

Judges and Foreign Affairs:
A Comment on the Institut de Droit International's
Resolution on 'The Activities of National Courts and the
International Relations of their State'

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'[T]he role of national courts in the application of international law ... must be strengthened if international law is to have greater efficacy.'¹

'Judges, however, as state functionaries, *cannot* neglect considerations of state interests and these may, on occasions, demand that doctrinal niceties be given short shrift in order to meet particular governmental emergencies.'²

I. Introduction

The enforcement of international law by national courts carries great promise for the enhancement of international norms. International fora have limited competence to adjudicate international disputes, and States are reluctant to resolve disputes through judicial procedures. Thus, as Professor Henry Schermers observed 'If we want questions of international law to come before courts, then we should allow individuals to raise them.'³ Until an international court to which individuals may appeal is established, national courts can potentially offer the best fora for judicial application of international law, since they are easily accessible by individuals, and their decisions can be readily executed.⁴ Aside from the settlement of disputes,

* A Resolution adopted at the 66th session in Milan, 1993.

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1 Conforti (Rapporteur), 'The Activities of National Judges and the International Relations of their State, Final Report', 65 *Yearbook of the Institute of International Law* (1993) Part I, 428.

2 R. Cotterrell, *The Sociology of Law* (2d ed., 1992) 235 (emphasis in original).

3 Schermers, 'The Role of Domestic Courts in Effectuating International Law', 3 *Leiden Journal of International Law* (1990) 77, 79.

4 Schermers, *ibid.*

national courts offer the best, indeed sometimes the only opportunity for individuals to invoke international law and participate in the democracy-deficient process of shaping international law.

Yet national courts seem to reject their role as guardians of the international rule of law. A comparative study of judicial attitudes towards the application of international law shows that judges, in general, refuse the application of international norms whenever they deem that such an application could impinge upon national interests.⁵ What are the reasons for this behaviour? Optimists refer to the lack of familiarity with the rules of the game, and other historic obstacles that can be removed; sceptics, myself among them, would argue that systemic causes drive even those judges who master international law to misapply it.

For optimists and sceptics alike, the initiative taken by the *Institut de Droit International* to address this issue, and to outline principles that would enhance judges' willingness to apply international law is a very welcome one. The Resolution, adopted in Milan on 7 September, 1993, calls upon national courts to become independent actors in the international arena, and to apply international norms impartially, without deferring to their governments. The Resolution is thus a timely and an important step towards establishing an 'international rule of law'. Yet even the optimists would concede that several more steps are necessary to reach that goal.

This comment discusses the contents of the Resolution, (Part IV), after a short exposition of the underlying roots of the problem (Part II), and a definition of the issue (Part III).

II. Identifying the Causes of Judicial Deference to the Executive

Any treatment of a problem must first begin with the identification of its causes, and only then address the appropriate remedy. The Resolution is based on the optimists' premise, namely that the causes of judges' hesitance in applying international law are their lack of knowledge of international law, and the existence of certain limitations on their independence which can be eliminated.⁶ Having thus defined the roots of the problem, the Resolution prescribes the remedy, formulated as a list of 'recommendations to be followed in the national legal systems'.⁷ More radical proposals, such as the call for changing the Statute of the International Court of Justice in order to permit national courts to refer a question for its interpretation, in

5 Benvenisti, 'Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts', 4 *EJIL* (1993) 159. See also *infra*, Part II.

6 The preamble reads: 'Whereas ... it is appropriate to strengthen the independence of national courts in relation to the Executive and to promote better knowledge of international law by such courts; Whereas the strengthening of the role of national courts may be facilitated by removing certain limitations on their independence...'

7 The Preamble.

a procedure similar to the one provided by Article 177 of the EEC treaty,⁸ were not pursued.

What are the causes of the limitations on the courts' independence in matters impinging on foreign affairs? Who initiated the limitations: the Legislature, the Executive, or the Court? Why? Do they reflect judicial ignorance, or rather a strategy of deference? I submit that these limitations are not a coincidence, but rather a reflection of an inherent deficiency in the structure of national courts. A comparative survey shows that these limitations are not accidental.⁹ Their root may be found by analysing the position of the court within the State apparatus.

Sociologists of law examine the sensitive role of the judiciary in a democracy. The judiciary answers the needs of citizens who look to it for the resolution of disputes, and for the correction of problems resulting from the under-representation in the democratic process of minorities and other groups.¹⁰ However, the value of the judiciary should also be examined from the perspective of the other branches of governments in the State apparatus. As pointed out by Roger Cotterrell, the courts are crucial in ensuring governmental interest in maintaining the stability of the social and political order. They do so, 'first, by providing legal frameworks and legal legitimacy for *government* and government acts and, secondly, by maintaining the integrity of the *legal order* itself – the ideological conditions upon which legal domination depends'.¹¹ The independence granted to the court by the other branches, and in particular the power of judicial review of governmental and legislative action, are at the same time a concession granted to the judiciary in return for its legitimating effect on the executive and the legislature, and a necessary condition for the judiciary's credibility in the eyes of the public.¹² Judicial independence in general and the power of judicial review in particular are thus two components of a 'deal' between the court and the other branches of government.

This 'deal' does not appear to include the granting of judicial discretion in the sphere of foreign affairs. In analysing the inception in US jurisprudence of the judicial abdication of judicial review powers with respect to foreign affairs, Thomas Franck traces a 'Faustian pact' offered by Chief Justice Marshall in *Marbury v. Madison*,¹³ aimed at reducing the other branches' anxiety over the newly asserted power of judicial review.¹⁴

8 Conforti, *supra* note 1, at 435.

9 Benvenisti, *supra* note 5; B. Conforti, 'Cours général de droit international public', (1988-V) 212 *RdC* (1991) 9, 30-61.

