

## **Human Rights Litigation and the transition from policing to warfare: the Case of Israel and its Governance of the West Bank and Gaza in the Al-Aqsa Intifada**

### **Abstract**

This article explores the relationship between human rights NGOs and state/military policies in the case of Israeli organisations operating in West Bank and Gaza. The article focuses on a period of fundamental change in Israel's management of the West Bank and Gaza unfolding alongside the Al-Aqsa Intifada, a transition from a framework of policing to a framework informed by the logic of war. It argues that NGO litigation, in this case, aided broader legal/political shifts that drifted away from a human rights agenda. Based on the Israeli/Palestinian case, the article aims to contribute to scholarship critically reflecting on human rights NGOs' position vis-à-vis the state and broader geo-political processes of change.

**Keywords:** human rights NGOs, policing, IHL, warfare, Israel/Palestine

## **Introduction**

In September 2000 Israel/Palestine saw the breaking of the Al-Aqsa Intifada. The trigger for this uprising was the visit of opposition leader Ariel Sharon to the compound of the al-Aqsa Mosque in Jerusalem. This visit was designed to make a political statement on the opposition party's commitment to keep East Jerusalem under Israeli rule. Some of the root causes for the uprising were the persisting abusive policies of the occupation, disillusionment with the 1994 Oslo Accords process, and the recent failing of the Camp David Summit, all signalling to Palestinians that no substantial change was to come from political negotiations. The uprising began on the day that followed Sharon's provocative visit and quickly spread into the West Bank and Gaza. The Palestinian death toll in clashes with armed forces in the West Bank and Gaza between September 2000 and December 2008 amounted to 4789 (2998 in the West Bank and 1791 in Gaza). The Israeli death toll in the same period included 332 armed forces personnel and 731 civilians (B'tselem 2016).

In the wake of the Al-Aqsa Intifada the Israeli legal system transformed its governance of the West Bank and Gaza by defining the situation in these areas as an "Armed Conflict Short of War." International Humanitarian Law (IHL) provided the legal toolkit governing the military occupation of the West Bank and Gaza from its outset, but the predominant logic guiding the Israeli legal system up to that point was a framework of policing, which aims in principle to restore public order. The newly accepted legal framework was grounded in IHL, the laws of war, in a novel way. This paradigmatic legal shift, to a framework substantially expanding the sphere of permitted violence, was initially introduced in a 2001 document provided by Israeli officials to the

Mitchell Committee.<sup>1</sup> The committee opposed to this legal position and encouraged Israel to return to the previous legal mode of policing. The adoption of this new framework, which Lisa Hajjar (2006) labelled the “war model,” had radically changed Israel’s governance of the West Bank and Gaza. This legal shift forms part of an international political change, whereby governance creates hybrid forms of policing and warfare (Steinert 2003, Degenhardt 2015).

In this same period human rights non-governmental organisations (NGOs) submitted to the High Court of Justice (HCJ), the key Israeli forum reviewing petitions concerning the West Bank and Gaza, many petitions aiming to curtail various state-military policies and actions.<sup>2</sup> Studies focusing on human rights litigation in Israel have examined the extent of influence of this legal activity on state actions and policies. Many of these accounts equate courtroom losses to “no impact” and, building on the NGOs’ poor record of success, assert that their litigation had a marginal impact on the governance of the West Bank and Gaza (Meydani and Mizrahi 2006, Barzilai 2008, Ben-Naftali 2011, Golan and Orr 2012). NGO practitioners, as will be discussed further, largely agree with these assessments. This article follows the line of inquiry

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<sup>1</sup> Also known as the “Sharm El-Sheikh Fact-Finding Committee,” an American commission chaired by former US Senator George Mitchell, seeking to inquire the failure of the 2000 Camp David Summit and violence erupting in September that same year.

<sup>2</sup> Assaf Meydani’s (2011) survey of petitions submitted to the High Court of Justice indicates a trend of increase in the number of appeals to court, from 289 petitions in 2000 to 384 in 2001 and 414 in 2002. The two ministers most commonly addressed in these appeals were the Minister of Interior and the Minister of Defense, the two ministers dealing with petitions relating to the West Bank and Gaza.

suggested by studies looking into the impact of “the court’s shadow,” i.e. influence that is not necessarily reliant on courtroom victories (Dotan 1999, Kretzmer 2002, Sfarid 2005). The article’s key argument is that NGO litigation, in this case, aided broader legal/political shifts that drifted away from a human rights agenda.

This article makes its argument on legal influence based on an engagement with academic research on litigation, human rights and the state, as well as empirical data. The article is divided into two parts. Its first part critically explores the discussions on litigation in the Israeli HCJ concerning the West Bank and Gaza, set in the context of wider debates on human rights litigation and its ability to bring about political change. Its second part examines three interrelated legal processes of change transpiring alongside the Al-Aqsa Intifada. This examination reflects on the extent to which the existing scholarship on human rights litigation corresponds with these changes. First, it investigates court discussions dedicated to targeted killings, planned killing operations aimed at specific individuals suspected of involvement in terrorism. Second, it analyses the alterations to Israel’s dealings with Palestinian casualties based on the army’s investigation policies. Third, it interrogates the growing prominence of legality and legal practitioners in military operations.

Rather than counting courtroom victories and losses, this article interrogates the relationships, power dynamics and discourse manifested in court discussions and institutional changes. The processes of change unfolding in court demonstrate that a case lost does not necessarily indicate zero influence on state policy. This inquiry forgoes the imagined precision that a straightforward count of court cases’ results vs. state policy offers, and instead attempts to consider the role that NGOs play vis-à-vis courtroom discussions and legal-institutional changes. This story tells us how NGOs’ position in relation to political shifts that is broader than any single court petition.

