Chapter 2
Adjudicating Armed Conflict in Domestic Courts: The Experience of Israel's Supreme Court

Galit Raguan

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2.1 Introduction

Until relatively recently, dealing with terror groups and terror activities had been viewed by most nations primarily as an act of law enforcement, regulated by domestic criminal law. Accordingly, in most instances the same codes that applied

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G. Raguan (✉)
University of California, Boalt Hall, Berkeley, USA
e-mail: galitraguan@gmail.com

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to 'ordinary' criminal acts were applied to acts of terrorism. Such crimes were investigated by law enforcement agencies which were also responsible for the apprehension of terrorists. An alleged terrorist would be prosecuted in a regular civilian court of law for crimes such as murder, destruction of property and assault. Specialized terrorism-related offenses were also codified but continued to be drawn from domestic criminal law. When reviewed by the courts, the legitimacy of such counter-terrorism measures was assessed by judges in light of familiar domestic criminal and constitutional legal standards.

In the decade following 9/11,[1] the US has maintained that it is 'at war' with terror organizations, al-Qaeda in particular.[2] More than just a figure of speech,[3] this position carries with it significant legal ramifications. If the 'war on terror' is indeed an armed conflict, then presumably it follows that the legal regime which governs a state's conduct in the course of this conflict is the Law of Armed Conflict. How a country engages in war is rarely regulated by domestic law.[4] Instead, armed conflict is governed almost exclusively by international law. From the actions of soldiers on the battlefield to the selection of military targets and the

[1] While some commentators have pointed out that the categorization of the conflict with al-Qaeda as an armed conflict preceded 9/11, Goldsmith 2007, p 104, it is fair to say that the full force and scope of the argument was not made clear by the US administration until after 9/11.

[2] Ibid. at p 103, pp 105–106; Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (such acts render it both necessary and appropriate that the United States exercise its rights to self-defense); Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism, 66 Fed. Reg. 57,883 (16 November 2001) (International terrorists, including members of al Qaida, have carried out attacks on United States… on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces); Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, UN Doc. S/2001/946, available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/567/85/PDF/N0156785.pdf?OpenElement (reporting to the United Nations Security Council that the US had initiated military action against the al-Qaeda terrorist organization and the *de-facto* Taliban government in Afghanistan pursuant to Article 51 of the United Nations Charter, which guarantees to states the right to use force in self-defense in the event of an armed attack). While the Bush Administration's position was that the US was in a global war against terror, the Obama Administration has narrowed the scope of the conflict to the war against al-Qaeda; Ward and Lake 2009. For a critique of the 'global' and amorphous nature of the Bush administration's armed conflict, see Weiner 2007, p 137.

[3] Weiner 2007, at pp 138–140.

[4] For instance, while the US Constitution does set forth how war is to be declared (US Const. Art. I, § 8 delegates to Congress the power to declare war) and determines that the President is the Commander in Chief (US Const. Art. II, § 2), specific guidance as to the conduct of war is usually found in military manuals or the Uniform Code of Military Justice.

means and methods of warfare—these and many other aspects of an armed conflict are regulated by the Law of Armed Conflict.[5]

However, the application of the Law of Armed Conflict to matters pertaining to counter-terrorism has been far from obvious.[6] Rather, since 2001, it has been the source of extensive legal and political debate in the US and around the world, manifesting in various policy questions, among them: the status and legal rights afforded to detainees apprehended in Afghanistan, the appropriate forum for prosecuting alleged terrorists and the legality of targeted killings. Legal scholars, politicians and human rights groups remain intensely divided as to the legal rules which regulate the 'war on terror'.[7]

If the 'war or terror' is indeed governed by the Law of Armed Conflict,[8] this not only affects the rules governing the situation, but also impacts substantially the

[5] Furthermore, armed conflict will often take place outside the sovereign territory of a state, making the application of domestic law largely irrelevant.

[6] See Weiner 2007, pp 140–141. Cf., for instance, Delahunty and Yoo 2010, pp 803–805; Yoo 2006, pp 1–17, (presupposing that the 'war on terrorism' is indeed governed by the laws of war or armed conflict) with Feldman 2002, p 457 (suggesting that the neither the crime or war paradigm necessarily apply exclusively to the conflict with Al-Qaeda).

[7] One only has to look at the first bombing of the World Trade Center in 1993 and compare its legal treatment with that of the 9/11 attacks to realize the difference between these two legal paradigms. While for all intents and purposes the individuals suspected of carrying out the 1993 attack were considered 'terrorists', they were nonetheless apprehended by the FBI, held in custody and tried in the US in accordance with US domestic law. Less than a decade later, following the 9/11 attacks, President Bush announced that the US was at war with al-Qaeda, the same terror organization that had been responsible for the 1993 attack. A UN Security Council resolution supported the position that an armed attack had been perpetrated against the US (SC.Res. 1368, UN Doc. S/RES/1386 (12 September 2001)), and NATO's collective self-defense provision was activated for the first time in history in response to the attack against the US, Press Release, North Atlantic Treaty Organization, Statement by the North Atlantic Council (12 September 2001), available at http://www.nato.int/docu/pr/2001/p01-124e.htm. Apprehension of suspects was carried out primarily by the military and those individuals apprehended and suspected of involvement with al-Qaeda were deemed 'enemy combatants'. The majority of such detainees were held in a detention facility outside the US without the procedural rights afforded to criminal defendants.

[8] In fact, the debate surrounding the appropriate legal regime for the 'war on terror' is not the focus of this Article nor will the justifications for this change in legal treatment be critically analyzed. Rather, the focus is on whether and to what extent this new categorization of the conflict between states and non-state armed groups has affected adjudication by the courts. Nonetheless, it should be noted that the rationales for this change in legal paradigm are not without merit—the scope and intensity of the 9/11 attacks were unprecedented with regard to an act of terror; the organization, structural command and training of al-Qaeda had become quite substantial and similar in nature to that of a militia; and the location of al-Qaeda outside the US made the use of standard law enforcement mechanisms and agencies unrealistic in many respects. The heated legal debate that subsequently ensued regarding the status of detainees for example was not a result of the US position that the Law or Armed Conflict governed the situation, but rather because the Administration adopted the position that essentially *no* law was applicable for handling this 'new' type of conflict.

role of the judiciary in reviewing counter-terrorism policies. Courts have always been reluctant to adjudicate matters pertaining to foreign affairs and the conduct of war.[9] US jurisprudence in particular reflects a certain reluctance to directly apply international law in domestic courts.[10] Hence, there is a high probability that if courts perceive a particular legal challenge as being closely related to an armed conflict and requiring the application of international law in a manner that will affect the conduct of hostilities, they will be deterred from adjudication.

However, this has not been the case in Israel. Since late 2000, Israel has been in a state of escalated hostilities with Palestinian terrorist organizations. As a result, concurrently with the ongoing debate in the US regarding the legal treatment of counter-terrorism policies, similar questions have risen in Israel. The Israeli government has also advanced the position that the violent clash with armed Palestinian groups, particularly with Hamas, has risen to a state of an armed conflict.[11] The Israeli Supreme Court has accepted this position in its judgments. Nonetheless, in doing so, rather than refraining from adjudicating petitions which question the legality of the government's counter-terrorism steps, it has taken a step further and has directly applied the international legal framework which governs armed conflict.

In what is perhaps the Israeli Supreme Court's most prominent decision in this context to date, it ruled substantively on the legality of Israel's targeted killings policy, and in doing so directly applied the principles of the Law of Armed Conflict to Israel's actions. In a subsequent decision, the Court considered the military's fulfillment of its humanitarian obligations during the conduct of hostilities, again in accordance with the Law of Armed Conflict. What is remarkable is that the petition was filed, heard, decided and the opinion published all in the course of ongoing hostilities between Israel and Hamas in the Gaza Strip.

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[9] See Glennon 1989, p 814; Henkin 1996, pp 208–215; *Gilligan* v *Morgan*, 413 US 1 (1973) (which presented a constitutional challenge to the training and weaponry of the Ohio National Guard); *Goldwater* v *Carter*, 444 US 996 (1979) (in which several members of Congress challenged the President's unilateral notice of termination of a mutual defense treaty with the Republic of China); *Mora* v *McNamara*, 387 F. 2d 862 (DC Cir.), cert. denied, 389 US 934 (1967) (in which the Supreme Court refused to examine the constitutionality of the Vietnam War); *Crockett* v *Reagan*, 720 F. 2d 1355 (DC Cir. 1983) (per curiam), cert. denied, 104 S. Ct. 3533 (1984) (regarding covert activities in Nicaragua). For a general overview of US Supreme Court jurisprudence with regard to foreign affairs, see Lee Boyd 2001, p 277; Slaughter Bruley 2003, p 1980; Franck 1992.

[10] Contra Yoo 1999, p 1979, (arguing that '[a] reading of Article VI [of the Constitution] that does not require self-execution of treaties is consistent with the Supremacy Clause)' with Paust 1988, p 760 (arguing that non-self-execution is a judicial invention at odds with the Constitution and the views of the Framers); Henkin 1984, p 1560 '(International law *is* law of the United States…' [emphasis added]); Henkin 1996, p 201 (arguing that non-self-execution 'runs counter to the language, and spirit, and history' of the Constitution); Vázquez 1992, p 1087 (arguing that the text and history of the Constitution demonstrate that courts may directly enforce treaty provisions in properly brought suits by individuals).

[11] See nn 37–40 infra and accompanying text.

The unique Israeli situation of a prolonged military occupation along Israel's borders has undoubtedly contributed to its Supreme Court's extraordinary jurisprudence. Coupled with procedural aspects of the Israeli Supreme Court's jurisdiction and its permissive rules of standing and justiciability, these characteristics can account for the active approach taken by the Court in relation to other countries. Nonetheless, the Israeli experience provides an intriguing perspective on how domestic courts can, when they choose to do so, adjudicate questions pertaining to the Law of Armed Conflict. If we accept that the 'war on terrorism' is not just a slogan, but also a legal paradigm, similar questions are bound to rise not just in Israel, but also in other countries which encounter threats from non-state actors. The Israeli experience thus provides a relevant case-study.

This Article will focus on how the Israeli Supreme Court has gradually incorporated the Law of Armed Conflict into its judgments when reviewing the Executive's policies, and will trace the historical circumstances and legal developments which have contributed to and enabled the creation of such jurisprudence. It will also address the question of whether the Israeli experience can be utilized by other jurisdictions. Part II of this Article will provide a brief overview of the status of international law in domestic Israeli courts and the legal framework that applies to executive action in Judea and Samaria and the and Gaza Strip. Part III will describe the transition in Israel to an armed conflict paradigm with respect to the Israeli hostilities with Palestinian armed groups, while Part IV will focus on recent Israeli case law in this regard. These cases illustrate the gradual move by the Court toward adjudicating questions which relate more and more closely to the battlefield. Part V will follow with an analysis of the circumstances which have led to this transition in the Israeli context. It will also discuss whether the Israeli experience is comparable to courts in other jurisdictions which encounter similar legal dilemmas.

