

# Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts

*Eyal Benvenisti* \*

## I. Introduction

Justice Powell remarked twenty years ago that '[u]ntil international tribunals command a wider constituency, the courts of the various countries afford the best means for the development of a respected body of international law.'<sup>1</sup> Few would challenge this statement which underlines the promise of world-wide development and enforcement of international law by national courts. But can national courts really live up to this challenge? Apparently, there are weighty factors that inhibit national courts from the rigorous application and enforcement of international law. This is particularly the case when the application of international norms is sought in an attempt to constrain the activities of the national court's executive.

The somewhat idyllic statement of Justice Powell is the starting point for this article. Sharing his aspiration, this article endeavours to explore its limitations. Only by understanding the factors that hinder national courts from becoming the enforcement agencies of international law will it be possible to assess the real potential of national courts in the international arena and the means to realize it.

The first part of the article is an inquiry into the practice of national courts with respect to the application of international law. This comparative analysis demonstrates the existence of a similar pattern of behaviour in most jurisdictions. It provides the background for assessing the reasons that prompt most national courts to adopt an apprehensive approach towards international norms, and the circumstances in which such an approach could be revised. In light of this general study, the second part of the article examines more closely the jurisprudence of the Israeli Supreme Court in this context. The claim I shall make in the second part is that the continuation of the

\* Lecturer, the Hebrew University of Jerusalem, Faculty of Law. LL.B., the Hebrew University; LL.M., J.S.D., the Yale Law School.

<sup>1</sup> *First National City Bank v. Banco Nacional de Cuba* 406 US 759, 92 S.Ct. 1808, 32 L.Ed.2d. 466 (1972), at (US) 775.

Arab-Israeli conflict, and particularly the occupation of the West Bank and Gaza, have led the Court to develop a unique and rather problematic jurisprudence regarding the application of international obligations both with respect to the Israeli legal system and to the occupied territories.

## II. The Accommodation of National Interests: A Comparative Analysis of National Courts' Enforcement of International Law

It would be almost trite to mention that from the point of view of international law, national courts are state organs and thus are required to conform with international norms. Failure to do so may impose international responsibility on the state.<sup>2</sup> International law assumes that national courts can be instrumental in enforcing international obligations upon recalcitrant governments. Thus, for example, the customary rule that requires that local remedies be exhausted before international proceedings may be instituted by the state whose nationals have been injured, assumes that national courts can reasonably be expected to correct wrongs done by their executive to aliens within their jurisdiction.

It is common among international lawyers to refer to national courts as a reliable if diffuse system for ensuring compliance with international norms, and therefore to urge judges to apply these norms rigorously.<sup>3</sup> Lacking central enforcement

2 See, e.g., I. Brownlie, *System of the Law of Nations – State Responsibility* (1983) (Part D), 144.

3 Many lawyers have commented favourably on the prospects of national courts as enforcers of international obligations. A partial list includes: Charney, 'Judicial Deference in Foreign Relations', 83 *AJIL* (1989) 805; Koh, 'Transnational Public Law Litigation', 100 *Yale L.J.* (1991) 2347; Lauterpacht, 'Implementation of Decisions of International Organizations through National Courts', in S. Schwebel (ed.), *The Effectiveness of International Decisions* (1971) 57; Lillich, 'The Role of Domestic Courts in Promoting International Human Rights Norms', 24 *NYLSL Rev.* (1978) 161; Lowenfeld, 'US Law Enforcement Abroad: The Constitution and International Law, Continued', 84 *AJIL* (1990) 444; Mann, 'International Delinquencies Before Municipal Courts', 70 *LQR* (1954) 181; reprinted: F. Mann, *Studies in International Law* (1973) 366; *id.*, 'The Consequences of International Wrongs in International and National Law', 49 *BYBIL* (1975-76) 1; reprinted: F. Mann, *Further Studies in International Law* (1990) 124; M.S. McDougal, *Act of State in Policy Perspective: The International Law of an International Economy, in Private Investors Abroad – Structures and Safeguards* (1966) 338; *id.*, 'Jurisdiction in Human Rights Cases: Is the Tel-Oren Case a Step Backward?', 79 *Am. Soc. Int'l. L. Proc.* (1985) 361; Schreuer, 'The Relevance of United Nations Decisions in Domestic Litigation', 27 *ICLQ* (1978) 1; Shockey, 'Enforcement in United States Courts of the United Nations Council for Namibia's Decree on Natural Resources', 2 *Yale Studies in World Public Order* (1976) 285.

Other scholars concede significant limitations on the national courts' autonomous role: Brilmayer, 'International Law in American Courts: A Modest Proposal', 100 *Yale L.J.* (1991) 2277; R. Falk, *The Role of Domestic Courts in the International Order* (1964); Franck, 'The Courts, the State Department, and National Policy: A Criterion for Judicial Abdication', 44 *Minn. L. Rev.* (1960) 1101; Stephan, 'Constitutional Limits on International Rendition of Criminal Suspects', 20 *Va.J.Int'l.L.* (1980) 777; Trimble, 'A Revisionist View of Customary International Law', 33 *UCLA L. Rev.* (1986) 665.

### Judicial Misgivings Regarding the Application of International Law

agencies, international law relies heavily on the action of national agencies. Many view national judges as the best candidates within the national systems to grapple with this important task, because of their independent status and their apolitical role.<sup>4</sup> A judiciary that is independent of the national Government, that employs international standards by resorting to technical, non-political, legal discourse, promises indeed to be a perfect forum to interpret, apply and develop international norms.

An analysis of the jurisprudence of national courts in international matters reveals, however, that there exist other factors, besides the shared legal language and formal independence of the courts, factors that prevent the promise from being fulfilled. Can one blame the judges for their attitude? Faced with judicial decisions that distorted legal doctrines so as not to rule against governmental interests, some scholars have maintained that the particular judges should be blamed, and that a better education in international law, or different nominating processes, could be the key to improvement.<sup>5</sup> A comparative analysis, however, shows that the jurisprudence of the national courts is consistent in protecting short-term governmental interests. Judges firmly refuse to live up to the vision of international lawyers. They are careful not to impinge with their decisions on their governments' international policies and interests. This consistent attitude is not the product of lack of courage or knowledge, but rather is the result of deeper factors that are explored below.

It is possible to identify the judicial tendency to defer to the Government in three distinct stages of the application of norms. First, courts tend to interpret narrowly those articles of their national constitutions that import international law into the local legal systems, thereby reducing their own opportunities to interfere with governmental policies in the light of international law. Second, national courts tend to interpret international rules so as not to upset their governments' interests, sometimes actually seeking guidance from the executive for interpreting treaties. Third, courts use a variety of 'avoidance doctrines', either doctrines that were specifically devised for such matters, like the act of state doctrines, or general doctrines like standing and justiciability, in ways that give their own governments, as well as other governments, an effective shield against judicial review under international law.

4 A characteristic observation is the following: '[R]espect for international law is guaranteed to the extent that national judicial and enforcement agencies – since men undeniably share certain basic values which go beyond national barriers – pay heed to that international solidarity which is so often lacking at governmental level.' B. Conforti, *Lezioni di diritto internazionale* (2nd ed., 1982) 8 (as translated by A. Cassese in 'Modern Constitutions and International Law' 192 *RdC* (1985-III) at 312).

5 On the need to educate judges on international law see McDougal, 'Jurisdiction in Human Rights Cases: Is the Tel-Oren Case a Step Backward?', *supra* note 3, at 376. On the background and personality of judges as possible factors see Koh, 'Why the President (Almost) Always Wins in Foreign Affairs – Lessons of the Iran-Contra Affair', 97 *Yale L.J.* (1988) 1255, 1315-16.

**A. The First Stage: The Interpretation of National Constitutions that Determine the Status of International Law within the National Legal System**

Many constitutions contain specific references to international law that determine the status of international law within the domestic legal system.<sup>6</sup> Usually these references incorporate one source of international law, either treaties or customs, and leave out the other sources. In view of these distinctions, arguments were made to the effect that the constitutional reference to one source, say customary law, should be interpreted as impliedly incorporating the other source, say treaties, as well. Despite scholarly endorsement of such arguments, they have never been adopted by national courts.<sup>7</sup>

The constitutions of Austria (Article 9 of the 1920 Constitution), Germany (Article 25 of the 1949 Basic Law), and Italy (Article 10 of the 1947 Constitution), all declare that the generally recognized rules of international law shall form part of the domestic legal system.<sup>8</sup> In all three countries it was argued before the Constitutional Courts that since the principle of *pacta sunt servanda* was a generally recognized rule of international law, it also formed part of domestic law and thus additionally provided for the similar applicability of treaty-based law. Each of the Courts rejected this argument.<sup>9</sup> The opposite case took place in the Netherlands. The Netherlands Constitution refers to treaties, and does not mention customary law. Article 93 of the 1983 Constitution provides that '[p]rovisions of treaties and of resolutions of international institutions, which may be binding on all persons by virtue of their contents shall become binding after they have been published.'<sup>10</sup> The Dutch Supreme Court refused to accept an argument of *a fortiori*, and rejected the claim that in view of the applicability of treaties, it must also accept the applicability of other sources of international law, including customary law.<sup>11</sup>

Another issue to be determined by courts was the weight that should be given to those international norms that constitute a part of the domestic legal system. In case of conflict between an applicable international obligation and an internal norm, which of the two is to prevail? Here too courts were generally hesitant, giving precedence to the local law. Thus, the French Constitutional Court declined to review the legality of legislation under the European Convention on Human

6 A. Cassese, 'Modern Constitutions and International Law' 192 *RdC* (1985-III), 331 et seq.

7 There was no need to develop such an argument in the United States, where customary international law is considered part of the common law.

