Israel Law Review **50**(3) 2017, pp 331–388. © Cambridge University Press and The Faculty of Law, The Hebrew University of Jerusalem, 2017.
doi:10.1017/S0021223717000164

Domestic Human Rights Adjudication in the Shadow of International Law: The Status of Human Rights Conventions in Israel

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This contribution is a reflection on the article 'The Influence of International Human Rights Law on the Israeli Legal System: Present and Future' by Eyal Benvenisti, originally published in (1994) 28 *Israel Law Review* 136.

The quarter-century anniversary of Israel's ratification of the major United Nations (UN) human rights treaties is an opportunity to revisit the formal and informal interaction between domestic and international Bills of Rights in Israel. This study reveals that the human rights conventions lack almost entirely a formal domestic legal status. The study identifies a minor shift in the scope of the Israeli Supreme Court's reference to international law, as the Court now cites international human rights law to justify decisions that a state action is unlawful, and not only to support findings that an action is valid. This shift may be the result of other reasons, for instance, a 'radiation' of the Court's relatively extensive use of international humanitarian law in reviewing state actions taken in the Occupied Territories. However, it may also reflect a perception of enhanced legitimacy of referring to international human rights law as a point of reference in human rights adjudication following ratification of the treaties.

At the same time, the Court continues to avoid acknowledging incompatibility between domestic law and international law. It refers to the latter only to support its interpretation of Israeli constitutional law, as it did before the ratification. This article critically evaluates this practice. While international human rights law should not be binding at the domestic level, because of its lack of sufficient democratic legitimacy in Israel, it should serve as an essential benchmark. The Court may legitimise a human rights infringement that is unjustified according to international law, but such incompatibility requires an explicit justification. The Court, together with the legislature and the government, are required to engage critically with the non-binding norms set by the ratified UN human rights treaties.

Keywords: international human rights law, Israel, human rights law, constitutional law

1. Introduction

From the perspective of national constitutional law, the legal status of the United Nations (UN) human rights treaties is often contested.[1] The debate is not only about the extent to which the

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[1] For comparative studies see, eg, Yuval Shany, 'How Supreme is the Supreme Law of the Land? A Comparative Analysis of the Influence of International Human Rights Conventions upon the Interpretation of Constitutional Texts by Domestic Courts' (2006) 31 *Brooklyn Journal of International Law* 341; David Sloss, 'Treaty Enforcement in Domestic Courts: A Comparative Analysis' in David Sloss (ed), *The Role of Domestic Courts*

https://doi.org/10.1017/S0021223717000164 Published online by Cambridge University Press

conventions are formally binding at the domestic level, thus limiting the powers of the legislature, but also their de facto effect on domestic practices. The study of these issues regarding Israel has emerged following the government's ratification in 1991 of five of the major UN human rights treaties. Several scholars have argued that international human rights law is (or should be) recognised as an exception to the basic premise that international law is a state- rather than an individual-centred system.[2] Arguably, once ratified, human rights covenants should be enforceable at the domestic level. Eyal Benvenisti's 1994 seminal essay, 'The Influence of International Human Rights Law on the Israeli Legal System',[3] marked the path of this line of scholarly work.[4] Benvenisti suggested that international human rights law should be recognised as having 'special features that distinguish[es it] from other international norms … [and thus] should be enforceable domestically'.[5] As for the de facto consequences of ratifying such treaties, Beth Simmons referred to Israel to demonstrate the general thesis presented in her influential 2009 book, *Mobilizing for Human Rights*.[6] Simmons suggested that the Israeli government's 1991 ratification of the Convention against Torture '[has] played a crucial supporting role' in 'bolster[ing]' the Israeli Supreme Court's 1999 judgment that particular interrogation practices are prohibited.[7]

The quarter-century anniversary of the ratification – which coincides with the anniversary of the enactment only a few months later, in March 1992, of the Basic Law: Human Dignity and Liberty – is an opportunity to revisit the formal and informal interaction between domestic and international Bills of Rights in Israel. The study of the Israeli Supreme Court's jurisprudence of the last 25 years reveals that the human rights conventions almost entirely lack a formal legal status. With the important exception of the application of the Fourth Geneva

in Treaty Enforcement: A Comparative Study (Cambridge University Press 2009) 1; André Nollkaemper, *National Courts and the International Rule of Law* (Oxford University Press 2011); Dinah Shelton (ed), *International Law and Domestic Legal Systems: Incorporation, Transformation and Persuasion* (Oxford University Press 2011).

[2] Even this premise is subject to debate. For an argument that human beings are becoming the primary international legal persons and that even 'ordinary' international rights, and not only 'human' (or 'fundamental') rights, flow directly from international law, see Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (Cambridge University Press 2016).

[3] Eyal Benvenisti, 'The Influence of International Human Rights Law on the Israeli Legal System: Present and Future' (1994) 28 *Israel Law Review* 136.

[4] David Kretzmer, 'Fifty Years of Supreme Court Jurisprudence in Human Rights' (1999) 5 *Mishpat Umimshal* [*Law and Government in Israel*] 297, 335 (in Hebrew) (arguing that it is time to couple the two human rights revolutions into one, and rule that a norm is constitutionally valid only if it is compatible with both domestic constitutional law and international human rights law); Orna Ben-Naftali and Yuval Shany, 'Living in Denial: The Application of Human Rights in the Occupied Territories' (2003) 37 *Israel Law Review* 17; Yuval Shany, 'Social, Economic and Cultural Rights in International Law: What Use Can the Israeli Courts Make of Them' in Yoram Rabin and Yuval Shany (eds), *Economic, Social and Cultural Rights in Israel* (Ramot 2004) 297, 333–45 (in Hebrew); Daphne Barak-Erez, 'The International Law of Human Rights and Constitutional Law: A Case Study of an Expanding Dialogue' (2004) 2 *International Journal of Constitutional Law* 611. See also Ruth Lapidoth, 'International Law within the Israeli Legal System' (1990) 24 *Israel Law Review* 451; Moshe Hirsch (ed), *The Treaty-Making Power in Israel: A Critical Appraisal and Proposed Reform* (The Leonard Davis Institute of International Relations 2008) (in Hebrew); Yaffa Zilbershats, 'The Adoption of International Law into Israeli Law: The Real is Ideal' (1996) 25 *Israel Yearbook on Human Rights* 243.

[5] Benvenisti (n 3) 144.

[6] Beth A Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge University Press 2009) 296–306.

[7] ibid 304. For a discussion see n 72 and accompanying text.

https://doi.org/10.1017/S0021223717000164 Published online by Cambridge University Press

Convention[8] in reviewing the government's actions in the Occupied Territories, the UN human rights treaties are not legally binding domestically. They do not bind the legislature and do not serve as a basis for judicial review of legislation. The treaties are not even directly enforceable against the government.

The conventions are recognised as a possible source for the interpretation of the Israeli Bill of Rights – namely, the Basic Law: Human Dignity and Liberty – but they are not considered as a formal legal source that the Court is bound to address in interpreting the law. Importantly, this study reveals that the Court completely avoids admitting the existence of a conflict between Israeli constitutional law and international human rights law. It achieves this outcome by ignoring the latter when it might not support the Court's interpretation of the former. In addition to avoiding any critical engagement with international human rights law, even when the Court does refer to it to support its ruling, the reference is cursory. Typically, the Court merely quotes a treaty article, almost always disregarding precedents implementing the article under consideration and its interpretations by the relevant treaty body and other international and national tribunals. Thus, in terms of the scope of explicit reference to the conventions, the 1991 ratifications appear to be futile.

As indicated, Simmons, as well as others, have suggested that the human rights conventions do have an effect on the rulings of the Israeli Supreme Court. While it is hard to identify such influence, it may well exist. Indeed, this study identifies a shift in the scope of the Court's reference to international law. Before 1991, the Court referred to international law mostly to support decisions that the state action under consideration was lawful. Referring to international law was very rare when the Court found a state action to be unlawful. The seminal decisions in which the Court ruled that state actions were invalid completely disregarded international law.

This pattern changed following the ratification of the UN human rights treaties. While the Court continues to avoid acknowledging incompatibility between domestic law and international law and refers to the latter only to support its interpretation of Israeli constitutional law, the Court has started to quote international human rights law to justify decisions that a state action is unlawful. This shift may be the result of other reasons, such as a 'radiation' of the Court's relatively extensive use of international humanitarian law in invalidating state actions taken in the Occupied Territories. However, it possibly also reflects an enhanced domestic popular legitimacy of referring to international human rights law as a point of reference in human rights adjudication following ratification of the treaties. This shift may also be attributed to other indirect effects of the ratification – among these, the informal but often effective scrutiny by the international legal community of the Court's decisions, which are more accessible through the reports that the state submits to the treaty bodies.

Isolating the actual influence of the ratification in terms of the scope of protection of the rights is difficult. At least in the case of Israel, it is impossible to determine the effect of the treaties merely by comparing the pre- and post-ratification periods, since several other key factors have changed along with this transition. Most importantly, as already mentioned, the ratification

[8] Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (entered into force 21 October 1950) 75 UNTS 287 (GC IV).

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coincided with the enactment of a domestic Bill of Rights – the Basic Law: Human Dignity and Liberty. The Court ruled that this norm binds the legislature, and hence its enactment is referred to as a 'Constitutional Revolution'. It is thus impossible to isolate the influence of the ratification, if it exists, on the Court's rulings over the last 25 years.

I suggest that international human rights law should have a greater role in domestic adjudication in Israel. The norms that limit the powers of the political branches are those that enjoy sufficient democratic legitimacy – a status that is gained through procedural, sociological and moral considerations. The norms of international human rights law, including treaties ratified by the government, do not satisfy this requirement, and it is thus justifiable that they are not considered as part of this type of norm in Israeli constitutional law. At the same time, international human rights law should guide the Court in scrutinising state actions, and thus also the legislature and the government in employing their powers. It is possible to legitimise a human rights infringement that is unjustified according to these norms, but such discrepancy requires explicit justification. The Court should be required to provide reasons to justify a result that is incompatible with international human rights by referring, for instance, to the state's particular constitutional identity, the binding language of the domestic constitutional text, or even stating its reasoned disagreement with the relevant norms of international human rights law, in exercising judicial discretion. However, the incompatibility may not be disguised. Rather, the Court, as well as the legislature and the government, should be required to engage critically with the norms set by the ratified UN human rights treaties. An incompatibility requires at least a second thought, and thus more through and detailed reasoning.

I thus agree with the idea, advocated by Benvenisti and by others, that international human rights law reflects 'common morality … and the common consent of the civilized world'.[9] Ratifying a human rights treaty enhances this status of international law. It does not make the treaty a constitutionally binding norm, but it does enhance the role of international law as an informal legal source, requiring the domestic players to act 'in its shadow'. Thus, the sceptical tone regarding the domestic status of international law notwithstanding, I suggest that international human rights law in general, and the government's ratification of the treaties in particular, are important elements in bolstering the domestic protection of human rights. The ratification holds potential for having a positive effect, but to further realise this potential the Court should take upon itself a requirement of explicit judicial engagement with the UN human rights treaties.

The remainder of this article is organised as follows. Section 2 presents an overview of the status of international law in general in Israeli law, referring to its applicability in Israel and in the Occupied Territories. The discussion aims to present the pre-ratification status of international law in the Israeli Supreme Court's adjudication, distinguishing between its stated status and its actual role in the Court's case law, and between its role in reviewing state actions in Israel and those taken in the Occupied Territories. The discussion then moves to focus on the domestic status of the UN human rights treaties. It first addresses, in Section 3, the background to, and the

[9] Benvenisti (n 3) 144.

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reasons for the 1991 decision to ratify the treaties, and then, in Section 4, analyses the explicit role of the conventions in the Supreme Court's jurisprudence in the quarter-century since ratification. The article concludes by suggesting, in Section 5, possible positive explanations of the prevailing doctrine, which gives international human rights law only a marginal role, and by providing a critical normative evaluation of the domestic status of this set of norms in Section 6.

2. The Status of International Law in Israeli Law: Myth and Reality

The jurisprudence of the Israeli Supreme Court refers fairly extensively to international law, although the formal domestic status of the various sources of international law is largely insignificant. The Court has repeatedly ruled that when an Act of the Knesset is incompatible with either treaty-based or customary international law, domestic legislation prevails. International law has some domestic legal implications, but these are limited mostly to governmental actions taken in the Occupied Territories. Within Israel, the role of international law is very limited, as incompatibility with international law is not recognised as an independent cause of action, and its role in interpreting legislation is insignificant.

This section will discuss these characteristics, focusing on two main aspects: the doctrine that international law is not legally binding domestically (Subsection 2.1); and the pattern of referring to international law exclusively to justify judicial decisions that find state actions lawful (2.2). The current section will present the approach that was formed before the human rights revolution. The consequences of the ratification of the five UN human rights conventions in 1991 and the enactment of the Basic Law: Human Dignity and Liberty in 1992 will be discussed in the subsequent section.

2.1. International Law is not Legally Binding Domestically

Unlike the constitutions of several countries, which include explicit provisions concerning the domestic status of international law,[10] the Israeli Basic Laws are silent on this issue, as well as regarding the power to ratify treaties. The two issues were left to judicial interpretation. The Court ruled that both treaty-based norms and customary international law do not bind the legislature, and that the former norms are not domestically enforceable.

The ruling on the status of treaties was based primarily on an axiomatic or formalistic approach. It assumed, rather than argued for, a dualistic model, according to which international law applies only in international relations, but not at the domestic level.[11] The main precedent

[10] For a comparative study on the status of international law in constitutions see Tom Ginsburg, Svitlana Chernykh and Zachary Elkins, 'Commitment and Diffusion: How and Why National Constitutions Incorporate International Law' [2008] *University of Illinois Law Review* 201.

[11] eg CrimA 5/51 *Steinberg v Attorney General* 1951 PD 5, 1061, para 5 (Justice Zussman): 'It is possible that international law obliges the state, but since this law does not deal with the relations between the state and its citizens but rather with its relations with other states, the obligation is imposed only for the benefit of other states, whereas the citizen is not bestowed with any right to demand fulfilling such obligation. Moreover, the courts of this country derive their judicial power from the laws of the state rather than from the international legal system.

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regarding the domestic status of treaties was established in *Samara* in 1956. The facts were unusual, and thus could have served to construct a doctrine recognising the status of a treaty at least in special circumstances. The Court's decision to avoid taking such a path demonstrates its strict position on this matter.

The case dealt with the property rights of certain Israeli Palestinians, classified as 'absentees'. Shortly after Israel's foundation, a law was enacted ordering the confiscation of lands the owners of which were present, even if only temporarily, in enemy territory after the beginning of the War of Independence on 29 November 1947.[12] In 1949, Israel and Jordan agreed (in the Rhodes General Armistice Agreement) that a certain area (known as 'the Triangle'), which until then was under Jordanian control and was thus classified as enemy territory, was to become part of the State of Israel and that the Palestinians living in this area were to become Israeli citizens. The parties were aware of the fact that according to Israeli law these persons were classified as 'absentees' and, in order to protect them, the treaty provided that their property rights would not be infringed as a result of the change in their status.

Israel nevertheless confiscated lands taken from these persons, based on their status as 'absentees'. Several landowners filed a petition based on the Rhodes Agreement, arguing against the confiscation. In rejecting their claim, the Court ruled that domestic legislation was not affected by the treaty. According to the relevant law, a person's status as 'absentee' was permanent and did not cease once this person became an Israeli citizen. Thus, the government was empowered to possess the land, notwithstanding the change in the legal status of the owners. The Court then explicitly ruled that a treaty is completely unenforceable in domestic courts and is thus powerless to confer rights upon individuals.[13]

The *Samara* decision, which dealt with a treaty provision that was designed explicitly to protect the interests of specific individuals, applies *a fortiori* to treaties that are of a more general nature, as is usually the case. Indeed, the Court has followed this position in subsequent cases. It has ruled that treaty provisions are normatively inferior to domestic legislation,[14] and in any case they are not enforceable domestically and do not limit the discretion of office holders in employing governmental powers.[15]

Thus, a person who is charged for violating the law of the state cannot find a defense in international law, as the courts rule on the relations between individuals and the state based exclusively on domestic laws' (in Hebrew).

[12] This norm was first established in Emergency Regulations, December 1948 (Israel). The Regulations were later replaced by the Absentees' Property Law, 1950 (Israel).

[13] CA 25/55 *The Custodian of the Property of Absentees v Samara* 1956 PD 10, 1825, 1829 (Justice Berenzon): '[T]he treaty is not a law that our courts will refer to or give an effect whatsoever. The rights that the treaty confers and the obligations it imposes are rights and duties of the state parties to the agreement … Such an agreement is not justiciable in domestic courts, unless enacted and became a law. … The persons affected by the treaty do not gain any right based on it'.

[14] eg CA 65/67 *Kurtz v Kirschen* 1967 PD 21(2) 20, para 5 (Justice Cohn): '[a treaty-based norm is not domestically binding] if it is in contradiction with a domestic law' (in Hebrew); CrimA 131/67 *Kamiar v State of Israel* 1968 PD 22(2) 85, 112 (Justice Landau): 'when domestic law contradicts a norm of international law, the Court is obliged to give preference to domestic law' (in Hebrew).

[15] eg HCJ 419/83 *Doron v Foreign Currency Commissioner* 1984 PD 38(2) 323, 333: 'treaty provisions … are not part of the law applicable in Israel, but norms that apply only in the international sphere' (in Hebrew); HCJ 7146/12 *Adam v The Knesset* ILDC 2078 (IL 2013), para 7 (Justice Arbel), http://elyon1.court.gov.il/files/

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As indicated, this doctrine was based primarily on a formalistic approach, which assumes the dualistic model.[16] More than a decade after the *Samara* decision, the Court addressed the institutional aspect of treaties. It ruled in *Kamiar* (1967) that while the Knesset is authorised to ratify (or, possibly, even de-ratify) a treaty, as long as the legislature is silent, as it had been thus far in these matters, the government is authorised to act on its own discretion in the area of signing and ratifying treaties.[17] The Court thus validated the practice, almost twenty years old at that time, of the government ratifying treaties without the legislature's approval.[18] It was only after establishing this doctrine that the Court started to justify its ruling regarding the domestic legal status of treaties on the ideal of democratic, mostly procedural, legitimacy. A notable example is the language used in the *Affo* (1988) decision:[19]

> Adoption of the viewpoint … according to which there is no need for Knesset legislation to assimilate into our law a rule of conventional public international law which finds expression in an international treaty joined by Israel … would, in fact, grant the government legislative power … [Thus, recognizing a treaty-based norm as domestically binding] is [un]desirable from the viewpoint of sound administration and the rule of law.

Thus, the ruling on the allocation of power to ratify treaties was not the basis of the position that treaty-based international law is not binding domestically. The correlation was in fact reversed. At first, the Court assumed the dualistic model, following the common law tradition, and ruled that given this model treaties are not binding at the domestic level. Based on this assumption it then recognised the power of the government to ratify treaties without the need for legislative approval, but this doctrine of the separation of powers was then used to justify the dualistic

12/460/071/b24/12071460.b24.htm; AdminA 4204/13 *State of Israel v Solo* (27 July 2014), para 5 (Justice Hendel) (for the purpose of domestic administrative law, treaty provisions do not restrict the discretion of officer holders in implementing their power according to domestic legislation), http://elyon1.court.gov.il/files/13/040/042/z08/13042040.z08.htm; HCJ 2587/04 *Buchris v Tax Officer Hadera* (unpublished, 23 June 2005), para 14, http://elyon1.court.gov.il/files/04/870/025/A05/04025870.a05.htm. Accordingly, the Court ruled that the requirement to officially publish laws does not apply to treaties, as they are not legally binding domestically. See also CA 580/82 *Insurance Corporation of Ireland Ltd v State of Israel* 1987 PD 41(2) 309.

[16] *Steinberg v Attorney General* (n 11).

[17] According to Basic Law: The President of the State, 1964 (Israel), the President, whose powers are mostly ceremonial, is empowered to 'sign such conventions with foreign states as have been ratified by the Knesset' (art 11(a)(5)) (translated by the Knesset). One may interpret this provision as inferring that the power to ratify treaties is bestowed on the Knesset. However, in *Kamiar* (n 14) 113, the Court ruled that in the absence of explicit provisions on this matter in Basic Law: the Knesset and Basic Law: the Government, the above norm refers only to a subset (which is still empty) of the conventions that Israel signed which the Knesset chose to ratify. This norm does not determine the allocation of powers between the legislative and the executive branches. At the time of this ruling hundreds of treaties had already been ratified by the government, and the Court was thus bound by the custom that had formed.