2.2 The Application of International Law by Domestic Courts in Israel

The Israeli phenomenon of adjudicating questions pertaining to the conduct of hostilities by the military cannot be isolated from the Israeli military occupation in Judea and Samaria (hereinafter also the West Bank) and the Gaza Strip.[12] The prolonged Israeli military presence in these Territories has had a direct contribution to the Israeli Supreme Court's willingness to adjudicate questions pertaining to hostilities. Because Israeli domestic law generally does not apply to these territories, the Court became accustomed long before 2000 to applying international law to executive action and policy in the Territories. This has had a tremendous effect on its

[12] On the legal status of the Gaza Strip in particular following Israel's Disengagement in 2005, see infra nn 65–67 and accompanying text.

treatment of international law in the last decade against the background of the changed nature of the conflict between Israel and Palestinian terrorist groups. Therefore, in order to place the jurisprudence of the Israeli Supreme Court in its proper context, a brief and rudimentary overview of the status of international law in domestic law in Israel and the legal sources applied by Israel's Supreme Court to executive action occurring in the Territories is necessary.[13]

2.2.1 The status of international law in domestic courts in Israel

Different jurisdictions have varying rules regarding the relationship between international and domestic law that will affect the extent to which domestic courts are able to rely on international law. Israel's treatment of international law is similar to that of the United Kingdom,[14] in that both draw a distinction between convention-based and customary international law. Convention or treaty-based law, i.e., those obligations a state takes upon itself by becoming a party to an international agreement, requires active transformation into domestic law through the legislative enactment of a statute. Hence, a treaty obligation does not bind the state of Israel in a domestic court absent a manifestation in its domestic law.[15] Customary international law, i.e., those practices which have formed a consensual custom among nations, is incorporated 'automatically' into domestic law and is applied by the courts, to the extent that no domestic legislation exists to the contrary. In the case of a conflict between a customary international norm and domestic legislation, the latter prevails. Nonetheless, Israeli courts will apply a canon of interpretation whereby the purpose of domestic law is, *inter alia*, to fulfill the provisions of international law and not to contradict it.[16] This is referred to as 'a "presumption of accord" between public international law and local law'.[17]

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[13] An exhaustive, comprehensive account of the debate regarding the legal and political status of the territories is outside the scope of this Article.

[14] Shaw 2003, pp 129–143.

[15] Crim FH 7048/97 *Anonymous* v *Minister of Defense* [2000] IsrSC 54(1) 721, 742–743.

[16] Ibid.

[17] Ibid. See also CrimA 6182/98 *Sheinbein* v *Attorney General* (unpublished); HCJ 279/51 *Amsterdam* v *Minister of the Treasury* [1952] IsrSC 6 945, 966; CrimA 336/61 *Eichmann* v *Attorney General* [1962] IsrSC 16 2033, 2041; CA 522/70 *Alkotov* v *Shahin* [1971], IsrSC 25 (2) 77, 80, as well as Aharon Barak, *Interpretation in Law*, Vol 2 (Jerusalem, Nevo 1994) (in Hebrew) p 576.

Hence, Israel's courts will make an effort, to the extent possible, to interpret a domestic law provision in a manner that does not contradict international law.[18]

2.2.2 *The legal framework applicable to Judea and Samaria and the Gaza Strip*

Israel gained military control of the territories known as Judea and Samaria and the Gaza Strip in 1967. These territories (notwithstanding East Jerusalem) were never annexed to the sovereign state of Israel and for many years remained governed by the military authorities of Israel and hence subject to martial law. Although the Territories are not sovereign Israeli territory, the actions of the military and the decisions of the military commander in the Territories are nonetheless subject to judicial scrutiny in Israel, as explained below.

The Israeli Supreme Court is the highest appellate court in Israel. In addition, it also enjoys original jurisdiction over actions by the state or its officials in its capacity as the High Court of Justice (hereinafter HCJ).[19] In such circumstances, it is a court of first and final instance to adjudicate such petitions. Naturally, the fact that a petition against the agencies of the state and state officials can be filed directly with the HCJ has resulted in a heavy case-load for the Court. The Court's tendency over the years to relax its standing requirements,[20] which gradually widened accessibility, has also contributed to the wealth of petitions filed and

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[18] A Similar presumption exists in the United Kingdom that legislation is to be construed so as to avoid a conflict with international law; Shaw 2003, p 139. There is also a presumption in the United States that Congress will not legislate contrary to international obligations of the state, so that when an act and a treaty deal with the same subject, the courts will seek to construe them in a manner that will not be contrary to the wording of either; ibid. at p 150; see also Steinhardt 2004, p 6.

[19] Article 15(c) of Israel's Basic Law: the Judiciary provides that the Court: 'shall hear matters in which it deems it necessary to grant relief for the sake of justice…,' Basic Law: Judiciary, 1984, S.H. 78. Furthermore, Article 15(d)(2) sets forth that the Supreme Court, sitting as the High Court of Justice (hereinafter HCJ), shall be competent to order the state and public officials to do or refrain from doing any act, granting the court jurisdiction over persons or bodies 'carrying out public functions under law'. The terms 'Supreme Court' and 'High Court of Justice' will be used interchangeably from hereinafter in the Article. While Israel does not have a constitution, since the state's foundation, the Basic Laws have been enacted piecemeal with the intention of eventually being consolidated into a Constitution. Accordingly, they have been interpreted by the Supreme Court as being superior in status to 'regular' laws enacted by the legislature. The Israeli legislature (Knesset) accordingly enjoys a dual role as both legislator and constitutional drafter. Thus, although the Basic Law: the Judiciary was enacted by the legislature, under certain circumstances it enjoys precedence over 'regular' laws; for a history of the enactment of the Basic Laws and Israel's constitutional regime see Barak-Erez 1995, pp 311–332; Edry 2005, pp 77–113.

[20] See nn. 107–110 infra and accompanying text.

heard by the Court. Thus, for example, in 2008, over 1,600 new petitions were filed with the Court in its HCJ capacity alone.[21]

Over the years, the Court substantiated its broad review powers over executive action, reviewing an ever-increasing number of petitions pertaining to the discretion of the executive branch, determining whether state officials and state policy are reasonable and measured.[22] This trend gradually extended to include petitions pertaining to national security.[23] Based on its general jurisdiction to review executive action, the Court determined in its early years that it had jurisdiction to hear cases pertaining to the actions of the military in the Territories and petitions filed by residents of the West Bank and the Gaza Strip.[24] Since then, the Court has adjudicated numerous petitions on matters pertaining to the military's actions and the decisions of the military commander in the Territories.[25]

The fact that the Territories are not a sovereign part of Israel has meant that domestic Israeli law is inapplicable. Instead, the legal framework that has been applied includes the law in place at the time Israel gained control of the Territories,[26] martial law promulgated by the military commander, and most significantly (for our purposes) international law.[27]

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[21] The Court System in Israel: Semi-Annual Report 1.7.09-31.12.09, available at http://elyon1.court.gov.il/heb/haba/dochot/doc/7-12_2009.pdf, p 32 (in Hebrew).

[22] For an overview of the Court's scrutiny of the Executive, see Barak-Erez 2002, pp 617–628; Bracha 1991, p 39.

[23] See Barak 2002, pp 148–156 (for a review of the Court's jurisprudence with regard to national security); Bracha 1991; for a translation of terrorism-related judgments of the Supreme Court from recent years, see Israel Ministry of Foreign Affairs, Judgments of the Israel Supreme Court: Fighting Terrorism Within the Law, available at http://www.mfa.gov.il/MFA/government/Law/Legal+Issues+and+Rulings/Fighting+Terrorism+within+the+Law+2-Jan-2005.htm; Vol 2; http://www.mfa.gov.il/MFA/government/Law/Legal + Issues+and+Rulings/Judgments_Israel_Supreme_Court-Fighting_Terrorism_within_Law-Vol_2.htm, Vol 3, http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Terrorism+and+Islamic+Fundamentalism-/Judgments_Israel_Supreme_Court-Fighting_Terrorism_within_Law-Vol_3.

[24] The Court determined in a number of cases in the 1970 s that since the military commander was a public servant performing a public duty under law, his decisions were subject to the statutory jurisdiction of the Supreme Court in its capacity as the HCJ, HCJ 302/72 *Khelou* v *Government of Israel* [1973] IsrSC 27(2) 169, 176; HCJ 393/82 *Ja'amait Ascan* v *IDF Commander In Judea and Samaria* [1983] IsrSC 37(4) 785, 809; see also Kretzmer 2002, pp 19–20.

[25] See n. 23 supra. See also Negbi 1981, (in Hebrew); Amit-Kohn et al. 1993, pp 59–81; Dotan 1999, pp 322–327. Cf. generally Kretzmer 2002, (for a more critical perspective of the Israeli Supreme Court jurisprudence on legal matters pertaining to the Territories).

[26] E.g., Jordanian law, law from the period of the British mandate, etc.

[27] For an overview of the applicable legal framework to the Territories, see Shamgar 1982, pp 13–60.

While the official (and contested)[28] position of Israel has been that the Territories were legally not under belligerent occupation,[29] it did agree as a matter of policy to abide by the humanitarian treaty obligations applicable to an occupied territory. This includes humanitarian obligations as set forth in the Geneva Convention IV, as well as *any relevant customary international law obligations*. The significance of this is that Israel would be bound by obligations that had become binding under customary law even if these were formalized in treaties it had not ratified. Accordingly, the Supreme Court has routinely examined the actions or decisions of the military commander in light of the humanitarian obligations as set forth in Geneva Convention IV and any obligations in customary international law pertaining to belligerent occupation.[30]

One additional legal source applicable to the Territories deserves mentioning. Although Israel's domestic law generally does not apply to the Territories, the Israeli Supreme Court did determine that some *domestic* legal principles would be applied to military action in the Territories—these are known as the substantive

[28] See for example, Roberts 1992, pp 25–85; Mari 2005, pp 358–362.

[29] Hence, the Israeli government formally refers to the Territories as 'Administered' rather than 'Occupied'. The Geneva Convention Relative to the Protection of Civilian Persons in time of War, Art 2, 12 August 1949, 6 UST 3516, 3518, 75 UNTS 287, 288 [hereinafter Geneva Convention IV] provides protection to the civilian population in times of war and also applies to an occupied territory. Article 2 to the Convention, which addresses its application, states, *inter alia*, that '[t]he Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party…', Israel argued that since neither of these regions—the West Bank or the Gaza Strip—had been the territory of a 'High Contracting Party' at the time Israel gained control of them, the Convention did not apply. A similar argument, made by an Israeli scholar shortly after Israel gained control of the Territories, was that since the annexation of the West Bank by Jordan in 1950 (following Israel's War of Independence) had not received international recognition, it was not the sovereign territory of another state when Israel took control of it in 1967. It followed then, according to the author, that Israel was not bound by those parts of the law of occupation whose purpose was to protect the rights of the previous sovereign; however, it was obligated to abide by the humanitarian aspects of belligerent occupation law. See Blum 1968, p 279; Kretzmer 2002, pp 32–34; Amit-Kohn et al. 1993, pp 21–23; Shamgar 1982, pp 31–43; Kelly 1999, pp 156–159.

