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Building respect for IHL through national courts

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Abstract
Respect for international humanitarian law (IHL) comes in many forms, one of which is through the practice of domestic courts in addressing IHL-related cases. This article takes a closer look at the structural conditions necessary for the effective enforcement of IHL by domestic courts, elaborates on the spectrum of options that are available to national judges when faced with IHL-related cases, and describes the functional roles of courts in adopting a particular posture. It is demonstrated that even if the structural conditions are fulfilled, this will not necessarily result in the normative application of the law. It appears that national judges are in the process of defining their own roles as independent organs for overseeing the State's acts during armed conflicts. In that regard, the article outlines a few suggestions for future research on the choices courts make and the conditions necessary for them to effectively handle IHL-related cases.

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Introduction

The enforcement of international law by domestic courts is essential. The tremendous powers allocated to the State, especially in times of war, have the potential to bear catastrophic consequences for the lives and security of many innocent people if not judicially supervised. Naturally, domestic courts cannot be the only institutions responsible for providing the necessary checks and balances on the State's exercise of its powers during armed conflicts. These institutions face particular political constraints related to security concerns and public opinion. Yet, the domestic courts of democratic States are in a good institutional position to enforce international humanitarian law (IHL) because evidence and testimony are easier to collect, the national investigation and judicial authorities are available and functioning, and therefore proceedings may be held relatively swiftly and in a cost-efficient manner. Moreover, national rulings have a strong impact on their respective societies because they are not seen as external pressures or interventions – and, as the trials are held inside the country, their outreach and positive effect in the long run are more likely to be guaranteed. Most importantly, national courts in democratic States are expected to conform to the rule of law requirements and thus enjoy an important degree of independence vis-à-vis the executive branch, which can be maintained even during armed conflicts.[1]

Currently, two main permanent international courts have jurisdiction over cases related to armed conflicts: the International Criminal Court (ICC), which is competent to determine individual criminal responsibility for war crimes,[2] and the International Court of Justice (ICJ), which has competence to determine State responsibility for IHL violations in disputes between States and to render advisory opinions on such issues. The jurisdiction of both the ICC and the ICJ is restricted by State sovereignty.[3] These limits on jurisdiction reflect the traditional

1 "[N]ational courts know that their executive is firmly tied to the national constitution from which it cannot exit and which the courts have the responsibility and sole authority to protect, for the benefit of the domestic population. Judges in national courts are relatively more independent than judges in international tribunals, and enjoy broader public support for their decisions". Eyal Benvenisti and George W. Downs, "National Courts, Domestic Democracy, and the Evolution of International Law", *European Journal of International Law*, Vol. 20, No. 1, 2009 p. 68. Yet, on their disadvantages, see Jose E. Alvarez, "Crimes of States/Crimes of Hate: Lessons from Rwanda", *Yale Journal of International Law*, Vol. 24, 1999, p. 375. See also Antonio Cassese, "On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law", *European Journal of International Law*, Vol. 9, 1998, pp. 5–7.

2 Rome Statute of the International Criminal Court, 17 July 1998 (entered into force 1 July 2002), UN Doc. A/CONF.183/9, Art. 8.

3 In the case of the ICC, this is due to two factors: first, the ICC Statute is a multilateral treaty and is thus only binding on States Parties, those that have accepted its jurisdiction (or when a case is referred to the

structure of the international legal order based on the principle of State sovereignty as laid down in Article 2(7) of the 1945 United Nations (UN) Charter.[4] Yet, the scope of "domestic jurisdiction" in Article 2(7) of the UN Charter is not an obstacle to the judicial enforcement of international law; rather, it shall be read as endowing national courts with a special role in enforcing international law.[5]

Indeed, the judicial enforcement of IHL relies primarily on domestic courts. This structure was foreseen by the Geneva Conventions in 1949, which imposed an explicit obligation on States Parties to incorporate the relevant rules into domestic legislation, with a view to enforcing international law governing armed conflict through national courts.[6] Today, one of the most extensive practices of this kind is taking place in the States of the former Yugoslavia following the end of the conflict there.[7] At the same time, the enforcement of IHL by the judiciary remains one of the most important challenges for guaranteeing respect for IHL (and for international law more generally). As observed more than a decade ago:

ICC by the Security Council); second, the principle of complementarity regulates relations between the ICC and national tribunals, and attributes primary jurisdiction to the national courts (see Article 17 of the ICC Statute). In the case of the ICJ, jurisdiction is limited by the non-compulsory nature of the proceedings and the necessity of having the States' consent in order to hold the proceedings. See the ICJ website, available at: www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1.

4 Article 2(7) of the UN Charter states: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state."

5 Richard Falk, *The Role of Domestic Courts in the International Legal Order,* Syracuse University Press, Syracuse, NY, 1964, p. 22: "To achieve international order, it is therefore necessary to rely upon horizontal distribution of authority and power among independent states … [I]t is likely that progress towards a more rational delimitation of jurisdiction will result from efforts to improve the horizontal method of allocating legal competence rather than from efforts to centralize authority … [F]rom this viewpoint, one grows more cautious about investing a high percentage of one's enthusiasm in proposed expansions of the compulsory jurisdiction of the ICJ or in attempts to narrow the scope of 'domestic jurisdiction' in Article 2(7) of the UN Charter." See also André Nollkaemper, *National Courts and the International Rule of Law,* Oxford University Press, Oxford, 2011, pp. 25–26: "Basing the primary role of national courts in the protection of the international rule of law on the principle of sovereignty presents something of a paradox. The principle of sovereignty has traditionally served as to give states control over the process of adjudication. In a Frankenstein-like reversal, it now provides a basis for courts to turn their dependent position into an independent power against the state."

6 See, for example, the obligation to prosecute individuals who have committed war crimes regardless of their nationality and where the crimes were committed, in common paragraph 1 of Articles 49/50/129/146 respectively to the four Geneva Conventions of 1949, and Article 85(1) of Additional Protocol I to the Geneva Conventions of 12 August 1949. Other IHL provisions that impose an obligation to implement IHL clauses into domestic legislation include those relating to the use of the Red Cross emblem and the protection of cultural property, and conventions regulating the use of weapons.

7 For selected publications on the work of these national tribunals, see United Nations Interregional Crime and Justice Research Institute, "Reports and Publications on War Crimes Proceedings", available at: http://wcjp.unicri.it/proceedings/. For ongoing war crimes cases prosecuted in Belgrade, see the Serbian Office of the War Crimes Prosecutor, available at: www.tuzilastvorz.org.rs/html_trz/pocetna_eng.htm. For ongoing war crimes cases prosecuted in Bosnia and Herzegovina, see: www.sudbih.gov.ba/?jezik=e. For prosecutions in Bosnia and Herzegovina, see the experience of the Bosnian War Crimes Chamber, documented in the Human Rights Watch report *Justice for Atrocity Crimes: Lessons of International Support for Trials before the State Court of Bosnia and Herzegovina*, available at: www.hrw.org/report/2012/03/12/justice-atrocity-crimes/lessons-international-support-trials-state-court-bosnia. Regarding Croatia's efforts towards effective prosecution of war crimes, see Ivo Josipovic, "Responsibility for War Crimes Before National Courts in Croatia", *International Review of the Red Cross*, Vol. 88, No. 861, 2006, available at: www.icrc.org/eng/assets/files/other/irrc_861_josipovic.pdf.

