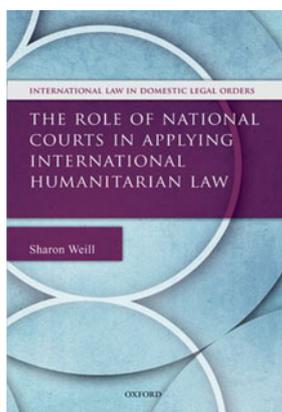


## BOOK REVIEW



# The Role of National Courts in Applying International Humanitarian Law

Sharon Weill\*

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States have exhibited a perennial wariness towards allowing judicial oversight of conduct during situations of armed conflict, by either international or national judicial bodies. While the prosecution of war crimes by international courts and tribunals over the past two decades has marked an upsurge in the judicial application of international humanitarian law (IHL) and invigorated scholarly interest in the area,<sup>1</sup> the jurisdictional reach of these bodies has been tightly circumscribed. The *ad hoc* international criminal tribunals have been granted a temporary existence, and their jurisdiction has usually been tied to a specific time frame and geographical location. Even the exceptional International Criminal Court (ICC) only addresses war crimes reaching a certain threshold, when committed by nationals of a State party or on its territory, and where national authorities have been unwilling or unable to investigate or prosecute the offences.<sup>2</sup> The United Nations Security Council represents an unlikely route for triggering the universal reach of the ICC, given the dominance of the “Permanent Five” members and the less than enthusiastic support for the Court by several of those States.

That State sovereignty would be a barrier to any broad judicial role was evident during the drafting of the Geneva Conventions – States would not agree

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to a proposal to grant compulsory jurisdiction to the ICC. The Plenary Assembly of the 1949 Diplomatic Conference heard that:

To deplore the inadequacy of the procedure for settling disputes under international law is almost a commonplace. Whereas national legislations generally provide for the repression of any infringement of their rules, and whereas all legal disputes are settled by the national courts of justice, the dogma of State sovereignty in international law has proved an insurmountable obstacle to any generalization of a system of compulsory international jurisdiction.<sup>3</sup>

The deliberately limited part played by international courts in this context, as Sharon Weill observes, “reinforces the important responsibility carried by national jurisdictions”.<sup>4</sup> Yet, as she discusses and analyzes at length in *The Role of National Courts in Applying International Humanitarian Law*, domestic judicial bodies are also subject to certain restrictions when addressing wartime conduct.

It was apparent during the preparation of the Geneva Conventions that States considered national courts the more appropriate venue for judicial consideration, if any, of matters relating to conduct during armed conflict. The judicial enforcement of IHL, Weill points out, “relies primarily on domestic courts”.<sup>5</sup> As the first detailed treatment of this subject, this book is a welcome and long overdue contribution to the existing literature on international law and IHL, which has not previously provided such a comparative analysis of the national application of IHL.<sup>6</sup> Against the backdrop of an increased number of national cases concerning IHL, Weill’s book provides “a theoretical framework for the analysis of national jurisprudence in the field of IHL”.<sup>7</sup> National courts do not enjoy the same degree of detachment that international tribunals have from domestic politics and pressures, and this invariably impacts on the national

- 1 See, for example, Derek Jinks, Jackson Nyamuya Maogoto and Solon Solomon (eds), *Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies*, TMC Asser Press, The Hague and the Netherlands, 2014; Leslie C. Green, “The International Judicial Process and the Law of Armed Conflict”, *Military Law and the Law of War Review*, Vol. 38, No. 4, 1999; Allison Marston Danner, “When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War”, *Vanderbilt Law Review*, Vol. 59, No. 1, 2006; Shane Darcy, *Judges, Law and War: The Judicial Development of International Humanitarian Law*, Cambridge University Press, Cambridge, 2014.
- 2 Rome Statute of the International Criminal Court, 17 July 1998 (entered into force 1 July 2002), UN Doc. A/CONF.183/9, Arts 12(2), 17(1).
- 3 Report drawn up by the Joint Committee and presented to the Plenary Assembly, *Final Record*, Vol. II, Section B, 1949, p. 131.
- 4 *The Role of National Courts in Applying International Humanitarian Law*, p. 7.
- 5 *Ibid.*, p. 7.
- 6 See generally Timothy L. H. McCormack and Gerry J. Simpson (eds), *The Law of War Crimes; National and International Approaches*, Kluwer Law International, Boston, MA, 1997; Igor P. Blishchenko, “Judicial Decisions as a Source of International Humanitarian Law”, in Antonio Cassese (ed.), *The New Humanitarian Law of Armed Conflict*, Editoriale Scientifica, Naples, 1979; Robert Y. Jennings, “The Judiciary, National and International, and the Development of International Law”, *International and Comparative Law Quarterly*, Vol. 45, No. 1, 1996; Vincent Chetail, “The Contribution of the International Court of Justice to International Humanitarian Law”, *International Review of the Red Cross*, Vol. 85, No. 850, 2003, pp. 235 ff.
- 7 *The Role of National Courts in Applying International Humanitarian Law*, p. 2.

