

©Copyright 2004  
Roni Amit



Judges Without Borders:  
International Human Rights Law in Domestic Courts

Roni Amit

A dissertation submitted in partial fulfillment of the  
requirements for the degree of

Doctor of Philosophy

University of Washington

2004

Program Authorized to Offer Degree:  
Political Science

UMI Number: 3131114

Copyright 2004 by  
Amit, Roni

All rights reserved.

### INFORMATION TO USERS

The quality of this reproduction is dependent upon the quality of the copy submitted. Broken or indistinct print, colored or poor quality illustrations and photographs, print bleed-through, substandard margins, and improper alignment can adversely affect reproduction.

In the unlikely event that the author did not send a complete manuscript and there are missing pages, these will be noted. Also, if unauthorized copyright material had to be removed, a note will indicate the deletion.

**UMI**<sup>®</sup>

---

UMI Microform 3131114

Copyright 2004 by ProQuest Information and Learning Company.

All rights reserved. This microform edition is protected against  
unauthorized copying under Title 17, United States Code.

ProQuest Information and Learning Company  
300 North Zeeb Road  
P.O. Box 1346  
Ann Arbor, MI 48106-1346

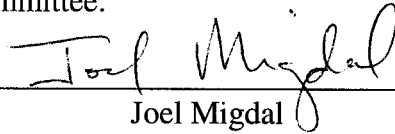
University of Washington  
Graduate School

This is to certify that I have examined this copy of a doctoral dissertation by

Roni Amit

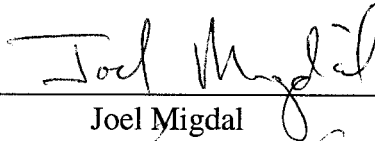
and have found that it is complete and satisfactory in all respects,  
and that any and all revisions required by the final  
examining committee have been made.

Chair of Supervisory Committee:

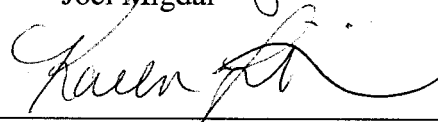


Joel Migdal

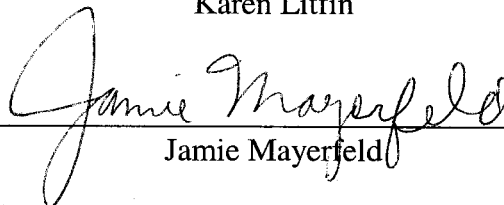
Reading Committee:



Joel Migdal



Karen Litfin



Jamie Mayerfeld

Date: 4/13/04

In presenting this dissertation in partial fulfillment of the requirements for the doctoral degree at the University of Washington, I agree that the Library shall make its copies freely available for inspection. I further agree that extensive copying of the dissertation is allowable only for scholarly purposes, consistent with "fair use" as prescribed in the U.S. Copyright Law. Requests for copying or reproduction of this dissertation may be referred to Proquest Information and Learning, 300 North Zeeb Road, Ann Arbor, MI 48106-1346, to whom the author has granted "the right to reproduce and sell (a) copies of the manuscript in microform and/or (b) printed copies of the manuscript made from microform."

Signature Roni Amit

Date 4/28/04

University of Washington

**Abstract**

Judges Without Borders: International Human Rights Law In Domestic Courts

Roni Amit

Chair of the Supervisory Committee:  
Robert F. Philip Professor Joel Migdal  
International Studies

The judicial branch has long been viewed as the weakest branch of government. Yet remarkably, the domestic judiciary has emerged as a significant actor on the international stage. Around the world, domestic courts are issuing rulings that shatter the long-standing norm of sovereignty while advancing the human rights norms found in international law—a process I call the domestication of international law. Through this process, international human rights law has gone from an almost entirely rhetorical statement of ideals to a domestically enforceable system of law. International human rights norms have begun to provide the citizens of the world with basic legal protections that they can enforce judicially. As a result, the “least dangerous branch” of government has become a major force in the pursuit of international justice.

The domestication process sheds new light on existing theoretical understandings of the relevance of both the courts and of international law. This dissertation traces the evolution of this process: from the relative isolation of U.S. tort law, where the seminal transformation of international norms into practical legal protections received little notice; to the halls of Britain’s highest court, where the entire world watched as the Law Lords determined the fate of a former head of state; to the culmination in Israel’s highest court, which issued a direct challenge to its own executive and legislature on a fundamental matter of security. To account for the domestication process, this dissertation has identified the central factors that these cases have in common. First, as

activist judiciaries engaged in public law litigation, domestic courts began to promote a more internationally oriented rights discourse. Second, they seized on the opportunity to expand their rights-based activism by incorporating international norms based on democracy and individual rights. These norms were in ascendancy after the end of the Cold War gave rise to newly democratizing states. Domestic courts took note of the widespread recognition of democracy during this period and transformed this recognition into a set of substantive legal obligations. Finally, these courts were acting as members of an international community of justices—the global judiciary.

## TABLE OF CONTENTS

|  | Page |
|--|------|
| Chapter 1: Introduction: The Domestication of International Human Rights Law | 1    |
| Chapter 2: U.S. Courts in the Forefront: Judicial Activism Goes Global       | 67   |
| Chapter 3: The Pinochet Case: Holding Leaders Internationally Accountable    | 122  |
| Chapter 4: Israel: Palestinian Rights and The Limits of Judicial Activism    | 167  |
| Chapter 5: Israel Redux: The Global Judicial Identity Trumps the Domestic    | 223  |
| Chapter 6: Conclusion  | 275  |
| List of References   | 299  |

## ACKNOWLEDGEMENTS

This dissertation could not have been completed were it not for the numerous people who provided advice, support and encouragement along the way. Special thanks to my committee—Joel Migdal, Karen Litfin, and Jamie Mayerfeld. My chair, Joel Migdal, provided invaluable guidance through every step of the process and pushed me to rethink certain aspects of my project at various times, resulting in a much improved final product. Karen Litfin's enthusiasm for my research from its very early stages, when it was not clearly situated as a political science question, enabled me to go forward and pursue my interest. Finally, Jamie Mayerfeld's knowledge of human rights issues challenged me to think about the implications of my research in new ways. Perhaps more than they realize, their unflagging enthusiasm and encouragement were vital to my completing the dissertation.

Several other people also provided valuable support and encouragement throughout my graduate studies. Thanks to Nathan Brown at The George Washington University for first suggesting and encouraging me to pursue a Ph.D. I gained critical knowledge of many of these issues at the joint George Washington and Oxford University human rights program, where Harold Koh and Joan Fitzpatrick inspired me to explore them still further.

My dissertation research in Israel was made possible by funding from Bruce Kochis and the Human Rights Education and Research Network at the University of Washington and by a travel grant from the Dorot Foundation. Once in Israel, the support network of family and friends allowed me to extend my stay there. Michael Keren helped me to establish a base at Tel Aviv University. The Gal and Netzky families provided periodic refuge from my research through family get-togethers and home-cooked meals. My experience in Tel Aviv was greatly enriched by the friendship of Ronit Gal and Roni Arbel, who helped me navigate both my life and research-related needs in Israel at various points.

Several other people have also helped me along the way. In particular, I would like to acknowledge the assistance and friendship of Karin Stromberg, who is no longer with us. As an advisor in the political science department, Karin helped me through the early trials and tribulations of graduate school and became a good friend in the process. Her support and encouragement helped me through the early ordeals of graduate school, but it is her lasting friendship that will be deeply missed.

I owe a huge debt of gratitude to Lucas Graves, who not only tirelessly read every chapter as I struggled through, but also enabled me to make the transition to New York by providing housing and moral support. Thanks also to Lauren O'Toole, Joe Akamatsu, Anne Bloom, Vipul Patel, Maysoun Freij, Stuart Chagrin and Don McClean, who provided both moral and technical support.

Finally, I would like to thank the owners, staff, and clientele of the Lotus Café in the Lower East Side for allowing me to spend hours on end in a friendly, caffeine-laden environment to write this dissertation. The presence of a supportive neighborhood place to go for coffee, conversation, and friendship played a crucial role in my ability to carry on with the writing process. It made “going to the office” far more enjoyable even on the days when the task at hand seemed particularly daunting,

## Chapter 1

### **Introduction: The Domestication of International Human Rights Law**

The mother of Baby Doe, a two-month old infant, was nursing her child when an officer of Burma's military junta kicked her into a fire, killing Baby Doe. The brutality was part of the government's efforts to intimidate villagers into leaving their homes in order to clear the way for a natural gas pipeline sponsored by Unocal (an American company), Total (a French company), and the Myanmar Oil and Gas Enterprise (MOGE), a state-owned company controlled by the military. Where it did not simply destroy villages en masse, the army relied on methods of intimidation that included forced labor, killings, rapes, and torture (*Doe* 1997). The victims were powerless to challenge the pipeline and its sponsors, who had the support of Burma's leadership—a military junta with an internationally notorious human rights record.

In Chad, Souleyman Guengueng spent over two years in a small prison cell, suffering torture and a near fatal illness, at the hands of dictator Hissène Habré's brutal regime (Bosco 2000; Human Rights Watch 2002). Under Habré's rule from 1982 until his ouster in 1990, the government murdered over 40,000 people. Following his release, Guengueng began gathering testimony from victims of the Habré regime. But although Habré had fled, his associates remained in power, and Guengeung was forced to hide the testimonials under his house, where they remained for eight years (Bosco 2000). Habré, in the meantime, followed the example of other deposed dictators and retired to another country, opting for a secure compound in Senegal.

These stories are not unusual. Around the world, countless victims lack the ability to challenge human rights abuses by the state, or those in league with it. Human rights abusers benefit from a global atmosphere of impunity arising from the seemingly

insurmountable norm of sovereignty. Yet, remarkably, Baby Doe's father is now the primary plaintiff in a class action suit against Unocal in a California district court. Such a case is still more unusual because U.S. law does not control the activities of American corporations abroad. This gives them an incentive to set up operations in developing states where the laws governing business activities may be less restrictive, particularly with respect to human rights, labor, and environmental standards. As a rule, companies cannot be charged with violations of their home state's laws for their operations abroad; rather, they have been subject only to the laws of the state in which they are operating. Now, however, the companies involved in the pipeline are learning that where domestic law proves unable or unwilling to control their activities, international law has begun stepping up to fill the gap. As a result, they find themselves facing charges of forced labor, crimes against humanity, torture, and violence against women—all acts that are criminalized under international law.

Baby Doe's parents are not alone in their ability to take action against human rights abusers. Guengueng's hidden evidence also resurfaced in 1999, with the help of Human Rights Watch and Harvard Law School's human rights program. His collection of victim testimonials became the basis of a Senegalese case against Habré. The former dictator was indicted on charges of torture and crimes against humanity. His passport was confiscated, and his estate fell under the watch of Senegalese guards after he was placed under house arrest.<sup>1</sup>

How did these state and non-state actors, operating above the law, suddenly find

---

<sup>1</sup> Although Senegalese courts eventually ruled against a trial, Senegal continues to hold him pending extradition to stand trial in Belgium. The case against Habré has continued despite an amendment to Belgium's anti-atrocity law, and a Belgian judge recently conducted an investigative trip to Chad. The government of Chad, for its part, has told Belgium that it will not support any claims of immunity on Habré's part (for more information, see Human Rights Watch: <http://www.hrw.org/justice/habre>).

themselves accountable for their actions—and facing a very real risk of prosecution—under an invigorated system of international human rights law? This dissertation will argue that these are not isolated cases, but are part of a new process of the domestication of international law. Around the world, domestic judiciaries are issuing rulings that shatter the long-standing norm of sovereignty while advancing the human rights norms found in international law. Contrary to the assertions of realism and other state-centered theories of international relations, international law, specifically international human rights law, matters. The central puzzle is exactly how this came to be, defying the expectations not only of avowed realists but even of those who argued in support of the relevance of international law. Thus, in contrast to the functionalist predictions of spillover and expanding supranational authority (Mitrany 1946, 1976; Haas 1964; Groom and Taylor 1975), the growing relevance of international human rights law has not been achieved primarily through the actions of international organizations and international courts. Instead, the process has been propelled by national courts acting against established precedents. This path is even more puzzling given that the judiciary has traditionally been viewed as the weakest branch of government. And even legal scholars who emphasize the role of the courts in achieving social change have overlooked this area of law creation brought about almost entirely through the efforts of domestic courts. Yet, through this process of domestication, international human rights law has gone from an almost entirely rhetorical statement of ideals to a domestically enforceable system of law, challenging long-held notions of sovereignty and state interests.

My argument in the pages that follow is that this development is the result of three related factors: 1) growing judicial activism and the emergence of public law litigation based on a rights discourse ultimately becoming international in scope; 2) post-

Cold War changes in the international legal order leading to the emergence of new international norms; and 3) the rise of globally oriented domestic judiciaries giving effect to these emerging norms.

Each of the empirical chapters emphasizes a different aspect of the domestication process, highlighting the path through which domestic courts have constructed an effective system of international law. Courts in the U.S. were the first to treat human rights protections as legal guarantees, creating a body of law based on these norms (Chapter 2). These rulings highlight the emergence of the public law role in an international context, as judges explicitly sought to give effect to the stated goals of the international community through civil cases. In the U.K., the decision regarding the extradition of former Chilean dictator Augusto Pinochet to face charges of human rights abuses represents the next step in the process begun by U.S. courts (Chapter 3). It marked the first time that a court ruled that a former head of state could be criminally liable for international law violations committed while serving as head of state. Applying domestic law, the Law Lords looked to the American example and undertook to give meaning and concrete legal effect to the emerging global norms of the post-Cold War legal order, transforming them in the process into established legal norms. Finally, the Israeli Supreme Court's ruling outlawing torture constitutes a significant evolution in the domestication process—the application of international human rights law with regard to the court's own state and its internal practices. The deliberations over the legality of torture (Chapter 5), set against previous human rights cases involving Palestinians (Chapter 4), demonstrate how the identification with a global judiciary can influence domestic decision-making, resulting in the incorporation of international human rights norms into the domestic law constraining the state.

National courts seem an unlikely venue for the revitalization of international human rights law for a variety of reasons. To begin with, there is the weakness of the judiciary relative to the other branches of government. This weakness and the threat of executive or legislative action make it dangerous for courts to be perceived as overstepping their bounds. Along the same lines, courts may be concerned with public views regarding the legitimacy of international law in a domestic context. At the same time, judges are generally unfamiliar with international law, which is not a significant part of their legal training, and are thus reluctant to employ it. Finally, the application of international law raises foreign policy and separation of powers concerns. As a result, courts have historically been inclined to characterize cases centered on international issues as non-justiciable political questions, matters better left to the executive. Yet, in spite of these obstacles and a history of judicial caution, the “least dangerous branch” of government has become a major force in the pursuit of international justice (Hamilton 1787). How this happened is the focus of this dissertation.

The predominance within international relations theory of the notion of sovereign states acting within an anarchic system has precluded serious consideration of international law as an independent force. This marginalization of international law is in large part a function of the way scholars conceptualize law. Discussions of the efficacy of law center around what are commonly viewed as its defining features: a central authority, authoritative commands, and punitive sanctions to enforce these commands (Austin 1875). These elements are decidedly absent at the international level, which is characterized by the lack of a supranational authority able to issue authoritative commands that are backed up with punitive sanctions.

In such a self-help system, what legal order there is consists of principles of

coexistence (Schachter 1991). This legal order is based on a negative set of rules established to regulate state behavior and preserve the norms of absolute sovereignty and non-intervention. Under this system, states are subject to a minimum set of restrictions designed to maintain the international order of sovereign states. In the absence of a specific rule outlawing the behavior, they can do as they please. Responding to this global order, courts historically adopted a deferential approach in which they would only limit sovereignty if an explicit rule establishing such a limitation existed (Sands 2001). Thus, the Permanent Court of International Justice (PCIJ), the predecessor to the International Court of Justice (ICJ), held that the rules of international law were based on explicit consent and that “restrictions upon the independence of states cannot therefore be presumed” (*Lotus* 1927). In 1964, the U.S. Supreme Court refused to consider the potential illegality under international law of the acts of a sovereign state, declaring that “both the national interest and progress toward the goal of establishing the rule of law among nations are best served by maintaining intact the act of state doctrine” (*Sabbatino*). This doctrine holds that the courts of one state will not sit in judgment of the acts of another state undertaken in the latter state’s sovereign territory.

An international order privileging sovereignty is one in which international law is exclusively the law of nation-states—it is made by them and for them. Under this conception, even international relations theories that disagree over the relevance of international law—such as neorealism and neoliberal institutionalism—agree that in the area of human rights, international law has been generally ineffective. These theories will be discussed in greater detail in another section, but the key point is that they discount the relevance of international human rights law. For pure realists, military power (and by association economic power) is the definitive factor in international

relations. International law has no independent effect, and states can ignore it without consequence. Regime theorists (which may include both neoliberal institutionalists and some realists), by contrast, maintain that some areas of international law succeed even in the absence of a supreme authority, on the basis of shared state interests and reciprocity. Such laws serve state interests by limiting the actions of other states and thus enhancing the security of each state. International law scholar Louis Henkin cites several examples where international law is generally obeyed, including respect for territory and airspace, laws regarding the sea, protection of property, and laws governing diplomacy (1979). By establishing common standards in these areas, states do not have to continuously negotiate ad hoc agreements. They can proceed in their international functions with confidence that other countries will not seize their diplomats, shoot down their planes, kill prisoners of war or try to take over the country. Thus, states accept some limits on their autonomy via international law as a price of membership in an international society of states (Bull 1977).

In the area of human rights, however, states have been unwilling to relinquish their autonomy in exchange for any perceived benefits of cooperation. The distinguishing feature of international human rights law is that its protections are geared toward individuals rather than states. As a result, it lacks many of the forces that regime theorists have identified as inducing compliance—there is no element of reciprocity, other states are not directly victimized, and violations do not necessarily affect friendly relations between states. States therefore have no material reason to cooperate in enforcing international human rights norms. On the contrary, enforcement is likely to carry significant political and even economic costs. These same factors, rooted in the fundamental concern with order and stability in the international system, have also

inhibited humanitarian interventions for fear of their destabilizing effects, particularly during the Cold War.

This has left individuals with few tangible rights protections in the international system. Although international law has long promoted universal human rights protections that apply equally to all people, irrespective of territorial boundaries, individuals have had no effective mechanisms with which to invoke these protections. Many states have regarded human rights protections as a hindrance to more immediate state interests, such as attracting investment, and have employed the sovereignty principle to avoid international scrutiny. Under these circumstances, international human rights law remained an empty ideal, a rhetorical device of little practical consequence. Yet, as the international human rights discourse developed through a growing range of international declarations and treaties, it also took on added significance. The proliferation of human rights treaties was not just an incremental advance. The system of human rights protection underwent a qualitative shift as well, as international human rights law acquired an unanticipated operational force through the domestication process.

### **Background**

Until World War II, the international community of states operated under the premise that a state's treatment of its citizens was a domestic matter. The scale of atrocities committed under Hitler, however, shocked the international community into action and gave rise to the Nuremberg Tribunal. The tribunal was created to try Nazi crimes that included crimes against the peace, war crimes, and crimes against humanity. Nuremberg established two concepts that would prove central to the development of human rights law: 1) the idea that human rights abuses are a matter of international concern, affecting the community of nations, and 2) the concept of individual criminal

responsibility under international law. This new internationalization of human rights was then legislated via the UN Charter, which established a state obligation to promote, observe, and respect human rights.<sup>2</sup> In December 1948, the General Assembly adopted the Universal Declaration of Human Rights, as well as a resolution recognizing the need for an international criminal court. It called on the International Law Commission to create a draft statute for such a court, with a list of offenses.

For approximately the next forty-five years, however, developments in international human rights law remained mostly symbolic. A large number of human rights treaties were passed, including the Convention on the Prevention and Punishment of the Crime of Genocide (1948), the International Covenant on Civil and Political Rights (1966), and the Convention against Torture (1984), as well as a host of treaties protecting particular groups, including women (1979), children (1989), indigenous peoples (1957, 1989), minorities (1965), and refugees (1950, 1966). But with the exception of Israel's 1961 trial of the former Nazi SS leader Adolf Eichmann, international human rights law was not put into practice. The United Nations fell captive to Cold War politics, as states focused on maintaining the balance of power and stability in the international system—a preoccupation that meant overlooking human rights violations. The Draft Statute for the International Criminal Court, completed in 1953, also fell victim to the Cold War, and no action was taken on it.<sup>3</sup> During this period, the international legal order demonstrated an overriding concern with order at the expense of justice. In other words, stability concerns were placed before human rights considerations.

In the absence of domestic alternatives, victims of human rights abuses during this period relied on a limited number of regional and international mechanisms to which

---

<sup>2</sup> These obligations are most clearly laid out in the Preamble, and in Article 1(3) and Article 55.

<sup>3</sup> This statute was given new life following a 1992 General Assembly resolution.

they had varying levels of access. Although meant to protect individuals, these mechanisms were developed within a state-centric system. As such, implementation was largely under state control, a situation that made enforcement unlikely for the reasons described above. To be sure, certain regional systems did demonstrate some level of effectiveness and cannot be completely discounted. The inter-American Court, for example, issued a highly significant ruling that for the first time established disappearances as a human rights violation and implicated the state (*Velasquez Rodriguez* 1988).<sup>4</sup> And the European Court on Human Rights has played a major role in resolving human rights issues in European states.<sup>5</sup> But in Africa, where major human rights violations and problems with democracy remain, the African human rights system has proven largely irrelevant. The success of regional systems such as those in Europe and the Americas, in contrast to the African system, rests on the presence of supportive democratic states. In the end, a finding in favor of the petitioners rests on voluntary compliance. Further, the states themselves decide whether they will even participate in these institutions, much less abide by their decisions.

At the international level is the International Court of Justice (ICJ), a civil court established in 1946 as part of the UN Charter. The Court has no enforcement arm outside of the unlikely (and as yet unused) prospect of Security Council action. It has no jurisdiction over criminal cases, nor does it have jurisdiction over individuals. Only

---

<sup>4</sup> The practice of disappearance, which is not expressly mentioned in any human rights instruments, was instituted precisely to avoid judicial liability. Because the crime could not be traced to any government body and the authorities systematically denied any knowledge of the disappeared person, relatives lacked the legal course of *habeas corpus*, which relies on ordering the relevant entity to produce the person in custody.

<sup>5</sup> The European system has been uniquely successful as domestic courts have engaged in domestication via the direct enforcement of the European Convention on Human Rights. While this process may be classified as part the larger domestication process, it also has been driven by the unique situation of European integration.

states have standing to bring cases and only against states that have accepted the jurisdiction of the court. Many of the most powerful states never became members or maintained their membership only as long as it served their short-term interests. The U.S., for example, withdrew from the compulsory jurisdiction of the Court as soon as a case was brought against it for the mining of Nicaragua's harbors. Moreover, states have not yet been willing to risk damaging their relations by filing suit in a case not directly affecting their national interest, such as one involving human rights. Given these circumstances, the ICJ is primarily a mechanism for dispute settlement, ill-suited to giving effect to global human rights norms and values. Its settlement procedures tend toward reinforcing the norms of state sovereignty and immunity.