10 This function bestows legitimacy on judicial review. See J. Choper, *Judicial Review and the National Political Process* (1980) 69; R. Dworkin, *A Matter of Principle* (1986) 27-28. This argument is developed further by J. Ely, *Democracy and Distrust* (1980).

11 R. Cotterrell, *supra* note 2, at 234.

12 Cotterrell, *ibid.*, at 232-236.

13 5 US (1 Cranch) 137 (1803).

14 T. Franck, *Political Questions/Judicial Answers: Does the Rule of Law Apply to Foreign Affairs?* (1992) 10-12. Franck writes that 'the origins of this abdicationist phenomenon [in matters concerning foreign affairs] can be understood only in terms of the judicial politics of the Supreme

While in the domestic sphere all branches of government stand to gain from judicial independence and judicial review, the situation is different with respect to foreign affairs. In this sphere, the political branches of government do not have the same interest in impartial judicial scrutiny of their policies. As opposed to their interests in proving the legitimacy of the national legal system, to which they are responsible, the political branches have no incentive to bestow legitimacy on the international legal system, in which their State is only one actor among numerous actors, many of whom do not face judicial restrictions. Their only interest is the judicial vindication of their action abroad.¹⁵ Whereas the government tolerates its own litigation losses in the domestic sphere, since these very defeats prove the overall soundness of the national legal system, it has no interest in a defeat in the courtroom in the name of the international legal order. Coinciding with this governmental interest is the limited public demand for the legitimacy of the international legal process. Since individuals *qua* individuals do not enjoy access to international fora, and have little opportunity to participate in shaping international law, the courts do not serve the function of protecting such access, a function that legitimizes their intervention in the domestic plane.¹⁶ Faced with an unenthusiastic governmental attitude towards judicial scrutiny over foreign affairs and the limited demand of the public, the judiciary has no leverage to negotiate a grant of power to review and must succumb to the restriction of its powers. The pact is thus dictated to the court, and not, as Franck suggests, offered as 'giveback' by the court.¹⁷

Judges, however, readily accept this dictate. From their point of view, this restriction of their powers protects the judiciary against intense confrontations with the government or with public opinion. Were a court to decide against the government in a foreign affairs matter, officials may refuse to comply, and the government may even restrict the court's jurisdiction. In addition, such decisions could expose the judges to the official and public critique of jeopardizing national interests and assisting enemies and rivals.

This analysis indicates that judicial timidity at the national level in foreign affairs can only be overcome by an accepted systemic remedy, such as the establishment of an Article 177-like procedure.¹⁸ But the approach of the Resolution is different. It offers tools for eliminating the symptoms of the problem, for example by abolishing the political question or the act-of-state doctrines, as if

Court's earliest years', and continues to describe 'Marshall's readiness to bargain away some ill-defined degree of judicial review over foreign affairs'. *Ibid.*, at 11.

15 On the quest for legitimacy in the international context see T. Franck, *The Power of Legitimacy Among Nations* (1990).

16 Safeguarding citizens' opportunity to participate in the political process is the central theme in legitimizing the role of the court in a democratic society. See *supra* note 10. See also similar considerations in Philip Trimble's interesting juxtaposition of the 'public choice approach' to foreign affairs law: Trimble, 'Foreign Affairs Law and Democracy', 89 *Mich. L. Rev.* (1991) 1371, 1377-1381.

17 Lea Brilmayer also emphasizes the role of judges in reaching this pact: Brilmayer, 'International Law in American Courts: A Modest Proposal', 100 *Yale Law Journal* (1991) 2277, 2308.

18 See *supra* text to note 8.

the symptoms were the cause of the problem. In my view, such a symptomatic cure stands only a limited chance of success in reversing the attitude of judges.

III. Defining the Issue: The Relevance of Domestic Law in Foreign Affairs

Faced with the misapplication of international law by national courts, one could argue that courts should rather apply *domestic* law more rigorously to foreign affairs issues. The assumption that judges do not have sufficient knowledge of international law does not apply to domestic law. Domestic law can be relevant in various important aspects of foreign affairs. Domestic law involves foreign affairs whenever its reach is extended extraterritorially to accommodate domestic commercial interests (as for example in antitrust cases);¹⁹ domestic constitutional norms are potentially useful in ensuring the compliance of State officials, in their actions abroad, with basic values of human rights;²⁰ domestic law may also be used to deny the effects of illegal foreign laws and acts, through the private international law doctrine of *ordre public*.²¹

Despite its title, the provisions of the Resolution focus only on the application of *international law*, and thus do not consider the relevance of domestic law in the maintenance of the international rule of law. The reason for this omission cannot be the satisfactory application of domestic law in matters concerning foreign affairs. The concern that a judicial decision would jeopardize the interests of the forum State in the international political arena, which results in the feeble judicial role in applying international law to foreign affairs matters, influences also the application of *domestic law*. Famous recent cases, like *US v. Verdugo-Urquidez*,²² *R. v. Secretary of State for the Home Department, ex Parte Cheblack*,²³ and the Israeli case concerning the 415 deportees,²⁴ show that domestic law is also misapplied to uphold governmental action which has international ramifications. In all three cases

19 On this see note 25, *infra*.

20 See L. Brilmayer, *Justifying International Acts* (1990); Brilmayer and Norchi, 'Federal Extraterritoriality and Fifth Amendment Due Process', 105 *Harv. L. Rev.* (1992) 1217. The Israeli High Court of Justice reviews activities of Israeli officials in the Occupied Territories under Israeli administrative law (see Benvenisti, *supra* note 5, at 182-183, and the discussion of the mass deportation case, *infra* text notes 64 to 65).