[30] HCJ 7015/02 *Ajuri* v *IDF Commander in the West Bank* [2002] IsrSC 56(6) 352, 364: '… the parties before us assumed that in the circumstances currently prevailing in the territory under the control of the IDF, the laws of international law concerning belligerent occupation apply… second, the rules of international law that apply in the territory are the customary laws (such as the appendix to the (Fourth) Hague Convention respecting the Laws and Customs of War on Land of 1907, which is commonly regarded as customary law…. With regard to the Fourth Geneva Convention, counsel for the Respondent reargued before us the position of the State of Israel that this convention—which in his opinion does not reflect customary law—does not apply to Judaea and Samaria. Notwithstanding, Mr. Nitzan told us—in accordance with the long established practice of the Government of Israel—that the Government of Israel decided to act in accordance with the humanitarian parts of the Fourth Geneva Convention. In view of this declaration, we do not need to examine the legal arguments concerning this matter, which are not simple, and we may leave these to be decided at a later date. It follows that for the purpose of the petitions before us we are assuming that humanitarian international law—as reflected in the Fourth Geneva Convention (including article 78) and certainly the Fourth Hague Convention—applies in our case.

rules of Israeli administrative law. Over the years, the Court had developed a set of general principles which regulated administrative action domestically—these included an obligation to act under authority granted by law; to ensure procedural fairness; and to exercise administrative discretion reasonably for a proper purpose and on the basis of relevant considerations.[31] In *Al-Taliya* v *Minister of Defense*[32] the Court, in dictum, acknowledged that in addition to customary international law obligations, the military's actions would also be examined 'according to the criteria which this court applies when it reviews the act or omission of any other arm of the executive branch, while taking into account… the duties of the respondents that flow from the nature of their task'.[33] In subsequent jurisprudence, the Court has often opined that 'every soldier carries in his pack both the rules of international law and also the basic principles of Israeli administrative law that are relevant to the issue'.[34]

To summarize, the Israeli Supreme Court's review of military actions and executive policy in the Occupied Territories began shortly after Israel gained control of the West Bank and Gaza in 1967. The Court substantiated its jurisdiction over the Territories based on the statutory authority granted to it to review actions of officials or bodies acting in their official capacity under law. Since domestic Israeli law did not apply to the Territories, the Court in its rulings generally applied customary international law pertaining to belligerent occupation. In addition, the Court reviewed executive and military action in light of a set of controlling principles that have evolved in domestic administrative law.[35] We now turn to the transition into the 'war on terror' paradigm and its effects on adjudication of matters pertaining to military activity in the Territories before the Israeli Supreme Court.

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[31] For instance, if an Israeli citizen applies for a gun permit from the authorities and is rejected, the responsible agency must act reasonably in rejecting the request. Similarly, if the military commander in the Territories determines that in order to pave a road in the territories, private Palestinian land must expropriated, the Court will first look at any legal obligations pertaining to the situation originating in international law. In addition, this decision will also be examined in light of its reasonableness and proportionality, i.e., was there a real need to expropriate the land; were other options examined; was the owner permitted to present his case; was the land taken no more than was necessary; and does the harm caused by the expropriation outweigh the expected benefits from the road, etc.

[32] HCJ 619/78 [1979] IsrSC 33(3) 505.

[33] Ibid. at p 512; Kretzmer 2002, p 26.

[34] *Ajuri*, IsrSC 56(6) 352 at 365; HCJ 393/82 *Ja'amait Ascan Cooperative Society* v *IDF Commander in Judaea and Samaria* [1983] IsrSC 37(4) 785, 810; HCJ 358/88 *Association for Civil Rights in Israel v Central Commander* [1989] IsrSC 43(2) 529, 536–538; HCJ 4764/04 *Physicians for Human Rights* v *IDF Commander in Gaza* [2004] Dinim 1098 (30) 2004, para 10; HCJ 2056/04 *Beit Sourik Village Council* v *the government of Israel* [2004] IsrSC 58(5) 807, 828.

[35] For an additional resource containing a detailed analysis of the Court's authority to review the decisions of the military commander, as well as the applicable legal sources, see Nathan 1982, pp 109–169.

2.3 The Legal Transition to an 'Armed Conflict' in Israel

Once Israel had gained control of the West Bank and Gaza in 1967, a military administration was established in the Territories. The Israeli military was responsible, in accordance with its humanitarian obligations under the law of belligerent occupation, for public order and security in the Territories. When issues of security arose, various law enforcement means would be employed by the Israel Defense Forces (hereinafter IDF) usually based on military orders promulgated by the military commander and in accordance with humanitarian principles of the laws of belligerent occupation.

The Israeli Supreme Court in its HCJ capacity established its jurisdiction over the decisions of the military commander relatively soon after Israel had gained control over the Territories and has since then engaged in judicial review of the discretion of the military commander in numerous judgments. Decisions and policies implemented by the military in the Territories have been examined by the Court in light of international law (the law of belligerent occupation) and the binding principles of Israeli administrative law.[36]

In 2000, the conflict between the IDF and Palestinians escalated, signified by the outburst of the al-Aqsa Intifada.[37] In the years that followed, the number of terror attacks targeted at Israelis intensified. The IDF in response renewed its military presence in Palestinian cities. Israel crafted various military responses, including aerial attacks, the use of substantial forces for military operations in the Territories, as well as the use of reserve forces. Thousands of Israelis and Palestinians were killed and injured as a result of the hostilities.

The hostilities that broke out in 2000 reached an unprecedented level and intensity in the history of the Israeli-Palestinian conflict. Almost immediately after violence broke out in September 2000, Israel's official position regarding the nature of hostilities with Palestinians began to shift and the government began to formulate its argument that the conflict between the Israeli military and Palestinian

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[36] See supra n 24 and accompanying text; see also Shamir 1990, pp 784–795; Dotan 1999, pp 326–336 (for figures regarding the number of petitions involving the Palestinian residents of the Territories filed with and adjudicated by the High Court of Justice between 1986 and 1995, a period covering, *inter alia*, the first Intifada; see n 37 infra).

[37] Intifada—literally 'uprising'—is the term used to describe the violent Palestinian campaigns directed at ending the Israeli military occupation. The first Intifada began in 1987 and came to an end with the signing of the Oslo Accords in 1993. It was characterized primarily by violent demonstrations, the throwing of rocks and Molotov cocktails at Israeli soldiers and riot control mechanisms employed by the IDF. The al-Aqsa Intifada, also known as the second Intifada or the 2000 Intifada, began in September 2000 shortly after the failed Camp David Summit between President Clinton, Prime Minister Ehud Barak and Chairman Yasser Arafat. This Intifada was characterized by the deployment of suicide bombers in Israel and the initiation of a rocket campaign from the Gaza Strip directed at Israel (with over 12,000 rockets launched at Israel between 2000 and 2008). This round of violence ultimately resulted in thousands of deaths and casualties for both the Israelis and the Palestinians. This increase in intensity and scope of the violence led to the categorization of the hostilities by Israel as an armed conflict.

armed groups had reached the level of an armed conflict. A comprehensive legal approach to this 'new' armed conflict was developed in a piecemeal fashion by the government of Israel over time.[38] However, an early manifestation of this shift can be traced to the government's position presented in 2001 before the Sharm El Sheikh Fact-Finding Committee (the Mitchell Commission) when it advanced the position that the situation between Israel and Palestinians had risen to an *armed conflict short of war*.[39] In subsequent responses by the government to petitions filed with the Supreme Court pertaining to the IDF's conduct in the Territories, the government began to rely more heavily on the contention that the nature of hostilities—their scope, intensity, level of organization, means—were such that IDF actions were now governed, under these new circumstances, by the Law of Armed Conflict rather than the laws of belligerent occupation[40] or under certain circumstances concurrently with the laws of belligerent occupation.[41]

As early as 2001, the Supreme Court observed that 'for several months now events of actual combat have been taking place in the areas of Judea and Samaria

[38] It is interesting to note that in petitions filed with the Supreme Court in support of this position, the government referred, *inter alia*, to the Presidential Order made by President Bush following 9/11, Military Order of 13 November 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism, 66 Fed. Reg. 57,883, UN Security Council Resolution 1373 which viewed the 9/11 attacks as 'a danger to international peace and security', UN Doc S/RES/1373/2001, available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf?OpenElement, and the NATO decision to treat the attacks of 9/11 as such that activates the self-defense of the NATO Treaty; Press Release, North Atlantic Treaty Organization, Statement by the North Atlantic Council (12 September 2001), available at http://www.nato.int/docu/pr/2001/p01-124e.htm; HCJ 769/02 *Public Committee Against Torture in Israel* v *Government of Israel*, Supplementary Brief for the State, 2 February 2003, paras 14–15 (on file with author) (hereinafter *PCATI* v *GoI*).

[39] In Israel's first position paper presented to the Committee, appointed to determine, *inter alia*, the causes of the outbreak of violence, it declared: 'Israel is engaged in an armed conflict short of war. This is not a civilian disturbance or a demonstration or a riot. It is characterized by live-fire attacks on a significant scale both quantitatively and geographically… The attacks are carried out by a well armed and organized militia, under the command of the Palestinian political establishment operating from areas outside Israeli control…' Sharm El Sheikh Fact-Finding Committee First Statement of the Government of Israel [28 December 2000] available at http://www.mfa.gov.il/MFA/MFAArchive/2000_2009/2000/12/Sharm%20el-Sheikh%20Fact-Finding%20Committee%20-%20First%20Sta, para 286.

[40] The distinction between these two legal regimes—the laws of belligerent occupation and the laws of armed conflict—is not purely an academic exercise but carries with it a practical significance. In some aspects it is similar to the distinction between law enforcement and armed conflict. For instance, under the laws of belligerent occupation, if a civilian holding a weapon advances towards a soldier at a checkpoint, the soldier may be required to attempt to disarm and apprehend the individual through calling to him or firing a warning shot and use lethal force only as a last resort for the purpose of self-defense. However, on the battlefield in the course of hostilities, if a soldier encounters a civilian who has picked up arms, the laws of armed conflict consider such a individual a legitimate military target that may be attacked. Hence, the applicable legal regime carries great weight in determining the legality of the act in question.

[41] See nn 50–51 and accompanying text.

and Gaza…'.[42] In a separate case it noted that the damage to property was as 'a result of the combat condition under which the area has been for over two years…,'[43] while in a brief one-page decision dismissing a petition challenging damage to property as a result of the IDF's actions, the Court implicitly accepted that the IDF was acting in accordance with the laws of war.[44] In early 2002, the Supreme Court commented in yet another decision:

> 'Israel finds itself in the middle of difficult battle against a furious wave of terrorism. Israel is exercising its right of self defense. See The Charter of the United Nations, art. 51. This combat is not taking place in a normative void. It is being carried out according to the rules of international law, which provide principles and rules for combat activity.'[45]

Later that year, in *Ajuri* v *IDF Commander in the West Bank*,[46] the Court stated explicitly that '[s]ince the end of September 2000, fierce fighting has been taking place in Judaea, Samaria and the Gaza Strip. *This is not police activity. It is an armed struggle*'.[47] In 2004, in *Beit Sourik Village Council* v *the Government of Israel*, the Court finally used the term 'armed conflict' to describe hostilities between Israel and the Palestinians.[48] The effect of recognizing that the military situation on the ground had changed was the concomitant recognition that the IDF was authorized to act in accordance with the principles dictated by the Law of Armed Conflict.