[18] This doctrine is subject to two qualifications. First, the practice is that the government is required to inform the Knesset about its intent to ratify a treaty. Second, according to the probably binding constitutional convention, treaties that include a provision about disengagement from territories under Israeli control, such as the peace agreements with Egypt (1979) and Jordan (1994), are subject to the Knesset's approval: see, eg, Hirsch (n 4); Zilbershats (n 4).

[19] HCJ 785/87 *Affo v Commander of IDF Forces in the West Bank* 1988 PD 42(2) 1, para 6 (Justice Shamgar), http://elyon1.court.gov.il/files_eng/87/850/007/Z01/87007850.z01.htm.

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model on which it is based and the ruling that domestic legislation prevails over a ratified treaty, regardless of whether the legislation preceded the ratification or followed it. Accordingly, several scholars, who support the view that ratified treaties should be binding domestically as well as internationally, recommended giving the Knesset a formal role in the ratification process.[20] These suggestions were not adopted.

It is often argued that customary international law, as distinct from treaty-based law, is legally binding in Israel, but this statement is only partially accurate. Customary international law does not bind the legislature and, in the event of conflict, domestic legislation prevails over customary law, as in the case of treaty-based norms. This doctrine was first established in *Amsterdam* (1952) with regard to the power of the legislature to create a norm that applies extraterritorially, arguably in contradiction to customary law. The Court ruled that 'as long as the legislature clearly expressed its intention that the law will apply extraterritorially, the domestic court should rule accordingly … irrespective of the limitations imposed by the principle [of customary international law] of territorial sovereignty'.[21] The Court further implemented this doctrine in the famous *Eichmann* (1962) case regarding *ex post facto* penal legislation: '[W]here [there is a conflict between the provisions of municipal law and a rule of international law], it is the duty of the court to give preference to and apply the laws of the local legislature'.[22]

Formally, the distinctive element of customary international law is that, unlike treaty-based law, it provides a cause of action against the government. Indeed, in the early 1950s the Court was willing to recognise such a cause of action, but in all cases it rejected the claims on their merits. The seminal case in this respect is *Shimshon* (1950), which addressed the question whether the newly formed State of Israel is obliged by the activities of its predecessor, the British Mandate – in that case to reimburse customs duties unlawfully charged. The Court ruled that a possible source for imposing an obligation on the government to reimburse the petitioner for the unlawful charge is the finding that 'all civilized nations' have accepted such a norm and acted upon it, thus supporting the presumption that Israel implicitly accepted it too.[23] The Court found that no such generally accepted norm existed, and thus rejected the claim. In subsequent cases, the Court has formulated a relatively stringent method of deciding whether a norm enjoys the status of 'customary' international law. It has ruled that the relevant inquiry is not about the 'learned opinion of scholars' but rather what countries do, thus conducting primarily a comparative law analysis in search of international consensus.[24] Implementing this requirement has resulted in a very narrow set of norms that the Court has recognised as customary international law.

Over time, the Court developed both common law-based administrative law and a judge-made Bill of Rights and, as a result, the reliance on international law became largely superfluous. The

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[20] See, eg, Hirsch (n 4); Zilbershats (n 4).

[21] HCJ 279/51 *Amsterdam v Minister of Finance* 1952 PD 6, 945, 965 (Justice Agranat) (in Hebrew).

[22] CrimA 336/61 *Eichmann v Attorney General* 1962 PD 16, 2033, 2041, http://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Israel/Eichmann_Appeals_Judgement_29-5-1962.pdf.

[23] Motion 41/49 *Shimshon Ltd v Attorney General* 1950 PD 4, 143, 146 (Justice Dunkelblum).

[24] eg *Eichmann* (n 22) 2041.

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Court has recognised an extensive set of causes of action against administrative bodies, including the requirement to act reasonably and the duty to respect 'unwritten' human rights, which include equality, freedom of speech, freedom of religion and freedom of occupation. It derived these norms from the state's constitutional identity as a liberal democracy, referring to provisions of the Declaration of Independence, and to other informal sources.[25] The Court considered it unnecessary, and even undesirable in terms of democratic legitimacy, to refer to customary international law as a binding source to establish these rulings. It did not explicitly retract from the stated doctrine that unlike treaty-based law, customary international law is binding even without legislation to incorporate it. However, in practice, the Court does not follow this doctrine, and avoids addressing these sources of international law as legally binding. International law serves neither as a cause of action against the government nor as a decisive formal basis for the Court's rulings, but merely as a persuasive source of interpretation.[26]

A notable exception to this approach is Justice Cohn's concurring opinion in *American-European Beth-El Mission* (1967). The Court reviewed a governmental decision prohibiting the admission of non-Christian children to the Mission's kindergarten. All Justices agreed, based on the established doctrine, that an administrative action is invalid if it unjustifiably infringes the right to religious freedom. However, possibly because the case was considered shortly after the conclusion of the International Covenant on Civil and Political Rights (ICCPR),[27] Justice Cohn based his decision, which did not result in invalidating the relevant state action, on international human rights law, ruling that the ICCPR is in fact customary law. According to his view, 'religious freedom, as well as all other human rights set in the Universal Declaration of Human Rights, 1948, and the [ICCPR], are today accepted by all civilized nations, regardless of whether or not they are UN members or whether they ratified the 1966 Covenant'.[28] The Court did not follow this position. Justice Witkon, writing for the majority in that case, explicitly noted that one does not need to address the international 'documents' in order to rule that the government is required to respect religious freedom, as this norm forms part of Israel's judge-made Bill of Rights.[29] As indicated, it is the latter approach that prevailed.[30]

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[25] eg HCJ 73/53 *Kol Ha'am Company Ltd v Minister of the Interior* 1953 PD 7, 871, 884, http://elyon1.court.gov.il/files_eng/53/730/000/Z01/53000730.z01.htm.

[26] For a discussion on the domestic status of customary international law see also, eg, RCA 7092/94 *Her Majesty the Queen in Right of Canada v Edelson* 1997 PD 51(1) 625.

[27] International Covenant on Civil and Political Rights (entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

[28] HCJ 103/67 *American-European Beth-El Mission v Minister of Social Security* 1967 PD 21(2) 325, 333. Justice Cohn presented a similar view, again in a concurring opinion, regarding the Convention Relating to the Status of Stateless Persons ((entered into force 6 June 1960) 360 UNTS 117), in *Kurtz v Kirschen* (n 14) 26–27: 'The Israeli legislature did not find it necessary to give Article 12 [of the ICCPR] the status of binding law by enacting it. This is understandable: It is a provision that all nations agreed to, [and] it represents a norm of customary international law' (in Hebrew). See also HCJ 4542/02 *Kav LaOved Workers' Hotline v Government of Israel* 2006 PD 61(1) 346, http://versa.cardozo.yu.edu/opinions/kav-laoved-worker%E2%80%99s-hotline-v-government-israel.

[29] *American-European Beth-El Mission*, ibid 329.

[30] eg CA 2266/93 *X v Y* 1995 PD 49(1) 221, para 4 (Chief Justice Shamgar): 'The appellant [mother] argues that the [family court's] decision prohibiting her from providing the children religious education unjustifiably infringes the children's religious freedom … She bases her argument on Article 14 of the Convention on the Rights of the

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A similar development is evident in the context of using customary international law for recognising governmental powers. In the early days, the Court recognised such powers based on customary international law, ruling that this source is a valid alternative to explicit legislative authorisation, which is otherwise required.[31] A notable example of this approach can be seen in cases in which the Court has acknowledged the state's power to impose, under certain conditions, criminal liability extraterritorially[32] or retroactively.[33] More recently, the Court has abandoned this practice, preferring to rely on domestic law doctrines to resolve disputes over governmental powers rather than referring to customary international law.

An exception to this approach is the status of international law regarding state actions taken in the Occupied Territories. The Israeli Supreme Court has ruled that such actions are justiciable domestically, and in scrutinising them it routinely applies international humanitarian law (IHL).[34] The main reason for this exception is of a political nature. The Israeli government has distinguished between parts of the Occupied Territories in which it preferred to declare, largely for internal purposes, that its possession is intended to be permanent (East Jerusalem and the Golan Heights) (Area 1), and the rest of the territory (the Sinai Peninsula, and the Gaza Strip, from which Israel has already withdrawn, and the West Bank) (Area 2) in which it chose to present a policy of temporary possession. Despite the fact that in Area 2 Israel also built settlements in which Israeli citizens have lived, the distinction between the two areas is maintained by formally applying Israeli law only in East Jerusalem and the Golan Heights. In these areas, international law, including IHL, is not domestically binding. In contrast, in the other parts of the Occupied Territories – currently the West Bank – given the government's decision not to apply Israeli law and the Court's position that state actions there are justiciable, it was inevitable, in order to avoid a legal vacuum, to rule that IHL is legally binding domestically. The Court has ruled that Israeli (common law) administrative law also applies to state actions taken in the area, but this body of norms simply complements IHL in further restricting the powers of the government, rather than replaces or trumps IHL.[35] As discussed below, the applicability of human rights law, at both the domestic and international level, is still unresolved.

Child. … [The argument] that parents and children are entitled to religious freedom is valid regardless of the Convention. … Religious freedom is a fundamental principle of our legal system. It was set in the Declaration of Independence and in the Court's extensive rulings' (in Hebrew).

[31] eg *Kamiar* (n 14) 103–11, in which the decision that the government's ratification of a treaty is valid at the domestic level was based on the Court's finding that such a ratification is recognised as valid according to customary international law.

[32] An example is CrimA 174/54 *Stampfer v Attorney General* 1955 PD 5, para 4, in which the Court ruled that the government may impose criminal liability on activities taken on board ships sailing under its flag, based on customary international law.

[33] *Eichmann* (n 22) 2060: 'The crimes established in the Law of 1950, which we have grouped under the inclusive heading "Crimes against Humanity", must be seen today as acts that have always been forbidden by customary international law. … This being so, the enactment of the Law was not, from the point of view of international law, a legislative act that conflicted with the principle *nulla poena* or the operation of which was retroactive, but rather one by which the Knesset gave effect to international law and its objectives'.

[34] For a critical discussion see, eg, David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (SUNY Press 2002).

[35] eg Amichai Cohen, 'Administering the Territories: An Inquiry into the Application of International Humanitarian Law by the IDF in the Occupied Territories' (2005) 38 *Israel Law Review* 24; Kretzmer, ibid; Barak-Erez (n 4) 618–23.

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This approach regarding the Occupied Territories is subject to two qualifications. One aspect, which today is largely moot, is the distinction between customary IHL norms and treaty-based norms, namely the non-customary norms of the Fourth Geneva Convention and its relevant Protocols. Following the traditional distinction between these two bodies of international law, the Court used to state that only customary law is legally binding domestically.[36] However, this rhetoric notwithstanding, the Court has in fact referred to these treaty-based norms as binding the government when it acts in the Occupied Territories.[37] In numerous cases the Court has reviewed state actions in accordance with the Fourth Geneva Convention and its additional Protocols, and declared activities invalid whenever they were found to be incompatible with this body of norms, without explicitly acknowledging that these provisions have become customary law.[38]

The second qualification concerns the position where there is a conflict between Knesset legislation and IHL. As indicated, in general, Israeli legislation does not apply in the Occupied Territories. However, in a handful of cases, in which the government found it justifiable to act in the Occupied Territories in a way prohibited by IHL, it chose to circumvent IHL by initiating legislation to apply in the area. The Court has ruled this practice to be valid. The seminal precedent in this context is *Sajadiya* (1988). At issue was a policy of detaining Palestinian residents of the Occupied Territories within Israel, a practice that is arguably prohibited by Articles 49 and 78 of the Fourth Geneva Convention. The Court ruled that even if this interpretation of the Convention is correct, the above policy is valid as it is explicitly authorised by domestic legislation.[39] The Court disregarded the important distinction between the application of domestic legislation within Israel, where the legislature enjoys democratic legitimacy, and its application in occupied territory, the Palestinian residents of which are not eligible to vote in the Knesset that sets the norm. The Court ruled that the *Eichmann* precedent referred to above – that is, where there is a conflict between the provisions of domestic law and a rule of international law 'it is the duty of the court to give preference to and apply the laws of the local legislature'[40] – applies also in the context of the Occupied Territories.[41]

The Court further expanded this doctrine in *Affo* (1988). At issue here was the deportation of several persons from the Occupied Territories. The deportation was authorised by law

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[36] eg *Affo* (n 19) para 5; HCJ 253/88 *Sajadiya v Minister of Defense* 1988 PD 42(3) 801, para 6 (Justice Shamgar).
[37] Implementing this position did not require resolving the formal status of the Geneva Convention, given the Israeli government's statement that it will de facto, without recognising the treaty to be domestically binding, comply with its 'humanitarian provisions': Meir Shamgar, 'The Observance of International Law in the Administered Territories' (1971) 1 *Israel Yearbook on Human Rights* 262. See also, eg, HCJ 769/02 *The Public Committee against Torture in Israel v The Government of Israel* 2006 PD 62(1) 507, para 20, http://elyon1.court.gov.il/files_eng/02/690/007/A34/02007690.a34.htm; HCJ 8091/14 *Center for the Defense of the Individual v Minister of Defense* (31 December 2014), http://elyon1.court.gov.il/files/14/910/080/t03/14080910.t03.htm.
[38] eg HCJ 3799/02 *Adalah, The Legal Center for Arab Minority Rights in Israel v GOC Central Command* 2005 PD 60(3) 67, http://elyon1.court.gov.il/files_eng/02/990/037/A32/02037990.a32.htm; HCJ 7015/02 *Ajuri v IDF Commander in the West Bank* 2002 PD 56(6) 352, http://elyon1.court.gov.il/files_eng/02/150/070/A15/02070150.a15.htm.
[39] *Sajadiya* (n 36) 812–16.
[40] *Eichmann* (n 22) 2041.
[41] *Sajadiya* (n 36) 815–16.

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(Regulation 112 of the Defence (Emergency) Regulations, 1945) and the petitioners argued that since this law is incompatible with the absolute prohibition on the deportation of 'protected persons' contained in Article 49 of the Fourth Geneva Convention, ratified by Israel, the law should be declared invalid. The Court rejected this argument on its merits, interpreting Article 49 as permitting deportation of individuals when employing this measure is absolutely necessary for security reasons, and also addressing the more general issue of the constitutional status of the Convention.

The Court could have distinguished its precedents on this matter, as the law under consideration was not enacted by the Knesset: it was enacted by the British Mandate in Palestine, then implemented by Jordan, the sovereign of the area from 1948 to 1967. The binding status of the Defence (Emergency) Regulations was in fact a result of international law – Article 43 of the 1907 Hague Convention Respecting the Laws and Customs of War on Land,[42] which requires the occupying state to respect 'unless absolutely prevented, the laws in force in the [occupied] country'. The conflict was thus between two international law norms – Article 49 of the Fourth Geneva Convention on the one hand, and Article 43 of the Hague Convention on the other – a conflict that could have been resolved regardless of the domestic status, in Israel, of the Fourth Geneva Convention. However, the Court preferred to follow its aforementioned strict approach. It treated Regulation 112 as if it were domestic legislation enacted by the Knesset, notwithstanding the fact that this same norm, as far as its application within Israel is concerned, was in fact annulled by the Knesset back in 1979 and remained in force in the Occupied Territories only as a result of Article 43 of the Hague Convention. The Court ruled that giving preference to the Geneva Convention over domestic legislation is undesirable 'from the viewpoint of sound administration and the rule of law'.[43]

To summarise, subject to the important exception of the law applicable to state actions in the Occupied Territories, international law is not binding domestically according to Israeli law. With regard to treaty-based norms, this doctrine is both as stated and that which applies de facto, employing a dualistic model, according to which Israel's international obligations are not enforceable at the domestic level. As for customary international law, the Court has ruled that in the case of a conflict between that and domestic legislation, the latter prevails and, while in other cases, customary international is binding in theory, this is not so in practice.

2.2. The Judicial Practice of Referring to International Law

The Court's approach – that violating international law is not a cause of action and thus may not serve as a basis for invalidating a state action – is often followed by a detailed evaluation of the relevant state action according to international law. The Court has insisted on demonstrating that

[42] Hague Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land (entered into force 26 January 1910) *Martens Nouveau Recueil* (ser 3) 461.

[43] *Affo* (n 19) 39. See also HCJ 1661/05 *Gaza Coast Local Council v The Knesset* 2005 PD 59(2) 481, para 55; HCJ 256/01 *Rabah v Jerusalem Municipal Court* 2002 PD 56(2) 930, para 6.

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the result obtained by implementing Israeli law does not contradict international law, despite its ruling that this set of norms is not legally binding. Thus, for example, in *Eichmann*, immediately after stating that international law is irrelevant since the domestic law is explicit and that it prevails even if it is in conflict with international law, the Court continued with a detailed analysis of international law to demonstrate that, in fact, such a conflict did not exist.[44] This choice reflects the Court's particular interest in obtaining legitimacy from the international community in important cases, of which the trial of Eichmann is a prominent example.

The formal justification for the Court's tendency to address both treaty-based and customary international law is the doctrine concerning the role of international law in statutory interpretation. The Court has ruled, following the well-known 'Charming Betsy' canon of interpretation,[45] that legislation should be interpreted to be in accordance with international law, as long as its express language does not bar such an interpretation. The Court established this canon of interpretation back in 1952 in *Amsterdam* in respect of customary international law,[46] and in 1956 in *Samara* in respect of treaty-based norms.[47] This canon has been cited frequently.[48]

However, a study of the Court's jurisprudence prior to 1991 reveals an interesting pattern. The Court referred to international law almost exclusively in order to *justify* a decision that the state action under consideration was *lawful*. Referring to international law, even based on the above canon of interpretation, was very rare when the Court found a state action to be unlawful. Examples of the first types of case are prevalent and include *Samara* as well as the *Eichmann* decision. Even Justice Cohn's concurring opinion in *American-European Beth-El Mission* (mentioned above) referred to international human rights law to justify validating the state action under consideration, rather than strike it down.[49] In contrast, the seminal decisions in which the Court has ruled state actions to be invalid completely disregarded international law.[50] The Court does not use standard 'avoidance techniques', such as the requirements of standing or non-justiciability, or narrowly interpreting international law to avoid conflict.[51] It has achieved this result through selective reference to international law. As discussed above, this pattern does not apply to decisions dealing with state actions taken in the Occupied Territories, in

[44] *Eichmann* (n 22) 2041–48.
[45] *Murray v The Charming Betsy* 6 US 64 (1804) 118: '[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights or to affect neutral commerce further than is warranted by the law of nations as understood in this country'.
[46] *Amsterdam* (n 21) 966.
[47] *Samara* (n 13) 1831.
[48] eg *Kamiar* (n 14) 113; *Kurtz* (n 14) 26; *Eichmann* (n 22) 2050; *Adam* (n 15) para 7 (Justice Arbel); CA 9656/08 *State of Israel v Saidi* ILDC 2101 (IL 2008) [2010], para 27 (Justice Hayut), http://elyon1.court.gov.il/files/08/560/096/v19/08096560.v19.htm; *Solo* (n 15) para 2 (Justice Hayut).
[49] *American-European Beth-El Mission* (n 28). For a similar approach – referring to treaty-based law to support the Court's ruling that the state action is valid – see, eg, CA 501/81 *Attorney General v X* 1982 PD 35(4) 430, 433.
[50] eg *Kol Ha'am* (n 25); HCJ 337/81 *Miterany v Minister of Transportation* 1983 PD 37(3) 337; HCJ 680/88 *Schnitzer v The Chief Military Censor* 1989 PD 42(4) 617, http://elyon1.court.gov.il/files_eng/88/800/006/Z01/88006800.z01.htm.
[51] eg Eyal Benvenisti, 'Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts' (1993) 4 *European Journal of International Law* 159.

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which international law is considered legally binding. Save for those rare cases in which it classified certain policies as non-justiciable (such as the legality of allocating public land for the establishment of Israeli settlements), the Court has addressed both customary and treaty-based international law in evaluating state actions, both when the governmental policy was found to be legally valid and to justify a declaration of unlawfulness.[52]

The above pattern, in the context of activities taken within Israel, of referring to international law largely to justify a judicial decision validating state actions but not to support a decision declaring them unlawful, is hard to explain. One may speculate that it had to do with the concern that international law did not have a sufficient level of popular legitimacy. Employing judicial review of state actions raises the anti-majoritarian concern, requiring the Court to rely on norms that enjoy a sufficient level of democratic legitimacy. As discussed below, from the 1990s the Court has quoted international law to justify not only decisions that a state action is valid, but also those that found them to be unlawful. The Court's extensive jurisprudence regarding activities taken in the Occupied Territories, which was based primarily on international law norms, may have contributed to this shift in the Court's approach. It may also be the result of the human rights revolution, including the ratification of five major UN human rights treaties, as most of the references to international law during this period are to these treaties.