application of IHL. It is these dynamics and influences which are at the heart of Weill's book. She focuses on the "functional role" of national courts, and the book has as one of its primary aims the deconstruction of the "contradictory and often incoherent positions in which national courts place themselves when applying IHL".<sup>8</sup> Weill proposes a methodology for understanding court decisions "in order to decipher properly their functional role".<sup>9</sup> According to the spectrum of roles she identifies, courts might:

serve as a legitimating agency of the state; avoid exercising jurisdiction for extra-legal considerations; defer the matter back to the other branches of government; enforce the law as required by the rule of law; or, develop the law and introduce ethical judgment beyond the positive application of the law.<sup>10</sup>

These various roles are analyzed in turn in the individual chapters of the book, which provide a thorough and critical demonstration as to why the domestic application of IHL is neither "predictable nor consistent".<sup>11</sup>

At the outset of the study, Weill observes how the unique context of armed conflict serves to place obstacles in the path of national courts that may seek to "oversee the state's exercise of its war time power".<sup>12</sup> She elaborates:

The conduct of wars has traditionally been left to the discretion of the executive and its professional agencies. Their information is generally kept out of the public domain. This concealment prevents the effective crystallization of public opinion, impairs public ability to influence decision-making, and weakens the demand for judicial scrutiny over armed conflict issues. These and other socio-psychological factors that favour unity and support for the state (all of which typically emerge in times of crisis and violence) lead to a weakening of the checks and balances of the democratic system, not least its oversight by the judiciary.<sup>13</sup>

Even where in a position to exercise such oversight, judges have shown a tendency to defer to military decisions taken on the battlefield, except perhaps in especially egregious cases. This judicial approach is apparent in a couple of cases which are not explicitly mentioned by the author, but which can be seen to confirm her analysis. In a 2013 case concerning British soldiers in Iraq, the UK Supreme Court expressed the view that a court should be "very slow indeed to question operational decisions made on the ground by commanders".<sup>14</sup> A UK-US Claims Arbitral Tribunal sitting over a century earlier, in 1910, also preferred to defer to those in the field on questions of military necessity:

8 *Ibid.*

9 *Ibid.*

10 *Ibid.*

11 *Ibid.*

12 *Ibid.*, p. 1.

13 *Ibid.*

14 *Smith et al. v. Ministry of Defence*, UKSC 41, 2013, paras 64–65.

The determination of these necessities ought to be left in a large measure to the very persons who are called upon to act in difficult situations, as well as to their military commanders. A non-military tribunal, and above all an international tribunal, could not intervene in the field save in case of manifest abuse of this freedom of judgment.<sup>15</sup>

Such deference is but one manifestation of the complex relationship between judicial bodies and State actions during situations of armed conflict. Weill's study helps the reader to make sense of these interactions, with its in-depth and thought-provoking analysis of national jurisprudence on IHL.

The book's structure is based on the spectrum of judicial roles put forward by the author, beginning with apologist in Chapter 1 and ending with utopian in Chapter 4. This schema obviously borrows from the work of Martti Koskenniemi in part,<sup>16</sup> and although the author does not explain the rationale for drawing on Koskenniemi in this way, the approach provides a useful means of characterizing the varying judicial approaches to the application of IHL. The reader is faced in Chapter 1 with the author's sternest criticism of the national application of the laws of armed conflict. Focusing on Israel and Serbia, Weill portrays the relevant courts as apologists for State wrongdoing. She shows that in certain instances judicial bodies are used to give legitimacy to governments and their policies by way of judicial review, given that such a process tends to lead to only the most serious of illegal acts being overruled.<sup>17</sup> Courts in this apologist category have tended to give a judicial imprimatur to wrongful activity, while demonstrating their independence "through the rare landmark cases in which they rule against the interests of the state".<sup>18</sup> In this chapter, Weill looks at the "hidden politics of the law", arguing that judicial interpretation allows for the making of policy choices, and that when making decisions, national courts "choose the most politically convenient option".<sup>19</sup>