2.4 The Application of the Law of Armed Conflict by Israel's Supreme Court to Military Activity

By the late 1990s, the Israeli Supreme Court had become relatively comfortable with adjudicating questions pertaining to the military's actions in the Territories and consulting international law in order to discern Israel's legal obligations. Hence, when petitions pertaining to the military continued to flow to the Court's doors after 2000, they seemed familiar and indistinctive. Yet a profound change

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[42] HCJ 2461/01 *Cna'an* v *IDF Military Commander in Judea and Samaria* [2001] Dinim 364 (7) 2001.

[43] HCJ 8172/02 *Ibrahim* v *IDF Military Commander in the West Bank* [2002] Dinim 737 (38) 2002.

[44] HCJ 9252/00 *Alsake* v *State of Israel* [2001] Dinim 572 (11) 2001 ('In the response… the military picture in the area was laid out before us… According to the state's response, its actions are taken in order to protect villages… *The authority to undertake these various actions is found in the laws of war as determined in the Hague Regulations of 1907*' [emphasis added]).

[45] HCJ 3451/02 *Almandi* v *Minister of Defense* [2002] IsrSC 56(3) 30, 34 [emphasis added].

[46] HCJ 7015/02, [2002] IsrSC 56(6) 352.

[47] Ibid. at 358 [emphasis added].

[48] HCJ 2056/04, [2004] IsrSC 58(5) 807, 815 (These combat operations—which are not regular police operations, but embody all the characteristics of armed conflict…).

had taken place—the nature of the ongoing conflict between Israel and the Palestinians had undergone a transformation, specifically an escalation in scope and intensity that had shifted perception of counter-terrorism efforts from the law enforcement paradigm to that of armed conflict, both in Israel and elsewhere around the world.

The intensity of the hostilities between the IDF and organized, armed Palestinian groups resulted in the Court having to deal with an ever-growing number of petitions involving legal questions pertaining to the conduct of hostilities. This is exemplified by what may be the issue most closely linked to the conduct of hostilities to date—the Court's 2006 adjudication on the merits of Israel's policy of targeted killings. Since then, the Court has continued to examine the military's actions, including those pertaining to the Gaza Strip despite the cessation of Israel's martial rule in the region,[49] as illustrated by the 'real-time' adjudication of petitions pertaining to IDF conduct while hostilities were ongoing in 2009.

2.4.1 Between two paradigms: belligerent occupation and armed conflict

The Israeli government's position regarding the existence of an armed conflict short of war in early petitions did not include a comprehensive approach regarding the legal ramifications of this change in classification. However, with each new petition the government's position was finessed, gaining clarity and depth. It is important to note that although the government advanced the position that the security situation had risen to an armed conflict governed by the Law of Armed Conflict, it did not dismiss the potentially concurrent application of the laws of belligerent occupation. In fact, the government conceded that the laws of belligerent occupation continued to apply to certain matters[50]—those that enjoyed sufficient coverage in the laws of belligerent occupation—as well as in certain areas—those that had remained under Israeli control and governance and had not been transferred to Palestinian responsibility.[51]

Hence, the two legal frameworks would not always be mutually exclusive—while the laws of belligerent occupation could continue to govern certain aspects of governance in the Territories, the government could also resort to the Laws of Armed Conflict in responding to the hostilities. Determining which legal regime

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[49] Infra nn 65–66 and accompanying text.

[50] HCJ 769/02 *PCATI* v *GoI*, Supplementary Notice by the State, 2 February 2003 (on file with author), paras 51–54 (on file with author).

[51] Ibid. Prior to 2000, the Israeli military had gradually withdrawn from certain Palestinian cities in accordance with the Oslo Accords and subsequent political agreements of the 1990s. Therefore, it was the State's contention that the laws of belligerent occupation could not apply to areas in which administrative responsibility had been transferred to the Palestinian Authority and the Israeli military no longer had effective control.

applied to a particular matter would therefore require examining that matter *ad hoc* in its specific context. The Supreme Court adopted a similar rationale, although the Court, to a greater extent than the state, has continued to rely on legal principles from various paradigms rather than exclusively on the Law of Armed Conflict.[52]

The petition in *Adalah* v *GOC Central Command*[53] exemplifies the transition—from the government's perspective—from law enforcement/belligerent occupation rationales to armed conflict rationales. The petition, filed in 2002, challenged an army procedure that allowed soldiers conducting arrests to enlist the voluntary assistance of Palestinian civilians to convey messages to wanted individuals in an attempt to convince them to surrender themselves peacefully. While the petitioners in the case relied on the laws of belligerent occupation to challenge the military's policy,[54] the government appeared to justify its actions primarily on the Law of Armed Conflict.[55]

The Supreme Court's decision was handed down in late 2005, by which time the Court had already recognized in several decisions that a state of hostilities existed between the IDF and Palestinian armed groups. Nonetheless, the Court did not adopt the government's position that in this particular case, the military practice was exclusively governed by the Law of Armed Conflict. Rather, it based its decision on the belligerent occupation paradigm in striking down the operational procedure. In the opening sentence of its decision the Court laid out the normative framework by stating that '[a]n army in an area under belligerent occupation is permitted to arrest local residents wanted by it, who endanger its security'.[56] It went on to cite various principles of the laws of belligerent occupation, noting that '[i]ndeed, safeguarding of the lives of the civilian population is *a central value in the humanitarian law applicable to belligerent occupation*'.[57]

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[52] See nn 73–74 supra and accompanying text.

[53] HCJ 3799/02 Adalah—The Legal Center for Arab Minority Rights in Israel v GOC Central Command, IDF Dinim 305 (61) 2005.

[54] The petitioners' primary claim was that the procedure was at odds 'with the principles of international humanitarian law regarding the military activity of an occupying force in occupied territory,' ibid. at para 13.

[55] The State cited the principle of proportionality, which 'require[s] that during the planning of a military activity, every attempt be made to reduce the collateral damage caused as a result of the military activity to those who are not combatants, to the extent possible, under the circumstances,' ibid. at para 17. A related argument made by the government, also derived from the Law of Armed Conflict, was that the 'the IDF prefers to arrest terrorists instead of killing them, *as permitted by the laws of war*,' ibid. at para 16 [emphasis added]. This argument did not directly support the use of civilians by the military to provide early warning to suspected terrorists, but spoke more to the target-ability of those terrorists and the legitimacy of attempting to minimize harm through the early warning procedure, which would allow apprehending rather than targeting them.

[56] Ibid. at para 20.

[57] Ibid. at para 23 [emphasis added]. The Court further wrote: 'The legality of the 'Early Warning' procedure might draw its validity from the general duty of the occupying army to ensure the dignity and security of the civilian population. It also sits well with the occupying army's power to protect the lives and security of its soldiers. On the other hand stands the occupying army's duty to safeguard the life and dignity of the local civilian sent to relay the warning'.

Hence, while the Court had already conceded that the security situation with the Palestinians had escalated to full-blown hostilities, in this decision it continued nonetheless to apply the laws of belligerent occupation. The Court's ruling reflects the position that the laws of belligerent occupation could continue to apply in certain situations or territories concurrently with the Law of Armed Conflict,[58] a position it would adopt explicitly in later petitions.[59] The decision in this case to apply the former rather than the latter was surely affected by the Court's long tradition of applying the laws of belligerent occupation when engaged in its judicial review of the military's actions in the Territories.

2.4.2 The 'Targeted Killings' case: a landmark decision

Another high-profile petition involving military operations in the Territories was filed with the Supreme Court in 2002 and involved the military's use of preemptive targeted strikes against suspected terrorists.[60] A petition filed a year earlier on the same issue had been dismissed by the Court in a brief, one-paragraph decision which stated that 'the choice of weapons used by the government to thwart murderous terror attacks was not a matter in which the Court intervened, especially in a petition lacking any concrete factual foundation that seeks a sweeping remedy'.[61] Nonetheless, when subsequent petitions were filed later that year raising the issue yet again, the Court requested extensive briefs from the parties addressing various questions of applicable law, both domestic and international, creating the impression that it would deliberate the petition on its merits.[62]

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[58] See nn 50–51 and accompanying text.

[59] See also HCJ 7957/04 *Mara'abe* v *Prime Minister of Israel* [2005] Dinim 602 (57) 2005, para 17: '[T]he situation in the territory under belligerent occupation is often fluid. Periods of tranquility and calm transform into dynamic periods of combat. When combat takes place, it is carried out according to the rules of international law. "This combat is not being carried out in a normative void. It is being carried out according to the rules of international law, which determine principles and rules for the waging of combat" (see HCJ 3451/02 *Almandi* v *The Minister of Defense*, 56(3) P.D. 30, 34; see also HCJ 3114/02 *Barakeh*, *M.K.* v *The Minister of Defense*, 56(3) P.D. 11, 16). In such a situation, in which combat activities are taking place in the area under belligerent occupation, the rules applicable to belligerent occupation, as well as the rules applicable to combat activities, will apply to these activities.'

[60] HCJ 769/02 *PCATI* v *GoI* [2006] Dinim 1089 (69) 2006.

[61] HCJ 5872/01, 3114/02 *Barakeh* v *Prime Minister and Minister of Defense* [2002], IsrSC 56(3) 1.

[62] One can speculate as to the reasons for the change in the Court's attitude towards adjudicating the matter. One possible factor may be the different justices appointed to each of the two petitions. Another possibility may be that the justices who first rejected the petition may have hoped that the security situation would improve and that the use of the tactic would be short-lived.

In December 2006, the Court issued its monumental decision regarding the normative legal framework for the targeting of terrorists acting on behalf of non-state groups. The Court's opinion relied heavily on core provisions of the Law of Armed Conflict.[63] It ruled that under certain conditions, targeting of such individuals would be compliant with international law and hence rejected the petition on its merits.[64]

A significant factor to note—and one that will become central in later decisions of the Court discussed below—is that while the case was pending, Israel carried out its unilateral disengagement from the Gaza strip by ending its military presence there and evacuating all Israeli settlements. Martial rule in the Gaza Strip, which had begun in 1967, came to an end.[65] It has been Israel's legal contention since that to the extent there had been a *de-facto* belligerent occupation in Gaza until 2005, the Disengagement had brought the occupation of the Gaza Strip to an end.[66] Today, academics remain divided on the question of the legal status of Gaza.[67] While it is true that Israel's presence in the Gaza Strip ended in 2005, Israel still controls Gaza's air space and waters. Gaza shares a border with Egypt; however, it is heavily dependent on the passage of goods and people into the Strip from Israel, which is tightly regulated by Israel, as well as the passage of people between the Gaza Strip and the West Bank (as there is no territorial contiguity between the two regions). Gaza is also highly dependent on Israel for its supply of basic resources, such as electricity. At the same time, since 2007 the Gaza Strip has been internally controlled exclusively by the terrorist organization Hamas,

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[63] In short, the Court rejected the State's contention that presently such individuals were viewed as unlawful combatants under the Law of Armed Conflict. Instead, the Court examined the targetability of such individuals within the confines of Article 51(3) of Additional Protocol I to the Fourth Geneva Convention, which recognizes that civilians can be stripped of their protection from targeting if and for such a time as they are directly participating in hostilities.

[64] Due to the Court's permissive rules of standing, which had been substantially relaxed over the years, the petition was heard despite the fact that it was filed by an Israeli non-government organization (hereinafter NGO) and was 'public' in nature. As for the question of justiciability and political question doctrine, the Court analyzed claims of non-justiciability raised by the government over several pages of its decision, consequently concluding that the question at hand was essentially a legal one reviewable by the Court.