3. The Ratification of the UN Human Rights Treaties

As indicated, the idea that the UN human rights covenants are customary international law, suggested by Justice Cohn in 1967, was not adopted by the Court.[53] Other than a brief, meaningless reference to the International Covenant on Economic, Social and Cultural Rights (ICESCR) in a single case,[54] the Court did not even mention, let alone rely on any of the human rights covenants before ratification.

In 1991, the Israeli government ratified five of the major UN human rights covenants. Israel had signed the treaties shortly after they were open for signature – three of them were signed back in 1966 (namely the ICCPR, the ICESCR, and the Convention on the Elimination of All Forms

[52] See, eg, the cases cited in n 38.

[53] In one case, Justice Levy left this possibility undecided: *Kav LaOved* (n 28) paras 35–37. Justice Levy noted that the International Covenant on Economic, Social and Cultural Rights ((entered into force 3 January 1976) 993 UNTS 3) (ICESCR) and the ICCPR (n 27) 'have not been adopted in Israeli internal law by means of legislation. Prima facie, therefore, they do not create any obligation in this sphere. But it is possible that obligations in these conventions have taken on a customary character … and that they therefore constitute "a part of Israeli law, subject to any Israeli legislation that stipulates a conflicting provision". … But since the petitioners did not focus their arguments on international law … we shall not make any firm determination on this issue … Whatever the position is, everyone agrees that by virtue of the "presumption of conformity" of Israeli internal law to the provisions of international law, we are required to interpret legislation – like a power given to a government authority – in a manner that is consistent with the provisions of international law'. See also HCJ 3239/02 *Marab v IDF Commander in the West Bank* 2003 PD 57(2) 349, para 27, http://elyon1.court.gov.il/files_eng/02/390/032/A04/02032390.a04.htm.

[54] CA 593/81 *Ashdod Cars Factory Ltd v Chizik* 1987 PD 41(3) 169, paras 18–19 (mentioning that the right to strike is recognised by the ICESCR, as well as by other international treaties and domestic constitutions).

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of Racial Discrimination (CERD)). However, with the exception of the CERD, which Israel ratified in 1979, the other five covenants (the ICCPR, the ICESCR, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Rights of the Child (CRC), and the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)) were left not ratified for years – until 1991 (an additional covenant, the Convention on the Rights of Persons with Disabilities (CRPD), was ratified in 2012).[55] The government did not initiate a process of 'transformation' of the treaties – i.e. incorporating them into domestic law through legislation – other than a handful of laws to implement specific elements of some of the ratified treaties.[56]

The experience gained in the pre-ratification period could indicate that ratification would not have a substantial effect on domestic law. The single UN human rights treaty that Israel did ratify during this period (the CERD, in 1979) left literally no traces in the Court's jurisprudence until 1991,[57] and did not induce any meaningful 'mobilisation' strategy. The prevailing position before ratification was that the government's duty to respect human rights was based on Israel's constitutional identity as a liberal democracy. The Court assumed that employing judicial review of administrative actions based on a judge-made Bill of Rights would gain a sufficient level of democratic legitimacy, and that the human rights treaties would be superfluous in this respect.[58] As for restraining the legislature, the prevailing approach was that only a written Constitution could provide the required democratic legitimacy, a requirement that the treaties failed to

[55] ICCPR (n 27); ICESCR (n 53); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (entered into force 26 June 1987) 1465 UNTS 85 (CAT); International Convention on the Elimination of All Forms of Racial Discrimination (entered into force 4 January 1969) 660 UNTS 195 (CERD); Convention on the Elimination of All Forms of Discrimination Against Women (entered into force 3 September 1981) 1249 UNTS 13 (CEDAW); Convention on the Rights of the Child (entered into force 2 September 1990) 1577 UNTS 3 (CRC); Convention on the Rights of Persons with Disabilities, UNGA Res 61/106 (2007), 24 January 2007, UN Doc A/RES/61/106.

In addition, during the 1950s Israel ratified other conventions, which in parts concerned human rights: Convention on the Prevention of the Crime of Genocide (entered into force 12 January 1951) 78 UNTS 277 (ratified by Israel in 1950); Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (entered into force 21 October 1950) 75 UNTS 31, Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (entered into force 21 October 1950) 75 UNTS 85, Geneva Convention (III) relative to the Treatment of Prisoners of War (entered into force 21 October 1950) 75 UNTS 135, GC IV (n 8) (all ratified by Israel in 1951); Convention relating to the Status of Refugees (entered into force 22 April 1954) 189 UNTS 137 (ratified by Israel in 1954); Convention on the Political Rights of Women, UNGA Res 640 (1952), 20 December 1952, UN Doc A/RES/640 (1952) (entered into force in 1954); Convention to Suppress the Slave Trade and Slavery (entered into force 9 March 1927) 60 LNTS 235 (Slavery Convention) (ratified by Israel in 1955); Convention on the Nationality of Married Women (entered into force 11 August 1958) 309 UNTS 65 (ratified by Israel in 1957); Convention relating to the Status of Stateless Persons (n 28) (ratified in 1960).

[56] Among these, amendments to several laws relating to children, following ratification of the CRC (for instance, Amendment No 14 (2009) to the Youth Law (Judging, Punishment and Treatment Methods) (2008)). See Amichai Cohen, Tal Filberg and Yuval Shany, 'The Effect of International Human Rights Law on the Legislation in Israel' 9 *Hukim* (forthcoming) (in Hebrew).

[57] The Court has mentioned the CERD only twice, in both cases very briefly, in support of the argument that fighting incitement to racism is important: ElecA 1/88 *Neiman v Chairman of the Central Election Committee* 1988 PD 42(4) 177, para 12; HCJ 399/85 *Kahana v Israel Broadcasting Authority* 1987 PD 41(3) 255, para 28.

[58] eg *American-European Beth-El Mission* (n 28) 329; *X v Y* (n 30).

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produce. Indeed, the covenants themselves typically refer to the duty of states 'to take the necessary steps, in accordance with its constitutional processes … to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant'.[59] According to Israeli constitutional law, ratification itself is insufficient for that purpose. Moreover, Israel has not joined the optional dispute resolution mechanism set out in some of the treaties (such as Article 41 of the ICCPR and the two Optional Protocols), thus also making this path of the treaties' potential domestic influence unavailable.

Notwithstanding these factors, ratification of the treaties could have bolstered the scope of the Court's protection of human rights along three paths, the first of which is by amending the doctrine that ratified treaties do not bind the legislature. This outcome could have been based on the notion that human rights covenants are exceptional, as they are directed primarily at the domestic level. These treaties typically require the parties 'to ensure that any person whose rights or freedoms … are violated, shall have an effective remedy; … and to develop the possibilities of judicial remedy'.[60] Second, the democratic legitimacy of judicially enforcing the duty of the executive branch to respect human rights could have been enhanced, based on both the government's ratification of the treaties and the canon of interpretation that legislation should be interpreted, as long as its express language does not bar such an interpretation, to be in accordance with international law. Third, as suggested by Simmons, the ratification could have 'mobilised' agents, both within and outside government, to achieve greater compliance by the state with the duty to respect human rights.[61]

Indeed, one cannot rule out the possibility that the 'mass' ratification of the five treaties in 1991, in conjunction with the earlier ratification of a sixth treaty, could have led the Court to change course. The idea of restraining the legislature and employing judicial review of legislation has gained growing popularity around the world following the emergence of the new democracies in Eastern Europe. The Israeli Supreme Court's doctrinal shift in the mid-1980s towards greater judicial activism and an expanded review of the executive branch set the ground for a judicial decision declaring a 'Constitutional Revolution', shifting from a model of legislature supremacy to a regime in which the legislature too is restrained.[62] The ratification of the UN human rights covenants could have provided the formal, even if not the substantial justification for such a paradigm shift. It is hard to rule this possibility out, since a very short time after ratification the Knesset provided the Court with the required document to make the paradigm shift.

Israel became internationally bound by the treaties in October 1991 (ICESCR) and January 1992 (ICCPR). Shortly afterwards, in March 1992, the enacted Bill of Rights – the Basic Law: Human Dignity and Liberty – came into force. It is this Basic Law that has revolutionised Israeli constitutional law, by strengthening judicial enforcement of the duty of the executive

[59] ICCPR (n 27) art 2(2).
[60] ibid art 2(3)(a)–(b).
[61] Simmons (n 6) 125–55.
[62] cf Joseph HH Weiler and Doreen Lustig, 'A Good Place in the Middle: The Israeli Constitutional Revolution from a Global and Comparative Perspective' (2016) 38 *Iyuney Mishpat* [*Tel Aviv University Law Review*] 419 (in Hebrew).

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branch to respect human rights and employing judicial review of legislation, thus leaving the ratified treaties in the shadow.

The legislative history does not support the hypothesis that the enactment of the Basic Law: Human Dignity and Liberty was influenced by the ratification. If anything, the causation is reversed.[63] The process of legislating a Bill of Rights was (re)started in 1989 with the introduction of the proposed Basic Law: Human Rights by the then Justice Minister, Dan Meridor, who was also responsible for the government's decision to ratify the treaties. He initiated these two processes based on the view that Israel's commitment to respect human rights should be entrenched in formal decisions, but each of the two decisions aimed to achieve a different purpose. The enactment of the Basic Law was directed internally, to strengthen the protection of human rights in Israeli law, while the ratification of the treaties was directed externally, to express to the international community Israel's commitments in this area.

As such, the mass ratification was not considered to be related to the enactment, either as an alternative to a domestic Bill of Rights or as a means to induce the Knesset to enact such a law. In fact, in a highly unusual manner, because of the absence of consensus among the parties forming the coalition, the government avoided establishing a formal position regarding the legislation: it did not introduce Meridor's bill to the Knesset, and when a similar version of it was submitted as a 'private' bill, the government neither endorsed it nor objected to it. This disagreement over the proposed Basic Law did not continue to discussion of the ratification. Meridor obtained almost unanimous support in the cabinet for the proposal to ratify the five covenants, based on the consensus that the ratification was intended exclusively for external purposes and was not expected to produce domestic consequences. The government recognised that ratifying these treaties was important for the international expression of Israel's self-proclamation as a liberal democracy. The idea was that the state was already committed domestically to protect human rights (even though no constitutionally entrenched Bill of Rights existed at the time), and the ratification was neither aimed at constituting or reinforcing this commitment, nor was it needed for this purpose. The ratification was merely intended to express at the international level the currently existing practice and culture of respecting human rights.[64] Accordingly, there was practically no domestic public discourse either before or after the ratification.

Given this background, the assessment required is to query the effect that ratification has had on the Court's jurisprudence and the protection of human rights more generally. As indicated above, it is hard to isolate the effect of the ratification from that of other developments, most notably the enactment of the Basic Law: Human Dignity and Liberty and its enforcement on the legislature. At the same time, a study of the scope of the Court's references to the treaties following ratification may assist in evaluating the overall effect of the ratification on Israeli constitutional law.

[63] Eric A Posner, 'Some Skeptical Comments on Beth Simmons's Mobilizing for Human Rights' (2012) 44 *NYU Journal of International Law and Politics* 819, 827–28.
[64] Dan Meridor, interview with the author, March 2017.

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4. The Explicit Reference to the Ratified Human Rights Treaties in the Supreme Court Jurisprudence

An inquiry into references in the Supreme Court's jurisprudence in the 25 years that have passed since the ratifications reveals no traces of any substantial effects of the UN human rights treaties. The potential role of the treaties in the Court's jurisprudence includes two main aspects: (i) their effect on the Court's 1995 decision that the Basic Laws are normatively superior to 'regular' legislation and thus bind the legislature; and (ii) the effect of the treaties on the implementation of this general principle in the use of judicial review of legislation and other state actions. In both respects, it is hard to identify any fulfilment of this potential.

In the 1995 *Bank Ha'Mizrahi* decision, the Supreme Court ruled that the Basic Law: Human Dignity and Liberty binds the legislature to respect human rights, and that the Court is authorised to employ judicial review of legislation to enforce the limitations imposed by the Basic Law.[65] This decision resolved the uncertainty surrounding the normative status of the Basic Laws.[66] It might be the case that this ruling was influenced by developments in other democracies and the increasing role of international human rights law in other countries.[67] However, the judgment itself avoids any reference to the ratified human rights treaties. In this very long decision, the treaties are mentioned only once – in Chief Justice Barak's introduction to his opinion in which he distinguished between developments in the international arena, to which the ratification relates, and domestic law:[68]

> Israel is a constitutional democracy. We have now joined the community of democratic countries … with constitutional bills of rights. We have become part of the human rights revolution that characterizes the second half of the twentieth century. The lessons of the Second World War, and at their centre the Holocaust of the Jewish people, as well as the suppression of human rights in totalitarian states, have raised the issue of human rights to the top of the world agenda. International accords on human rights have been reached. Israel has acceded to them. International tribunals have been established to address issues of human rights. The new constitutions include extensive sections treating of human rights … Judicial review of the constitutionality of laws infringing human rights has become the norm in most countries. This revolution has not passed us by. We joined it in March 1992.

Chief Justice Barak, as well as the other Justices, referred exclusively to March 1992, the date of the enactment of the Basic Law. It is the Knesset's legislation, not the 1991 treaty ratifications, which enabled Israel to 'join' the human rights revolution.

In the 25 years since the ratifications, the Supreme Court has reviewed state actions, including legislation, based on human rights in hundreds of cases. In those cases the Court has relied

[65] CA 6821/93 *Bank Ha'Mizrahi Ltd v Migdal* 1995 PD 49(4) 221.
[66] For a discussion see, eg, Adam Shinar, 'Accidental Constitutionalism: The Political Foundations and Implications of Israeli Constitution Making' in Dennis Galligan and Mila Versteeg (eds), *The Social and Political Foundations of Constitutions* (Cambridge University Press 2012) 207.
[67] Weiler and Lustig (n 62) 477–80.
[68] *Bank Ha'Mizrahi* (n 65) 352 (in Hebrew).

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exclusively on the Basic Law: Human Dignity and Liberty (as well as other relevant Basic Laws) and the judge-made Bill of Rights as the binding sources of its decision. Occasionally the Court has mentioned the ratified human rights treaties, but has given them a very marginal role.

In terms of quantity, the number of decisions in which the Supreme Court has quoted one of the ratified UN human rights covenants is relatively low.[69] Out of approximately 1,000 decisions concerning human rights law in the period between 1991 and 2016, the Court mentioned any one of the treaties in less than 15 per cent of its judgments. Within these cases, the Court referred relatively extensively to three of the covenants: the ICCPR (mentioned in 62 decisions), the ICESCR (38) and the CRC (58).[70] The four other treaties were each mentioned in only a handful of cases: the CERD (7), the CAT (10), the CEDAW (2), and the CRPD (1).[71]

Moreover, the reference to the treaties is very brief, typically just mentioning that the human right under consideration is protected according to one (or more) of the treaties. A characteristic example is the famous *Public Committee Against Torture in Israel* (1999) case in which the Court ruled that the use of force during interrogation is prohibited. The Court briefly mentioned, in passing, that its conclusion that 'a reasonable investigation is necessarily one free of torture, free of cruel, inhuman treatment, and free of any degrading conduct whatsoever', based primarily on Israeli constitutional law, 'is in accord with international treaties, to which Israel is a signatory, which prohibit the use of torture'.[72] The Court did not even name the specific convention, the CAT, which established this absolute prohibition.

In other cases, the Court has named the relevant convention, but has almost always found it sufficient to quote the provision which recognises the relevant right without any detailed assessment of its prevailing interpretation and implementation by the relevant treaty body in determining the protected interests and the conditions in which an infringement can be justified. Only rarely does the Court refer to an authorised interpretation of the relevant article – decisions of

[69] Empirical studies of other legal systems in which the treaties are not binding reveal conflicting evidence: see, eg, Wayne Sandholtz, 'How Domestic Courts Use International Law' (2015) 38 *Fordham International Law Journal* 595; Melissa A Waters, 'Creeping Monism: The Judicial Trend toward Interpretive Incorporation of Human Rights Treaties' (2007) 107 *Columbia Law Review* 628. For an evaluation of the actual impact of ratifying the human rights treaties compare Simmons (n 6), which argues for a positive impact, with Posner (n 63), and Oona A Hathaway, 'Do Human Rights Treaties Make a Difference?' (2002) 111 *Yale Law Journal* 1935, which questions such an impact.

[70] Most references to the CRC were made in cases dealing with disputes over child custody and adoption. While the number of cases here is relatively high, the CRC was mentioned merely as one of a long list of sources supporting the well-established doctrine that the overarching principle in resolving these disputes is the child's best interest: see, eg, AddCA 7015/94 *Attorney General v X* 1995 PD 50(1) 48, paras 11 (Justice Dorner), 15 (Justice Cheshin). For a discussion see Tamar Morag, 'The Jurisprudence after Israel's Ratification of the Convention on the Rights of the Child: A New Era?' (2006) 22 *HaMishpat* [*College of Management Law Journal*] 21 (in Hebrew).

[71] The total number of decisions is lower than the sum of these numbers, as in several instances the Court quoted more than one treaty. The numbers refer to citations of the treaties in the Court's reasoning, excluding citations mentioned only in the summary of the parties' arguments but not in the Court's own reasoning. The count was carried out through the Nevo repository, which consists of all decisions of the Supreme Court during the relevant period.

[72] HCJ 5100/94 *Public Committee Against Torture in Israel v State of Israel* 1999 PD 53(4) 817, para 23 (Chief Justice Barak), http://elyon1.court.gov.il/files_eng/94/000/051/a09/94051000.a09.htm.

https://doi.org/10.1017/S0021223717000164 Published online by Cambridge University Press

the UN Human Rights Committee were mentioned by the Court in only 22 cases – and even then the discussion is extremely brief, covering no more than a sentence or two. Additionally, the treaties are almost always quoted along with sources which are clearly non-binding, such as national comparative law and international treaties to which Israel is not a party. It is telling that the number of quotes from the European Convention on Human Rights (mentioned in 100 cases), which Israel did not even sign, exceeds the number of references to each of the ratified UN human rights covenants. The same is true regarding the number of cases that refer to judgments of the European Court of Human Rights (63), which greatly surpasses the number of references to decisions of the UN Human Rights Committee (22).

As for the substantive role of the treaties in these decisions, the study reveals an interesting pattern. The reference to the ratified treaties serves exclusively to justify or legitimise the Court's decision. Whenever it has quoted one of the treaties, the Court has presented it as supporting, or at least permitting the result that the Court has reached based on the binding sources in domestic law. As indicated, on the one hand this aspect reflects a development in comparison with the pattern of citations of international law in the Court's jurisprudence in the pre-1991 era. During the earlier period, with the exception of judicial decisions scrutinising state actions undertaken in the Occupied Territories, the Court referred to international law only in order to support decisions that the state action under consideration was lawful. This pattern changed following ratification of the UN human rights treaties, as the Court now cites international human rights law also to justify decisions that a state action is unlawful.

However, the Court continues to avoid acknowledging instances of incompatibility between domestic law and international law, and refers to the latter only in support of its interpretation of Israeli constitutional law. I could not find a single case in which the Court found that the result of an analysis based on domestic constitutional law was in conflict with international human rights law. It seems as if the Court either has always ruled according to the norms dictated by international human rights law, notwithstanding that the reasons it gave address almost exclusively domestic sources, or it chose to ignore the treaties and their authoritative interpretation when these sources contradict the Court's decision.

The Court has not revisited its long-standing precedent that the ratified treaties are not domestically binding. It has often restated this doctrine, but given that a conflict between international human rights law and domestic constitutional law was never acknowledged, the doctrine itself was not in fact binding. As indicated, it did not prevent the Court from citing the treaties when they supported its decisions. This pattern has also enabled state lawyers to avoid reconsidering the status of the established doctrine relating to the domestic status of the UN human rights treaties. In this context the government has followed its long-standing approach regarding the status of the Geneva Convention in dealing with state actions in the Occupied Territories, according to which it complies with the treaty without recognising it as binding.[73] Similarly, the government often argues before the Court that while international human rights law is not

[73] See sources at n 37.

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binding domestically, it will not object to the Court's review of the relevant state action based not only on domestic constitutional law but also according to the UN human rights treaties.[74] Given the lack of critical engagement with this body of law, it is too early to tell whether the government will stand behind this policy if the Court starts to take international human rights law seriously.