8 For these constitutions see A. Blaustein & G. Flanz (eds), *Constitutions of the Countries of the World*, Vol. 1 (Austria), Vol. 6 (Germany), Vol. 8 (Italy).

9 See Cassese, *supra* note 6, at 399 and notes 120, 121; Gaja, 'Italy', in F. Jacobs & S. Roberts (eds), *The Effect of Treaties in Domestic Law* (1987) (hereinafter *Treaties*), 87, at 88-89; Frowein, 'Federal Republic of Germany', in *Treaties*, 63, at 67.

10 Blaustein & Flanz, *supra* note 8, Vol. 11 (Netherlands); the 1953 Constitution contained a similar provision. On the legal status of international law in the Dutch legal system see Schermers, 'Netherlands', in *Treaties*, *supra* note 9, 109-122.

11 *The Nyugat v. The Netherlands* (S.Ct., March 6, 1959) 10 *Nederlands Tijdschrift Int'l Recht* (1963) 82, 86.

### Judicial Misgivings Regarding the Application of International Law

Rights<sup>12</sup> despite the fact that the French Constitution of 1958 expressly provides that '[t]reaties or other agreements duly ratified or approved shall, upon their publication, have an authority superior to that of laws. [...]'<sup>13</sup> The Court viewed its competence as being limited to examining legislation under the Constitution itself.<sup>14</sup> At the same time, the French *Conseil d'Etat* refused, until the *Nicolo* judgment of 20 October 1989, to accord precedence to treaties over subsequent laws, since by doing so – it reasoned – the Court would have implied that the local law was unconstitutional, a matter which is not within this Court's jurisdiction.<sup>15</sup> Earlier in 1989, the same court reversed its prior holdings and accepted that EEC directives could have direct effect in French law.<sup>16</sup> Similar reluctance to accept the supremacy of treaties over (federal) law can be found in the decisions of the Austrian Constitutional and Administrative Courts of the early 1960's.<sup>17</sup> The well known dispute between the Italian Constitutional Court and the European Court of Justice concerning which Court has the last word on the compatibility of Italian law with the Community law is also a case in point;<sup>18</sup> as is the 1974 decision of the Federal German Constitutional Court on its power to scrutinize Community norms for their compatibility with the fundamental rights established under the German Basic Law.<sup>19</sup>

In fact, in only two jurisdictions the national court adopted an interpretation that strengthened the status of international law *vis-à-vis* the local laws. The Luxembourg Court of Cassation (in 1950) and the *Conseil d'Etat* (in 1951) acknowledged the

- 12 Decision No. 74-75 DC of 15 January 1975, quoted in part in Polakiewicz & Jacob-Foltzer, 'The European Human Rights Convention in Domestic Law', 12 *Human Rights Law Journal* (1991) 65 (Part I), 125 (Part II), (hereinafter – Polakiewicz *et al.*), at 75-76. A decision from 1988 may suggest that the Court's attitude has changed, and that it is now willing to examine the legality of laws under treaties: *ibid.*, at 78.
- 13 Article 55 continues: 'subject, for each agreement or treaty, to its application by the other party.' (Blaustein & Flanz, *supra* note 8, Vol. 5 (France). On the French provisions and practice regarding these matters see de la Rochere, 'France', in *Treaties*, *supra* note 9, 39 *et seq.*
- 14 The Swiss Federal Court (judgment of 27 November 1984, confirmed by judgment of 11 February 1985, quoted in Polakiewicz *et al.*, *supra* note 12, at 137) also refused to review the legality of federal laws under the European Convention on Human rights, although the Swiss legal system recognizes both the applicability and the precedence of international treaties (Polakiewicz *et al.*, *ibid.*, at 136).
- 15 *Nicolo*, [1990] 1 CMLR 173. On the Court's jurisprudence on this issue see Polakiewicz *et al.*, *supra* note 12, at 76; de la Rochere, 'France', in *Treaties*, *supra* note 9, at 58. The case is different with the Court of Cassation: *ibid.* at 60-61.
- 16 *Compagnie Alitalia*, [1990] 1 CMLR 248. On the motivation for this new attitude see note 83 and accompanying text.
- 17 Polakiewicz *et al.*, *supra* note 12, at 67-69. This position was reaffirmed by the Constitutional Court in its judgment of 14 October 1987, quoted in *ibid.*, at 69.
- 18 On this debate see La Pergola & Del Duca, 'Community Law, International Law and the Italian Constitution', 79 *AJIL* (1985) 598; Gaja, 'New Developments in a Continuing Story: The Relationship between EEC Law and Italian Law', 27 *CML Rev.* (1990) 83.
- 19 *Internationale Handelsgesellschaft GmbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, [1974] CMLR 540. This ruling was reversed by the same court in *Re the Application of Wünsche Handelsgesellschaft*, [1987] 3 CMLR 225. See also case commentary by Frowein, 25 *CML Rev.* (1988) 201.

supremacy of treaty obligations over local laws.<sup>20</sup> In its famous 1971 *Le Ski* decision, the Belgian Court of Cassation, unable to rely on express provision in the Belgian Constitution, invoked the monist theory of the primacy of international law over national legislation, in determining that treaties supersede subsequent incompatible national laws.<sup>21</sup> These two interpretations are the exceptions that prove the rule.<sup>22</sup> They show that those that rejected similar claims to enhance the status of international law within their systems, had a plausible alternative. In fact, this alternative interpretation was strongly advocated by eminent local scholars.<sup>23</sup> In other words, the interpretations that limited the role of international law both with respect to its applicability and to its status *vis-à-vis* local law reflected a judicial choice, a hesitation from invoking international standards.

This judicial timidity is further underlined by the entirely different attitude shown by some courts towards the executive's role in treaty-making and its effects on the domestic legal system. In this context the courts' interpretation increased the Government's power. In Israel the Supreme Court found sufficient evidence to conclude that the Knesset, the Israeli Parliament, had implicitly approved the power of the executive branch to conclude and ratify treaties without legislative approval.<sup>24</sup> The Supreme Court of the United States went even further when despite the constitutional requirement of the Senate's 'advice and consent' to treaties, it recognized the existence of other types of international agreements which are not subject to the Senate's approval and yet take effect in the legal system as part of the law of the land.<sup>25</sup> The Court's distinction between 'treaties', which are subject to the procedure of 'advice and consent', and 'Executive Agreements', which are not, has no support either in the US Constitution or in international law. Moreover, the Court offered no guidelines to distinguish between these instruments: it conferred upon the executive the unfettered discretion to make this distinction.<sup>26</sup> Since World

20 As the Court of Cassation later explained in its *Pagani* judgment of 14 July 1954, 'a treaty is a law of a superior nature [essence] having a superior origin than the will of an internal [national] organ.' (quoted, together with the other cases, in Polakiewicz *et al.*, *supra* note 12, at 126).

21 *Minister for Economic Affairs v. Fromagerie Franco-Suisse 'Le Ski'* [1972] CMLR 330.

22 The Constitutional Court of Portugal seems to be divided on the very same issue. The first chamber (*Seccao*) of the Court views incompatible subsequent legislation as unconstitutional, whereas the second chamber is of the opinion that such laws are perfectly valid (although they may give rise to international responsibility): Polakiewicz *et al.*, *supra* note 12, at 131.

23 For the view of the Austrian lawyer J. Kunz see Seidl-Hohenveldern, 'Relation of International Law to Internal Law in Austria', 49 *AJIL* (1955) 451, at 467; The opinion of the Italian scholar R. Quadri is discussed by Cassese, *supra* note 6, at 398. For criticism of the Dutch Supreme Court decision regarding the inapplicability of international custom see Schermers, in *Treaties supra* note 9, at 113.

24 *Kamilar v. The State of Israel* 22 (2) Piskei-Din (Judgments) 85 (1968).

25 See *United States v. Belmont*, 301 US 324, 57 S.Ct. 758; 81 L.Ed.1134 (1937); *United States v. Pink*, 315 US 203, 62 S.Ct. 552, 86 L.Ed. 796 (1942); *Dames & Moore v. Reagan*, 453 US 654, 101 S.Ct. 2972, 69 L.Ed. 918 (1981). And see the Restatement (Third) on the Foreign Relations Law of the United States (1987) (hereinafter: 'Restatement'), Sec. 303 and comment: 'Presidents have asserted a broad authority to make many other international agreements [in addition to recognition of states and armistice agreements], at least in the absence of inconsistent legislation or of Congressional action restricting such agreements.'

26 L. Henkin, *Foreign Affairs and the Constitution* (1972) 182.

## Judicial Misgivings Regarding the Application of International Law

War II the majority of international agreements to which the United States is a party are referred to as Executive Agreements and thus do not pass the muster of the Senate.<sup>27</sup>

### **B. The Second Stage: The Determination and Interpretation of International Norms**

How do courts determine whether a certain international custom has emerged? How do they interpret international customs and treaties that form part of the local legal system? What meaning do they give to decisions of international institutions established under treaties? The examination of these questions reveals that here too one can clearly discern an apprehensive judicial attitude, deferring to the executive.