[65] Israeli Cabinet Decision No. 4235 dated 11 September 2005 (in Hebrew) ('With the withdrawal of IDF forces from these territories, responsibility for them will be transferred to the Palestinian authorities and the military rule in the area will cease.').

[66] HCJ 9132/07 *Al-Bassiouni* v *Prime Minister*, 1 November 2007, Petition for Respondents, paras 4–9 ('Since the Six-Day War the Gaza Strip was held under "belligerent occupation"… as of 12.9.05, at 24:00, the military rule of the IDF in the Gaza Strip ended, and along with it the IDF's belligerent occupation of the Gaza Strip, with all that it entails politically, security-wise and legally.') (on file with author); HCJ 201/09 *Physicians for Human Rights* v *Prime Minister of Israel*, Petition for Respondents, 8 January 2009, para 7 (in Hebrew) ('The Gaza Strip is not under Israeli occupation as of 12.9.05, when the last of IDF forces left the territory of the Gaza Strip following the completion of implementation of the Disengagement plan') (on file with author).

[67] See Shani 2005, p 369; contra Mari 2005, pp 366–368.

which violently seized political control and ousted its opposition.[68] With the cessation of martial law and conclusion of a military government in the Gaza Strip in 2005 on the one hand, and the growing presence of armed terrorist groups in what has become a breeding ground for terrorism under Hamas's rule on the other hand, it is hard to view Israel as having the effective control of an occupier over what happens in Gaza.

The withdrawal of all Israeli troops from the Gaza Strip and end of martial law strengthened substantially the government's position that the applicable legal regime to military action at least in the Gaza Strip (if not in the West Bank as well) could *only* be the Law of Armed Conflict and not the laws of belligerent occupation. Furthermore, this also reinforced the government's claim of non-justiciability—the cessation of belligerent occupation in the Gaza Strip likened the military's actions there with those conducted on foreign soil, and hence well within the core of foreign military actions traditionally considered off-limits to courts (even by the Israeli court).[69] In other words, to the extent that the Court in the past had felt it legitimate to review the military's actions in the Territories due to the prolonged military occupation or the military commander's obligation to administer public life in these Territories—by which it could subject the military commander to the same judicial scrutiny given to other domestic administrative officials—these new circumstances strengthened the argument that there was no longer room for domestic judicial review of the military's activities in the Gaza Strip after September 2005.

The Court nonetheless authored a decision delineating the boundaries for what would be considered legitimate targeted strikes. In doing so, it, *inter alia*, deemed the hostilities between Israel and armed Palestinian groups an international armed conflict governed by the Law of Armed Conflict. However, the Court also applied components outside the armed conflict regime in two respects. First, the Court ruled that a civilian taking a direct part in hostilities could not be attacked if a less harmful means could be employed, namely arrest, interrogation and trial.

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[68] See International Institute for Strategic Studies, 'Hamas coup in Gaza, 13 *IISS Strategic Comments* (2007) p 1, available at http://www.iiss.org/publications/strategic-comments/past-issues/volume-13-2007/volume-13-issue-5/hamas-coup-in-gaza/; 'Hamas takes full control of Gaza' in BBC News [15 June 2007] available at http://news.bbc.co.uk/2/hi/middle_east/6755299.stm; for an Israeli perspective see the website of the Israel Ministry of Foreign Affairs, 'A year since the Hamas takeover of Gaza' [16 June 2008] http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Hamas+war+against+Israel/A+year+since+the+Hamas+takeover+of+Gaza+-+June+2008.htm.

[69] See for instance, HCJ 4354/92 *Temple Mount Faithful* v *Prime Minister* [1993] IsrSC 57 (1)37 (challenging the legality of the government's authority to negotiate with Syria in the matter of the Golan Heights); HCJ 6057/99 *MMT Mateh Mutkafei Terror* v *Prime Minister* [1999] Dinim 713 (7) 1999 (unpublished), HCJ 7307/98 *Polack* v *Government of Israel* [1998] Dinim 727 (9) 1998 (unpublished), HCJ 2455/94 '*Betzedek*' *Organization* v *Government of Israel* (unpublished) (challenging the release of hostages in the framework of a political agreement); HCJ 4877/93 *Irgun Nifgai Terror* v *Government of Israel* Dinim 1492 (1) 1993 (challenging the carrying out of negotiations over the Oslo Accords).

The Court explained that '[i]n our domestic law, that rule is called for by the principle of proportionality'.[70] It went on to note that the availability of such lesser means 'might actually be particularly practical *under the conditions of belligerent occupation*, in which the army controls the area in which the operation takes place…'[71] In addition, the Court decided that following an attack, 'a thorough investigation regarding the precision of the identification of the target and the circumstances of the attack upon him is to be performed (retroactively)'.[72] In substantiating both requirements—the use of a lesser means and the retrospective investigation—the Court cited legal sources derived from human rights law, a separate body of law from that of the Law of Armed Conflict within international law.[73] Thus, in some respects, the Court's references were reminiscent of the previous categorization of terrorism as a criminal activity governed by the law enforcement paradigm.[74]

The relative weight the Court gave the obligation to employ lesser means to apprehend a terrorist, and its reference to a situation of belligerent occupation, were most likely a result of the fact that the petition, when filed in 2002, had challenged the targeted killings policy in general, with regard to both the West Bank and the Gaza Strip. Hence, while a change in the legal status of the Gaza Strip had arguably occurred in 2005, the Court's holding in the case was also applicable to the West Bank, where a military occupation still existed. This may explain to some extent the Court's willingness to adjudicate the issue of targeted killings—a matter at the core of operational military activity—while at the same time relying on legal principles outside the regime of the Law of Armed Conflict proper.

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[70] HCJ 769/02 *PCATI* v *GoI* [2006] Dinim 1089 (69) 2006, para 40.

[71] Ibid. [emphasis added].

[72] Ibid.

[73] The relationship between human rights law and the Law of Armed Conflict (or international humanitarian law as it is also referred to) is an intricate one, beyond the scope of this Article. Opinions vary as to whether the two bodies of law apply concurrently to a situation of armed conflict or whether the Law of Armed Conflict applies exclusively, with additional variants between these two points on the spectrum. On the relationship between human rights law and international humanitarian law in a situation of armed conflict, see generally Watkin 2004, p 1; Hampson 2008, p 549. There are also varying positions as to the applicability of human rights law beyond a state's borders, e.g. to territory under military occupation, Dennis 2005, p 119.

[74] In substantiating the investigation requirement, the Court relied in its decision on *McCann* v *United Kingdom*, 21 EHRR 97, at 161, 163 (1995) and *McKerr* v *United Kingdom*, 34 EHRR 553, 559 (2001). In the former case, three members of the IRA were shot to death in the streets of Gibraltar by English agents. In the latter, police officers had shot over 100 rounds at a car and killed three unarmed individuals; claims of a shoot-to-kill policy against suspected terrorists were raised against the government. In both cases the events took place either within the territory of United Kingdom (Northern Ireland) or a territory under its control (Gibraltar). Neither involved the employment of military means nor was considered part of an armed conflict.

2.4.3 A transition completed: armed conflict proper?

This brings us to a series of petitions pertaining exclusively to the Gaza Strip in what can be deemed as the post-Disengagement era. The significance of this distinction is that from a legal perspective, it is the farthest away from the regime of belligerent occupation Israel has been since 1967. In 2007, Hamas (considered to be a terror organization by Israel and many others, among them the US, Canada, and the EU), which had won a parliamentary majority in elections held in Gaza a year earlier, violently overtook the government in the Gaza Strip, and has since that time been estranged politically from the West Bank, where Fatah leaders remain for all intents and purposes exiled. To the extent there has been any interaction between the Israeli and Palestinian leadership in the past three years, it has been between the government of Israel and Palestinian Authority representatives in the West Bank. In the years following the Disengagement, rocket fire from the Gaza Strip into Israel intensified, with over several thousands of rockets fired from the Gaza Strip onto Israeli soil after the Disengagement and until the end of 2008,[75] while weapons and ammunition continue to be smuggled into the Gaza Strip.[76]

These factors assist in illuminating how similar the Gaza Strip has grown in nature after 2005 to an enemy party to an armed conflict. The Supreme Court may have become seasoned at adjudicating matters pertaining to the military's obligations within the context of administering public order and safety in a *de-facto* occupied territory. However, the political and military situation between Israel and the Hamas-controlled Gaza Strip had evolved into something quite different. The government of Israel had already argued in the last of its briefs to the Court in the targeted killings case that the Disengagement from Gaza had turned the hostilities between the IDF and Hamas to the equivalent of a conflict with a foreign adversary.[77] However, despite holding that the hostilities between Israel and Palestinian armed groups were to be treated as an international armed conflict, the Supreme Court nonetheless went on to adjudicate petitions pertaining to this armed conflict.

In late 2007, the government of Israel decided to adopt certain economic restrictions on the Hamas regime in the Gaza Strip which, since Hamas' takeover, has come to be regarded as 'hostile territory'.[78] These restrictions included, *inter alia*, a limitation on the supply of fuel and electricity into the Gaza Strip from

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[75] IDF Blog, Rocket Attacks towards Israel, available at http://idfspokesperson.com/facts-figures/rocket-attacks-toward-israel/.

[76] Website of Israel Ministry of Foreign Affairs, 'Hamas's illegal attacks on civilians and other unlawful methods of war—legal aspects.' [7 January 2009] available at http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Hamas+war+against+Israel/Legal_aspects_of_Hamas_methods_7_Jan_2009.htm.

[77] HCJ 769/02 *PCATI* v *GoI*, Supplementary Brief 2 for Respondents, 5 December 2005, para 5–9 (on file with author).

[78] Decision adopted 19 September 2007, as quoted in HCJ 9132/07 *Al Bassiouni* v *Prime Minister* [2008] Dinim 321 (7) 2008, para 2.

Israel[79] to be implemented 'after considering the legal ramifications of the humanitarian situation' in a manner that would 'prevent a humanitarian crisis'.[80] The government's position was that the fuel and electricity supplied by Israel to the Gaza Strip was being used to support terrorist operations, including the launching of rockets into Israel. A controlled reduction in the supply of fuel, it was believed, could damage the terrorist infrastructure and Hamas' ability to operate against Israel without adversely affecting the humanitarian supply of fuel.[81] A petition was filed with the Supreme Court to challenge this decision and its legality in light of Israel's humanitarian obligation towards the Gaza Strip. Much of the hearings before the Court revolved around factual questions—the manner in which the flow of electricity would be reduced, the effect the reduction would have on the civilian population, and the ability to manage and regulate the consumption of electricity inside the Gaza Strip.[82]

As to the applicable legal sources to the matter, the Court stated:

> '[T]he main duties of the State of Israel relating to the residents of the Gaza Strip *derive from the state of armed conflict* that exists between it and the Hamas organization that controls the Gaza Strip; these duties also derive from *the degree of control exercised by the State of Israel* over the border crossings between it and the Gaza Strip, as well as *from the relationship that was created between Israel and the territory of the Gaza Strip after the years of Israeli military rule in the territory*, as a result of which the Gaza Strip is currently almost completely dependent upon the supply of electricity from Israel.'[83]

It further noted that '[t]he state's pleadings in this regard are based upon norms that are part of the customary international law, which set out basic obligations that govern combatant parties during an armed conflict…'[84] The Court then went on to determine, based on the information it had received from the parties as well as alterations that had been made to the reduction plan by the military in the course of the proceedings, that the amounts of electricity and fuel that Israel intended to

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[79] The Gaza Strip was dependent on Israel for approximately 60% of its electricity supply, 120 megawatt out of 200 megawatt. Seventeen additional megawatts were being supplied at the time by Egypt and the remaining amount was produced within the Strip by Gaza's power plant. Fuel would be purchased by Gaza authorities from private suppliers; however, Israel was responsible for operating the border crossings which allowed fuel to be transferred physically into Gaza.