In what follows, I illustrate these characteristics of the Court's approach regarding international human rights law by discussing three specific fields: (i) judicial review of the positive obligation to protect social rights; (ii) the judgments that have considered the so-called 'anti-infiltration' law regarding the status of asylum seekers; and (iii) the applicability of the UN human rights covenants in the Occupied Territories.

4.1. The Positive Obligation to Protect Social Rights

The field of social rights is distinctive in the jurisprudence of the Israeli Supreme Court. Before the enactment of the Basic Law: Human Dignity and Liberty, the Court had developed a fairly extensive level of protection of civil and political rights (although based on negative obligations), but had avoided recognition of a positive obligation to protect social rights, such as rights to social security, housing, healthcare and education. Consequently, in the decade following the Constitutional Revolution, when the doctrine of positive obligation to protect social rights was still underdeveloped in Israeli constitutional law, the Court referred relatively extensively to international human rights law, mainly to the ICESCR and the CRC. Yet, in this field also the Court followed its general pattern of referring to international law to legitimise its decisions, and completely avoided any recognition of a conflict between international and domestic law. In particular, the Court referred to the UN human rights treaties in resolving disputes concerned with the protection of social rights only when these norms were in accordance with its decision, both in ruling that the government did not violate its duties and in finding a breach of a positive obligation to protect a social right. In contrast, when the Court chose not to follow the norms contained in the ICESCR and the CRC, reference to international law is completely missing with the Court basing its decisions exclusively on domestic sources.

In one type of case, the Court quoted international law to justify its decision not to require the government to positively protect a right. In *Gilat Friends* (1996), for instance, the Court reviewed the government's decision not to finance early childcare out of public funds. It restated the position that the CRC is not domestically binding and went on to demonstrate that its ruling – that Israeli law does not recognise a positive obligation to finance early childcare out of public funds – is compatible with the CRC.[75] The Court employed a similar approach in *Louzon* (2008) in denying a petition to require the government to finance certain life-saving drugs and types of medical treatment out of public funds. It noted that the ICESCR permits 'tak[ing] budgetary

[74] eg, regarding the Convention relating to the Status of Refugees (n 55), *Saidi* (n 48) para 27; HCJ 5190/94 *Al-Tai v Minister of the Interior* 1995 PD 49(3) 843.
[75] HCJ 1554/95 *Gilat Friends v Minister of Education and Culture* 1996 PD 50(3) 2, para 38.

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constraints into consideration, and [is] cautious in determining the scope of this right and the degree of protection it is accorded'.[76]

In another type of decision, the Court referred to international law to support its rulings to enforce a positive obligation. A noted example here is *Yated* (2002), in which the Court referred to the CRC and ICESCR to support its decision to recognise a human right to education, noting that the reference was intended to substantiate statutory interpretation rather than employ judicial review of legislation.[77] The Court has followed this approach in subsequent cases involving the right to education[78] as well as in rulings recognising the right of access to drinking water,[79] the right of immigrant workers to change their domestic employer,[80] and others.[81] The most important decision in this line of cases is *Hassan* (2012), the only decision in which the Court struck down legislation that was found to violate the duty to positively protect the right to live in dignity. Here, too, the Court

[76] HCJ 3071/05 *Louzon v Government of Israel* 2008 PD 63(1) 1, para 11 (Chief Justice Beinisch), http://elyon1.court.gov.il/files_eng/05/710/030/n12/05030710.n12.htm.

[77] HCJ 2599/00 *Yated – Non-Profit Organization for Parents of Children with Down Syndrome v Ministry of Education* 2002 PD 56(5) 834, para 6 (Justice Dorner): 'Petitioners did not claim that the law should be annulled because it violates the right to human dignity. Their claim was rather that the law should be interpreted and applied in light of the right to education. Indeed, the basic right to education, as established by statute, our case law, and international law, is of independent validity, and has no necessary connection to the right to human dignity prescribed by the Basic Law: Human Dignity and Liberty', http://elyon1.court.gov.il/files_eng/00/990/025/L12/00025990.l12.htm.

[78] eg HCJ 5373/08 *Abu-Labda v Minister of Education* (unpublished, 6 February 2011), para 25 (Justice Procaccia): 'Israel has expressed its deep commitment to fulfilling the right to education by joining international declarations, and by the obligations it took upon itself in international covenants … [ICESCR and CRC]', http://elyon1.court.gov.il/files/08/730/053/r07/08053730.r07.htm (in Hebrew). See also ibid para 32 (Justice Procaccia) and para 4 (Justice Danziger). On referring to these treaties to support judicial protection of the right to education see also HCJ 4805/07 *The Center for Jewish Pluralism v Ministry of Education* 2008 PD 62(4) 571, para 52; HCJ 7974/04 *X v Minister of Health* (unpublished, 21 April 2005), para 13, http://elyon1.court.gov.il/files/04/740/079/10O/04079740.10o.htm. In another case the Court noted that Israeli law, which requires the government to publicly finance education in school until 12th grade, goes beyond the requirement set in the ICESCR: HCJ 7351/03 *Rishon LeZion Parents Association v Minister of Education, Culture and Sports* (unpublished, 18 July 2005), para 6 (Justice Beinisch), http://elyon1.court.gov.il/files/03/510/073/N11/03073510.n11.htm.

[79] CA 9535/06 *Abu-Masa'ad v Water Commissioner* (unpublished, 5 June 2011), paras 25–29 (Justice Procaccia), pointing out that the Court's interpretation that the human right to dignity, protected by the Basic Law, covers the right of access to drinking water, is compatible with the state's obligations under the ICESCR, http://elyon1.court.gov.il/files/06/350/095/r07/06095350.r07.htm.

[80] *Kav LaOved* (n 28) paras 35–37 (Justice Levy). The Court noted that 'it is possible that obligations in [the ICESCR and ICCPR] have taken on a customary character … and that they therefore constitute "a part of Israeli law, subject to any Israeli legislation that stipulates a conflicting provision"… Whatever the position is, everyone agrees that by virtue of the "presumption of conformity" of Israeli internal law to the provisions of international law, we are required to interpret legislation – like a power given to a government authority – in a manner that is consistent with the provisions of international law. … It follows that the power of the Minister of the Interior "to determine conditions for giving a visa or a residence permit" is limited and restricted, inter alia, by the right given to every person "to earn his living by means of work that he chooses, or obtains, freely", by the right given to every individual to enjoy "just and fair work conditions", [protected according to the ICESCR] and by the principle of non-discrimination between workers who are citizens and workers from foreign countries, which is enshrined in the Convention concerning Migration for Employment'.

[81] eg HCJ 1892/14 *Association for Civil Rights in Israel v Minister of Homeland Security* (unpublished, 13 June 2017), paras 49–52 (Vice-Chief Justice Rubinstein), regarding the minimum standard of living of prisoners, http://elyon1.court.gov.il/files/14/920/018/T28/14018920.T28.htm.

https://doi.org/10.1017/S0021223717000164 Published online by Cambridge University Press

cited the ICESCR to support its ruling that positive rights are part of human rights law, and that they can serve as the basis for judicial review of legislation.[82]

As noted, all of these decisions have two common features. First, the Court refers to international law only as a non-binding source that merely complements the binding sources at the domestic level: legislation and precedents. The reference is in addition to other comparative law sources, and is typically very concise. Second, the reference to international law is always presented as supporting the Court's decision either to invalidate a state action or sustain it, rather than contradict it. Clearly, the Court often requires the government to positively protect social rights without referring to international law, even though the ratified human rights treaties could have supported the result.[83] The important point to note is that in *all* the instances in which the Court's decision that the government has not violated its duty appears to be in contradiction with international human rights law, the Court opted to refrain altogether from referring to the ICESCR, the CRC or any other treaty.[84]

A prominent example is the 2005 case of *Commitment to Peace and Social Justice Society*, which dealt with the duty of the legislature to provide those in need with sufficient social benefits to ensure them a proper standard of living. In his later academic writing on this issue, Aharon Barak explicitly criticised the norms contained in the ICESCR in this respect and acknowledged that his (academic as well as judicial) position deviated from the position there.[85] However, in giving the judgment for the majority in the decision, Chief Justice Barak preferred to completely disregard the ICESCR and its authoritative interpretation.[86] It is telling that a reference to the covenant can be found in that case in the dissenting opinion of Justice Levy, who ruled that the cut in social benefits discussed in the case was unconstitutional.[87]

Another example is *Rubinstein* (2014), which addressed the validity of legislation that exempted Jewish ultra-orthodox publicly funded schools from teaching the otherwise mandatory core curriculum, thereby teaching exclusively religious studies. The dissenting view – which ruled that the law violates the state's positive obligation to ensure that all children receive adequate education and

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[82] HCJ 10662/04 *Hassan v National Insurance Institute* 2012 PD 65(1) 782, paras 39, 51 (Chief Justice Beinisch), http://elyon1.court.gov.il/files_eng/04/620/106/n44/04106620.n44.pdf.

[83] For instance, HCJ 6973/03 *Marciano v Minister of Finance* 2003 PD 58(2) 270 (regarding a positive obligation to provide free education); HCJ 5631/01 *Akim Israel v Minister of Social Security* 2003 PD 58(1) 936; HCJ 1437/02 *The Association for Civil Rights in Israel v Minister of Homeland Security* 2004 PD 58(2) 746 (enforcing the right of detainees to counselling).

[84] An additional, indirect manifestation of the same approach is the policy of translating Supreme Court decisions into English. Until recently, the decision was made by the Court and anecdotal evidence might then be produced which suggested that the translated cases are biased towards decisions that are compatible with international standards. Partially in response to this concern, an independent translation project (the Versa project) was launched by the Cardozo Law School, in which cases for translation are selected by a panel of academic scholars: Cardozo Law School, 'Versa', http://versa.cardozo.yu.edu.

[85] Aharon Barak, *Human Dignity: The Constitutional Right and Its Daughter Rights* (Nevo 2014) 610 (in Hebrew).

[86] HCJ 366/03 *Commitment to Peace and Social Justice Society v Minister of Finance* 2005 PD 60(3) 464, http://elyon1.court.gov.il/files_eng/03/660/003/a39/03003660.a39.htm.

[87] ibid para 1 (Justice Levy): 'The human right to live with dignity is not enshrined merely in our internal law. It is also recognized in international law, where it is defined as a right to 'a proper standard of living' [according to] Article 11(1) of the ICESCR, to which Israel became a party on 3 October 1991'.

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is thus invalid – referred extensively to both the ICESCR and the CRC.[88] The majority, in contrast, which found no such obligation, ignored international law altogether. In these and similar decisions,[89] the Court preferred not to address the contradiction between domestic and international law.

4.2. Detention of Asylum Seekers

The second field in which the same pattern is demonstrated is the trio of judgments reviewing the so-called anti-infiltration law. Following concerns of mass influx of persons fleeing into Israel from sub-Saharan countries, the Knesset enacted a law authorising the government to administratively detain any person who entered Israel illegally, regardless of whether that person is an asylum seeker or an economic immigrant. The Court first struck down the law in 2013 in *Adam*; in response, the legislature amended the law by reducing the period of detention from three years to one year, an amendment that was also declared invalid (*Eitan* (2014)). This decision led to a second amendment of the law, which for the third time was found to be unlawful (*Dasta* (2015)). This trio of decisions – which resulted in intense critique of the Court by several politicians, who questioned the very legitimacy of employing judicial review of legislation – resembles the above-mentioned pattern regarding the role of international human rights law.

In all three judgments, the Court's reasoning was based almost exclusively on Israeli constitutional law, primarily the Basic Law: Human Dignity and Liberty and its authoritative interpretation. The Court did refer to two of the UN human rights treaties that Israel had ratified – mainly the Convention Relating to the Status of Refugees, and the ICCPR – but the references were very brief and were used exclusively to justify the opinions of the majority that the domestic legislation unlawfully infringes human rights. The dissent, which presented the view that the administrative detention was lawful, completely avoided mentioning the treaties, let alone critically engaging with their provisions.[90] Other decisions dealing with the government's duties towards asylum seekers have followed a similar pattern.[91]

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[88] HCJ 3752/10 *Rubinstein v The Knesset* (unpublished, 17 September 2014), paras 29, 40, 79 (dissenting opinion of Justice Arbel), http://elyon1.court.gov.il/files/10/520/037/B19/10037520.B19.htm.

[89] eg HCJ 5108/04 *Abu-Guda v Minister of Education* 2004 PD 59(2) 241 (denying a petition to require the government to provide kindergartens in Bedouin 'unrecognised' villages).

[90] *Adam* (n 15) was resolved unanimously. Justice Arbel, writing for the Court, referred in some detail to both treaties (and also to precedents of the European Court of Justice and other comparative law sources) in support of the position that general deterrence is not a proper purpose for detaining an asylum seeker (para 7). In HCJ 7385/13 *Eitan, Immigration Policy to Israel v Government of Israel* ILDC 2233 (IL 2014) [2014]), Justice Vogleman, writing for the majority, referred to both treaties (paras 33–34, 37), suggesting that 'although the Treaty was incorporated into Israeli law, it is relevant in domestic law, given the canon of interpretation that domestic legislation is presumed to be compatible with the norms to which Israel is internationally obliged' (para 33) (in Hebrew). The dissent did not mention any of the sources of international human rights law. Finally, in HCJ 8665/14 *Dasta v The Knesset* (unpublished, 11 August 2015), http://elyon1.court.gov.il/files/14/650/086/C15/14086650.C15.htm, Chief Justice Naor, writing for the majority, quoted quite extensively from both treaties to justify the decision that several provisions of the new law are invalid (paras 44, 45, 82, 99), and also to support the position that other provisions are lawful (paras 68–71). Here, too, the dissent did not mention any of the international human rights law sources.

[91] eg *Saidi* (n 48) para 27; *Al-Tai* (n 74).

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4.3. APPLICATION OF THE UN HUMAN RIGHTS COVENANTS IN THE OCCUPIED TERRITORIES

A third area that illustrates the same pattern is the jurisprudence regarding the applicability of the UN human rights covenants in the Occupied Territories. As discussed above, the main sources of international law applied by the Court in this context are those that regulate belligerent occupation, namely IHL. Occasionally, the Court has addressed human rights treaties, but again it did so only when its ruling, based primarily on either Israeli law or the international law of belligerent occupation, was compatible with the Court's interpretation of human rights treaties.

A notable example is *Marab* (2002). In its decision the Court referred to the ICCPR in support of both its ruling that a certain norm set by the military commander was invalid (authorising an officer to detain a person for up to 18 days without a judicial order), and that another norm was lawful (denying detainees the right to consult a lawyer).[92] The Court did not rely exclusively on the ICCPR, but it did note that Article 9(3) – which requires that a detainee 'shall be brought promptly before a judge', to which the Court referred – 'is perceived as part of customary international law'.[93] Despite this conclusion, the Court did not treat this norm as decisive, but referred to additional sources, mainly Israeli public law and IHL, as well as to comparative law. It has adopted a similar approach in reviewing legislation authorising the detention of so-called 'unlawful combatants'.[94]

A second example in this context is a set of cases – the most important of which is *Mara'abe* (2005) – concerning the legality of the Separation Barrier constructed by Israel. Parts of the Barrier are located within the Occupied Territory rather than on the border, thus creating enclaves of Palestinian villages on the 'Israeli' side of the Barrier and infringing several rights of Palestinians.[95] Initially, the Court ruled, in *Beit Sourik* (2004), that the construction of the Barrier is permissible, subject to a case-by-case evaluation whether its specific route meets the requirement of proportionality, given the burden it imposes on Palestinians who are adversely affected by it. The Court referred exclusively to IHL and Israeli public law, disregarding international human rights law.[96]

Shortly after the *Beit Sourik* decision was published, the International Court of Justice (ICJ) addressed the legality of the Barrier in an Advisory Opinion. It held that the issue should be resolved not only according to IHL, but also based on the ICCPR and the ICESCR. The ICJ ruled that state parties are bound to comply with these treaties even when acting extraterritorially,

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[92] *Marab* (n 53) paras 27, 41–42.

[93] ibid para 26.

[94] Internment of Unlawful Combatants Law, 2002 (Israel); HCJ 6659/06 *X v State of Israel* 2008 PD 62(4) 329, para 41, http://elyon1.court.gov.il/Files_ENG/06/590/066/n04/06066590.n04.htm. See also HCJ 1890/03 *Bethlehem Municipality v State of Israel, Ministry of Defence* 2005 PD 59(4) 736, para 15, http://elyon1.court.gov.il/files_eng/03/900/018/N24/03018900.n24.htm, in which the Court referred to the ICCPR to justify its ruling regarding a measure that infringed freedom of movement in order to protect religious freedom.

[95] For a discussion see, eg, 'Special Double Issue: Domestic and International Judicial Review of the Construction of the Separation Barrier' (2008) 38 *Israel Law Review*.

[96] HCJ 2056/04 *Beit Sourik Village Council v Government of Israel* 2004 58(5) PD 807, http://elyon1.court.gov.il/files_eng/04/560/020/A28/04020560.a28.htm.

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including in occupied territories.[97] The ICJ found that the Barrier infringes several rights, that these infringements do not promote general welfare, and thus ruled that the construction of the Barrier is unlawful. The approach of the Israeli Supreme Court, of reviewing each segment of the Barrier separately, provided it with an opportunity to revisit the subject and respond directly to the ICJ decision in *Mara'abe* (2005). Again the Court did not rule on whether Israel's activities in the Occupied Territories were bound by the covenants, although on this occasion it did review the legality of the Barrier according to these treaties by assuming *arguendo* that they were applicable.[98] The *Mara'abe* decision is unique in the sense that given the ICJ decision, the Court was practically compelled to address international human rights law in a case in which domestic Israeli law, which found the construction of the Barrier permissible, seemed to be incompatible with a ratified UN human rights treaty. Here, too, the Court did not acknowledge a conflict between the two sets of norms, but held that the ICJ ruling was based on a partial evidentiary basis, and that given a more comprehensive assessment of the relevant facts, the construction of the Barrier was in fact permissible. According to the Court's position, the Barrier serves a legitimate purpose in accordance with the treaties, and it is the proportionality requirement that should be employed, on a segment-by-segment basis, finding only parts of the Barrier to be unlawful.[99] Thus, here too the Court avoided ruling whether the ratified covenants legally bind the government in its actions in the Occupied Territories.[100]

As in other fields, in this context the Court avoids addressing international human rights law altogether in those cases in which its ruling might be in conflict with this set of norms. A prominent example is the long line of decisions finding that Israel's policy of demolishing terrorists' houses, for the purpose of general deterrence, is lawful. The Court has based its rulings in this matter exclusively on Israeli constitutional law and IHL, avoiding entirely an evaluation of the matter in accordance with international human rights law.[101] It is highly probable that the policy

[97] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Rep 136, 102–13. For a similar approach see Ben-Naftali and Shany (n 4). In contrast, Aeyal Gross has argued that applying international human rights law might in fact result in less protection to persons subject to occupation: Aeyal Gross, 'Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation' (2007) 18 *European Journal of International Law* 1.

[98] HCJ 7957/04 *Mara'abe v Prime Minister of Israel* 2005 PD 60(2) 477, para 27, http://elyon1.court.gov.il/Files_ENG/04/570/079/A14/04079570.A14.pdf. Chief Justice Barak stated: 'Can the rights of the protected residents be anchored in the international conventions on human rights, the central of which is the [ICCPR], to which Israel is party? … The [ICJ] determined, in its Advisory Opinion, that these conventions apply in an area under belligerent occupation. When this question arose in the past in the Supreme Court, it was left open, and the Court was willing, without deciding the matter, to rely upon the international conventions. … We shall adopt a similar approach. … We shall assume – without deciding the matter – that the international conventions on human rights apply in the area'.

[99] ibid paras 69–72.

[100] For a similar approach – referring to international human rights law based on the assumption that it applies in the Occupied Territories, without resolving the matter – see, eg, HCJ 13/86 *Shahin v Commander of the IDF in Judea and Samaria* 1987 PD 41(1) 197, paras 2–10; HCJ 9961/03 *Center for the Defense of the Individual v Government of Israel* (unpublished, 5 April 2011), paras 21–22, http://elyon1.court.gov.il/files/03/610/099/n37/03099610.n37.htm.

[101] eg HCJ 6026/94 *Nazaal v IDF Commander in Judea and Samaria* 1994 PD 48(5) 338; HCJ 8084/02 *Abasi v GOC Home Front Command* 2003 PD 57(2) 55; *Center for the Defense of the Individual* (n 37).