Grounded in this analysis, the paper reflects on the limits and perils of a liberal rights discourse and contributes to scholarship critically reflecting on human rights.

This article brings together literature on human rights NGOs in Israel/Palestine and globally and empirical data. The article also builds on fieldwork carried out in the course of a research project examining the historically shifting role of international law in Israel's management of the West Bank and Gaza. The wider project encompasses the study of NGOs, the HCJ and the MAG Corps' (Military Advocate General's Corps, the military legal system) activities in the West Bank and Gaza. The project's materials include HCJ decisions, NGO publications, and various documents produced by the MAG Corps' officers. The research's fieldwork included eleven interviews with senior MAG Corps officers, some of whom had served in the army during the 2000 Intifada, and others serving in the years leading up to this change. It also included interviews with three Ministry of Justice retired senior officials, including Meni Mazuz, Attorney General in the years 2004-2009 and a recently appointed Supreme Court justice, a retired HCJ judge, as well as three prominent human rights litigators and four human rights NGO practitioners. These were semi-structured interviews, with the shortest interview lasting an hour and the longest three hours. Most of the interviews were held in person between December 2012 and March 2013.

### **Israel, the West Bank and Gaza and Human Rights: The Rights Discourse and the Limitations of Litigation**

Israel's human rights community emerged by and large in response to the Palestinian uprising commencing in 1987 (Gordon and Berkovitch 2007). Prior to the Intifada only a few human rights organisations operated in Israel. Over the following

three years, fifteen new human rights organisations were founded, all focusing on the West Bank and Gaza. With this in mind, Neve Gordon and Nitza Berkovitch contend that the Intifada, in fact, “led to the emergence of a rights discourse in Israel,” and that in this sense “the Palestinians brought human rights to Israel” (2007,251). The human rights movement continued to grow and by 2002 twenty-six national human rights organisations were operating in the country (Berkovitch and Gordon 2008). The Israeli human rights movement utilises litigation as a key course of action in its efforts to intervene in state and military policies in the West Bank and Gaza.

Israeli human rights NGOs encapsulate some of the contradictions in the country’s approach to law. Israel entertains a self-image of a democracy governed by law (“the only democracy in the Middle East”), but it is a settler-colonial state, and its colonial logic informs its legal structures and processes (Masri 2017)<sup>3</sup>. As the political scientist Elian Weizman observes, in Israel “justice is framed ethnically but operates within a framework of liberal democratic institutions” (2015,47). Reflecting on this tension, Lisa Hajjar notes that “it was Israel’s enthusiasm for law and the ornate legalism of official discourse that catalyzed and propelled the development of a local human rights movement, which served as the harbinger of legalistic resistance” (2005:49). In this sense, while NGOs are often seen as a pariah in the Israeli discourse (Cohen and Cohen 2012), their very emergence and their continued practice are inseparable from their national context. The Israeli/Palestinian case is perhaps particular in some respects, but scholars of law have established that human rights litigators are intrinsically connected to the state and its institutions. The sociologist Terence Halliday

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<sup>3</sup> In recent years researchers increasingly offer analyses of Israel as a settler colonial project. See, for example, Robinson (2013), Rouhana, & Sabbagh-Khoury (2015), Shalhoub-Kevorkian (2014), Veracini (2015) and Weizman (2017); See Masri’s (2017) work for a comprehensive discussion on the relevance of the settler-colonial framework to Israeli constitutional law.

(1998) observed that there is a reciprocal relationship between legal professionals, who claim to have a monopoly of expertise in governance, and the states that rely on this expertise to govern.

The resistance posed by Israeli human rights NGOs has its limits.

These organisations' discourse and practices have often set aside questions relating to the Nakba and the rights of Palestinian refugees (Orr and Golan 2014). Similarly, the right to self determination, which has some potential of challenging the settler colonial structures, has not, by and large, entered into these NGOs' discourse (Allen 2013) and court petitions.

Recurring occasions when Israel's contradictory approach to law, and the tension accompanying litigation are most apparent are court petitions that touch on land, one of the core elements of the settler colonial project. Only in 1995 did Palestinian citizens of Israel petition to court against a ban on their access to state lands. Raef Zreik (2004) suggests that this blatantly discriminatory policy went unchallenged for so many years because

(...) the Palestinians did not see themselves as being merely discriminated against but, much worse, as being "outside" the system, on the other side of a zero-sum game where the state is an enemy bent on dispossessing them completely and erasing their national identity (2004,75).

A change transpired in the 1990s promising new legal opportunities for Palestinian citizens of Israel, leading to some court petitions. This process of change ended in October 2000, when demonstrations of Palestinians in Israel protesting the brutal

response of the armed forces to the Intifada were met with brutal measures, culminating in 13 protestors being shot dead.

Many accounts of the impact of litigation in the context of the West Bank and Gaza question the court's contribution to the lives of Palestinians living under the military occupation (Ben-Naftali 2011), and discuss the court as a legitimising institution. David Kretzmer (2002) argues that, far from standing in the way of state/military policies, by exercising a limited measure of liberal justice the court has legitimised the occupation of the West Bank and Gaza and contributed to its continuance. Gad Barzilai contends along these lines that the court has been providing state mechanisms with the "formal tools to legalize its ideological and political control over the territories" (Barzilai 1997:202), while sustaining an illusion of the rule of law.