In Weill's well-argued opinion, the Israel High Court of Justice, sitting in judicial review of the acts of military commanders, has largely acted as an apologist for Israeli military actions. Through its questionable treatment of the law of occupation, she starkly concludes, the Court has "not only legitimized the creation of a segregation regime in the [Occupied Palestinian Territories], but has actively contributed to its formation by providing the state with the necessary legal tools required to design and implement it".<sup>20</sup> Its approach has been one marked by selectivity, excessive deference to military opinion, and a failure to

15 Cited in *Affaire des Biens Britanniques au Maroc Espagnol (Spain v. United Kingdom)*, 1 May 1925, *Rapport III, Reports of International Arbitral Awards*, Vol. 2, 1949, p. 645, trans. in Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Stevens & Sons, London, 1953 (reprinted by Grotius Publications, 1987), p. 65. For further discussion, see S. Darcy, above note 1, p. 146.

16 Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, Cambridge University Press, Cambridge, 2005.

17 *The Role of National Courts in Applying International Humanitarian Law*, pp. 13–14.

18 *Ibid.*, p. 14.

19 *Ibid.*, pp. 15–17.

20 *Ibid.*, p. 25.

look at policies in their broader context.<sup>21</sup> The chapter also provides a consideration of the record of the Belgrade War Crimes Chamber, which stands as a rare example of a domestic court which has prosecuted its own nationals for crimes associated with a recent conflict.<sup>22</sup> Although created under international pressure, the Chamber is a domestic judicial body without international staff or judges, and lacking in sufficient expertise on IHL. As examples of its apologist approach, Weill highlights how the prominent *Scorpions* ruling was “in line with the political interest of the state”, while similarly the prosecutor refused to apply command responsibility and prosecute high-ranking commanders.<sup>23</sup> The focus on lower-level accused, she finds, was the result of either “political pressures or self-imposed restraints”.<sup>24</sup> The chapter provides an important reminder of the undoubted propensity for a regressive application of IHL by national judicial bodies.

In Chapter 2, Weill turns to the avoiding role played by domestic courts, whereby doctrines such as act of State, political question, *forum non conveniens* and combat immunity result in States being “shielded” from judicial scrutiny.<sup>25</sup> The chapter focuses principally on the United States and United Kingdom, where higher courts have avoided “politically sensitive cases through the application of self developed doctrines”.<sup>26</sup> Alien Tort Statute decisions, for example, have tended to reflect the State Department’s position on whether to allow or deny jurisdiction, with courts mostly, but not always, seeking to avoid interfering in political questions and foreign affairs. Weill finds that US courts can “rely on convenient jurisprudence to decide on a *state by state* basis whether it is *appropriate* to adjudicate and apply IHL or whether it is *appropriate* to avoid rendering justice”.<sup>27</sup> She usefully contrasts the US and Israeli courts’ approach to justiciability in the context of targeted killings.<sup>28</sup> The chapter concludes by suggesting that an international court’s intervention may be desirable where the oversight provided by national courts proves unsatisfactory.<sup>29</sup>

The subsequent chapter addresses the normative role of national courts, and provides a more positive account of the part played by judicial bodies in limiting the conduct of States during armed conflicts. Weill finds that domestic courts are showing “a growing determination and willingness to exercise their role of ‘law enforcer’ for violations of IHL during armed conflict”.<sup>30</sup> The influence of human rights law is also addressed in Chapter 3, with courts more likely to tackle individual rights violations rather than matters pertaining to conduct of hostilities.<sup>31</sup> The same can be said for international courts applying

21 *Ibid.*, pp. 34–39.

22 *Ibid.*, p. 47.

23 *Ibid.*, pp. 60–63.

24 *Ibid.*, p. 65.

25 *Ibid.*, p. 65.

26 *Ibid.*, p. 82.

27 *Ibid.*, p. 100 (emphasis in original).

