, and the settlers, 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 the annexation of the land (and more critically, its native people). [25] The High Court of Justice enabled it to be done while using IHL, 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.
By ignoring the illegality of the settlements[26] and in ruling that the settlers are a part of the *local population*, as early as in 1972, the High Court of Justice has conferred upon the State an effective legal tool that enabled it to carry out the settlement policy that required the creation of distinct legal

[24] *The First Electricity case* (1972), p. 138.
[25] Under modern *jus ad bellum* as reflected in Article 2(4) of the UN Charter, territorial acquisition resulting from the threat or use of force is illegal. According to General Assembly Resolution 2625 (XXV) of 1973, entitled "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States", "no territorial acquisition resulting from the threat or use of force shall be recognized as legal." The ICJ recognized "the principle of non annexation" as a customary rule (ICJ Advisory Opinion on *International Status of South West Africa*, ICJ Reports 1950, p. 131; ICJ Advisory opinion on the Wall, paragraphs 70 and 87). Under *jus in bello*, Article 43 makes it clear that it does not confer any sovereign right, and Article 47 of the Fourth Geneva Convention states that in cases of annexations – the rights of the protected persons provided by the Convention remain intact. See also BEN-NAFTALI (O.), GROSS (A.) and MICHAELI (K.), "Illegal Occupation: The Framing of the Occupied Palestinian Territory", *Berkley Journal of International Law*, Vol. 23, p. 551, 2005, at pp. 571-574.
[26] 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 define the transfer of the occupier's population in the occupied territories as a war crime. In 2005 Justice Barak found that the illegality of the settlements was *irrelevant.* The HCJ 7957/04 *Mara'abe et al. v Israel Prime Minister et al.* (2005) (hereinafter: *The Mara'abe* case), paragraph 19.

environment for the settlers. The interpretation 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 Israeli political and economic norms, required a completely different kind of legislation, while the Palestinians, as an occupied population, could stay deprived of any civil rights. These military 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. Yet, as these orders are not regularly published in any official gazette, the massive legislation project has been obscured.[27]

3. Facts finding

3.1 The dominant factor test

Presumptions, burden of proof, and other general rules are the legal forms for manipulating factual issues to achieve policy goals.[28] While the military commander may not be guided by national economic or social interests of his own country alone in order to introduce changes, the High Court of Justice ruled that these can be secondary considerations. 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.[29] 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*".[30]

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

[27] WEILL (S.), 'Reframing the Legality of the Israeli Military Courts –Military Occupation or Apartheid?' in *Threat - Palestinian Political Prisoners in Israel*, BAKER (A.) and MATAR (A.) (eds.), London, Pluto Press, 2011, pp. 141-142.
[28] SHAPIRO (M.) and STONE SWEET (A.), *On Law, Politics and Judicialization*, Oxford, Oxford University Press, 2002, p. 42.
[29] HCJ, *The Jami'at Ascan* case (1983), p. 795; HCJ 2056/04, *Beit Zourik Village Council v The Government of Israel*, (2004), paragraph 27 (hereinafter: *The Beit Sourik* case).
[30] HCJ, *The Beit Zourik* case (2004), paragraphs. 28, 47.

that State agencies "tell the truth", it becomes almost impossible to challenge the State's arguments. Also, the State is 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. 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 needs not to establish that the political aims were absent, just that these were not the dominant ones. In almost all the cases the court's conclusion is that the *dominant factor* was not political but was relating to security concerns.[31]

3.2 The proportionality test

The High Court of Justice applied the "proportionality test", which enabled the court to provide remedies to the Palestinian individuals in extreme cases without having to challenge the entire policy. 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 not likely to happen. This inherent bias is well present in the *Road 443* case (2009).

Road 443 – built mostly in the OPT, *inter alia* on the private land, which was expropriated 25 years earlier for the benefit of the local Palestinian population (see the *Jami'at Ascan case*) – has become one of the most important traffic routes connecting the centre of Israel to Jerusalem. It is estimated that 40,000 Israelis residing in Israel use it on daily basis. Since the Second Intifada, 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".[32] In 2009, the Court was seized to review the legality of the order banning its use by Palestinians. The proportionality test was defined by the Court as the following: whether the

[31] According to the knowledge of the author, there have been only two cases in which the Court did not accept that dominant factor was a security factor, as claimed by the State. The first case was a case dealing with the settlement Alon Moreh: *Duikat v Government of Israel*, (1979); English summary in (1979) 9 *Israel Yearbook on Human Rights*, p. 345; (hereinafter: *The Elon Moreh* case); For more details on the specific circumstances of that case see KRETZMER (D.), *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories*, *op. cit.*, pp. 85-89. The second case was *the Zufin case* (2005), dealing the route of the Wall: HCJ 2732/05, *Head of the 'Azzun Local Council et al. v. Government of Israel et al.*. For more on that case see: NGO B'TSelem (the Israeli Information Center for Human Rights in the Occupied Territories), "Under the guise of security, Routing the Separation Barrier to Enable the Expansion of Israeli Settlements in the West Bank December", 2005, p.15.