#### *1. International Custom*

The method of inquiry used by a national court in examining the existence of a custom is likely to reflect its national affiliation. Thus, one should expect the courts of developing countries to invoke multilateral instruments as well as U.N. instruments as evidence of customary law.<sup>28</sup> On the other hand, a court in a Western jurisdiction is most likely to insist on evidence of actual conduct by a considerable number of states for a substantial period of time as a prerequisite for the identification of a customary rule. These different methods of inquiry reflect different national interests. In addition, different conclusions can sometimes be drawn even when using the same methods of inquiry. In any case, the outcome is likely to conform with national interests.<sup>29</sup> It is especially rare for a national court to invoke customary law against its own executive.

At the turn of the 20th century, the United States Supreme Court delivered the much celebrated decision of *The Paquete Habana*, in which the Court clarified and

27 H. Steiner & D. Vagts, *Transnational Legal Problems* (3rd ed., 1986) 611.

28 Thus, for example, the Yugoslav Constitutional Court treated the United Nations Charter, the Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights, as expressing the generally recognized norms of international law: decision of 16 March 1977, cited in Cassese, *supra* note 6, at 377. Right after gaining independence from Portugal, a court in the People's Republic of Angola recognized a criminal offence of 'mercenarism', on the basis of United Nations resolutions and statements of the Organization of African Unity (the decision is reprinted in Lockwood, Report on the Trial of Mercenaries: Luanda, Angola, June 1976, 7 *Manitoba L.J.* (1977) 183, 198-99.

29 See Cassese, *supra* note 6, at 439: '[E]ven in the most internationally minded Western or socialist countries, domestic courts often place such an interpretation on international customary rules as to fit their municipal standards or accommodate them to national interests' (italics in original); Henkin, 'International Law as Law in the United States', 82 *Mich. L. Rev.* (1984) 1555, 1566 (referring to US courts): 'Courts are often reluctant to conclude that a principle has become customary international law'; Trimble, *supra* note 3, observes after surveying the entire case-law of American courts on this issue, that there is 'a clear trend away from judicial determination of legal rules and a movement toward judicial deference to political branch direction' (at 687).

enforced international customary law against US authorities.<sup>30</sup> Yet despite the forceful reasoning of the decision, not many decisions followed suit, neither in the United States nor in other jurisdictions. Since then, both judicial and scholarly opinion in the United States seem to support the contention that the administration may violate customary law.<sup>31</sup> Moreover, even cases in which enforcement of international customary law was sought against a foreign Government or foreign officials, courts hesitated and acquiesced only when encouraged to do so by the executive.<sup>32</sup>

## 2. Treaties

The interpretation of treaties by national courts will determine whether or not any given treaty is directly applicable, or 'self-executing', in the internal legal system without implementing legislation. Interpretation will also determine the relationship between the applicable treaty and related statutes. Finally, the courts' interpretation will give meaning to the treaty provisions and outline their contents. National courts could of course adopt an 'internationalist' view and invoke the 1969 Vienna Convention on the Law of Treaties as their compass in the interpretation process. Where relevant, they could also adopt the case-law of international and regional tribunals like the International Court of Justice or the European Court of Human Rights. The case however, has usually been different. The deference to national considerations in general and to the executive in particular is apparent also in the context of treaty interpretation.

In many cases the treaties remain silent as to the question of self-execution. The Vienna principles of interpretation do not provide specific guidelines in this matter, and national courts facing such a task have developed their own rules. The jurisprudence of US courts on this issue, for example, shows a tendency to regard treaties as non-self-executing, and thus to refrain from applying them in the absence of

30 175 US 677, 20 S.Ct. 290, 44 L.Ed. 320 (1900). The authorities were ordered to return to their Spanish owner two fishing vessels that had been illegally condemned as prize of war. The application of international customary law was in line with prior decisions of that Court: Henkin, *ibid.*, at 1555.

31 *Garcia-Mir v. Meese*, 788 F.2d 1446 (11th Cir. 1986) (Cabinet officers may violate international customary law); Henkin, *supra* note 29, at 1568. For an extensive debate on this issue see Henkin, 'Agora: May the President Violate Customary International Law?', 80 *AJIL* (1986) 913; Paust, 'Agora: May the President Violate Customary International Law?', 81 *AJIL* (1987) 371; Glennon, 'Agora: International Kidnapping', 86 *AJIL* (1992) 736; Leigh, 'Is the President above Customary International Law?', 86 *AJIL* (1992) 757; Paust, 'Rediscovering the Relationship between Congressional Power and International Law: Exceptions to the Last-in-Time Rule and the Primacy of Custom', 28 *Va.J.Int'l.L.* (1988) 393; Weisburd, 'The Executive Branch and International Law', 41 *Va.J.Int'l.L.* (1988) 1205; Riesenfeld, 'The Powers of Congress and the President in International Relations: Revisited', 75 *Cal.L.Rev.* (1987) 405.

32 Compare the famous precedent of *Filatiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), where the Federal Government filed a memorandum (19 ILM (1980) 585) urging the court to apply international human rights law against a Paraguayan official (the court applied that law), with *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (DC Cir. 1984) where the State Department did not favour the adjudication of the case (Brief reprinted in 24 ILM (1985) 427), and the court acted accordingly.



implementing legislation.<sup>33</sup> In examining this question, '[m]any courts have considered the executive's intent as most relevant in determining whether a treaty is directly applicable.'<sup>34</sup> A similar tendency is apparent when courts must determine whether there is a conflict between the local law and a related treaty. The treaty is often interpreted narrowly so as not to affect the authority of the local law.<sup>35</sup> The 1992 US Supreme Court decision regarding the abduction of a Mexican national to the United States under the guidance of US drug enforcement agents is yet another illustration of this tendency: the Supreme Court did not consider this abduction to be incompatible with the 1978 US-Mexican extradition treaty, because this treaty did not expressly prohibit such actions.<sup>36</sup>

The reliance on the executive in interpreting the contents of a treaty is heavy. France is the country which is usually referred to as a peculiar example in this context. Until recently the rule used to be that the French Ministry for Foreign Affairs was the only authority competent to interpret treaties to which France was a party.<sup>37</sup> The administrative courts went even further when they declined to review under treaty law the legality of administrative acts.<sup>38</sup> Thus, despite the supremacy of treaty law as provided in Article 55 of the French Constitution, the courts' jurisprudence guaranteed the French executive the control over the implementation of treaties in the French legal system. Probably to align itself with the requirement of the European Community's prescriptions, the *Conseil d'Etat* has recently begun to take a more independent role in interpreting and enforcing treaties,<sup>39</sup> although the

33 See Restatement, Sec. 111(4): 'An international agreement of the United States is "non-self-executing": (a) if the agreement manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation, (b) if the Senate in giving consent to a treaty, or Congress by resolution, requires implementing legislation, or (c) if implementing legislation is constitutionally required.'

On the implementation of the test of self-execution see Jackson, 'United States', in *Treaties*, *supra* note 9, 141, at 147-56, and Steiner & Vagts, *supra* note 19, at 605-610. For criticism of this distinction between treaties see Paust, 'Self-Executing Treaties', 82 *AJIL* (1988) 760.

34 Jackson, *supra* note 9, at 155. The fact that the test of self-execution is heavily dependent on the national point of view is apparent also from reading Sec. 111(4) of the Restatement (*ibid.*, subsections (b) and (c)).

35 See *Société Nationale Industrielle Aérospatiale v. United States District Court for the Southern District of Iowa*, 107 S.Ct. 2542 (1987) (concerning the interpretation of the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, 1970).

36 *United States v. Alvarez-Machain*, 112 S.Ct. 2188 (1992). In footnote 16 the Court mentions '[t]he advantage of the diplomatic approach to the resolution of difficulties between two sovereign nations, as opposed to the unilateral action by the courts of one nation [...]' For a similar decision by a chamber of the German Federal Constitutional Court see *Stocke v. the Federal Republic of Germany*, decision of 17 July 1985 (*EuGRZ* (1986) 18, at 20).

37 See de la Rochere, 'France', in *Treaties* *supra* note 9, 39, at 40-5.

38 The civil courts do not refer to the executive when they determine that the treaty provisions are not ambiguous (the '*acte clair*' doctrine), or if the dispute concerns private interests and does not raise issues of international public order: *ibid.*, at 49-50.

39 Dreifuss, 'The Recent Change in the French Administrative Case-Law concerning EEC and Domestic Rules' (lecture presented in Tel-Aviv University, March 1991); see also discussion in *Revue française de droit administratif* (1991) 172-79; Buffet-Tchakaloff, 'L'interprétation des Traités internationaux par le Conseil d'Etat', 95 *RGDIP* (1991) 109.

view of the executive is still cautiously considered.<sup>40</sup> France is not the only jurisdiction where the executive's opinion regarding treaty interpretation has been followed. The British Court of Appeal came close to a similar doctrine when it ruled that '[it] ha[d] no jurisdiction to determine the meaning and effect of any treaty to which the Government of the United Kingdom [was] a party and indeed [was] not equipped to do so, that being a matter of public international law.'<sup>41</sup> In the United States it is the rule that in interpreting treaties the court shall give 'great weight' to the opinion of the administration.<sup>42</sup> Reference to the position of the executive for the purpose of treaty interpretation is given also by the courts in Germany<sup>43</sup> and in Denmark.<sup>44</sup>

### 3. International Decisions

Often, national courts may be requested to implement prescriptions of international institutions established under treaties that have direct effect in the domestic legal system. When such prescriptions are incompatible with domestic policies – especially when these prescriptions were made without the consent of the national Government – courts would occasionally dodge the conflict by interpreting the international decision as not self-executing, i.e., a decision that was not intended to carry immediate effects. Thus, the Belgian Court of Cassation, despite its generally positive attitude towards international obligations,<sup>45</sup> avoided the implementation of the judgment of the European Court of Human Rights in the *Marckx* case,<sup>46</sup> by declaring that it was not 'sufficiently precise and complete to have direct effect,' and therefore implementation was only possible through legislation.<sup>47</sup> In the same vein, courts in several other

40 See Buffet-Tchakaloff, *ibid.*, at 110-111.

41 *British Airways v. Laker Airways*, [1984] Q.B. 142, 192. On appeal, the House of Lords emphasized that the rule applied to unincorporated treaties: [1985] Appeal Cases 58, 85-86. For criticism of this decision see Higgins, 'United Kingdom,' in *Treaties*, *supra* note 9, 123, at 132-33; F.A. Mann, *Foreign Affairs in English Courts* (1986) 96. Professors Higgins and Mann mention a number of other decisions in which British courts did engage in interpretation of unincorporated treaties: Higgins, *ibid.*, at 133-34; Mann, *ibid.*, at 89-93.