[80] HCJ 9132/07 *Al Bassiouni* v *Prime Minister*, at para 2.

[81] Ibid. at para 4.

[82] For example, the state contended that if the authorities in Gaza managed the consumption of electricity properly, the flow of electricity to maintain humanitarian needs (such as hospitals and water supply) would continue without interruption. The petitioners argued in response that there was no physical way to reduce the supply of electricity to the Gaza Strip without affecting those services deemed vital, hence causing irreversible harm to the civilian population in Gaza. It is interesting to note that while the Court waited to receive additional information regarding the ability to regulate the flow of electricity in the Gaza Strip, it issued an order mandating that until the aforesaid submissions were received, the plan to reduce the electricity supply to the Gaza Strip would not be implemented.

[83] HCJ 9132/07 *Al Bassiouni* v *Prime Minister*, at para 12 [emphasis added].

[84] Ibid. at para 14.

supply satisfied the humanitarian needs in the Gaza Strip. Accordingly, the petition for injunctive relief was denied.

Hence, while the Court recognized the de-facto cessation of military occupation,[85] it did draw upon two additional sources of legal obligations—the degree of control exercised by Israel over the border crossings to the Gaza Strip and the relationship that was created between Israel and the territory of the Gaza Strip after the years of Israeli military rule in the territory. It seems that the unique situation created as a result of the physical proximity between Israel and the Gaza Strip and the prolonged military occupation of the Strip by Israel had created in the Court's opinion a penumbral source of obligations or rather a heightened level of humanitarian obligation towards the Gaza Strip somewhat beyond the confines of the Law of Armed Conflict.[86]

The peak, to date, of the Court's willingness to adjudicate matters relating to the battlefield appears to be its decision in *Physicians for Human Rights* v *Prime Minister*[87] (hereinafter the *Cast Lead petition*). In late 2008 the IDF initiated a month-long, large-scale military operation in the Gaza Strip, which included both ongoing aerial strikes and the deployment of ground forces. Operation 'Cast Lead' presented the most intense level of hostilities between the IDF and Palestinians in the history of the region. In the course of the Operation, two petitions were filed with the Israeli Supreme Court. The first concerned delays in evacuating Palestinian casualties in the Gaza Strip and claims that medical personnel and ambulances were being attacked by the IDF; the second addressed the shortage of electricity in the Gaza Strip, attributed to the IDF. Two urgent hearings were held within days, in the course of which the state was ordered to submit a more detailed response regarding the efforts it had undertaken to fulfill its humanitarian obligations.[88]

Here too, a large portion of the Court's decision was dedicated to ascertaining the facts, including, for example, the mechanisms that had been set up by the IDF to coordinate humanitarian relief, evacuation and supply to the Gaza Strip; specific repair work to electricity lines; and evacuation efforts of particular individuals (based on real-time information provided by NGOs monitoring the situation and IDF personnel on the ground).[89] The situation changed rapidly even as the petition was pending and

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[85] In fact, the Court noted (ibid. at para 12) that:

… since September 2005 Israel no longer has effective control over what happens in the Gaza Strip. The military government that was in force in this territory in the past was ended by a decision of the government… In these circumstances… Israel does not have a general duty to ensure the welfare of the residents of the Gaza Strip or to maintain public order in the Gaza Strip under all of the laws of a belligerent occupation under international law.

[86] For a thoughtful analysis and critique of the Al-Bassiouni decision, see Shani 2009, p 101.

[87] HCJ 201/09 Physicians for Human Rights v Prime Minister of Israel [2009] Dinim 901 (7) 2009.

[88] The Court also specifically ordered the state to submit an affidavit by a senior officer responsible for the humanitarian arrangements in the Gaza Strip. The affiant, a colonel who headed the District Coordination Office for the Gaza Strip, also appeared before the Court.

[89] See e.g. para 9 of the decision, HCJ 201/09 *Physicians for Human Rights* v *Prime Minister of Israel* [2009] Dinim 901 (7) 2009.

the Court itself noted on several occasions in the decision the inherent difficulty, in light of ongoing hostilities, in receiving all the necessary information pertaining to the petitioners' claims.[90] Nonetheless, it rejected the state's argument that due to the ongoing hostilities the petition was non-justiciable,[91] and applied to the facts in question the obligations found in customary international law, the application of which was not disputed by either party.[92] The decision was delivered within days and while the operation was still ongoing. The Court determined that the IDF had taken the necessary steps and was prepared to carry out its humanitarian obligations.[93]

Before concluding this section, two additional petitions deserve attention. Unlike the *Cast Lead petition*, which was adjudicated by the Court in the course of intense hostilities, these petitions were less urgent in nature. Nonetheless, they challenged the means and methods of attack used by IDF in its operations. In this regard, they are similar to the targeted killings petition in the sense that all three raise questions that lie at the heart of the Law of Armed Conflict. The first challenged the use of sonic booms by the Israeli Air Force over the Gaza Strip[94] while the second challenged the safety distances (buffer zones) maintained by the military between artillery shelling and civilians or civilian objects.[95] Both petitions pertained exclusively to actions taken by the military in the Gaza Strip, a territory arguably no longer under military occupation.

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[90] HCJ 201/09 *Physicians for Human Rights* v *Prime Minister of Israel* at para 13: Our judicial scrutiny is exercised in such a case while the hostilities are continuing. Naturally this imposes restrictions upon the court's ability to exercise its scrutiny and to ascertain all of the relevant facts at this stage of the hostilities… Indeed, while the hostilities are taking place it is not always possible to obtain all of the information that is required for exercising judicial scrutiny, in view of the dynamic changes that are continually occurring.

[91] Ibid. at para 11.

[92] In addition, it stated that 'the fundamental rules of Israeli public law also apply', citing previous cases which had been decided in the context of the military occupation, ibid. at para 15. While the application of the principles of Israeli administrative law to the discretion of the military commander in an occupied territory had become a familiar standard in the Court's jurisprudence, continuing to apply these principles to the military's actions where a belligerent occupation no longer exists (assuming this legal position is accepted) is quite a different matter. Admittedly, the Court referenced Israeli administrative law only briefly in the decision and focused primarily on whether actions taken by the IDF had fulfilled obligations set forth in various provisions of customary international law. Nonetheless, the linkage to domestic administrative law shows what a substantial impact the long-term military occupation has had on the Court's jurisprudence, so much so that it continues to attribute to State action domestic legal principles even when it is operating in what has become from a practical perspective a hostile and foreign territory.

[93] Ibid., at para 28.

[94] HCJ 10265/05 *Physicians for Human Rights* v *Minister of Defense* (unpublished). The sonic booms are presumably used by the military to deter individuals from launching rockets towards Israel for fear of being targeted by the Israeli Air Force.

[95] HCJ 3261/06 *Physicians for Human Rights* v *Minister of Defense* (pending). Because of the relative imprecision of artillery fire, firing units are required to keep a minimum safety distance from civilians and civilian objects when discharging artillery fire. According to the petition, the military had narrowed the security buffer zone for artillery shelling from 300 to 100 m away from any civilian presence.

With regard to the sonic booms petition, the Court requested detailed written arguments from the parties, particularly on the questions of the applicable legal regime to the Gaza Strip, the justiciability of the matter and the use of sonic booms under international law. The state argued that following the Disengagement, the legal regime that applied was exclusively the Law of Armed Conflict and that the use of military means in the course of hostilities outside the state was non-justiciable.[96] Since the use of the sonic booms was discontinued as of July 2006, the Court dismissed the petition, which had become theoretical in nature, without prejudice, allowing the petitioners to file it again should the military resume the use of sonic booms.

As for the artillery shelling petition, a response was filed by the state, in which it, *inter alia*, stated that the use of artillery shells in the Gaza Strip had been suspended. To date, the petition remains pending. The renewed use of artillery shells in the Gaza Strip during Operation Cast Lead may perhaps lead to renewed interest in the petition. At any rate, the current status of the petitions is far less significant; like the earlier petitions discussed, of importance is the fact that in both cases the IDF has had to defend its use of military means on its merits.

Although the majority of petitions presented thus far were eventually rejected, their adjudication by the Court nonetheless has significant ramifications for the military. The Court in deciding on the merits of these petitions undertook an in-depth factual examination, which required the government and military to invest resources and valuable time, in the course of hostilities, in gathering data, putting together written responses, obtaining affidavits and appearing before the Court. Furthermore, often times in the course of adjudication of security matters, while a petition is still pending, the parties will make various concessions which will eliminate the need for a court order.[97] Thus, while the petition may be ultimately denied, often times in the course of proceedings the relief sought after is received. The very real threat of immediate litigation before the Israeli Supreme Court regarding actions by the military in the course of hostilities serves in itself as a deterrent when formulating such policy. Moreover, to date, the military has responded to and argued all petitions

[96] It also presented its arguments in defense of the petition on its merits.

[97] In one such case, HCJ 4764/04 *Physicians for Human Rights* v *IDF Commander in Gaza* [2004] Dinim 1098 (30) 2004, petitioners demanded that the military allow Palestinian civilians to participate in the funerals of relatives. The IDF had originally rejected the request because the individuals were in a neighborhood that had been surrounded by the IDF in the course of operations. In the course of the hearings, the Court demanded that the military find a solution. After the oral arguments before the Court were concluded, several proposals were made by the IDF to allow several family members to participate in the funerals. Each of the proposals was ultimately rejected by petitioners who preferred to hold the funerals after the siege on the neighborhood was lifted, in order to ensure mourning rituals could be carried out in full compliance with Islamic law. The Court noted at para 27 that: '*Prima facie* it would appear that the proposals which he [the IDF representative] made in the end could have been made at an earlier stage. The changing position of the respondent, as it appears from the response of the State Attorney's Office, implies that the matter was not originally taken into account, and the solutions that were proposed were improvisations made up on the spur of the moment. This should not happen. Preparations for dealing with this matter should have been made in advance. A clear procedure should be adopted…'.

challenging its policies. Hence, it seems that the accessibility of the Court alone has an impact on the implementation of the military's policy.

2.5 What Does It All Mean? The Future of Adjudicating Armed Conflict

The decisions of the Israeli Supreme Court discussed in the previous section illustrate the development of the Court's jurisprudence pertaining to questions of armed conflict. However, it would seem that this jurisprudence is a result of a set of legal and factual circumstances unique to Israel. In light of this, one might legitimately ask whether the Israeli experience can be instructive in predicting how other domestic courts, particularly those in the US, will behave if faced with similar legal questions.