> The international community has still to solve the problem of enforcement. Until it does so, the international rule of law is bound to be a less effective counterweight to international political power and the sovereign independence of states than it could, and should, be.[8]

The rule of law requires courts to be independent, impartial, accessible and able to provide effective and equal enforcement of the law.[9] In assessing whether national courts possess these features, two aspects – structural and functional – need to be examined. The structural conditions refer to the legal framework that empowers courts to enforce IHL, whereas the functional conditions refer to the courts' *de facto* enforcement of IHL.[10] This article takes a closer look at these conditions, while focusing mainly on the functional aspects. The first section outlines the structural conditions necessary for the effective enforcement of IHL by national courts. The second section elaborates on the spectrum of options that national judges have available to them while applying IHL, and describes the functional roles of courts in choosing any of these options. It is demonstrated that even if the structural conditions are fulfilled, it may well be that the *de facto* functioning of the court will not result in the normative application of the law. It appears that national judges are in the process of defining their own roles as independent organs for overseeing the State's acts during armed conflicts. Accordingly, the following section lists several conditions and factors aimed at strengthening their function, and the last section offers key questions to be looked at in future studies.

Conditions necessary for the effective application of IHL by national courts: Structural aspects

The preliminary conditions necessary for the effective application of IHL by national courts depend on several structural factors. These include the existence of domestic legislation that allows for (1) the independence and impartiality of the judiciary, (2) the application and enforcement of IHL rules by national judges (either through a direct application of IHL rules into the national legal system or through their endorsement through national laws), (3) access to courts in cases of IHL violations, and (4) the equal and effective application of the law by the judiciary.

8 Arthur Watts, "The International Rule of Law", *German Yearbook of International Law*, Vol. 36, 1993, p. 44. See also A. Nollkaemper, above note 5, p. 50: "in states that in all other aspects have a reputable quality of the rule of law, the powers of judicial review against the political branches often do not cover international law to the full extent". And see A. Cassese, above note 1, p. 17.

9 Andrei Marmor, "The Ideal of the Rule of Law", in Dennis Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory*, 2nd ed., Wiley-Blackwell, Oxford, 2010), p. 666. One of the most inclusive definitions is probably the one formulated by Raz, who identified eight fundamental elements common to all legal systems: Joseph Raz, "The Rule of Law and Its Virtue", *Law Quarterly Review*, Vol. 93, No. 2, 1977, reproduced in Keith C. Culver (ed.), *Readings in the Philosophy of Law,* 2nd ed., Broadview Press, Ontario, 2008, p. 16.

10 The division between the structural and functional aspects is echoed in the ICC complementarity principle set forth in Article 17 of the ICC Statute: while the term "unable" indicates structural deficiencies of national courts, the term "unwilling" refers to functional deficiencies.

Within this ongoing process, each State has complied with the domestic implementation obligation to a varying degree.[11]

Structurally, the independence of the judiciary from political interference is realized mainly through the separation of powers principle, and through procedural guarantees prescribed by human rights law.[12] A threat to the independence of the judiciary may be understood as direct pressure from the political branch and as a way of imposing a limitation on the courts' competence. Thus, national legislation relating to immunities or amnesties, and rules that confer on the executive the exclusive binding interpretation of treaty law, actually limit the independence of courts. This would "amount just as much to interference by the political branches as direct political pressure".[13]

National courts will not be able to derive jurisdiction from international law beyond that vested in them by national legislation and their own constitutional framework.[14] They will only be competent to apply IHL if the international rules are applicable and the enforceable norms within their own national legal systems are sufficiently clear and detailed. In a number of States, the applicability of international law within the domestic national legal order is automatic. In other States, an explicit act of endorsement by the national legislator is required. In the latter case, States must adjust their own domestic legal system to be able to enforce international rules. They are required to incorporate these rules into domestic legislation or to empower courts constitutionally to directly apply international law. Yet, even in cases where courts may directly apply international law, in view of the fact that treaties are drafted in general terms as a result of their negotiation processes, in most cases further detailed and clear legislation is required in order to be enforced by a domestic court. Therefore, all States, whether dualist or monist, have to adjust their domestic legislation to be able to enforce those IHL rules that are not self-executing.[15] Also, the legislation should allow judges adjudicating international law cases to cite and rely upon international case law, academic writings by international lawyers, and other expert reports by the UN and the International Committee of the Red Cross (ICRC).

Given the central role of domestic courts in ensuring the rule of law, access to them is of paramount importance. For that purpose, it is not enough that a State

11 These structural demands were studied in a recent collective publication: Dinah Shelton (ed.), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion*, Oxford University Press, Oxford, 2011.

12 These include formal procedural requirements relating to the appointment of judges and their working conditions, the demand that judicial proceedings be conducted openly and fairly, and that the rights of the parties be respected. See International Covenant on Civil and Political Rights, Art. 14; and the UN Basic Principles on the Independence of the Judiciary Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by UNGA Res. 40/32, 29 November 1985, and UNGA Res. 40/146, 13 December 1985.

13 See A. Nollkaemper, above note 5, pp. 53–54; Resolution on the Activities of National Judges and the International Relations of their State, Institut de Droit International, Milan, 1993, Art. 1(1).

14 A. Nollkaemper, above note 5, pp. 44–45.

15 See Marco Sassòli, Antoine A. Bouvier and Anne Quintin, *How Does Law Protect in War?*, 3rd ed., Vol. 1, ICRC, Geneva, 2011, pp. 360–361.

endorses IHL rules in its domestic legislation. In order to make these laws enforceable, access to the courts and issues of standing must also be guaranteed by legislation. Furthermore, access to a court is only meaningful if the court can provide an effective remedy for violations.[16] Therefore, the structural aspect requires that judges are equipped with the necessary skills in order to apply IHL. This in turn relates to the legal education that is provided to judges; the curriculum at law faculties and special workshops, which can be provided to the judiciary in collaboration with international bodies such as the UN, ICRC or regional organizations; and other expertise required in the process of the qualification of judges and the creation of special international law benches.