42 'While courts interpret treaties for themselves, the meaning given to them by the departments of Government particularly charged with their negotiation and enforcement is given great weight.' *Kolovrat v. Oregon*, 366 US 187, 81 S.Ct. 922, 6 L.Ed. 218 (1961); Restatement, Sec. 326(2); Jackson, *supra* note 9, at 167. For a recent assertion of a more independent judicial role in treaty interpretation see *Haitian Centers Council, Inc. v. McNary*, 969 F.2d 1350, 1361-66 (2nd Cir. 1992). At the time of writing, an appeal from this decision is pending before the United States Supreme Court.

43 See Frowein, *supra* note 9, at 85.

44 Gulmann, 'Denmark,' in *Treaties*, *supra* note 9, 29, at 37.

45 In the *Le Ski* decision, *supra* note 21.

46 58 ILR (1980) 561. In this decision the court declared that the Belgian laws that distinguished between legitimate and illegitimate children were incompatible with certain provisions of the European Convention on Human Rights.

47 Decision of 10 May 1985, quoted in Polakiewicz *et al.*, *supra* note 12, at 72. On this issue see also Maresceau, 'Belgium,' in *Treaties*, *supra* note 9, at 25-26. The European Court of Human Rights criticized the Belgian court's position: *Vermeire v. Belgium*, decision of 29 November 1991, Series A,

## Judicial Misgivings Regarding the Application of International Law

European jurisdictions have failed to follow the decisions of the European Court of Human Rights in which the latter interpreted the 1950 Convention.<sup>48</sup> One can predict that it would be quite difficult to avoid the implementation of United Nations' Security Council decisions, which are binding upon member states according to Article 25 of the Charter, since such decisions would most probably contain directly applicable instructions. Yet even such decisions could sometimes be avoided through interpretation or by invoking domestic principles.<sup>49</sup>

### C. The Third Stage: The Use of Avoidance Doctrines

Certain judge-made doctrines relieve the national courts of the duty to enforce norms of international law in some politically sensitive situations. In most cases these doctrines remove from judicial review issues that might adversely affect the executive's interests in the realm of international politics.

The British Act of State doctrine provides that English courts shall not entertain a claim of an alien regarding the activities on foreign soil done on behalf of the Crown or ratified by it.<sup>50</sup> Although this doctrine is unique to the British system, a similar outcome is reached in other jurisdictions by using different barriers to claims against the national executive. In the United States there are several of these obstacles, ranging from standing and non-justiciability through sovereign immunity to lack of cause of action against governmental violations of international law. Thus, some courts have held that individuals had no standing to challenge alleged violations of international law, unless the involved foreign sovereign did not register a formal complaint regarding the violation.<sup>51</sup> This rule, for example, was invoked by the District Court for the Southern District of Florida to reject the claim of General Noriega, the abducted Panamanian strongman, that the illegality of the invasion of Panama deprived the court of jurisdiction over him.<sup>52</sup> This doctrine was recently qualified by the US Supreme

No. 214-C, *EuGRZ* (1992) 12. For an analysis of this case see Polakiewicz, 'Die innerstaatliche Durchsetzung der Urteile des Europäischen Gerichtshofs für Menschenrechte', 52 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1992) 149.

48 See the report of Polakiewicz *et al.*, *supra* note 12, regarding Austria (at 69), France (at 77, 78), Italy (at 84), the Netherlands (at 129, case-law until the early 1980's), and Turkey (at 141).

49 See *Diggs v. Schultz*, 470 F.2d 461 (DC Cir. 1972), where the court found that the Security Council decisions on sanctions against Rhodesia were self-executing, yet determined that the subsequent Byrd Amendment, passed by the Congress, was implicitly intended to invalidate – for domestic purposes – US's obligations under the UN Charter (at 466).

50 See Mann, *supra* note 41, 184-90, at 187; T. Hartley & J. Griffith, *Government and Law* (2nd ed., 1981) 312-16.

51 *United States v. Hensel* 699 F.2d 18, 30 (1st Cir. 1983), *Cert. denied*, 461 US 958, 103 S.Ct. 2431, 77 L.Ed.2d 1317 (1983); *United States v. Verdugo-Urquidez*, 939 F.2d 1341, 1357 (9th Cir. 1991). For a similar German decision see the *Stocke* case, *supra* note 36. For a critical discussion of this approach see Note, 'Judicial Enforcement of International Law against the Federal and State Governments', 104 *Harv. L. Rev.* (1991) 1269, 1280-84.

52 *United States v. Noriega*, 746 F.Supp. 1506, 1532-33 (1990).

Court in the *Alvarez-Machain* case so as not to apply to claims made under self-executing treaties.<sup>53</sup>

The political question doctrine was invoked to fend off claims of breaches of international obligations to Taiwan on the eve of recognizing China.<sup>54</sup> Claims of aliens harmed during the US night bombing of Libya in 1986 and during the invasion of Panama in 1989 did not fare better. In the former case, the DC Circuit Court upheld the personal immunity of the defendants, President Reagan and Prime Minister Thatcher,<sup>55</sup> while in the latter case the court relied on the Federal Tort Claims Act in determining that the actions during Operation Just-Cause were within the 'discretionary functions' of the US executive, and thus immune from judicial review.<sup>56</sup> Finally, the claim against the executive under international law may fail on the substantive ground that the executive may lawfully violate customary international law,<sup>57</sup> and unilaterally terminate agreements.<sup>58</sup>

The timidity of national courts is not reserved to claims under international law against the national governments. It encompasses also claims against foreign governments or against their interests. The doctrine of foreign sovereign immunity is well entrenched in the various domestic systems.<sup>59</sup> Initially explained as derived from the notion of comity and equality between sovereigns,<sup>60</sup> today sovereign immunity is justified on the basis of judicial prudence in light of possible adverse political ramifications to the forum state from a judgment on the merits.<sup>61</sup> Of course, the granting of immunity to a foreign Government is in the interests of the local Government as well, as the latter may hope to rely on reciprocal treatment in the foreign jurisdiction.<sup>62</sup>

53 *United States v. Alvarez-Machain*, *supra* note 36.

54 *Goldwater v. Carter*, 444 US 996, 100 S.Ct. 533, 62 L.Ed.2d. 428 (1979). For surveys of court decisions applying the doctrines of standing, political question and non-justiciability see Koh, *supra* note 5, at 1314-15; Brilmayer, *supra* note 3, at 2302-06.

55 *Salamy v. Reagan*, 886 F.2d 438 (DC Cir. 1989). For criticism of this decision, and the unusual imposition of costs on the plaintiffs' lawyers see D'Amato, 'The Imposition of Attorney Sanctions for Claims Arising from the US Air Raid on Libya', 84 *AJIL* (1990) 705.

56 *Industria Panificadora, S.A., et al. v. United States*, 763 F. Supp. 1154 (DDC, 1991), *aff'd*, 957 F.2d 886 (DC Cir. 1992), *Cert. denied*, 113 S.Ct. 304; *Goldstar (Panama S.A. v. United States)*, 967 F.2d 965 (4th Cir. 1992), *Cert. denied*, 113 US 411.

57 See the decision in *Garcia-Mir*, *supra* note 31.

58 Restatement, Sec. 339(b): 'Under the law of the United States, the President has the power [...] to make the determination that would justify the United States in terminating or suspending an agreement because of its violation by another party or because of supervening events, and to proceed to terminate or suspend the agreement on behalf of the United States.'

59 See, e.g., C. Schreuer, *State Immunity: Some Recent Developments* (1988); International Law Association, 'First Report on Developments in the Field of State Immunity Since 1982,' *Queensland Conference* (1990).

60 *Schooner Exchange v. M'Faddon*, 11 US (7 Cranch) 116, 3 L.Ed. 287 (1812).

61 Therefore the contemporary doctrine of sovereign immunity applies only to *acta jure imperii*, or sovereign acts, while *acta jure gestionis*, or commercial acts, do not enjoy immunity. See, e.g., Schreuer, *supra* note 59, at 1-9.