2.5.1 Israel

At first glance, the transition in Israel from the law enforcement paradigm to the armed conflict paradigm seems inconsequential. By the year 2000, Israel's Supreme Court was already well-accustomed to reviewing decisions of the military commander because of Israel's long-time military presence in the Territories. Although the government was claiming an armed conflict was now taking place between Israel and the Palestinians, the battlefield essentially had not changed and was one the Court was already familiar with, since it had entertained many petitions in the past pertaining to the Territories. The Court was also experienced at applying international law principles when assessing the military commander's discretion in the Territories, since it had been applying the laws of belligerent occupation since the late 1960s to such petitions. The fact that the government was arguing that in some instances the laws of belligerent occupation continued to apply concurrently with the Law of Armed Conflict helped blur the magnitude of this transition even more. In short, by the beginning of the 21st century, there were probably hundreds of cases on record in Israel in which the Supreme Court had adjudicated petitions against the military; applied international law; and had determined whether or not the military commander's discretion could survive judicial scrutiny.

These factors contributed to making this transition—which was doctrinally significant—seem quite subtle and almost natural. The Israeli Supreme Court, by simply continuing to do what it had had been doing, began adjudicating matters pertaining to the conduct of hostilities by the IDF. The novelty of the situation was made clearer when Israel withdrew entirely its military forces from the Gaza Strip

in 2005, ending martial law in the area.[98] Compared with the West Bank which was still subject to Israeli martial law, the Gaza Strip became more removed from Israeli responsibility.

The incursion of IDF forces into the Gaza Strip in late 2008 was the first time a significant Israeli military presence had entered the region in over 3 years. Israel employed extensively its air force and ground forces over a month-long period. It encountered fighting on the ground, as well as cross-border mortar and rocket fire, quite similar to the conflict that had taken place in 2007 between the IDF and Hezbollah in southern Lebanon (a conflict that subsequently became known in Israel as the Second Lebanon War). Yet the judicial review that Operation Cast Lead was subjected to was unlike that of any other armed conflict around the world or previous armed conflicts between Israel and its neighboring countries.

This can no doubt be attributed to the unique circumstances and context of the military conflict between Israel and the Palestinians, which make it distinguishable from other armed conflicts. This is best illustrated by a comparison to the 2006 hostilities between Israel and Hezbollah. Hezbollah, also considered a terrorist entity, carried out rocket attacks in July 2006 from Lebanese territory into Israeli cities and kidnapped several IDF soldiers from Israeli territory near the Lebanese–Israeli border, killing several more in the attack itself. Israel initiated an extensive military operation which was subsequently officially deemed the Second Lebanon War[99] by Israel. In the course of the 5 week operation, despite extensive damage to infrastructure in south Lebanon and loss of life, not a single documented petition pertaining to the conduct of hostilities by the IDF in Lebanon was filed with the Court.[100] There were no challenges to the legal basis for attacking Hezbollah operatives; nor were there any petitions filed contesting the highly-controversial use of cluster munitions by the IDF; or the Israeli naval blockade which burdened the provision of humanitarian aid to Lebanon.

The lack of petitions in the Hezbollah conflict is remarkable in comparison to the frequent petitions challenging military actions in the Gaza Strip. It can most likely be explained by the fact that Lebanon is a sovereign country. In terms of

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[98] As noted earlier, Israel withdrew its military presence and considered the belligerent occupation to have ended. However, the Gaza Strip is not recognized as a sovereign state. Claims have been made that Israel still has effective control de-facto of the Gaza Strip due to its control of a majority of the Strip's borders. While the legal status of the Gaza Strip may still be indeterminate in international law, it is uncontested that there is no longer an Israeli military commander who administers the area and that Israeli physical control in the area has diminished substantially; see nn 65–68 and accompanying text.

[99] It is important to in this regard to emphasize that Israel carried out hostilities primarily against Hezbollah—it targeted Hezbollah infrastructure, there were no encounters between the IDF and the Lebanese army in the course of the conflict and the conflict was generally viewed by both countries independently of the state of affairs between Israel and Lebanon.

[100] A petition was filed with the Supreme Court demanding that the government make a formal declaration of war and a state of emergency, HCJ 6204/06 *Beilin* v *Prime Minister of Israel* [2006] Dinim 139 (46) 2006. Both the petition and the decision were limited to questions of constitutional rather than international law.

public perception, the Second Lebanon War fell more squarely within the category of an armed conflict between two nations. Israel's 'duty of care' towards Lebanon was perceived as diminished because of Lebanon's ability to provide assistance to its citizens and the ability of the civilian population to evacuate to areas outside of the immediate combat zone.

The Gaza Strip, on the other hand, is perceived as more dependent on Israel not only because of the prolonged occupation but also because of the physical control Israel still has over most of the Gaza Strip's borders. Moreover, it may be that because of the indeterminate status of the Gaza Strip the Court's involvement in and adjudication of Gaza-related matters was perceived of as less of an intrusion into foreign relations than adjudicating military actions taken by the IDF in the course of a conflict with Hezbollah on Lebanon's territory.[101] Finally, it is highly likely that human rights groups and politically-motivated bodies acting on behalf of the Palestinian residents of the West Bank and the Gaza Strip are simply less invested in the hostilities involving the IDF in other regions of the world.

Whatever the reasons, it seems clear that despite the Court's acceptance that the belligerent occupation in the Gaza Strip has ended and that hostilities between the IDF and Palestinian armed groups are governed by the Law of Armed Conflict, both the Court and the Israeli public still distinguish between this particular armed conflict and others because of its unique circumstances. Hence, the Court's willingness to adjudicate matters pertaining to armed conflict may be limited to those relating to the Palestinian territories.[102] Nonetheless, this is still impressive given the operational issues the Court is willing to adjudicate, such as the targeted killings policy or humanitarian efforts in a combat zone, which are inextricably connected to how the military conducts hostilities.

2.5.2 Is the Israeli experience relevant to other jurisdictions?

There is room to wonder whether the Israeli experience, namely the ongoing development of jurisprudence by Israel's Supreme Court on the adjudication of questions pertaining to armed conflict, will influence the judiciary in other jurisdictions as well. Several factors have contributed to the Court's said jurisprudence.

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[101] It is important to remember; however, that the Supreme Court in the targeted killings petition categorized the conflict with Palestinian armed groups as an *international* armed conflict.

[102] This proposition could be put to the test should a petition challenge IDF conduct in an armed conflict in a different region or perhaps if a general petition is filed demanding a blanket prohibition on the use of a particular weapon by the IDF, such as cluster munitions. In all probability, absent a particular military operation, the Court will refrain from adjudicating such a theoretical petition, cf., HCJ 8990/02 *Physicians for Human Rights* v *Doron Almog, O.C. Southern Command* [2003] IsrSC 57 (4) 193 (dismissing a petition challenging the legality of flechette munitions on grounds of non-justiciability). Ironically, then, the chances of the Court adjudicating a petition challenging the legality of a particular means or method increases in the course of an armed conflict, when the calls for judicial deference are usual at a high.

First and foremost are the characteristics of the Israeli–Palestinian conflict itself. Other factors that must be considered concern the Court's jurisdiction and accessibility, as well as its jurisprudence on questions of standing and justiciability, all of which determine which cases actually reach the court. Finally, the treatment of international and comparative law by judges may also play a role in the extent to which domestic courts will apply the Law of Armed Conflict. These factors are further developed below.

The Israeli Court's jurisprudence is intrinsically linked to Israel's long-term military occupation in the West Bank and Gaza Strip. Israel has had a military presence in the Territories for over 40 years. Israel shares its borders with the Territories, which are at most 60 km away from Israel's center (and no more than a few kilometers from the Supreme Court). Moreover, military service in Israel is mandatory so that a considerable number of Israelis have served in the military, making it an institution more familiar and accessible to the general public than perhaps in other countries. The military is also much smaller than that of other fighting armies around the world. All of these factors no doubt contribute to the Court's openness to adjudicate questions pertaining to the armed conflict between the IDF and Palestinian armed groups.

The circumstances in other nations with active militaries deployed to combat zones are clearly different. The great distances between the battlefield and the courtroom, such as the one between American, British or Canadian courts and Iraq or Afghanistan, affects the perception of justiciability. It strengthens the sense that a local court has no business reviewing actions taking place so far away in a foreign land. It may even strengthen a judge's fear of interfering in matters in a manner detrimental to security because of an unfamiliarity with the battlefield.[103]

Distance from the battlefield also affects the practical ability to adjudicate because of the difficultly in gathering relevant information and testimony pertaining to the question before the Court. Senior IDF officers have at times attended Supreme Court hearings. There have been instances in which the Court has received information in 'real-time' from IDF personnel in contact with officers 'on

[103] The fact that Guantánamo Bay is so *physically* close to the US and that no hostilities were taking place there no doubt impacted the US Supreme Court justices' position, perhaps subconsciously, that federal courts should exercise jurisdiction over the island and that some constitutional and even statutory protections applied to detainees held there; *Rasul* v *Bush*, 542 US 466 (2004) (determining that the federal habeas corpus statute applied to detainees held at the US military base in Cuba); *Boumediene* v *Bush*, 553 US 723 (2008) (determining that the constitutional provision of habeas corpus has full effect at Guantanamo Bay). *Contra Maqaleh* v *Gates*, 605 F.3d 84 (DC Cir. 2010) (finding that the constitutional writ of habeas corpus did not extend to aliens held in detention in a military detention facility in the Afghan theater of war).

the ground'.[104] This may be harder to execute when the battlefield is a great distance away, although technological advances can provide some practical solutions.

The jurisdiction of the Israeli Supreme Court is such that it is the first (and last) instance to adjudicate a challenge to government or military policy.[105] Combined with the fact that the Court's jurisdiction over such petitions is obligatory, this makes the Court relatively accessible. A petitioner does not have to go through the lower courts before reaching the Supreme Court. Moreover, once a petition has been filed with the Supreme Court, the Court is limited in its ability to tailor its docket. This enables filing and hearing petitions within a matter of days, when necessary.

The structure and jurisdiction of courts in foreign jurisdictions may affect substantially the speed with which cases reach the upper courts, if at all. In the US, for instance, similar suits challenging executive or administrative policy would generally have to go through the district and circuit courts before potentially reaching the US Supreme Court. This makes adjudication of time-sensitive matters by the Supreme Court unlikely (although not impossible).

Furthermore, once a petition for certiorari is filed with the US Supreme Court, the Court may pick and choose the cases it will hear.[106] This enables the Court to steer clear of cases which it considers imprudent to adjudicate without having to resort explicitly to questions of justiciability. Moreover, the abundance of courts in the US exacerbates the complexity of the situation. The fact that there is no single tribunal to adjudicate suits requesting injunctive relief against the military means

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[104] In HCJ 4764/04 *Physicians for Human Rights* v *IDF Commander in Gaza* [2004] Dinim 1098 (30) 2004, a petition challenging the military's compliance with its humanitarian obligations in the course of a military operation in the Gaza Strip (prior to the Disengagement), the Head of the District Coordination Office for the Gaza Strip was present in Court to provide oral explanations during the hearing regarding various matters in question, and at times stepped out to receive additional information from his personnel in the area of operations, which he relayed back to the justices. The Court received detailed and changing information in 'real-time', regarding matters such as the number of water wells that were being repaired by the IDF, the flow of water to particular neighborhoods in the Gaza Strip, delays in repairs, the supply of additional water tankers by Israel into the Strip and coordination between the IDF and various NGOs on the matter. Ibid. at para 14: 'While he was explaining this to us, Col. Mordechai was told—and he told us—that six additional water tankers had entered the neighbourhood. We were also told that all the wells are now functioning. Diesel fuel has been brought into the neighbourhood to enable the operation of generators which allow water to be pumped from the wells. As a result of this, there is now running water in all the neighbourhoods of Rafah.