Witness a recent ruling involving a Belgian attempt to try Congo's foreign minister for human rights violations. The ICJ ruling favored the principle of sovereignty over the enforcement of human rights norms (*Congo v Belgium* 2002). The Congo had initiated proceedings against Belgium in the ICJ on the grounds that Belgium's issuance of an international arrest warrant against Congo's foreign minister violated its sovereignty and the principle of sovereign equality upheld by international law. The Court agreed. Belgium's case was based on the principle of universal jurisdiction. The court avoided dealing with the status of this principle in international law, however, and ruled only on the question of immunity. And although the individual in question no longer held any position at the time of the ruling, the court based its decision on the fact that he had held the position of foreign minister at the time that the arrest warrant was issued and that there was no rule of customary international law suspending immunity for a sitting foreign minister. It therefore ordered Belgium to cancel its arrest warrant; it remained silent, however, on the possibility of issuing a new arrest warrant.

In a separate opinion, the President of the Court adopted the traditional view in arguing that state practice did not support Belgium's assertion of universal jurisdiction, even quoting Lord Slynn's rejection of the concept in his minority opinion in the Pinochet case. In his view, international law recognized universal jurisdiction only in the case of piracy: "Universal jurisdiction *in absentia* as applied in the present case is unknown to international law" (President Guillaume 2002: para 12). He added that giving national courts the power to prosecute international crimes would create "total judicial chaos" (para. 15). Viewing international law as a political mechanism, he suggested that allowing courts to rule in such a manner would serve as a tool of the more powerful states.

The separate opinions elaborating on the concept of universal jurisdiction acknowledged that there was some evidence supporting the expansion of universal jurisdiction, but the judges were unwilling to fully embrace the concept as national courts have done. Instead, they concluded that the evidence, based on national legislation, case law, and treaty law, suggested that there was no clear or established practice (Joint Opinion: Judges Higgins, Kooijmans, and Buergenthal; see also Separate Opinion: Judge Oda).

The ICJ's more traditionalist interpretation has raised questions regarding the continued application of the Pinochet precedent (Rispien 2002). Even among those judges who did not wholly reject the principle of universal jurisdiction, support was muted and rested on a judicially conservative approach, in contrast to the activism of national courts. Such limited support is best characterized as a response to developments driven by domestic courts, developments that had advanced to a degree that compelled some level of acknowledgment by the conservative justices of the ICJ. Accordingly, the separate

opinions cited national court decisions, including the Pinochet decision and the human rights cases in the U.S. It seems unlikely, however, that the IJC will become a force for human rights enforcement any time soon.

Some human rights treaties have also included mechanisms to enforce the norms they guarantee. The Genocide Convention requires that a person guilty of grave breaches be tried on the territory where the violation occurred or by an international tribunal. The only international tribunals currently available to try individuals, however, are the special tribunals limited to crimes in the former Yugoslavia, Rwanda, and Sierra Leone. A case in the ICJ would depend on the unlikely prospect of one state filing charges of genocide against another.<sup>6</sup> With regard to the domestic option, a state is unlikely to prosecute abuses occurring on its territory, since human rights abuses are usually tied to state power. Where newly democratized states have been forced to deal with the previous regime's human rights abuses, the tendency has been to avoid individual accountability in exchange for a truth and reconciliation commission accompanied by some sort of amnesty.<sup>7</sup>

The Human Rights Committee, a UN body established under the International Covenant on Civil and Political Rights (ICCPR), can consider individual complaints and communicate its findings to the parties, although its determinations are not legally binding. The individual complaint mechanism, however, is available against only those states that have ratified the Optional Protocol to the ICCPR; otherwise, the Committee is

---

<sup>6</sup> In March 1993, Bosnia and Herzegovina filed a claim against Yugoslavia in the ICJ under the Genocide Convention for events arising under the break-up of the former Yugoslavia and the actions of the Serbs. This case is still pending.

<sup>7</sup> Critics have challenged the domestication process for endangering these reconciliation efforts. Two former Justice Department officials criticized the recent spate of human rights cases for interfering with the sovereign right of these states to choose how best to deal with past abuses (Rivkin and Casey 7/22/03).

limited to examining the periodic reports of state parties.<sup>8</sup> The Committee may question states regarding their compliance with the treaty, but it lacks any independent investigatory power.

The Commission on Human Rights, created under the auspices of the UN Economic and Social Council, also accepts individual complaints, but the procedure is confidential and a complainant must show that there is a pattern of consistent abuse. The Commission mechanisms are weak, at best, and their efficacy has been hampered by the fact that some of the worst human rights abusers sit as members.<sup>9</sup> Finally, the special tribunals established to prosecute abuses in the former Yugoslavia, Rwanda and Sierra Leone have been hampered by limited mandates and resources, and represent only isolated, ad hoc solutions (see Goldstone 2001 on the weaknesses of these tribunals).

The weaknesses of the above mechanisms underscore the significance of the domestication of international law. The decisions of national courts are directly enforceable, giving them more practical effect than those originating in international or regional institutions. Moreover, once an issue enters the court system, the executive typically does not have full control over the process. Recognizing this loss of control, states may try to distance themselves from events that have political and foreign policy repercussions by emphasizing that they are judicial in nature, a move that results in even greater judicial autonomy. Both Spain and the U.K. painted the Pinochet matter as a judicial one after they were unable to end the proceedings against him (Chapter 3). When judicial and political interests conflict, efforts to attain justice in national courts may not fall victim to political concerns as easily as they do at the international level, where states

---

<sup>8</sup> The Committee may also hear complaints filed by one state party against another, but this option has never been used.

<sup>9</sup> At the time of writing, Libya chaired the Commission.

can exert greater control. This judicial autonomy and the fact that increasingly liberal notions of standing are providing individuals with even greater access to domestic courts have combined to make the domestic judiciary a significant force in international human rights protection.

### **The Process of Domestication**

A combination of factors has brought about the domestication of international law: the activism of U.S. courts, followed by the end of the Cold War, and the emergence of more globally oriented local judiciaries. As developments at the international level gave rise to new understandings of sovereignty, a burgeoning global judiciary gave legal effect to these new understandings with regard to human rights enforcement. Crucially, state practice contributed to an emerging legal order in which stability and justice became intertwined. Taking note of these global developments, domestic courts began identifying and enforcing norms of customary international law that upheld human rights at the expense of sovereignty, reinforcing their evolution. U.S. courts played a leading role in identifying and interpreting these norms, as will be discussed in greater detail in Chapter 2. They created a body of law that encompassed new understandings of state accountability for human rights violations—understandings that were then incorporated by other courts in the post-Cold War legal order.

This legal order, brought about by the rise of multilateralism, the proliferation of international institutions and treaties, and the changes wrought by globalization, has transformed the role of international law (Sands 2001; Slaughter 1994). Under this reconstituted understanding of international law's purpose, courts have started to treat implied or ambiguous norms more affirmatively, despite the absence of an explicit rule. They have taken advantage of international law's ambiguity to assert what they identify

as global rights and values—even at the expense of sovereignty. While the old legal order operated under the positivist’s strict separation of law and morality, the new legal order has incorporated elements of natural law. What this means is that domestic courts have abandoned the traditional order’s practice of strictly adhering to the explicitly stated rules governing states and have begun taking a broader view in which these courts fill in legal lacunae in accordance with universal goals. Around the world, judiciaries are adopting “an interpretive approach which seeks to ascertain and then apply the presumed values of the international community” (Sands 2001: 552). Under this “purposive” conception of international law, rules of coexistence established to preserve sovereignty may be superseded in pursuit of the more fundamental goals of the international community (Schachter 1991). These fundamental goals, in turn, may result in the advancement of individual rights even where they conflict with more immediate state interests.

Because of the system of incorporation established by most states, customary international law has taken on the central role in the domestication of international law and has contributed to the emergence of this interpretive approach.<sup>10</sup> Very few states have embraced a monist view of international law in which international and domestic law make up one legal system. Instead, most states have adopted a mixed or intersectionist approach in which customary law is automatically incorporated into domestic law, while treaties require the passage of implementing legislation at the domestic level before they can be enforced in the courts. In other words, a norm of customary international law is directly enforceable in most domestic courts, but a treaty

---

<sup>10</sup> The Statute of the International Court of Justice establishes four sources of international law: 1) international conventions or treaties; 2) “international custom, as evidence of a general practice accepted as law; 3) the general principles of law recognized by civilized nations;” and 4) judicial decisions and the works of international legal scholars as a subsidiary means of identifying the rules of law (Article 38).

obligation cannot be pursued in the courts in the absence of accompanying domestic legislation. And even though the ratification of human rights treaties has become more widespread, these treaties are still rarely given effect through implementing legislation. As a result, human rights enforcement in the courts has had to rely mainly on customary international law.

Ironically, this has given states less control over international norm enforcement at the domestic level as they find themselves bound by these norms in unintended ways. In a world of sovereign states, treaty language is often deliberately vague—a maneuver used to gain widespread support among states that are reluctant to undertake concrete obligations and place limits on their autonomy, particularly in the area of human rights. These ambiguities were indeed effective in limiting the scope of human rights law under the traditional legal order. Yet, paradoxically, these same ambiguities now serve as a source of opportunity rather than constraint. Under the interpretive approach, judges have begun to employ customary law, as well as “soft” or non-binding law, such as resolutions and declarations, to give meaning to the abstract norms embodied in treaties. And courts point to the existence of these norms within treaties, even if abstract or undefined, as evidence of their status in customary law. Thus, state actors who expressed a reluctance to be bound by concrete obligations via the treaty process find that they are nonetheless subject to judicial interpretations of human rights norms—interpretations that are influenced by developments not confined to the treaty process itself.

### **U.S. Courts in the Vanguard**

The United States judiciary has played a pivotal role in the domestication process, identifying and giving substantive meaning to previously symbolic norms. U.S. decisions transformed vague, emerging norms of international law—norms that until then had been

purely rhetorical in effect—into concrete legal standards. These decisions extended the scope and reach of international law and reinforced the notion of an international community. The rulings laid the groundwork for later cases, providing a body of law that the courts of other countries could draw upon once they confronted such cases. In fact, foreign human rights decisions frequently take note of U.S. jurisprudence, citing key U.S. human right cases—what Mary Ann Glendon has referred to as the “brisk international traffic in ideas about rights” (1991: 158). A Canadian Supreme Court judge, ruling on the newly established Canadian Charter of Rights and Freedoms, took note of the U.S. judiciary’s rights pedigree: “The courts in the United States have had almost two hundred years experience at this task and it is of more than passing interest to those concerned... to study the experience of the United States courts” (*Law Society of Upper Canada v Skapinker* 1984, cited in Glendon 1991: 162). Other judicial actors, including Irish Supreme Court judges and the European Commission on Human Rights, have expressed similar sentiments (Glendon 1991; see also Stephens and Ratner 1996).

Why did the U.S. judiciary take on such a key role in human rights norms enforcement even before the end of the Cold War? This question will be examined in greater detail in Chapter 2, but a few brief comments can be made here. In part, the answer is that a unique U.S. law providing aliens with standing to sue for international law violations enabled such cases to be heard in the U.S. when they could not be heard anywhere else. But the law had remained largely dormant for two hundred years and was not specifically meant for human rights cases. So it alone cannot explain the leading role adopted by the American judiciary.

A broader explanation rests on the fact that the U.S. is characterized by a high degree of rights consciousness, a situation that has generated a great deal of scholarship

(Scheingold 1974; Dworkin 1977; Glendon 1991; McCann 1986, 1994). The sixties and seventies witnessed a well-known period of judicial activism in American courts under the rubric of individual rights. In the late seventies, Abram Chayes developed the concept of public law litigation to describe what was happening in U.S. courts (1976). The defining feature of this type of litigation is its identification and actualization of the public values expressed in constitutional and statutory provisions (Chayes 1976, 1982). In this context, the international human rights cases seem logical outgrowths of U.S. jurisprudence rather than anomalous departures from it. U.S. justices embraced the norms of the international human rights discourse in fulfilling their public law role, defining values on a global level and giving rise to the notion of an international community. These global values gained greater prominence as the judiciaries of other countries looked to U.S. rulings in formulating their own rights decisions, particularly after the emergence of the post-Cold War legal order. As other countries experienced rights revolutions of their own (Epp 1998), the U.S. practice became increasingly relevant. In fact, the global spread of the rule of law has been characterized as the “Americanization” of law (Dezalay and Garth 2002a; see also Santos 2002.).

### **Individuals and the New Legal Order**

By the late 1980's, international human rights norms and institutions had become more significant, at least rhetorically, as countries began to acknowledge these norms more routinely (Keck and Sikkink 1998; Risse, Ropp and Sikkink 1999). The example of the 1975 Helsinki Final Act, a security agreement between the member states of the Conference on Security and Cooperation in Europe, is instructive. The Soviet Union allowed the inclusion of human rights provisions in the Act in exchange for agreement on strategic goals. This agreement was made at a time when human rights enforcement and

implementation procedures were weak. But it became the basis of citizen demands for government accountability with regard to these human rights obligations. Groups such as Helsinki Watch, the Moscow Helsinki Group, and Charter 77 in Czechoslovakia sprang up and began monitoring and publicizing government adherence to the standards laid out at Helsinki, increasing the salience of these norms.

At the same time, the end of the Cold War gave rise to a changed international environment in which a state's treatment of its citizens for the first time became a matter of global concern. States began to employ international law in promotion of democracy, as multilateral interventions lent support to the norm that a government may cede its sovereign rights by its failure to adhere to certain standards of international law (Reisman 1990; Franck 1992; Fielding 1995). Recent history is rife with examples of such interventions, which would have been hindered by sovereignty and stability concerns under the old legal order: the establishment of Kurdish safe zones, the UN-sponsored interventions in Somalia and Haiti, and the UN and NATO peacekeeping efforts in the former Yugoslavia.

Previously, courts and states alike recognized sovereignty on the basis of *de facto* control without regard for the means through which this control was achieved or exercised. In 1923, a UN arbitration panel recognized the *de facto* government of a regime that had come to power by a coup (*Tinoco*). Similarly, a U.S. court in 1933 upheld the Soviet seizure of property as an act of a *de facto* government, despite the perceived illegitimacy of the government in the eyes of the U.S. (*Salimoff*).

Under the old legal order, states tolerated massive human rights abuses rather than infringe upon the inviolable concept of sovereignty. Thus, the international community did nothing in response to the human rights violations occurring in Bangladesh in 1971

and Cambodia from 1975-1979, but reacted strongly to India's 1971 invasion of Pakistan/Bangladesh and Vietnam's 1978 invasion of Cambodia. Despite the massive human rights abuses inside the invaded states, the international community chose to focus solely on the incursions as an infringement of the norm of sovereignty.<sup>11</sup> In the traditional system, the competition between sovereignty and human rights protections represented a tension between justice and order (Teson 1992). Under this framework, the old order was solely concerned with order at the expense of justice. More recently, however, the international community has adopted a new understanding of order that incorporates justice by promoting human rights under a reconstituted understanding of sovereignty.

The case of "failed states" illustrates this new understanding. Where governments are so illegitimate that they are no longer able to effectively govern, the international community has begun stepping in and assuming governing power (Helman and Ratner 1992/3). In Cambodia, for example, the Security Council decided in 1991 to create the United Nations Transitional Authority in Cambodia (UNTAC) to oversee the state's operations until elections could establish an effective administration.

This modified understanding of sovereignty, moreover, has extended even beyond intervention in failed states and has been applied in pursuit of democracy. Thus, after economic sanctions failed to end the military coup in Haiti, the UN put together a multinational force to restore democratic governance and maintain stability there. Security Council Resolution 917 characterized barriers to democracy in Haiti as a threat to the peace under Chapter VII of the UN Charter (Fielding 1995). Madeleine Albright, then the U.S. representative to the UN, confirmed the link between internal and external

---

<sup>11</sup> See, specifically UN General Assembly Resolutions 2793 (XXVI), December 7, 1971 and A/Res/34/22, November 14, 1979.

sovereignty as a cornerstone of international stability and peace in comments on a related resolution authorizing the use of force. She explained that the resolution was meant not “to impinge upon the sovereignty of Haiti, but to restore the power to exercise that sovereignty to those who rightfully possessed it” (cited in Fielding 1995: 339).

In this way, democracy and respect for human rights have become integral features of the norm of sovereignty, resulting in an emerging norm of “democratic entitlement” (Franck 1994). It has become increasingly difficult for states that desire recognition within the international community to rule without the consent of their citizens. Regional organizations such as the Organization of American States (OAS), the Commission on Security and Cooperation in Europe (CSCE), and the European Union (EU) have made representative democracy a requirement of membership, linking the right to govern with democracy. In the 1991 Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, members pledged to “support vigorously” democracy in case of its overthrow (Franck 1992). The growing use of election monitors also points to the changing criteria for sovereign recognition.<sup>12</sup> Demand was so great that the Secretary General of the UN created a special office to handle requests for election assistance.

As a result of these developments, the tension between order and justice has become less pronounced. The international community increasingly links these two concepts. How a state governs inside its territory is now a subject of international concern and may itself be defined as a threat to the international order. In fact, international law adopted with the intent of upholding norms of nonintervention has been transformed into a justification for intervention on the basis of humanitarian or

---

<sup>12</sup> By 1995, the UN alone had monitored over 30 elections.

democratic concerns. For example, Chapter VII of the UN Charter was initially meant to limit intervention by defining enforcement measures solely against threats to the international peace, as distinct from domestic activities. But a declaration released during a 1992 Security Council summit reinterpreted Chapter VII, incorporating domestic concerns into its definition of threats to the peace and rejecting the absolute character of state sovereignty on the basis that “its misuse also may undermine human rights and jeopardize a peaceful global life” (cited in Scheffer 1992). The declaration affirmed the notion that gross human rights violations constitute threats to international peace and security and could provide grounds for intervention under the criteria set forth by the UN Charter.

The following year, the Security Council gave life to this new understanding and set up the International Criminal Tribunal for the Former Yugoslavia under its Chapter VII authority. Having determined that the situation in the former Yugoslavia constituted a threat to the peace, the Security Council created the tribunal as a means of restoring the peace. In 1994, the International Tribunal for Rwanda was similarly set up under Ch. VII authority. The establishment of these tribunals was based on a conceptual linkage between the realization of justice and the restoration of peace (Goldstone, 2001).

The impetus for an International Criminal Court also was renewed following the end of the Cold War, with the atrocities in Rwanda and Yugoslavia lending weight to efforts to establish such a court (Goldstone 1999, 2001). The International Law Commission, in conjunction with a preparatory committee, completed work on the Rome Statute of the International Criminal Court in 1998. This statute incorporated the significant advances that had occurred in the evolution of human rights norms, employing both new and expanded categories of crimes. For example, crimes against humanity no

longer required a nexus with armed conflict, as they did under Nuremberg. In addition, rape and forced pregnancy, and persecution on political and gender grounds, were now included as crimes against humanity (Article 7).

All of these developments have contributed to a modern body of law that upholds individual rights while eroding long-standing barriers to adjudicating these rights. The linking of sovereignty with democracy placed the rights of the people before those of the state, meaning that states could no longer point to the traditional concept of sovereignty to defend actions that violated certain norms of the international community. In this way, by reinforcing norms that privilege processes within states over processes between states, state practice began to recognize that non-state actors also constituted subjects of international law. As a result, the positivist conception of international law as an explicit set of rules governing the relations of self-regarding, unfettered sovereign units began to erode, and international law stopped being a mechanism for states alone. As a greater number of activities were interpreted within the standards of international human rights law, states were no longer exempt from legal judgment under the defense of state sovereignty.

Yet individuals were not immediately able to avail themselves of these changes in the international order. These processes remained under state control and were bounded by their interests. Despite changes in the opportunity structure, individuals still needed a venue through which to take advantage of these opportunities. National courts have become this venue as judges have begun to identify these changes as constitutive of customary norms of international law. Through domestic court decisions, developments in the international system have been crystallized and transformed into tangible legal resources.

The reach of these developments has extended beyond states where the judiciary has a well-established power to challenge state actions. Even where legislative or executive supremacy relegates the judiciary to a subordinate role, the courts nonetheless have transcended traditional judicial boundaries. They have adopted this role without the express consent of the dominant parts of the state, and at times in direct opposition to key state interests as represented by the executive and legislative branches. In doing so, the courts have chosen to bypass domestic limits and respond to a transnational context that increasingly advances universal norms. Why did courts begin responding to this new opportunity structure? The next section examines how and why these international processes affected domestic judiciaries.

### **The Global Judiciary and Transnational Public Law**

As the end of the Cold War gave rise to a new international legal order, it also facilitated the development of a global judiciary characterized by increased judicial communication across borders and by judicial deliberations within an international context. Since then, judges have increasingly been taking note of developments beyond their own borders, applying what they identify as universal or democratic norms. Judiciaries look both to the decisions of foreign courts and to the decisions and statutes of international tribunals. They also survey broader developments at the international level, like those described in the previous section, to identify emerging and established customary norms. At the same time, judiciaries themselves have become stronger across the globe, demonstrating an increased politicization, or willingness to rule in areas previously reserved for the executive or legislature (Vallinder 1994; Stone 1994; Shapiro and Stone 1994; Tate and Vallinder 1995). And this global judicialization of politics has been accompanied by a growing rights consciousness (Tate 1995; Epp 1998; Cappelletti

1981; Henkin and Rosenthal 1991).

Because the increase in judicial activism has occurred under the purview of the court's role as rights protector, courts have in turn become more receptive to arguments based on the international human rights discourse. At the same time, the international order that emerged after the Cold War, as described in the previous section, has enhanced the legitimacy of international human rights law. As a result, judiciaries can lend greater authority to their decisions by emphasizing that they reflect universal rights recognized by the democratic community of states. In support of its recent decision upholding privacy rights (*Lawrence* 2003), for example, the U.S. Supreme Court cited a 1981 opinion by the European Court of Human Rights as evidence of a Western consensus (*New York Times* 7/1/03). The recognition of a democratic community of states has also contributed to the rise of a global judiciary. Accordingly, in its review of the 2002-2003 Supreme Court term, the *New York Times* remarked that "the justices have begun to see themselves as participants in a worldwide constitutional conversation" (*New York Times* 7/6/03).

The changes wrought by the Cold War's end have created new opportunities for judges to communicate across national borders. Specifically, growing economic interdependence, accompanied by a wave of democratization (in which Western judiciaries often provide direct assistance in the constitution drafting process of newly democratized states), has contributed to international communication between courts and to the emergence of a global judiciary (Glendon 1991; Slaughter 1994, 2000; Helfer and Slaughter 1997; Weiss 2000; Sands 2001; Koh 2001; Bahdi 2002). In her "Typology of Transjudicial Communication," Anne-Marie Slaughter illustrates the growth of horizontal communications across countries and vertical communications between domestic and

supranational courts (1994). These include courts in countries from distinct regions—Zimbabwe, Canada, and the members of the European Union.

One aspect of this communication is that judiciaries increasingly survey the decisions of their peers, citing these rulings in their own deliberations. For example, in a ruling regarding the death penalty, South Africa's constitutional court devoted an entire section to a discussion of the decisions of regional, international, and high courts (Helfer and Slaughter 1997). Judges and legal institutions around the globe have explicitly recognized that the judiciary should take note of global developments and legal norms in their deliberations.<sup>13</sup>

Beyond that, judges all over the world are meeting face to face with greater frequency (a comprehensive description of these meetings can be found in Helfer and Slaughter 1997; Slaughter 2000; Koh 2001). Harvard, Yale, and New York University all sponsor programs to bring together law students, law professors, and judges from around the world. The European Court of Justice (ECJ) and the U.S. Supreme Court have held meetings and observation sessions with each other. U.S. Supreme Court justices have also met with their counterparts in Europe, under the leadership of Justice Sandra Day O'Connor, who has encouraged American justices to consider foreign and international law. Regionally, Supreme Court justices in Europe meet regularly, as do the justices of the Americas, who have established the Organization of Supreme Courts of the Americas. In Eastern Europe, judges have joined together in the Association of Judges of the Baltic States.