62 On reciprocity as a basis of the sovereign immunity doctrine see G. Badr, *State Immunity* (1984) 101-106.

### Judicial Misgivings Regarding the Application of International Law

The Foreign (or US) Act of State doctrine is also motivated by a similar policy. Recently reiterated by the United States Supreme Court, this doctrine 'requires that in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid.'<sup>63</sup> Therefore, according to the doctrine, the courts may not question the legality of such foreign measures under international law. When first pronounced broadly in the famous *Sabbatino* case, this doctrine was explained as reflecting the proper role of a national court:

The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals. [...] [The doctrine's] continuing vitality depends on its capacity to reflect the proper distribution of functions between the judicial and the political branches of the Government on matters bearing upon foreign affairs.<sup>64</sup>

As is well known, this decision has been widely criticized, and public pressure led to the Hickenlooper Amendment to the Foreign Assistance Act of 1961.<sup>65</sup> This amendment, aimed at overriding the doctrine as enunciated in *Sabbatino*, provided that courts may review acts of foreign governments in their territories under international law, unless the President determines that the application of the doctrine is required by the foreign policy interests of the United States. Despite this clear mandate, the Supreme Court refused to depart from its position. Instead it chose to interpret the Hickenlooper Amendment as aimed at overturning the specific outcome of *Sabbatino* rather than overruling the entire doctrine.<sup>66</sup> Lower federal courts have since expanded the Act of State doctrine and blurred its limits while using it whenever the executive was deemed to be potentially embarrassed by a judicial pronouncement.<sup>67</sup>

In other jurisdictions, courts used doctrines from the realm of conflict-of-laws to arrive at similar results. I refer here first and foremost to the continental doctrine of *ordre public*. In civil law countries this doctrine is used as the sole barrier against the recognition of foreign acts that offend the public conscience. Thus, violations of international law by foreign governments may theoretically not be given effect in those jurisdictions to the extent that such violations would offend the local *ordre public*.<sup>68</sup> Indeed, this doctrine is used in France so as not to give effect to foreign violations of

63 *W.S. Kirkpatrick & Co., Inc. et al. v. Environmental Tectonics Corp., International*, 110 S.Ct. 701, 29 ILM (1990) 182, 189.

64 *Banco Nacional de Cuba v. Sabbatino*, 376 US 398, 423, 427 (1963).

65 22 USC. Sec. 2370(e)(2).

66 See *First National City Bank v. Banco Nacional de Cuba*, 406 US 759, 92 S.Ct. 1808, 32 L.Ed.2d 466 (1972); *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 US 682, 96 S.Ct. 1854, 48 L.Ed.2d 301 (1976). In fact, the Hickenlooper Amendment was applied only in the last scene of the *Sabbatino* saga: *Banco Nacional de Cuba v. Farr*, 383 F.2d 166 (2d Cir. 1967), where the court determined that Cuba had violated international law.

67 For a review of the cases and criticism see, e.g., Bazylar, 'Abolishing the Act of State Doctrine', 134 *U. Pa. L. Rev.* (1986) 325. The recent decision in *W.S. Kirkpatrick & Co.*, *supra* note 63, is an effort to redefine the limits of the doctrine.

68 See, e.g., H. Batiffol & P. Lagarde, *Droit international privé* (7 ed., 1981) 409-428.

international law.<sup>69</sup> In other civil law jurisdictions, however, this doctrine is used only selectively. Comparative analysis shows that the doctrine has been invoked to block violations by foreign governments of international law only when the persons affected were citizens of the forum state and the relationship between the two governments (usually the foreign state being a former colony) was poor.<sup>70</sup>

Finally, the national courts' reliance on the executive occurs also with respect to the question of recognition of foreign states and governments. In common law countries the rule is that courts do not form their own views on these matters. Instead they must refer to the ministry of foreign affairs. A certificate issued by the latter shall be conclusive evidence to the truth of its contents. This procedure ensures that the state will not speak in two voices on the matter, and that only the executive's voice will be heard.<sup>71</sup> When the issue concerns recognition of governments, and the practice of the ministry of foreign affairs does not include issuing formal recognition, the courts will have to reach an independent decision, yet a decision that will most likely be heavily influenced by the policy of their Government towards the foreign one.<sup>72</sup> In the countries that follow the civil law tradition there is no legal requirement to defer to the

69 *S.N.T.R. v. C.A.T.A.*, (C. Cass. 1979) 65 ILR 83 (1984) (nationalization of assets of French citizens in Algeria); *Soc. Potasas Ibericas v. Bloch*, (C. Cass. 1939) [1938-40] Annual Digest 150 (Spanish nationalization); *U.R.S.S. v. la Ropit*, (C. Cass. 1928) [1927-28] Annual Digest 67 (Soviet nationalization). The same doctrine was used to protect the interests of an American company against a Chilean nationalization: *Corp. del Cobre v. Bradden Copper Corp.* (Trib. Paris, 1972) 65 ILR 57 (1984).

70 The Iranian nationalization of the concession of the Anglo-Iranian Oil Co. was declared illegal and void under international law by the British court in Aden (*Anglo-Iranian Oil Co. v. Jaffrass*, [1953] Weekly Law Reports 246), while the same measure was not deemed offensive to the *ordre public* of Italy and Japan: *Anglo-Iranian Oil Co. v. Idemitsu Kosan Kabushiki Kaisha*, (H.C. Tokyo, 1953) [1953] ILR 305; *Anglo-Iranian Oil Co. v. S.U.P.O.R.*, (C. Civ. Rome, 1954) [1955] ILR 23. The Italian jurisprudence has been consistent in not scrutinizing foreign nationalizations under international law: *Libya v. Spa Imprese*, (C. Cass., 1979), 81 ILR 90 (1988); *B.P. Exploration Co. v. Astro and Sincar*, (C. Civ. Syracuse, 1973), 13 ILM 106. Dutch courts reacted strongly to Indonesian measures nationalizing assets of Dutch citizens, and declared their ineffectiveness under international law and the *ordre public* doctrine: *Indonesian Corp. P.T. Escomptobank v. N.V. Assurantie Maatschappij de Nederlanden van 1845*, (S.Ct., 1964), 40 ILR 7 (1970); *Bank of Indonesia v. Senembah Maatschappij*, (C.A. Amsterdam, 1959), 30 ILR 28. At the same time, the German court of appeals in Bremen found the Indonesian measures compatible with the German *ordre public*: *N.V. Verenigde Deli-Maatschappijen v. Deutsch-Indonesische Tabak-Handelsgesellschaft M.B.H.*, (DC & CA Bremen, 1959), 28 ILR 16, 24 (1963). The Supreme Court of Hamburg stated that a foreign nationalization could offend the German *ordre public* only when German interests would be harmed from such measure, and on this basis rejected a claim of an American company whose property was nationalized by Chile: *Sociedad Minera at Tentiento v. Aktiengesellschaft Norddeutsche Affinerie*, (1973), 12 ILM 251. Indeed, when property of Germans was nationalized, a German court refused to recognize its effect in Germany, under the same doctrine: *Confiscated Property of Sudeten Germans Case*, (Amtgericht, 1948) [1948] Annual Digest 24.

71 *The Arantzazu Mendi*, [1939] Appeal Cases 256, 264: 'Our State cannot speak with two voices on such a matter, the judiciary saying one thing, the executive another. Our Sovereign has to decide whom he will recognize as a fellow sovereign in the family of states.'

72 See *Gur Corp. v. Trust Bank of Africa Ltd.*, [1986] 3 Weekly Law Reports 583, 598. *Attorney General for Fiji v. Robt. Jones House*, (New Zealand H.C., 1988) 80 ILR 1 (1989).

## Judicial Misgivings Regarding the Application of International Law

executive in such matters. Nevertheless judges informally seek governmental guidance on these questions.<sup>73</sup>

### D. Tracing the Policies That Motivate Judicial Timidity

The doctrines discussed above are all judge-made. Also common to all of them is the fact that opposite avenues were legally possible, and in some cases those opposite paths were ardently urged by scholars. The choice for judicial timidity is thus apparent both from the consistent attitude of each national court in using the various legal shields it has armed itself with, and from the comparative study that produces a quite invariable picture in most jurisdictions.

What are the reasons for this judicial deference to the political branches of Government? Why do judges quite eagerly relieve the executive from checks and balances in matters of international relations? Sometimes courts hint at their motives. When they do so they refer to the mysterious realm of international politics in which their intrusion, they fear, will only hurt national interests by binding the executive to rules which do not constrain other actors. The following statement of the British House of Lords, in a matter concerning a Spanish law that compulsively acquired shares of certain companies, captures this thought:

In their pleadings the appellants seek to attack the motives of the Spanish legislators, to allege oppression on the part of the Spanish government and to question the good faith of the Spanish administration in connection with the enactment, terms and the implementation of the law of the 29 June 1983. No English Judge could properly entertain such an attack launched on a friendly state which will shortly become a fellow member of the European Economic Community.<sup>74</sup>

In the same vein, the United States Supreme Court recently voiced its apprehension of judicial interference with the activities of US forces operating abroad. In determining that the Fourth Amendment of the Constitution did not apply in such circumstances, the Court explained:

The United States frequently employs armed forces outside this country – over 200 times in our history – for the protection of American citizens or national security. Application of the Fourth Amendment to those circumstances could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest. [...] If there are to be restrictions on searches and seizures which occur incident to an American action, they must be imposed by the political branches through diplomatic understanding, treaty, or legislation.<sup>75</sup>

73 J. Verhoeven, 'Relations internationales de droit privé en l'absence de reconnaissance d'un état, d'un gouvernement ou d'une situation', 192 *RdC* (1985-III) 9, 35.