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of house demolition is incompatible with the state's commitments under the ICCPR,[102] and the Court's refusal to address this issue is telling. Here, too, the exceptions are found in the dissenting opinions, which in some cases refer to international human rights law to support their position that this policy is prohibited.[103]

In summary, in the quarter-century since their ratification, the UN human rights treaties have played a marginal role, at least in terms of explicit reference to them, in the jurisprudence of the Israeli Supreme Court. The Court has stated repeatedly that the covenants are non-binding domestically (or has left the issue unresolved, in the context of activities taken in the Occupied Territories), and it seems that it has not taken seriously the canon of interpretation relating to the presumption of compatibility. The most prominent element is the Court's insistence on carefully avoiding the admission of a conflict between Israeli constitutional law and international human rights law by ignoring the latter completely when it might not support the Court's interpretation of the former. In addition to avoiding any critical engagement with international human rights law, even when the Court has referred to it in support of its ruling, the reference was typically very concise. It was often made in conjunction with quotes from comparative law sources, such as the jurisprudence of the European Court of Human Rights, thereby implicitly inferring that the ratified UN human rights treaties also are not binding.

5. POSSIBLE EXPLANATIONS FOR THE PREVAILING DOCTRINE

It is possible that the ratification of the treaties, along with the rise of globalisation trends in human rights law, has influenced the Court, contributing to the expansion in the protection of human rights. However, the study presented above of the Court's judgments and the legal sources to which it chose to refer does not provide direct evidence to support this claim. Moreover, even if the Court had been influenced by international human rights law, its decision not to present this body of laws as binding, or even persuasive, is telling.

Several studies have suggested that reference to international law by a domestic court may serve to empower it, providing the court with a wider set of legal tools to scrutinise state action.[104] Eyal Benvenisti and George Downs, for instance, have pointed out that national courts have managed to 'impede the dilution of the democratic controls of government … by [forging] coalitions across national boundaries … by adopting similar interpretation of

[102] For a discussion see, eg, Guy Harpaz, 'Being Unfaithful to One's Own Principles: The Israeli Supreme Court and House Demolitions in the Occupied Palestinian Territories' (2014) 47 *Israel Law Review* 401, 416–22.
[103] eg HCJ 7220/15 *Aliwa v Commander of the IDF in the West Bank* (unpublished, 1 December 2015), para. 7 (dissenting opinion of Justice Mazuz).
[104] eg Shany (n 1); Osnat Grady Schwartz, 'International Law and National Courts: Between Mutual Empowerment and Mutual Weakening' (2015) 23 *Cardozo Journal of International and Comparative Law* 587; Amichai Cohen, 'Domestic Courts and Sovereignty' in Tomer Broude and Yuval Shany (eds), *The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy and Subsidiarity* (Hart 2008) 265.

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domestic or international law, and through various means of informal communication'.[105] It has also been suggested, with specific reference to Israel, that there is a positive correlation between the scope of reference to international law and a judge's tendency towards judicial activism.[106] The present study does not support this hypothesis regarding references to the UN human rights treaties.

As a positive matter, it is possible that the Court does not recognise international human rights law as a set of norms that fulfils all aspects of a domestic legal system. Arguably, the absence of a tribunal that enjoys the status of authoritative interpreter of the treaties, including aspects of 'judicial supremacy', and mostly the absence of a systematic implementation of international human rights law by a court that bases its decisions on a solid factual basis, might raise concerns among the Justices that this body of law should not serve as a formal legal source. In this respect, the less-than-fully-realised function of the 'General Comments' institution promulgated by the UN Human Rights Committee may have contributed to the Court's reluctance to rely on the Committee's interpretations and precedents.[107] The Court, in its decision in *Mara'abe* (2005), made these concerns explicit regarding the ICJ's Advisory Opinion. Chief Justice Barak noted that the ICJ had reached incorrect legal conclusions as a result of the insufficient factual basis on which it ruled, since 'there was no adversarial process, whose purpose is to establish the factual basis through a choice between contradictory factual figures'.[108] Justice Cheshin added in this respect that while '[i]nternational law has undergone many welcome revolutionary changes in recent decades … the road is long before it will turn into a legal system of full standing'. He added, expressing a strong public sentiment in Israel, that if one 'takes away' the markers of a court that the ICJ presents, such as 'writ[ing] its opinion in the way of a court … and the judges sitting in judgment don the robes of a judge', what is left is no more than another 'political forum'.[109]

Additionally, one may speculate that the Court's preference to avoid systematically addressing international human rights law is based on its concern for international reaction to its

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[105] Eyal Benvenisti and George Downs, 'Democratizing Courts: How National and International Courts Promote Democracy in an Era of Global Governance' (2014) 46 *NYU Journal of International Law and Politics* 741, 743–44. See also Eyal Benvenisti, 'Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts' (2008) 102 *American Journal of International Law* 241; Johanna Kalb, 'The Judicial Role in New Democracies: A Strategic Account of Comparative Citation' (2013) 38 *Yale Journal of International Law* 423 (the prevalence of comparative citation among the courts in transitional democracies is explained by strategic behaviour that aims to legitimate the judiciary and protect the democratic processes); Wen-Chen Chang and Jiunn-Rong Yeh, 'Internationalization of Constitutional Law' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 1165.

[106] Osnat Grady Schwartz, 'International Law in Domestic Judges' Decisions: The Relationship Between Broad Role-Perception and a Strong Internationalist Inclination' (2011) 34 *Iyunei Mishpat* [*Tel Aviv University Law Review*] 475 (in Hebrew).

[107] For a discussion see Eckart Klein and David Kretzmer, 'The UN Human Rights Committee: The General Comments – The Evolution of an Autonomous Monitoring Instrument' (2015) 58 *German Yearbook of International Law* 189; see also Thomas Buergenthal, 'The UN Human Rights Committee' (2001) 5 *Max Planck Yearbook of United Nations Law* 341.

[108] *Mara'abe* (n 98) para 69.

[109] ibid para 2 (Justice Cheshin).

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decisions. Indeed, as indicated above, referring to international law may well empower national courts 'by adopting similar interpretation of domestic or international law, and through various means of informal communication';[110] but this same process may also have an opposite effect. While it may empower national courts that seek to increase the scope of their supervision of government action, at the same time it might deter other courts from explicitly engaging in this process of reciprocating with other tribunals and courts. Justifying a decision based on the Supreme Court's interpretation of the UN human rights treaties and international and national precedents that implement them inevitably exposes it to substantial international scrutiny.[111] A judicial decision that is based explicitly on a universal text such as a human rights treaty, which serves as a common point of reference, makes it much harder to justify a decision by relying on particular domestic characteristics and notions of constitutional identity. In contrast, a decision that is based on domestic constitutional law can often be justified based on the unique language of the prevailing norms, thus making the judiciary at least partially immune from international comparison and critique. Thus, from the perspective of the Court's international reputation, an explicit reference to a treaty might be undesirable. The experience gained in the context of the Israeli Supreme Court's extensive jurisprudence in interpreting the Geneva Convention, which is subject to quite extensive criticism by international law scholars, justifies this concern. Thus, even if certain Justices are interested in forming a global network of judges in support of innovative interpretation, it might be the case that the cost in terms of exposing the Court to international scrutiny is prohibitive.

A related argument is the Israeli Supreme Court's strong preference for maintaining wide discretion in determining the scope of judicial review; its jurisprudence reflects an attentiveness to political pressures and popular sentiment. The Court is a sophisticated player; it employs various legal techniques to adjust the scope of judicial review of state action to the anticipated political reaction to its rulings. This practice has enabled the Court to employ stricter judicial review at certain times and in relation to certain matters, while presenting considerable restraint in others, despite a rather hostile political environment and the absence of a complete written Constitution. It is therefore essential for the Court to preserve sufficient flexibility in terms of the applicable law to ensure at least formal consistency. This practice is illustrated by the Court's strong preference for doctrines in the form of open standards, all-things-considered types of analysis, over rules that are far less flexible.[112] The same explanation applies to the marginal role given to international law. In order to maintain its wide discretion, and adjust the scope of judicial scrutiny to

[110] Benvenisti and Downs (n 105) 744; see also Benvenisti (n 105).

[111] For a general discussion of this interaction see Amichai Cohen, 'Strategies of Domestic Justice: Domestic Courts' Response to International Criticism' in Yedidia Stern (ed), *My Justice, Your Justice: Inter-Cultural Justice* (Israel Democracy Institute 2010) 483 (in Hebrew).

[112] eg Barak Medina and Asor Watzman, 'The Constitutional Revolution or Human Rights Revolution? The Constitutional Basis of "Institutional" Norms' *Iyunei Mishpat* [*Tel Aviv University Law Review*] (forthcoming) (in Hebrew); Barak Medina, *Judicial Independence and the Choice between Rules and Standards in Human Rights Law* (manuscript); cf Aziz Z Huq and Jon D Michaels, 'The Cycles of Separation-of-Powers Jurisprudence' (2016) 126 *Yale Law Journal* 346.

https://doi.org/10.1017/S0021223717000164 Published online by Cambridge University Press

the changing institutional environment, it is essential for the Court to avoid explicitly relying on international human rights law, especially in its authoritative interpretations.[113]

It seems, however, at least in the Israeli case, that the main reason for the Court's position has to do with the expected reaction of political actors and society at large to the Court's explicit reliance on international human rights law. Consider, first, a decision that recognises the government's power to infringe a basic liberty in circumstances prohibited under international law. Presumably, it is much harder to justify such a decision, in terms of popular legitimacy, when the Court explicitly acknowledges that it contradicts international human rights law. A practice according to which referring to international human rights law is not essential, even when this body of law is in accordance with domestic constitutional law, helps to justify disregarding it when international law is in conflict with the Court's interpretation of Israeli law.

An even stronger deterrence factor exists when the Court finds an infringement to be unlawful. Human rights adjudication is often counter-majoritarian, invalidating actions that could have improved the public interest, thus imposing a burden on the majority. This counter-majoritarian perception of judicial review is quite substantial in Israel, which is a rifted society with only a partially written Constitution (in the form of twelve Basic Laws). It is essential for the Court to ensure a sufficiently high level of popular legitimacy. While employing judicial review based on the Basic Laws, which were enacted by the Knesset, enjoys considerable popular support, reliance on international law, which the legislature did not approve, is expected to be counter-productive from the perspective of securing popular legitimacy for judicial review. International law, and particularly international tribunals and organisations, enjoy a low level of trust among many in Israel. As indicated above, a popular perception is that international law is implemented in a biased, politicised way, promoting the interests of powerful actors.[114] This concern is particularly high given the perception shared by many in Israel about the exceptional nature of the case of Israel, both in terms of the state's unique constitutional identity as a Jewish and democratic state, and given the allegedly unusual security and social challenges that Israel faces. International law, and particularly its application by foreign tribunals and committees, is perceived by many in Israel as insufficiently sensitive to the uniqueness of the case of Israel. An explicit reference to international law, as a decisive or even required justification for a decision of the Israeli Supreme Court, might be perceived by many as a judicial coup. The greater the role of international law in the Court's reasoning, the higher the risk that the political actors and the general population would view it as evidence that domestic constitutional law does not justify the Court's decision.[115] As a result, explicit reliance on international law is

[113] cf Eyal Benvenisti, *Implications of Considerations of Security and Foreign Relations on the Application of Treaties in Israeli Law* (1992) 21 *Mishpatim* [*Hebrew University Law Review*] 221 (in Hebrew); Barak-Erez (n 4) 631.

[114] While bias is evident mostly in the UN Human Rights Council, many in Israel associate other bodies, such as the Human Rights Committee, with the prejudice of the Council, and discredit them all: see, eg, *Association for Civil Rights in Israel v Minister of Homeland Security* (n 81) para 50 (Vice-Chief Justice Rubinstein).

[115] For an argument that this concern was realised in India, see Lavanya Rajamani, 'International Law and the Constitutional Schema' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution* (Oxford University Press 2016) 143. Rajamani argues that the Supreme

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expected to jeopardise the Court's efforts to obtain sufficient popular legitimacy for judicial review.

These concerns may explain the Court's reluctance to refer explicitly to the treaties. In high-profile cases, such as the prohibition of the use of force when interrogating terrorist suspects, the Court is careful to base its decision almost exclusively on domestic sources, taking great efforts to avoid referring to international law sources even when they support its decision. This tendency also results in an even greater reluctance to engage critically with international law when it finds Israeli constitutional law incompatible with international law. Unless practically obliged to do so, as occurred following the ICJ's ruling regarding the Separation Barrier, the Court strongly prefers to avoid making such confrontation explicit.

6. CRITICAL EVALUATION

The de facto status of the UN human rights treaties in Israel is not substantially different from that of comparative law. The prevailing approach reflects a dichotomy, according to which a certain legal source is either formally binding, and is thus addressed in every case in which it is relevant, or not binding, making it merely persuasive. The UN human rights treaties are classified in the latter category, as a source that cannot be decisive in determining what the law is, and to which the Court refers at its own discretion. In my view, this approach is only partially justified. On one hand, the position that the UN human rights treaties are not binding at the domestic level is warranted, based on the requirement of democratic legitimacy. At the same time, I suggest that this set of norms should serve as an essential point of reference. The Court should engage critically with the norms set by international human rights law to justify its conclusion that domestic law is incompatible with treaty-based law.

6.1. UN HUMAN RIGHTS TREATIES SHOULD NOT BE DOMESTICALLY BINDING

The starting point is the ideal of democratic legitimacy. The normative justification for the binding power of the Constitution, and thus also the justification for judicial review, is based on three related elements – procedural, sociological, and moral – which together form democratic legitimacy.[116] Procedural legitimacy deals with the process by which the relevant text was determined. The authority of the constitutional text results from the recognition of the Constitution as 'law', and from the fact that it was created through successive acts of popular sovereignty. Sociological legitimacy is derived from acceptance of the Constitution by the current generation, a requirement being that the Constitution will both reflect and accommodate that generation's values. Finally, the Constitution is binding based on moral justifications for its provisions. In

Court's extensive internalisation of international law, developing 'domestic rights jurisprudence in dialogue with international law', is viewed by many as a process of 'wresting power from Parliament, … vulnerable … to the charge that it is democracy denying' (ibid 144).

[116] eg Jack Balkin, *Living Originalism* (Harvard University Press 2011) 64–73; Richard H Fallon Jr, 'Legitimacy and the Constitution' (2005) 118 *Harvard Law Review* 1787.

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constructing the framework of constitutional interpretation, as well as in identifying which sources should be legally binding, all three requirements should be satisfied.

The main purpose in adopting a formal constitution is not necessarily to entrench a certain – either a pre-existing or a new – social identity. On the contrary, it is often aimed at establishing a mechanism that will enable society to constantly re-evaluate and, when needed, to redefine its constitutional identity. The Constitution – this 'thing' that limits the powers of the current majority – is not a set of answers. Occasionally, most commonly in deeply divided societies, the quest for achieving consensus may be unattainable. In some cases, the Constitution may even serve to remove certain issues from the debate.[117] Mostly, however, a Constitution is formed to ensure an ongoing dialogue about its meaning through the interaction between the judiciary, the political branches and public opinion at large. Its text serves as a 'focal point' for ongoing debate and dialogue in which the members of society can participate.[118] Accordingly, a theory about what set of norms should enjoy constitutional status should be constructed in a way that will ensure that the members of the political entity known as 'the People' can take a meaningful part in the constitutional interpretation project. As suggested by Jack Balkin, '[a] Constitution is our law when we feel … that we have a stake in it'.[119] Similarly, Joseph Raz has suggested that the purpose of constitutionalising the prohibition on violating human rights is to enable 'a common culture to be formed round shared intermediate [moral] conclusions'.[120]

These considerations are very relevant to Israel. The Israeli society is a rifted society. It intensively debates central elements of its constitutional identity in issues regarding Jews and Arabs, about secular-liberals and religious people, and more. Consequently, Israel's Bill of Rights is characterised by a gradual, slow process of development over several decades. As indicated above, initially the Court imposed a legal duty to respect human rights only on the executive branch, focusing only on negative obligations. As long as the Knesset did not enact a norm explicitly recognising such a duty, in a form that was recognised as part of Israel's unique piecemeal constitutional process, the Court ruled that the legislature is not constitutionally bound by a judge-made Bill of Rights. The idea was, and still is, that the Constitution should be formed as a result of public discourse, and mainly that it would be constructed in a way that invites stakeholders to participate actively in its interpretation.[121] Only when the Knesset enacted the

[117] eg Ruth Gavison, 'What Belongs in a Constitution?' (2002) 13 *Constitutional Political Economy* 89; Sujit Choudry (ed), *Constitutional Design for Divided Societies: Integration or Accommodation?* (Oxford University Press 2008); Hanna Lerner, *Making Constitutions in Deeply Divided Societies* (Cambridge University Press 2011).
[118] cf Balkin (n 116) 97.
[119] ibid 62. Habermas, too, emphasised the idea that legitimation is an ongoing social process: Jürgen Habermas, *Communication and the Evolution of Society* (Thomas McCarthy tr, Beacon Press 1979) 178. For a discussion of legitimacy in the international sphere see, eg, Thomas M Franck, *The Power of Legitimacy among Nations* (Oxford University Press 1990).
[120] Joseph Raz, *The Morality of Freedom* (1986) 181; see also Alon Harel, *Why Law Matters* (Oxford University Press 2014) 13–48.
[121] The Court explicitly recognised the essential role of democratic legitimacy in HCJ 142/89 *LAOR Movement v Speaker of the Knesset* 1990 PD 44(3) 529, para 30 (Justice Barak): 'In principle, it is possible that a court in a democratic society would declare invalid a law that violates the fundamental principles of the system, even if these principles are not enumerated in an entrenched Constitution. … [However], according to our sociologically and

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Basic Law: Human Dignity and Liberty, after a long process of deliberation and a profuse set of compromises, did the Court recognise that Israel has a constitutional Bill of Rights.[122]

It was no coincidence that the Basic Law was formed as it was. It is not completely entrenched, and can thus be amended by a regular majority in the Knesset. The Basic Law contains very broad language, protecting primarily the right to 'human dignity' and employing the broad standard of proportionality. Most importantly, the Basic Law recognises the power of the political branches to infringe human rights not as 'necessary in *a* democratic society', as is the common perception in human rights treaties; rather, the Basic Law permits human rights infringements that are 'befitting the values of the State of Israel [as] a Jewish and democratic state'.[123] The Israeli Supreme Court's distinctively non-originalist method of constitutional interpretation but rather one of 'living constitutionalism' – following the lead of its former Chief Justice Aharon Barak[124] – reflects the ideals of political and popular engagement in the ongoing process of giving meaning to the Bill of Rights.

Accordingly, international human rights law does not enjoy a sufficient level of democratic legitimacy in Israel. One aspect is obvious: the human rights treaties were not ratified by the Knesset. As discussed above, it is the government who ratified the treaties, without the Knesset's approval. In fact, the government itself acted based on the presumption that ratification would not make the treaties domestically binding.[125] However, the treaties' democratic deficit is more fundamental than the procedural aspect of the ratification process. The main concern is that international human rights law is not 'our' law in the sense essential for a source to be considered as part of a constitution. Israeli society does not and often cannot participate actively in the process of interpreting the treaties by foreign tribunals and institutions. It is distinctively not 'our law'. The treaties do not reflect the specific foundations of the Israeli democracy. International human rights law, by contrast, is distinctively universal. Making precedents set by international bodies, addressing other societies, binding law in Israel contradicts the essence of the constitutional project and the ideal of democratic legitimacy. Thus, recognising the UN human rights treaties as binding might undermine the Court's delicate, and still debated recognition of the Basic Law as constitutionally binding.

Moreover, the benefit – in terms of providing a broader, more just protection of human rights – of making international human rights law nationally binding is questionable. Israel's Bill of Rights – both the enactment (the Basic Law: Human Dignity and Liberty) and its

legally accepted perception, the Court does not take for itself this power … We developed this position given the sociological elements of our democracy. … Given this popular perception, … it is improper for us to deviate from our legal and political tradition and recognize the Court's power to declare a law unconstitutional. … The prevailing popular convention is that such a principled decision [of awarding the Court the power to employ judicial review of legislation] should be made … by the people and their representatives' (in Hebrew).

[122] *Bank Ha'Mizrahi* (n 65). For a discussion see, eg, Shinar (n 66).

[123] Basic Law: Human Dignity and Liberty (1992), arts 8 and 1 (emphasis added).

[124] Aharon Barak, *The Judge in a Democracy* (Princeton University Press 2006).

[125] Accordingly, scholars who support giving a greater formal role to international human rights law in Israel call for a formal incorporation of the covenants, through legislation: eg Ruth Lapidoth, Orna Ben-Naftali and Yuval Shany, 'The Duty to Incorporate Human Rights Treaties into Israeli Law' (2004) 1 *Concord Research Center Position Paper* (in Hebrew).