In addition, a variety of institutions have set up conferences with justices from

---

<sup>13</sup> The French Institute of International Law, in a 1993 resolution, called upon national courts to act independently in the international arena and apply international norms as members of this international community, rather than as representatives of their governments (Slaughter 2000; see also Benvenisti 1994b).

around the world. Some of these have very specific activist agendas designed to promote the exchange of liberal judicial trends. For instance, London-based InteRights seeks to raise awareness of comparative constitutional law with regard to individual rights among commonwealth countries. Participants in InteRights conferences share their decisions, referencing both international law and foreign decisions. Along the same lines, the Washington DC-based Judiciary Leadership Development Council held a judicial conference for justices of common law countries to discuss common problems and developments.

According to Slaughter, this increased level of communication is the result of a shared judicial identity—an awareness among the judges that they are participating in a common enterprise (1994, 2000). Elements of this shared identity and purpose include an understanding of courts as autonomous institutions separate from their governments, a commitment to the rule of law, and a shared focus on legal issues that include constitutionalism and rights protections. The global judiciary has emerged as “judges, like the litigants and lawyers before them, are coming to understand that they inhabit a wider world” (Slaughter 2000: 1124). As a result, judicial identity is based less on the notion of serving as a representative of a particular government and has moved toward recognition of membership in a global, professional community (Slaughter 2000).

As professional, institutional identity replaces national identity, courts no longer make decisions solely on the basis of national norms and laws. Their interpretations of domestic issues are colored by their identification with global norms, especially in the area of human rights. As a result, they have transformed these norms into legally binding obligations on domestic actors. By identifying themselves as rights protectors upholding universal norms, domestic courts incorporate and give legal effect to global developments

within the human rights regime. More specifically, they give judicial expression to the changing international environment and its recognition of non-state actors as the subjects of international law under a reconstituted understanding of sovereignty rooted in the developments described in the previous section.

The emergence of a global judiciary, coupled with increased judicial activism within an international context, has resulted in transnational public law litigation (Koh, 1991, 1996, 2001). Chayes, when he developed the concept of public law litigation within a domestic context, characterized courts as “essential partners” in ensuring “that the bureaucracy carries out the positive programs assigned to it” (Chayes 1982: 60). This same concept of public law has now emerged at the international level, based on shared understandings of international norms rooted in democracy and human rights: “transnational public law litigation seeks to vindicate public rights and values through judicial remedies” (Koh 1991: 2347; see also 2001). These rights and values are those found in the international human rights discourse. Following the American example, judiciaries around the world have fulfilled this public function as part of the global judiciary.

In this role, the courts have taken on the function of articulating human rights norms. Although the concept of human rights already was nearly universal, it embodied broad ideals. In their public function, the courts have implemented specific conceptions of these ideals. This has meant adopting a less positivist understanding of international law and embracing a wider conception of the sources that contribute to the norm-formation process, while understanding the judicial role as one of giving meaning and substance to affirmative values and purposes. In the decisions in the following chapters, the justices are often explicit in their intent to give effect to the protections provided by

the system of international human rights law where states have failed to do so. In doing this, they look beyond actual state practice and explicit consent, inferring these elements instead from stated ideals often found in non-binding sources of law.

### **Judicial Activism and Customary International Law**

International law provides a unique opportunity for courts to fulfill a more activist public law role, especially given the necessary reliance on customary international law. The lack of clear, explicit standards for how to identify and define the norms of customary international law provides a space for the judiciary to step in and give concrete meaning to the vaguely expressed values of the international community. The two key elements of customary international law—consistent state practice and its acceptance as law—leave justices with little specific guidance in determining when a norm has reached this status. One important question is what constitutes state practice—is it what states say or what states do? Relying on the former enables courts to turn to a broader array of sources to determine custom and increases their ability to bind states under their international obligations. These “soft law” sources include non-binding documents such as resolutions or declarations, which states signed on to in some cases only because they were non-binding. By turning to them as a source of custom, courts have transformed unenforceable soft law into binding hard law, holding states to the ideals of the international human rights discourse and giving effect to the values of the international community. As a result, states have found themselves bound by human rights norms in ways that they never anticipated. Courts have taken the crux of the realist criticism—that states merely pay lip service to human rights norms—and turned it on its head, transforming often disingenuous declarations into binding law.

Slaughter Burley and Mattli have suggested that providing a forum for individuals

to pursue rights claims is in fact a judicial power play (1993). Decisions framed within the rights discourse bolster the court's legitimacy and provide a defense against challenges to judicial power. By framing their activism within their legitimate, apolitical judicial role as guarantors of individual rights, they argue, judges have been able to mask their motives of increasing their power relative to other institutions. Whether judiciaries have in fact been this calculated in their actions is debatable. What is certain, however, is that judicial power has grown as a result of the increasing judicial role with regard to rights protection.

Still, the judicial use of international law in furtherance of human rights has met with criticism. This criticism springs from the belief that international law is meant to regulate state interactions in the international system and should, as such, be firmly in the control of states. Accordingly, organs of the state should represent the state's interest at the international level when interpreting and applying international law and should employ a strict definition of consent. Judicial use of customary international human rights norms to advance individual rights represents an alternative vision of the role of international law, one that is misplaced according to the critics. In applying this vision, courts are over-stepping their bounds.

Reacting to the burgeoning human rights litigation in U.S. courts, Curtis Bradley and Jack Goldsmith have characterized these cases as illegitimate, representing a break with the traditional notion of customary international law in which norms evolved more slowly and were more firmly grounded in state practice (1997a, 1997b). They also note that this traditional law was meant to regulate state relations, while the modern version claims to regulate relations between a state and its citizens. They point out that since the establishment of the United Nations and other international organizations, courts have

defined customary norms on the basis of General Assembly resolutions, declarations, and treaties without considering whether these pronouncements actually reflect state behavior. Moreover, the reliance on custom enables individuals to circumvent the consent-based system of treaty-making and ratification. Thus, even where a state has not signed on to a treaty, it may still be bound by its norms if such norms are deemed to be part of customary international law, and the treaty itself may be used as evidence of this customary norm. Such an understanding of custom, in their view, “permits federal courts to accomplish through the back door of CIL [customary international law] what the political branches have prohibited through the front door of treaties” (1997b: 330-1).

This new understanding of custom, according to Bradley and Goldsmith, is based on shaky assumptions; violates the central tenets of democracy and the separation of powers; and is being advanced entirely by the urgings of international legal scholars, with no basis in the law. Commenting on this trend in the U.S., they attribute it to “a combination of troubling developments, including mistaken interpretations of history, doctrinal bootstrapping by the Restatement (Third) of Foreign Relations Law, and academic fiat” (1997a: 821). Because judges around the world have had little experience with international law, they frequently turn to academic sources in the form of articles, friend of the court briefs, and expert testimony by international legal scholars. According to Bradley and Goldsmith, this has transformed the academic establishment into a significant force in human rights litigation. This transformation is profoundly unsettling to them given their belief that international law is meant to serve states in their international political dealings

This criticism of the judicial use of international human rights law has not been limited to the actions of U.S. courts. Britain’s arrest of former Chilean dictator Augusto

Pinochet and the prospect of a trial based on violations of international human rights law sparked a similar reaction from critics of activist courts:

Bit by bit, without fanfare, international law is acquiring a fantasy counterpart—the “customary law of human rights”—that is the special preserve of activists and ideologues with their own agendas. Like judicial activists on the domestic scene, the promoters of this new international “law” make up the rules as they go along, in defiance of ordinary principles of consent (Rabkin 11/23/98).

International law and politics scholar Jeremy Rabkin challenged the legality of Pinochet’s arrest as an illegitimate application of international law, comparing it to the judicial activism of American judges in the 1970s and labeling it a “disturbing trend.” He questioned the appropriateness of judicial involvement in international law, which is ultimately about the interaction of sovereign states and feared that the involvement of legal actors would threaten the order and stability of the international community (Rabkin 11/23/98).

Representing the traditional approach, Rabkin condemned the Pinochet case as violating two long-established principles of international law—state sovereignty and the act of state doctrine. He also rejected the application of universal jurisdiction in the absence of state consent, characterizing extra-territorial trials as hostile acts. Like Bradley and Goldsmith, Rabkin questioned the more rapid development of custom, which was removed from traditional understandings of state consent and was taking place in the absence of ratified treaties as academics and human rights advocates pushed the process forward. The Pinochet arrest, in his view, was not based on any treaty establishing consent but was instead the result of “a formless process by which scholars extrapolate

new principles of ‘customary international law’” (11/23/98). According to this view, law professors fancy particular norms as law, while judges create legal norms on the basis of an abstract “international consensus.” This process has replaced what Rabkin deems the legitimate development of law, which is based on treaty ratification by states and states alone.

Harold Koh has responded to this critique of human rights litigation as a judicial construct by arguing that states themselves consciously transformed the global legal order following World War II (1991). The post-war order represented an abandonment of the traditional system of negative rules based on state sovereignty, in exchange for a more positive, multilateral system rooted in constitutionalism and the growth of international institutions, including the UN and the Bretton Woods system. This order was also represented by the Nuremberg and Tokyo tribunals, which gave rise to the current wave of domestic human rights litigation by establishing that international law does not just regulate state relations but also regulates a state’s treatment of its citizens.

Critics of the emergence of an activist global judiciary accuse those who advance customary human rights norms of confusing aspiration with law. Commenting on the mixing of “ought” with “is” in legal decisions, Ruth Wedgwood has cautioned judicial actors not to lose sight of the boundaries of state practice: “otherwise, customary law will lose its claim of legitimacy, founded on state consent” (1999: 297). What this debate makes clear is that the use of international law, specifically customary law, by domestic courts has become a significant force in transforming international human rights norms into a tangible source of law. Critics of human rights litigation would deny courts an autonomous role in the international system, rejecting the notion that international law is

“law” in a judicial sense. In their view, judicial interference jeopardizes the primary function of international law, which is a political one— to regulate the interactions of sovereign states as the sole actors in an anarchic system.

The debate over judicial activism underscores the role of the courts as autonomous actors within an international context. The emergence of this role offers a new perspective on one of the main discussions in the law and society literature— whether courts matter in achieving social change. This debate has centered both on the direct effects of judicial victories on public policy (Rosenberg 1991) and on the “radiating effect” of these decisions, through which legal mobilization is converted into the political mobilization of social movements (Scheingold 1974; Galanter 1983; Zemans 1983; McCann 1986, 1994). The discussion of whether courts matter, however, has been centered on domestic policy change without recognizing that courts act within an international context as well. Identifying courts as autonomous actors at the international level provides new insight regarding the significance of the judiciary, demonstrating that courts matter a lot when conceived of as actors in the international system. Specifically, they have begun to matter in the creation of an effective system of international human rights law.

While defenders of the relevance of the courts focused on legal mobilization, a subset of this literature began turning its attention to globalization. These scholars identified a new process—the construction of a transnational legal field—that emerged as social movements mobilized around the law began to cross borders and to employ international law (Dezalay and Garth 1996, 2001, 2002; Hajjar 1997, 2001; Keck and Sikkink 1998; Sarat and Scheingold 2001). In examining these linkages across borders, however, the role of the courts dropped out. These scholars concentrated exclusively on

the mobilization process, failing to consider the outcome of this process as it reached the courts. The cases described in the following chapters, alternatively, emphasize the role of the courts in the creation of a transnational legal field. This dissertation, then, combines both the mobilization and the efficacy literature to highlight the autonomous role of the courts as international actors, asking the question: why have courts, especially domestic courts, begun to matter in the construction of an enforceable system of international human rights law?

### **Courts and Change**

The debate regarding the use of the courts as mechanisms of social change has been centered on the question of whether legal decisions have any effect. In *The Hollow Hope*, Gerald Rosenberg asks whether courts actually bring about social change (1991). According to the more optimistic “dynamic court” view, courts are uniquely situated to bypass the electoral and political constraints that inhibit other institutions and to bring about social change because they are not burdened with electoral considerations and political repercussions. The “constrained court” view, by contrast, maintains that the judiciary’s lack of budgetary and enforcement power renders it weak and ineffective. Although Rosenberg ultimately found the “constrained court” view more convincing, he believed that courts could achieve social reform under certain conditions.

Rosenberg closely examined the policy effects of Supreme Court litigation in two areas where it was widely believed that the Court had played a significant role—civil rights and women’s rights. He undertook a less exhaustive examination of the effects of judicial decisions in the areas of criminal procedure, reapportionment and environmental protection. Testing his views on the almost mythical *Brown v. Board of Education* (1954) and *Roe v. Wade* (1973) decisions, he concluded that these decisions had little

direct impact on civil and women's rights and that changes in these areas could not be attributed to the rulings themselves. Instead, he identified alternative pressures that accounted for such changes. For example, he presents evidence showing that Southern schools remained segregated following the *Brown* decision because local officials opposed the decision. Desegregation only became more widespread after the federal government took a proactive role and provided financial incentives for implementation. He reached the same conclusion—that the effect of judicial decisions was minimal—in the other cases he considered.

Rosenberg determined that the efficacy of legal decisions is constrained by three factors: the limits of constitutional language; a lack of independence from the other branches of government that inhibits the courts from overstepping their bounds; and a lack of implementation powers. These conditions must be overcome in order for the court to bring about social change. In other words, the following conditions must be present: sufficient legal precedent; a high degree of support from the other branches of government; and widespread public support with little opposition, as well as the presence of one or more additional factors supporting implementation (these include positive incentives for compliance, high costs for noncompliance, an opportunity for private market implementation, and motivated local officials). But the very presence of these factors, according to Rosenberg, means that the court's contribution is nothing more than an official recognition of reforms that are already in progress, "more like the cutting of the ribbon on a new project than its construction" (1991: 338).

Having discounted the direct effect of judicial decisions, Rosenberg also undertook an examination of the indirect or extra-judicial effects of these decisions. He turned to media coverage and data on social movements to address the claims of scholars

who contend that although legal decisions may not directly affect outcomes, they may nonetheless bring about change by creating increased, focused pressure on an issue. For example, Stuart Scheingold has claimed that the symbolic power of law may be employed to express resistance and facilitate political mobilization (1974). Frances Zemans has argued that utilizing the legal system enables individuals to be heard by the government and represents a more direct form of political participation (1983). In response to these claims, Rosenberg asserted that the court decisions he considered failed to activate any sort of social movement. These decisions were more accurately viewed as a response to social pressures that preceded the legal decision. These pressures translated into a supportive political and legal culture that contributed to the judicial outcome, reversing the accepted logic that social movements, at least in part, grow out of judicial action. Where social pressures were lacking, court decisions failed to influence political elites, including Congress and the Executive, or prod them into action. Nor did they result in increased press coverage that could have put these issues on the public agenda. As a result, these decisions did not mobilize social movements around the issue.

One of the main challenges to Rosenberg's conclusions regarding the extra-judicial effects of court decisions is Michael McCann's study of the pay equity movement in the United States (1994). Relying on surveys, interviews and analysis of newspaper coverage, McCann studied twenty-eight different pay equity struggles demanding equal skills recognition and pay levels for female-dominated jobs. He advanced a legal mobilization framework demonstrating that litigation was an important resource for this movement in the United States and highlighting that law plays both a transformative and a mobilizing role. One of his main points is that the court victory itself was less important than the fact that the litigation provided a discourse for the

articulation of activist demands and in this way defined the course of the struggle. In its transformative role, the legal effort presented the pay equity campaign in the language of rights, tapping into vaguely defined feelings of injustice and framing them in the language of anti-discrimination. This new understanding of the situation both drew people into the struggle and provided them with a sense of empowerment. McCann shows that organizers used court decisions to raise awareness, frame the issue, and bring women into the movement. High-profile decisions and media coverage served as a catalyst and focal point, mobilizing activists around shared legal norms as the cause was defined as a struggle for rights. In this way, legal efforts worked in concert with organizing efforts.

McCann also challenged Rosenberg's contention that institutional actors were not influenced by legal decisions. He demonstrated that, in addition to serving as a catalyst, legal action—or even the possibility of legal action—based on the rights discourse altered the balance of power and exerted pressure on institutional actors to change the practices in question. In other words, legal resources provided activists with leverage and the ability to maneuver tactically. Judicial recognition increased their power and affected the course of negotiations. In this respect, it was the content of the decisions more than the court's ability to enforce them that was important. Hence, McCann argued, the debate over judicial capacity as framed by Rosenberg was misplaced.

Neither McCann nor Rosenberg considered the question of the significance of the courts within an international context. Adopting such a perspective provides new information with which to evaluate the insights of both. To the extent that legal rights constitute a strategic resource that can be employed to challenge existing power relations, as McCann maintains, the expansion of these rights to encompass international human

rights norms is significant. The incorporation of these norms is still more relevant when considered against Rosenberg's contention that courts are constrained by existing statutory and constitutional language. Within an international context, the prominent role played by customary international law, coupled with a relatively advanced international human rights discourse, give courts more freedom to interpret the law progressively without facing the same type of international constraints confronting the executive branch. The rhetorical power of the human rights discourse also inhibits the opposition of the other branches of government, as Chapter 3 will show in the progression of the case against Pinochet and Chapter 5 will demonstrate with the Israeli government's response to the ruling of its Supreme Court outlawing torture. These cases lend support to McCann's argument that the specification of legal rights creates pressures on institutional actors. Once international human rights norms became defined as legal norms in these cases, it became more difficult politically for government actors to ignore the legal process. Such evidence challenges Rosenberg's contention that legal decisions have little effect on the activities of government or other institutional actors.

The mobilizing potential of legal cases also seems to hold greater possibility at the international level. Rosenberg argued that significant domestic decisions received little press coverage and did not enter the public consciousness. Thus, they did not contribute to mobilization. By contrast, the cases discussed in the following pages, particularly the Pinochet case (Chapter 3) and the torture case in Israel (Chapter 5), received significant press coverage and mobilized groups on both sides of the issue. While deciding Pinochet's fate, for instance, British Home Secretary Jack Straw received 70,000 letters and emails from all over the world—most of them in support of extradition (Brody and Ratner 2000).

Similarly, the elements of legal precedent and a supportive legal culture, identified by Rosenberg as essential in ensuring the relevance of legal decisions, may be present at the international level even if they are absent at the domestic level. For example, the broad range of human rights cases litigated in U.S. courts created a significant body of precedent with respect to the domestic application of international human rights law, establishing these rights as legal rights. And the emergence of the global judiciary has encouraged courts to follow global legal trends supporting human rights claims. Thus, at the international level, the domestication of international human rights law is based on an increasing amount of legal precedent and a supportive legal culture. Moreover, the fact that the rights discourse resonates globally empowers the courts in giving effect to this discourse.

As courts give new force to international human rights law, they also take on the judicial policymaker role identified by Feeley and Rubin (1998). These authors explored the function of the courts in the modern bureaucratic state by studying the prison reform movement in the United States. They described how federal courts literally overhauled the national prison system, creating a set of judicially derived rules and regulations based on correctional literature, sociology, and their own views on political morality. This phenomenon, they argued, demonstrates that judges engage in policymaking, which means that they base their decisions on what they deem to be the socially desirable outcome. What sets this apart from interpretation is that the legal text is used only as a source of jurisdiction, not as a basis for the content of the decision. Instead, judges turn to non-legal sources, including moral norms, social principles, legal texts, and similar discussions in other legal decisions.

According to Feeley and Rubin, judicial policymaking is motivated by what the

judges perceive as the central normative values of the community. With regard to prison reform, this perception emerged from the rejection of Southern social values by all three branches of the government. The judges, influenced by the actions of the other branches, determined that conditions in Southern prisons were no longer acceptable. The recognition that conditions had become outrageous motivated them to engage in policymaking. Feeley and Rubin point out, however, that this definition of outrage was based on changing values regarding what was acceptable, not on an actual change in conditions. They concluded: “Judges tend to engage in policy making when confronted with a practice that violates a widely held principle of social morality” (1998: 161). In other words, judges will engage in policymaking to impose their moral values when they believe these values are widely shared.

Feeley and Rubin’s description of the process by which outrage inspired judicial action can be applied to the path leading Israel’s Supreme Court to outlaw torture—but only if the court is understood as an international actor. The shared values characterizing torture as unacceptable in all situations existed at the international rather than the national level. Israel’s executive and legislative branches had not rejected the use of torture in the war against terror. But the international legal community had wholeheartedly rejected its legitimacy. Thus, confronted with the facts of what was going on, the justices concluded that conditions had become outrageous, a definition based on international legal values, not domestic ones.

Although policymaking and interpretation are two distinct judicial actions, Feeley and Rubin acknowledge that they overlap and the line between them may be hard to identify. In the chapters that follow, domestic judiciaries engaged in some degree of policymaking as they turned to a variety of outside sources to give legal effect to the

norms of the international human rights discourse. In fact, Judge Kaufman's explanation of his seminal human rights opinion in the U.S. closely parallels Feeley and Rubin's portrayal of policymaking. As will be described in Chapter 2, Judge Kaufman first determined the action to be abhorrent, then turned to a variety of sources to back up his contention and transform it into a legal assertion. The Israel case provides an even clearer example of judicial policymaking. In this case, no domestic legislation existed regulating interrogation methods and the use of torture, nor were there any specific laws governing the security body in question. The Court independently determined the legal status of this body, the limitations upon it, and the status of torture in Israeli law.

Recognizing that courts constitute autonomous actors at the international level sheds new light on the question of whether courts matter. Even where courts may be constrained domestically, they have become significant actors on the international stage via the domestication process. This process has both influenced and been influenced by the efforts of transnational movements focused on international human rights. The next section will discuss the transnational aspect of mobilization.

### **Transnational Mobilization**

While McCann and others (see, e.g., Olson 1984; Milner 1986) have concentrated on the role of the courts in domestic mobilization, other public law scholars have begun examining mobilization in an international context. But as this literature has acknowledged that legal struggles and social groups are beginning to cross borders, the courts have dropped out of its view. Drawing attention to the efforts of transnational social movements and cause lawyers, these scholars have virtually ignored the aspect of this struggle that occurs in the courts. Yet, just as lawyers and social movements have become autonomous actors on the international scene, so too have courts.

One aspect of this transnational research has examined how globalization, especially economic globalization, has internationalized the practice of law. Trubek, Dezalay, Buchanan and Davis presented a set of case studies that illuminated transformations in the legal practice and the production of law both in the European Union and the developing world as a result of economic globalization (1994). One effect they point to is the globalization of the rule of law as countries in the developing world have initiated legal reforms in order to please donor agencies and attract private capital.

The case studies also examined the effect that economic integration has had on the efforts of public interest lawyers, concluding that while globalization has created new opportunities to influence international norms, the fact that this influence occurs within the framework of continued economic globalization both circumscribes the content of these norms and risks producing less than favorable outcomes. By limiting their assessment of public law efforts to the framework of economic agreements such as NAFTA, Trubek and company reached a more pessimistic conclusion than that revealed in this dissertation.