[105] See n 19 supra and accompanying text.

[106] The data gathered distinguishes between petitions filed '*in forma pauperis*', i.e., costs and printing requirements are waived on the basis of a showing of indigence (such 'ifp' are filed primarily by state and federal prisoners), and petitions in which costs are paid by the parties. In the 2001 term, 1886 paid petitions were dockets and 82 (4.3%) were granted; 6037 ifp petitions were docketed and 6 (0.1%) were granted. In the 2006 Term, 1723 paid petitions were docketed and 62 (3.6%) were granted; 7132 ifp petitions were dockets and 15 (0.2%) were granted; Fallon 1991 2009, pp 1462–1463.

that some courts may occasionally or only rarely encounter such petitions, making them all the more reluctant to adjudicate such questions.

Substantive doctrines of standing and justiciability also play a key role. The Israeli Supreme Court has developed over the years relatively lenient standards for substantiating petitioners' standing.[107] In practice, the Court today allows 'public petitioners' to challenge laws or policies which raise concerns regarding the rule of law. This has consequently had a substantial impact on the adjudication of petitions challenging military or executive actions and policies.

The central benefit of the Court's liberal approach to standing is the fact that interest groups can now file petitions challenging military action in the Territories regardless of whether or not they represent a particular individual whose interest has been or could be affected by a particular policy. This is best-illustrated by the petition challenging Israel's targeted killing policy.[108] The petition was filed by two human rights groups and challenged the general policy of Israel to target those individuals considered to be terrorists. Assuming that Israel's target list is likely confidential and undisclosed to the public, it would have been almost impossible to ever substantiate standing had the court insisted on an injury-in-fact showing or one of probable harm. A high-profile terrorist (or alleged terrorist) would have had to convince the Court of the probability of his name being included in such a target list. It is highly doubtful that such a person would be willing to come forward and initiate legal proceedings before an Israeli legal tribunal.[109] It is equally doubtful that the Court, based on traditional rules of standing, would be willing to entertain such a petition.[110]

The importance of the evolution in Israel's standing doctrine cannot be overstated. In the US, for example, attempts to challenge the legality of the NSA wiretap program initiated post-9/11—a legal challenge brought entirely under constitutional law by US citizens—failed precisely on grounds of standing.

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[107] For an overview of the evolution of the standing doctrine in Israeli law, see HCJ 910/86 *Ressler* v *Minister of Defense* [1988] IsrSC 42(2) 441, 457–472; Barak 2002, pp 106–110; Bracha 1991, p 96.

[108] HCJ 769/02 *PCATI* v *GoI* [2006] Dinim 1089 (69) 2006.

[109] Two human rights groups in the US received permission from the Treasury Department in 2010 to file a lawsuit challenging the reported inclusion on a target-list by the US government of Anwar al-Aulaqi, a militant American-born Islamic cleric. Approval to provide legal services to al-Aulaqi was required as part of the regulation of services provided to individuals and groups subject to anti-terrorism sanctions, see Gerstein 2010. The suit was filed by al-Aulaqi's father Nasser both on his own behalf and as "next friend" of al-Aulaqi. The district court did not recognize the petitioner's standing and the case was therefore dismissed, *Al-Aulaqi* v *Obama*, 2010 US Dist. LEXIS 129601 (D.D.C., 2010).

[110] Assuming that the district court in Al-Aulaqi had recognized the "next friend" status of Nasser al-Aulaqi or if the lawsuit had been filed on behalf of Al-Aulaqi himself directly, it is still uncertain that absent official confirmation by the Government, a court would be willing to accept the presumption that al-Aulaqi is indeed on the US target list for the purpose of establishing standing, see *Al-Aulaqi* v *Obama*, ibid. at n 4.

Plaintiffs were unable to show they had been subjected to wiretaps due to the confidential nature of the program.[111]

Just as the Israeli Supreme Court has been relaxing its standing requirements, the role played by the political question doctrine—another potential barrier to adjudication particularly in matters pertaining to national security—has become less and less substantial.[112] The Court has for the most part adopted an approach that at the heart of most challenges are legal questions, which the Court is capable of examining. In so doing, the Court has stressed on many occasions that it does not replace the discretion of the military commander or the government with its own; rather, it examines whether the executive's exercise of discretion was reasonable. This has led the Israeli Court to adjudicate cases relating to national security previously considered to be off-limits.[113]

Political question doctrine, however, still plays a dominant role in the jurisprudence of other courts, such as the US, in matters pertaining to foreign relations and the military. Hence, it can be assumed that the more closely related a question is to the conduct of hostilities or the laws of war, the slimmer the chances of adjudication by courts in the US. For instance, while the federal courts have been willing to address questions pertaining to the detention of

[111] See *ACLU* v *NSA*, 493 F.3d 644 (6th Cir. 2007) (overturning an earlier district court decision which recognized petitioners' standing and ruled that the government program was constitutional); *cert. denied*, 552 US 1179 (2008); *Amnesty Int'l USA* v *McConnell*, 646 F. Supp. 2d 633 (D.S.D.N.Y. 2009) (dismissing a suit challenging FISA provisions pertaining to wiretaps dismissed for want of standing); See also *Jewel* v *NSA*, 2010 US Dist. LEXIS 5110, 3 (dismissing a challenge to the wiretap program because none of the plaintiffs had alleged 'an injury that is sufficiently particular to those plaintiffs or to a distinct group to which those plaintiffs belong; rather, the harm alleged is a generalized grievance shared in substantially equal measure by all or a large class of citizens').

[112] The political question doctrine assumes that there exist certain issues of constitutional law that are more effectively resolved by the political branches of government and are therefore inappropriate for judicial resolution. See generally Redish 1984, p 1031; Tushnet 2002, p 1204; *Baker* v *Carr*, 369 US 186, 217 (1962); and supra n. 9. For the evolution of justiciability doctrine in Israeli jurisprudence see Barak 2002, pp 98–106; HCJ 910/86 *Ressler* v *Minister of Defense* [1988] IsrSC 42(2) 441, 472–498; Bendor 1997, p 311. See also HCJ 222/68 *National Circles Association* v *Minister of Police* [1970] IsrSC 24(2) 141 (rejecting the claim that the police's decision not to allow prayer at a religious sight is non-justiciable, but dismissing the petition on its merits); HCJ 306/81 *Sharon* v *Knesset Committee* [1981] IsrSC 35(4) 118 (rejecting the claim that the Knesset (Parliament) Committee's decision to suspend a member's privileges is non-justiciable and finding that the Committee exceeded its authority in its decision to suspend a member who had been criminally convicted, but was not sentenced to jail time); HCJ 73/85 '*Kach*' *Party* v *Hillel—Chairman of the Knesset* [1985] IsrSC 39(3) 141, 162 (finding that 'the issue before us does not raise a non-justiciable political question, but rather a justiciable legal question' and vacating the Knesset Chairman's decision not to allow a one-man party to present a bill dispersing the Knesset).

[113] Barak 2002.

individuals apprehended in the course of the 'war on terror',[114] we are less likely to see judgments regarding the legality of a particular air strike or military target in the near future.[115]

Finally, when attempting to anticipate whether, like Israel, we can expect other domestic jurisdictions to also adjudicate legal questions pertaining to the conduct of hostilities in the foreseeable future, we should not only compare such jurisdictions with the Israeli Supreme Court, but also question whether the Israeli jurisprudence itself will have any bearing on foreign courts. This is dependent to a great extent on foreign courts' attitude towards and receptiveness to comparative law. Those jurisdictions that tend to look at comparative law for legal trends and approaches may perhaps be emboldened by the Israeli Supreme Court jurisprudence pertaining to the application of the Law of Armed Conflict. However, the potential impact of Israeli jurisprudence on those jurisdictions which have adopted a more exceptional, isolationist approach towards the jurisprudence of foreign jurisdictions can be expected to be considerably less significant.

2.6 Conclusion

The Israeli Supreme Court in recent years has engaged in judicial review of questions pertaining to the conduct of hostilities within the context of what it has recognized as an armed conflict between Israel and Palestinian armed groups. This can be attributed to several factors that are unique to Israel, the most prominent being Israel's long-time military presence in the Territories. This military occupation which began in the late 1960s had made the Israeli Court by the 21st century accustomed to adjudicating matters governed by international law and scrutinizing the discretion of military figures. Concurrently, the Court's evolving jurisprudence regarding standing and political question doctrine made the Court overall more accessible to general petitions challenging national security issues. Combined together, these two processes paved the road to adjudication of questions pertaining to the modern battlefield, as at least some counter-terrorism policies, previously considered to be law enforcement actions, have come to be perceived in Israel and elsewhere as part of the armed conflict paradigm.

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[114] Supra n 103.

[115] *El-Shifa Pharmaceutical Industries Company* v *US*, 402 F. Supp. 2d 267 (D.D.C. 2005) (finding that questions regarding the legality of targeting decisions involving military attacks ordered by the President were likely immune from judicial review under political question doctrine), *aff'd,* 559 F. 3d. 578 (D.C. Cir. 2009), *vacated and hearing reordered en banc*, 2009 US App. LEXIS 17310 (D.C. Cir. Aug. 3, 2009), *dismissal aff'd*, 607 F. 3d 836 (D.C. Cir. 2010).

Although the Israeli legal system may share common-law attributes with other countries such as the US, and perhaps similar threats from non-state actors, they also have divergent jurisprudence on matters of justiciability, as well as different national experiences pertaining to security and distinctly different military arenas. Hence, any analogy to other domestic courts requires extreme caution. Nevertheless, other jurisdictions are also encountering legal challenges to the actions of the military in combat arenas abroad.[116] Even the US federal courts have made a small step toward adjudication of war-related issues primarily in matters pertaining to the detention of individuals,[117] including some analysis of legal requirements derived from international law.[118] To the extent that such jurisdictions are receptive to comparative law, the Israeli experience may prove useful in developing domestic jurisprudence on questions pertaining to the Law of Armed Conflict and its application to executive policy in the 'war on terror'.

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[116] For example, in 2007 UK's House of Lords addressed the legality of the arrest of a British citizen held in detention in Iraq by British forces as of 2004 in *R—on the application of Al-Jedda (FC) v Secretary of State for Defence* (2007) UKHL 58. The Canadian Supreme Court was asked to rule on the applicability of the Canadian Charter to individuals detained by Canadian forces in Afghanistan, *Amnesty International Canada* v *Chief of the Defense Staff for the Canadian Forces*, 2008 F.C. 336, aff'd 2008 F.C.A. 401. While these suits may not necessarily implicate directly questions of the Law of Armed Conflict, they do relate to the conduct of militaries overseas in situations of hostilities.

[117] This is exemplified, *inter alia*, by the Supreme Court recognizing federal jurisdiction over those incarcerated in Guantanamo Bay, *Rasul* v *Bush*, 542 US 466, 480 (2004); the application of constitutional *habeas corpus* to Guantanamo Bay; *Boumediene* v *Bush*, 553 US 723 (2008).

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