ARTICLE

The international law of human rights and constitutional law: a case study of an expanding dialogue

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1. Introduction

There is a growing influence of international law on national judiciaries. Broadly speaking, this is part of a larger trend reflecting the increasing significance of international law in several spheres. First, international agreements have become major factors in the economic and political spheres in an age of globalization. Second, there is an increasing tendency to bring disputes to international tribunals, notably exemplified in the establishment of the International Criminal Court.[1] Third, and more significant to the discussion at hand, national courts are tending to increase their recourse to international instruments, particularly in the context of applying international human rights norms. This may be seen in those countries that are parties to the European Convention on Human Rights,[2] and in those that have adopted constitutions that expressly mention the international law of human rights as a source of inspiration.[3] The process that culminated in the adoption of the European Convention on Human Rights in the English Human Rights Act of 1998 is a prime example.[4]

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[1] *See generally* YUVAL SHANY, THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS (2003).

[2] *See* Jorg Polakewicz & Valerie Jacob-Foltzer, *The European Human Rights Convention in Domestic Law*, 12 HUM. RTS. L.J. (Part I) 65; (Part II) 125 (1991). The Convention now applies in 44 Council of Europe Countries, including virtually all East European countries.

[3] *See* G. M. Danielko, *The New Russian Constitution and International Law*, 88 AM. J. INT'L L. 451 (1994). *See also* Wiktor Osiatynski, *Rights in New Constitutions of East Central Europe*, 26 COLUM. HUM. RTS. L. REV. 111 (1994).

[4] *See* Anthony Lester, *Fundamental Rights: The United Kingdom Isolated?*, PUB. L. 46 (1984). *See also* Lord Lester of Herne Hill, Q.C., *The Mouse That Roared: The Human Rights Bill 1995*, PUB. L. 198 (1995). *See also* Lord Lester, *Taking Human Rights Seriously* in HUMAN RIGHTS IN THE UNITED KINGDOM 99 (Richard Gordon & Richard Wilmot-Smith ed., 1996). *See also* Luke Clements & James Young,

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An important development in this context has been the growing tendency of jurists and human rights activists from different countries to identify themselves as part of a unified international community. Harold Koh points to the role of transnational issue networks and activists who trigger processes of nationalization of international law.[5] Particularly relevant to this discussion is Anne-Marie Slaughter's argument regarding the influence of different courts on one another through their engagement in "judicial dialogues."[6] Indeed, this transjudicial communication is seen not only in the application of international norms, but also in the recourse to comparative law, particularly in the area of constitutional law.[7] As various national courts resort increasingly to international law, comparative methodology supplies additional support and guidance.[8] At the same time, the application of international law may not be uniform among states. National courts have been criticized for the tendency to apply international law in a way that favors their own states' interests.[9]

One court where international law has gradually gained influence since the late 1990s is the Supreme Court of Israel. The high visibility of the Israeli-Palestinian conflict in the international scene is a factor that heightens international interest in Israeli court decisions that involve international law aspects—whether applicable to Israel proper or to the territories in the West bank and the Gaza strip occupied by Israel in 1967 (hereinafter "the occupied territories").

The Israeli example is interesting for several reasons. First, the constant threats posed to Israel's security by terrorism, coupled with the prolonged military occupation Israel maintains in territories it acquired by conquest,

Human Rights: Changing the Culture, 26 J. L. & Soc. 1 (1999). *See also* David Feldman, *The Human Rights Act 1998 and the Constitutional Principles*, 19 Legal Stud.165 (1999). *See also* K.D. Ewing, *The Human Rights Act and Parliamentary Democracy*, 62 Modern L. Rev. 79 (1999). *See also* Alexander Andrew Mackay Irvine, *The Impact of the Human Rights Act: Parliament, the Courts and the Executive*, Pub. L. 208 (2003).

[5] *See* Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 Yale L.J. 2599 (1997). *See also* Harold Hongju Koh, *Bringing International Law Home*, 35 Hous. L. Rev. 623 (1998).

[6] *See* Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. Rich. L. Rev. 99 (1994). *See also* Laurence R. Helfer and Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 Yale L.J. 273 (1997). *See also* Anne-Marie Slaughter, A New World Order (2004).

[7] *See generally* Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 Colum. L. Rev. 537 (1988).

[8] *See generally* Karen Knop, *Here and There: International Law in Domestic Courts*, 32 N.Y.U.J. Int'l. L. & Pol. 501 (2000) (pointing at the tendency of national courts to be persuaded by international norms, rather than conceiving them as binding).

[9] *See* Eyal Benvenisti, *Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts*, 4 E. J. Int'l L.159 (1993). *See also* Knop, *supra note 8* at 532–33 (emphasizing the importance of local translations of international law in the process of applying it, as part of the international dialogue the courts are engaged in).

create a laboratory for the intensive application of international law. Second, Israel's Supreme Court has a policy of hearing almost every petition that raises rule-of-law or human rights issues, with only minimal application of preliminary doctrines such as standing and non-justiciability.[10] In other words, the Israeli Supreme Court is not inclined to dismiss petitions because they touch on sensitive political issues, but is rather willing to review them on their merits. As a result, it confronts issues of international law more than many other national courts. It also entertains petitions regarding the occupied territories, where Israeli law does not apply and the jurisdiction of the Court is therefore not self evident. In fact, the Israeli Supreme Court is unique in the world in its willingness to hear petitions from occupied territories. Third, due to the special nature of the risks that Israel faces—extensive terrorist activity originating in Palestinian residential areas adjoining the hub of the country—some of the petitions brought to it are precedential from an international and comparative perspective. The main documents of international law on the laws of war were drafted in light of the wars of the past, primarily World War II. Israel is one of the states that carry the ongoing burden of interpreting them and applying them in the reality of present day war on terror. In this sense, the Israeli jurisprudence not only applies existing principles of international law, but also has the potential to contribute to their further development.[11] Finally, Israel does not have a full written constitution. At the current stage, Israel had only accepted several basic laws,[12] expected to form chapters of its future constitution. Therefore, International human rights law has the potential of affecting the Israeli constitution at the stage of its evolvement. This article will examine the references to, and uses of, international human rights law by the Israeli Supreme Court, and assess its implications.

2. The role of international law in Israel's jurisprudence

a) The traditional limited impact of international law on Israeli law

Any evaluation of the impact of international law on national jurisprudence must start from the question whether norms of international law have direct

[10] *See* H.J.C. 910/86 Ressler v. Minister of Defense, 42(2) P.D. 441. *See also* Aharon Barak *Foreword: A Judge on Judging: The Role of the Supreme Court in a Democracy*, 116 Harv. L. Rev. 16, 97–110 (2002) (presenting Chief Justice Barak's views in these matters).