74 *Williams & Humbert v. W. & H. Trade Marks* [1986] 1 Appeal Cases 386 (H.L.). For criticism of this decision see Mann, 'Further Studies', *supra* note 3, at 389-98.

75 *United States v. Verdugo-Urquidez*, 110 S.Ct. 1056, 29 ILM (1990) 441, 449-50. See also *US v. Alvarez-Machain*, *supra* note 36, at footnote 16.

The choice is therefore to uphold national interests as viewed by the executive. Ultimately, the judges examine whether their 'engagement in the task of passing on the validity of foreign acts of state may hinder rather than further [their] country's pursuit of goals,'<sup>76</sup> while these goals are formulated by the executive. The same test is used to examine whether or not to review the acts of their own Government.

Note that by refusing to review their Government's conduct in international affairs, the courts deprive the Government of the aura of legitimacy it enjoys in the internal sphere.<sup>77</sup> The lack of review prevents the courts from the opportunity to uphold the legality of the Government's conduct abroad. But neither the Government nor the public at large seem to be troubled by this outcome. Democratic societies which ardently protect the rule of law within their communities seem ready and even willing to grant their executive branch *carte blanche* to mold their country's external relations unfettered by international law. Therefore they are ready to accept these judge-made doctrines that substantially hinder access to courts.

The concern for a free governmental hand in external affairs is sometimes entwined with a concern for the internal democratic process, a concern that is often mentioned when international law is pleaded in circumstances that cannot impinge directly on the country's external relations.<sup>78</sup> Judges and commentators invoke the separation of powers doctrine to block international norms that did not receive the express approval of the country's legislature, explicitly preferring the opinion of the local voters over international standards.<sup>79</sup> This concern is unpersuasive in many respects,<sup>80</sup> and its reiteration must be attributed to the fact that judges find it impossible to distinguish between the different contexts in which international law is invoked.<sup>81</sup> The concern is that by giving effect to international norms in a case that does not impact on national interests a precedent would be created that would necessitate a similar deference to international norms when national interests may be harmed. In short, the separation of

76 *Banco Nacional de Cuba v. Sabbatino*, *supra* note 64, at 423.

77 One of the functions of a national court system is the granting of legitimacy to the Government and the political system. The legitimacy is conferred through the exercise of judicial review: R. Cotterrell, *The Sociology of Law* (1984) 245; M. Shapiro, *Courts – A Comparative and Political Analysis* (1981) 17-28.

78 This is the case, for example, when a claim for an internationally recognized human right, such as the prohibition of capital punishment, is invoked in a country whose internal laws do not recognize the same prohibition.

79 See, e.g., Trimble, *supra* note 3, at 716-723. The Israeli Supreme Court relies on the separation of powers doctrine as the main reason for its aversion to international law: see *infra* notes 92-96, and accompanying text.

80 See, Note, 'Judicial Enforcement of International Law Against the Federal and State Governments', 104 *Harv. L. Rev.* (1991) 1269, 1285-87. For a critical discussion of the use of the separation of powers doctrine in the Israeli context see *infra* text accompanying notes 92-96.

81 Brillmayer, *supra* note 3, suggests that courts can and must distinguish between a 'horizontal model', in which conflicting national interests loom large, and a 'vertical model', in which individual interests are the heart of the case, as in many human rights issues. Brillmayer dismisses the claim of 'democracy deficit', arguing that cases that belong to the vertical type may be adjudicated under international law. A similar approach was suggested by Franck, *supra* note 3.



### Judicial Misgivings Regarding the Application of International Law

powers rationale is more an excuse than a reason for the judicial disinclination to implement international norms.

Aside from the political advantages that such judicial deference bestows upon the executive, there are sometimes also important economic ramifications to the courts' unwillingness to implement international norms to question the legality of foreign measures. If, for example, a court were to question the legality under international law of a foreign nationalization of an oil concession, it would most probably bring about the suspension of supply of the oil extracted in breach of the concession to the forum state. The nationalizing state would then seek, and presumably find, other markets for its export. Since under present conditions it is highly unlikely that courts in all jurisdictions would join in a concerted reaction to such unlawful nationalizations, no court would want to act unilaterally, thereby adversely affecting its national economy for the sake of international order. Sometimes we do find the courts invoking international law (or the doctrine of *ordre public*) to annul the effects of a foreign nationalization measure. This conduct, however, would usually be motivated by local feelings of animosity towards the foreign regime.<sup>82</sup>

National courts are the prisoners in the classic prisoner's dilemma. If they could have been assured that courts in other jurisdictions would similarly enforce international law, they would have been more willing to cooperate. They might have been ready to restrict their Government's free hand, had they been reassured that other governments would be likewise restrained. But in the current status of international politics, such cooperation is difficult to achieve, and rational judges act like the prisoner who cannot be sure that his or her fellow prisoner will cooperate.

What is therefore a precondition to increasing judicial application of international law is a community-wide commitment to cooperation. The model of the European Communities is the best evidence for the effect that changing commitments can have on judges' willingness to cooperate. The willingness of the national courts in Western Europe to apply unreservedly the Community norms has increased significantly in recent years, coinciding with the growing community-wide recognition of the need to align the economies of the Member States, and the increasing confidence in the Community's institutions.<sup>83</sup> Judges cannot alone bring about this new understanding, but once such a new understanding takes place, the courts will surely follow suit and then their decisions will enhance the inclination to cooperate.

<sup>82</sup> See *supra* note 70 and accompanying text.

<sup>83</sup> On the change of attitude by French courts with respect to both the Community law and the law of the European Convention on Human Rights see *supra* notes 15, 17, and 39 and accompanying text. On the current accommodating attitude of Italian courts to the Community law see Gaja, *supra* note 18. On the shift in Germany's Constitutional Court see Frowein, *supra* note 19. On the recent compliant attitude of the British House of Lords regarding the supremacy of Community law see *R. v. Secretary of State for Transport, Ex parte Factortame*, [1990] 2 Appeal Cases 85 (H.L.); *R. v. Secretary of State for Transport, Ex parte Factortame (No. 2)* [1990] 3 Weekly Law Reports 836 (H.L.).

### III. The Attitude of the Supreme Court of Israel towards the Implementation of International Law

#### A. Which International Norms Apply in the Israeli Legal System?

The jurisprudence of the Israeli Supreme Court with respect to the application of international norms reflects a conflict between opposing aims which the Court has striven to balance.<sup>84</sup> Being a small country, surrounded by enemies and relying on foreign assistance and encouragement, one could have expected the Israeli legislature, or its courts, to embrace international law as part of the legal system. And indeed, despite the fact that no law provides for the incorporation of international law into the local system, one of the earlier decisions of the Supreme Court on this subject did adopt a monist approach which could have meant the incorporation of all international norms without qualification. In explaining the Court's power to apply international law, Justice Cheshin relied on the very independence of the State of Israel:

The [Israeli] Declaration of Independence [of May 14, 1948] gave the new State access to the international laws and customs which all States enjoy by virtue of their sovereignty, and enriched its legal system by the accepted principles of the law of nations.<sup>85</sup>

This reasoning is not unique. A similar approach was taken in early decisions of the United States Supreme Court,<sup>86</sup> and the Belgian and Luxembourg Courts of Cassation.<sup>87</sup> From a formal point of view, sovereignty *per se* does not necessarily involve the automatic incorporation of international law into national legal systems.<sup>88</sup> Therefore, the decision reflects a clear judicial choice for the applicability of international law. While this decision discussed the applicability of a certain customary norm, namely the jurisdiction of the state over offences committed on ships sailing on the High Seas carrying the state's flag, the rationale expressed in this decision would further imply that treaty-based norms would also be part of the local legal system.

While this decision reflected the Court's choice to ensure compliance with international law, security considerations soon came to the fore and changed the Court's attitude. Events in the volatile Middle East made the Court keenly aware of Israel's security concerns. Cases involving international law would often come up before the Court entwined with considerations of national security. These considerations were reflected in administrative law, where considerations of military necessity, once invoked by the authorities, were rarely disputed by the

84 For a review of the status of international law in the Israeli legal system see Lapidot, 'International Law within the Israel Legal System', 24 *Israel Law Review* (1990) 451.

85 *Stampfer v. Attorney General*, 23 ILR 284, 289.

86 *Chisholm v. Georgia* 2 US (2 Dall.) 419, 474 (1793).

87 See text to note 20, *supra*.

88 Lapidot, *supra* note 84, at 453, Y. Dinstein, *International Law and the State* (1971, in Hebrew) 44.

### Judicial Misgivings Regarding the Application of International Law

Court.<sup>89</sup> It is my thesis is that these considerations have also influenced the Court into restricting the applicability of international norms. Just months after the above-mentioned *Stampfer* decision, the Court clarified its position on the applicability of international law in the *Samra* case, which concerned the invocability of the 1949 Israeli-Jordanian General Armistice Agreement.<sup>90</sup> The respondents were Arabs whose village came under Israeli jurisdiction under the terms of the Agreement. They claimed that in light of the Agreement, their lands, which were situated near the Israeli-Jordanian border, could not be deemed 'Absentees' Lands' under Israeli law, and that therefore the claimants were entitled to regain control over those lands. In rejecting this claim the Court adopted the common law rule that treated only customary law – and not international treaties – as binding law. The Armistice Agreement, being a treaty, could not be invoked in Israeli courts.<sup>91</sup> This fundamental distinction between customs and treaties is still the law today.