Human rights NGOs' litigation in Israel concerning the West Bank and Gaza has achieved a negligible number of courtroom victories. Some studies of these few successes and the many failures suggest that courtroom discussions on Palestinians' rights are rhetorically transformed into a question on human rights vs. state security. In this perspective, Neve Gordon (2014) argues that the state discursively constitutes human rights organisations as a security threat. Aeyal Gross (2007) suggests that the Israeli discourse on human rights positions the rights of Israelis as 'security interests' and Palestinians' rights as simply "rights," This difference implies that the former systematically outweigh the latter "because proportionality analysis justifies limiting rights in the name of security as long as those limits are proportional, and because courts tend to defer to security arguments, the occupiers' rights often prevail over those of the occupied" (Gross 2007, 8). The gist of these analyses echoes the inherent tension



between the Zionist project and the ethos of equality embedded in democratic institutions.

The translation of the Israeli/Palestinian political realities to the discourse of rights does more than allow for a rhetorical positioning of rights vs. security, or rights vs. a threat. The rights discourse, its ethos grounded in the premise of liberalism and an imaginary separation between law and politics, promises to bring about change through the suspension or repression of politics. In Raef Zreik's words, "the universality of rights creates a common ground allowing everyone – oppressors and oppressed – to find their place and participate in the discourse" (2004:69). Thus a rights discourse approaches to any and all situations as though they were equal, as though a situation arose or persisted with no context and no history. Zreik argues that for Palestinians this has meant that they "have lost not only their rights and their land, but also the context that enables them to demand these rights in a way that makes sense" (2004, 78).

The flip side of this discussion is an accusation common in the Israeli public discourse by which the court's very involvement in affairs relating to Palestinians is "political" or "too political" (Barak-Erez 2002, Barak-Erez 2008, Barak-Erez 2009). Based on this logic, the court should steer clear of any political issues, which include matters relating to Palestinians, to the Zionist project and to the country's Jewish identity. Barzilai (2004) identifies in the HCJ's judgements a professional-legalistic language that he interprets as an effort to create a discursive distance from politics. This supposedly distanced position, he argues, creates a double-edged sword. On one hand, the HCJ's legal activity, being supposedly removed from politics, represents a democratic supervision of political affairs. On the other hand, this "political neutrality" limits the court, because under these circumstances it is unable to challenge the state in any manner that might be seen as political. The differentiation between "the legal" and

“the political” vis-à-vis the court’s activities is inevitably a site of struggle. When NGOs petition the court they are making a claim about the topic in question being legal. State representatives often argue in response that the issue concerned is political rather than legal, and it then follows that the petition should not be reviewed in court.

Even if not engaging with a fundamental critique of the rights discourse, NGO practitioners have also questioned the consequences of their litigation. Golan and Orr (2012) quote NGO directors whom, at a conference entitled “Forty Years of Occupation: What Have We Done, What Have We Achieved and What Next?” critically discussed the impact of their work. One NGO director described human rights organisations as “a fly on the emperor’s nose.” Another suggested that their work amounts to carefully rearranging chairs on the deck of the Titanic, and a third NGO director said that organisations’ practice is comparable to sticking notes on the Wailing Wall. A prominent NGO advocate went further and suggested that human rights litigation is complicit in harming Palestinians by taking part in a facade by which the occupation of the West Bank and Gaza is “under control”:

I am afraid that the HCJ has played a role in anesthetizing (...) the part of the public for which morality and the protection of human rights are important; the public that believes that as long as the HCJ is watching, our occupation is enlightened and we can sleep well at night. (Yehuda in Golan and Orr 2012, 794-5)

The decision to appeal to court, even if not accompanied by a naïve belief in a positive outcome, is inevitably driven by the assumption that legal tools can promote justice. Human rights organisations continue to appeal to court even though their

petitions rarely result in victories, and despite the concerns that the legal process contributes to the legitimacy of the occupation of the West Bank and Gaza. Daphna Golan and Zvika Orr (2012) engage with this tension and examine NGOs' persistence in litigating. Their suggestions rightly acknowledge that favourable courtroom decisions are not the only goal or mark of achievement for litigating NGOs. Golan and Orr suggest four explanations for NGOs' continued recourse to court: a) the impact of the "court's shadow," i.e. petitions' influence that is independent of a formal legal "victory." This type of influence includes the state's decision to change a policy in order to halt its review in court or even in order to avoid a potential petition; b) judges' encouragement of settlements between NGOs and the state; c) using court proceeding as a means of documentation of abusive practices and policies; and d) exhausting national procedures to pave the way for legal action in international forums.

The NGO Adalah: The Legal Center for Arab Minority Rights in Israel initiated a virtual roundtable discussion between academics and practitioners debating if NGOs should continue to petition the HCJ. The opinions expressed and their rationales were varied. Gad Brazilai (2008) argued that the HCJ has, in practice, been shielding Israel from effective international judicial review, as well as an honest examination by the Israeli public. Brazilai speculated that halting litigation might "stimulate Palestinians to file more appeals to international courts. Equally, it may force Israelis to acknowledge, more directly, the brutal reality of the damage that the occupation has inflicted on human rights and principles of democracy." George Bisharat (2008) contended that NGOs should continue to litigate for the purpose of exposing the court's compliance with political interests. Bisharat urged NGOs to "challenge the Supreme Court, and to force it into the manipulations and contortions of law that it must articulate to achieve politically determined outcomes." Lisa Hajjar (2008) argued in favour of NGO

litigation as a means of documentation, meaning that court proceedings provide knowledge of the military occupation's repressive policies available to anyone who is inclined to seek it. The underlying assumption of all these perspectives is that court proceedings do not directly influence the occupation of the West Bank and Gaza in any meaningful way.