[11] *See* Ian Brownlie, Principles of Public International Law 52 (6th ed., 2003) (stating that "Judicial Decisions in the municipal sphere and acts of legislation provide prima facie evidence of the attitudes of states on points of international law and very often constitute the only available evidence of the practice of states").

[12] This status of the Basic Laws was established by a Knesset decision from 1950, known as the "Harari Resolution," to enact the future Israeli constitution gradually, chapter by chapter, in the form of "Basic Laws." The idea was to embark on a process that would address controversies one

effect in local law and therefore can serve as a basis for argumentation in national courts, or whether they must first be incorporated by domestic legislation. Israeli law has adopted the British approach to that question, based on the distinction between norms of customary international law and norms of conventional law derived from treaties.[13] Norms of customary international law are applied in domestic courts except where inconsistent with domestic legislation,[14] whereas norms of conventional international law are enforced only if incorporated in domestic law by legislation.[15] For this reason, the impact of international law on judicial decisions is not self-evident.[16] The traditional justification for the distinction between customary and treaty-based international law was based on the principle of separation of powers. Treaties are made by the government, and not by the legislature. If they had the force of law the government could have the power to legislate with no involvement of the legislature.[17] This justification is weak with regard to conventions whose main purpose is to limit the powers of the government to infringe upon human rights, and that do not alter the law of the country in any other way. Moreover, in Israel, the Government Code of Procedure mandates two weeks' notice to the Knesset, the Israeli parliament, before a proposal to ratify a convention is brought to the government.[18] This procedure is meant

by one, so that every single compromise could serve as the basis for another basic law. Together, these basic laws would eventually form the Israeli Constitution. The resolution states: "The First Knesset directs the Constitutional, Legislative and Judicial Committee to prepare a draft constitution for the State. The constitution will be composed of separate chapters, each one constituting a basic law by itself. Each chapter will be submitted to the Knesset as the Committee completes its work, and all the chapters together will make up the constitution of the state." 5 Knesset Protocols 1743 (Hebrew).

[13] *See* Brownlie, *supra* note 11, at 41–5. *See also* Rosalyn Higgins, *The Role of Domestic Courts in the Enforcement of International Human Rights: The United Kingdom* in Enforcing International Human Rights in Domestic Courts 37 (Benedetto Conforti and Francesco Francioni, eds., 1997). *See generally* Murray Hunt, Using Human Rights in English Courts (1998).

[14] *See* Cr. A. 174/54 Shtamper v. Attorney General, 10 P.D. 5, 17. *See also* Cr. A. 336/61 Eichman v. Attorney General 16 P.D. 2033.

[15] *See* C.A. 25/55 Custodian of Absentee Property v. Samra, 10 P.D. 1825, 1831.

[16] *See generally* Ruth Lapidoth, *International Law within the Israeli Legal System*, 24 Isr. L. Rev. 451 (1990). *But see* Eyal Benvenisti, *The Implications of Considerations of Security and Foreign-Relations on the Applications of Treaties in Israeli Law*, 21 Mishpatim 221 (1992) [Hebrew]; Yaffa Zilbershatz, *The Role of International Law in Israeli Constitutional Law*, 4 Mishpat Umimshal 47 (1997) [Hebrew]. For the American view in this matter, see Curtis Bradley and Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harv. L. Rev. 815 (1997); Harold Hongju Koh, *Is International Law Really State Law?*, 111 Harv. L. Rev. 1824 (1998); Jordan J. Paust, *Customary International Law and Human Rights Treaties Are Law of the United States*, 20 Mich. J. Int'l L. 301 (1999).

[17] *See* H.C.J. 785/87 Afu v. IDF Commander of the West Bank 42(2) P.D. 4, 39.

[18] *See* Article 6 of the Government Code of Procedure, *available at* http://www.pmo.gov.il

to guarantee parliamentary oversight of ratification of international conventions by the government.

A judicial desire to resolve the seeming disparity between Israel's obligation to respect international conventions to which it is a party and its failure to adopt their norms in its legislation has resulted in an interpretive approach stating that statutes should be construed, as much as possible, as conforming to international customary and treaty-based law.[19] This approach, important as it may be in principle,[20] has been applied only marginally in practice. For many years, this interpretive presumption was rarely invoked and did not figure significantly in the recognition of human rights in Israeli law. In fact, for more than forty years after its establishment, Israel had no formal constitutional human rights guarantees (until the enactment of Basic Law: Freedom of Occupation and Basic law: Human Dignity and Liberty in 1992). During those years, the Supreme Court recognized an unwritten bill of rights, but based this mainly on interpretation of local documents and sources of inspiration such as the Israeli Declaration of Independence.[21]

b) The challenge of the occupied territories

The recognition of the crucial significance of international law to Israeli jurisprudence occurred when Israel became an occupying power in the territories it acquired during the six day war of 1967. The legal regime applicable to this area is the international law of belligerent occupation. More specifically, the normative regime the Israeli Supreme Court has applied when deciding petitions regarding the territories is composed of international law, as interpreted by the Court, and substantive principles of Israeli public law—primarily due process and governmental fairness—in addition to the law prevailing in the territories prior to the Israeli occupation.

The essential role of international law in the legal regime in the occupied territories did not alter the dualist approach applied by the Israeli courts, and therefore convention-based norms of international law could serve as a basis for argumentation in Israeli courts in matters that involved the territories only as far as they were adopted by legislation. In addition, the official position of the State of Israel has always been that the Fourth Geneva Convention relative to the Protection of Civilian Persons in Times of War (hereinafter, the Fourth

[19] *See generally* Eichman, *supra* note 14, at 2041; Cr. A. 131/67 *Kamiar v. State of Israel* 22(2) P.D. 85, 112; C.A. 522/70 *Alkutub v. Shahin* 25(2) P.D. 77, 80–81.

[20] *See* Aharon Barak, Interpretation in Law, Vol. III 237 (1994) [Hebrew]. In his important treatise on legal interpretation, Chief Justice Aharon Barak states that the international conventions on human rights to which Israel is a party should be given a special interpretive status, because they reflect the consensus of the international community to which Israel aspires to belong on an equal standing.

[21] *See* Daphne Barak-Erez, *From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective*, 26 Colum. Hum. Rts. L. Rev. 309 (1995).