21 The doctrine of *ordre public*, used to deny the effects of foreign laws contrary to public morals, may well absorb and reflect standards of international law. On the application of the *ordre public* doctrine with respect to international wrongs see Benvenisti, *supra* note 5, at 171-172.

22 110 S.Ct. 1056; 29 ILM (1990) 441 (interpreting the extraterritorial reach of the Fourth Amendment of the US Constitution, with respect to an unauthorized search by US officials in Mexico).

23 (1991) 2 All ER 319; (1991) 1 WLR 890 (discussing the legality of the arrest and deportation of a resident alien from Britain during the Gulf War, as part of a plan to deport hundreds of citizens of a number of States in the Middle East).

24 HCJ 5973/92 *Association for Civil Rights in Israel et al. v. Minister of Defence et al.* (unpublished opinion). For a description of the case see *infra* text to notes 64-65.

there were concerns for national security coupled with considerations of possible foreign affairs implications. In these cases the courts manipulated domestic law to reach a result that accommodated the executive. When commercial interests of the forum State are at stake, courts also tend to accommodate national interests (as perceived by the executive), by applying domestic law and extending domestic jurisdiction to foreign persons and acts, notwithstanding conflicting foreign laws, and irrespective of international standards and considerations of comity.²⁵

In light of this analysis, it appears that the Resolution's encouragement of national courts to apply *international law* rigorously should have been complemented with a call to treat with similar boldness relevant provisions of domestic law. In particular, the Resolution could have restated the principle, which may well be considered a general principle of law, that domestic law is *prima facie* compatible with international law.²⁶ This presumption, a potent tool that judges in a great number of jurisdictions use to apply international norms despite apparent conflicts with domestic law, can contribute further to the alignment of national prescriptions with international law.²⁷

- 25 In the economic sphere, in cases dealing with conflicts of jurisdiction, such as anti-trust litigation, courts are faced with conflicting prescriptions by States, struggling over the right to regulate extraterritorial commercial activity. In this battle, national courts are an important factor, and indeed, they do not fail to uphold the policy of their State. See, e.g., the Laker litigation (in the US, *Laker Airways Ltd. v. Pan Am World Airways*, 559 F. Supp. 1124 (D.D.C. 1983), *aff. sub nom. Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F. 2d. 909 (DC Cir. 1984); in Britain, *British Airways v. Laker Airways*, [1984] QB 142; [1985] AC 58).
- 26 This presumption proved crucial to end the 'sad case of the PLO mission' *US v. The Palestine Liberation Org. et al.* 695 F. Supp. 1456 (1988); Reisman, 'An International Farce: The Sad Case of the PLO Mission', 14 *Yale J. Int'l L.* (1989) 412, 429-432. The presumption is accepted in many other jurisdictions. Regarding Canada see Hayward, 'International Law and the Interpretation of the Canadian Charter of Rights and Freedoms: Uses and Justifications', 23 *University of West Ontario Law Review* (1985) 9, 13-16; Denmark: Gulmann, 'Denmark', in F. Jacobs and S. Roberts (eds), *The Effect of Treaties in Domestic Law* (1987) 29, 36; England: *R. v. Home Secretary, Ex p. Brind* [1991] 1 AC 696, 760 (H.L.), *Derbyshire County Council v. Times Newspapers LTD* [1992] 3 WLR 28, 44 (C.A.); Germany: Frowein, 'Federal Government of Germany', in F. Jacobs and S. Roberts (eds), *ibid.*, 63, 68-69; India: *Kubik Darusz v. Union of India et al.*, 92 ILR 540 (1993) (S.C.); Israel: *Custodian of Absentee Property v. Samra et al.*, 10 P.D. 1825, 1831; 22 ILR 5 (1956); Italy: Gaja, 'Italy', in F. Jacobs and S. Roberts (eds), *ibid.*, 87, 100-101; Namibia: *Minister of Defence, Namibia v. Mwandighi*, 91 ILR 341 (1993) (H.C.); Zimbabwe: *State v. Ncube et al.* 91 ILR 580 (1993) (S.C.).
- 27 This presumption suggests that the powers of the executive are *prima facie* delimited by international law. This principle has been recognized by a number of national courts: In Australia: *re Minister of Foreign Affairs* 37 Federal Court Reports 298, 112 Australian Law Reports 529 (1992) (H.C.). In New Zealand: *Birds Galore Ltd. v. Attorney-General et al.* 90 ILR 567 (1992). In India, this proposition was accepted, but was qualified as applicable only with respect to interactions with foreign nationals: *Kubik Darusz v. Union of India*, *supra* note 26, at 551. In Britain, in the case of *R. v. Home Secretary, Ex p. Brind* [1991] 1 AC 696 (H.L.), this claim, despite its 'considerable persuasive force' (at 748) was rejected due to its novelty. This principle is hotly debated in the US with respect to the President's powers; see, e.g., *Garcia-Mir v. Meese*, 788 F.2d 1446 (11th Cir., 1986); 'Agora: May the President Violate Customary International Law?', 80 *AJIL* (1986) 913; 81 *AJIL* (1987) 371; Leigh, 'Is the President above Customary International Law?', 86 *AJIL* (1992) 757.

IV. The Contents of the Resolution

A. Generally: Striking a Tone Too Mild

The Resolution advances the idea that the role of the national judiciary should be strengthened *vis-à-vis* the other branches of government 'in order to attain within each State a correct application of international law'.²⁸ Recognizing that such a goal may be achieved only through common agreement, the Resolution is addressed to all three branches of government. The Resolution offers bold suggestions for the strengthening of the independence of the courts, yet it formulates these suggestions as recommendations and concedes that each State is entitled to decide on what are 'the most appropriate ways and means for ensuring that international law is applied at the national level'.²⁹ This watered-down formulation³⁰ reflects the differing views of the drafters.³¹

The recognition of *joint responsibility* of all branches of government to the application of international law, rather than judges' *particular responsibility*, sustains judges' inclination to defer to the executive as the most suitable organ to meet this responsibility. Yet a violation of international law may result from the misapplication of international law by judges as much as by other State officials.³² Many judges tend to ignore this principle, since they do not have to execute their own judgments. The Resolution provided the appropriate occasion to remind judges of their own responsibility in reaching decisions incompatible with international law. The 'diplomatic' style of the Resolution fails to make such an emphasis.