The discussions on the impact of human rights litigation in Israel/Palestine should be placed in a broader analytic context. Scholars have long engaged with questions on human rights NGOs' impact on state policies (Evans 1997, Gurowitz 1999, Brysk 2005, Hafner-Burton and Tsutsui 2005, Risse, Ropp et al. 2013). Studies in this area have examined the relationship between conceptions of the global and the local in human rights practice (Goodale and Merry 2007, Merry 2008), and the extent of influence that the human rights movement has had on both national and international politics (Keck and Sikkink 1998, Berkovitch 1999, Gurowitz 1999, Risse, Ropp et al. 1999, Donnelly 2003). Other scholars have critically examined the impact that human rights litigation has had on struggles for change, with some accounts fundamentally questioning litigation's ability to promote justice. Gerald Rosenberg's study of court activities in the United States, titled *The Hollow Hope* (1991), was a paramount contribution to this discussion. Rosenberg examined courts' involvement in socio-political changes and argued that "US courts can almost never be effective producers of significant social reform" (1991, 422). Stuart Scheingold (2004), a critic of this thesis, questions a direct link between litigation and social change, but nevertheless rejects Rosenberg's conclusions. Scheingold argues, instead, for the utility of litigation as part of a broader strategy for organising and mobilising political action. Even when courts do promote change, its extent and nature are limited; Seingold and Sarat (2004) tell us that liberal democracy "invites those with transformative aspirations to abandon their

lawyering work” and in the case that they pursue a legal course of action they find that “their victories may ring hollow. In effect, they legitimate the very institutions that they would like to dismantle” (2004, 123).

In historical perspective the Israeli HCJ has become relatively more involved in military and security-related issues in the 1990s (Ben-Naftali 2011). The relative proportion of petitions submitted the HCJ concerned with the West Bank and Gaza rose from 6% in the 1970s to almost 22% in the 1990s (Dotan 2014). The socio-political atmosphere of the 1990s saw a deterioration of public trust in political parties, instead lending greater credibility to the state's legal institutions (Barzilai 1997). In the years to follow the court began reviewing cases that were previously deemed “political,” hence outside of its reach (Barzilai 1997, Barak-Erez 2008). Notwithstanding the court’s increased involvement, as discussed, in its decisions in cases relating to the military occupation of the West Bank and Gaza the HCJ has by and large refrained from interfering with state policies (Ben-Naftali 2011, Kretzmer 2002).

The court’s increased involvement in the Israeli governance of the West Bank and Gaza is closely tied up with broader changes in the more general position of international law. In the 1990s Israeli courtroom decisions displayed an increased reliance on international law, in line with international trends (Cohen and Cohen 2012). In 2004 Chief Justice Aharon Barak explained in a court decision the international context directing Israeli legal practice:

Israel is not a desert island. It is a part of international setting (...) Military conduct in battle does not occur in a legal void. There are legal norms – partly in international customary law, partly in international treaty law to which Israel is a signatory party, and partly in the fundamental rules of

Israeli law – determining rules regarding the conduct of war. (HCJ 4764/2004:385; 391)

If nothing else, this statement signals to international institutions that the Israeli HCJ is committed to incorporating international law into its work vis-à-vis the army's operations.

### **The Al-Aqsa Intifada and the Making of the War Model**

The Al-Aqsa Intifada encouraged the constitution of a new Israeli legal regime for the West Bank and Gaza, made through the transition from a state of “policing” to the war model. Lisa Hajjar (2006) notes that the transition was not entirely conclusive, and that even after adopting the “war model,” Israel continued to simultaneously employ the “law enforcement model.” The point, for the Israeli legal authorities, was to engage ‘creatively’ with law. The military legal system’s shift to IHL, based on the framework of an Armed Conflict Short of War was a decisive turn, expanding the sphere of legally permissible violence and facilitating an array of novel policies and practices. Court discussions, set into motion by NGO petitions, some of which examined below, provided the central forum where the new Israeli legal paradigm for the governance of the West Bank and Gaza was constituted.

The change unfolding in Israeli legal forums was entwined with the lenient political-legal atmosphere created by the war on terror. ILD (International Law

Department) Commanding Officer Daniel Reisner places the Israeli legal shift in this context:

When we started to define the confrontation with the Palestinians as an armed confrontation, it was a dramatic switch, and we started to defend that position before the Supreme Court. In April 2001 I met the American envoy George Mitchell and explained that above a certain level, fighting terrorism is armed combat and not law enforcement. His committee [which examined the eruption of violence in the second Intifada and the events leading up to it] rejected that approach. Its report called on the Israeli government to abandon the armed confrontation definition and revert to the concept of law enforcement. It took four months and four planes [referring to the September 11 attacks] to change the opinion of the United States, and had it not been for those four planes I am not sure we would have been able to develop the thesis of the war against terrorism on the present scale. (in Feldman and Blau 2009)

### ***Court Discussions on Targeted Killing***

Targeted killing is a military term describing the practice of killing people suspect of involvement in terrorism. The Israeli army had adopted this policy when it shifted to the war model. Making this link explicit, when asked about targeted killings, ILD Commanding Officer Pnina Sharvit-Baruch said in a media interview: “War is a bad thing, but it isn't illegal. Killing the enemy is bad, but it's what we do in war” (in

Yoaz 2005). Targeted killings were first used in 2000 and were recognised as an official military policy in 2002, after Operation Defensive Shield (Strasberg-Cohen 2011). This operation, which was carried out in the midst of the Al-Aqsa Intifada, was then Israel's most extensive operation in the West Bank and Gaza since 1967. Between September 2000 and until Operation Cast Lead in 2008/9, 232 people were targeted and killed in these operations, including 150 in Gaza and 82 in the West Bank. The casualties of these operations, including both the targeted and bystanders, amounted to 277 (B'tselem 2016).