Finally, all individuals must be equal before the law, meaning that no State organization or individual is above IHL. All belligerents are equally bound and protected by IHL, irrespective of the reasons that triggered the original conflict and of which side is deemed responsible for it.[17] The selective enforcement of IHL is usually not a problem related to the legislation itself – i.e., the structural aspect – as it is uncommon that the law explicitly provides for its uneven application. It is more of a functional issue, as discussed below.

While democratic States operating within a rule of law system increasingly comply with these structural requirements, which are necessary for the proper application of IHL, this is not a guarantee that national courts will enforce the law. The responsibility for applying international law through national courts depends largely on judges, who operate within a particular context and are bound by national political and institutional limits. Thus, even if structurally, judges are nominated through a procedure which seeks to guarantee their independence, and even if the relevant rules of IHL are endorsed by appropriate legislation and access to courts is provided for by the law, it may nonetheless well be that the actual functioning of the court will not result in the normative application of the law. This is so especially in IHL cases, which typically involve major political concerns.

The function of courts: A spectrum of options

In a prior study, a spectrum of functional roles that judges may assume while applying IHL was identified.[18] Judges can variously serve as a legitimating agency of the State; avoid exercising jurisdiction due to extra-legal considerations; defer

16 Since the courts' judgments establish the law in the case before them, the litigants can only be guided by law if the judge applies the law correctly. Moreover, an open and fair hearing and absence of bias are essential for the correct application of the law. See J. Raz, above note 9, p. 18; A. Watts, above note 8, p. 39.

17 This principle was recognized in the Preamble of Additional Protocol I. See also M. Sassòli, A. Bouvier and A. Quintin, above note 15, pp. 114–115.

18 For a comprehensive analysis of the different roles of national courts, see Sharon Weill, *The Role of National Courts in Applying International Humanitarian Law*, Oxford University Press, Oxford, 2014. This work presents a critical analysis of case law from different democratic jurisdictions, including criminal, civil and administrative cases. It has been largely based on the prior works of Eyal Benvenisti, André Nollkaemper, Marco Sassòli and critical legal scholars such as David Kennedy, Duncan Kennedy and Martti Koskenniemi.

the matter back to the other branches of government; enforce the law and impose limits on the State as required by the law; or develop the law and introduce ethical judgment beyond the positive application of the law. The following section elaborates on a number of these functional roles of courts. It is argued that although in IHL cases, the way national courts apply the law is not always consistent, it can be observed that national courts have gradually moved away from the traditional tendency to avoid jurisdiction in cases related to armed conflicts and towards a more assertive role.[19] As national courts are increasingly solicited to handle cases related to armed conflicts, and public demand for such scrutiny rises, it can be assumed that this tendency will keep expanding.

Judges as legitimating State (illegal) acts

The apologist or legitimating role of courts can occur when courts legitimize States' illegal acts and policies even if this involves a misuse or distortion of the law. Obviously, legal choices are also motivated by political preferences. Indeed, IHL was drafted by States to regulate the conduct of hostilities during armed conflicts, and an important degree of discretion was left to accommodate for the needs of the armed forces and provide them with a margin of discretion based on necessity. Yet this is not to be confused with the view that positive limitations do not exist and that all positions can be endorsed due to the indeterminacy of the law.

The apologist application of IHL must remain outside the legitimate judicial choices available because such a function violates the founding principles of the rule of law that are essential for the proper functioning of the judiciary. It defies the fundamental requirement that the judiciary is independent and impartial. A court that serves as a legitimating agency for the State's illegal actions does not maintain a neutral position, and it becomes no more than the long arm of the executive. In addition, the right to access a court cannot be realized in an effective manner. If judges provide a distorted interpretation of the law to justify the State's actions, the law is not effective because it does not provide a reliable source upon which litigants can base their choice of action or provide legitimate expectations for remedies in case of violations. Moreover, the misuse of international law by national jurisdictions may have far-reaching and negative consequences beyond the specific facts of the case because it promotes the development of bad law, which runs the risk of being cited and adopted by other national jurisdictions.

19 See, for example, Lord Justice Richards: "It can be seen that the approach of the courts has been very far from insular or narrow. There has been a readiness to tackle issues arising across the world and involving complex and sensitive questions of public international law. … [M]y chosen focus has been on foreign affairs and military conflict. In those fields there are, inevitably, certain forbidden areas – areas where the courts themselves have accepted that it is not appropriate for them to intervene. But that should not be allowed to obscure the fact that modern judicial review is operating in a way that exposes ministers and their officials to close and effective judicial scrutiny, to which the human rights legislation has given additional impetus." Lord Justice Richards, "The International Dimension of Judicial Review", The 2006 Gray's Inn Reading, 7 June 2006, p. 10.

Avoiding the application of the law

Given that political objectives may, in certain situations, be unavoidable (like during ongoing hostilities, in which the legal system is not always able to function at full independence), national judges have developed avoidance doctrines.[20] These doctrines, such as the act of State doctrine, the principle of non-justiciability or the political question doctrine, permit judges to refrain from hearing cases despite having jurisdiction, thus shielding States from judicial scrutiny before national courts. By avoiding cases through the use of such doctrines, the legal question remains outside the realm of justice and is left to the political arena. Recourse to avoidance doctrines may be justified in light of the difficulty of assessing evidence in cases involving foreign affairs and of applying legal standards to policy questions, as well as the question of expertise of judges in these matters and the institutional fear of judges that the executive will ignore their decisions. However, these doctrines usually serve policy goals, which are not always made public.[21]

From the perspective of the rule of law, the use of avoidance doctrines by courts is problematic as it violates several requirements of the rule of law, most notably the right of access to a court and the requirement of a legal system to enforce the law in an impartial and effective manner. Avoidance doctrines have no definite boundaries; this is notwithstanding the judicial enumeration of "neutral" factors for their application.[22] While in one jurisdiction an issue may be not justiciable, in another the same issue would be. Thus, it appears that a policy choice (and not a legal one) motivates the decision of a court invoking the avoidance doctrine. This means that the law is often applied in a selective manner, in breach of the equality principle, which most often corresponds to the State's position.[23] Having said that, the positive aspect of avoidance doctrines is that when avoiding cases, courts do not produce distorted jurisprudence which may be cited by other jurisdictions in order to legitimize States' illegal acts. Thus, in cases in which the court is not sufficiently independent and is not in a strong

20 Louis Henkin, "Is There a 'Political Question' Doctrine?", *Yale Law Journal*, Vol. 85, No. 5, 1976, p. 599; Eyal Benvenisti, "Judicial Misgivings Regarding the Application of International Norms: An Analysis of Attitudes of National Courts", *European Journal of International Law*, Vol. 4, 1993, p. 183; Thomas M. Franck, *Political Questions/Judicial Answers: Does the Rule of Law Apply to Foreign Affairs?*, Princeton University Press, Princeton, NJ, 1992, pp. 45–60.