B. The List of Principles

The seven Articles of the Resolution aim at obliterating doctrines that have been developed by courts to shield themselves from applying international law.³³ For the

28 Resolution, Preamble, para. 4. See also Final Report, *supra* note 1, at 429.

29 Resolution, Preamble, para. 3.

30 In the Revised Draft Resolution, the fifth paragraph in the Preamble finds it 'appropriate to indicate rules which should be followed in the national legal systems to attain the strengthening of the role of national courts and to guarantee them independence in deciding questions of international law comparable to the independence they enjoy in deciding domestic issues'. See *supra* note 1, at 444 (emphasis added).

31 See Final Report, *supra* note 1, at 428-430.

32 See, e.g., I. Brownlie, *System of the Law of Nations – State Responsibility* (Part I) (1983) 144: 'The Judiciary and the courts are organs of the State and they generate responsibility in the same way as other categories of officials... Like the executive organs and the legislature, the courts may be instrumental in the misapplication of treaty standards.' Court decisions have been the focus of several international disputes. See, e.g., *Case concerning Barcelona Traction, Light and Power Co. Ltd. (Belgium v. Spain)* [1970] ICJ Reports 3; *Case concerning the Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v. Sweden)* [1958] ICJ Reports 55.

33 For a discussion of these avoidance doctrines and the courts which use them see Benvenisti, *supra* note 5, at 169-173; Conforti, *supra* note 9, at 30-40.

purpose of this comment, the Articles may be grouped into two categories: (a) the call for independent and impartial interpretation of international law and international facts; and (b) the rejection of the avoidance doctrines of the political question and the act of State.

1. Independent and Impartial Interpretation of International Law and International Facts

(a) Judicial Independence in Principle

Article 1 refers to the deference by many courts to the executive's interpretation of international law. It calls upon courts to exercise an independent interpretation, based on 'the methods followed by international tribunals'. (Article 1(2)). With respect to the interpretation of treaties, the Resolution adds (Article 5(3)), rather optimistically, that the courts should 'avoid interpretations influenced by national interests'. Yet Article 1(3) strives for a balance between the ideal of impartial interpretation and the reality of governmental intervention. It holds that in the process of interpreting international law, courts should not be precluded from consulting with the executive, as long as the executive opinion is not assigned 'binding effect'. It could be argued that Article 1(3) diminishes the thrust of the principle of independent interpretation enunciated in Article 1(2), since it implicitly approves the judiciary's assignment of as much as 'great weight'³⁴ to the interpretation of the executive.

A similar balance is aimed for with regard to the courts' role in establishing 'international facts', such as the existence of an entity, a foreign State for example, or the status of a litigant – be it a recognized government, or a person entitled to diplomatic immunity – or the existence of a situation, such as an international armed conflict, or belligerent occupation.³⁵ Common law courts rely almost exclusively on their government's assessment of these facts.³⁶ Yet in some other jurisdictions courts ascertain the facts independently.³⁷ Article 7 strikes a balance between the interests involved, by differentiating between the ascertainment of facts and the assignment of legal consequences to these facts. In the process of fact-finding, the Resolution accepts cooperation between the executive and the court, with Article 7(1) allowing for judicial deference to the executive. Deference to the executive in the area of fact-finding is tolerated in light of the prevailing reality.³⁸ Article 7(2)

34 In the United States it is the rule that in interpreting treaties the court shall give 'great weight' to the opinion of the Executive. See Benvenisti, *supra* note 5, at 168.

35 For an interesting discussion of this question see Conforti (Rapporteur), 'The Activities of National Judges and the International Relations of their State, Provisional Report', 65 *Yearbook of the Institute of International Law* (1993) Part I, 371, at 393-406.

36 *Ibid.*, at 401-403.

37 See B. Conforti (Rapporteur), 'The Activities of National Judges and the International Relations of their State, Preliminary Report', 65 *Yearbook of the Institute of International Law* (1993) Part I, 328, at 337.

38 *Ibid.*, at 404.

emphasizes, however, that those facts gathered and presented by the executive are only *prima facie* evidence in court. After the facts have been established, the Resolution states that courts should be free to interpret the legal meaning of those facts, or in the words of Article 7(3), 'the legal characterization of the facts should be reserved for the judiciary alone'.

The distinction between facts and law is more complicated than the Resolution seems to imply. Many 'facts' are based on legal assumptions. Indeed, the criteria for the establishment of many 'facts', like statehood, or aggression, are legal, not factual ones. Having deferred to the executive's judgment as to the existence of such a 'fact', the court could yield to the executive's interpretation of the law. Thus, without a clear distinction between 'international facts' and their legal characterization, the call in Article 7 for courts to consider the executive's 'findings' as *prima facie* evidence must be emphasized.

(b) Discharging the Duty of Independence in Practice

Having established that national courts should interpret and apply international law independently, 'basing themselves on the methods followed by international tribunals' (Article 1(3)), the Resolution addresses the following questions: May the courts contribute to the transformation of customary international law (Article 4)? May courts determine independently whether a treaty is valid or not, or no longer valid (Articles 5(1) and 5(2))? May courts determine the existence or content of general principles of law and binding resolutions of international organizations (Article 6)? The answer to all of these questions is in the affirmative. In a sense, these answers could have been deduced from the principle mentioned in Article 1(2), namely that courts should utilize the same methods of inquiry used by international tribunals. Thus, Articles 4, 5 and 6 serve mainly to emphasize the call for independent interpretation and application by national courts.