Geneva Convention) does not apply to the occupied territories. Israel's argument is based on the view that the Convention applies only to territories removed by the occupier from the control of their legal sovereign. Israel is unwilling to grant implicit recognition to Egypt's and Jordan's sovereignty in Gaza and the West Bank, respectively (maintaining that those nations had occupied the territories unlawfully when the British Mandate of Palestine ended). In addition, Israel has rejected the view that the Convention reflects customary international law; the result being that without incorporating legislation, its provisions could not be enforced by Israeli courts.[22] At the same time, Israel has declared that it will voluntarily comply with the Convention's humanitarian provisions.[23]

The result of this complex approach has been twofold. First, for years, judicial review of emergency powers implemented by the Israeli military forces in the territories was usually based not on norms of international law, but on local norms of Israeli public law, more specifically administrative law, such as the right to a hearing in cases of house demolitions[24] and deportations[25] of terrorists. Second, the norms of the main international instrument in this context, the Fourth Geneva Convention, were marginal to the decisions regarding the occupied territories. The Court routinely applied the Hague Regulations Respecting the Laws and Customs of War on Land 1907, considered to reflect customary international law. These regulations, however, although they place important limitations on the ability of the occupying power to alter the *status quo* in the occupied territory, contain only rudimentary human rights protections.

In practice, the Israeli Supreme Court would analyze arguments of international law raised in the proceedings, but this analysis was usually made in

[22] It is interesting to note that the insistence on incorporating legislation is particularly problematic with regard to the occupied territories, because the Israeli legislature is not expected to legislate for this area, where the international law of belligerent occupation applies, and not Israeli law as such.

[23] *See* Meir Shamgar, *The Observance of International Law in the Administered Territories*, 1 Isr. Y. Hum. Rts. 262 (1971) (stating the official Israel view). This article was written by Meir Shamgar, Israel's Military Advocate General at the time of the Six Day War in 1967, and reflects Israel's official position. Later on, Shamgar served as Israel's Attorney General, and subsequently was appointed to the Supreme Court, where he served also as the Chief Justice., *But see* David Kretzmer, The Occupation of Justice 32–34 (2002). It may be interesting to add here that the official view regarding the voluntary compliance with the humanitarian provisions of the Fourth Geneva Convention may serve basis for a new argument supporting the application of provisions of unincorporated treaties, based on the doctrine of legitimate expectations. This argument was not yet raised or evaluated in the Israeli scene. *See* Hunt, *supra* note 13, at 242–59 (commenting on this development in English and Commonwealth case law and literature).

[24] *See* H.C.J. 358/88, Association for Civil Rights in Israel v. General of the Central Command, 43(2) P.D. 529.

[25] *See* H.C.J. 5973/92, Association for Civil Rights in Israel v. Minister of Defense, 47(1) P.D. 257.

obiter dicta, taking into consideration the official Israeli view that barred application of the Fourth Geneva Convention by the courts. On some major issues, the Court has adopted interpretive views considered unconventional by most authorities on international law. For example, it may be argued that house demolitions (of terrorists) for purposes of deterrence are altogether illegal under international law. The Court, however, stated that since this measure was authorized under the law that prevailed in the territories prior to 1967, its use was legal.[26] With regard to deportations from the territories, the Supreme Court expressed the view that international law forbade only mass deportations of populations, as opposed to selective individual deportations.[27] The legality of the Israeli settlements in the territories was also never discussed from the perspective of the general prohibition against moving populations into an occupied territory. The Court did uphold a petition against a settlement established on private property in its famous *Elon Moreh* decision,[28] but the legality of the settlement project as a whole was never considered as such. This remains one of the few issues that the Court considers altogether too political to address.[29] The Court's holdings in these and other cases were criticized for their incompatibility with the norms of international law.[30]

c) The scope of the new Israeli jurisprudence inspired by international law

The new jurisprudence of the Israeli Supreme Court (from the late 1990s and onwards) has tended increasingly to attach significance to norms of international law, although the basic doctrine in that regard has not formally changed. Treaty-based international norms are still only an interpretive tool, but judicial recourse to them has increased in frequency and scope.

Generally speaking, there are three main contexts in which the growing recourse to international law has been significant: in matters concerning the occupied territories, in matters within Israel that have a bearing on the Israeli-Arab conflict, and in purely internal matters. The distinctions among these categories are not based on the legal rules that apply to them. Formally speaking, the legal doctrine with regard to all three is the same: norms of customary international law are applied unless inconsistent with domestic legislation, whereas norms of conventional law are enforced only if incorporated in domestic law by legislation. Some distinctions can still be made, however. The first category differs from the other two in that international law is expected to play a major role with regard to the territories because the applicable legal

[26] *See* H.C.J. 897/86, Jabar v. Commander of Central Command, 41(2) P.D. 522, 525–26.

[27] *See* Afu, *supra* note 17.

[28] *See* H.C.J. 390/79, Dweikat v. Government of Israel, 34(1) P.D. 1.

[29] *See* H.C.J. 4481/91, Bargil v. Government of Israel, 47(4) P.D. 210.

[30] *See generally* Kretzmer, *supra* note 23.

regime in them is based on the international law of belligerent occupation. In contrast, inside Israel, international law is only a supplementary source of law and a source of interpretive inspiration. The distinction between the second and third categories is based on the lesser amount of international concern focused on Israeli internal matters unrelated to the Israeli-Arab conflict. Therefore, such matters serve as the best gauge of the Supreme Court's inclination to draw inspiration from international norms. The court could have easily avoided recourse to international norms in this context, unless it was really committed to them.

The common denominator among the three categories is the application of international law in matters having to do with human rights. As far as the occupied territories are concerned, the international norms applied are mainly those of humanitarian law, which constitutes part of the law of war. The distinction between humanitarian law, which provides only minimal human rights safeguards and ordinary human rights law is not as clear as it used to be; and there is a growing tendency to apply them side by side.[31] The official position of Israel has traditionally been that only humanitarian law, in contrast to the whole body of human rights law, applies to the occupied territories.[32] Nevertheless, in its new jurisprudence on the occupied territories, the Israeli Supreme Court has begun to have recourse also to the general conventions on human rights, without directly tackling the controversy in this matter.[33]

3. The uses of the international law on human rights in various contexts

a) Decisions regarding the occupied territories

In its struggle against the new tide of terrorism in the age of the suicide bombers, Israel has on occasion launched special military operations in an effort to destroy terrorist infrastructures and thwart further terrorist acts. Many of the actions taken by the military in the course of these operations were the subject of petitions to the Supreme Court, and the series of judgments rendered thereon are marked by extensive discussion of relevant norms of international law—both customary and convention-based. In the majority of cases, the Court did not refuse to hear the petitions, notwithstanding their submission during times of armed hostilities and their direct relation to military actions.

[31] *See generally* Jochen Abr. Frowein, *The Relationship Between Human Rights Regimes and Regimes of Belligerent Occupation*, 28 Isr. Y. Hum. Rts. 1 (1998); Theodor Meron, *The Humanization of Humanitarian Law*, 94 Am. J. Int'l L. 239 (2000); Andreas Laursen Nato, *The War over Kosovo, and the ICTY Investigation*, 17 Am. U. Int'l L.Rev. 765, 800–804 (2002); Ruti G. Teitel, *Humanity's Law: Rule of Law for the New Global Politics*, 35 Cornell Int'l L.J. 355 (2002).