A first petition against the practice of targeted killing was filed in 2001. State representatives, the lawyers of the High Court of Justice Department and MAG Corps officers, argued on this occasion that the court should not interfere with the state's decisions on its means of combat. The judges agreed, and rejected the petition.

The Public Committee against Torture then filed a second petition in January 2002. On this occasion the judges rejected the quick state objection to having its military practices examined in court and the case was reviewed. The court's decision to take on this case is inseparable from international trends. In a contradictory era, defined both by the permissive legal atmosphere of the war on terror and a growing prominence of international legal institutions, courts have tended to review security-related cases, in an effort to re-affirm liberal values (Benvenisti and Downs 2009). This trend, which is driven by contradictions, has some ironic implications. The irony demonstrated in this case is that much of the Israeli court's practice de facto relied on international law to safeguard national practices and institutions from international scrutiny (Benvenisti 2008).

The HCJ's judges were acutely aware of the potential involvement of the ICC and courts operating under universal jurisdiction in Israel/Palestine. Chief Justice Barak



(in Lahav 2002) had publicly stated that if the court were to refrain from reviewing security-related cases it will damage the Israeli interests, because it might then inadvertently make way for the ICC's involvement. This argument is guided by international law's premise by which national courts are the primary sites of legal debate. Only if adequate legal process does not take place in these institutions then international legal bodies could get involved.

The court discussions on targeted killings led to a constitutive legal turn. The events unfolding in court capture some of the elusive, indirect influence of litigation that happens when legal practice driven by a human rights agenda finds itself entangled in broader political shifts. This entanglement is a result of systemic features of legalism, rather than an incidental mishap. At a crucial moment in these discussions the HCJ's judges presented the state representatives with a series of questions on the legal framework guiding state/military policies in the West Bank and Gaza. The legal discussions on targeted killing were closely linked with the overall interpretation of IHL in the West Bank and Gaza. Shay Nitzan, then a senior official at the Attorney General's office representing the state in these discussions had admitted that the state-military legal team was unable to readily provide a comprehensive response to the judges' questions (in Meridor and Fass 2006:123). Nitzan indicated to have understood the judges' request as a 'go ahead' for the state legal system to create a new legal formula. Thus, the judges' questions served not as a mere request of information, but as a push towards the formation of new legal interpretations, which the court could then review. ILD Commanding Officer Daniel Reisner, the named "architect" of the targeted killing policy, described this situation in similar terms:

The HCJ is making a very bold move: it demands of the state to present its positions [...] on questions that have not been answered anywhere in the world. Justice Barak says in formal and informal conversations that he knows that there is no ready-made law and that he wants you to develop the law right then and there (my translation, in Meridor and Fass 2006,206).

The debates on the policy of targeted killing began in January 2002 and ended in December 2006. In its decision, the court had accepted the war model as the appropriate framework to govern Israeli conduct in the West Bank and Gaza. In fact, by 2006 the court had already adopted this model as the framework governing state/military conduct in the West Bank and Gaza in several other decisions.

The court created a formula to determine the legality of targeting operations, thus extending its power to legitimise this practice. This judgment was based on the First Protocol to the Geneva Convention's exception to the protection granted to civilians. Grounded in this exception, the judgment established a threefold criterion: a) it is only permissible to target a person taking part in hostilities; b) this participation must be direct; and c) protection is lost only in such time when this participation takes place. In addition to this set of criteria, the operation is subject to the test of proportionality. Justice Barak, the chief author of this court decision, being well aware of the HCJ's position vis-à-vis international institutions, was inclined to refer in his judgement to the opposing expert opinion of Antonio Cassese, a renowned legal scholar and the first president of the International Criminal Tribunal for the former Yugoslavia. Barak included this reference even though, or perhaps precisely because, his final decision did not accept Cassese's opinion.

The court's decision had direct implications on international legal proceedings.

One of Israel's most controversial targeted killing operations was its July 2002 killing of Salah Shahadeh. On that occasion the Israeli Air Force dropped a one-ton bomb on Shahadeh's home, located in a densely populated residential neighborhood in Gaza City. Shahadeh was killed with fourteen other people, among them eight children, and many more were injured. Shahadeh's home was destroyed, as well as nine other houses in its vicinity. Nine additional houses were partially destroyed, and twenty others moderately damaged. In 2006, after the court had made its decision, NGOs demanded an independent investigation into this operation. Justice Barak supported the NGOs' demand and in 2008 the Strasberg-Cohen Commission was formed to examine this case. Based on these actions, a Spanish court decided against reviewing this event on the grounds of universal jurisdiction (Rosenzweig and Shany 2009).

The pushes and pulls forging the Israeli engagement with IHL manifested in this case divert from an imagination of the court as a forum engaging with two conflicting positions on equal terms, or as a forum deciding between two existing positions. The judges' actions in this case also show that if we were to assess this case as either an NGO victory or loss we would not do justice to the dynamic sequence of events unfolding in the courtroom. On this occasion, the judges set out to work together with the state's representatives in order to reach a decision that is acceptable for both the court and the army/state. An NGO petition initiated these debates, but the petition itself, its agenda and aspirations certainly did not steer the court discussions that followed. This state of affairs reflects some of the contradictions that the court navigates between the notion of a democracy and a settler-colonial project. In this particular setting, democratic institutions and processes exist, but they are structurally tied up with ethnically-defined state/military interests. In more general terms, this chain of events tells us something about the ways in which litigation driven by a human rights agenda

may find itself inadvertently aiding state practice that is pushing in entirely different directions.