Dezalay and Garth have also examined how the emergence of institutions to deal with transnational business disputes has transformed institutions at both the national and international level, empowering certain actors while weakening others and internationalizing the rule of law (1996; 2002b). As in the case studies by Trubek et al (1994), they explore how the wave of constitution building and the export of legal institutions has resulted in the emergence of a new legal orthodoxy based on the “rule of law” (2002a). In focusing on the development and spread of this new legal orthodoxy, however, Dezalay and Garth include only one chapter that explicitly analyzes the role of the courts in this process. In this chapter, Anne-Marie Slaughter builds on her earlier

work and explains that a growing number of actors are involved in the production of law (2002). But she is not only concerned with the arrival of non-state actors on the scene. Instead, Slaughter disaggregates the state and points to the emergence of trans-governmental legal relations among its component parts. Specifically, connections among the courts of different states are playing a role in the construction of global norms. These networks contribute to the new legal orthodoxy by transmitting the meta-norms of the rule of law and judicial independence.

Like Slaughter, Katherine Sikkink has also illuminated the role of transnational processes in the production of rules, but she has looked more exclusively at non-state actors and the formation of transnational advocacy networks (2002). Accordingly, she illustrated how the legal category of violence against women came about solely through the efforts of the international women's network. In a related work, she and Margaret Keck examine in greater detail the "emancipatory politics" (Santos 1995) of transnational advocacy networks, in which activists united around shared values and a common discourse produce alternative ideas, norms, and identities in the international system (1998). These networks rely on persuasion and socialization to alter the context of state decision-making through a combination of mechanisms: they provide an alternate source of information that may not otherwise be available; they interpret events symbolically for added salience; they employ both material and moral leverage, the latter often resting on international scrutiny and the "mobilization of shame;" and they hold states accountable to their expressed commitments (Keck and Sikkink 1998). Through these mechanisms, these networks act strategically within existing shared understandings of normative behavior while at the same time working to reshape contested meanings.

Risse, Ropp and Sikkink have advanced a more explicit framework for

understanding the ways in which transnational advocacy networks that formed around international norms may affect state interests, behavior, and identities through a process of norm diffusion (1999). They developed a five-phase spiral model to account for variation among states in internalizing human rights norms and to identify the conditions under which domestic institutional change occurs. The five phases include repression, denial, a period of tactical concessions (in which cosmetic changes are made to mollify international critics), prescriptive status (in which the norms themselves are accepted as valid), and, eventually, rule-consistent behavior. The model highlights three types of socialization processes that occur in the different phases: instrumental adaptation and strategic bargaining; moral consciousness-raising, shaming, argumentation, dialogue, and persuasion (through which actors begin to accept the validity of norms as a result of discursive practices and exchanges); and institutionalization and habitualization. In this process, transnational networks and domestic opposition work to exert pressure from above and below on the violating state. The authors conclude that, in addition to the strength of the advocacy network, a country's vulnerability to outside pressures is a key factor in bringing about tactical concessions—the most crucial phase in the achievement of domestic reform, leading either to the continued empowerment of domestic opposition groups, or to increased repression as a threatened government fights to stay in power. Like Keck and Sikkink, they focus both on the role of norms in strategic interaction and on their constitutive function, as states progress from instrumental adaptation to institutionalization and internalization.

According to the spiral model, transnational pressure is more likely to be successful where states are susceptible to external pressures. This norm-based argument points to the importance of rhetoric, demonstrating that states that are concerned with

their reputation and legitimacy within a normative community may be shamed into norm-conformance (Schimmelfennig 2001; Keck and Sikkink 1998; Risse, Ropp and Sikkink 1999). Rhetorical action—the strategic use of norm-based arguments—may force states into adherence to avoid jeopardizing their collective identity (Schimmelfennig 2001). This understanding of norm-based behavior, however, is only part of the story. Judiciaries, in part as a result of the shared judicial identity described earlier, may also transform rhetorical commitments into legal obligations. Even where legitimacy concerns do not override other strategic interests, states may still find themselves bound by rhetoric in ways that they never anticipated. By disaggregating the state and locating the autonomous actions of its component parts within the international system, one can identify additional mechanisms through which norms may affect outcomes.

The Israeli Supreme Court's ruling outlawing torture highlights this point. Keck and Sikkink cite Israel as an example where the process of norm diffusion has been less effective because the state is important to U.S. security interests, which makes it less vulnerable to international pressure (1998). This assessment, however, rests on filtering the effects of these norms through the unitary state as the relevant actor. In fact, international norm diffusion via the global judicial identity and the domestication of international law played a fundamental role in altering state practices, in opposition to key state interests, as Chapter 5 documents. Moreover, the human rights norms changed policy in an area that the Israeli state viewed as vital to its national security. Thus, not only may the judicial mechanism succeed in cases where the advocacy network has failed, its effects may in fact be much stronger, subjecting the state directly to international law in a domestic legal context even where the Executive has proven unresponsive to international pressure.

By pointing to the role of transnational advocacy networks, transnationalists draw attention to mechanisms that occur outside of state control and may influence state behavior. In this way, state autonomy and control is being challenged, even if the state is still ultimately in charge. The domestication of international law described here demonstrates an even greater curtailment of autonomy and control in a process that bypasses the state. As the judiciary becomes an independent actor in the international system, it may generate outcomes that are at odds with state preferences as defined by the Executive, the actor most closely associated with foreign policy.

Rather than occurring separately, however, these processes are mutually constitutive. Where norm diffusion comes into play through the global judiciary, transnational advocacy networks contribute to the diffusion process by increasing the rhetorical power of these norms and altering the context within which the judiciaries deliberate. By highlighting the normative context, drawing attention to and altering the human rights discourse, transnational networks emphasize the rules that bind states and contribute to the shared understandings that influence judicial interpretations of customary international law. These networks contribute to the domestication process in a more practical way as well. Lawyers filing human rights cases rely on the research of human rights organizations in order to establish the facts of their case. And they call on expert testimony from these researchers and international law scholars to explain the underlying law. Many of the ATCA cases in the U.S., for example, have included a version of an expert affidavit signed by over twenty international law experts (Stephens and Ratner 1996).

In reinforcing international norms, advocacy networks both influence and empower judicial deliberations. At the same time, judicial decisions upholding these

norms reinforce the efforts of advocacy networks. Judicial recognition empowers advocates. In a world of transnational advocacy networks, decisions based on the international human rights discourse provide these networks with a valuable resource. Conversely, these transnational networks constitute the support structure that Charles Epp has identified as essential for continued legal mobilization and social change (1998).<sup>14</sup> These mechanisms, then, work together.

Transnational advocacy networks are made up of a variety of actors, both legal and otherwise. Analysis of these networks has moved more squarely into the legal field with an edited volume on transnational cause lawyering by Stuart Scheingold and Austin Sarat (2001). In an earlier volume, they described the development of cause lawyering and the relationship between law and political struggle in several countries (1998). The second volume is devoted to an examination of cause lawyering in a global context, noting that cause lawyers are beginning to form transnational networks based on international norms that they call upon in their domestic struggles. Through these struggles, cause lawyers have been contributing to a reconfiguration of state power brought about by the forces of globalization and democratization.

Sarat and Scheingold note that globalization and democratization often work in opposite directions: flowing up from the state to the transnational level via the globalization of capital, and flowing down to subnational institutions and social movements via the pressures for democratization and the rule of law that are the by-products of globalization. These dual pressures create new opportunities for cause lawyers to challenge the status quo. Like Dezalay and Garth, Sarat and Scheingold also understand globalization primarily within an economic framework, explaining that it “is

---

<sup>14</sup> The other essential factors identified by Epp—rights consciousness, a bill of rights, and a willing and able judiciary—are also present (1998).

driven by, and gives priority to, the economic rationality of corporate capitalism” (2001: 5). Globalization, then, involves the spread of corporate capitalism and neoliberal values. But these forces, by altering the international landscape, also create a space for cause lawyers to adopt and strengthen international norms in their domestic struggles as they become involved in the new battles over power and the redistributive opportunities created by economic globalization. They point out, however, that globalization may inhibit certain opportunities even as it creates others.

Sarat and Scheingold are primarily concerned with the process of mobilization within a transnational context and the subsequent reconfiguration of state power. As a result, they black box the court. The country-specific chapters explore the new political spaces and opportunities of access open to cause lawyers, the interaction between these developments and the state, and the emergence of transnational networks among cause lawyers. But the courts enter this conception as arenas of struggle, not as autonomous actors who are themselves taking advantage of these developments. For example, Dezalay and Garth examine the emergence of an autonomous, international field of human rights, exploring “how groups move into the field of state power, what they bring, how they operate, how they are oriented, and what changes are produced in the institutions and organizations operating in the field” (2001: 355). But their focus on individuals and organizations emphasizes the political struggle rather than the judicial one. Yoav Dotan similarly neglects the course of the legal struggle in the courts in his chapter investigating the “shared ethos of the rule of law” that unites lawyers seemingly on opposite sides of the fence—those representing Palestinians against the Israeli state, and those representing the state (see also Lev [in Sarat and Scheingold 1998] on the shared values of activist lawyers in Indonesia and Malaysia).

Lisa Hajjar has explored the evolution of the human rights approach to cause lawyering in the Palestinian struggle (1997, 2001). Examining Palestinian rights claims in the Israeli legal system, she asks how cause lawyers use the international human rights discourse in a domestic context. These efforts are largely confined to the military court system where most Palestinian claims are heard. Because this system constrains their ability to use the law as a mechanism of political struggle, Hajjar sought to identify the alternative strategies of resistance that these lawyers employ. She explained that the first *intifada* internationalized the Palestinian struggle by focusing the world's attention on the territories, bringing more lawyers into the struggle, and framing the issue as one of human rights. This process led cause lawyers to make contact with human rights organizations, which resulted in the development of transnational networks.

Hajjar was primarily concerned with the motivations of Israeli, Arab Israeli, and Palestinian lawyers and with the ways in which the international human rights discourse could influence and empower these cause lawyers. She explored how their legal strategies emerged within a global context, but she did not examine the course of these strategies in the courts. Hajjar, like her fellow cause lawyering scholars, sought to illuminate the struggles of “politically motivated legal practitioners” (2001: 68). So far, however, these scholars have failed to acknowledge that judiciaries represent more than mere arenas of struggle in the events they describe and in fact directly participate in these struggles.

By recognizing the participation of the judiciary in this process, this dissertation combines and builds upon two aspects of the law and society literature—studies of the efficacy of the courts and the recognition of a transnational legal field. Their contributions, taken together, provide a framework for understanding the role of the

courts acting autonomously in the international system. By identifying this role, one can also begin to provide new answers to questions about the relevance of the courts and the implications of judicial autonomy. Exploring judicial autonomy within a transnational context illuminates the specific process described in the chapters that follow: the critical role of domestic courts in the emergence of an effective system of international human rights law, an area of law creation that has so far gone unnoticed by law and society scholars.

This development also constitutes a departure from the way scholars of international relations generally characterize international law—not as a legal system, but as a political tool of states. The next section briefly examines the contributions and limitations of international relations literature in understanding the role of the judiciary in the domestication process.

### **Approaches to International Law in International Relations**

The domestication of international law has resulted in the transformation of human rights law into a tangible judicial resource. Yet the dominant theories of international relations have reflected little possibility that international law would develop into an effective legal system. Only the functionalist prediction—that demand for functional specialties would result in the progressive development of international organizations that would in turn spill over into more issue areas—allowed for this possibility (Claude 1956; Haas 1964; Mitrany 1976). The functionalists, however, expected that such progress would occur at the international level, through international organizations and international courts. There was no expectation that national courts could be the critical mechanism, implementing international law in a systematic way in the area of human rights.

The recognition that international law, specifically international human rights law, has become a relevant legal system through the actions of domestic courts is rooted in a liberal approach toward international politics. Liberal IR theory focuses on domestic structures and processes and allows for normative influences, taking account of the domestic and transnational social context within which both state and non-state actors are embedded (Maoz and Russett 1993; Slaughter Burley 1993; Moravcsik 1997). Because it disaggregates the state and recognizes the role of individual government institutions, a liberal approach is well-suited to examining the autonomous role of courts within an international context.

This research highlights the liberal notion that the judicial branch is not simply a reflection of state interests as given by the international system. Instead, the judiciary defines its interests independently as an actor within this system. The case studies that follow will show how domestic judiciaries operate within an international context, a process reflected in the judicial incorporation of international human rights norms and the emergence of a global judiciary. A unitary treatment of the state misses both the independent role of the courts and the subsequent emergence of international law as a relevant legal force existing outside of the vagaries of power politics.

The dominant international relations theories overlook the new relevance of international human rights law because of their approach to international law. Realists and institutionalists focus on if and how international legal norms affect state behavior instrumentally, taking interests as given. Constructivists, on the other hand, examine the constitutive aspects of these norms in the interest-formation process of states and state actors. My research considers this question from an alternative perspective. It asks in what way international legal norms function as law—not how these norms may influence

the interest formation process or the pursuit of these interests, but how they serve more fundamentally as a constraint in opposition to state interests. In the simplest terms: is international law really law? By examining the autonomous role of the judiciary as an actor in the international system, one reaches a different answer to this question from that offered by realist, institutionalist and constructivist approaches.

The anarchy of the international system, in which a supreme authority is lacking, has led international relations theorists away from conceptualizing international law as a legal system. Rather, under existing theories, legal norms may be epiphenomenal (realists), or they may constitute a more informal regime that alters interest calculations where interests are given (neoliberal institutionalists). Alternatively, they may be constitutive of identity and interests (constructivists). They do not, however, function as an independent constraint on state behavior in the absence of any enforcement authority.

Both traditional realists and neorealists emphasize the fundamental role of power and downplay the role of international law in the international system: “National politics is the realm of authority, of administration, and of law. International politics is the realm of power, of struggle, and of accommodation” (Waltz 1986: 111). Traditional realists emphasize that politics is a struggle for power and warn against the misguided idealist attempt to overcome this essential feature of international politics (Carr 1939; Morgenthau 1948). The role of international law is limited in this conception, and generally represents the great power interest in maintaining the status quo. Neorealists or structural realists have employed the concept of anarchy to further develop the realist notion of power politics. Anarchy means a self-help system of self-regarding units seeking to ensure their survival, a pursuit that forces them into a preoccupation with relative power (Waltz 1979; Gilpin 1981; Grieco 1990). The overriding concern with

relative power leaves no role for international law, which merely reflects the interests of the most powerful states and has no independent effect on state behavior. Realists maintain that when law and state interests fail to converge, law will always lose out. The lack of any over-arching authority to enforce agreements means that states will never sacrifice short-term interests for long-term gains, a prospect that is too risky under a self-help system in which a state's very survival is at stake.

Realists can point to the ICJ to support this contention. The ICJ reflects realist power politics in that it reinforces the norm of sovereignty, it has no independent enforcement power, and the most powerful states simply withdraw when the court goes against their interests. This supports the realist contention that international law is mostly irrelevant. For them, the ICJ, as an organization made up of states, is the only relevant legal actor in the international system, albeit an ineffective one. Their framework of unitary states acting within the international system does not conceptualize substate or domestic actors, nor does it recognize the effects of global processes operating inside the state.

The picture presented by structural realism as developed by Waltz reduces international politics to nothing more than the distribution of power in the international system (1979). In response, modified structural realists contend that institutions also influence state behavior and affect outcomes. This view of international politics emphasizes the facilitative role of international institutions in an interdependent international system. For realists, international institutions matter only insofar as they are supported by the dominant power. Modified structural realists, by contrast, emphasize that in a situation of interdependence states may continue to support cooperative arrangements even after the hegemonic power that established and supported them has

eroded (Keohane 1984).

More specifically, regime theorists believe that regimes, which are defined as “principles, norms, rules and decision-making procedures around which actors’ expectations converge in a given area,” constitute “something more than temporary arrangements that change with every shift in power or interests” (Krasner 1983: 2). These regimes, which include international law, change the context within which governments act and influence international politics even in the absence of coercion and a centralized authority. They facilitate order by coordinating state action and providing stable expectations regarding behavior. Information as well as power is thus an important element of international politics. Accordingly, and in contrast to the neorealist contention, regime theorists believe that it can “make sense to accept obligations that restrain one’s own freedom of action in unknown future situations if others also accept responsibilities, since the effect of these reciprocal actions is to reduce uncertainty” (Keohane 1984: 17).

International law scholars have employed similar logic to account for compliance with international agreements, pointing out that the definition of regimes in fact constitutes international law by another name (Slaughter Burley 1993). Treaties and other sources of law alter the context within which states interact, creating an environment of repeat interactions with increased information, reduced transaction costs and increased transparency (Keohane 1984; Stein 1983; Chayes and Chayes 1993, 1995). Noting that compliance is the norm, these scholars explain that international agreements serve the long-term interests of states by bringing about order and stability (Chayes and Chayes 1993, 1995; Bull 1977; Henkin 1979). Accepting the realist factors of power and interests, they argue that international legal norms and rules serve the rational self-

interest of even the most powerful actors by providing systemic stability (Slaughter Burley 1993). Thus, law is consistent with, rather than subordinate to, power and the pursuit of self-interest.

The forces inducing compliance, however, are absent in the issue area of human rights, rendering human rights law more expressly aspirational than other areas of international law. Because human rights regimes serve no material state interest and human rights violations are generally domestic in nature, states have little to gain from creating an environment of coordinated action. Consequently, human rights regimes, resting on moral rather than material interdependence, are likely to remain procedurally weak (Donnelly 1986).

With respect to international norms, constructivists have rejected regime theory's instrumental approach in favor of a more reflectivist understanding of law and state behavior as rule and norm-bound rather than instrumentally guided (Ruggie 1983; Kratochwil 1989; Wendt 1992). Constructivists view states as embedded within a social as well as a material structure; their actions are imbued with social meaning. In this view, the social context of shared, intersubjective understandings actually helps to define state interests and identities. States cooperate and adhere to international law not through a rational choice assessment of costs and benefits in which interests are exogenous but through "a process of reconstructing their interests in terms of shared commitments to social norms" (Wendt 1992). While realists and institutionalists focus on the regulative effects of norms and international law, constructivists focus on their constitutive effects (Katzenstein 1996; Finnemore 1996; Klotz 1995). States may change their behavior in accordance with the norms of international human rights law through a process of socialization that leads them to internalize these norms. They are operating not in an

environment of constraints and opportunities, but in one of shared, socially constructed identities and understandings, of which international human rights norms may be a part.

The constructivist approach is useful in understanding the emergence of a global judiciary united around a shared understanding of universal norms. But the emergence of a global judiciary has had even more profound effects as it has given rise to the domestication process. Through this process, the autonomous global judiciary has transformed international law into a functioning legal system that directly constrains the state. Such a development falls outside of the conceptual framework of international relations theories that observe state behavior in the international arena without addressing the effects of global processes below the state. There has been relatively little examination of the dynamic link between international and domestic processes, which is at the crux of my explanation. Where this link is recognized, the effects tend to be filtered through the unitary state as the primary international agent. Component parts of the state are given no room to independently alter or be influenced by global processes.

### **Linking the International with the Domestic**

To the extent that it has been acknowledged, the need to more systematically incorporate domestic processes into theories of international relations has occurred primarily in the field of international political economy. Noting the gap between theories of comparative and international politics, Peter Gourevitch has advanced an approach that recognizes the mutually interactive relationship between the domestic and the international level and the domestic effects of international processes—the second image reversed (1978). He notes that just as domestic politics may affect state behavior in the international system, so too may the international system alter domestic politics and structures. But he employs this relationship as an independent variable to explain interest

formation at the state level. The bulk of his discussion, moreover, focuses on the linkage between the international political economy and domestic economic actors. There is little mention of developments beyond the economic realm.

Alternatively, the two-level games approach brings together the domestic and international levels in order to explain international bargaining outcomes (Putnam 1988; Evans, Jacobson and Putnam 1993). International bargainers simultaneously respond to constraints at both levels, but these do not remain conceptually separate. Instead, the domestic and international levels interact to affect strategies and outcomes on each level. While this approach recognizes a more dynamic linkage between international and domestic developments, the state, or more specifically the statesman, remains the central actor. These linkages are understood only insofar as they constrain or create new opportunities for the statesman involved in negotiations with another state.

Efforts to examine the emergence of international processes outside of state control, in particular those brought on by globalization and increased economic interdependence, have occurred almost exclusively within an economic framework, focusing on the loss of state control in response to increased capital mobility and the rise of non-state actors, such as multinational corporations (Cooper 1989; Garret and Lange 1996). Increased economic interdependence, however, has non-economic effects as well, including the spread of democratic norms. States desiring inclusion in the liberal economic system must meet the membership requirements of organizations such as the EU, which demand more democratic political systems as well. As described earlier, this has resulted in the promotion of democratic norms in the international system. Once these norms exist, their significance is not confined to the activities of state. They function in alternative arenas as well and may influence global developments in a variety

of ways.

### **The Role of International Norms**

Alternative approaches to international relations have taken a wider view of the effects of interdependence, examining the role of non-state actors in the international sphere and the global diffusion of norms (Jepperson, Wendt, and Katzenstein 1996; Katzenstein 1996; Klotz 1995; Finnemore 2003). This perspective has its roots in the concept of complex interdependence first developed by Keohane and Nye (1977). This concept challenged the prevailing realist understanding of the system by identifying multiple state and non-state actors and channels in the international system. Keohane and Nye highlighted alternative processes that included multilevel issue linkages, transnational relations, and the effects of norms and institutions.

Since then, scholars have continued to examine non-state linkages across borders. The processes first described by Keohane and Nye have given rise to the notion of a global civil society that exerts internal and external pressure upon states, demanding legitimacy and accountability from governments by defining the boundaries of just behavior (Connolly 1993; Falk 1992; Wapner 1995). In many cases, domestic actors have been empowered by linking up with international actors around an international regime. The resultant transnational issue network attempts to change policy by invoking international norms and pressuring states to change their behavior, as described in an earlier section (Sikkink 1993; Klotz, 1995; Risse-Kappen 1995). These networks achieve success by framing the issue in a discourse that resonates (Keck and Sikkink 1998) and by establishing a winning coalition that can effectively penetrate the social and political system to exert policy pressure (Risse-Kappen 1995). Like Keohane and Nye, transnationalists point to the fact that the international system now provides multiple

channels of access and can no longer be conceived as exclusively state-centric.

Along the same lines, transnational legal decisions and the use of international law in national courts represent a new dimension in the configuration of power between state and society. As described above, much of the scholarly focus so far has been on activist mobilization (Risse-Kappen 1995; Keck and Sikkink 1998; Risse, Ropp and Sikkink 1999), cause lawyering (Sarat and Scheingold 1997, 2001), and the reconfiguration of power in the context of globalization (Dezalay and Garth 1996; 2002a; 2002b); or, alternatively, on the effects of economic globalization and the rise of multinational corporations on the legal practice (Abel 1994; Trubek et al 1994). But exploring this new avenue of social empowerment also requires recognizing how it came about—that is, by understanding that national courts act within a transnational context and recognizing their transformative role in the creation of an enforceable system of international human rights law.