The issue of courts' determination of a treaty's validity raises a further question concerning the law of treaties. When grounds to terminate or invalidate a treaty arise, do they automatically invalidate or terminate the treaty without a formal act of denunciation (or an equivalent act)? If the answer is yes, then judges could declare the status of a treaty, without the need to refer to formal acts. The Resolution does not enter into this debate. Instead, it relies on the findings of Conforti and Labella concerning the performance of national courts in this context.³⁹ After a thorough survey of legal literature, these authors concluded that national courts have largely asserted their power to declare treaties invalid or terminated when no formal denunciation was made, even in matters that require such a denunciation to

³⁹ Conforti and Labella, 'Invalidity and Termination of Treaties: The Role of National Courts', 1 *EJIL* (1990) 44.

invalidate or terminate a treaty.⁴⁰ Courts have followed a formal denunciation when such was issued by their State (but not by other States).⁴¹

The impressive collection of court decisions actively engaged in analysing treaties, as presented and appraised by Conforti and Labella, might seem incompatible with the generally hesitant attitude of judges towards international law. Note however that the authors do not suggest that these courts overlooked national interests. An inquiry into whether in making these decisions courts diverged from their tendency to favour such interests requires an examination of the circumstances of each case and the consequences of each decision. Indeed, my own survey of the behaviour of a large number of national courts in cases relating to the application of the law of belligerent occupation,⁴² showed that despite a seemingly independent application of the international law of occupation,⁴³ courts manipulated the law to reach outcomes that accommodated national interests. Conforti and Labella's description of a number of cases suggests that a similar deferential attitude inspired at least some of the outcomes.⁴⁴ As Conforti and Labella concede, in reference to the decision of the District Court of the Hague of 20 May 1986,⁴⁵ which refused to examine the validity of a treaty regarding the installation of US cruise missiles in The Netherlands, there are limits to judicial independence in such matters.⁴⁶ In the light of such concerns, it would be preferable to look to the law of treaties for defining the proper role of national courts in determining the status of treaties, rather than entrusting the courts the task of defining their own competence in this matter, as the Resolution recommends (Articles 1(3), 5(3)).

2. *The Rejection of Prudential Doctrines*

The Resolution addresses the two major judicially created doctrines that have proved high hurdles on the road to judicial application of international law. Yet the two doctrines should not be treated similarly. While the abolition of the foreign act of State doctrine is justified, the rejection of the political question doctrine is quite problematic. In addition to the Resolution's recommendation regarding these two doctrines, I shall discuss a third hurdle, which was not addressed by the Resolution.

40 Courts have refrained, however, from finding independently the occurrence of a fundamental change of circumstances or a breach of the treaty by another State. *Ibid.*, at 60-63.

41 *Ibid.*, at 63-64.

42 E. Benvenisti, *The International Law of Occupation* (1993) 192-202.

43 See Morgenstern, 'Judicial Practice and the Supremacy of International Law', 27 *BYBIL* (1950) 42.

44 See the cases discussing the validity of the Munich Agreement of 1938 *supra* note 39, at 51-52, and those discussing the validity of treaties not properly ratified. *Ibid.*, at 52-54.

45 *Stichting Verbiedt de Krusraketten and 14,774 Natural and Legal Persons v. The State of the Netherlands*, *NYIL* (1987) 417.

46 See *supra* note 39, at 66.

(a) The Political Question and Justiciability

As Alexander Bickel observed, '[t]he culmination of any progression of devices for withholding the ultimate constitutional judgment of the Supreme Court – and in a sense their sum – is the doctrine of political questions'.⁴⁷ The same can be said with respect to the long list of 'the international passive virtues'⁴⁸ that stand in the way of the proper application of international law by national courts. The Resolution rejects the political question doctrine. According to Article 2, whenever international law provides legal criteria for examining the legality of a certain governmental act, courts 'should not decline competence on the basis of the political nature of the question'. This is a strong statement for justiciability. All executive actions are justiciable, if legal guidelines exist, and every justiciable act should be examined by national courts.

In discussions preliminary to the formulation of the Resolution, members expressed doubts as to whether such a complete rejection of the political question doctrine was realistic, especially when the reviewed executive act was a decision to initiate an international armed conflict.⁴⁹ Thus the Revised Draft resolution created a specific derogation from the principle of justiciability, providing that this principle 'does not imply that national courts have competence to declare war or other use of force in international relations invalid, even when the war or the use of force is unlawful under international law and provided that it has been deliberated by constitutionally competent organs'.⁵⁰ The Resolution, however, does not include this exception.

The 'political question' doctrine is a central one in common law jurisdictions. It has attracted much comment by constitutional and international lawyers.⁵¹ As Anne-Mary Burley notes, international lawyers have been more assertive than constitutional lawyers in their criticism of this doctrine,⁵² probably because *recourse to the doctrine is more widely used when international law is invoked*. Thomas Franck's recent book⁵³ continues this assault in an impressive effort to