21 When a case is declared by the court as non-justiciable, it may appear that the judiciary is not only deferring to the political branch, but also implicitly condoning the action. Deeper examinations of cases in which these doctrines are not applied – through their rejection or by defining their exceptions – support this assumption. Studies have shown that a court is more likely to render a decision on the merits in cases involving foreign relations or military affairs when the case results in a finding in favour of the State. See Jeff Yates and Andrew Whitford, "Presidential Power and the US Supreme Court", *Political Research Quarterly*, Vol. 51, No. 2, 1998, pp. 539–550.

22 US Supreme Court, *Banco Nacional de Cuba* v. *Sabbatino*, 376 US 398, 1964, p. 428. In this case, a number of factors were established, leaving a wide margin of appreciation for the court to decide on the matter.

23 For the selective application of avoidance doctrines in US Alien Tort Statute cases, which corresponds almost always to the State position see Jeffrey Davis, *Justice across Borders: The Struggle for Human Rights in U.S. Courts*, Cambridge University Press, Cambridge, 2008; S. Weill, above note 18, pp. 82–100. When the State directs courts as to when to exercise their competence (or not), the principle of independence and impartiality of the court is also compromised.

enough position to apply the laws governing armed conflicts, it may be preferable for the court to avoid exercising its competence. By doing so, it prevents a situation in which it would distort the law and confer a rubber stamp legitimizing the abuse and misuse of international law. In both situations, whether performing an apologetic or avoidance function, the political branches would be able to pursue the issue, even if the State's acts are in violation of IHL. In the latter case, however, the political branch would not enjoy the perception of legal legitimacy provided by a court in a democratic society. The issue would be left to be decided in the political sphere. NGOs could then advance the argument that the law has been violated and maybe gain public support, which is more difficult to achieve if a court has approved the illegal policy.

From avoiding to deferring

While avoidance doctrines completely deny access to courts and leave the issue entirely outside the realm of the law, there are preferable solutions that could be enacted by courts in the process of defining and affirming the legitimate boundaries of their independent institutional position – for example, through the use of the deferral technique. In order to deal with the inherent political complexity of international law, courts have developed a nuanced and gradual way to do define the boundaries of their independent institutional position, in the form of an open dialogue with the other legislative and executive branches, through the deferral technique. Here, courts exercise their competence and do not avoid the issue. However, as they are still reluctant to overturn a decision by the executive on the merits, they defer to the executive. Thus, the court may make pronouncements on the legality of the act to a varying degree, yet it will choose to defer back to the executive or legislative branches the decision on implementation or interpretation. The deferral technique offers courts a range of options for applying the law while at the same time maintaining dialogue with other branches of the government, and not confronting them. Progressively, with the use of the deferral technique, courts have begun to exercise their judicial authority as an IHL enforcer.[24]

As case law shows, courts are increasingly willing to exercise their competence over questions of international law, especially cases dealing with the individual's protection of human rights. Thus, the deferral technique opens the gates to the normative application of international law by courts and enables courts to slowly abandon previous patterns of functions concerning the law applicable during armed conflicts. The deferral technique has allowed an important transition from the use of avoidance doctrines to judicial review. Cases that were previously seen as touching on "forbidden areas" have entered the

24 Eyal Benvenisti, "United We Stand: National Courts Reviewing Counterterrorism Measures", in Andrea Bianchi and Alexis Keller (eds), *Counterterrorism: Democracy's Challenge*, Hart Publishing, Oxford, 2008, p. 257. The deferral role of courts is well apparent in a number of Guantanamo cases in different jurisdictions; see S. Weill, above note 18, pp. 121–134.

sphere of judicial review, and courts may well decide to be even more assertive in the future. Thus, while exercising judicial review, instead of deferring to the executive, courts may impose further limits on the executive. To turn back to the traditional path of avoidance is less expected. Yet, the risk with the deferral technique is that at the end of the day, if the State misuses the discretion allocated by the judiciary, the courts may facilitate a State's illegal policy instead of using their role to limit abuses of the law. Thus, courts need to instruct the State explicitly and unequivocally as to what the law says and the legal consequences of wrongdoing. Yet, as IHL cases involve sensitive and complex issues, national courts must also respect the institutional limits of the State within which they operate in order to maintain their authority and reputation.

Conditions necessary for the effective application of IHL by national courts: Functional aspects

From a rule of law perspective it is desirable that the growing practice and proper function of national courts in their application of international law, along with the work of international courts, will guarantee the enforcement of the law by the judiciary also during armed conflicts. The section below identifies a number of factors necessary for the effective function of national courts in the application of IHL. It also proposes avenues for future studies aimed at strengthening the position of national courts and their capacity to enforce IHL.

The independence of courts

When the structural requirements related to the independence of the courts are fulfilled, the extent of the application of IHL by national courts is dependent on the domestic judicial tradition and the level of independence and strength of the courts vis-à-vis the political branches of government. Here, an analogy to the court's authority for judicial review of administrative acts of the State under domestic law can be useful.[25] The more a legal system is used to limiting the State through far-reaching constitutional review powers, the more it can be expected that the judiciary will enforce IHL, even to the extent of imposing limits on State acts or legislation. At the same time, because of the special nature of international law and more specifically the law applicable during armed conflict, an excess of judicial "activism" is not necessarily a guarantee that IHL will be better enforced; courts must take into account political concerns and the political

25 "If national constitutional courts are willing to strike down laws passed by the national legislature, then they should have the institutional clout to do the same thing when enforcing international law": Mattias Kumm, "International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model", *Virginia Journal of International Law*, Vol. 44, 2003, p. 24. Benvenisti proposes on the basis of that analogy to adjust the requirement of standing. Eyal Benvenisti, "Judges and Foreign Affairs: A Comment on the Institut de Droit International's Resolution on 'The Activities of National Courts and the International Relations of their State'", *European Journal of International Law*, Vol. 5, 1994, p. 438.

consequences of their rulings.[26] Courts are national institutions, and as such they have a defined role in the governmental structure of the State. In democratic systems, the judiciary is required to balance between two conflicting vectors: the institutional need of any government to rely on the court as a legitimizing agent, and the need for the courts to be seen as independent and capable of delivering justice according to the rule of law.[27] Scholars describe domestic courts' position in the national system as a pact with the political branch, which attributes to the courts the competence to carry out judicial review.[28] A court that exceeds the implicit limits of this pact risks a legislative counter-response that may impose limitations on the court's authority for judicial review in the future. Thus, courts must consider the consequences of their rulings because these may result in follow-up legislation that would invalidate the rulings or, more generally, limit their jurisdiction. Furthermore, as opposed to other fields of law, the State does not have the same interest in the law of armed conflict being independently and impartially applied.[29] This is because in cases of armed conflict, public opinion prevails over national interests and does not demand the same level of scrutiny with regard to compliance with the law in other fields. Courts cannot be expected to stand alone against the State and/or public opinion in the name of the law, particularly in relation to sensitive issues such as armed conflict. On the other hand, when public demand for judicial scrutiny over IHL grows, the independent position of the court is reinforced.