The rationale of this distinction relies on the separation of powers doctrine. Since in Israel the Government is empowered to conclude and ratify treaties, the claim goes, the automatic incorporation of treaties would grant the Government the power to introduce norms into the Israeli system thereby bypassing the legislature.<sup>92</sup> In criticizing the validity of this argument, it has been 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.<sup>93</sup> But this argument is flawed for other reasons as well. As mentioned, the separation of powers rationale is meaningful only when the Government may ratify treaties. But this power was not a given: it was the Supreme Court who approved 'a constitutional practice' that it found had developed, in which the legislature acquiesced in the delegation of the power to ratify treaties to the Government.<sup>94</sup> Curiously, when it came to increasing the Government's powers *vis-à-vis* the legislature, the separation of powers doctrine did not loom large. Finally, the governmental power to make laws indirectly through treaties is not necessarily in conflict with the doctrine: it is still possible to regard treaties as binding, subject to the supervision, and possible intervention, of the legislature.<sup>95</sup> Beyond technical

89 See, e.g., Y. Zamir, 'Human Rights and National Security', 19 *Mishpatim* (1989, in Hebrew) 17, 36-37.

90 *Custodian of Absentee Property v. Samra et al.*, 10 Piskei-Din (Judgments) 1825 (1956); 22 ILR 5.

91 *Ibid.*, at 1829. The Court also concluded that the Armistice Agreement could not have supported the respondents' claim even if it were applicable.

92 *Affu et al. v. Commander of the IDF in the West Bank et al.* 42 (2) Piskei-Din (Judgments) 4 (1988), 29 ILM (1990) 139, 159.

93 See Lapidot, *supra* note 84, at 479-484; Rubin, 'The Adoption of International Treaties into Israel Law by the Courts', 13 *Mishpatim* 210 (1983, in Hebrew).

94 *Kamiar*, *supra* note 24.

95 In interpreting statutes it is assumed that the legislature does not intend to derogate from the international obligations of the state, including its treaty-based obligations, unless a different intention is manifested (see, e.g., *Samra*, *supra* note 90, at 1831; Lapidot, *supra* note 84, at 455). This attests that such interaction between the Government and the legislature is permissible under the separation of powers doctrine.

arguments, one must examine the questionable outcome of the adherence to the doctrine of separation of powers in this context. The reliance on this doctrine does not protect the Israeli democracy from abuse of governmental powers, but quite the opposite: it effectively insulates the Government from judicial enforcement of its international undertakings.

In the specific case of the applicability of the laws of war in general and the laws regarding belligerent occupation in particular, the doctrine of separation of powers is actually irrelevant: these norms do not impinge on the rights and duties of persons within the state who are entitled to participate in the democratic process, but rather on the rights and duties of aliens residing on foreign, occupied soil. This is the reason why in Britain the courts have recognized that with respect to the international laws of war it is senseless to invoke the separation of powers doctrine.<sup>96</sup>

Since only customary international may be invoked before the Israeli courts, a crucial issue is what evidence is required in order to establish the existence of such a custom. Here too the jurisprudence of the Supreme Court reflects the two conflicting interests: respect for enlightened international standards on the one hand, and security considerations on the other. In two cases that related to matters of statelessness,<sup>97</sup> and the freedom of religion,<sup>98</sup> Justice Cohn took a rather broad interpretation of international custom, and drew within its ambit multilateral agreements like the 1966 Covenant on Civil and Political Rights, and declarations, like the 1948 Universal Declaration of Human Rights.<sup>99</sup> Yet later cases, all linked with issues concerning the management of the territories occupied during the June 1967 war, have substantially raised the burden of proof concerning the existence of a custom. Thus the Court found that while the 1907 Hague Regulations reflected customary law and therefore were part of the Israeli legal system, there was no sufficient evidence to support a similar claim regarding the Fourth Geneva Convention of 1949.<sup>100</sup> The general rule was stated by President Shamgar:

From the nature of the matter, [customary international law] refers to accepted behaviour 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.<sup>101</sup>

96 This argument was discussed but rejected in *Affu*, *supra* note 92, at 160-63.

97 *Kurtz and Latushinski v. Kirschen*, 21 (2) Piskei-Din (Judgments) 20 (1967); 47 ILR 212.

98 *The American European Beth-El Mission v. Minister of Public Welfare et al.*, 21 (2) Piskei-Din (Judgments) 325 (1967), 47 ILR 205.

99 *Kurtz and Latushinski*, *supra* note 97, at 26; *Beth-El Mission*, *supra* note 98, at 333.

100 *Ayyub et al. v. Minister of Defence et al.* 33 (2) Piskei-Din (Judgments) 113 (1979).

101 *Abu Aita et al. v. Commander of the Judea and Samaria Region et al.* 37 (2) Piskei-Din (Judgments) 197, at 238-239; 7 Selected Judgments of the Israeli Supreme Court 1, at 36 (Italics in original). An even more rigorous standard would be required for proving the existence of a binding rule of the laws of war, *ibid.* at 242 (Hebrew version), 39 (English version).

## Judicial Misgivings Regarding the Application of International Law

In a heterogeneous world with a variety of convictions, it is quite difficult to identify rules so widespread that they would qualify as customs under Justice Shamgar's definition. Thus the recognition of only customary law as incorporated into the legal system, coupled with its restrictive definition, clearly narrowed the opening through which international norms could enter the Israeli legal system. In its effort to bridge the conflict between the interest of compliance with international standards and the requirement of national security on the level of legal principles, the Supreme Court has significantly limited the invocability of international norms in Israeli courts not only to issues related to the laws of war, but also to human rights issues, and even to economic and trade relations.

### B. Interpretation of the Applicable International Norms

As was noted in the first part of this article, the second strategy used by national courts in containing the impact of international norms is through their interpretation. The Supreme Court of Israel has not differed from its counterparts in other jurisdictions. Although the Court interpreted those norms that qualified as customary law independently, it never gave the norms meaning which conflicted with governmental policies. Thus, Article 43 of the 1907 Hague Regulations Respecting the Laws and Customs of War on Land,<sup>102</sup> which delimits the competence of an occupation administration to modify the legal *status quo ante*, has been interpreted rather broadly. The Court acknowledged that the occupant could modify a wide array of policies so as to accommodate what it considered to be the existing or even future needs of the occupied population.<sup>103</sup> Similarly, the Court has never declared that the methods used by the administration for the acquisition of immovable property in the territories were in principle incompatible with Articles 52 or 55 of the Hague Regulations.<sup>104</sup> The same policy was applied even with respect to the 1949 Fourth Geneva Convention relative to the Protection of Civilians in Times of War, which the Court viewed as reflecting treaty law as opposed to customary law, and therefore unjusticiable in Israeli courts. The Court took pains to demonstrate, sometimes in long *obiter dicta*, that

<sup>102</sup> Annex to the Fourth Convention Respecting the Laws and Customs of War on Land of 1907.

<sup>103</sup> *Jama'iat Isean Cooperative Society v. Commander of the IDF in the Region of Judea and Samaria et al.* 37 (4) Piskei-Din (Judgments) 785, 804 (1983): 'The power of a military administration extends to the carrying out of all necessary measures to ensure growth, change and development... [it] may develop industry, commerce, agriculture, education, health and welfare services and comparable matters, which appertain to proper management, and which are required to ensure the changing needs of a population in an area under belligerent occupation.'

<sup>104</sup> On the legality of the seizure of private immovable property see *Ayyub*, *supra* note 100; on the legality of the acquisition of 'State Lands,' deemed to be the public property subject to Article 55, see *Al Nazer v. The Commander of Judea and Samaria*, 36 (1) Piskei-Din (Judgments) 701 (1982).

measures such as deportations<sup>105</sup> and house demolitions,<sup>106</sup> were not illegal under international law.

Indeed, in a number of instances the Court did declare that certain measures were illegal and therefore annulled them. But common to all these instances was the fact that the criticism of the Court was not directed at the general policy level, but rather at the level of its implementation in the specific instances.<sup>107</sup> Thus, for example, in the famous decision of the *Elon More* case, which declared that a certain plan for the erection of a specific Jewish settlement was illegal, the Court did not reject the settlement policy as illegal *per se* under international law. The plan was annulled since the Court could not be convinced that the military commander had properly employed his discretionary powers in the specific case.<sup>108</sup> Other interventions of the Court were also prompted by ad-hoc scrutiny of the officials' discretion.<sup>109</sup>

### C. The Rejection of 'Avoidance Doctrines'

It is significant that the Court did not choose an alternate path to accommodate the conflicting considerations. As discussed in the previous part, other national courts have developed a variety of 'avoidance doctrines' to assist them in mitigating the effects of international law in sensitive matters. In light of the rather liberal use of these doctrines in other jurisdictions, it must be examined why these doctrines did not loom large in the decisions of the Israeli Court.

Some Israeli Government counsels have invited the Supreme Court to introduce certain avoidance doctrines into the legal system, but the Court has curtly rejected such

105 For the Court's view on the legality of deportations see *Affu et al. v. Commander of the IDF in the West Bank et al.* 42 (2) Piskei-Din (Judgments) 4 (1988), 29 ILM (1990) 139. For a critical analysis of this view see Dinstein, 'Deportation from Administered Territories', 13 *Tel-Aviv U. L. Rev.* (1988, in Hebrew) 403, Kretzmer, 'The Interpretation of Article 49 of the Fourth Geneva Convention', (unpublished manuscript), T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989) 48-49.