47 A. Bickel, *The Least Dangerous Branch* (2nd ed., 1986) 183.

48 Brilmayer, *supra* note 17, at 2299.

49 Final Report, *supra* note 1, at 437; see also the comments of members, *ibid.*, at 412-427.

50 Final Report, *supra* note 1, at 445.

51 The majority of international lawyers criticize this doctrine. See, e.g., Conforti, *supra* note 9; Franck, *supra* note 14; M. Glennon, *Constitutional Diplomacy* (1990); L. Henkin, *Constitutionalism, Democracy, and Foreign Affairs* (1990); Randall, 'Book Review: Foreign Affairs in the Next Century', 91 *Colum. L. Rev.* (1991) 2075. Yet there are other views as well: Brilmayer, *supra* note 17, at 2305; Burley, 'Book Review: Are Foreign Affairs Different?', 106 *Harv. L. Rev.* (1993) 1980, 1994-1995; Halberstam, 'In Defence of the Supreme Court Decision in *Alvarez-Machain*', 86 *AJIL* (1992) 736, 743; Koh, 'Transnational Public Law Litigation', 100 *Yale Law Journal* (1990) 2347, 2386-87. Constitutional lawyers recognize the importance of the doctrine, especially with respect to foreign affairs: Bickel, *supra* note 47, at 183-198; Choper, *supra* note 10, at 289, 360-361. The political question doctrine is well established in English law: see the seminal case of *C.C.S.U v. Ministry of Civil Service* [1985] 1 AC 374, 402, 412 (H.L.); P. Cane, *An Introduction to Administrative Law* (2nd ed. 1992) 33-38.

52 Burley, *supra* note 51, at 1994-1995.

53 *Supra* note 14.

abolish the doctrine altogether. At least with respect to the Resolution, his effort has proved a success.⁵⁴ In fact, the Resolution takes Franck's suggestion a crucial step further. Whereas Franck also suggests permitting courts to establish special executive-minded evidentiary rules,⁵⁵ the Resolution does not approve such preferential treatment.⁵⁶

The call to abolish the political question doctrine garners support from the assumption that this doctrine is not as pervasive in non-common law jurisdictions. However, in French law one finds the doctrine of *actes de gouvernement*, which recognizes that the government has an unfettered prerogative of action in the sphere of international relations.⁵⁷ As discussed in Conforti's Report, this doctrine is similar to the political question doctrine.⁵⁸ While the German Constitutional Court does not recognize any of these doctrines – in fact, Franck's argument that we can and should do without this doctrine, relies on the German jurisprudence⁵⁹ – the German Court finds other avenues for negotiating possible conflicts between international law and national interests.⁶⁰ The preoccupation of common law judges with deferring to the executive so that their country can speak in international fora with a single voice⁶¹ is shared, as Franck shows, also by the German judges.⁶²

The Resolution's suggestion to abolish this doctrine underestimates the forces that impelled courts to devise it. It must be recognized that sometimes, in difficult encounters between the executive and the court, judges must defer to the executive. In such situations judges must choose the lesser evil between the two: misapplication of the law, or abstention, through a reliance on the political question doctrine. I suggest that the first alternative, which necessarily entails a distortion of the law, is not a legitimate exercise of judicial power. It also sanctions an illegality to be used by the executive on other, less dramatic, occasions.⁶³

54 Franck's book was cited in the Final Report, *supra* note 1, at 429, for the proposition that in the US the executive's prerogatives are being eroded.

55 Franck, *supra* note 14, at 126-136.

56 See Article 1 and Article 7 of the Resolution.

57 L. Neville Brown and J. Bell, *French Administrative Law* (4th ed., 1993) 134-135; 155-157. The authors note at 155 that the 'international relations of the French State are outside the competence of the [French] administrative courts'. See also Conforti, *supra* note 9.

58 Preliminary Report, *supra* note 37, at 331-332.

59 Franck, *supra* note 14, at 107-125.

60 *Ibid.*, at 116-125.

61 See *The Arantzazu Mendi*, [1939] AC 256, 264; *British Airways v. Laker Airways*, *supra* note 25, at 193. The US Supreme Court, in *Banco Nacional de Cuba v. Sabbatino*, 376 US 398 (1964), determined that State courts, as well as federal courts, should defer to the federal executive in matters involving foreign affairs.

62 See Franck, *supra* note 14, at 119-120, citing *The Rudolf Hess Case*, No. 23, 55 BVerfG (E) 349 (1980). Franck summarizes his observations at 124: '[it is] clear that the German judiciary has reserved for itself the right to decide but that the judges tend to listen sympathetically to the policy-makers. In practice, there has been little serious conflict between the political and the judicial organs.' Franck estimates that 'the judicial results in the two systems [Germany and the US] are about as similar as the judges' conceptual formulations are different'.

63 See Burley, *supra* note 51, at 1993-1994.

An example of the consequences of a courts' choice of the first alternative, the misapplication of the law, is the case in which the Israeli High Court of Justice was requested to review the deportations of 415 Islamic fundamentalists suspected of being members of terrorist groups from the occupied territories.⁶⁴ The litigation attracted enormous attention, both in Israel and throughout the world. Yet despite the difficult political situation it faced, the Court did not opt for silence. The unanimous decision of the unusually large panel of seven judges did not examine the legality of the deportation orders under international law.⁶⁵ Instead, the Court held that in Israeli administrative law the right to be heard (*audi alterem partem*) prior to the deportation, as provided by the local law, may be qualified due to overriding security considerations. As a consequence of the Court's effort to vindicate the deportation orders, the general right to be heard in administrative proceedings suffered an unnecessarily severe setback. By choosing the second alternative – abstention through the use of the political question doctrine – the Court could have avoided the misapplication of the law, and the blow to the principle of *audi alterem partem*).

Given the inescapable deference of national courts to the executive, the Resolution's rejection of the political question doctrine represents a choice for the occasional misapplication of international law by national courts. There is much to be said against this choice, especially in light of the Resolution's expectation that national courts will assume a larger role in the development of international law. If courts in various jurisdictions take the route suggested by the Resolution, we should anticipate more outcomes such as the decision that deportations from occupied territories are not illegal, or that individuals have no standing to sue against violations of international law.⁶⁶ Soon enough we would encounter cross-references between jurisdictions, each court entrenching the other's prior misapplication of the law, thus producing an executive-oriented jurisprudence that initially would purport to be, but later would become, evidence of customary international law. Lawyers who strive to protect international standards of human rights should explore the second alternative, as the flawed but better option in hard cases.