[32] At first the ban was done through physical means. It became statutory through the issue of a Military Order Concerning Transportation and Traffic (Road 443) (West Bank) 2007, 28 April 2007. Interestingly, the military order was issued only after the petition of Association of Civil Rights in Israel was filed.

freedom of movement and the "military need" to secure the Israelis use of the road (built in the OPT), 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 thousands of Israelis drivers would continue to use that road on a daily basis in total security, in another way?[33] 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 itself, which is to be restricted in the *balancing*. The proportionality test does not consider limiting the Israeli use of the OPT resources.[34]

The bias of the proportionality test manifests in another way. The democratic social and political rights of the Israelis that should be guaranteed at the level of developed States are balanced against the occupied, native people, deprived of civil rights, whose humanitarian needs as guaranteed by the law of military occupation are provided with a minimum set of rights until the occupation ends. Thus, settlers 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*.

4. Concluding observations

The legitimating role of the court is manifested through the court legitimating States' illegal acts and policies even if this involves a misuse or a distortion of the law. The case study illustrates how a court, which seriously addresses IHL, provided a misinterpretation of Article 43 of the Hague Regulations by ruling that the settler population is part of the *local population*. This interpretation goes clearly against the purpose of the law in order to facilitate Israel's illegal settlement policy. That the apologist application of IHL seemingly violates founding principles of the rule of law related to the judiciary's function.

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

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[33] HCJ, *The Road 443* case (2009), at paragraph 36.

[34] The remedy delivered by the Court and its implementation only reinforces that observation. 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. 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 HAREL Amos, "Despite Court Ruling, Palestinian Use of Route 443 Likely to be Limited", *Haaretz*, 10 May 2010 (at : http://www.haaretz.com/print-edition/news/despite-court-ruling-palestinian-use-of-route-443-likely-to-be-limited-1.289321 and The Association for Civil Rights in Israel (ACRI), "Route 443: Fact Sheet and Timeline", May 25, 2010, available at: < http://www.acri.org.il/en/2010/05/25/route-443-fact-sheet-and-timeline/>.

> "*[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]. 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*".[35]

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.[36] However, had the court 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.

II. – The avoiding role of the Israeli High Court of Justice

A variation of avoidance doctrines has 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 manifest violation of IHL – the legality of the settlements in light of Article 49 (6) of the Fourth Geneva Convention.

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 issued by the military commander in light of Art. 52 of the Hague Regulations, but not the more general legality of the settlement policy.[37] It was ruled that Article 49 (6) of the Fourth Geneva Convention did not consist a customary rule, and therefore it could not be directly enforced by Israeli courts.[38] 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

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[35] HCJ, *The Road 443* case (2009), paragraph 20.
[36] HCJ, *The Road 443* case (2009), Opinion of Justice Beinisch, paragraph 6.

[37] According to Article 52 of the Hague Regulations, the occupying power may temporarily requisite private property (in that case – private Palestinian land) for security reasons.
[38] The Israeli legal system is a dualist system: while international treaty law must be endorsed by parliament legislation in order to be enforced by a domestic court, customary law becomes 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 customary law may be enforced by Israeli domestic courts.

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.[39] 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 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*".[40]

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*".[41]

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 obtained the (temporary) possession of the land to build 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, 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*"…[42]

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[39] HCJ 606/78, *Ayyub v Ministry of Defense*, (1978), 121. An English summary is available at: (1979) 9 *Israel Yearbook on Human Rights*, p. 337 (hereinafter: *The Beit-El* case).
[40] HCJ, *The Beit-El case* (1978), p. 124.
[41] HCJ, *The Elon Moreh case* (1979), p. 15.
[42] 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, paragraph 269 (hereinafter: *The Bil'in Canadian case*).See also *The Elon Moreh* case, pp. 4-5 cited in *The Bil'in Canadian case*, paragraph 281. *The Beit El* case, p. 124.