### **Case Selection and Methodology**

This dissertation is not testing a predictive theory; instead, it employs the case study method to develop a theory of the domestication process. The three cases illustrate the evolution of judicial autonomy and the process through which courts have constructed a legally enforceable set of norms in international human rights law. The main evidence to support this claim is the content of the cases themselves. Accordingly, the primary method employed in each of the case studies is content analysis of the legal decisions in order to discover the recurrent themes and shared judicial orientations. Additional data includes court filings and legal briefs, news articles, interviews with participants and court experts, legal analyses of the decisions, and commentaries by the actors involved in the cases. Most of the data on Israel was collected during a year of field research there,

gathering case materials and conducting interviews with legal and political actors. Fortunately, this field research coincided with the momentous decision against torture that is the focus of Chapter 5. Much of the data on the U.S. cases was collected in New York, where many of the human rights organizations and activists involved in these cases are located. Some of these organizations participated in the case against Pinochet as well.

Although interviews with judges may seem to be a key source of information regarding the role of the courts, there are a few reasons why they were not included. Aside from the practical difficulties involved with gaining access to the judges making the decisions described ahead, judges also are unlikely to grant interviews to discuss particular cases. Even were such interviews to be granted, they may be inclined to downplay their judicial activism to avoid criticism that they have overstepped their bounds, especially when asked to explain their actions without recourse to the technical legal argument. Moreover, relying on such interviews implies that judges are acting in a calculated, strategic fashion to achieve a clear purpose. The effects of judicial identity, however, may operate far more subtly. Even if judges are able to explain their actions in legal terms, they may not be fully aware of the broader elements at work. For all of these reasons, analyses of the cases themselves and of their impact provide a better indicator of the role of the courts in creating a judicially enforceable set of legal norms. The decisions point to each of the three factors identified as significant in the domestication process: public lawyering based on a more internationally oriented rights discourse; the emphasis on human rights norms as a result of post Cold War democratization; and the emergence of the global judiciary.

The three cases discussed in this dissertation were selected for their significance with respect to the larger domestication process, and for their illustration of key factors of

this process. Moreover, with each successive case, both the domestic and the international repercussions increased. This is in part due to variations among the cases. The cases in the U.S. were civil cases, the Pinochet case was a criminal case, and the torture case in Israel dealt with a fundamental constitutional question regarding the legality of government policy.

The domestication process began in the U.S. following the precedent-setting *Filartiga* case, which established that human rights abuses occurring abroad were justiciable in U.S. courts under a unique U.S. statute. *Filartiga* and the cases that followed sought to give legal effect to the norms of the international community, transforming the largely symbolic norms of the international human rights discourse into enforceable legal norms. As a result, they internationalized the public law role of the activist judiciary. What is most significant for the domestication process is that through these cases, the U.S. judiciary developed a concrete body of human rights law. By endowing these norms with substantive meaning, U.S. courts established legal precedents that could be followed by foreign courts, resulting in the spread of the domestication process and ensuring that it would not remain solely a U.S. phenomenon. And by expanding the scope and reach of these norms to encompass a growing range of violations and actors, they contributed still further to its expansion.

The Pinochet case moved this process from the relatively innocuous arena of civil litigation to the more contentious realm of criminal law. While most of the cases in the U.S. involved monetary judgments issued *in absentia*, the Pinochet case considered the detention and punishment of a person in state custody. Still more significant, the person in question was being tried for actions committed as a head of state, a category of person long thought to be immune from judicial proceedings. As a result, the case had serious

international and foreign relations implications. And because of the high profile nature of the case, the domestication process moved into the public spotlight. Like the U.S. judiciary, the British judges considered the status of international human rights norms in the post-Cold War world to make their determination. But unlike the U.S. judiciary, which had initiated the domestication process, the Law Lords were both influenced by and, in turn, reinforced this process.

Through the domestication process, courts were not only giving concrete legal effect to the emerging global norms of the post-Cold War legal order, they were beginning to be constrained by them as well. The case outlawing torture in Israel can be understood as a direct effect of this process. The advanced development of the norm against torture coupled with the Court's strong identification with the global judiciary resulted in its decision, a decision that challenged existing state policy on a matter of national security. In this respect, the Israeli Supreme Court was to a great extent responding to international norms as opposed to solidifying them. And in a new phase in the domestication process, the Israeli court employed these international norms to alter domestic practice in its own state.

It is important to note that these cases deal with developments prior to the attacks of September 11, 2001. Since then, state efforts to deal with the terrorist threat have altered the international landscape and led governments to more directly challenge the hearing of these cases. The Bush administration, for example, in an *amicus curiae* brief filed in one of the cases discussed in Chapter 2, has argued that the entire line of human rights cases in the U.S. should be overturned. Although it is too early to tell how post-September 11 developments will affect the continued judicial enforcement of international human rights norms, this question will be taken up in greater detail in the

concluding chapter.

### **Chapter Outline**

Each of the following chapters examines the domestication of international human rights law in a different country, while highlighting how these cases are connected through the same over-arching process. These chapters focus on the courts as the central actors in this process. In each chapter, I explain the legal rulings and their significance both domestically and internationally, pointing out the elements that constitute a new legal terrain and contribute to the construction of an enforceable set of international human rights norms. At the same time, I attempt to identify the key factors influencing the judiciary, including the judges' global orientation, in order to clarify how the rulings came about and to place them within the larger process. What these cases bring to light is the new role played by a largely unrecognized autonomous actor on the international stage—domestic courts operating as a global judiciary.

Chapter 2 examines a series of cases brought in the United States under the Alien Tort Claims Act, a unique piece of domestic legislation. Beginning with the precedent-setting *Filartiga* case, it examines the evolution of these cases as the courts eliminated political barriers to adjudication, expanded the set of enforceable norms, and applied them to a growing range of both state and non-state actors. This chapter also attempts to account for this activism and global orientation on the part of U.S. judges.

Chapter 3 turns to the internationally recognized extradition proceedings against former Chilean dictator Augusto Pinochet. Although three countries were involved—Chile, Spain, and the United Kingdom—the chapter is primarily concerned with the case in the U.K., where the legal proceedings actually occurred. The chapter follows the complicated course of the case and the related political battles. Despite strong political

opposition in each of these countries, the case remained largely within judicial control and was decided on the basis of international norms as defined by the global judiciary. Foreign policy concerns were for the most part put aside.

Chapters 4 and 5 look at Palestinian efforts to invoke international human rights norms in Israel's High Court of Justice to challenge government actions in the territories. The frustrated history of these efforts, and the Court's general practice of reinforcing the state's security policies, is presented in Chapter 4. Chapter 5 examines the Court's groundbreaking departure from this long-standing practice, analyzing and accounting for the decision outlawing torture with reference to the international context. Finally, the concluding chapter summarizes the material presented, points to other developments in the domestication process and considers the future of this process in light of the changed international landscape and the war on terror.

## Chapter 2

### U.S. Courts in the Forefront: Judicial Activism Goes Global

On March 29, 1976, seventeen-year old Joelito Filartiga disappeared from his house in Asunción, Paraguay. The next morning, his sister was summoned to the home of a neighbor who was also the Inspector General of Police in Asunción, where she discovered Joelito's body. The Inspector General, Americo Norberto Peña-Irala (Peña) told her: "Here you have what you have been looking for, for so long and what you deserve. Now shut up" (Kaufman 1980). Joelito had been tortured to death. Joelito's father, Dr. Joel Filartiga, was an outspoken critic of President Alfredo Stroessner's military dictatorship. The Filartigas maintained that Joelito was tortured and killed in retaliation for Dr. Filartiga's political activities.<sup>15</sup> The family attempted to pursue criminal action against the police in Paraguay, but their lawyer was arrested, threatened with death, and disbarred. A short time later, they learned that Peña, who they believed was responsible for Joelito's death, was in the United States. The Filartigas filed a civil complaint in a New York district court, basing their charges of torture and wrongful death on international human rights law, and seeking compensatory and punitive damages of \$10 million (For more information on the Filartiga story, see Claude 1983, 1992 and White [writing as Cabral] 1977).

The district court denied that it had jurisdiction, basing its ruling on two recent decisions of the 2<sup>nd</sup> Circuit Court of Appeals—*IIT* (1975) and *Dreyfus* (1976)—which held that international law does not apply to a state's treatment of its own citizens. On appeal, however, the 2<sup>nd</sup> Circuit overturned its earlier precedent and the Filartigas were

---

<sup>15</sup> Officials in Paraguay argued that it was not a political crime at all, but that a member of the household had murdered Joelito after discovering him with his wife in "flagrante delicto."

eventually awarded over \$10 million in damages after the case was remanded to district court (*Filartiga* 1980, 1984).

The *Filartiga* ruling ushered in a new era of human rights protection, enabling foreign nationals to seek justice and enforce international human rights law in U.S. courts. But U.S. judges were not content to simply enforce established norms of international law. With *Filartiga* (1980), they began to actively develop and solidify previously fluid or non-specified norms. Moreover, as these norms became established in U.S. courts, they also become part of the international human rights discourse. As such, they began to alter global interpretations of customary international law—a source of law that victims of human rights abuses can call upon in diverse venues. In this way, U.S. courts played a leading role in the development of international human rights law.

The role of U.S. federal courts as leaders in the enforcement of international human rights norms is remarkable when one considers the U.S. record regarding international law. The country has ratified very few international human rights treaties, due in large part to concerns about sovereignty and a belief that domestic law provides sufficient protections. And it has attached non-self-executing clauses to almost every treaty it has ratified, meaning that the treaty cannot be enforced in the absence of domestic legislation. It has demonstrated a reluctance at times bordering on contempt with respect to the jurisdiction of international law. The U.S. withdrew from the compulsory jurisdiction of the International Court of Justice as soon as a case was brought against it for its mining of Nicaragua's harbors. It has vehemently opposed the newly established International Criminal Court, even leveling threats to prevent other countries from participating. Yet, in spite of this demonstrated aversion to international law, U.S. courts have given concrete meaning to vague international norms, and they

have given them teeth.

The legacy of *Filartiga*, set against the U.S. attitude toward international law, highlights the autonomous role of the judiciary as an international actor. With this autonomy in mind, this chapter will examine the significance of the *Filartiga* case, and the subsequent evolution of human rights law in U.S. courts. In the rulings discussed below, U.S. judges breached the gap between the collection of human rights norms as a statement of aspirations, and as a system of legal protections. And they did not stop at the protections established by *Filartiga*. Instead, they solidified an expanding range of international human rights norms that encompassed a growing set of actors, creating a functioning legal system in the process. In doing so, they also altered the very nature of international law—it was no longer simply a political mechanism employed by states, but had become a judicial mechanism employed by individuals. And by explicitly relying on international rather than domestic law, they created a body of judicial precedent with international effect. These rulings transformed human rights into judicially enforceable guarantees, a step domestic courts around the world had until then been unwilling, or unable, to take.

Through this expansion of both the scope and the reach of human rights norms, international law—once created by and for states alone—has evolved into a resource for non-state actors in a variety of situations. This system has advanced beyond holding the actual perpetrator accountable for human rights abuses and now targets higher-placed officials who either ordered the crime, or did nothing to stop it. At the same time, non-state actors may now be liable under international law. U.S. judges have also chipped away at long-established notions of state sovereignty, demonstrating a growing willingness to rule on events occurring within another state's borders—actions

traditionally off limits under the sovereign prerogative. As the once intractable barrier of sovereignty has eroded, the scope of activities reserved for the sovereign has narrowed. Consequently, sovereign immunity has offered little defense under U.S. jurisprudence—a view that has begun to spread, as former Chilean dictator Augusto Pinochet discovered on a 1999 trip to London, where he was arrested and held pending extradition to Spain for human rights abuses committed when he was head of state (Chapter 3).

The following review of cases will bring this transformation to light. The first section discusses the revolutionary aspect of *Filartiga*—the judicial enforcement of an international human rights norm by a domestic judiciary acting in the global sphere. The next section examines the ruling and its background more closely in order to emphasize and explain both the court’s activism and its global orientation. The third section illustrates how the judiciary eliminated political barriers to international law by emphasizing the judicial character of international human rights norms as legal guarantees. The following sections highlight the evolution of this concept into a broad legal system in which the range of actors and norms has been expanded. Finally, the last section offers a brief discussion of the significance of these developments. All of these sections serve to illustrate the influential role that can be played by the judiciary as an autonomous actor in the international system. They also bring to light the leading role of U.S. courts in the larger domestication process.

### **The *Filartiga* Revolution**

U.S. policy notwithstanding, a limited legal basis for the *Filartiga* ruling did exist.

In 1900, the Supreme Court declared:

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose,

where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators (*Paquete Habana*).

This understanding of international law, however, was intended to govern relations between states. There was no recognition that international law regulated interactions between states and their citizens until *Filartiga* put forth this revolutionary concept. In fact, U.S. courts had previously ruled that individuals lacked the right to bring cases based on international treaty obligations. (Stephens and Ratner 1996).

The *Filartiga* ruling tackled longstanding judicial hurdles related to foreign policy concerns, standing, extraterritoriality, and officially protected acts. The ruling rested upon a little known statute, the Alien Tort Claims Act (ATCA), enacted in 1789 to counter piracy. This statute provides aliens with standing to sue in U.S. courts for a violation of the law of nations. It reads: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States” (28 U.S.C § 1350 1789).

The statute had remained largely dormant for almost two hundred years until lawyers at New York’s Center for Constitutional Rights, working with the *Filartiga* family, sought a way to hold Peña accountable for Joelito *Filartiga*’s death. The court’s acceptance of this statute as the basis for a human rights case was a radical departure, given judicial reluctance to apply international law. Its interpretation of the statute transformed federal courts into a venue for adjudicating violations of human rights norms recognized under international law (*Filartiga* 1980).

As mentioned, the 2<sup>nd</sup> Circuit had in two recent rulings argued for a narrow construction of “the law of nations” referenced in the ATCA, one that did not include a state’s treatment of its own citizens (*ITT* 1975; *Dreyfus* 1976). These rulings guided the

district court's dismissal. On appeal, however, the 2<sup>nd</sup> Circuit argued against its previous interpretation. The court drew on a variety of sources that included international treaties and non-binding declarations, scholarly works, and national constitutions and laws. The general language of the United Nations Charter, the justices believed, made it clear that a state's treatment of its own citizens had become an issue of international concern, transforming individuals into subjects of international law.<sup>16</sup> The court also turned to a 1977 address to the UN by then-President Jimmy Carter, who stated that "no member of the United Nations can claim that mistreatment of the citizens is solely its own business" (*Filartiga* 1980: 889).

Identifying a clear and unambiguous prohibition against torture, the court explained its reversal:

We must conclude that the dictum in *Dreyfus v. von Finck*... to the effect that 'violations of international law do not occur when the aggrieved parties are nationals of the acting state,' is clearly out of tune with the current usage and practice of international law. The treaties and accords cited above, as well as the express foreign policy of our own government, all make it clear that international law confers fundamental rights upon all people vis-à-vis their own governments. While the ultimate scope of those rights will be a subject for continuing refinement and elaboration, we hold that the right to be free from torture is now among them (1980: 884-85).

In both *IIT* and *Dreyfus*, the 2<sup>nd</sup> Circuit had expressed the view that a violation of the law of nations was one that affected state relations and their common good and had adopted a narrow, state-centric understanding of this criterion. In *Filartiga*, however, the 2<sup>nd</sup> Circuit embraced a much broader conception of the common good. The international community, it believed, now recognized a shared interest in preventing human rights violations.

---

<sup>16</sup> The Court relied on Article 55 of the Charter, calling for universal respect for and observance of human rights and fundamental freedoms.

By adopting an interpretive approach, the court was able to rely on a broad range of sources to support its contention. In 1952, California's Supreme Court had ruled that the human rights clauses of the UN Charter, like all treaty clauses, were non-self-executing (*Sei Fujii v. State*). The *Filartiga* court avoided this issue by opting not to employ the Charter as a source of any particular obligations. Instead, it invoked the Charter more generally as having established that human rights protection constituted a common purpose among states. Specifically, it cited Articles 55 and 56 of the Charter, which call for the promotion of "human rights and fundamental freedoms." The court then turned to a variety of sources to give meaning to this general obligation. Although the Charter made no mention of the specific rights that were to be included in this guarantee, the court was convinced that torture was among them, turning to non-binding declarations and other sources to support this view. It explained that its departure from earlier precedent involving the ATCA was in part due to the clear and universal nature of the particular norm that was at issue in this case.

But the determination that there existed a clear norm against torture was itself a remarkable development. The status of the prohibition against torture in international law was far from settled at the time of the ruling. It was unclear whether this prohibition had reached the level of binding international law, or whether it remained an aspiration. The statute of the International Court of Justice defines a customary norm of international law as a general practice of states accepted as law by most states (Article 38b). Employing this criterion, the lower court had classified the prohibition against official torture as an emerging norm of international law, rather than an existing one. The appeals court, however, identified a definitive norm against torture. Since the Supreme Court had identified the works of legal scholars and jurists as a source of international

law (*Paquete Habana* 1900), the 2<sup>nd</sup> Circuit turned to affidavits by well-known international legal scholars to make its determination. These affidavits, submitted by the Filartigas, argued that there was a clear and absolute prohibition against torture in the law of nations.

Yet, at the time of the ruling, torture was a widespread practice among states. It would be difficult to assert that a majority of states refrained from the practice out of legal obligation. The Torture Convention was not yet in existence. The appeals court, however, maintained that the prohibition existed in principle if not in practice, given that it was widely condemned at the international level and that states denounced its use as part of official policy in their constitutions. Here, the justices demonstrated great ingenuity, transforming the basis of customary international law from actual state practice to espoused principles. Violations did not matter because it was the condemnation itself that became the relevant practice. This was both a progressive and a controversial interpretation, given that states often merely paid lip-service to these principles and supported a much narrower conception of customary international law—one based on concrete physical practices.

Moreover, international condemnation of the practice rested on non-binding declarations such as the Universal Declaration of Human Rights, the Declaration on the Protection of All Persons from Being Subjected to Torture, and additional declarations from both the General Assembly and regional organizations. Although technically not binding under international law, the court argued that these declarations laid out expectations of adherence and represented authoritative understandings of state obligations by the international community. It also turned to international and regional treaties as evidence of custom, although Paraguay was not a signatory to any of them.

The court's use of human rights treaties and declarations as a source of concrete obligations transformed the traditional system of international law. This system had been rooted in a strict, positivist conception of law where limitations on sovereignty were based on explicit state consent. For the most part, this understanding applied to treaty obligations interpreted under the letter of the law. Yet many treaties, including the UN Charter, rely on intentionally vague language precisely because states are reluctant to undertake concrete obligations. For the same reason, declarations regarding human rights have had more widespread support than enforceable treaties. Countries have signed on to these declarations with the understanding that they are not legally binding, making it difficult to defend the assertion that states adhere to the standards found therein out of a sense of legal obligation. By turning these declarations into sources of customary international law, the court made it clear that international human rights law—often regarded cynically by countries—contained binding and enforceable legal obligations. The fact that violations were widespread did not mean that states were above the law where human rights were concerned.

In this way, aspirations became binding legal obligations. The *Filartiga* court chose to identify a legal norm against torture in a case where the law had yet to be clearly stated or crystallized, discovering the existence of a concrete, “clear and unambiguous” norm applying equally to aliens and citizens (*Filartiga* 1980: 884). But no practical legal norm had existed until the judges identified one. In effect, the court was holding Paraguay to an ideal—a world free from torture. And the federal courts, more than just emerging as a venue for the enforcement of human rights norms, became a force for developing, articulating, and strengthening these norms. As a result, the judiciary was able to transform the very nature of international human rights law protection.

At the same time, it was itself transformed into a dynamic global actor seeking to fulfill the goals of the international community as expressed by international human rights law. Judge Irving Kaufman, who authored the *Filartiga* decision, explained the court's ruling in an article for the *New York Times*: "The enunciation of humane norms of behavior by the global community and the articulation of evolved norms of international law by the courts form the ethical foundations for a more enlightened social order" (Kaufman 1980). This language and the impact of the decision point to a global version of judicial policymaking in which judges seek to achieve what they believe to be the socially desirable outcome and to impose their vision of the social order (Feeley and Rubin 1998).

Judges engaged in policymaking act when they deem conditions to be outrageous, a determination based on their perception of the moral standards of the community. Accordingly, the *Filartiga* court was motivated by what it perceived to be the central normative values of the community, defined globally, and by an accompanying sense of moral outrage. Judge Kaufman recognized that American courts generally should not get involved in disputes abroad:

But where torture is involved, on the state or international level, the Federal courts have no choice. The articulation of settled norms of international law by the Federal courts, much like their adherence to constitutional precepts, is an expression of this nation's commitment to the preservation of fundamental elements of human dignity throughout the world. Despite the emergence of an international consensus condemning torture, the abominable practice remains with us. We watch nations committed to enforcing this norm of international law—our own included—seemingly overlooking the human-rights record of certain allies and rivals in an attempt to maintain the balance of power and to avoid confrontation... Meanwhile, the nation and the world will continue to look with hope to the President, the Congress and the courts for an articulation of this nation's principled commitment to enforcing universally accepted norms of international law (Kaufman 1980).

The court acted out of a sense of moral imperative based on its perception of acceptable behavior. But as Judge Kaufman notes, the court's determination regarding the norms of accepted behavior did not necessarily coincide with the actions of the U.S. or other states engaged in power politics. Instead, these values were rooted in a broader notion of the international community, detached from actual practice and expressed by the norms of international law. In this way, the court sought to implement its vision of the international order in the same way that judges had been implementing their vision of the domestic order under the policymaking framework.

The *Filartiga* case was the first of its kind in the U.S., or any domestic court for that matter, and it rested on a novel legal argument. Judge Kaufman, however, situated the decision within an international context, emphasizing that it was part of an ongoing process of attention to international human rights, expressed through the development of international and regional human rights organizations in Europe, Africa, and the Americas; human rights activities within the UN; and the rise of NGOs such as Amnesty International. These developments outweighed political considerations with regard to the judicial application of international law. The primary goal, according to Judge Kaufman, was "that the worldwide momentum in behalf of human rights be carried forward" (Kaufman 1980). By defining its purpose in this way, the court had internationalized the public law role first defined by Abram Chayes (1976, 1982), adopting a global orientation in which its goals were based on fulfilling the policies of the international community.

The damage award saw the district court adopt this same global orientation and understanding of its goals (*Filartiga* 1984). The court awarded the Filartigas compensatory damages of \$375,000. Awarding an additional \$10 million in punitive

damages, the judge explained:

In order to take the international condemnation of torture seriously this court must adopt a remedy appropriate to the ends and reflective of the nature of condemnation. Torture is viewed with universal abhorrence; the prohibition of torture by international consensus and express international accords is clear and unambiguous; and 'for purposes of civil liability, the torturer has become—like the pirate and the slave trader before him—*hostis humani generis*, an enemy of all mankind.' 630 F.2d at 884, 888, 890. We are dealing not with an ordinary case of assault and battery. If the courts of the United States are to adhere to the consensus of the community of humankind, any remedy they fashion must recognize that this case concerns an act so monstrous as to make its perpetrator an outlaw around the globe (1984: 863).

The court believed that punitive damages were essential in order to give effect to the international prohibition against torture. The award was meant both as a deterrent and as a demonstration of the extent to which torture was condemned by the international community. By framing its decision in this way, the court indicated that its pioneering interpretation was not solely domestic in effect but was to become a part of the international human rights discourse as an authoritative interpretation of a universal norm.