This second option, abstention, entails further choices: a declaration of the law without requiring compliance, judicial silence, or a middle course that may take the form of creative *obiter dicta* or even a deliberately wrong statement of the facts of the case. The first choice is advocated by Franck,⁶⁷ and indeed, there is much to be said in its favour. Declaratory judgments, suggests Franck, 'make it possible to reconcile pragmatically the obligation to say what the law is with [judges'] duty not to cripple the political branches in their task of defending the national interests

64 See *supra*, note 24.

65 Thereby it implicitly expanded its prior pro-governmental interpretation of Article 49(1) of the Fourth Geneva Convention of 1949. *Affu v. Commander of the IDF Forces in the West Bank*, 42 (2) P.D. 4, 29 ILM (1988) 139.

66 See *infra* text accompanying notes 81-85.

67 *Supra* note 14, at 153-155.

against foreign adversaries.⁶⁸ As this option presumes reduced political pressure on the judge, one could expect a faithful interpretation of the law. This option, however, underestimates the extra-judicial effect of a judicial pronouncement portraying governmental action as illegal. Where such effects are to be expected, and are conceived as contrary to national interests, judges could either opt for a declaration on the law in the abstract, without entering into factual assessments, or simply resort to silence, by invoking the political question doctrine.

A silent court, objects Michael Glennon,

promotes disorder, for judicial nondecision of a bona fide case or controversy deprives litigants as well as future actors of ... knowledge of the rules they must live by, undermines predictability in public affairs and maximizes chaos.⁶⁹

But judicial abstention does not undermine predictability, for no matter which option the court takes – abstention or (mis)application of the law – the immediate outcome of the litigation of hard cases will usually be the same: the rejection of the petition against the government.⁷⁰ In other words, the existence of the doctrine does not significantly circumscribe the scope of potential judicial review. Instead, it inspires a vital and candid public debate over the proper limits of judicial review. Invoking the political question doctrine is a highly visible move that exposes the court to public scrutiny much more than a pro-government misapplication of the law. A judicial resort to the political question doctrine could convey to the public a strong message of disapproval of a certain act. It stops short of legitimizing the act, and thus relegates the issue to be resolved by public debate. Judges who hesitate to expose the limits of their power prolong a myth of broad judicial powers but in the end play into the hands of the executive, and produce bad international law.

It is conceded that the scope of the political question doctrine does not lend itself to satisfactory textual definition.⁷¹ But contrary to lawyers' instincts, an effort to define more clearly the scope of this doctrine would be counterproductive: It is preferable that the government remain with doubts regarding its area of 'free reign', and at the same time, that litigants remain hopeful regarding the prospects of their appeal. The scope of the doctrine will be reexamined constantly in and outside of the courtroom.

The Resolution, in Article 2, does not always require national courts to issue injunctions. The recommendation that courts 'not decline competence on the basis of the political nature of the question' leaves to the judges enough discretion to select the refined remedy most suitable under the specific circumstances. The above analysis shows that the optimal remedy is not necessarily the more assertive one.

68 Ibid., at 155.

69 Glennon, *supra* note 51, at 321.

70 I share Burley's assessment that courts 'are more likely to invoke [the political question doctrine] as an alternative to deciding in favour of [the] government'. Burley, *supra* note 51, at 1994.

71 The factors underlying the doctrine were, however, aptly and concisely stated by Bickel *supra* note 47, at 184.

(b) The Rejection of the Act of State Doctrine

Article 3 abolishes the political version of the Foreign Act of State doctrine.⁷² Invoking this doctrine, US courts, and courts of other countries,⁷³ have refused to examine the conformity of foreign official acts and laws with international law. The Resolution recommends that national courts assert their competence to examine the compatibility of foreign laws with international law, and 'decline to give effect to foreign public acts that violate international law' (Article 3.1).⁷⁴ If national courts follow this recommendation, they may provide an even more solid barrier to illegal acts and laws than international tribunals have proved in the past, due to the insufficient enforcement powers of the latter.⁷⁵

As opposed to the political question doctrine, which is a response to a genuine challenge to the courts, it is widely accepted that the Act of State doctrine is based on a faulty premise. The premise is that courts should refrain from rendering a judgment which would offend a foreign State, so as to avoid retaliation by the foreign State against the national interests of the forum State, or cause embarrassment to the national executive.⁷⁶

However, as was succinctly pointed out by Ignaz Seidl-Hohenveldern, the risk of the forum State being embarrassed by a decision is negligible, and the executive actually may prefer judicial intervention that relieves it from the necessity to make a politically difficult choice.⁷⁷ Indeed, the rejection of this doctrine was unanimously approved by the commentators.⁷⁸ Even the US Supreme Court, which had inspired the development of this doctrine, has recently clarified that the possible embarrassment of foreign States from determinations contrary to their interests is not a relevant consideration.⁷⁹

72 The non-political version of the Foreign Act of State doctrine is a rule of private international law favouring the application of foreign law to transactions in assets situated within the jurisdiction of the foreign State. For an interesting recent study on this doctrine see Burley, 'Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine', 92 *Colum. L. Rev.* (1992) 1907.

73 See Preliminary Report, *supra* note 37, at 332 (referring to a series of similar decisions by the Italian Court of Cassation); in England: *Butes Gas and Oil Co. v. Hammer*, [1982] AC 888 (referring to transactions between foreign States).

74 Thus rules of private international law should defer to public international law. On the relationship between private and public international law see, e.g., Lowenfeld, 'Public Law in the International Arena: Conflict of Laws, International Law, and Some Suggestions for their Interaction', 163 *RdC* (1979) 315; Stevenson, 'The Relationship of Private International Law to Public International Law', 52 *Colum. L. Rev.* (1952) 561.