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 private property rights.[43] 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 on the settlements would be built only on public – and not private – land.[44] This fact is completely irrelevant for assessing the (il)legality of the settlement according to IHL. But from a domestic perspective this enables 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 issues. From the moment the State accepted this limit imposed by the court – the court has continued to respect the limits it imposed on itself not to review the settlement policy until today.

In the following cases the avoidance doctrine used by the High Court of Justice was standing. As the State declared that the settlements are built on public occupied 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 occupied land is in violation of Art. 55 of the Hague Regulations, accordingly the Occupying Power has the duty to administrate public Occupied 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 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 because of the political nature of the settlement question, which makes it non justiciable.[45] 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 disputed question is

[43] Years later, the same policy will be applied by the High Court of Justice in the Wall cases.
[44] KRETZMER (D.), *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories*, *op. cit.*, p. 89.
[45] HCJ 4481/91 *Bargil v. The State of Israel* (1993). *(Hereinafter: The Bargil* case). Cited in *The Bil'in Canadian case*, paragraph 264.

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*".[46]

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*".[47]

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,[48] the High Court of Justice, in contrast, persistently avoided addressing this issue, ruling that the legality of the settlement is an *irrelevant* question.[49]

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[46] HCJ, *The Bargil* case (1993), Opinion of Justice Shamgar, paragraph 5 (Cited partly in *The Bil'in Canadian case*, paragraph 262).
[47] HCJ, *The Bargil* case (1993)., p. 11.
[48] ICJ, *The ICJ Advisory Opinion on the Wall*, paragraph 120.
[49] HCJ, *The Mara'abe* case (2005), paragraph 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 8414/05, *Yassin, Bil'in Village Council Chairman v The State of Israel, et al* (2007), paragraph 28 (hereinafter: *The Israeli Bil'in Wall* case).

Today, in light of 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.[50] 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*".[51]

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 risks to loose its legitimacy in the eyes of the Israeli society, the executive may not respect the judgment and the legislator would probably overrules its judgment, as the legislator, and not only the executive, has always been involved in the settlements policy. To provide Jewish residents the same socio-economic environment as in Israel, the Israeli Parliament adopted several texts 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.[52] 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 Israelis resident in the OPT. Today it contains 17 laws.[53]

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 Fourth Geneva Convention and they avoid dealing with that issue. When IHL enforcement is avoided in such a

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[50] See HENCKAERTS (J.M.) and DOSWALD-BECK (L.), *Customary International Humanitarian Law - Volume I: Rules*, Cambridge, Cambridge University Press, 2005, Rule 130, p. 462: "States may not deport or transfer parts of their own civilian population into a territory they occupy"; See also: Article 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".

[51] KRETZMER (D.), *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories*, *op. cit.*, p. 78.

[52] *The International Law of Occupation*, *op. cit.*, p. 129-133.

[53] 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 Defence Forces, 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>.

systematic way by national jurisdictions, from the rule of law enforcement perspective only one avenue remains available: an international court.

III. – The deferral role of the Israeli High Court of Justice

> "*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*".[54]

1. The torture case (1999)

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.[55] The authorization of using a "moderate degree of physical pressure" during interrogations was 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,

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[54] HCJ 5100/94, *Public Committee against Torture in Israel v the State of Israel*, (1999), paragraph 39, available in English at <http://elyon1.court.gov.il/files_eng/94/000/051/a09/94051000.a09.pdf>(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. Available at http://www.mfa.gov.il/mfa/aboutisrael/state/law/pages/fighting%20terrorism%20within%20the%20law%202-jan-2005.aspx. 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: 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, 73.

[55] '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.

according to B'tselem, to the use of physical methods amounting to torture against 850 persons a year.[56]

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."[57] 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).[58] 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.[59] In an absence of any other authorizing law, according to the general regulations applicable to law enforcement officers, 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*".[60]

1.1 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:

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[56] NGO 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> .
[57] HCJ, *The Torture* case (1999), paragraph 18.
[58] 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 sets derogation clause.
[59] HCJ, *The Torture* case (1999), paragraph 23, 35.
[60] HCJ, *The Torture* case (1999), paragraph 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 IHL 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.