The revolutionary character of the *Filartiga* ruling and its use of the ATCA is underscored by a case that followed soon after—*Tel Oren et al v Libyan Arab Republic* (1981, 1984). In this case, victims of a 1978 terrorist attack in Israel and their relatives filed suit three years later against Libya and the PLO, among other defendants. The DC district court that heard the case adopted an extremely narrow construction of the ATCA, ruling that the statute provided jurisdiction, but it did not create an independent cause of action. The court could hear a case under the ATCA, it held, only in instances where a treaty to which the United States was a party, or the law of nations in general, provided a private right of action. But the ATCA in itself did not provide such a cause of action:

Otherwise, federal courts would clutch power over cases, under the guise of the law of nations, undoubtedly casting effect on international relations and foreign policy when no country, friend or foe, has consented to an American court opening its door to one alleging violations of international legal principles. In the end, of course, it behooves the court to discern promptly in cases such as the instant whether international law has expressly or impliedly entrusted individuals with the authority to enforce its precepts.... Absent the clear indication, not present here, that nations intend to subject themselves to such worldwide jurisprudential assaults, jurisdiction under § 1350 will not vest (1981: 550).

Rejecting *Filartiga* and adopting a narrow understanding of consent, the court concluded that Congress had not envisioned federal courts as venues for adjudicating international law and that no state had consented to such a development, a determination that reinforced the traditional conception of international law. In this view, the judiciary had no power to infringe upon a state's sovereign power to act in the absence of clear state consent.

The appeals court affirmed the district court's ruling in three concurring opinions, each rejecting jurisdiction for a different reason (*Tel Oren* 1984). In the only opinion friendly to the *Filartiga* outcome, Judge Edwards agreed with what he characterized as the four basic propositions of *Filartiga*: 1) the law of nations should be interpreted as it exists today, not as it did at the time the statute was passed; 2) this law is based, in part, on customary international law; 3) international law endows all people with fundamental rights; 4) the ATCA empowers U.S. courts to rule with respect to rights recognized under international law. He did not believe, however, that international law had evolved to the point of recognizing liability for non-state actors, particularly in relation to terrorism. Consequently, the case against the PLO could not go forward. He also noted that there was no consensus among nations over terrorism.

In contrast to Judge Edwards' evolutionary view of international law, Judge Bork believed that the ATCA covered only violations of international law that were recognized

at the time the statute was passed in 1789. These breaches were limited to safe passage, the rights of ambassadors, and piracy. In a complete rejection of *Filartiga*, Judge Bork also maintained that the ATCA established jurisdiction but did not actually provide aliens with a right to sue in U.S. courts, a right he believed had to be expressly granted by a treaty or by an act of Congress. Otherwise, courts would be acting beyond the scope of their powers, and beyond legislative intent, while infringing upon the executive's role in foreign affairs: "When courts go beyond the area in which there is any historical evidence, when they create the substantive rules for topics such as that taken up in *Filartiga* or in Judge Edwards' formulations, then law is made with no legislative guidance whatever" (1984: 815). Judge Bork also insisted that international law was confined to states and was meant to regulate their relations. International documents recognizing individual rights were "statements of ideals and aspirations only." These rights were "clearly not expected to be judicially enforced throughout the world" (1984: 818).

Judge Robb similarly rejected *Filartiga* as "fundamentally at odds with the reality of the international structure and with the role of United States courts within that structure" (1984: n5). In his view, international law was a political mechanism available to the Executive; it was not a judicial resource. He cautioned courts against ruling on questions of international law. Such cases presented non-justiciable political questions better left to the other branches of government. The ATCA, he believed, was never intended to encompass such cases.

Following this ruling, some lower court judges argued that the *Filartiga* precedent was not definitive and relied instead on *Tel Oren*. Adopting Judge Bork's argument, the district court of Hawaii dismissed a suit against former Philippine ruler Ferdinand

Marcos, ruling that the ATCA did not provide a right to sue and that international law applied only to states, not to individuals (*Trajano* 1986). The judge emphasized that where the plaintiffs were citizens of the offending state, there could be no violation of international law. Such acts constituted acts of state and as such were non-justiciable. This ruling, however, was overturned on appeal, and subsequent cases based on the ATCA have flatly rejected the opinions put forth by Judge Robb and Judge Bork (see, e.g., *Xuncax* 1995; *Forti* 1987; *Doe v Islamic Salvation Front* 1998).

### **Understanding *Filartiga*: the ATCA and Judicial Activism**

Much of the debate over the ATCA stems from its relative obscurity. Judge Henry Friendly described it as “a kind of legal Lohengrin...no one seems to know whence it came” (*ITT* 1975). What is known is that the ATCA was part of the Judiciary Act of 1789, passed by the First Congress, as a means of providing redress for foreigners claiming violations of international law. Fearing that state actions might otherwise draw the country into war, the founding fathers wanted to ensure that the federal government had the power to enforce international law (see, e.g., D’Amato 1988; Stephens 2002a). Thus, the ATCA, as part of the larger Judiciary Act, was meant as a mechanism to regulate foreign relations. Beyond this goal, however, little is known about the intention of the framers because the statute lacks any legislative history.

In light of this ambiguity, Bradley and Goldsmith contend that the judges in *Filartiga* misunderstood history. They argue that the ATCA was intended to facilitate peaceful foreign relations. Specifically, it provided foreign ambassadors in the U.S. recourse if they were attacked. This limited purpose, they point out, is largely at odds with its usage in *Filartiga* (1997b).

In addition to questioning the judiciary’s reading of the ATCA, Bradley and

Goldsmith have also challenged its direct incorporation of customary international law into U.S. law (1997a; 1997b; 1999; see also Bradley 2001).<sup>17</sup> This incorporation, they argue, goes against the express wishes of the executive and legislative branches. They point to a variety of sources to support this view, including Executive opposition to many ATCA suits, State Department and Executive opposition to elements of the Foreign Sovereign Immunities Act (FSIA) and the Torture Victim Protection Act (TVPA,) the attachment of non-self-executing clauses to treaty ratifications to avoid judicial enforcement, and the absence of Congressional legislation enacting these treaties (Bradley 2001; Bradley and Goldsmith 1999). Regarding the latter two, they conclude: “it seems illegitimate for federal courts to apply as domestic law a CIL [customary international law] of human rights based almost exclusively on human rights treaties that the political branches have taken pains to ensure do not apply as domestic law” (Bradley and Goldsmith 1999: 2168). Such an approach, they argue, in addition to being undemocratic, interferes with the foreign relations role of the executive, shifting it to unqualified actors and raising the prospect of retaliation (Bradley 2001).

This judicial autonomy is still more troubling to them because they believe that the judiciary has redefined custom and that state practice in fact reflects a great deal of human rights abuse (Bradley and Goldsmith 1997b). Bradley and Goldsmith are critical of the interpretive approach. They characterize the shifting definition of custom—from an established behavior or practice to a more purposive conception—as a radical, dangerous, and anti-democratic development (1997b). Because of the ambiguities inherent in defining customary international law, such definitions necessarily represent a “highly creative process” undertaken by actors who are not accountable politically

---

<sup>17</sup> Proponents argue that the U.S. legal history and structure support the incorporation of customary international law (see Koh 1991, 1998; Stephens 2002a).

(Bradley 2001). Accordingly, the interpretive approach, meant to advance the norms of international law, involves a large degree of judicial autonomy. Uncomfortable with this situation, Bradley and Goldsmith question whether “U.S. federal courts have been delegated the power under our constitutional system to operate as international norm creators” (Bradley 2001: 76). Yet, this is precisely the role U.S. courts took on in *Filartiga*. As Judge Kaufman explained, the judicial articulation of the norms of international law fulfilled the country’s role in guaranteeing fundamental human rights throughout the world (Kaufman 1980).

In fulfilling this purpose, U.S. judges have abandoned the narrow understanding of the ATCA espoused by Bradley and Goldsmith and have employed a much broader view of what the maintenance of international relations entails. Where the positivist conception is limited to the avoidance of war, the interpretive approach involves advancing the good of the global community, a goal that requires peaceful relations and the preservation of human rights. In pursuing this goal, the courts must articulate and give legal effect to public values and goals, internationalizing the public law role described by Chayes (1976, 1982). In fact, Judge Kaufman equated the judicial obligation to address human rights violations to its role in addressing denials of civil rights, this role having inspired Chayes’ public law conception. Judge Kaufman was explicit in his application of this purposive approach to the *Filartiga* ruling and its connection to the court’s global orientation. By looking to developments at the international level, the court was able to place its ruling within the shared goals of the global community. In this way, the ruling reflected “the collective conscience of civilized society” (Kaufman 1984: 22).

In accordance with the interpretive approach, Judge Kaufman explained that

statutory application required consideration of the underlying purpose, particularly when confronted with a situation of legal ambiguity. Such ambiguity, and the freedom it afforded, dictated judicial activism: “In large part, judicial activism is spawned by breaking free from the nebulous semantic bounds of restraint and conceiving judicial logic relative to the social consequences of a chosen statutory interpretation, rather than a literal interpretation” (Kaufman 1984: n50). In fact, the decision-making process he described went beyond the interpretive process as described by Feeley and Rubin and more closely resembled their description of the policymaking process, in which judges seek the desired social outcome. Policymaking is also distinguished by the judicial identification of a morally reprehensible behavior. This identification may not have a legal basis. Having established a conception of the socially desired outcome, the judge then turns to a variety of sources, many of them non-legal, in order to make a legal argument outlawing the abhorrent behavior. Along these lines, Judge Kaufman admitted an initial inclination to declare that torture was prohibited under international law. He then located international treaties, background documents, and academic sources to support this view (Kaufman 1984).

For Bradley and Goldsmith, this approach rests on an “uncertain brew” of questionable soft law sources that are not based on actual state practice or consent (1999). They have been particularly critical of the judiciary for treating the American Law Institute’s Restatement on Foreign Relations Law as a codification of established law. These restatements, they maintain, tend to be aspirational rather than reflective of established norms of international law (1997b, Bradley 2001). The use of soft law sources, in turn, has created a significant role for international law scholars. In fact, Judge Kaufman recounted how the *Filartiga* court started with scholarly works, and how

these works, in turn, led the justices to the broader sources that they drew upon. Bradley and Goldsmith are particularly troubled by the judicial reliance on academic scholarship because these academics are themselves adopting a purposive conception, transforming aspirations into binding norms in advancement of their advocacy goals (Bradley 2001). This development is still more troubling to them in that *Filartiga*, in combination with the Restatement (Third), has given rise to the interpretive approach, and this approach is now being adopted by courts around the world (Bradley and Goldsmith 1997a). Accordingly, the U.K. judges considering Pinochet's liability under international law turned to U.S. case law, and to the Restatement, and employed the modern or interpretive approach to find the former head of state accountable.

Implicit in the criticism of judicial activism is a recognition of the leading role played by the U.S. judiciary and the broader significance of this role. But what accounts for this development in U.S. courts? A history of judicial activism, the rise of the public law model, and the global orientation of the judiciary have all contributed to the domestication process initiated by the *Filartiga* decision. In addition, the Justice and State Departments filed a joint brief in support of the plaintiffs' arguments in *Filartiga*, which may have emboldened the court to make its groundbreaking ruling, although subsequent reversals by the Justice Department did not inhibit continued use of the *Filartiga* precedent.

The *Filartiga* decision and the leading role adopted by the U.S. judiciary were also facilitated by several structural factors within the U.S. legal system. Obviously, the ATCA provides victims of human rights abuses with an opportunity for adjudication in U.S. courts that does not exist in other countries. And the fact that the ATCA rests on civil rather than criminal litigation means that more cases can reach the courts, as

plaintiffs do not have to wait for or convince a government official to initiate legal proceedings (Stephens and Ratner 1996). In addition, procedural rules in the U.S. allow for greater discovery than is allowed in other countries (Stephens and Ratner 1996). Finally, although such cases are expensive, the individual cost to the plaintiff of initiating civil litigation in the U.S. is far less burdensome than in other countries where a losing plaintiff may be made to pay the defendant's legal fees (Stephens 2002b).

These elements, however, provide only part of the story with regard to the decision and the leading role adopted by the U.S. judiciary. Developments at both the domestic and international level also encouraged the *Filartiga* decision. As Judge Kaufman noted, human rights had become a more central issue on the international stage. The 1973 coup in which Augusto Pinochet took power in Chile galvanized the human rights community (Sikkink 1993). Regional and international human rights organizations and networks began to emerge in the 1970's (Keck and Sikkink 1998; Risse, Ropp and Sikkink 1999). At the same time, human rights bodies were established within the U.S. government, and within the UN structure. The first international human rights treaties entered into force during this period (Risse, Ropp and Sikkink 1999). Then President Jimmy Carter emphasized human rights in his administration, altered foreign policy accordingly, and even filed a brief in support of the case. Congress linked U.S. aid to human rights practices as well (Ratner 2001). And in 1977, Amnesty International won the Nobel Peace Prize, focusing greater attention on human rights (Keck and Sikkink 1998). All of these changes coincided with a period of judicial activism in the U.S. in which the courts began to be viewed as a vehicle for social change (Koh 1991; Stephens 2002b; see more generally Glendon, 1991; Epp 1998).

As developments continued at the international level, U.S. courts moved still

further in strengthening human rights norms after *Filartiga*. For all its revolutionary character, the *Filartiga* ruling was based on an extremely narrow construction of international human rights norms under the ATCA.<sup>18</sup> The cases that followed moved beyond this narrow construction. U.S. courts, most notably the 2<sup>nd</sup> and 9<sup>th</sup> Circuits, have continued to enlarge the scope of rights that are enforceable under customary international law. They have also broadened the statute's reach and, in turn, the reach of international law to hold non-state actors accountable. These actors include individuals, political parties, and multinational corporations. ATCA cases have recognized individual accountability for rulers, as well as those below them, firmly establishing the norm of command responsibility while chipping away at the norm of immunity. They have given increasing weight to international human rights norms at the expense of sovereignty, abandoning the tradition of non-interference in a state's domestic affairs. These developments have greatly eroded three related doctrines that had long served as barriers to suits based on human rights law—the act of state doctrine, the political question doctrine, and foreign sovereign immunity.

### **Breaking Down Barriers: Acts of State, Political Questions, and Sovereign Immunity**

The judiciary has developed these three doctrines—the act of state, the political question, and sovereign immunity—in recognition of the fact that certain issues fall within the domain of the executive branch. Courts have traditionally been reluctant to rule on issues seen as fundamentally political in nature. And because international law has generally been viewed as a political mechanism regulating foreign relations, these

---

<sup>18</sup> Judge Edwards pointed out that the *Filartiga* court's comparison of torture to slavery and piracy established a standard of *jus cogens*, a standard that applies to very few international norms (*Tel Oren* 1984). A *jus cogens* norm is one that is considered non-derogable and applies to all states regardless of consent.

doctrines have weighed against the judiciary hearing cases based on international law. As the range of ATCA cases has grown, however, U.S. courts have demonstrated an increased willingness to judicialize the political realm. In doing so, they have emphasized the judicial and downplayed the political character of their rulings.

Both the 2<sup>nd</sup> and 9<sup>th</sup> circuits (where the majority of human rights cases have been heard) have explicitly rejected the notion, asserted by Judges Robb and Bork in *Tel Oren* (1984) that all cases involving foreign relations are non-justiciable political questions. In a rebuke, the 2<sup>nd</sup> circuit declared: “judges should not reflexively invoke these doctrines to avoid difficult and somewhat sensitive decisions in the context of human rights” (*Kadic* 1995: 249). Instead, the court maintained that international human rights norms are universally recognized and provide discoverable judicial standards. In other words, international human rights law provides judicially enforceable guarantees. These guarantees, moreover, transcend state relations and foreign policy considerations.

Various executive branches have held differing views regarding the justiciability of extra-territorial human rights claims. None, however, have fully embraced the court’s view that all such cases are in fact justiciable.<sup>19</sup> In a “Statement of Interest” regarding the case against Bosnian Serb leader Radovan Karadzic, the Clinton administration provided some support for the notion of justiciability, but limited it to the case at hand: “Although there might be instances in which federal courts are asked to issue rulings under the Alien Tort Statute or the Torture Victim Protection Act that might raise a political question, this is not one of them” (*Kadic* 1995: 250). The 2<sup>nd</sup> Circuit, for its part, believed that virtually all human rights cases lent themselves to judicial remedies. While citing the administration’s Statement of Interest to bolster its ruling, the court was explicit in its

---

<sup>19</sup> The current administration has rejected the entire line of ATCA cases, filing a friend of the court brief in one such case (*Doe v. Unocal* 2002) arguing that the precedent should be overturned.

contention that even a government declaration indicating the existence of a political question would not necessarily rule out judicial consideration (*Kadic* 1995).

Even where political questions concerns have been removed, a related doctrine, the act of state, may still limit judicial consideration of a case based on international law. The Supreme Court's initial declaration of this doctrine was rooted in international comity: "Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory" (*Underhill v Hernandez* 1897). Later, the Court linked the doctrine to recognition of the fact that the executive controls foreign affairs (*Sabbatino* 1964).

The act of state has been raised in defense of the majority of human rights offenders charged under the ATCA. U.S. courts, however, no longer reflexively invoke the doctrine to avoid ruling on such cases. Instead, they have made the determination of acts of state itself a judicial question, and have generally rejected its use in defense of human rights violations. The courts have adopted the view, first established by the *Filartiga* court, that the act of state applies only where individuals possessing sovereign authority are in fact acting in an official capacity. Certain acts, by their very nature, cannot be characterized as official acts of state despite the authority of the actor undertaking them. In response to accusations that judicial rulings related to acts of state enter the political sphere, the courts have insisted that they are judicially capable of distinguishing between an official's legal or official acts, and those that are undertaken for personal profit or that are beyond the scope of official acts and, as such, constitute private conduct (*Republic of the Philippines v. Marcos* 1988).

This view has facilitated the advancement of international human rights norms

against what were once considered officially protected acts. In *Forti v. Suarez-Mason* (1987), an Argentine general charged with torture, summary execution, disappearance, and arbitrary detention claimed that these acts were committed under a “state of siege” proclaimed by the government and by a military junta. As such, he argued, they constituted official acts that were part of a government policy, and the act of state doctrine barred the court from ruling on the policies of another government. The act of state, the court responded, held less sway in instances where there existed a large degree of codification and consensus around an international norm.<sup>20</sup> This was especially true with regard to a *jus cogens* norm, one that has been “accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted” and which can only be altered by a subsequent *jus cogens* norm (Vienna Convention 1969: Article 53). Since the Argentine case involved violations of “fundamental human rights lying at the very heart of the individual’s existence,” such acts could not be considered official in nature (*Forti* 1987: 1546). This determination, the court emphasized, was not a political one. Instead, it involved the application of an established norm to a question of fact.

This logic has been employed still further in privileging human rights norms over sovereign immunity. Two theories of sovereign immunity exist—an absolute and a restrictive one. The absolute theory is based on the idea of conceptual unity between sovereign and ruler. It precludes any legal action against a foreign sovereign or government because subjecting one sovereign to the judicial systems of another violates the norm of sovereign equality (*Schooner Exchange* 1812). The restrictive theory, first espoused by the State Department in response to increased international commerce,

---

<sup>20</sup> This standard was established by the Supreme Court in a case involving Cuban expropriations of American assets (*Sabbatino* 1964).

creates a commercial exception to this exemption, but otherwise adheres to the absolute theory's doctrine of sovereign equality (Tate Letter 1952). The commercial exception is aimed at activities of a private or commercial nature, such as business dealings, that have no connection to the sovereign acts of a state. Congress adopted the restrictive doctrine when it passed the Foreign Sovereign Immunities Act (FSIA) in 1976, granting immunity to foreign states with respect to sovereign or public acts, but not with respect to private or commercial acts.<sup>21</sup>

The restrictive theory has guided the consideration of suits filed against states, which have been barred in the absence of a commercial exception. This has held true even for cases filed under the ATCA.<sup>22</sup> U.S. courts have ruled that neither the ATCA nor the passage of international treaties constitutes a waiver of sovereign immunity with respect to states (*Siderman v. Argentina* 1985; *Denegri v. Chile* 1992). Moreover, an individual acting in an official capacity is entitled to sovereignty as a representative of the state. Only in the case of a commercial exception is this sovereign immunity lifted.<sup>23</sup>

Even so, U.S. courts have not let this doctrine impede the transformation of international human rights norms into legal guarantees. Although the restrictive theory has provided states with immunity from lawsuits, it has not protected officials within these states from such suits. In considering individual liability, courts have gone beyond the commercial exception established by Congress and have created additional criteria for establishing acts as official or unofficial. The *Filartiga* court first established the idea

---

<sup>21</sup> The FSIA defines a commercial activity as "either a regular course of commercial conduct or a particular commercial transaction or act" (28 U.S.C.A. § 1602 1976).

<sup>22</sup> See *Siderman de Blake v The Republic of Argentina* (1985), which explains that "the longstanding general rule of foreign sovereign immunity...indicates that when 28 U.S.C. § 1350 was enacted, the legal status quo was the recognition of immunity."

<sup>23</sup> In 1996, Congress established another limited exception that allows U.S. nationals to sue countries designated as state sponsors of terrorism for violations of international law (28 U.S.C. § 1605 (a)(7)).

that certain acts, even if undertaken by state officials, could not be categorized as official if they violated the norms of international law. Only public acts, by definition those that were not in violation of these norms, activated the sovereign immunity protection. Later cases continued to apply this distinction in holding foreign officials and former heads of state responsible for human rights violations, as courts ruled that the FSIA only immunized foreign officials acting in their official capacity. Certain acts, especially human rights violations, exceeded the scope of official authority even in the absence of a commercial exception (*Chuidian* 1990; *Hilao* 1994).

The Senate Judiciary Committee endorsed this view when it passed the Torture Victim Protection Act (TVPA) in order to codify *Filartiga* and to hold foreign actors accountable for torture in accordance with the Torture Convention.<sup>24</sup> The Committee explained that the Act of State Doctrine applied only to public acts, and torture did not fall into this category. Both the Reagan and Bush administrations opposed the law, expressing concerns that it presented an improper interference with the Executive's role in foreign affairs (Stephens and Ratner 1996).<sup>25</sup>

The public/private distinction has even been applied to the activities of heads of states. The district court of Hawaii initially held that the act of state doctrine barred the application of command responsibility to former Philippine ruler Ferdinand Marcos, as federal courts did not have the authority to review the official acts of a head of state (*Trajano* 1986). But in a consolidated appeal, the 9<sup>th</sup> Circuit reversed both this ruling and

---

<sup>24</sup> The TVPA also opened the courts to U.S. citizens, who had not been entitled to sue under the ATCA. Both U.S. and foreign citizens could sue under the TVPA, but they could only sue defendants acting on behalf of a foreign authority (106 Stat, 73 1992, 28 U.S.C.A. § 1350).

<sup>25</sup> Despite his opposition, President Bush signed the bill into law, taking note of a "new era, in which countries throughout the world are turning to democratic institutions and the rule of law" (Signing Statement, 1992). This era, he concluded, called for a strong U.S. commitment to human rights protection around the globe.

a similar one by a California district court.<sup>26</sup> The act of state doctrine, it explained, was meant to assist in the maintenance of foreign relationships. It did not grant *carte blanche* to dictators, particularly when they were no longer in power (*Republic of the Philippines v. Ferdinand Marcos* 1988).