[32] *See generally* Orna Ben-Naftali &Yuval Shany, *Living in Denial—The Application of Human Rights in the Occupied Territories*, Isr. L. Rev. (2004) (forthcoming).

[33] *See infra* notes 46–47 and accompanying text.

The Court's first significant decisions based mainly on norms of international law were made in the wake of operation "Defensive Shield," which was mounted in response to a series of terrorist suicidal attacks on Israeli civilians. A few petitions made the claim that Israeli Defense Force (IDF) soldiers had shot at Palestinian ambulances.[34] Without getting into the details of incidents, the Court clarified that the Israeli forces were obligated to respect humanitarian rules with regard to the wounded, the sick and the dead. Although it noted the abuse of medical privileges by medical personnel on the Palestinian side, it emphasized that this did not justify sweeping derogations from the humanitarian rules.

In another matter, the Court reviewed the behavior of the military in the situation arising from the siege around the Church of Nativity in Beth-Lehem, where armed terrorists had taken refuge. The Court held that the army must supply water and basic food to all civilians in the church compound, in pursuance of the rules of international humanitarian law.[35] In a rather exceptional procedure, the Court also heard a petition claming that military rescue units must be used to search and locate people reportedly buried alive under the ruins in the Jenin Refugee Camp, and stated that the military was indeed under a duty to do so, according to the dictates of law as well as morality.[36]

There are grounds for skepticism regarding the significance of these decisions. First of all, they focused on humanitarian norms, to which Israel adheres as a matter of policy. Second, it is doubtful whether the decisions made any difference in practice. In the ambulances decisions, the court did not review any particular case, but rather gave general statements without direct effect. The Church of Nativity decisions supported the means employed by the respondents, which were declared to conform to the norms of international law. Likewise, the decision regarding rescue actions in the Jenin camp was given after the army had started rescue operations there, and the Court was merely affirming its initiative. In other words, these decisions served mainly a legitimizing function. However, they were not unimportant. They were rendered at a time when hostilities were ongoing, and they highlighted the centrality of international law, which was at times the only source of law cited.

In addition, one may not discount the restraining effect of the Court's potential intervention even in cases that it does not decide directly. Numerous arrangements and compromises between the military commander and residents are struck following petitions that are brought to the Court but never get

[34] *See generally* H.C.J. 2936/02, Society of Physicians for Human Rights v. Commander of IDF Powers in the West Bank, 56(3) P.D. 3; H.C.J. 2117/02, Society of Physicians for Human Rights v. Commander of IDF Powers in the West Bank, 56(3) P.D. 26.

[35] *See generally* H.C.J. 3436/02, Custodia Internationale de Terra Santa v. Government of Israel, 56(3) P.D. 22; H.C.J. 3451/02, *Elmadani v. Minister of Defense*, 56(3) P.D. 30.

[36] *See generally* H.C.J. 3117/02, Center for the Protection of the Individual v. Minister of Defense, 56(3) P.D. 17.

decided by it.[37] In fact, a semi-formal procedure enables potential petitioners to submit their arguments to the authorities in the form of a "pre-petition." On occasion, this procedure leads to a change of the challenged position, based on the legal counseling of the state attorneys. In some instances, the authorities change their positions while the petition is still pending, based on their evaluation of the position of the Court or suggestions made by it. In fact, negotiations between the parties are conducted "in the shadow" of the Supreme Court.

The cases cited above were soon followed by additional decisions in which international law was applied for the purposes of judicial review, which deviated from the line drawn by the authorities. A representative example is the precedential *Assigned Residence* decision, which focused on one question of international law: whether a decision of the Military Commander of the West Bank to use a new security measure, entitled "assigned residence," was legal under the Fourth Geneva Convention.[38] In pursuit of new means of deterring terrorists, the military commander had amended the Security Provisions Order applicable to the area so as to broaden his powers to place people under special supervision (assign their residence). Whereas in the past this power had only been exercised in relation to movement restrictions within the West Bank, the amendment enabled him to assign people from this area to the Gaza Strip, which is geographically detached from the West Bank. Notwithstanding its neutral title, the amendment was directed at family members of suicide bombers, no effective means having been found to deter such terrorists themselves. Assigned residence was intended to supplement other measures, such as house demolitions, Israel having concluded that other options were not effective deterrents or patently illegal from the perspective of international law. For example, to deport families of terrorists to other countries, such as Lebanon, cannot be considered legal under the Fourth Geneva Convention. The new amendment to the order was envisaged as a pragmatic compromise between security needs and the constraints of international law. Israel claimed to have based it upon the provisions of Article 78 of the Fourth Geneva Convention.[39]

[37] *See generally* Yoav Dotan, *Judicial Rhetoric, Government Lawyers, and Human Rights: The Case of the Israeli High Court of Justice during the Intifada*, 33 L. & Soc. Rev. 319 (1999); Yoav Dotan, *Government Lawyers as Adjudicators: Pre-Petitions in the High Court of Justice Department 1990–1997*, 35 Isr. L. Rev. 453 (2001).

[38] *See* H.C.J. 7015/02 Ajuri v. IDF Commander in West Bank, 56(6) P.D. 352.

[39] *See* Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949 75 U.N.T.S. 31 (hereinafter Fourth Geneva Convention) (stating in Article 78 that "Decisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention. This procedure shall include the right of appeal for the parties concerned. Appeals shall be decided with the least possible delay. In the event of the decision being upheld, it shall be subject to periodical review, if possible every six months, by a competent body set up by the said Power").

The Israeli Supreme Court accepted the view that the military commander's competence to issue orders to assign residence indeed derived from Article 78 and therefore did not constitute forbidden deportation under Article 49 of the Convention. In fact, the Court considered Article 78 to be *lex specialis* and therefore limited its review to the legality of the military commander's actions under this provision. The Court held that while every person has a basic right to retain his place of residence and to prevent a change of that place, international law itself—in article 78 of the Fourth Geneva Convention—recognizes circumstances in which this right may be trumped by other interests, namely "imperative reasons of security." The Court emphasized that "the rights of a person to his dignity, his liberty and his property are not absolute rights . . . they may be restricted in order to uphold the rights of others, or the goals of society."[40] It further held that the preconditions set out in article 78 for allowing the assignment of a person's residence had been fulfilled. The West Bank and the Gaza Strip were regarded, for this purpose, as a single territorial unit subject to belligerent occupation. The court explained that they were both part of the British Mandate of Palestine and that, even more important, "from a social and political viewpoint, the two areas are conceived by all concerned as one territorial unit."[41] Therefore, the case did not involve a transfer of a person outside the area subject to belligerent occupation. It further held that the Convention's requirements were fulfilled with respect to an appellate procedure (which was indeed available before the Appeals Board) and with respect to a reconsideration of the decisions (which was to be held every six months).