> "*f 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 principle of the separation of powers and the rule of law, under our understanding of democracy*".[61]

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.[62] 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.[63]

1.2 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".[64] Moreover, the High

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[61] HCJ, *The Torture* case (1999), paragraph 37.
[62] *Ibid*, paragraph 23.
[63] *Ibid*, paragraph 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), paragraphs 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).
[64] HCJ, *The Torture* case (1999), paragraph 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 ESER (A.), 'Grounds for Excluding Criminal Responsibility', *in Commentary on the Rome Statute of the ICC: Observers' Notes, Article by Article*, TRIFFTERER (O.) (ed.), Baden-Baden, Nomos Verlagsgesellschaft,1999, pp. 863-878. ESER (A.), '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., 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, 789- 790.

Court of Justice went one step further in allowing an important deference to the Executive, which would result in upholding the very 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'".[65] 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.[66] 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. 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.[67]

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.[68] For example, in its

[65] HCJ, *The Torture* case (1999), paragraph 38.
[66] *Ibid*, paragraph 37: "The principle of necessity cannot serve as a basis of authority."
[67] 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, paragraphs 146-147.
[68] See SHOUGHRI-BADARNEH (B.), 'A Decade after the High Court of Justice "Torture" Ruling, What's Changed?', *in Threat: Palestinian Political Prisoners in Israel*, BAKER (A.) and MATAR (A.) (eds.), London, Pluto Press, 2011, pp. 114-123; GINBAR (Y.), "'Celebrating' a Decade of Legalised Torture in Israel', available at: <http://projects.essex.ac.uk/ehrr/V6N1/Ginbar.pdf>. 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 paragraph 6(c). Public Committee Against Torture in Israel, 'Ticking Bombs - Testimonies of Torture Victims in Israel' (30 May 2007), p. 90.

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 show how Palestinian detainees might find themselves tortured after being labelled as "ticking bomb" without having any effective legal review over this practice.[69] 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.[70] 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 until September 2009 has been criminally investigated.[71] 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.[72] 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.[73] Since then, three individual cases have been submitted, of which one was rejected on procedural grounds.[74]

2. Concluding observations

Courts have developed a nuanced and gradual way to imposed limits on the State in IHL issues, in form of an open dialogue with the legislative and executive branches, through the deference technique: 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

[69] Public Committee against Torture, *Ibid*, p. 12-90.
[70] 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), paragraph 1.
[71] Public Committee Against Torture in Israel, 'Israel – Briefing to th e Human Rights Committee Jerusalem' (June, 2010), paragraph 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).
[72] Public Committee Against Torture in Israel, 'Accountability Denied: The Absence of Investigation and Punishment of Torture in Israel' (December, 2009), p. 93.
[73] 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).
[74] See also HCJ 1265/11, *PCATI et al. v Attorney General*, (2012). For more details see S. WEILL and I. BALLAS "The Investigation Mechanism of Torture Claims in Israel: An Analysis of the 2012 GSS Investigation Decision and the Türkel Report", in S. MALSEN (ed), *The War Report*, Oxford University Press (2013).

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 IHL in States in which a traditional independence of the judiciary *vis-à-vis* the political branches exists.[75] Yet, the danger with the deferral technique is that, 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.

IV. – The limiting role of the Israeli High Court of Justice : the Human shield case (2005)

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.[76] 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 IHL and constitutes a grave breach of the Geneva Conventions.[77] 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".[78] 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.[79] 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"

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[75] BENVENISTI (E.), 'National Courts and the "War on Terrorism"', *op. cit.*, p. 257.
[76] 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> (hereinafter: *The Human Shield* case). 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.
[77] HCJ, *The Human Shield* case (2005), paragraphs 64-80 (Petition). English translation of the petition is available at: <http://www.adalah.org/eng/features/humshields/3799petition-eng.pdf>. 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.
[78] *Ibid*, p. 2.
[79] HCJ, *The Human Shield* case (2005), paragraph 3 and Response on behalf of the Respondents to the Request for a Temporary Injunction, paragraph 2, unofficial translation available at: <http://www.adalah.org/eng/features/humshields/3799response2-eng.pdf>.

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 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,[80] 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 IHL.[81] 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 entirety 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."[82]

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. 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:

[80] 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.
[81] HCJ, *The Human Shield* case (2005), paragraph 25.
[82] HCJ, *The Human Shield* case (2005), paragraph 24. For more details on the judgment, see SCHMITT (M.N.), 'Human Shields in International Humanitarian Law' (2009) 47 *Columbia Journal of Transitional law* 292, at pp. 311-322.

> "*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*". [83]

Following the High Court of Justice's decision, the army proceeded to modify its orders.[84] 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*".[85]

In 2007, B'Tselem documented 12 such cases. In the aftermath of the operation called "Cast Lead" by the Israeli Army 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.[86] 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*

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[83] 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> .