The impartiality of courts

Koskenniemi observes a *structural bias* within the international legal order: "Out of any number of equally 'possible' choices, some choices – typically conservative or *status quo* oriented choices – are *methodologically privileged* in the relevant institutions."[30] This observation also seems to be valid for national courts that apply IHL.

The inherent impartiality of national judges is related to the combination of a number of factors that influence judges' willingness to serve their State's national interest while applying IHL. First, the subjective default orientation of the judge

26 Paradoxically, too much independence can limit the effectiveness of international law, as the judiciary may lose its ability to compel the executive to act. Nollkaemper argues that the political dimension of international law not only *de facto* limits the possibility of full independence of national courts but also questions the very desirability of such independence. See A. Nollkaemper, above note 5, p. 59.

27 Martin Shapiro, *Courts: A Comparative and Political Analysis*, University of Chicago Press, Chicago, IL, 1981; E. Benvenisti, above note 24, p. 275.

28 *Ibid.* See also Rofer Cotterrell, *The Sociology of Law*, Butterworths, London, 1984, pp. 232–236; T. M. Franck, above note 20, pp. 10–12.

29 E. Benvenisti, above note 25, pp. 425–427, holding the view that this pact did not include judicial review in foreign affairs, because of the absence of the State's interest in having legal legitimization for its acts abroad and because of a lack of public demand for scrutiny over those acts.

30 Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, Cambridge University Press, New York, 2006, p. 607. See also Duncan Kennedy, *A Critique of Adjudication [fin du siècle]*, Harvard University Press, Cambridge, 1997, pp. 59–60. On the structural bias and the Israeli High Court of Justice, see S. Weill, above note 18, pp. 37–40.

herself tends to defend and favour her own national interest. This is especially true in times of armed conflict. Courts are State institutions – they consist of judges who are citizens of the State, and who therefore share the same sociological and psychological mindset.[31] Second, when two sides fall into a conflict that they cannot resolve between themselves, it is natural for them to resort to a third party to resolve the conflict. This is the prototype triadic structure of courts (i.e., two disputing parties and a third-party decision-maker). The condition for this structure to be legitimate is for the conflict-solver to be perceived as independent and impartial vis-à-vis the two parties to the conflict. As the judge is a State agent, in cases where the State is a party to the proceedings (and to the armed conflict), the triadic structure is necessarily weakened, as one of the parties may perceive the third party as an ally of its adversary.[32]

Presumptions, the burden of proof and other general rules may serve as legal tools to mask this structural bias through *factual* determination. In this respect, when the State is a party to IHL proceedings, and evidentiary or normative presumptions are made in its favour, the bias in favour of the State is only reinforced. In many legal systems, despite the complexity of establishing the facts in IHL cases (in which the State usually possesses exclusive information, already giving it an advantage over its adversary), additional presumptions are granted in favour of the State, further weakening the triadic structure. The authorities' version of the facts is given special weight. The general presumptions of honesty, good faith and integrity afforded to agency officials assume that the authority's factual claims are true. Moreover, it becomes extremely difficult to prove that the authority's decision was arbitrary. The factual presumption, taken together with the more general presumption that the judiciary does not have more expertise than the authorities on certain matters, prevents courts from intervening effectively in a decision that was taken according to a professional authority's assessment. This means that where State authorities claim they were guided by *reasonable* considerations, their rationale will generally be upheld by courts.

Finally, the complex political relations between the States involved in an IHL case often lead to a selective enforcement of the law that depends on the nationality of the victim and the identity of the responsible State or individual. In politically sensitive cases, courts may follow their government's stance and avoid exercising their competence, while in politically "easy" cases, they will exercise their competence (usually in accordance with their own executive).

31 See generally the critique of American legal realism, an intellectual movement in the United States during the 1930s: "How a judge responds to the facts of a particular case is determined by various psychological and sociological factors, both conscious and unconscious. The final decision, then, is the product not so much of 'law' (which generally permits more than one outcome to be justified) but of these various psychological factors, ranging from the political ideology to the institutional role to the personality of the judge." Brian Leiter, "American Legal Realism", in Dennis M. Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory*, 2nd ed., Blackwell, Oxford, 2010, p. 249. See also José J. Toharia, "Judges", in James D. Wright (ed.), *International Encyclopedia of the Social & Behavioral Sciences*, 2nd ed., Elsevier, Amsterdam, 2015, pp. 879–884.

32 M. Shapiro, above note 27, p. 27.

The duration of the conflict and public demand for judicial scrutiny

The duration of the conflict, the timing of the review and the length of time that has elapsed since the armed conflict took place are important factors for courts in determining their willingness to exercise their authority. An active and independent civil society and media, which could influence public opinion and increase the demand for judicial scrutiny during the period after the conflict, are equally important factors.

In the context of duration, we can distinguish between two types of situations: full-scale military operations involving active hostilities, and prolonged and low-intensity struggles, such as those waged by States against terrorist threats or insurgencies over a long period of time. Benvenisti argues that the need of the executive to rely on the courts as agents of legitimacy and the institutional need for the judiciary to be independent from the government must both take a "back seat" during short and intense crises. In contrast, when the conflict is prolonged – including a situation of enduring occupation – these factors become relevant again.

On the one hand, the State needs to rely on the courts as legitimating agencies in their exercise of judicial review; on the other hand, courts will be more willing than in other situations to review a State's actions and safeguard their institutional independence and reputation.[33] The initial stages of armed conflicts are typically characterized by a strong sense of patriotism and unity of the State in support of the executive. As courts are State institutions, and judges are citizens of their States, they form an integral part of the State system. This may partially explain the fact that "State interests are attributed particular weight during wars."[34] However, this is not necessarily the case when the review is carried out months or years after the facts (which frequently happens when a case is heard in a second or third instance). The time interval and the public opinion that has meanwhile crystallized due to media, NGO and academic reports concerning IHL violations may have an impact on the courts' willingness to exercise their authority. Once the conflict becomes protracted, it becomes easier for a court to exercise its authority and to rule against the State – a situation that is barely imaginable during the initial stages of a full-scale military operation.[35]

There is another temporal aspect that is particular to serious violations of IHL. War crimes are not subject to statutory limitations.[36] Therefore, war crimes trials can be held a long time after the crimes occurred. When the courts of the

33 E. Benvenisti, above note 24, pp. 309–318.

34 *Ibid*, p. 309. See more generally the critique of American legal realism.