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judge-made version – along with the tradition of an independent judiciary employing judicial review of legislation through an expansive interpretation of the Basic Law, already ensure significant protection of human rights in Israel.[126] The added benefit of relying on international human rights law is unlikely to justify the cost in terms of the potential erosion of the political and popular trust in the Court and in constitutionalism more generally, given the doubtful normative legitimacy of making the treaties domestically binding.

Several scholars – most notably Ruth Lapidoth,[127] Eyal Benvenisti,[128] and Yuval Shany[129] – have pointed out that the argument over lack of democratic legitimacy is relevant also to customary international law, which is nevertheless considered domestically binding. Thus, arguably, the debate surrounding democratic deficit should not be considered decisive in determining the national status of treaty-based law in general, and the ratified UN human rights covenants in particular. Benvenisti and Downs have even suggested that enhancing the domestic status of international law is in fact essential for mitigating the difficulties encountered by democracies nowadays, as 'democratic processes within states fail to take into account the preferences of all the relevant stakeholders'.[130] Moreover, it is also argued that bolstering the national status of international human rights law is required precisely in countries like Israel, in which there are threats to the Court's independence and there is thus a considerable risk that the Court might not stand firm in protecting core values of liberal democracy. In Benvenisti's words, greater domestic reliance on international human rights law may be essential for 'reclaiming democracy'.[131]

Using the above categorisation, the underlying idea of all these arguments is that moral legitimacy should trump the other two elements that form the requirement of democratic legitimacy. Arguably, the prospect that reliance on international human rights law will ensure that courts reach more just results, thereby providing better protection of human rights, is sufficient to justify classifying this body of law as binding at the domestic level. In fact, this argument is closely related to the idea suggested by Justice Cohn in two concurring opinions (mentioned earlier) that international human rights law is customary law and should thus be binding.[132]

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[126] eg Barak Medina, *Human Rights Law in Israel* (Sacher Institute for Legislative Research and Comparative Law 2016) (in Hebrew).
[127] Lapidoth (n 4).
[128] Benvenisti (n 3) 141–43.
[129] Shany (n 1); see also Barak-Erez (n 4) 614.
[130] Benvenisti and Downs (n 105) 742. This depiction is common among scholars in the field known as 'public choice theory': see, eg, Jerry L Mashaw, *Greed, Chaos, and Governance: Using Public Choice to Improve Public Law* (Yale University Press 1997) 15–29, 37–40; Norberto Bobbio, *The Future of Democracy: A Defence of the Rules of the Game* (Roger Griffin tr, Polity Press 1987) 1–24. For a critical evaluation of the literature, see Steven Croley, 'Interest Groups and Public Choice' in Daniel A Farber and Anne Joseph O'Connell (eds), *Research Handbook on Public Choice and Public Law* (Edward Elgar 2010) 49.
[131] Benvenisti (n 105). A similar argument has been offered to explain the decision of the new democracies in Eastern Europe to join the UN human rights treaties: see, eg, Andrew Moravcsik, 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe' (2000) 54 *International Organization* 217.
[132] See nn 28, 53 and accompanying text. See also Shany (n 4) 342–43; David F Klein, 'A Theory for the Application of Customary International Law of Human Rights by Domestic Courts' (1988) 13 *Yale Journal of International Law* 332, 337–42.

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I find these arguments only partially convincing. Consider, first, the argument that international human rights law is customary law. It is acceptable that the general duty to respect human rights, including the requirement to defend human rights infringements based on certain types of justification, should be considered customary international law. However, this kind of norm is practically meaningless. A general duty to respect and protect human rights is recognised nationally. In those contexts in which legislation is immune from judicial review (for instance, in Israel, legislation that was passed before the Basic Law was enacted in March 1992), classifying international human rights law as customary law would not change this result, as customary law also is normatively inferior to national legislation.[133] The important element is not the general duty to protect human rights but the more detailed content of the specific rights: which interests are protected by each right, which state actions are considered an infringement, and under what conditions can an infringement be justified? In this respect, it is obviously the case that there is no universal consensus. Legal systems differ in the rights that are enumerated in their Bills of Rights; in the private interests that the rights protect (for example, is incitement to racism or pornography protected speech);[134] in determining what types of state action are considered an infringement (for example, is there a positive obligation to protect rights,[135] whether it is only intentionally targeting the free exercise of religion that is considered to be an intervention or whether any undue burden constitutes one),[136] and so on. The fact that the same rights are enumerated in various legal systems[137] says very little about the types of state action that these rights limit. In fact, the entire field of comparative constitutional law is founded on the basic insight that human rights law differs across the various legal systems. Similarly, regional and international human rights tribunals employ a fairly wide 'margin of appreciation' and similar deference doctrines,[138] based again on the recognition that the scope of protection of rights is determined according to each state's specific values, referred to as its 'constitutional identity'.[139] There are

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[133] See nn 21–22 and accompanying text.

[134] eg Friedrich Kübler, 'How Much Freedom for Racist Speech? Transnational Aspects of a Conflict of Human Rights' (1998) 27 *Hofstra Law Review* 335; Gregory H Fox and Georg Nolte, 'Intolerant Democracies' (1995) 36 *Harvard International Law Journal* 1; Michel Rosenfeld, 'Hate Speech in Constitutional Jurisprudence: A Comparative Analysis' (2003) 24 *Cardozo Law Review* 1523; Robert A Kahn, 'Why Do Europeans Ban Hate Speech? A Debate between Karl Loewenstein and Robert Post' (2013) 41 *Hofstra Law Review* 545.

[135] eg Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press 2008).

[136] eg Anna Elisabetta Galeotti, *Toleration as Recognition* (Cambridge University Press 2002).

[137] eg Zachary Elkins, Tom Ginsburg and Beth Simmons, 'Getting to Rights: Treaty Ratification, Constitutional Convergence and Human Rights Practice' (2013) 54 *Harvard International Law Journal* 61.

[138] Regarding the ICJ see, eg, Yuval Shany, 'Toward a General Margin of Appreciation Doctrine' (2005) 16 *European Journal of International Law* 907; Yuval Shany, 'All Roads Lead to Strasbourg? Application of the Margin of Appreciation Doctrine by the European Court of Human Rights and the UN Human Rights Committee' *Journal of International Dispute Settlement* (forthcoming); Andrew Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (Oxford University Press 2012). For the role of this doctrine in the European Court of Human Rights (ECtHR) see, eg, ECtHR, *Handyside v United Kingdom*, App no 5493/72, 7 December 1976. Compare, for instance, the conflicting decisions in ECtHR, *S.A.S. v France*, App no. 43835/11, 1 July 2014 and ECtHR, *Lautsi v Italy*, App no 30814/06, 18 March 2011.

[139] eg Gary J Jacobsohn, *Constitutional Identity* (Harvard University Press 2010).

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specific areas in which international consensus has been formed – such as the prohibition on the use of torture in interrogation[140] – but these instances are identified through a detailed comparative law inquiry, and they are the exception rather than the general norm. The fact that a certain right is enumerated in an international human rights treaty may be instrumental in forming an international consensus, but it is not the case that this mere enumeration on its own makes the relevant norm – the scope of protection of a certain interest – universally accepted.

Accepting that international human rights, at least in most of its parts, is not customary international law is important not only for doctrinal purposes – that is, for rejecting the argument that it is binding at the domestic level – but also for questioning the more general premises about democratic legitimacy. The idea that, at least in the context of customary law, the requirements of procedural and sociological legitimacy can be ignored is debatable. One may infer these doubts from the accentuated reluctance of the Israeli Supreme Court to enforce customary law within Israel.[141] As discussed above, there is a clear distinction in the Court's jurisprudence in this respect between the law applicable in the Occupied Territories on the one hand – where the Court does require the government to obey the limitations imposed by customary law – and within Israel on the other. This practice can be explained by the concept of democratic legitimacy. In the Occupied Territories, it is indeed the case that procedural and sociological legitimacy is irrelevant, as those who are subject to state action – the Palestinian residents in the area – are ineligible to vote or participate more generally in the political discourse. Thus, moral legitimacy in enforcing customary law is sufficient to justify it. In contrast, within Israel, notwithstanding the criticism of Benvenisti and Downs about the failure of the democratic process to represent all relevant stakeholders, the lack of procedural and sociological legitimacy of customary international law should not be ignored. It is this deficiency that is probably the main reason for the Court's reluctance to implement de facto customary international law.

Moreover, the suggestion that since customary law is binding, the requirement of democratic legitimacy is superfluous, is unwarranted. One may ignore the requirements of procedural and sociological legitimacy in the context of customary law only since the underlying assumption is that there are no 'reasonable' disagreements regarding the relevant norm.[142] Even if not all members of society actually agree on the notion of human rights – or, for that matter, on the norm that one should not be tortured – regardless of the anticipated benefits of the use of this practice, it is the universal consensus that makes these disagreements normatively irrelevant. This essential element is missing in the context of the greater part of international human rights law. Benvenisti suggested that international human rights law should be domestically binding since 'human rights have a special status in a democratic society. They are the very foundation of the democratic system. The majority of the people is … incapable of denying human rights'.[143]

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[140] eg Restatement of the Law (Third) of Foreign Relations Law of the United States (1987), s 702.
[141] See nn 21–43 and accompanying text.
[142] eg Gillian K Hadfield and Stephen Macedo, 'Rational Reasonableness: Toward a Positive Theory of Public Reason' (2012) 6 *Law and Ethics of Human Rights* 7.
[143] Benvenisti (n 3) 144–45.

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However, as discussed above, international human rights law is not recognised as customary law precisely because of the recognition that disagreements on the scope and nature of the protection of human rights are reasonable. In fact, this body of law – again, not the general recognition of the duty to respect the rights enumerated in the treaties, but the details of this duty – is not recognised as customary law because of the importance of the requirements of procedural and sociological legitimacy. The fundamental aspect of constitutional human rights law is the participation of members of society in determining the actual content of such law. Otherwise, the argument that the 'special status' of human rights is sufficient to make international human rights law domestically enforceable, thus making the national Bill of Rights superfluous, is self-defeating: if it were true, international human rights law itself is equally superfluous. The reasons that generally deny the legal status of human rights if procedural and sociological legitimacy is missing apply when resolving the domestic status of international human rights law.[144]

I thus find the Court's dualistic approach justifiable. Given that the treaties were not adopted by the legislature and were not adapted to the country's specific constitutional identity, they should not be recognised as domestically binding, given the lack of a constitutional provision stating otherwise. At the same time, it does not follow that the ratified treaties should be regarded in the same way as comparative law, as a mere source of inspiration.

6.2. International Human Rights Law as a Benchmark

While lacking in terms of procedural and sociological legitimacy, the treaties enjoy substantial moral legitimacy. The concept of human rights has an important universal element. Norms set in the treaties form a benchmark – a standard reflecting common-sense morality. In resolving disputes about the permissibility of infringing human rights, addressing practices and judgments of other jurisdictions are expected to contribute to achieving greater compatibility between morality and state actions. Requiring the Court, as well as the legislature and the government, to refer to international human rights law in making decisions as a persuasive source and justify instances of incompatibility is an essential element of human rights protection.[145] In formal terms, this requirement is induced by applying to the Basic Law: Human Dignity and Liberty the canon of interpretation involving the presumption of compatibility with international human rights law.

[144] It should be noted that most scholars, including Benvenisti, do not argue for a constitutional status for the treaties, but only for 'the enforceability of treaty-based human rights against the government', recognising the power of the legislature to authorise the government to act in contradiction to the treaties (Benvenisti (n 3) 146). This suggestion is subject to the same concerns of the democratic deficit discussed above, as determining the content of the duty to protect human rights is subject to reasonable disagreement even when applied only to the government.

[145] Shany (n 1); Waters (n 69) (suggesting that international human rights law is incorporated through a variety of interpretive incorporation techniques); Weiler and Lustig (n 62). Benvenisti and Harel went a step further by calling for maintaining a 'persistent tension and conflict' between domestic and international human rights laws, arguing that intentionally avoiding a principled ranking of the two systems would better protect human rights: Eyal Benvenisti and Alon Harel, 'Embracing the Tension between National and International Human Rights Law: The Case for Discordant Parity' (2017) 15 *International Journal of Constitutional Law* 36.

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From the perspective of Israeli constitutional law, it is permissible to legislate or to judge in a way that is incompatible with international human rights law. The justification for such incompatibility may be based on reasons such as the state's particular constitutional identity, Israel's reservations to the treaties,[146] the binding language of the constitutional text, or even mere disagreement with the relevant norms of international human rights law, by exercising judicial discretion. Similarly, as in the *Mara'abe* judgment, the Court may deviate from a decision made by an international body after determining that the relevant facts are different from those assumed by that tribunal,[147] but the incompatibility should be acknowledged explicitly. A judicial decision should be subject to a requirement of justification whenever the outcome contradicts the prevailing interpretation of the treaty. Treaty-based norms should not be domestically binding, but at the same time should not be viewed as a mere source of inspiration.[148] The basis for the Court to take upon itself such a commitment is its expected contribution to the proper exercise of its discretion in interpreting the Israeli Basic Laws and implementing them in concrete cases.

International human rights law is best suited to address the challenge in using comparative law in domestic adjudication. On one hand, referring to foreign legal systems is essential in constitutional interpretation.[149] Addressing foreign precedents is important in a well-functioning democracy. Comparative law is an important source for implementing doctrines such as the minimal impairment requirement of the proportionality doctrine, which includes identifying whether alternative, less harmful measures exist to achieve a particular social interest. Primarily, the comparison with other legal systems is vital for identifying and critically evaluating the fundamental principles of a legal system and to ensure progressive development of human rights protection. The role of such a comparison is especially vital in legal systems that function less than optimally, which includes the Israeli system. Referring to a foreign legal system, even for the mere purpose of comparison, may well have an empowering element for domestic courts.[150] It enables them to locate Israeli constitutional law along a spectrum, by reference to prevailing norms in other democracies. This very act of explicit comparison is often sufficient to bolster

[146] The main reservations are the following: Israel made a reservation to art 4 of the ICCPR, referring to measures of arrest and detention required by the state of emergency, and to art 34, referring to the implementation of religious law in issues of marriage and divorce.
[147] See nn 108–109 and accompanying text.
[148] An example of a clause implementing this approach is s 39(1) of the Constitution of the Republic of South Africa, 1996: 'When interpreting the Bill of Rights, a court, tribunal or forum (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law'. Another example is art 51(c) of the Constitution of India, 1949, included in Part IV of the Constitution, which identifies the Directive Principles of State Policy, intended not to be enforceable by the court, which directs the state to 'endeavor to … foster respect for international law and treaty obligations'.
[149] eg Stephen Breyer, *The Court and the World: American Law and the New Global Realities* (Vintage 2015); Rosenfeld and Sajó (n 105); Vicki C Jackson, 'Constitutional Comparisons: Convergence, Resistance, Engagement' (2005) 119 *Harvard Law Review* 109. See also Jeremy Waldron, '*Partly Laws Common to All Mankind': Foreign Law in American Courts* (Yale University Press 2012); Eric A Posner and Cass R Sunstein, 'The Law of Other States' (2006) 59 *Stanford Law Review* 131.
[150] cf Benvenisti (n 105).

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the protection of human rights, and prevent deviation from fundamental values arising from instances of moral panic or populist pressure. On the other hand, the overarching problem of this method of utilising comparative law in constitutional adjudication is the absence of a systematic and sufficiently comprehensive methodology. The concern is that judges may employ a 'pick and choose' method, referring to certain legal systems but not to others as required to support their specific positions. Comparative constitutional law often suffers from the lack of 'focal points' of legal systems to which reference is universally accepted. It is also subject to biases such as the availability of certain legal systems but not others, as a result of language constraints, or the scope of familiarity of a certain judge with a particular legal system.

International human rights law serves as a preferable reference point, both to obtain the benefits of referring to a foreign legal system and to avoid the difficulties of this practice. International human rights law provides a natural 'focal point'. Referring to this body of law, which is formed around a shared text – the UN human rights treaties – also facilitates the conduct of national comparisons, given that other legal systems similarly address that body of law as a point of reference. Indeed, the lack of a nationally accountable judiciary, which implements international human rights law based on a fully articulated factual basis, creates some difficulties in relying on decisions of international tribunals and the UN Human Rights Committee. However, the central institutions that develop international human rights law are in fact national courts.[151] This ever-evolving body of international human rights law, with its multiple players of diverse types, is the preferable point of reference for domestic courts to consult, define themselves in comparison with, and consider revisiting their precedents and existing perceptions.

7. CONCLUDING REMARKS

It is hard to determine what was the actual effect of Israel's ratification of the UN human rights treaties. It is possible that the ratification did have an implicit and indirect positive effect. However, the Supreme Court's reluctance to rely explicitly on the treaties and its insistence on citing them only as a non-binding source, in the same way as foreign law, represent an important choice. This approach is based on the conclusion that, at least in the case of Israel, the treaties do not have the sufficient level of democratic legitimacy that is essential for recognising them as part of Israel's constitutional law. The enactment of the Basic Law: Human Dignity and Liberty, along with the Court's expansive interpretation of this Law, has made it practically unnecessary to classify the ratified treaties as binding at the domestic level.

At the same time, it is time for the Court to recognise the importance of meaningful engagement with international human rights law in conducting constitutional interpretation and resolving disputes. In a decision in 2000, Justice Beinisch noted[152] that:

[151] eg Benvenisti and Downs (n 105).
[152] CrimA 4596/98 *X v The State of Israel* PD 54(1) 2000 145, para 28, http://elyon1.court.gov.il/files_eng/98/960/045/N02/98045960.n02.htm.

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> in examining the normative aspect of a parent's behaviour to his child, [the Court] will take into account the current [global] legal attitude to the status and rights of the child. This is the case in many countries around the world, and it is also the case in Israel after the enactment of the Basic Law: Human Dignity and Liberty, and in the era after Israel became a signatory to the Convention on the Rights of the Child.

The time has come to implement this doctrine. The Court should take upon itself the commitment to engage critically with international human rights law in any decision that requires resolution of a dispute over the scope of protection of human rights.

Indeed, it may seem to be against the interests of the Court to note explicitly that a certain decision is incompatible with international human rights law. It might be read as if the judges are admitting they are complicit in the breach of Israel's international commitment in the relevant UN human rights treaty. However, this perspective is incorrect. First, the Court should be explicit in making the distinction between what, according to its interpretation, Israeli constitutional law says in a specific context, and what international law says on the same issue. By giving preference to the former, the Court does not become complicit in any wrongdoing as it fulfils its duty to enforce the Constitution. Second, employing the practice of explicitly addressing international law is expected to substantially improve the quality of the Israeli Supreme Court's already commendable human rights adjudication. The requirement to consider international human rights law and to justify a deviation from it is expected to assist the Court in fulfilling its task of protecting human rights and thus enhancing democracy.

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THE INFLUENCE OF INTERNATIONAL HUMAN RIGHTS LAW ON THE ISRAELI LEGAL SYSTEM: PRESENT AND FUTURE*

*Eyal Benvenisti***

I. *Introduction*

Since Israel's independence, the Supreme Court has been very active in establishing and securing an impressive edifice of human rights. Lacking a written constitution, the Court has based its constitutional jurisprudence on the democratic character of the state. It has developed an "Israeli made" bill of rights, relying on comparative studies, yet with little reference to the standards set in international human rights instruments.

Two legal events of the last three years may change the judicial attitude towards international human rights. The first major event was the Israeli government's ratification of important human rights conventions during 1991, first and foremost among them the 1966 Covenant on Civil and Political Rights, which has been named the "International Bill of Rights"[1] (hereinafter: the 1966 Covenant).[2] In the following year came the second event, the promulgation of two Basic Laws concerning

* Based on a paper given at the Anglo-Israeli Judicial Exchange, London, January 1994.

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1 See L. Henkin, ed., *The International Bill of Rights* (1981). By 1 January 1994 this Covenant has been ratified or acceded to by 122 states. Since 1990, 33 states have ratified or acceded to this Covenant. No less than 73 states have acceded to the Optional Protocol to this Covenant (25 of them since 1990).

2 During the summer of 1991, the Israeli Government ratified the 1966 Covenant on Civil and Political Rights, the 1966 Covenant on Economic and Social Rights, the 1979 Convention on the Elimination of Discrimination against Women, the 1984 Convention Against Torture, and the Convention on the Rights of the Child. For the dates of ratifications, and the text of the declaration and reservations regarding the 1966 Covenant (concerning Articles 9 and 23) see B. Cohen, "The Practice of Israel in Matters Related to International Law," (1992) 26 Is.L.R. 572-573.

https://doi.org/10.1017/S0021223717000164 Published online by Cambridge University Press

human rights,[3] which created a "constitutional revolution".[4] In this paper I will explore the possible ramifications of these two events on the future interaction between Israeli and international human rights.