Accordingly, government officials, including former heads of state, have had little success invoking the FSIA to avoid facing human rights charges. This circumvention of sovereign immunity demonstrates the extent to which judicial activism has contributed to the advancement of international human rights protections. Despite the existence of specific legislation governing sovereign immunity—the FSIA—the court did not limit itself to the guidelines established by Congress. Under the traditional approach, these explicit exemptions would have limited further judicial action. U.S. courts, however, adopted an interpretive approach and identified additional exemptions in international law to cover actions they believed fell outside the bounds of official action. Congress had legislated only a commercial exception to sovereign immunity; U.S. courts created additional exceptions. And these judicially established exceptions to immunity influenced future interpretations by the global judiciary regarding the status of international human rights norms. As a result, these norms have increasingly trumped sovereign immunity and the act of state doctrine, both in the U.S. and in other countries.

Rejecting the absolute theory of sovereign immunity in the case against Marcos, the 9th circuit explained the conceptual distinction between the state, with full immunity, and the head of state, as an individual:

Although sometimes criticized as a ruler and at times invested with extraordinary powers, Ferdinand Marcos does not appear to have had the authority of an

---

<sup>26</sup> The 9<sup>th</sup> Circuit made a series of rulings involving suits brought by individual victims of the Marcos regime, by a class involving thousands of his victims, and by the Philippine government itself.

absolute autocrat. He was not the state, but the head of the state, bound by the laws that applied to him. Our courts have not had difficulty in distinguishing the legal acts of a deposed ruler from his acts for personal profit that lack a basis in law. As in the case of the deposed Venezuelan ruler, Marcos Perez Jimenez, the latter acts are as adjudicable and redressable as would be a dictator's act of rape (*Republic of the Philippines v. Ferdinand Marcos* 1988: 1361).

Contrasting the case with *Siderman* (1985), in which a district court had dismissed charges against Argentina, the 9<sup>th</sup> Circuit explained that the FSIA and its exceptions applied only to a foreign state, not to an individual official within the state. Filing suit against an individual acting beyond the scope of his authority was not the equivalent of filing suit against another state.

Following the Marcos and *Filartiga* precedents, U.S. courts have continued to solidify the priority given to international human rights norms and have denied state officials impunity under the act of state. In the 1990's, for example, a Massachusetts district court held that the human rights abuses committed by forces under the command of the Guatemalan Minister of Defense, Hector Gramajo, exceeded "anything that might be considered to have been lawfully within the scope of Gramajo's official authority" (*Xuncax* 1995: 176). A New York district court similarly ruled that torture charges against Ghana's Deputy Chief of National Security fell outside of the scope of sovereign immunity (*Cabiri* 1996).<sup>27</sup> And when former Haitian military leader Prospero Avril invoked the act of state and political question doctrine, a Florida district court responded that the acts involved—torture, cruel, inhuman or degrading treatment, arbitrary arrest and detention, and other international law violations—did not constitute official acts (*Paul et al v. Avril* 1992). Yet, even as these acts were deemed unofficial, they still were required to be committed under color of law to qualify as international crimes.

---

<sup>27</sup> This ruling includes a review of cases in which U.S. courts ruled that an official acted beyond the scope of his authority and beyond FSIA protection.

Regarding this relationship, the 9<sup>th</sup> Circuit explained: “An official acting under color of authority, but not within an official mandate, can violate international law and not be entitled to immunity under FSIA” (*Hilao v. Estate of Ferdinand Marcos* 1994: n8).

The rulings against Marcos and Avril were issued when they were no longer heads of state. The question of head-of-state immunity has been considerably more complicated where a sitting head of state is concerned. The answer, in part, has hinged on the issue of recognition. In determining if a case against an individual could proceed, the courts have considered whether the U.S. government has recognized and is engaged with the individual as the leader of a state, and whether pursuing the case creates any diplomatic concerns. In *Kadic v Karadzic* (1995), a case against the self-proclaimed leader of the Bosnian Serb republic of Srpska, Radovan Karadzic, the court faced the dual questions of Karadzic’s putative immunity as a head of state, and, conversely, whether the fact that Srpska was not a recognized state rendered him a non-state actor for the purposes of holding him liable under international law. Either of these factors could have resulted in dismissal of the case. Instead, however, the 2<sup>nd</sup> Circuit reconciled these two issues in favor of Karadzic’s liability by concluding that recognition by the U.S. was necessary for immunity but was not necessary to meet the state action requirement. To make its determination, the court looked to the overriding goals of the international community, as laid out in human rights law, and developed an argument that would fulfill these goals.

The district court had determined that Karadzic lacked head-of-state immunity because the executive branch did not recognize the Bosnian Serb state. It noted, however, that this situation could change and this possibility weighed against the court’s jurisdiction (*Kadic* 1994). The appeals court rejected this approach on the grounds that

“it would be entirely inappropriate for a court to create the functional equivalent of such an immunity based on speculation about what the Executive Branch might do in the future” (*Kadic* 1995: 248). Karadzic also maintained that, as an invitee of the UN, he was immune from service of process. The court responded that the UN Headquarters Agreement confers immunity only within the headquarters district as defined by the U.S. and the UN in the agreement. It was not for the court to renegotiate the terms of this agreement. Following a request from the plaintiffs’ attorneys, the State Department submitted a letter stating that Karadzic was not immune from legal proceedings as a UN invitee.

Trying all angles, Karadzic also argued that, as a non-state actor, he could not be held liable under international law. The district court agreed. True, international law had evolved to protect the individual against the state, as upheld by the *Filartiga* (1980), *Marcos* (1988, 1994), and *Forti* (1988) decisions. But, turning to Judge Edward’s opinion in *Tel Oren*, the district judge concluded that only state actors could commit violations of international law. The self-proclaimed Bosnian Serb republic was not a recognized state, so Karadzic and those acting under him could not be characterized as acting under color of law. Their acts constituted private acts.

The 2<sup>nd</sup> Circuit took up the issue of international law and non-state actors on appeal and found Karadzic liable. The court considered two questions. First, could some violations of international law be committed by non-state actors? Second, did Karadzic meet the “color of law” standard for the purposes of other international law violations? With respect to the first question, the court examined the evolution of international law, concluding: “We do not agree that the law of nations, as understood in the modern era, confines its reach to state action” (*Kadic* 1995: 239). Citing the early prohibition against

piracy, the justices determined that certain actions violate international law regardless of whether they are committed by private individuals or state actors. These include acts of genocide, war crimes and crimes against humanity.<sup>28</sup> The executive branch submitted a statement of interest sharing this view. The court also cited The Restatement (Third) of the Foreign Relations Law of the United States (1986) that listed a separate category of violations from those committed by states. And while torture and summary execution generally had to be committed under color of law, individual liability ensued when these acts were committed in the course of genocide or war crimes.

The 2<sup>nd</sup> Circuit then went on to consider whether Karadzic's actions were committed under color of law—did they constitute state actions as required for certain crimes under international law? The court concluded that Srpska, the entity headed by Karadzic, met the *de facto* criteria of statehood.<sup>29</sup> Karadzic's actions thus fulfilled the state action requirement. Employing the international law definition of statehood, the court determined that only *de facto* statehood, not recognition, or *de jure* statehood, was necessary to fulfill this requirement:

It would be anomalous indeed if non-recognition by the United States, which typically reflects disfavor with a foreign regime—sometimes due to human rights abuses—had the perverse effect of shielding officials of the unrecognized regime from liability for those violations of international law norms that apply only to state actors (*Kadic*1995: 245).

In establishing that only the impression of official authority was necessary, the court ensured a greater degree of liability for violations of internationally recognized human

---

<sup>28</sup> The court cited a variety of sources to support this view. Individual liability for genocide was established by General Assembly resolution and by the Convention on the Prevention and Punishment of the Crime of Genocide. Private liability for war crimes has long been recognized under the Geneva Convention and the Nuremberg Charter.

<sup>29</sup> There are four criteria for statehood under international law: a defined territory, a permanent population, a government that is in control, and the capacity to engage in foreign relations.

rights.

This reasoning has enabled U.S. courts to expand the range of defendants who may be accountable for human rights violations. As such, they have also broadened the legal effect of international human rights norms. The courts have ruled that both former heads of state and non-recognized heads of state are liable under international law.<sup>30</sup> They have stopped short, however, of pursuing legal action against sitting heads of state. Such cases present significant foreign policy issues for an executive branch conducting relations with these countries. Thus, while a district court exercised jurisdiction over the former military leader of Haiti, another court dismissed a case of extrajudicial killing against Jean-Bertrand Aristide, Haiti's sitting head of state (*Lafontant v. Aristide* 1994). The Aristide court held that although it had subject matter jurisdiction based on the TVPA, it could not exercise personal jurisdiction over Aristide as a sitting head of state with whom the Executive engaged in foreign relations.

Another district court reached the same conclusion in a case filed against Zimbabwean President Robert Mugabe, his foreign minister, and other state officials, alleging acts that included murder, torture, terrorism, rape, beatings, and destruction of property (*Tachiona v. Mugabe and ZANU-PF* 2001). In reaching his decision, the judge discussed at length the absolute and restrictive doctrines of sovereign immunity. He did not question the fact that the alleged abuses were prohibited under established human rights norms and thus fell within the scope of the ATCA and the TVPA. Nonetheless, he accepted the State Department's suggestion of immunity in accordance with U.S. foreign policy interests.

Noting that previous rulings had simply stated that personal jurisdiction could not

---

<sup>30</sup> The criminal prosecution of Panamian leader Manuel Noriega proceeded on the grounds that the U.S. had never officially recognized General Noriega as the head of state.

be exercised against sitting heads of state, the judge decided to undertake an extensive examination of head-of-state immunity. He explored the scope of FSIA immunity with regard to individuals as opposed to state agencies; heads of state as opposed to the states themselves; private unofficial acts as opposed to public acts; and private acts of non-state actors committed under ‘color of law’ or with government affiliation.

The ruling took note of the globalization of human rights standards and norm enforcement, the advancement of international law to protect individual rights and to hold non-state actors accountable, and the expansion of individual accountability at the expense of traditional notions of sovereignty and immunity. The judge cited the key developments, which included the establishment of the Yugoslav and Rwanda Tribunals, the drafting of the Rome Statute of the International Criminal Court, and cases both inside and outside the U.S.—*Filartiga* (1980), *Kadic* (1995), and those against Marcos, Milosevic, and Pinochet—as evidence that sovereignty no longer provided cover for human rights abuses. Despite this progress in global justice, however, he concluded that the international community had not yet established clear, widely recognized principles regarding the prosecution of sitting heads of states. Citing the case against Aristide, the judge ruled that the FSIA did not alter the established norm of absolute immunity for a head of state. The only exception was if the U.S. government did not recognize the head of state as legitimate.

The judge was acutely aware of the injustice of his ruling, but he emphasized that he was bound by the law:

In the final analysis, as this Court concludes, the instant case is one in which hopes outpace remedy, personal demands for justice run higher than the availability of full and immediate legal recourse in this forum. The progression of the legal precepts and theories Plaintiffs here invoke, despite critical strides marked in recent years, still trails behind human aspirations and has some time

and way to go to close the gap. Consequently, on the circumstances now before the Court, the measure of justice necessarily is gauged on a scale some may feel does not fully reckon all that is seen and unseen, and whose standards may account, perhaps disproportionately, for things not altogether discernible (*Tachiona* 2001: 265).

Although immunity, rooted in the interest of comity among nations, trumped justice in this instance, the court warned that “resort to head-of-state and diplomatic immunity as a shield for private abuses of the sovereign’s office is wearing thinner in the eyes of the world and waning in the cover of the law” (*Tachiona* 2001: 317). By contrasting aspirations with law, the judge reinforced the notion that all that had gone before was rooted in concrete law. He also demonstrated that, in spite of criticism that the creative use of custom confuses aspiration with law, judges make judicial distinctions between the two.

The judiciary generally has shown deference to the government with regard to immunity for sitting heads of state, but it has not blindly followed the government interest in these suits. In the Zimbabwean case, the judge did not share the government’s view that head-of-state immunity extended to the political party with which the head of state was associated. He ruled that Mugabe’s political party, ZANU-PF, could be liable under international law, as its close association with Mugabe and other state officials meant that it had acted under color of law. In this situation, the court had both subject matter and personal jurisdiction over ZANU-PF.

The role played by the executive branch in ATCA cases is difficult to pinpoint. Favorable executives may have encouraged the courts to pursue such cases, but it is not clear that less enthusiastic executives impeded such suits. The Carter administration, for example, filed a brief in support of the *Filartiga* (1980) case. Four years later, the Reagan administration filed a brief against hearing the *Tel Oren* case (1984) and in

another brief argued for limiting the ATCA's application to events with a concrete link to the U.S (*Trajano v. Marcos* 1989). The Justice Department brief in *Marcos* maintained that the government position had been wrong in *Filartiga*. Despite this statement, the 9<sup>th</sup> Circuit upheld the *Filartiga* precedent and rejected immunity for *Marcos*. When the Supreme Court considered whether the case against Bosnian Serb leader Karadzic would constitute an interference with the executive's foreign policy because the Dayton peace accords were being negotiated, it called for a brief from the Clinton administration. Initially, the executive branch opposed the suit. After the fall of Srebrenica, however, the administration filed a brief in support of the case being heard.

Although they often seek statements of interest in these cases, the courts have made clear that they will not simply follow the interests of the Executive. When *Marcos's* daughter challenged the court's jurisdiction over her on the basis that the executive branch had withdrawn its earlier support for *Filartiga* and had filed an *amicus* brief calling for a more restrictive interpretation of the ATCA, the court rejected this contention. It explained that it was not bound by changes in position among various administrations, but only by the ATCA itself (*Trajano* 1992). Similarly, in *Kadic* (1995), the court made clear that a government declaration asserting the political question doctrine would not automatically rule out judicial consideration.

This judicial independence and activism has resulted in the defeat of several longstanding barriers to cases involving international law. Abandoning judicial rules of self-restraint, courts have both circumvented judicial doctrines barring adjudication and rejected the assertions of other branches of government that these cases are political in nature. As a result, they have established the novel assertion that human rights abuses are open to judicial as well as political resolution.

### Command Responsibility

U.S. courts have also advanced the goal of accountability for human rights violations by linking international human rights norms to the concept of command responsibility—the notion that military and other government officials are responsible for abuses committed by those serving under them. This link is essential in holding to account the leaders of the most brutal regimes, given that they themselves generally did not participate first-hand in the commission of the illegal acts. Several ATCA cases have established that, even if these officials did not directly undertake the human rights violations themselves, an individual is “responsible under international law for his own acts, for acts which he directed, ordered, aided, abetted or participated in, and for acts committed by forces under his command which he authorized” (*Abebe-Jiri* 1993, Lexis 21158: 9-10).<sup>31</sup>

The class action suit against Marcos centered on his command responsibility for human rights abuses committed by those serving under him. In fact, the district court instructed the jury that the Marcos estate could be found liable not only if Marcos directed, ordered, conspired with, or aided the military in torture, summary execution or disappearance, but also if he knew of these actions and did nothing to prevent them (*In re Estate of Ferdinand Marcos Human Rights Litigation* 1995). When the Marcos estate challenged this latter basis of jurisdiction on appeal, the 9<sup>th</sup> Circuit responded that the principle of command responsibility was firmly entrenched in both U.S. and international law, citing the International Criminal Tribunal for the Former Yugoslavia (ICTY), the

---

<sup>31</sup> See also *Forti* (1987, 1988) finding an Argentine general liable for abuses committed by military personnel under his command; *Paul v. Avril* (1994) finding that as the military ruler of Haiti, “Avril bears personal responsibility for a systematic pattern of egregious human rights abuses in Haiti during his military rule;” and *Xuncax* (1995), finding the Guatemalan defense minister liable for the acts of military forces under his command.

legislative history of the TVPA, and previous cases including *Xuncax* (1995), *Paul v Avril* (1992, 1994) and *Siderman* (1985). The Senate Report on the TVPA, according to the court, made clear that Congress intended to establish command responsibility and liability for higher officials who “authorized, tolerated, or knowingly ignored” the prohibited acts (*Hilao* 1996).

U.S. courts have expanded the concept of command responsibility still further in applying the criteria established by Congress. A Chilean major found liable for the murder of a member of the Allende government, committed as part of the Caravan of Death,<sup>32</sup> argued that he could not be held legally responsible for actions that were ordered by his military superiors and for actions in which he did not directly participate, given that he himself did not kill the victim on whose behalf the plaintiffs were filing suit. In holding him accountable for his indirect participation, the district court adopted a goal-oriented approach, explaining: “Congress has clearly indicated its intent to provide federal courts as a forum to bring to justice individuals who contribute directly to human rights abuses, even where it cannot be shown that an individual actually committed the acts of abuse” (*Cabello* 2002, Lexis 10323: 24-25). As a participant in the Caravan of Death, the court ruled that the defendant fulfilled this criterion by contributing to the environment in which the specific abuse took place. In adopting this view, it gave effect to a more expansive notion of human rights protection, one that went beyond notions of individual punishment to get at the general environment of human rights abuse that was a pervasive element in the state-centric international system.

### **Expanding Norms**

Throughout the ATCA rulings, there has been a clear attempt by the courts to

---

<sup>32</sup> In October 1973, military officers traveled the country as part of a “delegation” and removed Pinochet’s political opponents from their prison cell. These prisoners were then executed or disappeared.

expand the reach of the system of international human rights protection in order to give legal effect to the broader goals of the international community. Many defendants have adopted the argument, put forth by Judge Bork in the *Tel Oren* (1984) decision, that the ATCA applies only to those torts that existed when the act was adopted in 1789. The courts, however, have embraced the view, first put forth by *Filartiga*, that “courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today”(1980: 881). As a result, they have gradually expanded the list of international norms that are actionable under the ATCA.

To ascertain the applicable norms of international law, the courts have employed the sources laid out in *Filartiga*: “the usage of nations, judicial opinions and the works of jurists.” In addition, they have considered whether the norm is “universal, definable and obligatory” (*Forti*: 1987: 1540). To make this determination, they have frequently relied on the works of international law scholars as authoritative guides. These scholars often submit affidavits commenting on the legal status of particular human rights norms (*Forti* 1988; *Xuncax* 1995). Since *Filartiga* first established the illegality of torture in 1980, the courts have identified several additional customary international prohibitions: summary execution (*Forti* 1987); arbitrary detention (*Forti* 1987); disappearance (*Forti* 1988; *Xuncax* 1995); cruel, unusual and degrading treatment (*Abebe-Jiri* 1993; *Xuncax* 1995); genocide (*Kadic* 1995); war crimes (*Mehinovic* 2002); and crimes against humanity (*Doe v. Islamic Salvation Front* 1998). And they have made clear that the passage of the TVPA does not in any way limit the range of norms to which the ATCA applies (*Kadic* 1995).

The judiciary has been open to the expansion of international human rights norms, even allowing others to fulfill the burden of proof where it has been unable to meet this

burden itself. This was the case with regard to the norm against disappearance. Initially, a lower court did not believe that there was a sufficient international consensus to establish a customary norm against disappearance or against cruel, inhuman, or degrading treatment (*Forti* 1987). These were emerging norms that lacked the requisite elements of universality and definability. The court explained that it could not identify what specific behavior constituted the proscribed acts. The plaintiffs filed a motion to reconsider, citing numerous international documents and authorities, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, General Assembly resolutions, and the Organization of American States. In addition, they submitted the affidavits of eight well-regarded international law scholars. As a result, the court reversed itself and agreed that there was in fact an international consensus around the norm against disappearance and that the sources cited by the plaintiffs provided the essential elements for defining the act of disappearance (*Forti* 1988).

The court also agreed that there existed a universal proscription against cruel, inhuman, or degrading treatment. But the norm still did not meet the standard of definability. It was not defined in the Restatement, in the UDHR, or in the affidavits submitted by the legal scholars. So, although the norm was universal, it was not definable and thus not actionable. Five years later, however, a Georgia district court ruled in favor of a claim based on cruel, inhuman, or degrading treatment, noting that its prohibition was found in every international human rights treaty (*Abebe-Jiri* 1993; see also *Cabello* 2001). Another court later ruled that certain acts that did not reach the level of torture could be recognized as falling under the category of cruel, inhuman, or degrading treatment and were actionable under the ATCA (*Xuncax* 1995).

Subsequent cases expanded the range of norms even further, drawing upon developments in humanitarian law and the resurgence of the concepts of war crimes and crimes against humanity in the judicial realm. In the almost fifty years between Nuremberg and the establishment of the special tribunals for Yugoslavia and Rwanda, these crimes had virtually dropped out of the legal consciousness. Rather than leave this special category of crimes to the exclusive purview of the newly established international tribunals, however, U.S. courts were quick to incorporate and develop these newly revived norms. A 2002 ruling against a Bosnian Serb soldier awarded \$140 million in compensatory and punitive damages for acts of torture, arbitrary detention, and cruel, inhuman, or degrading treatment (*Mehinovic* 2002). Expanding the category of crimes, the district court ruled that acts of torture, inhuman treatment, and arbitrary detention committed as part of an armed conflict, either international or internal, constituted war crimes under the Geneva Conventions and that the relevant norms of the Geneva Conventions were part of customary international law. In another case, the DC district court ruled that crimes against humanity, as prohibited in common Article 3 of the Geneva Conventions, applied to both state and non-state actors and found the Islamic Salvation Front and one of its members liable for such crimes in Algeria (*Doe v. Islamic Salvation Front* 1998). Thus, U.S. courts gave effect to these previously dormant norms, renewed through the statutes of international tribunals, as elements of customary international law.

The *Mehinovic* court also found the soldier Vuckovic guilty of crimes against humanity (2002). Under the 1945 Nuremberg Charter, crimes against humanity were recognized as violations of customary international law when committed in connection with a war. Since then, this definition has evolved in two ways. First, it is no longer

necessary for these acts to be committed in connection with an armed conflict in order to qualify as crimes against humanity. Second, new categories of crimes such as rape, torture, and imprisonment are now included. The inclusion of rape under humanitarian law marked the first time that sexual crimes against women fell under the purview of international law. These changes were codified in the Rome Statute of the International Criminal Court.

The court relied on the definition of crimes against humanity established by the Rome Statute. But it did not limit itself to this definition, noting that it may be narrower than that found in customary international law. Nonetheless, the acts in question constituted crimes against humanity under any accepted definition. The Rome Statute held that certain acts constituted crimes against humanity “when committed as part of a widespread or systematic attack directed against any civilian population” (Article 7). Because the acts of torture, imprisonment, and cruel, inhuman, or degrading treatment had been committed as part of an official government policy of ethnic cleansing against Bosnian Muslims, they qualified as crimes against humanity. The court relied on the decisions of the International Tribunals for Rwanda and Yugoslavia in its consideration of this case. More significantly, it employed norms of international law that had been established by the Statute of the International Criminal Court, even though the United States is not a signatory to the treaty establishing the court and refuses to be bound by its norms.

As these cases demonstrate, U.S. courts since *Filartiga* have continued to draw upon a range of sources in order to solidify a growing list of emerging norms of customary international law. In fact, a handbook written for lawyers filing ATCA cases suggests that these cases present a significant opportunity to gain recognition for

emerging norms (Stephens and Ratner 1996). This is because the courts have not stood idly by waiting for these norms to ripen into well-established legal norms. Instead, they themselves have propelled this process, synthesizing various sources into a cohesive body of evidence demonstrating the existence of a customary norm where one had not previously been identified in a judicial context. In this way, they have contributed to the establishment of a body of law and precedent giving rise to an international legal system of protections implemented by courts around the world.