35 For instance, the willingness of the US Supreme Court to exercise its authority and to rule against the US State position in the *Hamdan* case is likely related to the fact that the petitioner has been held for more than four years in detention without legal procedure, a situation which was strongly criticized by the international community, the ICRC and local NGOs. Similarly, in *Abbasi*, a decision which was rendered in the UK relatively close to the event had to allow complete deference, as politically, this was probably the farthest a court could go at that stage. See S. Weill, above note 18, pp. 124–130.

36 See the 1968 UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity; Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005, Rule 106.

responsible State in a post-conflict setting deal with war crimes cases, courts may have an easier time in ruling against one of their own citizens. This is especially the case if there exists a consensual historical narrative that has identified individuals responsible for committing war crimes, and if enough time has passed to ensure that the people directly involved in the violations no longer belong to the circle of decision-makers.

During an ongoing armed conflict, when responsible individuals still hold key positions in government and in the military, it is hardly conceivable for such trials to take place at the national level. Until a national historical narrative becomes widely accepted, in which the nation's own responsibility has been acknowledged, the independence and impartiality of the judiciary, and thus its ability and willingness to apply IHL, remain at risk.[37] In this regard, the time that has elapsed since the crimes occurred and the political and historical narrative that has emerged are factors to take into account.

National courts as a part of a global system

Another aspect to be taken in account is the fact that national courts are part of a global legal order, a development that domestic courts are increasingly becoming aware of when adjudicating IHL cases. Thus, if international tribunals or leading national courts have already reviewed the same issue, it may be legally and politically easier for other courts to take a more active or assertive role. For example, consider the US Supreme Court's rulings in *Rasul* (2004) and *Hamdan* (2006), before the Canadian Supreme Court found that the conditions under which Khadr was held in detention in the US military base at Guantanamo Bay were in violation of international law,[38] holding that the participation of Canadian officials in the "Guantanamo Bay process" constituted a "clear violation of Canada's international human rights obligations" and was "contrary to Canada's binding international obligations".[39] The US Supreme Court decisions had a decisive impact on the Canadian Supreme Court. These cases provided the legal authority to confirm that international law was violated during

37 In this context, the war crimes trials carried out in Serbia are among the rare examples of prosecution of war crimes just a few years after they were committed. See S. Weill, above note 18, pp. 46–67.

38 Supreme Court of Canada, *Canada (Justice)* v. *Khadr*, 2 SCR 125, 2008 SCC 28, 2008, available at: www.canlii.org/en/ca/scc/doc/2008/2008scc28/2008scc28.pdf. Khadr, a Canadian citizen, was arrested by US forces in Afghanistan before his 16th birthday and had been detained since 2002 in Guantanamo Bay. His legal action involved a number of litigations, including two cases before the Canadian Supreme Court. The first Supreme Court ruling in 2008 addressed the involvement of Canadian officials in his illegal detention in Guantanamo, and the second case, from 2010, requested his repatriation to Canada.

39 *Ibid.*, paras 21, 25. Interestingly, the Court does not refer explicitly to IHL violations, but refers only to human rights or international obligations. "Given the holdings of the United States Supreme Court, the *Hape* comity concerns that would ordinarily justify deference to foreign law have no application here. The effect of the United States Supreme Court's holdings is that the conditions under which Mr. Khadr was held and was liable for prosecution were illegal under both U.S. and international law at the time Canadian officials interviewed Mr. Khadr and gave the information to U.S. authorities. Hence no question of deference to foreign law arises. The *Charter* bound Canada to the extent that the conduct of Canadian officials involved it in a process that violated Canada's international obligations": para. 26.

the detention process for Khadr, an assessment that is required for the application of the Canadian Charter extraterritorially. In fact, the US Supreme Court rulings in 2004 and 2006 enabled the Canadian Supreme Court in 2008 to apply the Canadian Charter extraterritorially to the acts of Canadian officials in Guantanamo Bay in 2003 – a decision that imposed a remarkable limitation on the executive's authority. Another example can be found in the readiness of national courts to exercise universal jurisdiction over crimes that were committed in the Balkans or Rwanda, subsequent to the *ad hoc* international tribunals' decisions. These universal jurisdiction cases were prosecuted more easily because of the establishment of the international *ad hoc* tribunals, which provided both an authoritative legal analysis of the situation (that serves as legal guidance for national courts) and political legitimacy for prosecutions.

Types of violations: Individual rights versus conduct of hostilities cases

The growing trend of courts taking an active role in IHL cases is especially noticeable in cases dealing with the protection of individual rights, usually of the State's own nationals, during protracted conflicts. Violations related to individual rights in specific cases are more readily adjudicated. Courts are less willing to exercise judicial review over policies and conduct of hostilities issues (weapons, combat tactics etc.). Courts usually refrain from pronouncing on means and methods of warfare, which are seen as being not only under the exclusive discretion of the State, but completely outside the realm of judicial review and law enforcement.

One factor that explains the tendency of courts to take a more assertive position with regard to human rights violations committed by the State's own nationals is that human rights do not have an impact on future policies and practice. Another factor that comes to play is the national implementation of international human rights obligations, facilitating access to courts and the development of local political cultures in support of their legal enforcement. Following the human rights law movement of the last sixty years and its penetration into domestic law and international jurisprudence, national courts have developed their own important jurisprudence related to human rights, and have thus become the guardians of those rights.[40] This allows for judicial intervention from a practical and policy perspective, and indeed, the majority of courts in democratic States today are in a position to limit the State's exercise of powers when it leads to human rights violations. Such human rights jurisprudence has also become gradually applicable in situations of armed conflict, as evidenced by the Guantanamo Bay-related cases. Thus, in addition to – or rather, instead of – IHL, courts increasingly tend to apply international human rights law during armed conflicts. One advantage of this approach is that human rights are often embedded in constitutional law and that litigants may have better access to courts.

40 E. Benvenisti, above note 24, fn. 52 and accompanying text.

As petitioners increasingly attempt to bring cases before national courts during ongoing conflicts because of domestic legislation that grants them access to the courts, the training of specialized lawyers and the public's demand for judicial scrutiny of such cases can reasonably be expected, given that the emerging trend of reviewing IHL cases will be expanded to also include conduct of hostilities cases. International human rights law may also influence this process, as the decision of the European Court of Human Rights in the *Al-Skeini* case suggests.[41]

Access to the courts

Even when national constitutions explicitly provide for the incorporation of international law into domestic legal systems, access to courts can still be denied by the courts themselves on policy grounds. Courts have developed rules on standing, through which they define their own role in applying IHL. For example, the US Constitution establishes that international treaties are part of the supreme law of the land. At the same time, the enforcement of treaties in the US legal system has been restricted by judges through the development of self-executing and standing doctrines.[42] One of these is the demand for a "private cause of action". Under this doctrine, private parties may only enforce a treaty provision if they possess a private right of action conferred by the treaty – a determination to be made by judges. Thus, in certain legal systems, the courts may still have the ability to decide, by using their interpretative tools, whether IHL is enforceable or not. Another example is the determination of whether or not a specific rule constitutes customary international law, which would then be directly enforced by courts in dualist States.