This paper concentrates on the effect international human rights have within the Israeli legal system. It does not discuss the applicability of international humanitarian law — like the 1907 Hague Regulations[5] or the 1949 IV Geneva Convention[6] — in the territories occupied in 1967. Although international human rights law may be relevant in occupied territories,[7] the Israeli Supreme Court usually reviews the measures of the Israeli authorities in the territories under customary humanitarian norms, as well as under principles of Israeli administrative law.[8]

3 Basic Law: Freedom of Occupation (*S.H.* 1992, p. 114); Basic Law: Human Dignity and Freedom (*S.H.* 1992, p. 150). For the English text of these Basic Laws see (1992) 26 Is.L.R. 247-248, see also D. Kretzmer, "The New Basic Laws on Human Rights: A Mini-Revolution in Israeli Constitutional Law?" *ibid.*, at 238.

4 A. Barak, "The Constitutional Revolution: Entrenched Basic Rights", (1992) 1 *Mishpat Umimshal* 9. In March 1994, the Knesset adopted a new version of Basic Law: Freedom of Occupation, and amended Basic Law: Human Dignity and Freedom. Both instruments now refer (in common Article 1) to the Israeli Declaration of Independence ((1948) 1 L.S.I. 3-5) as a source of enlightenment in the implementation of the rights contained therein. This change enhances further the link to international human rights norms since the Declaration provides, *inter alia*, that the State of Israel "will be faithful to the principles of the Charter of the United Nations".

5 Regulations Respecting the Laws and Customs of War on Land, annexed to Hague Convention (IV) Respecting the Laws and Customs of War on Land, 1907.

6 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 1949.

7 On the applicability of human rights instruments in occupied territories see E. Benvenisti, "The Applicability of Human Rights Conventions to Israel and to the Occupied Territories", (1992) 26 Is.L.R. 24.

8 It is probable that future claimants would invoke in petitions relating to the territories the recently ratified human rights conventions, as well as the two Basic Laws. In my view, both the conventions and the Basic Laws should instruct the Court in reviewing Israeli actions in the territories (also during the Interim Period envisioned in the Israeli-Palestinian Declaration of Principles of 13 September 1993). Of course, both types of instruments provide enough room to consider claims of national emergency and public security as possible limiting factors: see Benvenisti, *ibid.*, at 29-30; E. Benvenisti, "Deportations Without Prior Hearing", (1993) 1 *Mishpat Umimshal* 441, at 459-460.

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II. *The Traditional Outlook: The Distinction Between Customary Law and Treaty Law*

(a) *General Overview: The Status of International Law within the Israeli Legal System*

Following the common law tradition, Israeli law distinguishes between customary international law and treaty-based law.[9] Customary law[10] is considered part of the domestic law. It is binding without the need of transformation by a statute, unless it conflicts with an existing statute.[11] On the other hand, treaties have no legal effect as such. To take effect, a treaty must be incorporated by a statute, unless it is considered a declaratory rather than a constitutive treaty, the former being a treaty which merely restates customary norms.[12] In addition, a canon of interpretation provides a presumption that the Knesset, the Israeli parliament, has no intention of derogating from the international obligations of the state, and accordingly, statutes should be construed as far as possible to conform with international customary,[13] and even treaty-based law.[14] Justices have hinted in a few occasions that treaties

9 For a general discussion on this issue see R. Lapidoth, "International Law Within the Israeli Legal System", (1990) 24 Is.L.R. 451.

10 For the Supreme Court's definition of customary law see *infra*, text accompanying n. 26.

11 Unless a statute so authorizes, subsidiary legislation may not derogate from international custom: *The American-European Beth-El Mission* v. *Minister of Public Welfare et al.* (1967) 21 (ii) *P.D.* 325, 47 I.L.R. 205; Lapidoth, *supra* n. 9, at 456.

12 If an unincorporated treaty contains both provisions that reflect existing customary law and new prescriptions, only the former provisions would have internal effect.

13 *Hilu et al.* v. *State of Israel et al.*, (1973) 27 (ii) *P.D.* 169, at 177; Lapidoth, supra n. 9, at 455.

14 See, e.g., *Custodian of Absentee Property* v. *Samra et al.*, (1956) 10 *P.D.* 1825, at 1831; 22 I.L.R. 5 (applying this canon of interpretation explicitly to treaty law); *Poraz* v. *The Mayor of the Municipality of Tel-Aviv-Jaffa et al.*, (1988) 42 (ii) *P.D.* 309, at 329 (referring to this presumption without distinguishing between customary and treaty-based law). See also A. Barak, *Interpretation In Law, Vol. II: Statutory Interpretation* (Jerusalem, 1993, in Hebrew) 576-577. *Id.*, *Interpretation in Law, Vol. III:* Constitutional Interpretation (Jerusalem, 1994, in Hebrew) 354. In England, there are two approaches to this presumption. The more conservative would resort to treaties only if the statutory text is ambiguous (see, e.g., *R.* v. *Home Secretary, Ex p. Brind* [1991] 1 A.C. 696, at 760 (H.L.)), whereas the more liberal approach would seek to accommodate domestic and international norms: see, e.g., *Derbyshire County Council* v. *Times Newspapers Ltd.* [1992] 3 W.L.R. 28, at 44 (C.A.): "even when the common law

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that bind the government, like those relating to human rights, could be considered as reflecting governmental policies and therefore having the effect of administrative guidelines.[15] Curiously, however, the Court stopped short from reaching the necessary inference from the presumption of compatibility described above, namely that the government, being subject to Israeli law, was bound by Israel's international obligations, unless a statute expressly derogated from such obligations.[16]

is certain the courts will still, when appropriate, consider whether the United Kingdom is in breach of Article 10 [of the ECHR] (Balcombe. L.J.); *Attorney-General* v. *Guardian Newspapers (No. 2)* [1990] 1 A.C. 109, at 283 (H.L.): "I conceive it to be my duty, when I am free to do so, to interpret the law in accordance with the obligations of the Crown under [the ECHR] treaty" (Lord Goff); *R.* v. *Chief Immigration Officer, Ex p. Salamat Bibi* [1976] 1 W.L.R. 979, at 984; (1981) 61 I.L.R. 267, at 271: "[I]f there is any ambiguity in our statutes, or uncertainty in our law, then these courts can look to the [ECHR] as an aid to clear up the ambiguity and uncertainty, seeking always to bring them into harmony with it. Furthermore, when Parliament is enacting a statute, or the Secretary of State is framing rules, the courts will assume that they had regard to the provisions of the Convention, and intended to make the enactment accord with the [ECHR] and will interpret them accordingly" (Lord Denning M.R.). In the United States this presumption proved crucial to end the "sad case of the PLO mission": *U.S.* v. *The Palestine Liberation Org. et al.* 695 F. Supp. 1456 (1988); M. Reisman, "An International Farce: The Sad Case of the PLO Mission", (1989) 14 Yale J. Int. L. 412, at 429-432. The presumption is accepted in many other jurisdictions. Regarding Canada see: M. Hayward, "International Law and the Interpretation of the Canadian Charter of Rights and Freedoms: Uses and Justifications", (1985) 23 U. West. Ontario L. R. 9, at 13-16; Denmark: C. Gulmann, "Denmark", in F. Jacobs and S. Roberts, *The Effect of Treaties in Domestic Law* (1987) 29, at 36; Germany: J. Frowein, "Federal Government of Germany", in *The Effect of Treaties, ibid.*, 63, at 68-69; India: *Kubik Darusz* v. *Union of India et al.*, (1993) 92 I.L.R. 540 (S.C.); Italy: G. Gaja, "Italy", in *The Effect of Treaties, ibid.*, 87, at 100-101; Namibia: *Minister of Defence, Namibia* v. *Mwandinghi*, (1993) 91 I.L.R. 341 (H.C.); Zimbabwe: *State* v. *Ncube et al.* (1993) 91 I.L.R. 580 (S.C.).

15 *Jamai'at Iscan* v. *The IDF Commander in Judea and Samaria et al.* (1983) 37 (iv) *P.D.* 785, at 793-794 (per Barak J.), *Affu et al.* v. *The IDF Commander in the West Bank et al.* (1988) 42(ii) *P.D.* 4, (1990) I.L.M. 139 (per Bach J.), A. Barak, *Interpretation In Law, Vol. II: Statutory Interpretation*, *supra* n. 14, at 580.

16 For an Australian decision affirming this duty of the administration to abide by international obligations see *re Minister of Foreign Affairs* 37 F.C.R. 298, 112 A.L.R. 529 (1992). For a New Zealand case see *Birds Galore Ltd.* v. *Attorney-General et al.*, 90 I.L.R. 567 (1992). In England, in the case of *R.* v. *Home Secretary, Ex p. Brind*, *supra* n. 14, this claim, despite its "considerable persuasive force", (at 748) was rejected due to its novelty: "When Parliament has been content for so long to leave those who complain that their Convention Rights have been infringed to seek their remedy in Strasburg, it would be surprising suddenly to find that the judiciary had,

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The rationale for this distinction between treaties and custom is based on the principle of separation of powers. Since in Israel the government is empowered both to conclude and ratify treaties, it is claimed that the automatic incorporation of treaties would grant the government the power to introduce norms into the Israeli legal system, thereby bypassing the legislature.[17] In criticizing the validity of this argument, Professor Lapidoth has noted that the same line of thought should have required the court to disregard customary law, which is also the outcome of governmental action or inaction.[18] Indeed, one may wonder why the governmental power to make laws indirectly through treaties should necessarily be considered to conflict with the separation-of-powers doctrine: it should still be possible to regard treaties as binding, subject to the supervision, and possible intervention, of the legislature. The presumption of compatibility of statutes and international obligations described earlier[19] attests to the fact that such interaction between the government and the legislature exists and is permissible.

The insistence on the separation-of-powers rationale is puzzling in light of the approval by the Supreme Court of the implied delegation of ratification power from the Knesset to the government, despite any explicit statutory text to this effect.[20] Had the Court viewed treaties as applicable within domestic law, it should have resisted this delegation since it would have conferred upon the government legislative powers which were, according to the argument mentioned earlier, incompatible with the separation-of-powers principle. Yet the Court chose to regard treaties as inapplicable within domestic law, and this is why it could accept the delegation of ratification power to the government. Thus, the decision to view the treaties as having no effect within domestic law

without Parliament's aid, the means to incorporate the Convention into such an important area of domestic law and I cannot escape the conclusion that this would be a judicial usurpation of the legislative function", (Lord Bridge, at 748). Lord Ackner resisted this claim as being a vehicle for incorporating the Convention into English law "by the back door". (at 761-762).

17 See the *Affu* case, *supra* n. 15.

18 See Lapidoth, *supra* n. 9, at 479-484; B. Rubin, "The Adoption of International Treaties into Israeli Law by the Courts", (1983) 13 *Mishpatim* 210.

19 See *supra* text accompanying nn. 13-14.

20 The Court approved a "constitutional practice" that it found had developed, in which the legislature acquiesced in delegating this power to the government: *Kamiar* v. *The State of Israel* (1968) 22 (ii) *P.D.* 85.

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preceded the application of the separation-of-powers principle, and was not mandated by it. This was a policy choice which resulted in granting more leeway to the government in the international arena.

(b) *International Human Rights as Customary Law*

To date, the Supreme Court has applied to international human rights law the general rules concerning the domestic applicability of international law. Therefore, under current case law, only customary human rights are applicable in the Israeli legal system. Nevertheless, about 27 years ago, Justice Cohn was ready to recognize the provisions of certain human rights instruments, including the then recently promulgated 1966 Covenant, as binding law. Justice Cohn's method of doing so was by referring to these instruments as embodying customary law. In two cases, related to matters of statelessness[21] and freedom of religion,[22] Justice Cohn interpreted international custom broadly, and also included within it multilateral agreements, such as the 1966 Covenant, as well as declarations, such as the 1948 Universal Declaration of Human Rights. His reasoning emphasized the wide participation in the formulation of these instruments, and their approval in the General Assembly of the U.N.[23]

21 *Kurtz and Latushinski* v. *Kirschen*, (1967) 21 (ii) *P.D.* 20; 47 I.L.R. 212.

22 *The American European Beth-El Mission*, *supra* n. 11.

23 In the first case, concerning the law governing a testament of a stateless Jew who resided in Germany, (*Kurtz and Latushinski*, *supra* n. 21, at (*P.D.*) 26-27; (I.L.R.) 214-215) Justice Cohn applied the Convention Relating to the Status of Stateless Persons of 28 September, 1954, which was ratified by Israel but not transformed into law. Justice Cohn stated that: "The Israeli legislator has found no occasion or necessity to pass legislation of its own in order to confer upon Article 12 of the said Convention — which is a typical provision of general law — the force of binding law. And with good reason: this provision of the Convention has gained general acceptance by the nations of the world; and it is immaterial for our purposes whether or not states have acceded to it formally, since this Convention has been formulated and approved by legal experts from all over the world, both scholars in the field of international law and representatives of all the legal systems of the world, and there was no objection to or questioning of it . . . I find unavoidable the conclusion that the provision of this Convention, as a faithful reflection of an accepted principle of international law, was designed and intended to fill the lacuna . . ."
In the second case, concerning the freedom of religion, (*The Beth-El Mission* case, *supra* n. 11, at (*P.D.*) 333; (I.L.R.) 208) Justice Cohn said: "The principles of freedom

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Justice Cohn's approach was not an eccentric one.[24] Distinguished scholars have argued that the method of proving the customary status of human rights is different than the usual method that applies to other norms because of the unique nature of these rights. According to this view, the universal adherence to the U.N. Charter, the universal acceptance of the Universal Declaration, and the numerous reaffirmations of human rights principles constitute admissible evidence as to the customary status of the basic rights enumerated therein.[25]

Yet later decisions of the Supreme Court, all concerning the management of the territories occupied during the June 1967 war, have substantially increased the burden of proof concerning the existence of international custom, and criticized Justice Cohn's methodology of evaluating the customary status of human rights.[26] The Court has so far not

of religion, like the other human rights enshrined in the Universal Declaration of Human Rights, 1948, and the Covenant of Civil and Political Rights, 1966, are today the heritage of all enlightened nations, whether or not they are members of the United Nations Organization, and whether they have ratified the 1966 Covenant or have not done so; for these instruments have been drafted by legal experts from all corners of the world, and have been approved by the General Assembly of the United Nations in which the vast majority of the world takes part".

24 Compare T. Franck, "The Emerging Right to Democratic Governance", (1992) 86 Am. J. Int'l. L. 46, at 61: "As a mere resolution, the Universal Declaration does not have the force of a treaty; yet it was passed with such an overwhelming support, and such prestige has accrued to it in succeeding years, that it may be said to have become a customary rule of state obligation". See also Dickson C.J.C.'s reference to the Universal Declaration in the course of applying sec. 11(d) of the Canadian Charter, as evidence of "the widespread acceptance of the principle of the presumption of innocence". *R.* v. *Oakes*, 26 D.L.R. (4th) 200, at 213.

25 *Restatement (Third) on the Foreign Relations Law of the United States*, Sec. 701, Reporters' notes 2 and 6; L. Henkin, *International Law: Politics, Values and Functions, General Course on Public International Law*, (1989-IV) 216 Recueil des Cours 223-24; T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989) 91-94.

26 *Abu Aita et al.* v. *Commander of the Judea and Samaria Region et al.* (1983) 37 (ii) *P.D.* 197, at 238-239; 7 S.J. 1, at 36, (Shamgar P.) (emphasis in original): "From the nature of the matter, [customary international law] refers to accepted behavior which has merited the status of *binding law* [. . .]: general practice, which means a fixed mode of action, general and persisting [. . .] which has been accepted by the vast majority of those who function in the said area of law. [. . .] The burden of proving its existence and status [. . .] is borne by the party propounding its existence. [. . .] [T]he views of an ordinary *majority* of states are not sufficient; the custom must have been accepted by an overwhelming majority at least".

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indicated any inclination to reiterate Justice Cohn's position regarding human rights. The claimant who wants to prove the customary status of international human rights today faces a difficult challenge. Thus, claimants tend to rely on "Israeli made" human rights. Theoretically, however, Justice Cohn's approach has not been directly overruled, since the later cases dealt with humanitarian law, rather than human rights.

Despite the liberal methods scholars have suggested to identify customary international human rights, our potential claimant would not feel too confident in relying on these methods before the court. International lawyers differ greatly in the identification of those human rights which have gained the status of customary law. Only the very essential rights are widely identified as having a customary character.[27] It is rather difficult to find a consensus on the customary status of other rights.[28] Needless to say, the questions that the Israeli courts face usually do not deal with such essential rights as the right to life or to racial equality, but rather with issues of personal status and political freedoms, to which the customary law of human rights could not provide solid guidelines. Thus, the fluid notion of customary law could be convenient where the court is eager to promote certain human rights.[29] Yet, on the other hand, where the court's disposition is different, the promise of invoking customary human rights is quite limited.

27 See, e.g., *Restatement (Third) on the Foreign Relations Law of the United States*, Sec. 702: "A state violates international law if, as a matter of state policy, it practices, encourages and condones (a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman, or degrading treatment or punishment, (e) prolonged arbitrary detention, (f) systematic racial discrimination, or (g) a consistent pattern of gross violations of internationally recognized human rights". See also L. Henkin, *supra* n. 1, at 234 (n. 26); T. Meron, *supra* n. 25, at 94-101.

28 On the claim regarding the right to democracy as an emerging customary norm see Franck, *supra* n. 24.

29 The Israeli Supreme Court in the two cases cited earlier (nn. 21, 22) was inclined to do so. The German Federal Constitutional Court also took a broad view at international custom when it referred to Article 16 of the Universal Declaration in support of its conclusion that there was "a consensus under international law that freedom of marriage is one of the fundamental human rights". 72 I.L. R. 295, at 298 (decision of 4 May, 1971).

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III. *International Human Rights Law: A Unique Type of International Norms With a Unique Status In Domestic Law*

In this section I call for the recognition of the special features that distinguish international human rights law from other international norms. These features merit a qualification of the traditional approach to international norms described above. Under the traditional approach, the reliance on customary international law was explained as a reliance on shared culture. As the King's Bench stated in the *West Rand* case, "[w]hatever has received the common consent of civilised nations must have received the assent of our country . . ."[30] In the past, it was customary international law which reflected the common morality, and therefore became part of the law of the land. Today it is the multilateral conventions on human rights, general and regional, that demonstrate the common culture and the common consent of the civilized world. Paraphrasing on the *West Rand* rationale, these shared principles must have received the assent of our country and thus should be enforceable domestically.

International human rights comprise a unique branch of international law.[31] These rights center on the relationship between a state and its subjects, rather on international relations. They stem from the post-Holocaust realization that national authorities, even in democratic systems, are not omnipotent; they must respect basic human rights.[32] The aim of recognizing international human rights is to complement and bolster the national protection of human rights. A democratic system is the only system that is capable of ensuring human rights. But more profoundly, it is the recognition of human dignity and of a person's entitlement to certain inviolable rights that explains the value of the democratic state. Therefore, human rights have a special status in a democratic society. They are the very foundation of the democratic

30 *See West Rand Gold Mining Co.* v. *R.* [1905] 2 K.B. 395, at 406.

31 Indeed, one could argue that international human rights form the core from which the entire body of international law draws its legitimacy. Such an argument follows a similar argument for the subjection of the concept of "sovereignty" to human rights: M. Reisman, "Sovereignty and Human Rights in Contemporary International Law", (1990) 84 Am. J. Int'l. L. 866.

32 On the connection between the atrocities of World War II and the birth of international human rights see, e.g., Henkin, "Introduction", in *The International Bill of Rights*, *supra* n. 1, at 1, 5.

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system. The majority of the people is constrained in its choices, since it is incapable of denying human rights.

The separation-of-powers principle is one of the tools used to construct a democratic system that promotes and protects human dignity. The principle has the merit of ensuring that decisions on the primary organization of the society will be taken by the society's representatives, and not usurped by the government. Thus, it is an important tool. Yet, unlike the principle of human dignity, it is not an end in itself. In case of a conflict between the separation-of-powers principle and the principle of human dignity, the latter must prevail: there is no need to protect the majority's prerogative with respect to decisions that the majority may not take in any case.