106 The legality of this measure was predicated on the existence of a local regulation (from the days of the British Mandate over Palestine) that authorized demolition of houses. This and other Emergency Regulations were deemed superior to the Geneva Convention: *Jabar v. Commander of Central Command*, 41 (2) Piskei-Din (Judgments) 522, 525-526 (1986). Such measures were not deemed as collective punishment: *Dujlas v. Commander of the IDF in Judea and Samaria* 40 (2) Piskei-Din (Judgments) 42 (1985). For a thorough discussion and incisive criticism of these cases see Kretzmer, 'Judicial Review of Demolition and Sealing off Houses in the Territories', in Y. Zamir (ed.), *Klinghoffer Book on Public Law* (1993, in Hebrew) 305.

107 For a general discussion of the Israeli policies in the territories and the Supreme Court's reaction to them see E. Benvenisti, *The International Law of Occupation*, (1993) 108-144.

108 *Doykat v. The Israeli Government* 34 (1) Piskei-Din (Judgments) 1 (1979). In prior cases the Court did not nullify the settlement plans because it was convinced that they were properly motivated by military necessity: *Ayyub*, *supra* note 100; *Amira et al. v. Minister of Defence et al.* 34 (1) Piskei-Din (Judgments) 90 (1979).

109 See, e.g., *Samara v. Commander of the Judea and Samaria Region*, 34 (4) Piskei-Din (Judgments) 1 (1979); *The Electricity Co. for the District of Jerusalem v. Minister of Energy and Infrastructure* 35 (2) Piskei-Din (Judgments) 673 (1981). See also Kretzmer, *supra* note 106 (noting that the Supreme Court never rejected the practice of house demolition as contrary to international law).

arguments. Thus the Court refused to assert that the question of the legality of particular land acquisitions in the occupied territories for the purpose of the establishment of Jewish settlements was a non-justiciable political question.<sup>110</sup> Similarly, the Court refused to accept the Government's claim and adopt the British Act of State doctrine to block judicial review of acts of the Israeli Defence Forces in Lebanon during the 1982 war.<sup>111</sup> The Court never explicitly declared that the Government's interpretation of international law should be given 'great weight',<sup>112</sup> and its opinions reflect independent elaboration.

It is noteworthy that the Government never raised the British Act of State doctrine with respect to the occupied territories. This claim was mentioned only with respect to actions in Lebanon. In fact, it was the policy of the Government from the outset not to contest the jurisdiction of the Supreme Court to review Israel's administrative measures in these territories nor to question the access of residents of these territories to the Supreme Court.<sup>113</sup> While in earlier cases the Court relied on the Government's consent to litigate, in later cases the Court declared that its jurisdiction over measures in the territories was a matter of law, independent of the Government's consent.<sup>114</sup> Indeed, it is my claim that the policy of allowing judicial review over occupation measures necessitated the rejection of avoidance doctrines. The employment of such doctrines would have made judicial review depend on the type of issue at hand or the identity of the petitioner. Such a selective review would have conflicted with the principles of the rule of law and of equality before the law to which the Court was committed. It would also have limited the effect of general legitimization of the administration, a function that was clearly in the interest of the Government.<sup>115</sup> As no context-based restrictions on the Court's jurisdiction could thus be imposed, the Court instead restricted the general invocability of international law.

#### D. Appraisal

Since 1967, most of the cases dealing with the application of international law in Israel have been associated with the occupied territories and the sensitive security and political issues that were involved. It was in decisions relating to these issues that the jurisprudence of the Supreme Court regarding the general question of applicability of

110 *Ayyub*, *supra* note 100, at 124-125.

111 *Tsemel et al. v. Minister of Defence et al.* 37 (3) Piskei-Din (Judgments) 365, 379 (1983); *Al-Nawar v. Minister of Defence et al.* 39 (3) Piskei-Din (Judgments) 449, 461 (1983).

112 Compare with the practice in other jurisdictions: *supra* notes 37-45 and accompanying text.

113 See, e.g., the Government's position in one of the earlier cases, *Hilou et al. v. The Israeli Government et al.*, 27 (2) Piskei-Din (Judgments) 169 (1973), in which the Court examined the merits of the petition relying on the Government's acquiescence.

114 *Jama'iat Iscan*, *supra* note 103, at 809-18.

115 On the role of the Israeli Supreme Court in legitimizing the administration in the occupied territories see Shamir, "Landmark Cases" and the Reproduction of Legitimacy: The Case of Israel's High Court of Justice, 24 *Law & Society Rev.* (1990) 781. Martin Shapiro mentions that governments that acquired control over new territories (usually in colonial situations) used to establish an effective judicial system to provide for a source of legitimacy to their rule: Shapiro, *supra* note 77, at 22.

international norms was consolidated. Two trends are noticeable: on the one hand, the judicially imposed restrictions on the invocability and impact of international norms, and on the other the refusal to adopt doctrines that would allow the selective application of judicial review. These trends are the outcome of a three-fold effort to strive to maintain international standards, to bestow upon the executive an aura of legitimacy under international law, but without imposing restrictions on the executive which might compromise what the latter conceives to be in the national interest.

The appraisal of this jurisprudence should be conducted on two distinct levels. One is the internal Israeli level, concerning the policy grounds and the outcomes of the Court's rather restrictive approach towards international law. The other level deals with the specific outcomes of that attitude with respect to the administration of the occupied territories. From the point of view of the Israeli legal system and Israeli interests, there is no doubt that the court's jurisprudence has taken its toll. Influenced by considerations of security or international relations, this apprehensive attitude is also extended to matters of international trade and economic cooperation, and to other issues that have no connection whatsoever with the country's national security. In these latter cases there is little sense in limiting the applicability of treaty-based norms. As a matter of policy it is wrong not to allow litigants to invoke, for example, free-trade agreements or other commercial treaties in Israeli courts. It is similarly questionable why multilateral treaties concerning human rights, which the Government ratified (and thereby undertook to respect) and which do not impinge on the country's security interests may not be invoked in petitions against the Government. Had the Court adopted certain 'avoidance doctrines', it might have been possible to differentiate between treaties dealing with occupied territories and commercial treaties, for example, and to apply only the latter ones. But the current jurisprudence prevents such a varied approach towards international norms.

With the Court's disregard of treaty-based laws, its strict definition of customary law, and its broad interpretation of the occupant's powers under those customary rules which were found to exist, the ultimate outcome of the jurisprudence of the Court was a refusal to deal with the territories as a truly international matter. Surely, the Court never treated these areas as part of Israel. Yet by practically stultifying the effectiveness of international law, on the one hand, and on the other by its readiness to review the occupant's measures under the principles of Israeli administrative law,<sup>116</sup> the Court has come to treat the administration's action in the territories in much the same way as it treats governmental action within Israel. This attitude is best

116 In addition to the compliance with international customary law, the Court requires the occupation administration to conform with the principles of the Israeli administrative law: *Abu Aita*, *supra* note 105, at 230; *Jama'iat Iscan*, *supra* note 103 at 810. Accordingly, the Court required the administration to conduct hearings before resorting to house demolition: *The Civil Rights Association in Israel v. The Commander General of the Central Region*, 43 (2) Piskei-Din (Judgments) 529 (1989).



## Judicial Misgivings Regarding the Application of International Law

demonstrated by the January 1993 decision of the Supreme Court concerning the deportation of 415 persons from the territories. Although the petitioners invoked several international norms, the Court did not elaborate on them. Instead, it discussed the legality of the deportation orders under the rule of *audi alteram partem* in Israeli administrative law.<sup>117</sup>

In a 1988 case involving the issue of deportations from occupied territories,<sup>118</sup> President Shamgar elaborated on the policy reasons underlying the rule regarding the inapplicability of treaties. This rule, the President said, 'adequately reflect[ed] [...] what [was] desired in terms of the power of the State to shape its law through its own independent legal tools.'<sup>119</sup> In addition, treaty-based law 'would subordinate Israeli law to provisions which had not been adapted to the conditions of this country, its interests and its residents.'<sup>120</sup> While these arguments could be relevant to the general question of the applicability of international norms within Israel, they clearly cannot justify the disregard of treaties that impose restrictions on the occupying power with respect to *aliens* residing *outside* Israel. This statement, which overlooks the unique situation of occupation, highlights the fact that in fashioning a common attitude both with respect to the applicable international norms in the occupied territories and the general applicability of international law within the Israeli system, the Court has significantly limited the invocability of international law with respect both to Israel and the territories.

## IV. Conclusion

National courts tend to limit the application of international law within the national legal systems, and to seek the guidance of their governments whenever national interests are involved. For this purpose an impressive array of legal principles have been judicially defined. The jurisprudence of the Supreme Court of Israel coincides with that general tendency to limit the applicability of international law. Its concern with national security, and since 1967 its exercise of judicial review over the occupation administration, have significantly limited the applicability of international law both in Israel and in the territories. Since greater reliance on international law in national courts is dependent on a more positive attitude towards international cooperation, there is room for hope that the end of the anomalous situation of occupation and the lessening of security concerns would ultimately be reflected in a more positive attitude towards international law.

117 *The Association for Civil Rights in Israel et al. v. The Minister of Defence et al.* High Court of Justice 5973/92, 28 January 1993 (to be published in ILM, 1993). The Court ruled that the denial of the right to be heard prior to the deportation, if such a right had existed, did not invalidate the deportation orders. During subsequent hearings of the deportees, it reasoned, all procedural failures, if such had occurred, could be remedied.

118 *Afiu*, *supra* note 92.

119 *Ibid.*, at 159.

120 *Ibid.*, at 160.