The Supreme Court proceeded to consider the principles governing the military commander's discretion in issuing assigned residence orders under article 78. It emphasized that, while the military commander had broad discretion to assign someone's place of residence, his discretion was not absolute but subject to judicial review, as the "security of the state" was not a "magic word."[42] At the same time, the Court clarified that it would not replace the discretion of the military commander with its own, but would merely consider whether his decisions fell into the "zone of reasonableness."

More specifically, the Court held that an essential condition for exercising this authority was the existence of a reasonable possibility that the candidate for assignment presented a real threat that would reasonably be averted by assigning his place of residence. It was forbidden to assign the residence of an innocent relative who did not pose a danger or of someone who no longer did so, even if the measure might deter others from carrying out terrorist acts or collaborating with active terrorists.

[40] *See* Ajuri, *supra* note 38, at 365.

[41] *Id.* at 369.

[42] *Id.* at 376.

Following the principles thus laid down, the Court examined three petitions. It decided not to intervene in the military commander's decision to assign the residence of two petitioners, but annulled his decision with regard to the third. The petitions that were dismissed concerned a sister and brother who had knowingly and directly assisted their brother, an active terrorist. The sister had sewn explosive belts and the brother had sheltered the terrorist in a hide-out apartment and served as a look-out while the terrorist's group transferred explosive charges from one place to another. The Court considered the sister's behavior as "very grave" and held that it created "a significant danger to the security of the area . . . well beyond the minimum level required."[43] Likewise in the case of the brother, the court found that he was "deeply involved in the grave terrorist activity."[44] On the other hand, the Court accepted the petition filed by the brother of another suicide terrorist. Although it was shown that this petitioner had known of the actions of his terrorist brother, his involvement had consisted only of lending his brother a car and giving him clean clothes and food at his home, with no connection established between the petitioner's acts and terrorist activity. Holding that there were inadequate grounds for determining that the petitioner was sufficiently dangerous for his residence to be assigned, the Court concluded that this case did not fall within the "zone of reasonableness" prescribed by Article 78 and the amending order.[45]

Two other important decisions based on norms of international law concerned the conditions of detention applied to the thousands arrested during the "Defensive Shield" operation.[46] In both decisions, the Supreme Court reviewed these conditions in light of international norms, citing the provisions of the Fourth Geneva Convention as well as Article 10 of the International Covenant on Civil and Political Rights, regarded as reflecting customary international law, and undertook a close examination of the conditions in which the detainees were held. The Court criticized the conditions afforded in the period that immediately followed the military operation, but found the conditions afterwards to be generally satisfactory. As a result, it gave only relatively minor directions for needed reforms.

Another example of effective judicial review that relied on norms of international law is found in the *Mar'ab* decision.[47] In this case, the Court accepted a petition against a military order that allowed for people arrested during military operations against terrorism to be held in detention for up to eighteen days before

[43] *Id.* at 378.

[44] *Id.* at 379.

[45] *See* Daphne Barak-Erez, *Assigned Residence in Israel's Administered Territories: The Judicial Review of Security Measures*, 33 Isr. Y. Hum. Rts. 303 (2003).

[46] *See* H.C.J. 3278/02, Center for the Protection of the Individual v. IDF Commander of the West Bank, 57(1) P.D. 385; H.C.J. 5591/02. Yassin v. Commander of the Military Camp "Ketsiot, 57(1) P.D. 403.

[47] *See* H.C.J. 3239/02, Mar'ab v. IDF Commander of the West Bank, 57(2) P.D. 349.

their case would be afforded judicial review. The Court held that this period exceeded reasonableness and limited validity of the order to six months (to enable the authorities to reorganize and adapt their procedures). In this case as well, the Court cited not only the Fourth Geneva Convention, but also the International Covenant on Civil and Political Rights, this time with reference to Article 9.

b) Decisions in the context of the Israeli-Arab conflict

When discussing the application of international law in Israel itself, special notice should be given to cases that deal on their face with internal matters, but in fact raise questions that are not domestic in the strictest sense, because they involve foreign citizens or are related to the Israeli-Arab conflict. In such cases, the subject matter lends itself to the application of international law.

The *Iraqi Detainees* case[48] is one of the first instances of this kind in the Court's newer jurisprudence. In this matter, the petitioners were Iraqi citizens arrested soon after they had crossed the Israeli border. They were kept in detention with an eye to deporting them to a third country. In their petition, the detainees argued that they were entitled to be treated as refugees and therefore demanded prohibition against deportation to countries in which their life or freedom would be threatened. They also sought to be released from detention until their deportation materialized. The Israeli Supreme Court accepted the view that the power to deport should be exercised in line with the limitations posed by article 33 of the Convention Relating to the Status of Refugees, and ordered the authorities to reconsider their decisions in respect of the petitioners (including the decision regarding their prolonged detention).

An even more important decision in this context was the so-called *Torture* case[49] which raised the question of whether the Israeli General Secret Service (GSS) could use physical measures, such as deprivation of sleep, shackling and vigorous shaking for purposes of interrogating suspected terrorists. The use of these measures has been more prevalent regarding suspected terrorists from the occupied territories, but was not confined to them; therefore the Court discussed this as a purely internal question. In its decision in this matter, considered as one of its landmark precedents, the Israeli Supreme Court answered the question in the negative. The formal basis for the decision was the principle of legality, as the GSS was not authorized by Israeli law to use physical force while conducting investigations. The decision, however, drew heavily on the international norm that clearly mandates the prohibition of torture. Chief Justice Barak stressed that at the international level, Israel was obligated to refrain from torture and that this prohibition was absolute and without exceptions.[50]

[48] *See* H.C.J. 4702/94, *Al-Tai v. Minister of Interior* 49(3) P.D. 843.

[49] *See* H.C.J. 5100/94, Public Committee Against Torture in Israel v. Government of Israel, 53(4) P.D. 817.

[50] *Id.* at 836.

Another prominent example was the *"Bargaining Chips"* affair. In this matter, the Israeli Supreme Court had to decide whether Israel could hold Lebanese prisoners solely to use them as "bargaining chips" in future negotiations regarding Israeli soldiers held by terrorist groups. In the first decision in this matter, the Supreme Court had approved the legality of this practice.[51] Chief Justice Barak explained that Israeli legislation on administrative detentions should be construed as authorizing the holding of prisoners for this purpose, adding that he would not elaborate on the international law aspects of the case, since specific local legislation supersedes international law.[52] Soon afterwards, the Court opted to use its special capacity to rehear the case, due to the novelty and complexity of the questions it raised.[53] It based its new decision on a different, stricter interpretation of Israeli law. In addition, it cited in detail the position of international law on this matter, which served as an additional basis for the decision. Justice Barak stated that international law prohibited holding hostages, and that this prohibition applied to holding persons as "bargaining chips." He added that the conventions on these matters might not have been adopted in domestic law, but the presumption of compatibility between state law and international law should be applied in order to strengthen the interpretation now endorsed by the Court.[54]

A notable precedent in the context of humanitarian law was the *Red Cross Visits* decision.[55] In this case, the petition dealt with the demand of two of the Lebanese "bargaining chip" prisoners to meet with delegates of the International Committee of the Red Cross, based on Article 143 of the Fourth Geneva Convention. Counsel for the respondents contested the customary nature of this provision. Justice Barak acknowledged the possibility of denying meetings with Red Cross representatives for security reasons, but held that, taking into consideration the long detention of the petitioners, it would be unreasonable to deny them that right at this stage. The decision was issued despite public opinion that objected to the lack of reciprocity in the matter, as Israeli soldiers held in Lebanon and other unknown locations were denied the same right.