[84] Israeli Ministry of Foreign Affairs, 'The Operation in Gaza - Factual and Legal Aspects' (29 July 2009), paragraphs 227-228 http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Hamas+war+against+Israel/Operation_in_Gaza-Factual_and_Legal_Aspects.htm (hereinafter: The Israeli Ministry of Foreign Affairs).

[85] ADALAH, "Update Report: On the Israeli Military's Continued Use of Palestinian Civilians, including Minors, as Human Shields", Adalah's Newsletter, Volume 69, Jully 2009, available at: http://adalah.org/newsletter/eng/jul09/Rana_Human_Shields_update_report_Englsih_july_2009.pdf. In 2007, B'Tselem documented twelve such cases. B'Tselem, "Human Shields" http://www.btselem.org/english/human_shields/timeline_of_events.asp (hereinafter: *B'Tselem Human Shields*).

[86] During the operation called "Cast Lead" by the Israeli Army 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.

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".[87]

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.[88] 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.[89] 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 child.[90] 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."[91] It was affirmed by the authorities that sufficient evidence was found in another case that involved a senior army commander.[92] Yet, whilst Israel recognizes that the use of "human shields" amounts to a war crime,[93] and insists that "disciplinary proceedings are reserved for less serious offenses",[94] the senior army commander in this case was indeed subject to disciplinary proceedings, instead of conducting a criminal trial, for reasons that remain unknown.[95] 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.[96]

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[87] Israeli Ministry of Foreign Affairs, paragraphs. 227-228.
[88] For the allegations raised see, *The Goldstone report*, 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.
[89] 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.
[90] In January 2010, a year after Cast Lead operation in Gaza, a single soldier was prosecuted and convicted for stealing a credit card. While sentenced to seven and a half months, the Court Martial declared: "The crime of looting is harmful to the moral duty of every IDF soldier to keep human dignity, a dignity 'that does not depend on origin, religion, nationality, sex, status and function.' …The accused harmed the 'combat moral code,' the spirit of the IDF, in using his power and his arms not for the execution of his military mission." *Military Prosecutor v. Sergeant A.K.*, S/153/09 12 (11 August 2009).
[91] 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> .
[92] The State of Israel, "Gaza Operation Investigations: Second Update" (July 2010), paragraph 37, http://www.mfa.gov.il/mfa/foreignpolicy/terrorism/pages/gaza_operation_investigations_second_update_july_2010.aspx (hereinafter: The State of Israel 'Gaza').
[93] IDF MAG CORPS, 'Human Shields – Legal Framework' <http://www.law.idf.il/592-1521-en/Patzar.aspx> .
[94] The State of Israel 'Gaza', *op. cit.*, p. 6, fn 13.
[95] 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/ .
[96] See, for further information, *B'Tselem Human Shields*.

The non-compliance of the State of Israel with the human shield ruling – the case in which no deference was allocated, is a clear red light, and 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.

V. Conclusion: The functional roles of national court and the rule of law

Different functional roles of the courts in their application of IHL have been identified. The legitimating role of States, is manifested through the Court legitimating States' illegal acts and policies even if this involves a misuse or a distortion of the law. It is argued that the apologist application of IHL must remain outside the valid choices available under the rule of law. 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 – 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 second section 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 to 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. From the 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 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.

Through the application of avoidance doctrines, or their rejection, courts design their own role in applying IHL. Following the Courts' decision to avoid enforcement of IHL, the legal question remains outside the realm of justice and is left to the political arena. 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 shield the State from judicial review and allow 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. 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.[97]

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 a legitimating or avoiding function, the State would be able to pursue its acts, even if these are in violation of IHL. 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

[97] YATES (J.) and WHITFORD (A.), "Presidential Power and the US Supreme Court", (1998) 51 *Political Research Quarterly* 2, pp. 539-550.

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 IHL, whether it is in support or against the position of the State, the recourse to avoidance doctrines shall be denied.

As shown through the case studies in the third section, 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 progressively, with the use of deference techniques, starts to exercise its judicial competence as an IHL enforcer. Yet, the follow-up to the Israeli High Court of Justice *Torture* case well illustrates 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.

International law's weakest element remains the lack of its enforcement by the judiciary. While the international judicial system has been established, international law has also continuously been enforced by political actors, traditionally confined to that role through the exercise of diplomacy. From a rule of law perspective, it is to be hoped that the growing 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 rule of law.