In a democratic society each of the three branches is subject to the duty to protect human rights. This duty, which is embedded in the idea of democracy, was made explicit in Israel by the recent Basic Laws.[33] In fulfilling this duty, each branch has power to interpret these rights. By ratifying treaties relating to human rights, the Israeli government gives its own interpretation of the values of the democratic system and the limits that are imposed on the majority. The government implements its duty to respect human dignity. The Knesset may intervene and reject the government's interpretation, and the Court, using its powers under the Basic Laws,[34] is empowered to reflect over the Knesset's response, as well as over the government's act. Such an interaction between the three branches is the essence of the theory of checks-and-balances, and is required in a democracy committed to human dignity

33 See sec. 11 of the Basic Law: Human Dignity and Freedom: "All governmental authorities are obliged to respect the rights under this Basic Law". See also a similar duty in sec. 3 of Basic Law: Freedom of Occupation.

34 A strong argument can be made for the recognition of such a judicial power of review even without those Basic Laws: *The La'or Movement et al.* v. *The Chairman of the Knesset et al.* (1989) 44 (iii) *P.D.* 529. Indeed, the supremacy of certain basic human rights over legislation is a necessary lesson from the Holocaust and the Post World War II rejection of positivism. For a similar suggestion by Lord Denning, relating specifically to international human rights, see *Ram Chand Birdi* v. *Secretary of State for Home Affairs* (11 February 1975, unreported) rep. in (1981) 61 I.L.R. 250, at 258: "...I would so construe an Act of Parliament so as to see it conforms to [the European Convention on Human Rights]. If it did not conform I might be inclined to hold it invalid". Yet soon Lord Denning abandoned his suggestion: *R.* V. *Secretary of State for the Home Department Ex p. Bhajan Singh* (2 May 1975) [1976] 1 Q.B. 198, at 207; 61 I.L.R. 260, at 265. Referring to his earlier suggestion, Lord Denning said: "That was a very tentative statement, but it went too far".

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and the rule of law. The enforceability of treaty-based human rights against the government must therefore be recognized, even without their incorporation by a statute.

Finally, it should be noted that the application of the separation-of-powers principle in the context of human rights treaties leads to a rather ironic outcome. In the sphere of human rights, this principle does not protect the majority against a usurpation of powers by the administrative branch, but quite the opposite. The application of this principle, devised as a shield against the government, insulates the government from judicial enforcement of the government's commitment to respect those human rights mentioned in the treaties.

IV. *The Potential Influence of International Human Rights Law in Statutory Interpretation and in the Definition of Human Rights in Israeli Law*

In the past, a hesitant attitude towards international law in general, and international human rights law in particular, discouraged Israeli judges from referring to international standards for the purpose of defining human rights within the Israeli system. The Supreme Court drew insights from the constitutional jurisprudence of other democracies,[35] but not from international law.[36] However, it should be emphasized that international human rights law can play an important role in elucidating Israeli laws concerning human rights, and especially the two recent Basic Laws.

35 See, e.g., *Levi* v. *The Commander of the Southern District* (1984) 38 (ii) *P.D.* 393 (the right to demonstrate). The same attitude is taken with respect to the interpretation of Basic Law: Human Dignity and Freedom: HCJ 5304/92 *Perach 1992* v. *The Minister of Justice* (rendered 31 Aug. 1993; not yet reported). In both cases the Court reviewed the law in a number of democratic states, but did not refer to international law.

36 It is interesting to contrast the Israeli Supreme Court's decisions regarding demonstrations in front of foreign embassies and consulates (see *Eindor* v. *Teddy Kollek et al.* (1991) 45 (iv) *P.D.* 483; *Servetman* v. *Commander of Israeli Police Tel-Aviv District* (1985) 40 (iv) *P.D.* 550) with a recent decision of Australia's Supreme Court (*Re Minister of Foreign Affairs* 37 F.C.R. 298, 112 A.L.R. 529 (1992). The Israeli decisions mention only Israeli norms, whereas the Australian court's judgment turns on the proper relationship between the international right of diplomatic immunity of embassies under the 1961 Vienna Convention, and the freedom of speech recognized under the 1966 Covenant.

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This role can be explained in a number of ways. The usual explanation would invoke the general presumption of compatibility between statutes and international law, under which Israeli laws are presumed to heed the objectives of international human rights law.[37] Yet the influence of international human rights law is even more profound than that which this general presumption implies. Since international human right norms embody the basic tenets of the enlightened international community, they influence the values of the enlightened Israeli community. As Justice Barak recently stated, international law is among the factors that inspire the convictions and values of the enlightened Israeli community.[38] These convictions and values constitute, according to Justice Barak, the compass that instructs the judge in assigning weights to conflicting interests in the interpretation of statutes.[39] Among the various fields of international law, international human rights law is surely the prime source of such inspiration.

In the same vein, international human rights law can contribute to the shaping of the Israeli *ordre public*.[40] This potential contribution was acknowledged by the National Labor Court. In an issue concerning the scope of the right in Israeli law to gender equality in the work place, the National Labor Court sought guidance in international instruments, including the Universal Declaration and the U.N. Charter.[41] Since this body of laws is intended to be relevant not only to the relationship

37 See *supra*, n. 14 and accompanying text.

38 *Re'em Engineers and Contractors Ltd.* v. *The Municipality of Nazareth-Illit* (rendered 21.9.93; not yet reported) (sec. 19 of Justice Barak's opinion). Compare *Mabo* v. *Queensland* (1992) 107 A.L.R. 1, at 29; 175 C.L.R. 1, at 42 (High Court of Australia): "The expectations of the international community accord in this respect with the contemporary values of the Australian people".

39 *The Re'em Engineers and Contractors Ltd.* case, *ibid.*, at sec. 18.

40 *Committee of Flight Attendants et al.* v. *Hazzin et al.*, (1973) 4 *P.D.A.* 365: The Labor Court referred to the Supreme Court's decision in *Beth-El Mission* (*supra* n. 11), stating that certain principles and basic rights, enshrined in international conventions and declarations, may influence the delineation of Israel's *ordre public* (at 377). For the influence of basic human rights on private law see *Chevra Kadisha* v. *Kestenbaum* (1992) 46 (ii) *P.D.* 464; A. Barak, "Protected Human Rights and Private Law", in I. Zamir (ed.), *Klinghoffer Book on Public Law* (1993, in Hebrew) 163.

41 When the Supreme Court dealt recently with the same issue of gender equality in labor contracts, it did not refer to international standards, despite the fact that the ILO has adopted a number of treaties on this subject: *Nevo* v. *The National Labor Court* (1990) 44 (iv) *P.D.* 749. For a summary of this case see Rothman, "A Digest of Selected Judgments of the Supreme Court of Israel", (1992) 26 Is.L.R. 377, at 396.

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between the government and the public, but also to relations among individuals,[42] it may identify duties that individuals owe to other individuals.[43] Indeed, the jurisprudence developed under the European Convention on Human Rights,[44] in Canada,[45] and recently in New Zealand,[46] recognizes the relevancy of international human rights law to the sphere of private law. International human rights law is also relevant in determining Israel's "external" *ordre public*, i.e. the threshold that checks against the application or recognition of immoral foreign laws or acts.[47]

More specifically, the international standards on human rights can help in interpreting Israel's two Basic Laws concerning human rights.[48] In addition to the general arguments for compatibility described above, one could argue that the Basic laws have been enacted in fulfillment of the duty under Article 2(2) of the 1966 Covenant "to adopt such legislative or other measures that may be necessary to give effect to the

42 See the Preamble to the 1966 Covenant: "*Realizing* that the Individual, having duties to other individuals and the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant".

43 See P. Sieghart, *The International Law of Human Rights* (1983) 43-44; J. Paust, "The Other Side of Right: Private Duties under Human Rights Law", (1992) 5 Harv. Hum. Rt. J. 51; A. Clapham, *Human Rights in the Private Sphere* (1993).

44 On the effects of European human rights law on individuals see Sieghart, *supra*, at 44; F. Jacobs, *The European Convention on Human Rights* (1975) 11-12.

45 See the report by A. Bayefsky, "International Human Rights Law in Canadian Courts" a paper presented in the Siena colloquium on the Role of Domestic Courts in the Enforcement of International Human Rights Law, Siena, June 22-23, 1993 (due to be published).

46 *TV3 Network Ltd*. V. *Eveready New Zealand Ltd*. (1993) 3 NZLR 435 (C.A.); *R*. v. *Goodwin* (1993) 2 NZLR 153 (C.A.); *Noort* v. *Ministry of Transport*, (1992) 1 NZLR 743 (C.A.); *Parkhill* v. *Ministry of Transport*, (1992) 1 NZLR 555 (C.A.).

47 See *Casparius* v. *Casparius*, (1954) 8 *P.D.* 1289 (refusing to give effect to Nazi laws that revoked the German nationality of German Jews, in the course of determining the status of a testament made by an immigrant from Germany); *Beck* v. *The Israeli Bar Association*, (1966) 20 (ii) *P.D.* 617 (refusing to recognize the effects of a Polish law that discriminated against Jews).

48 Beyond this, international standards may also influence the interpretation of other statutes impinging on human rights. As Justice Elon recently stated, although Basic Law: Human Dignity and Freedom does not apply to prior legislation (sec. 10), it is appropriate, whenever it is possible, to interpret prior legislation in accordance with this Basic Law (HCJ 5304/92 *Perach 1992* , *supra* n. 35, at sec. 37).

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rights recognized in the [1966 Covenant]".[49] More importantly, the relevance of the international standards to the Basic Laws derives from the fact that the central idea of the two, and the common denominator of both, is the respect for human dignity.[50] International human rights jurisprudence places human dignity at its center,[51] and so does the Israeli jurisprudence emerging under the two Basic Laws.[52] Moreover, the fact that the 1966 Covenant and the recent Israeli Basic Laws use the same method, whereby the right to a certain freedom is set against possible limiting considerations, some of them very similar, reflect similar goals. Therefore, in interpreting the rights under the Basic Laws, as well as the limitations on those rights, international standards, first and foremost those enunciated in the 1966 Covenant, are of

49 For a similar claim in the Canadian context, see M. Cohen and A. Bayefsky, "The Canadian Charter of Rights and Freedoms and Public International Law", (1983) 61 Can.B. R. 265, at 302. Indeed, the concern for promoting human rights was shared by the Knesset, which enacted the Basic Laws, and the government: as the Deputy Attorney General Y. Karp remarks, concerning the process of the enactment of the Basic Laws, the Ministry of Justice has been actively involved in their conception. See Y. Karp, "Basic Law: Human Dignity and Liberty — A Biography of Power Struggles", (1993) 1 *Mishpat Umimshal* 323, at 331.

50 On human dignity under the Canadian Charter see *Kindler* v. *Canada*, 84 D.L.R. (4th) 438, 470-471 (S.C.C, 1991) (discussing "the fundamental importance of human dignity in Canadian society", and referring to a number of cases on this point). Compare *R.* v. *Keegstra* [1991] 2 W.W.R. 1, 45 (SCC), C.J.C. Dickson: "Generally speaking, the international human rights obligations taken on by Canada reflect the values and principles of a free and democratic society, and thus those values and principles that underlie the Charter itself".

51 The preamble of the United Nations Charter, "reaffirm[s the] faith in fundamental human rights, in the dignity and worth of the human person, ..".; The preamble of the 1966 Covenant recites that "*Whereas* recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world". M. McDougal, H. Lasswell, L. Chen, in their book, *Human Rights and World Public Order* (1980) 375-378, emphasize human dignity as the fundamental postulate of the international human rights law.

52 *Re'em, supra* n. 38 at sec. 25 (the freedom of expression is derived from the principle of human dignity and freedom); A. Barak, "Protected Human Rights: Scope and Limitations", (1993) 1 *Mishpat Umimshal* 253, at 259-261.

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particular significance.[53] Note that this claim not only imports international standards to Israeli human rights law, but also elevates these standards to the level of entrenched law, thereby possibly restricting the competence of the Knesset to derogate from them,[54] and influencing the interpretation of other laws that impinge on human rights.[55]

In this process of interpretation, it would be worthwhile to examine the jurisprudence that has developed under the 1966 Covenant and the European Convention of Human Rights. The European Convention and the 1966 Covenant contain many similar standards.[56] The experience of the European Convention could be especially illuminating in interpreting Israel's commitments under the 1966 Covenant, due to the abundance of decisions by the Commission, the Court, and the Committee of Ministers, as well as state responses thereto. In these two conventions there are specific limitation clauses appended to specific freedoms, rather than the single general one that appears in either of the two Basic Laws. These specific clauses enumerate considerations that are relevant to each of the freedoms. They identify some basic rights, such as the right to equality, that may not be limited, and, on the other hand, rights that may be derogated from in times of "public

53 Compare the accepted relevancy and persuasiveness of international human rights law to the interpretation of the Canadian Charter: *Re Public Service Employee Relations Act* 38 D.L.R. (4th) 161, 185 (Dickson, C.J.C.): "I believe that the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified". See also *Slaight Communications Inc*. v. *Davidson* [1989] 1 S.C.R. 1038, 59 D.L.R. (4th) 416, at 427-28.
The Indian Supreme Court held that Article 21 of the Indian Constitution implicitly incorporated the right to protection against torture or cruel, inhuman or degrading treatment, enunciated in the Universal Declaration and the 1966 Covenant: *Mullin* v. *Administrator, Union Territory of Delhi et al*. (1981) 1 SCC 608, at 619 (cited in Meron, *supra* n. 25, at 117-118).

54 On the possibility of judicial review of statutes under the two Basic Laws see Barak, *supra* n. 4, at 15-22.

55 Although Basic Law: Human Dignity and Freedom does not apply retroactively, it could influence the interpretation of other laws: HCJ 5304/92 *Perach 1992* v. *The Minister of Justice, supra* n. 48.

56 The European Convention influenced the drafters of the 1966 Covenant: see V. Pechota, "The Development of the Covenant on Civil and Political Rights", in L. Henkin, ed., *The International Bill of Rights, supra* n. 1, at 32, 40.

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emergency which threatens the life of the nation".[57] These detailed provisions may aid in identifying the scope of the freedoms,[58] the proper limitations for each freedom,[59] as well as their respective weights.[60]

A comparative look into other common law jurisdictions would reveal a common phenomenon in contemporary judicial attitude towards international human rights law in general, and towards the 1966 Covenant in particular. The courts in Australia, Canada and New Zealand are beginning to refer more and more to international standards. Their attitude hinges on what they perceive as positive signals from the other branches. Canada is the best example of this trend, with "an exponen-

57 Article 4(1) of the 1966 Covenant. For a similar definition see Article 15(1) of the European Convention. The jurisprudence developed on the particular area of permitted derogations in emergency situations could be relevant to the interpretation of sec. 12 of the Basic Law: Human Dignity and Freedom, and sec. 50(d) of the recent Basic Law: The Government (adopted in 1992, to become applicable after the elections to the 14th Knesset), which limits the power of the government to deny or restrict certain human rights during a state of emergency.

58 Thus, for example, the detailed definition of freedom of expression included in Article 19 of the 1966 Covenant, was adopted by the Ontario Court of Appeal in *R.* v. *Videoflicks Ltd.* 14 D.L.R. (4th) 10, at 46 (1984).

59 See e.g., *R.* v. *Keegstra, supra* n. 50, at 48 [S.C.C]. In interpreting the limitation that Sec. 319(2) of Canada's Criminal Code imposed on the freedom of speech (in the context of hate-promoting expressions), C.J.C. Dickson said:
"[I]nternational human rights law and Canada's commitments in that area are of particular significance in assessing the importance of Parliament's objective under sec. 1. [. . .] Canada, along with other members of the international community, has indicated a commitment to prohibiting hate propaganda, and in my opinion this court must have regard to that commitment in investigating the nature of the government objective behind sec. 319(2) of the Criminal Code. That the international community has collectively acted to condemn hate propaganda, and to oblige State Parties to [the 1966 Convention on the Elimination of All Forms of Racial Discrimination] and [the 1966 Covenant] to prohibit such expression, thus emphasizes the importance of the objective behind sec. 319(2) and the principles of equality and the inherent dignity of all persons that infuse both international human rights and the Charter".
See also *Slaight Communications, supra* n. 53, at S.C.R. 1056-57: "Canada's international human rights obligations should inform not only the interpretation of the content of the rights guaranteed by the *Charter* but also the interpretation of what can constitute pressing and substantial sec. 1 objectives which may justify restrictions upon those rights".

60 In *Derbyshire County Council, supra* n. 14, the court considered the question presented to it by reference to Article 10 of the ECHR alone (and not in reliance on the common law), "since [this Article] states the right to freedom of expression and the qualifications to that right in precise terms" (at 43).

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tial growth in the number of cases which referred to conventional international human rights law in the course of interpreting domestic law" since the promulgation in 1982 of the Canadian Charter of Rights and Freedoms.[61] In New Zealand, the enactment of the New Zealand Bill of Rights Act of 1990,[62] also led to an increased judicial reference to international standards.[63] In Australia, the positive signal came not from the legislature,[64] but from the government which acceded on 25 December 1991 to the Optional Protocol of the 1966 Covenant, thereby providing for international remedies for individuals alleging Australia's breaches of the 1966 Covenant.[65] This jurisprudence influences courts in other jurisdictions, such as India, Namibia and Zimbabwe.[66] The South African courts are expected to follow this trend, encouraged by a

61 A. Bayefsky, *supra* n. 45, at 22. Professor Bayefsky notes however, that Canadian courts treat other international norms differently: "Human rights cases in Canadian courts might turn out to be *sui generis*, with different rules applicable where the relevant international law is on a different subject" (at 25).

62 For this Act see A. Blaustein and G. Flanz, eds., XIII *Constitutions of the Countries of the World, New Zealand*, Booklet two, (Oceana, New York) 289-295. This Act, whose preamble declares that its purpose is to affirm, protect and promote human rights, and to affirm New Zealand's commitments to the 1966 covenant, contains a limitation clause which subjects the rights and freedoms contained in the Bill of Rights "only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" (sec. 5). Yet the courts may not refuse application of enactments (even later in time) due to inconsistency with the Bill of Rights (sec. 4); it is the Attorney-General who must report to Parliament where a proposed Bill appears to be inconsistent with the Bill of Rights (sec. 7).

63 Since the enactment of the Bill of Rights, the New Zealand Court of Appeal referred to the 1966 Covenant and to Canadian jurisprudence interpreting it in a number of cases (see *supra* n. 46).

64 Despite the Human Rights and Equal Opportunity Commission Act 1986: see 18 (2) UMLR 428 (1992).

65 See *Mabo* v. *Queensland*, *supra* n. 38: "The opening up of international remedies to individuals pursuant to Australia's accession to the [Optional Protocol] brings to bear on the common law the powerful influence of the [1966 Covenant] and the standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights". See also *Re Minister of Foreign Affairs*, *supra* n. 36.

66 In India: *Kubic Darusz* v. *Union of India et al.*, *supra* n. 14; in Namibia: *Minister of Defence, Namibia* v. *Mwandinghi*, *supra* n. 14; in Zimbabwe: *State* v. *Ncube et al.*, *supra* n. 14.

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detailed provision to this effect in the 1993 Constitution.[67] A similar development may take place in many Central and Eastern European countries, as their new constitutions refer to international law as setting the standards for the domestic protection of human rights.[68] In Israel one may expect the courts to follow suit, especially in light of the combined signals of both the legislature and the government.[69]

V. *Conclusion*

A number of paths exist through which international human rights may influence Israeli law. One is based on the customary nature of certain rights. The other claims the applicability of treaty based human rights without incorporating statutes, emphasizing the unique status of international human rights. In addition, international human rights may aid in the interpretation of legislation, especially the two Basic Laws concerning human rights, and influence the values of the enlightened Israeli community and its *ordre public*.

To date, the Supreme Court has chosen to develop its human rights jurisprudence without relying on international standards. The ratification of important human rights conventions in 1991, and the promulgation of the Basic Laws in 1992, offer an opportunity to change this attitude, and promote a closer tie between Israeli law and international human rights standards.

67 Article 35(a) of the South African Constitution states: "In interpreting the provision of this Chapter [on Fundamental Rights] a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law".

68 On these constitutions and their significance see E. Stein, "International Law in Internal Law: Toward Internationalization of Central-Eastern European Constitutions?" (1994) 88 Am. J. Int'l L. 427, esp. 444-446; G. Danilenko, "The New Russian Constitution and International Law" (1994) 88 Am. J. Int'l L. 451.

69 In England, the Parliament gave a strong positive signal with respect to the EC treaties (the European Communities Act 1972), and this led to the famous *Factortame* litigation: *R.* v. *Secretary of State for Transport, Ex parte Factortame*, [1990] 2 A.C. 85, (H.L.); *R.* v. *Secretary of State for Transport, Ex parte Factortame (No. 2)* [1990] 3 WLR 856 (HL). Yet the Court did not acknowledge a comparable signal in the context of international (including European) human rights.

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