An interesting though minor development is the Court's new tendency to make reference to international law also in cases that deal with the rights of the Arab minority in Israel. Such references are found in the *Signs* case, in which the Court upheld a petition demanding the use of Arabic in public signs placed in the so-called "mixed" municipalities (populated by Jews and Arabs),[56] and in the last precedent in the line of *Election* cases, a decision that

[51] *See* Ad. A.A. 10/94, Roes v. Minister of Defense, 53(1) P.D. 97.

[52] *Id.* at 109. *But see* Orna Ben Naftali & Sharon Gliechgevitch, *Missing in Legal Action: Lebanese Hostages in Israel*, 44 HARV. INT'L L.J. 185 (2000) (criticizing this decision).

[53] *See* Cr. F.H. 7048/97, Roes v. Minister of Defense, 54(1) P.D. 721.

[54] *Id.* at 742–743.

[55] *See generally* H.C.J. 794/98, Oubeid v. Minister of Defense, 55(5) P.D. 769.

[56] *See generally* H.C.J. 4112/99, Adalah, The Legal Center for the Rights of the Arab Minority in Israel v. Municipality of Tel-Aviv-Jaffa, 56(5) P.D. 393.

upheld appeals of Arab candidates who had been disqualified from taking part in general elections.[57] In the *Signs* case, the Court quoted, among other sources, the relevant international documents on language rights;[58] in the *Election* cases, it referred to a precedent of the European Court of Human Rights, which had recognized the possibility of limiting participation in elections in extreme cases, for the sake of protecting democratic principles.[59] In both decisions, however, international law was cited among other sources of inspiration, and was accorded less significance than comparative constitutional law. These cases are in many respects more internal than the examples reviewed thus far, as the claimants were Israeli citizens of Arab origin, not foreigners, and the issues raised were "normal" civil rights matters. At the same time, it should be noted that the rights of the Arab minority in Israel raise more international concern than other purely internal Israeli matters, and that its political status is influenced, to a large extent, by the broader context of the Israeli-Arab conflict.

c) Decisions in purely internal matters

Judicial decisions regarding human rights issues in the purely domestic context merit a separate discussion and evaluation. In this context, the international community shows less concern about Israel's compliance with international norms, and the pressure in this direction comes mainly from Israeli organizations and human rights groups that seek to utilize international law to promote their causes.

So far, the use of international law in purely Israeli matters has been seen mainly in decisions that dealt with social and economic rights. In contrast to the civil and political rights that are long established in the jurisprudence of the Israeli Supreme Court, the recognition of social and economic rights began much later, in a more hesitant manner. One means of establishing the status of these rights in Israeli law was to refer to the international documents recognizing them.

One decision, which dealt with the legality of parents' supplementary fees for high school education, overruled this policy based on the concept of the right to (free) education.[60] Justice Prokacia cited in this context, in addition to Israeli sources, several international documents, such as the International Convention on Economic, Social and Cultural Rights, the European Convention on Human Rights, and the Convention on the Rights of the Child.[61]

[57] *See generally* El. Ap. 11280/02, Central Elections Committee for the Sixteenth Knesset v. MK Tibi, 57(4) P.D. 1.

[58] *See* Adalah, *supra* note 56, at. 413.

[59] *See* Central Elections Committee, *supra* note 57, at 23–4.

[60] *See generally* H.C.J. 4363/00, Poria Ilit Committee v. Minister of Education, 56(4) P.D. 203.

[61] *Id.* at. 213.

Also important in this context was the petition of an organization representing families of children with Down syndrome.[62] The petitioners argued that the state must cover the expenses of the special assistance these children needed when they enrolled in regular schools (whereas the state was willing to finance their special needs only in special education classes). Justice Dorner decided to accept the petition based on the unwritten constitutional right to education. Among the sources cited for establishing this right were the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child.[63] Reference was made also to the article in the Convention on the Rights of the Child establishing the more specific right for special education.[64] Justice Dorner used in this context the presumption of compatibility of national law with the international obligations of the state.[65]

In a recent decision, the Israeli Supreme Court made references to international law also for the purpose of reviewing the constitutionality of new planning legislation, which was argued to infringe upon the right to worthy environment (due to the especially short periods it allowed for raising objections regarding new programs which could cause long lasting damages to the environment).[66] The main opinion, written by Chief Justice Barak, cited international sources on the protection of environment, but ultimately rejected the possibility of reading the right to worthy environment into the text of Basic Law: Human Dignity and Liberty, and therefore dismissed the petition against the constitutionality of this legislation. The opinion did, however, stress the possibility of reviewing specific planning decisions that would be accepted in the framework of the new law, including with regard to unreasonable damage to the environment. In a separate opinion, Justice Dorner decided to interpret this law as well according to the presumption of compatibility. Accordingly, she stated that the fixed statutory periods for submitting objections with regard to new planning programs should be interpreted as subject to the possibility of prolonging them.

4. The limits and potential of the new Israeli jurisprudence inspired by international law

Having examined the growing significance of international law for the development of Israeli law—in contexts where it was clearly binding and where it

[62] *See* H.C.J. 2599/00, Yated—Association for Children with Down syndrome v. Ministry of Education, 56(1) P.D. 834.

[63] *Id.* at 841.

[64] *Id.* at 844.

[65] *Id.* at 846.

[66] *See generally* H.C.J. 4128/02, Man, Nature and Law—Israel Union for Environmental Defense v. The Prime Minister of Israel (decided on 16 March 2004, to be published) (on file with author).

served as a source for interpretive inspiration—one may conclude that international law has become more significant for judicial decisions. That conclusion must be qualified by some observations, however.