The rule of law requires not only access to a court, but also equal access for all. However, avoidance doctrines developed by judges impose *de facto* limitations upon the ability to access a court. These avoidance doctrines include doctrines of non-justiciability, such as the political question doctrine or the act of State doctrine, and questions of the convenient fora and subsidiarity rules – all

41 European Court of Human Rights, *Al-Skeini and others* v. *The United Kingdom*, Case No. 55721/07, Judgment, 7 July 2011. According to the British Act of State doctrine, English courts are prevented from considering a claim by an alien regarding the acts of the UK on foreign soil on behalf of the Crown (see F.A. Mann, *Foreign Affairs in English Courts*, Oxford University Press, Oxford, 1986, pp. 184–190). Yet, the European Court of Human Rights in *Al-Skeini* ruled that the European Convention of Human rights applied extraterritoriality and bound the UK forces in Iraq (from the moment armed forces exercised effective control), resulting in access to the UK courts through the UK domestic Human Rights Act. *Al-Skeini*, para. 148.

42 The Supremacy Clause of the United States Constitution, Article 6, Clause 2, provides as follows: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." The distinction between self-executing and non-self-executing treaties was introduced into US jurisprudence by the Supreme Court for the first time in *Foster* v. *Neilson*, 27 US (2 Pet.) 253, 1829. See also Carlos M. Vazquez, "The Four Doctrines of Self-Executing Treaties", *American Journal of International Law*, Vol. 89, No. 4, 1995, p. 699.

doctrines developed by judges. Through the use of avoidance techniques, the court can deny a party access to the courts, and consequently the law is not enforced. While courts have established various factors for the application of avoidance doctrines, it has not always been possible to predict when courts would render a judgment on its merits, as extra-legal considerations are often involved. The willingness to exercise competence varies therefore from one jurisdiction to another, and is not related to the legal question itself. Thus, in the United States, the policy of targeted killings was seen as a political question, while in Israel it was deemed to be a legal question and a justiciable case.[43] This means that the law and the use of avoidance doctrines are often applied in a "double standards" mode, in breach of the equality principle. In the same jurisdiction, similar cases may be decided differently depending on the nationality of the victim and the State responsible, in a way that most often corresponds to the State position. Such uneven application of the law has been clearly demonstrated through the application of the Alien Tort Statute by US courts.[44]

Reinforcing national capacities to interpret IHL

Seeking a remedy in court means not only that the judgments will be given effect, but also that the law will be effectively applied by a competent court. Judges must apply the law correctly. In this regard, an outstanding question remains as to the level of the court's knowledge of IHL and the objective capacities and skills of the judges with regard to this body of law. Functionally, in their interpretation and application of IHL, judges may rely (to the extent made possible by their own legal system, together with international case law) on domestic cases from other jurisdictions dealing with similar legal questions, academic writings, and other expert reports such as those produced by the ICRC or the UN.[45]

The first step in the correct application of IHL is to classify the conflict. An accurate classification of the conflict is of major importance, as the applicable law

43 See US District Court for the District of Columbia, *Al-Aulaqi* v. *Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010), at p. 80: "Because decision-making in the realm of military and foreign affairs is textually committed to the political branches, and because courts are functionally ill-equipped to make the types of complex policy judgments that would be required to adjudicate the merits of plaintiff's claims, the Court finds that the political question doctrine bars judicial resolution of this case." On the other hand, the Israeli High Court of Justice found that "[w]hen the character of the disputed question is political or military, it is appropriate to prevent adjudication. However … the questions disputed in the petition before us are not questions of policy. Nor are they military questions. The question is whether or not to employ a policy of preventative strikes, which cause the deaths of terrorists and at times of nearby innocent civilians. The question is – as indicated by the analysis of our judgment – legal." Israeli High Court of Justice, *The Public Committee against Torture in Israel et al.* v. *The Government of Israel et al.*, HCJ 769/02, 2006, para. 51.

44 See above note 23.

45 The author, along with judges, prosecutors and defence lawyers from around the world, was invited to participate in a workshop in Geneva organized by the ICRC Advisory Service in May 2015. The workshop addressed different topics including a discussion on how the judicial sector has contributed to the interpretation, enforcement and development of IHL, and the ICRC's role in IHL training for judges. See: www.icrc.org/en/document/icrc-consultation-brings-together-legal-professionals-discuss-ihl.

depends on this preliminary determination. Nonetheless, the task of classifying a conflict is not always carried out by national courts in their decisions.[46] A clear example is the adjudication of cases related to the "war on terror". While a vast academic literature has attempted to define the scope of this "war", its qualification and hence the applicable law,[47] different Western jurisdictions, such as Australia, Canada and the UK[48] (involved in reviewing legal questions related to detainees in Guantanamo), have completely ignored the applicability of IHL and the question of classification of conflicts.[49] National courts have also been less attentive to the distinction between international human rights law and IHL. National courts do not always address both branches of law, even if they are applicable. In most cases, courts only look at human rights law. Yet, for the correct application of international law, there are situations in which it is necessary to rely on both IHL and international human rights law. Useful examples include the rules on detention during international armed conflict and the right to life and liberty in armed conflicts of a non-international character.[50] The Israeli High Court of Justice in the 2006 *Targeted Killing* case is one of those rare cases in which a national court explicitly addressed the application of IHL and international human rights law and their interrelationship.[51]

46 In some legal systems, courts have to rely on a classification by the executive power and cannot do it independently. This is, as indicated above, a structural obstacle for the effective application of IHL.

47 To mention only a few: Marco Sassòli, "Use and Abuse of the Laws of War in the 'War Against Terrorism'", *Law and Inequality: A Journal of Theory and Practice*, Vol. 22, 2004; Luigi Condorelli and Yasmin Naqvi, "The War against Terrorism and Jus in Bello: Are the Geneva Conventions Out of Date?", in Andrea Bianchi (ed.), *Enforcing International Law Norms against Terrorism*, Hart Publishing, Oxford, 2004; Christopher Greenwood, "International Law and the 'War against Terrorism'", *International Affairs*, Vol. 78, No. 2, 2002. For a resources list, see M. Sassòli, A. Bouvier and A. Quintin, above note 15, pp. 129, 131–132. Academic literature has examined at length the relations between IHL and international human rights law during armed conflict. See, for example, Cordula Droege, "The Interplay between IHL and International Human Rights Law in Situation of Armed Conflict", *Israel Law Review*, Vol. 40, No. 2, 2007; Françoise J. Hampson, "The Relationship between IHL and Human Rights Law from the Perspective of a Human Rights Body", *International Review of the Red Cross*, Vol. 90, No. 871, 2008.