75 On the power and impact of international tribunals in this context, see Benvenuti, *supra* note 42, at 202-204.

76 Justice Brennan viewed the Act of State doctrine as a special case of a political question: *First National City Bank v. Banco Nacional de Cuba* 406 US 759, 787-88 (1972). On the applications of the doctrine due to political considerations, see Burley, *supra* note 72, at 1965-1969.

77 See 'Observations of Mr L Seidl-Hohenveldern', Preliminary Report, *supra* note 37, at 361.

78 See Final Report, *supra* note 1, at 438, and observations of the members of the Ninth Commission, *supra* note 35, at 411-427.

79 See *W.S. Kirkpatrick & Co., Inc. et al. v. Environmental Electronics Corp.*, *International*, 110 S.Ct. 701, 29 ILM (1990) 182, 189: 'The act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments.'

Even those who prefer to supply the courts with prudential doctrines would not insist on the retention of the Act of State doctrine. Whenever courts find it prudent to abstain they have other, more appropriate tactics, like the political question doctrine, at their disposal.⁸⁰ The rejection by the Resolution of the Act of State doctrine is therefore a noteworthy step towards its eradication.

(c) Standing: An Issue Not Addressed in the Resolution

Despite its importance, the issue of standing to sue under international law has not enjoyed a high profile in legal literature. The classic conception of international law views States, not individuals, as the bearers of rights and duties. Only in the sphere of human rights does international law recognize individuals as bearers of rights *vis-à-vis* their States. Having no rights under the law of expropriation, for example, or even under the humanitarian rules of warfare, the standing of the injured individual to bring suit in national courts against the offending State is not self-evident.⁸¹ National courts have refused on a number of occasions to review administrative action under international law on the ground that the applicant was an individual and thus had no rights under the specific international norm.⁸²

This position must be refuted.⁸³ The rebuttal may benefit from the analogy of judicial review of administrative action under domestic law. It has been widely accepted that one can initiate judicial review of administrative action on the sole ground that an official breached their duty towards the society at large, by exceeding powers granted by law, rather than requiring a showing that the official owes a specific duty to the claimant. One is not required to show that one's personal rights have been infringed. The doctrine of standing has been developed to delimit the range of citizens who have no personal rights against the administration, but nevertheless can sue against an administrative act. Similarly, international law also delimits an official's powers, usually without creating personal rights on behalf of members of the public towards the government. Judicial insistence on a showing of an infringed right of the claimant against the government would stultify judicial review under international law. Therefore, if a judicial enforcement of international law is the goal, the doctrine of standing must be applied to admit individual suits

80 See Bazylar, 'Abolishing the Act of State Doctrine', 134 *U. Pa. L. Rev.* 325, 384-392. For a view that supports the selective retention of this doctrine (to be applied with respect to laws and acts of non-liberal States) see Burley, *supra* note 72.

81 With respect to the rights of abducted defendants, see, e.g., Benvenisti, *supra* note 5, at 169-170; Mann, 'Reflections on the Prosecution of Persons Abducted in Breach of International Law', reprinted in F.A. Mann, *Further Studies in International Law* (1990) 339, 341-343.

82 See Benvenisti, *supra* note 5, at 169-170 where it is noted that the British Act of State doctrine, prohibiting a foreigner from questioning in court the conduct of the Crown abroad, can be regarded as a special case of standing.

83 See Note, 'Judicial Enforcement of International Law Against the Federal and State Governments', 104 *Harv. L. Rev.* (1991) 1269, 1280-1284; Cf. Brilmayer, *supra* note 17, at 2302.

that invoke international law, even when they fail to show an infringed personal right.⁸⁴

The drafters of the Resolution were probably quite confident that most courts acknowledge this principle, and take up private challenges to acts under international law. Yet, in light of recent US case-law to the contrary,⁸⁵ an affirmative statement on the issue of standing was in place.

V. Conclusion

The Resolution addresses a very complex issue. An effective network of national courts applying international law could contribute immensely to the enhancement of the law. It is time that judges be called upon to recognize their duty to implement international law. However, the invitation to judges to join in the process of international lawmaking should take into consideration the judges' sensitive position within the State apparatus. One should not expect judges to divorce themselves entirely from internal power struggles and public opinion.

It is extremely difficult to reduce this inherent conflict to a number of concise statements, as the Resolution sets out to do. Faced with this challenge, its drafter chose to emphasize the courts' duties rather than the difficulties they face. Yet the drafters were fully aware that these difficulties would continue to shape courts' decisions.

It is to be hoped that the call of the *Institut* will not be lost on litigants and courts. For the academics among us, the Resolution is a good opportunity to refine our positions on the perennial question of defining the proper role of national courts in the international legal system.

84 See Vazquez, 'Treaty-Based Rights and Remedies of Individuals', 92 *Colum. L. Rev.* 1082, 1134-1141 (1992); H. Koh, *supra* note 51, at 2384-85.

85 *Goldstar (Panama) v. United States*, 967 F.2d 965, 968 (4th Cir., 1992) (refusing to apply the 1907 Hague Convention No. IV Respecting the Laws and Customs of War on Land, to a claim concerning US military activities in Panama during the December 1989 occupation). See also Benvenisti, *supra* note 5, at 169. For criticism of the *Goldstar* decision see A. Lowenfeld and T. Meron, *Brief of the Government of Panama as Amicus Curiae in Support of Petition for Writ of Certiorari*, (1992). In *US v. Alvarez-Machain*, 112 S.Ct. 2188, 31 ILM (1992) 900, the Court was ready to consider a self-executing extradition treaty as conferring a private cause of action on the abducted person, at 907, ILM.