First, as already noted, when a national court interprets an international instrument its interpretation may not necessarily be the one that is prevalent in other jurisdictions or supported by international authorities. This was particularly apparent in some major decisions of the Israeli Court. Most famous in this context was the decision which held that individual deportations were legal under Article 49 of the Fourth Geneva Convention. This interpretation clearly ran counter to the prevalent view among legal scholars,[67] and the express wording that excluded deportations "regardless of their motive." In other cases, even when the decision of the court does not depart from an established view, it may include interpretive choices that are not self-evident, as in the *Assigned Residence* decision. The Court in that instance admitted that its judgment had necessitated interpretive choices. It stressed that it was doubtful whether the drafters of the Fourth Geneva Convention had anticipated protecting persons who collaborated with terrorists or "living bombs" such as the suicide bombers and that therefore "this new reality requires a dynamic interpretive approach" to the provisions of Article 78.[68] One of its most significant interpretive moves in that decision was the choice to regard the West Bank and the Gaza Strip as a single territorial unit subject to belligerent occupation. Without that premise, moving civilians from the West Bank to the Gaza Strip would have to be seen as an illegal deportation under Article 49 of the Convention. The court's choice was not without foundation, considering the prevalent view worldwide that the residents of these areas form a single community, and the Palestinian view that these territories should form a single Palestinian state (a view recognized also in the agreements made between Israel and the Palestinians).[69] Nevertheless, this interpretation is not without controversy, considering that the Gaza Strip was formerly ruled by Egypt, whereas the West Bank was occupied by Jordan, and that they are geographically separated by an Israeli area. In addition, it is doubtful whether areas outside Israel's effective control, such as the majority of the Gaza Strip that is controlled by the Palestinians, can be considered part of the occupied territories.

Second, it is important to note that in many cases, judicial recourse to international norms is made for the purpose of strengthening the legitimacy of the

[67] *See supra* notes 27 and 30 and accompanying text.

[68] *See* Ajuri, *supra* note 38, at 382.

[69] The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Sept. 28, 1995, PLO-Isr. [hereinafter Interim Agreement] *available at* http://www.mfa.gov.il Article XI(1) states that "The two sides view the West Bank and the Gaza Strip as a single territorial unit, the integrity and status of which will be preserved during the interim period."

challenged administrative action.[70] This was certainly the case with the Church of Nativity decisions. Likewise in the *Assigned Residence* case, the recourse to the Fourth Geneva Convention was made for approving the legality of a new security measure. Reliance on the norms of international law enabled the Court to legitimize the new security measure rather than overturn it. At the same time, the Court did limit the lawful uses of this measure and prohibited its use against inactive relatives of terrorists. In fact, according to the interpretation of the Court, assigning residence is prohibited in the most prevalent situations, in which family members give general assistance to terrorists, but are not directly involved in assisting terrorist acts, the typical case being that of the petitioner who only helped his terrorist brother by supplying him a car and food. However, the first message of its decision was the approval of assigned residence outside the West Bank. This assessment is not a criticism of the results of the decision, but rather an acknowledgement that recourse to international norms does not necessarily entail outcomes that impose checks upon the authorities.

Another question that waits to be answered is whether the Court will use arguments based on international law mainly for strengthening decisions that could have been reached independently, or whether the recourse to international law will be determinative of the outcomes of cases. In some of the cited instances, arguments of international law served only for strengthening conclusions well based on local norms. This is true of almost all the examples that discussed the law in Israel proper. In the *Torture* case, the ruling was firmly based on the principle of legality (in the absence of legislation that authorized the use of physical measures in interrogations) and in the *Bargaining Chips* affair, the final decision was likewise based on domestic legislation on administrative detentions, which mandates that detainees must be people who present danger. At the same time, it is possible that these views regarding local law were shaped by the position of international law[71] and influenced by the complex processes of dialogue and inspiration within the international community of judges and jurists.[72]

The use of international law only to strengthen independently formulated judicial conclusions is especially evident in the right to education cases, where

[70] The conferral of legitimacy on operations reviewed by domestic tribunals gains additional importance in the age of the international criminal justice. *But see* Leora Bilsky, *Territory, Community and Political Trials: A New Challenge for International Law*, 27 Tel-Aviv U. L. Rev. 655, 699 (2003) [Hebrew].

[71] It is significant to notice that after the decision in the *Bargaining Chips* case, the Knesset enacted a special law in the matter of holding terrorists in detention in Israel. Incarceration of Unlawful Combatants Law 2002 *translated in* 32 Isr. Y. Hum. Rts. 389–92 (2002)). This law, which lies beyond the scope of this discussion, was controversial among Israeli jurists, and the main concern raised was whether it was compatible with international law.

[72] *See supra* notes 5–8 and accompanying text.

references to international law only helped Justices who were probably inclined to strengthen the right to education and looked for additional justifications for their choice. This is especially evident when these cases are compared with an earlier decision on a petition to fund an enrichment program designed to address the cognitive needs of young children raised in grossly dysfunctional or extremely poor families (in order to enable their incorporation in the regular school system).[73] While dismissing the petition, Justice Orr took the position that it could not be grounded on the right to education, because that right had not been recognized in Israeli constitutional law. The petitioners having tried to base their argument also on international law, Justice Orr noted that the provisions of the cited international conventions were not incorporated in domestic law.[74] He made no mention of the presumption of compatibility. The difference between this decision and the later decisions on the right to education suggests that the latter reflect not only the growing significance of international law for Israeli jurisprudence but also an increased judicial activism in favor of the right to education, which has inspired an increased willingness to borrow from international law.

With regard to the occupied territories, the change in the judicial treatment of international law is even more pronounced; and it seems that a mini-revolution has taken place. Many of the new decisions on the occupied territories start with the question of whether the military operations at issue are compatible with international law. This is no longer a marginal issue discussed in *obiter dicta*. Another phenomenon evident in recent decisions is the reemergence of the Fourth Geneva Convention as an influential text, although it is still not directly recognized as reflecting customary international law. In other words, a change in judicial culture can be traced. The other side of this coin is that the change has happened during a time of constant deterioration in the security situation in the territories, accompanied by increasing infringements of human rights in the effort to combat threats to the security of Israeli citizens and soldiers. As this process is taking place, one may ask whether the new jurisprudence of the Israeli Supreme Court has the potential to impact reality, or only to supply the legal community with landmark cases.[75]

It also remains to be seen whether this change will have a significant impact on the decisions of the Israeli Supreme Court in the long run, and therefore make a lasting difference. A major question in this context is whether the Court's new use of international law will affect decisions in matters to which international law has not yet been applied. The decisions regarding house

[73] *See generally* H.C.J. 1554/95, Friends of Gilat Association v. Minister of Education, Culture and Sport, 50(3) P.D. 2.

[74] *Id.* at 28.