48 See, for example, *Hicks* v. *Ruddock et al.*, FCA 299, 2007; *Canada (Prime Minister)* v. *Khadr*, SCC 3, 2010 1 SCR 44, 2010; *R (Abbasi)* v. *Secretary of State for Foreign and Commonwealth Affairs*, EWCA Civ 1598, 2002, UKHRR 76 CA, 2003.

49 One of the rare cases that explicitly attempted to qualify the "war on terror" was the *Hamdan* case of the US Supreme Court, the outcome of which remains highly questionable: "The United States Supreme Court found in Hamdan v. Rumsfeld that the military commissions set up in Guantanamo violated precisely those judicial guarantees prescribed by common Article 3 to the Four Geneva Conventions of 1949. Yet the court left open the question whether Hamdan, arrested in Afghanistan when the country was still occupied by the United States and its allies, should rather be covered – as I would submit – by the law of international armed conflicts." Marco Sassòli, "Transnational Armed Groups and IHL", Harvard University, Program on Humanitarian Policy and Conflict Research, Occasional Paper Series, Winter 2006, p. 20.

50 Marco Sassòli and Laura M. Olson, "The Legal Relationship between IHL and Human Rights Law where It Matters: Admissible Killing and Internment of Fighters in Non International Armed Conflict", *International Review of the Red Cross*, Vol. 90, No. 871, 2008, p. 599.

51 The official position of the State of Israel is that human rights treaties do not apply in the Occupied Palestinian Territories (OPT). See State of Israel, "International Covenant on Civil and Political Rights – Second Periodic Report", UN Doc. CCPR/C/ISR/2001/2, 20 November 2001, para. 8. At first, when the question of the applicability of international human rights law in the OPT arose before the Israeli High Court of Justice, it was left open, and the Court was "willing without deciding the matter,

Avenues for future enquiry

Some of the factors that may influence judges in reaching their optimal functional role in applying IHL from the standpoint of the rule of law have been discussed above. In order to better understand the function of national courts, it will be useful if future research in this area can investigate in-depth the following questions:

(1) National courts will not be able to derive jurisdiction from international law beyond the competence accorded to them by the national constitutional framework. Therefore, the applicability of international law within the domestic legal system and the competence of courts to enforce it must be guaranteed at the national level. One of the more interesting questions to pursue further in this regard is the exact "rank" or "role" that international law plays in domestic courts, in particular in conflict-affected States. Does the national legislation correspond to the international rules? May courts repeal domestic legislation contradicting international law on the grounds that it is unconstitutional?

(2) As observed by scholars, because of the special nature of international law, and more specifically the law applicable during armed conflict, an excess of court independence is not necessarily a guarantee that IHL will be better enforced. Courts have to take into account political concerns and the consequences of their rulings. In this regard, it may be useful to study whether it is possible to discern an evolution or a trend in the willingness of national courts to assert an independent position and strengthen their authority in IHL-related cases. Is this evolution linear? How successful have they been in limiting the State with regard to other branches of law?

(3) To what extent are the judicial function and judicial interpretation by courts performed on an equal basis for all of their subjects? Does this depend on the identity of the subjects litigating before the court, and on factors such as their nationality, rank or position? Can a double standard be identified? Do members of the political and military branches allegedly responsible for IHL violations still hold key positions? Do courts establish the facts in the cases before them by using presumptions in favour of the State?

(4) Would it be easier for courts to deliver a ruling against the State for past violations that do not have an impact on future policies? Have there been any political responses to court decisions that have imposed limits on the executive (for example, counter-legislation)?

to rely upon the international conventions". *Mara'abe et al.* v. *Israel Prime Minister et al.*, HCJ 7957/04, 2005, para. 27. The doctrinal framework was articulated in 2006 in the *Targeted Killing* case, where the Israeli High Court of Justice declared that IHL is the *lex specialis* law applicable during armed conflict. When there is a lacuna in that law, it can be supplemented by human rights law. Israeli High Court of Justice, *Public Committee against Torture in Israel*, above note 43, para. 18. This position has since been cited as a matter of evidence. See, for example, Israeli High Court of Justice, *A and B* v. *The State of Israel*, HCJ 6659/06, 2008, para. 9: "where there is a lacuna in the laws of armed conflict … it is possible to fill it by resorting to international human rights law".

(5) How much time has passed since the alleged violations? Is there an active and independent civil society and media that could influence public opinion and demand judicial scrutiny over international law issues? Have civil society and the media taken an active role in demanding judicial scrutiny over IHL violations? How influential can their demands be?
(6) National courts are part of a global system. Have international tribunals/institutions or leading national courts already reviewed the same issue/context? Did they provide an authoritative legal analysis that could provide legal guidance for other national courts? Politically, has it been easier for national courts to address IHL issues when their decisions follow international courts' decisions? In this context, it might be useful to undertake further research in order to inquire to what degree national courts take into account the jurisprudence of international courts and third States' courts. Do they see them as guiding? Which are the courts most often cited by other courts? Do courts attempt to harmonize their decisions with transnational and international case law, or do they simply reject these as non-binding?
(7) Regarding access to courts, it might be useful to further study whether standing before national courts is regulated by legislation, and to what extent. Do judges provide a restrictive interpretation limiting access? Is access allowed in an equal manner for all victims? In this regard, it might be useful to examine whether new tendencies can be observed, for instance if courts (a) attempt to extend the exceptions to the application of traditional avoidance doctrines in order to justify their exercise of jurisdiction over cases, or (b) explicitly reject their application altogether in light of the key principles of the rule of law, such as the right of access to a court.
(8) Regarding the capacity of domestic courts to effectively handle IHL-related cases, it may be useful to document whether, beyond treaty law, judges are familiar with international law jurisprudence, customary international law and academic writings. In their interpretation, do judges rely on these sources? The existence of domestic international law expertise is also important: do private lawyers, State prosecution attorneys and legal advisers to NGOs use international law in their claims? Are they sufficiently familiar with international rules, and how do they procedurally rely on them within the particular circumstances of each domestic system? Is education in the domain of IHL available at universities or through professional training courses, international organizations' teaching projects and the like?

Conclusion

These are only some of the many questions that can help enhance our understanding of how domestic courts position themselves with respect to international law cases, and specifically with respect to the law regulating armed

conflict. It is important that research tell us more about these tendencies and trends, as that can in turn help identify certain knowledge gaps and produce a better understanding of judicial enforcement of IHL domestically. This is crucial, as domestic courts remain the best, though likely also the most delicate, avenue for pursuing effective and lasting enforcement of IHL. The international community thus has an interest in not only better understanding the functioning of domestic courts, but also in ensuring that they are equipped and well placed to perform this role within the domestic legal order.