The process unfolding in court also allows some reflection into legalism and legitimacy. As this article's first part discussed, many legal scholars describe the Israeli court as a legitimising institution (Shamir 1990, Ben-Naftali, Gross et al. 2005, Barzilai 2008, Zreik 2010, Ben-Naftali 2011). Reflecting on law's relation to state policy, Raef Zreik likens law to a mask:

If law is to play a role in veiling power or to adopt the function of a mask, then it cannot be completely transparent: if it were transparent then it would be unable to hide anything. For law to act as a mask it therefore needs to possess some shape, some color. If the face of violence is ugly, then in order for law to conceal that face, to refine it and improve its appearance, it needs a degree of beauty. (Zreik 2010:62)

It is certainly true that in general terms the HCJ's involvement in military affairs grounds the acceptability of state/military actions, but perhaps the notion of legitimacy does not tell the whole story. The image of the mask, similarly to the notion of legitimation, does not fully capture the court's workings in this case. Legitimation best describes instances when the court's decisions soften the blow of state/military policies. On this occasion, the HCJ did not just soften the rough edges of a repressive state policy. Rather, it played an active part in the formation of a novel legal paradigm that has introduced a host of war-like policies to the West Bank and Gaza.

***The Acceptability of Palestinian Fatalities: Military Investigation Policies***

Several months after the start of the Al-Aqsa Intifada the military legal system changed its policy regarding Military Police investigations of incidents resulting in Palestinian fatalities. The change of policy reflected an altered state/military perspective on Palestinians' death. This was one of the implications of the authorities' adoption of the war model, under which killings became much more readily acceptable. A senior MAG Corps officer described this transition, emphasising the military legal system's impact on it:

We were the first to recognize, within the IDF, that what we have, to all intents and purposes, is a war, an armed conflict. This was incredible innovation (...) This decision resulted in a shift to the paradigm of armed conflict. One difference is that civilians may be killed. (Officer D 2013)

The MAG declared that since the realities on the ground amounted to an "armed conflict," legal standards have changed and, in contrast to the policies of the past, fatalities no longer automatically necessitated a Military Police investigation. Instead, an 'operational inquiry' is to take place within the relevant unit, and depending on its findings, this inquiry may or may not lead to a Military Police investigation. The operational inquiry is to be performed by soldiers of the same unit investigated, who have no training in conducting such investigations.

Two prominent human rights NGOs, B'tselem and the Association for Civil Rights in Israel, petitioned against the changed investigations policy in October 2003. The petitioners demanded that the army would be required to carry

out Military Police investigations in all cases where a Palestinian who was not involved in hostilities was killed.

In the war model, however, killing civilians no longer marked an exception. MAG Avichai Mendelblit made this point clear:

Supposedly, our critics have a decisive argument: 2,000 casualties, zero convictions. But there is no automatic investigation for every case of fatality. Of course we will not approve of war crimes, but it is not possible to carry out 2,000 investigations for 2,000 cases of death, when many of the cases are related to combat activity (my translation, in Harel 2003).

Mendelblit's observation demonstrates the war model's logic. This model moves away from handling death as an exception, to handling it as a structural result of policy. In the war model the death of civilians is an acceptable product of military activity. The magnitude of destruction and anguish alone do not indicate a violation of law. David Kennedy (2006) vividly describes IHL's lack of regard to magnitude by showing that, grounded in the legal principle permitting proportionate attacks, a valid legal case can be made in defence of the bombing of Hiroshima. In this sense, the potential legal permissibility of death in IHL, which knows no bounds, is telling of this phase in the Israeli governance of the West Bank and Gaza. According to the war model's rationale, civilians cannot be the targets of an attack, but their death can be justified legally, when it is seen as "collateral damage." Laleh Khalili pointedly observes that this liberal emphasis on intention pushes aside a discussion on consequences:

(...) the insistence on intentionality (rather than consequences) stems not only from a liberal understanding of the ethics of political acts but also from

the manner in which Israeli military activity—as all Israeli political activity—is imbued with the rhetoric of legal legitimacy, where such intentionality matters in law. (Khalili 2013,63)

Human rights NGOs engaging in legal arguments informed by the logic of the war model, are implicated in this same understanding of ethics. Even if IHL and human rights are not one and the same, and even if they did so reluctantly, once the war model was introduced, NGOs had no choice but to incorporate this model into their own research and publications, if they wanted to stay in the conversation.

The petition against the change to the army's investigation policy was submitted in 2003, yet court discussions taking place in the years to follow led to no significant change. The petition was only dealt with years later, when the army declared an overall change to its policies. This petition was rejected, meaning that it ended in neither a victory nor a loss, but that should not imply that it had no impact. This petition should be seen as part of a bigger picture of the transition to the war model. The petition acted as yet another push for state authorities to construct a comprehensive legal structure that then served to ground a more permissive governance of the West Bank and Gaza.

In 2010, a period of relative rest in the West Bank, when faced with a question about a possible return to the framework of policing, MAG Mendelblit (2010:28) stated that the most suitable framework should be determined on a case by case basis. This flexibility to determine the applicability of a legal framework depending on time and situation leaves considerable power in the hands of the army and its legal practitioners. In April 2011 the MAG announced a change of

policy whereby incidents resulting in the death of people who were not involved in hostilities will again automatically lead to an opening of a Military Police investigation, with the exception of incidents characterised by the army as ‘actual combat’. This change of policy was to apply only to the West Bank and not to Gaza. The HCJ decided to reject the petition in August that same year as a result of this announcement. The rationale for the change of policy presented both by the MAG and the HCJ’s decision was that the situation in the West Bank had temporarily ‘calmed down’. The court’s decision implies that it approved of the MAG’s authority to determine what legal model to apply to any situation.