[75] *See generally* Ronen Shamir, *Landmark Cases' and the Reproduction of Legitimacy: The Case of Israel's High Court of Justice*, 24 L. & Soc. Rev. 781 (1990) (criticizing earlier landmark cases of the Israeli court regarding the occupied territories as not representative of the general case load).

demolitions are a particularly important example. Alongside the new cases based on international law, the Israeli Supreme Court kept approving the administrative measure of demolition—without even mentioning international law, and sometimes even without close scrutiny of the proportionality of the administrative decision to the circumstances of the case[76] (in contrast to the careful review of the extent of involvement of family members in terrorist activity exemplified in the *Assigned Residence* decision). Clearly, a new judicial resort to international law in the context of house demolitions is more complicated for the Court. First, it could constitute an admission that a long line of previous cases on this issue was erroneously decided. Second, and even more important, the demolition of houses following deadly terrorist attacks by one of their inhabitants is argued to be one of the more effective measures used by Israel in its fight against terror. Therefore, ruling that measure impermissible could subject the Court to harsh criticism inside Israel. The Court's position here is a particularly uneasy one. It is caught in the vise of two conflicting concerns regarding the legitimacy of its decisions—that of the international community and that of the Israeli polity and public opinion.[77] It is true that decisions considered unpopular when first handed down have acquired legitimacy over time. A prime example of such revisionism may be seen in the *Torture* case. This process has its limits as well, however.

It is worth noting that the Israeli Supreme Court has shown a willingness to reconsider its views. In the *Bargaining Chips* affair, the court changed its decision, inspired in part by international law. In the *Assigned Residence* decision Chief Justice Barak emphasized that this judgment did not consider the legality of deportations from the territories.[78] This emphasis reflected some uneasiness with the settled precedent of the Court on this matter. It should be noted that in practice, the Israeli legal community has implicitly adopted the view that deportations from the territories are altogether illegal. Deportations from the territories have in fact stopped for the last ten years, despite the significant escalation in terror. The absolute wording of the Fourth Geneva

[76] *See* H.C.J. 6996/02, Za'arub v. IDF Commander of the Gaza Strip, 56(6) P.D. 407., *see also* Kretzmer, *supra* note 22, at 145–163 (criticizing the practice of house demolitions); Dan Simon, *The Demolition of Homes in the Israeli Occupied Territories*, 19 *Yale J. Int'l L.* 1 (1994); Brian Farrell, *Israeli Demolition of Palestinian Houses as a Punitive Measure: Application of International Law to Regulation 119*, 28 Brook. J. Int'l L. 871 (2003).

[77] *See generally* Amnon Reichman, *When We Sit to Judge We Are Being Judged' The Israeli GSS Case, Ex Parte Pinochet and Domestic/Global Deliberation*, 9 Cardozo J. Int'l & Comp. L. 41 (2001) (discussing the *Torture Case* following an "internal axis" concentrating on the dialogue between the Supreme Court and other internal institutions and an "external axis" dealing with the dialogue the Court engages with the international community, mainly other courts).

[78] *See Ajuri*, *supra* note 38, at 367 (quoting Barak as stating "We did not see any reason to examine the scope of application of article 49 of the Fourth Geneva Convention. In any event, we see no need to consider the criticism that the petitioners raised with regard to the ruling of this Court . . . with regard to the interpretation of article 49 of the Fourth Geneva Convention".

Convention in this context probably carried some weight[79] (in contrast to the somewhat less restrictive language in the provision on the destruction of private property, which is relevant to the issue of house demolitions),[80] as did the intensity of international criticism.

From a realpolitik perspective, some of the Israeli precedents considered problematic by international law scholars could not have been decided otherwise. Judicial decisions dismissing the legality of demolition of houses of terrorists or prohibiting deportations of terrorists would not have been considered legitimate by the Israeli public. The real choice the Court probably had was between dismissing the petitions in these matters as involving "political questions" (as it did with regard to the settlements project) and dismissing them on their merits. The Court chose to decide on the merits of the cases, thus holding the constant threat of further judicial review over the authorities. The partial incompatibility of some decisions with international law uncovers, in fact, the non-justiciable nature of the issues decided upon, which the Court was usually unwilling to admit (aside from the settlements context).

The Israeli Supreme Court is facing a dilemma with regard to its willingness to limit government action in the name of international law. The adaptation of international law to the legal regime that applies to the territories has become even more difficult due to the continuous nature of the Israeli belligerent occupation of the area. At the same time, the entire international community faces the challenge of updating some of the concepts of international law, in order to adapt them, for example, to the war on terrorism—a war that is entirely different from World War II, which served as the model for the Geneva Conventions. This war should be pursued with human rights as a paramount concern. At the same time, it cannot be conducted without adapting some of the traditional doctrines of international law to present day threats and realities.

5. Conclusion

The new jurisprudence of the Israeli Supreme Court has attached increasing significance to norms of international law, even citing provisions of international instruments that have not been incorporated into domestic legislation. Thus the Court has contributed to the protection of human rights in Israel proper and in the Occupied Territories. In the case law that refers to the territories, the role of international law is significant; that role is more modest in decisions that concern Israeli internal matters, but not negligible. As Israel has

[79] *See* Fourth Geneva Convention, *supra* note 39, at Article 49. Art. 49 states: "Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, *regardless of their motive*."

[80] *See id.* at Art. 53. According to Article 53, the destruction of private property is prohibited "except where such destruction is rendered absolutely necessary by military operations."

not yet completed formulating its constitution, international law has the potential at this stage to inspire the process by imbuing human rights with meaning, and to influence the drafting of future Basic Laws.

This potential impact of international law is important not only with regard to civil and political rights but also with regard to economic and social rights. The status of civil and political rights is well established in the jurisprudence of the Israeli Supreme Court, although they can still benefit from the additional support of international law, especially when the Court is faced with a question that has bearing on national interests. In contrast, the status of social and economic rights is less established in the Court's precedents. Therefore, these rights have much to gain from judicial reference to the authority of international law.

The new jurisprudence of the court exemplifies the contribution of international law to the protection of human rights in Israel, but also reveals the limitations of the application of international law by national courts. In principle, the Israeli Supreme Court confronts the same challenges as other national courts when it is called upon to apply international law. In other countries as well, international norms do not always coincide with state interests or with the political majority's perception of these interests. Other countries also have to face the current challenges of the war on terror. Israeli courts, however, are in a particularly uneasy position: First, the long-standing threat to Israel's security means that the conflict between international norms and perceived national interests arises constantly rather than just occasionally. Second, public opinion looks askance at the moral authority of international law, as large sections of the polity associate international law with the political bias of many countries against Israel and with selective condemnation of Israel for human rights breaches. Thus, the Israeli public identifies international law with international decisions hostile to Israel and does not always find international law a persuasive reason to restrict the military in its operations against terror. Third, the superiority of human rights norms that were not legislated and endorsed by a political majority is not obvious in a legal system that has yet to complete its constitutional project. A legal culture that is willing to overrule the political majority in the name of its written constitution is also more likely to do so vis-à-vis norms of international law.