28 *Ibid.*, pp. 102–109.

29 *Ibid.*, p. 115.

30 *Ibid.*, p. 117.

31 *Ibid.*, pp. 153–154.

IHL, whereby “Geneva” law addressing the protection of civilians, detainees and prisoners of war has and continues to receive far more attention than “Hague” law applicable to the conduct of hostilities.

The final substantive chapter looks at the “utopian role” played by judges when they engage in activism and the development of the law. The latter occurs, Weill argues, where national courts interpret treaty rules beyond acceptable limits, perhaps “in the name of ethical values”, or where they identify a new rule of customary international law without sufficient evidence. Such occurrences are not unknown in the international jurisprudence on IHL,<sup>32</sup> and indeed judge-made law has been a feature of common-law legal systems. However, this is problematic for the international legal order:

When adjudicating between two parties, if the court chooses to develop the law rather than just applying the law appropriate to that particular case, unforeseen consequences may result. It is questionable whether a national court has the ability, or the willingness, to take into consideration the global consequences of its ruling, which may go beyond the particular interests of the litigating parties.<sup>33</sup>

The chapter reveals that in national jurisprudence applying the laws of armed conflict, such decisions are “extremely rare”, with the *Ferrini* case in Italy, involving the lifting of State immunity for *jus cogens* crimes, standing apart.<sup>34</sup> Weill notes that the case went against settled practice on the matter, as the International Court of Justice confirmed, and that the Italian courts were in fact guilty of double standards.<sup>35</sup> While accepting that judges have some discretion in choosing between claims of varying legal merits, she considers that when they enter “the twilight zone of utopia, that choice is no longer an implementation of a legal rule, but the execution of a moral value”.<sup>36</sup> It can be difficult, of course, to draw fine lines here, especially if unwritten customary international law is being applied by the courts.

The concluding chapter provides an assessment of the different roles accorded to national courts by the author over the preceding pages with regard to various rule of law principles. The rule of law requires that the judiciary be “independent, impartial [and] accessible” and that it provide “an effective and equal enforcement of the law”.<sup>37</sup> For Weill, the record of national courts in this regard has proven deficient; she considers there to be a demonstrable structural bias in favour of the State during adjudication, which at its worst reveals “judicial practice based on double standards, bias and impartiality”.<sup>38</sup> She provides a very

32 See, for example, S. Darcy, above note 1, pp. 216–221.

33 *The Role of National Courts in Applying International Humanitarian Law*, p. 158.

34 *Ferrini v. Germany*, Corte Suprema di Cassazione, sezioni unite civili, Appeal Decision No. 5044/4, 11 March 2004.

35 *The Role of National Courts in Applying International Humanitarian Law*, pp. 160–163.

36 *Ibid.*, p. 177.

37 *Ibid.*, p. 180.

38 *Ibid.*, p. 184.

valuable section at the end of the book entitled “Looking Forward” which usefully summarizes the factors that influence the performance of national judiciaries addressing the laws of armed conflict.

The book demonstrates a healthy scepticism towards judicial bodies and presents a strong critique at times of the record of national bodies, motivated by the author’s desire for “the optimal fulfilment of the international rule of law”.<sup>39</sup> The book is thoroughly researched and unquestionably timely, and will appeal to scholars of IHL and international law, as well as those with an interest in the judicial function and the interaction of different legal regimes. Military lawyers, international and domestic judges, and the legal advisers of non-governmental and inter-governmental organizations will also be richly rewarded by reading this book. The critique presented by Weill contributes significantly to our understanding of how judicial bodies apply IHL and the motivations and dynamics underlying such application. The book also acts as a counterpoint to an emerging discourse which claims that military activities are becoming increasingly and indeed overly restricted by the expansion of applicable legal rules and the growing reach of judicial bodies, particularly with regard to developments in international human rights law.<sup>40</sup> Weill’s analysis demonstrates that there remains considerable scope for enhancing judicial oversight of the activities of parties to armed conflict.

39 *Ibid.*, p. 199.

40 See, for example, Thomas Tugendhat and Laura Croft, “The Fog of Law: An Introduction to the Legal Erosion of British Fighting Power”, Policy Exchange, 2013. See also Christopher P. M. Waters, “Is the Military Legally Encircled?”, *Defence Studies*, Vol. 8, No. 1, 2008.