### ***The Growing Prominence of Legal Advisors in Warfare***

The sociologists Antonin Cohen and Antoine Vauchez (2011) suggest that we reflect on legal institutions as dynamic social and historical constructs. Human rights litigation revolving around the Al-Aqsa Intifada provides an opportunity to observe a process of institutional change. In this process the court changed its relationship with the MAG Corps, shifting power away from itself and to the military legal system. The MAG Corps’ newly obtained power in turn affected the military institution. The adoption of the war model made the MAG Corps, and specifically the ILD’s officers, essential participants in operational-decision making forums. The ILD saw a surge in power and influence. It became increasingly integrated into the military’s operational decision making processes, gaining access to forums and discussions that were previously considered off limits for military legal officers (Craig 2009, Cohen 2011). The Israeli HCJ, in its involvement with human rights cases, greatly influenced state/military policies and facilitated an institutional rearrangement of power.



The court's formulation of criteria examining the legality of targeted killing operations on a case-by-case basis meant that the legal decision making forum in such instances was the MAG Corps. This court decision meant that the ILD's officers were made vital participants in operational decision-making forums, because commanders were in need of an authoritative interpretation of the general legal criteria in order to apply it to specific cases. An ILD officer reflected on this change, whereby lawyers at once gained a seat at the decision making table: "The presence of the legal practitioner became crucial. When it was time to make a decision, people would ask 'where's the legal advisor?' (...) In the past there was far more supply than demand; the situation had reversed" (Keidar 2012). The involvement of lawyers in targeted killing operations demonstrates a broader change in the position of legal practice in the army (Mendelblit 2007, Cohen 2011). As a senior MAG Corps officer attests: "It [the war model] had operational implications regarding consultancy and concrete matters such as targeted killing. This was the root of the intensification of legal consultancy, which reached much deeper than ever before" (my translation, Officer D 2013).

The MAG Corps' officers go as far as making an argument for the necessity of their presence in decision making forums based on NGO petitions. In an article published in an IDF journal ILD Commanding Officer Noam Neuman (2007) argued that if lawyers are providing advice on the spot then they can offer quick responses to the HCJ's inquiries and halt legal proceedings.

Two of the major military operations that followed this legal turn, the 2006 conflict in Lebanon and the 2008/9 offensive in Gaza, each causing massive destruction and many fatalities, were instances exemplifying this department's novel position. The ILD was, on both these occasions, extensively involved and closer than ever before to the battlefield and to combat related decision-making processes.

Describing the MAG Corps' new status, MAG Finkelstein had said in 2003:

During this last year we have become involved and engaged in different aspects of war in a way that is unprecedented in the IDF's history. The participation of the MAG Corps' officers in decision making processes dealing with operational issues, the integration of legal perspectives to the military's orders, on-the-spot legal consultation with forces in the field - all these are daily actions in the IDF's reality of combat (in Roytman 2013:320).

Changes in the Israeli army, affording greater power to lawyers and legal considerations, are inseparable from an international context. The role of law and questions concerning legality have been gaining prominence in Western armies in the last two decades or so (Dunlap 2001, Dunlap 2001, Lohr and Gallotta 2003, Kennedy 2006, Dunlap 2009). As Brigadier General Charles Dunlap pointedly observes, "savvy American commanders seldom go to war without their attorneys" (Dunlap 2001,6). The employment of law in war instructs procedures and administrative processes that purport to achieve ethical compliance (Kennedy 2006, Khalili 2013) and then provide a token of legitimacy (Weizman 2009, Weizman 2011).

Processes of change within the military establishment are also entwined with institutional shifts in international arenas. Concerns among military and state officials about the potential involvement of the ICC and of courts exercising universal jurisdiction undoubtedly contributed to military lawyers' new status. Meni Mazuz, Attorney General in 2004-2010 describes these shifts in an interview:

The Rome Statute, the International Criminal Court (...) People in the political and military system gradually realized that there is a personal price to pay, on top of the political one, for decisions violating international law. I think this made them more careful and eager to get on-site legal backing. (Mazuz 2013)

In Israel, the increased integration of law into the army coincided with extreme violence (Feldman and Blau 2009, Weizman 2010, Weizman 2011). A senior MAG Corps officer demonstrates this point by describing an occasion when law actually encouraged an attack: “They [commanders] thought it is not allowed to attack mosques, but I, the legal practitioner, tell them that it is allowed. You can attack, no problem” (Officer A 2010). In another interview a different senior MAG Corps officer responded with difficulty to a question about legal advisors’ contribution to the protection of Palestinian civilians in military operations, the most fundamental declared intent of IHL: “Do we prevent harm to civilians?... I don’t know... maybe... I’m not sure... I’m not sure it [law] lessens harm... The opposite is sometimes true...” (Officer D 2013).

NGO litigation, coinciding with the rising power of international institutions, inadvertently played part in the process leading to an increase in the MAG Corps’ involvement in military activities. In his seminal account, *The Politics of International Law*, legal scholar Martti Koskenniemi (2011) argues that international jurists took on the grand project of cleansing the state of politics in favour of law. Even if this goal will never fully be achieved, the assumption is that the advancement of international law diminishes politics and brings us closer to a just world. The Israeli army’s legalistic turn can be understood as an advancement of liberalism, supposedly being a step further in

the journey adopting law as a substitute for politics. However, Israel's intensified legalism, coupled with an intensification of violence, hardly goes hand in hand with a vision of justice.

The political scientists Nicola Perugini and Neve Gordon (2015) suggest a different point of view and argue, in contrast to the common understanding of international law as a force restricting state sovereignty (and state politics), that the logic of human rights does not structurally weaken the state: "Insofar as human rights empower the legislature, courts and bureaucracy to secure international human rights limit and restrain the state, the threat that human rights produce (...) is not really a threat to the state" (2005, 14). This understanding of the workings of law fits the processes shifting power between state institutions. Petitions did effect the state, but not in a manner that weakened it. Indeed, the court forms part of the settler-colonial project and its decisions are not likely to dismantle or challenge this same project. The court's workings in the cases discussed did not produce a threat to the state; they actually provided it with an opportunity to rearrange its governance of the West Bank and Gaza in a way that allowed it greater freedom.

The processes of change discussed in this article demonstrate the active role human rights petitioning plays in broad legal political shifts. The targeted killing case facilitated the discussions where the war model was constituted; the petition on investigations encouraged the state to solidify its novel legal framework; and, the adoption of the war model shifted power to the military legal system, which gained considerable power in the army institution.

## **Conclusion**

The article set out to examine the relationship between human rights litigation and state/military policy grounded in the legal processes of change transpiring alongside the Al-Aqsa Intifada, as a doorway into the broader discussion on human rights and the state. Based on an analysis of court cases and institutional change, the article engaged with questions on litigation's ability to bring about change favouring Palestinians. The processes of change discussed in this article demonstrate that an evaluation of courtroom victories and losses may miss out on key parts of the story. Rather, court cases should be contextualised, allowing for a consideration of where petitions fit in the bigger picture vis-à-vis other legal and political institutions and shifts.

Courts take on human rights related cases for a host of reasons; some of these reasons have little to do with an attempt to stop or tame human rights abuses, and some even contradict a human rights agenda. The transition to the war model, which was facilitated by human rights petitions, demonstrates the dynamic way by which NGOs inadvertently aided broad legal/political shifts enabling a lenient legal approach and state violence. It is impossible to analytically separate NGO litigation from parallel shifts, and any argument on what would have happened in the absence of litigation is speculative, but in the processes of change that this article reviewed litigation supported trends that were harmful to Palestinians.

The court's involvement in Israel's state/military policies in the West Bank and Gaza certainly legitimised these policies, but that does not imply that the court always functions as a rubber stamp, or that it only softens the rough edges of state/military policies. The changes that the article examined show that the court played an active role in policy-making. Thus, courts can bring about significant political change, but petitioning NGO do not necessarily have much impact on the nature and direction of

these changes. Arguments in favour of petitioning to court as means of documentation of as a way to push the court into clumsy legal arguments that expose its structural set of priorities (Bisharat 2008, Hajjar 2008) might not fully appreciate the ways in which the court harms human rights causes.

NGO litigation in this case did not weaken the state, but instead facilitated the strengthening of some state institutions over others. NGOs might be seen as being ironically ‘successful’ by contributing to a process by which the military establishment intensified the incorporation of law to its activities. However, as we have seen, in the Israeli case this process of change went hand in hand with an institutional movement towards a legal state of war. Legality’s power in the military establishment grew precisely when law’s role and practical implications were radically changed. The correlation between intensified military legal practice and the expansion of legitimate violence should alarm anyone assuming that the advancement of law in and of itself leads to the limitation of violence. In this light, human rights NGOs that turn to legal avenues of action find themselves in a dubious position.

Israeli NGOs’ particular entanglements with state apparatuses are indicative of the intertwined relationship between these bodies. As Nicola Perugini and Neve Gordon (2015) point out, we must not think of NGOs as the diametric opposite of armies. To make this point, Perugini and Gordon use the example David Kennedy, a prominent Harvard law professor who is quoted in this article. Kennedy, they argue, embodies some of the tensions of the human rights movement vis-à-vis armies. Kennedy is a critic of humanitarian organisations and humanitarian logic who also takes part in training armies in the practice of international humanitarian law. Reflecting on his professional path, Kennedy describes his view on the legal military and humanitarian professions, and how his perspective on both occupations changed over time:

Nothing seemed as different as the humanitarian and military professions – the one made war, the other sought to limit war’s incidence and moderate war’s violence. Indeed, the military seemed to me then all that international law was not – violence and aggression to our reason and restraint (2006:29)

His later perspective reconciles, at least in part, these supposed differences: “Military professionals also have desires for law. For starters, they also turn to law to limit the violence of warfare, to ensure some safety, some decency, among professionals on different sides of the conflict” (2006, 32). Kennedy’s judgment, which warrants a degree of critical reflection, tells us something about the common ground that legal professionals share, and the ways in which legal logic and reasoning unite supposed opposites.

Accounts examining human rights organisations identify a shift whereby NGOs have grown closer and increasingly similar to armies (Weizman 2010), with some human rights NGOs even campaigning in favour of military operations as means to promote rights (Perugini and Gordon 2015). In the case of Israel, the state system’s shift to IHL meant that NGOs were compelled to adapt and engage with these legal tools. IHL now informs the language that NGOs must use if they want to be part of the conversation. This change keeps them in the conversation, but distances them from the human rights discourse, which rejects the acceptability of killing. NGOs’ engagement with this language has ‘earned’ them some lip-service support from the military legal system (see Harel 2009, Bob 2013), but this acceptance comes at a price. The adoption of IHL structurally reshapes human rights organisations’ modes of resistance to

state/military affairs (Kennedy 2006, Weizman 2011). This process of change, in turn feeds into the future of legal struggles in Israel/Palestine.

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