### **New International Legal Actors: Holding Multinational Corporations Accountable**

In actively developing a legal system for the protection of human rights, U.S. courts have gone beyond simply allowing victims to sue individuals for international law violations. This remedy, although significant, has been limited in its ability to address a country's human rights situation in any systematic way. The latest ATCA cases, however, offer hope that a qualitative shift may be underway. A new wave of cases has begun to target multinational corporations (MNCs), holding them accountable for internationally prohibited practices that occur in countries where they do business. This development holds great promise for the direct enforcement of human rights. A judgment against a corporation with headquarters or significant business dealings in the U.S. has a much higher likelihood of being enforced than one against an individual whose assets are hidden and who has most likely escaped to a country offering safe haven. If these cases are successful, MNCs may be forced to rethink investment practices abroad. And countries seeking investment may be forced to rethink human rights policies at home.

Traditionally, multinational corporations have been subject only to the laws of the host country. Under the ATCA, they are finding suddenly that they are subject to the

laws of the international community as well. As a result, they may be liable for human rights abuses that occur in association with their business activities, even if undertaken with the approval or cooperation of the host country. In fact, in many of these cases, the MNCs are closely aligned with the governments and their development policies, a fact that the MNCs point to in their defense.

The first such case, *Aguinda v Texaco, Inc*, filed on behalf of indigenous and settler residents of the Amazon, was brought in New York district court (*Aguinda* 1994, 2001). The plaintiffs argued that this court had jurisdiction because the tortious acts and omissions were the result of policies and decisions made in Texaco's corporate headquarters in New York. They charged Texaco with environmental abuses, including large-scale disposal of non-treated hazardous wastes, failure to clean up large oil spills, and destruction of the tropical rain forest habitat. They also alleged that Texaco's actions caused harm to indigenous peoples living in this habitat, to their property, and to the stability of Amazon basin habitats.

The lawsuit was ultimately dismissed on the grounds that environmental norms were not sufficiently crystallized in customary international law. In addition, Ecuador was deemed an indispensable party to the case but was barred from suit by sovereign immunity (2001). Without the participation of the indispensable party, the case could not continue. The ruling, however, said nothing about the prospect for future cases. To the contrary, it implied that MNCs were not immune from judgment for their activities abroad. Ecuador had filed a brief arguing that U.S. courts would be in violation of the act of state doctrine in ruling on Ecuador's sovereign right to develop its resources. In a blow to sovereignty, the court responded that the right to engage in a particular activity did not protect Texaco from lawsuits regarding the manner in which the activity

proceeded (1994). On appeal, the 9<sup>th</sup> Circuit ruled that the case against Texaco should be heard in Ecuador, but it held that any ruling and penalty imposed against Texaco (now ChevronTexaco) would be enforceable in the U.S. (2002). A case in Ecuador is now underway (*New York Times* 10/23/03).

Subsequent cases dealing with human rights rather than environmental norms have to date advanced the notion of MNC accountability under international law, although final rulings have yet to be issued in any of these cases. In 1993, the Yadana gas pipeline project was established in Burma, also known as Myanmar. The project was a joint venture between Myanmar's State Law and Order Restoration Council (SLORC),<sup>33</sup> its oil and gas enterprise (MOGE), the Unocal Corporation, and French company Total. The participants agreed that the SLORC would be responsible for clearing the land and providing labor, materials, and security. Four years later, a suit was filed against Unocal in California district court, naming both its president and its CEO as co-defendants. The alleged crimes included forced labor, crimes against humanity, torture, violence against women, arbitrary arrest and detention, cruel, inhuman, or degrading treatment, and wrongful death (*Doe v. Unocal* 1997).<sup>34</sup> These crimes were committed not by Unocal, but by the SLORC, in support of the pipeline project. In holding Unocal accountable, the plaintiffs maintained both that Unocal was aware, or should have been aware, of the SLORC's history of human rights violations, and that the company and its chief officers were aware of and benefited from the use of forced labor for the pipeline project.

Because the suit named the SLORC as a co-defendant, the court considered the SLORC's immunity in light of the FSIA's commercial exception, which waived

---

<sup>33</sup> Now called the State Peace and Development Council (SPDC).

<sup>34</sup> The suit also named Total, the SLORC, and MOGE as defendants.

immunity for acts that were private in nature. Although the human rights abuses were undertaken in connection with the pipeline project, a commercial undertaking, the court determined that the commercial exception did not apply. The acts in question constituted an abuse of police power, and were, as such, “peculiarly sovereign in nature” (1997: 888). Accordingly, the SLORC, as the sitting head of state, and its oil and gas enterprise (MOGE), had sovereign immunity. In contrast to the *Aguinda* case, however, the court ruled that they were not indispensable parties and the case could proceed against Unocal.

The individual liability of Unocal, a non-state actor, was also at issue. Citing both *Tel Oren* (1984) and *Kadic* (1995), the court concluded that slavery had long been recognized as one of the few crimes under international law for which individual or private responsibility was recognized. Explaining that slavery should be understood in its modern form, it determined that forced labor in Myanmar was tantamount to slavery.<sup>35</sup> As such, Unocal and its executives could be liable under international law. The court flatly rejected Unocal’s contention that Myanmar’s forced labor constituted a limited public service requirement.

Unocal also invoked the act of state doctrine in its defense. The court responded that, in the modern era, considerations with respect to acts of state were driven less by concerns over international comity and more by respect for the separation of powers (see *Sabbatino* 1964). Since the U.S. government had already criticized Myanmar’s human rights practices, ruling on the case would neither significantly alter or damage state relations, nor interfere with foreign policy. Moreover, the court adopted the view, espoused in *Forti* (1987), that a high degree of international consensus with respect to an

---

<sup>35</sup> The court relied on the International Labor Organization as the authoritative body on labor rights, referring to its reports on forced labor and slavery in Myanmar (*Doe v Unocal* 2000).

act's prohibition, particularly if a *jus cogens* norm was involved, diminished the influence of the act of state doctrine: "In the context of *jus cogens* violations of international law, which are, by definition, internationally denounced, the high degree of international consensus severely undermines defendants' argument that SLORC and MOGE's alleged activities should be treated as acts of state" (*Doe v. Unocal* 1997: 894). In other words, no state could claim a right to torture or enslave its citizens.

The court established that Unocal could be held liable for human rights abuses in Myanmar. But it then created a distinction between knowledge and active participation in determining liability (2000). It concluded that Unocal had full knowledge of the military's record of human rights abuses and had hired the military to provide security for the pipeline project. Nonetheless, it had neither participated in nor conspired with the military to undertake these abuses (this despite the fact that by hiring the military to provide security for the project, it was subjecting the villagers to forced labor, forced relocation, torture, rape, and murder). Unocal may have had knowledge of and benefited from forced labor, but it did not specifically seek out such labor or direct the military to commit the human rights abuses. The court thus dismissed the charges against the company and its chief officers. The case, however, has continued. Following an appeal, the 9<sup>th</sup> Circuit reinstated the case in September 2002.<sup>36</sup> In addition, the charges are simultaneously being pursued in California state court. The state judge rejected Unocal's motion to dismiss, arguing that Unocal could be liable for the human rights abuses committed by the military. Neither case has yet gone to trial.

In New York, a similar case is being heard against Shell Oil for its activities in Nigeria. On November 10, 1995, Ken Saro-Wiwa, a prominent author and activist on

---

<sup>36</sup> The plaintiffs argued that Unocal aided and abetted the military. A full panel of the 9<sup>th</sup> circuit is now re-hearing the case to determine if it may continue.

behalf of the indigenous Ogoni peoples of Nigeria, was hanged by the Nigerian government along with youth leader John Kpuinen and seven other Ogoni activists. The hangings occurred after a military tribunal convicted the men, all members of the Movement for the Survival of the Ogoni People (MOSOP), of murder. Human rights and environmental activists, among others, believed the charges to be politically motivated and complained that the judicial proceedings involved widespread violations of due process including the intimidation of defense witnesses (see, for example, reports and press statements by Amnesty International, Human Rights Watch, Greenpeace, and the Sierra Club).

The trial was the culmination of the government's efforts to suppress opposition, led by Saro-Wiwa, to Shell Oil. Saro-Wiwa had formed MOSOP to resist Shell's expropriation and destruction of Ogoni land, organizing the Ogoni in peaceful protest against the company. Shell's oil exploration, which had caused significant environmental damage, disease, contamination of water, and destruction of farmland, occurred with no compensation for the residents of "Ogoniland." Shell undertook its oil development efforts with the full cooperation of Nigeria's military government. In the events preceding the trial, the government had violently repressed opposition to the oil giant's activities, attacking and burning down Ogoni villages, raping and murdering villagers and driving them into the bush.

The victims of these abuses and their survivors allege that Shell directed, conspired, or participated in the human rights abuses committed by the Nigerian military; provided the military with money, weapons, and support; and bribed witnesses to give false testimony in the trial against the Ogoni activists. The charges included summary execution; torture; cruel, inhuman, or degrading treatment; arbitrary arrest and detention;

violations of the right to life, liberty, and security of person and peaceful assembly; crimes against humanity; and wrongful death. These charges were also leveled against Brian Anderson, the Nigeria country chairman for Royal Dutch/ Shell and managing director of Shell Nigeria.

The district court dismissed the case on the grounds of *forum non conveniens*, or inconvenient forum, arguing that the case could be tried more suitably in the U.K. because Royal Dutch Shell and Shell Petroleum are headquartered in the Netherlands and the U.K., respectively (*Wiwa* 1999). The appeals court, however, ruled that Shell's maintenance of an Investor Relations Office in New York was sufficient to establish jurisdiction and that litigation in New York City did not constitute an unfair or significant burden on the defendants (*Wiwa* 2000). Regarding the *forum non conveniens* question, the 2<sup>nd</sup> Circuit believed that the district court had not given sufficient weight to the choice of forum by the plaintiffs, who were also U.S. residents.

Moreover, the 2<sup>nd</sup> Circuit ruled, the district court had failed to consider the U.S. interest in providing a forum for litigating international human rights law claims. Linking its view to that of the other branches of government and to the goals of the international community, the circuit court agreed with the plaintiffs' contention that the ATCA and the passage of the TVPA were indicative of such an interest: "In passing the Torture Victim Prevention Act 28 U.S.C. § 1350 App. in 1991, Congress expressly ratified our holding in *Filartiga* that the United States courts have jurisdiction over suits by aliens alleging torture under color of law of a foreign nation, and carried it significantly further" (2000: 104).

In accordance with judicial policymaking, the court first identified the desired outcome, assigning a moral imperative to Congressional legislation in accordance with

the goals of the international community. Employing a purposive approach, the court determined that the TVPA contained evolutionary language that explicitly laid out a U.S. interest in eliminating torture around the globe. In its view, the statute represented an unequivocal recognition that international law was part of U.S. law and, accordingly, that international human rights violations would constitute violations of U.S. domestic law. The court concluded that these changes indicated a Congressional desire to provide a federal forum for adjudicating international law violations: “The new formulations of the Torture Victim Protection Act convey the message that torture committed under color of law of a foreign nation in violation of international law is ‘our business’” (2000: 106).<sup>37</sup> Having identified the statute’s underlying purpose, the court ruled that this U.S. policy interest, in addition to the significant burdens victims of human rights abuses face in pursuing justice and the prohibitive costs a change of venue would impose upon them, mitigated *forum non conveniens* considerations, England’s interests in adjudicating the case notwithstanding. On the other hand, the costs associated with moving resources from Britain to the U.S. would not be excessively burdensome to Shell, in the eyes of the court, given the vast reserves available to the company.

Following the Supreme Court’s refusal to hear Shell’s arguments for dismissal, the case was remanded to the district court (*Wiwa* 2002). Upon remand, the district court considered whether the alleged crimes constituted violations of specific, universal, and obligatory norms. In particular, the court was faced with the difficulty of defining the norm against cruel, inhuman, or degrading treatment, noting the contrary conclusions reached by the *Forti* and *Xuncax* courts. The court concluded that Owens Wiwa’s forced exile and the attempt to blackmail him to save his brother, Ken Saro-Wiwa, constituted

---

<sup>37</sup> Critics have rejected this interpretation of U.S. interests and characterize the court’s rejection of *forum non conveniens* as a political move (see, e.g. Short 2001; Bradley 2001).

cruel, inhuman, or degrading treatment.<sup>38</sup> In addition, plaintiff Doe suffered cruel, inhuman, or degrading treatment, the court ruled, when she was beaten and her property destroyed. The forced exile and beatings also fell under the ambit of crimes against humanity as defined by the Rome Statute because they were knowingly committed against the victims as part of a widespread attack against the Ogoni.

The court ultimately determined that the following violations had occurred: crimes against humanity; torture; cruel, inhuman or degrading treatment; violation of the right to life, liberty and security of person; and violation of the right to peaceful assembly and association. Each of these crimes required state action for liability. The defendants argued that their actions were not committed under color of law. The court, however, responded that there existed a significant degree of cooperative action between Shell and the Nigerian government, and that the acts of Shell Nigeria could thus be attributed to Royal Dutch/ Shell.

It based this decision on evidence of meetings in both London and the Netherlands among Shell Nigeria, Nigerian officials, Royal Dutch/ Shell and Brian Anderson to discuss anti-MOSOP activities. Shell is alleged to have made payments to the Nigerian military and police, contracted for weapons, provided boats and helicopters for attacks on Ogoni villages, coordinated with Nigerian military and police on intelligence regarding the anti-MOSOP campaign, helped plan raids on Ogoni villages, bribed witnesses to give false testimony, and paid the military to respond with violence to complaints about oil spills and to contain protests against Shell's activities. These acts, and in particular Brian Anderson's offer to Owens Wiwa to save his brother's life in exchange for an end to MOSOP's activities, showed that Shell was a "willful participant"

---

<sup>38</sup> The defendants had offered Owens Wiwa a deal to secure Ken Saro-Wiwa's freedom in exchange for a written commitment by MOSOP to end its activities against Shell.

in the Nigerian government's violation of internationally protected rights.

The court rejected the defendants' argument that plaintiffs had to prove Shell's actions with respect to each individual human rights violation, explaining that joint collaboration with the Nigerian government had been sufficiently proved. The district judge also specifically rejected the Unocal decision as relevant, concluding that Shell's activities revealed a much greater level of participation in the military's criminal activities. And she adopted an expansive notion of liability as defined by the TVPA, holding that liability applies, not only to the direct perpetrators of torture, but also to those who aid and abet or whose activities cause someone to be subjected to torture. Finally, she argued that the case held no significant foreign policy implications, as the government in question was no longer in power and had been replaced by a democratic one. Thus, the act of state doctrine was not relevant. The case is currently in the evidence-gathering phase.

The establishment of MNC liability under international law has evolved from the notion that U.S. courts should pursue human rights violations as members of the global community. This international orientation also has given rise to the contention that U.S. courts are an appropriate venue to hear such cases, regardless of where the MNC may be headquartered, or where the abuses occurred. As a result, investment practices no longer are the business of the corporation and the state alone, despite the state's sovereignty over its land and resources. Recognizing a U.S. interest in eliminating human rights violations around the globe, and defining the judicial role with regard to the system of international human rights protections accordingly, U.S. courts have established a legal basis for MNC accountability under international law.

### Significance of ATCA Cases

The cases described in this chapter established the groundbreaking notion that the system of international human rights law is more than just an empty ideal—it is a judicially enforceable set of norms. And these norms extend well beyond the traditional prohibitions against piracy and the slave trade. U.S. courts have transformed a growing range of human rights norms into legally enforceable guarantees. Moreover, by taking care to link these guarantees to international rather than domestic law, they have created a global system of rights protection whose judicial guarantees can be invoked in courts around the world.

Even the ATCA cases that have failed have not undermined this assertion. Among these cases, two key factors have accounted for their failures. First, cases against a state, state body, or sitting head of state are always dismissed because, although the courts have subject matter jurisdiction, they are unable to exercise personal jurisdiction (see, e.g., *Saltany v. Reagan* 1988; *Jama v. INS* 1998; *Denegri v. Chile* 1992). Second, prior to the passage of the TVPA, ATCA cases filed by U.S. citizens were dismissed on the grounds that the statute only established jurisdiction over actions filed by aliens (see, e.g., *Linder v. Calero Potocarrero* 1990; *Kyler v. Montezuma County* 2000). Aside from these limited exceptions, the trend has been to accept an expanding range of cases that have served to buttress the international system of human rights law.

The ATCA cases have altered the international context, transforming declared ideals with little real effect into a practical and usable legal resource. This transformation has been facilitated by the judicial reliance on domestic law for jurisdiction (see Ratner 2001 for a discussion of the importance of the ATCA cases). By basing jurisdiction on the ATCA, U.S. justices have been able to develop and crystallize

the emerging body of international human rights norms rather than having to wait for the legal norms to reach a certain stage of maturity before they could be enforced. Without their creative use of the ATCA, U.S. courts would have been confined to enforcing the limited number of *jus cogens* norms to which universal jurisdiction attached. In addition, the ATCA enables the courts to exercise jurisdiction over any violation of international human rights law. As long as the defendant can be served with notice, no further connection to the U.S. is necessary. And unlike the TVPA, ACTA claims are based on customary rather than statutory definitions of an international norm, enabling the courts to more actively apply international human rights law in a variety of situations while contributing to the norm-formation process.

In developing a set of legally enforceable human rights norms, the U.S. judiciary consciously created precedents for other courts to follow. The *Filartiga* court first specified that only where virtually all, as opposed to several, nations had clearly indicated their concern over a particular wrong did there exist a violation against the law of nations under the ATCA. By employing this criterion, the courts gave international as well as domestic significance to their rulings. Although not technically binding on other states, such rulings defined norms of the global community and as such applied to all states. In *Xuncax*, the district court made it clear that the ATCA was intended to realize the purposes found in international law and was thus meant as an international remedy with lasting international ramifications. For this reason, the court rejected the domestic law approach suggested by Judge Edwards in *Tel Oren*. Such an approach would imbue the legal norm with domestic significance while diminishing its relevance in international law.

The decision in most cases to award punitive damages that were considerably

larger than compensatory ones was another means by which the court furthered the goals of the international community.<sup>39</sup> Punitive damages are meant to symbolize not only the abhorrent nature of the acts, but the outrage of the international community: “An award of punitive damages must reflect the egregiousness of the defendant’s conduct, the central role he played in the abuses, and the international condemnation with which these abuses are viewed” (*Paul*: 1994: 336). The justices intended for these cases to have international import, and they made it clear through their punitive damage awards that their decisions regarding universal human rights norms represented, not just their views, but the views of the international community as well.

The notion that these rulings are meant to represent the universal consensus is borne out by the fact that the *Xuncax* court rejected an attempt by the plaintiffs to use a Senate reservation as evidence of a specific content being assigned to the norm against cruel, unusual, or degrading treatment:

A precept of “international law” cannot be recognized as such unless and until that recognition is universal. And the requirement of universality goes not only to recognition of the norm in the abstract sense, but to agreement upon its content as well. Far from affirming the international law status of the norm, the Senate reservation appears to cut precisely the other way: it explicitly ties the content of the abstract standard not to international customs and norms, but to Constitutional law, i.e. the organic domestic law of the United States (1995: 187).

Because the ATCA rulings are meant to represent authoritative statements regarding the norms of international law, the court was unwilling to rely on a uniquely domestic interpretation of a particular norm.

---

<sup>39</sup> For example, *Mehinovic* (2002): \$40 million in compensatory damages, \$100 million in punitive damages; *Hilao, Class Plaintiffs v. Marcos Estate* (1996): \$766 million in compensatory damages, \$1.2 billion in punitive damages; *Xuncax* (1995): \$18 million in compensatory damages, \$28.75 million in punitive damages; *Paul v. Avril* (1994): \$17 million in compensatory damages, \$24 million in punitive damages; *Kadic* (2000): \$265 million in compensatory damages, \$480 million in punitive damages; *Doe v. Karadzic* (2000): \$617 million in compensatory damages, \$3.9 billion in punitive damages.

These cases represent a bold and resourceful use of international law. U.S. justices were able to take this daring step in part because the ATCA deals with civil rather than criminal cases. As a result, rulings could be issued *in absentia* without causing much furor. A large damage award may have had great symbolic significance, but it often went unenforced. In contrast to the torture case in Israel or the Pinochet ruling in Britain, U.S. judges labored along silently with little fanfare or controversy. ATCA cases enjoyed scant press coverage and virtually no public mobilization on either side. The relative silence surrounding these cases, however, belies their importance and their impact. The legal advancements they put forth have altered the norms of international human rights law and emboldened foreign courts in their dealings with human rights cases. By the time the British and Israeli courts began dealing with Pinochet and torture respectively, U.S. courts had reshaped the international context and the legal landscape within which they were operating. They had, in effect, altered the existing body of law (see, e.g., Stephens and Ratner 1996). As a result, rather than undertaking bold and creative interpretations of the law themselves, these foreign courts were able to ground their landmark decisions squarely within existing legal understandings of international human rights norms.

### Chapter 3

#### **The Pinochet Case: Holding Leaders Internationally Accountable**

In March 1998, General Augusto Pinochet stepped down as Chile's Commander in Chief and named himself Senator for Life. Pinochet awarded himself this title to avoid any chance of prosecution stemming from his seventeen-year rule as head of Chile's oppressive junta. It was a prudent step: after leading a coup to overthrow leftist leader Salvador Allende in September 1973, he initiated a brutal campaign to eliminate his opponents and potential rivals. Over 3000 people were tortured, disappeared, and/or murdered under his rule. To protect against the possibility of future legal reprisals, the Chilean military in 1978 granted itself a general amnesty from prosecution covering the worst period of abuses, from the start of the coup until March 1978. What few legal efforts there were inside Chile stalled as a result of this amnesty, which was consistently upheld by the Supreme Court (Human Rights Watch [HRW] 11/18/98). Pinochet's reign ended in 1990, but he remained Army Commander until 1998 before becoming a senator for life. This latter status protected him from any kind of future prosecution, regardless of when the offenses might have been committed. For added security, he left behind a constitution that put in place significant barriers to overcoming the military presence in the government or to reversing the laws that made it difficult to pursue past human rights violations (HRW 1999).

A professed Anglophile, Pinochet arrived in Britain with a diplomatic passport on September 21, 1998. As it had on his many previous visits, the foreign office received him as a VIP. He took tea with former British Prime Minister Margaret Thatcher and gave an interview to *The New Yorker* magazine, in which he expressed his fondness for England. On October 9, he underwent back surgery in London.

Across the Channel, a Spanish magistrate learned that Pinochet was to be released from the hospital and would be heading back to Chile. In 1996, Judge Baltasar Garzón had begun investigating the torture, disappearance, and killing of Spanish citizens in Argentina's dirty war. By the time of Pinochet's trip, he had widened his inquiry to Chile and wanted to interrogate Pinochet about Operation Condor, a joint operation between the military regimes in the two countries, as well as those in Uruguay, Paraguay, Bolivia, and Brazil, to monitor and eliminate their political opponents. After British authorities informed him that they could not detain Pinochet, Garzón issued an arrest warrant through Interpol on October 16. The warrant included charges of murder, genocide, and terrorism against both Spanish and Chilean citizens. That night, shortly before midnight, Scotland Yard placed Pinochet under arrest as he recuperated in an upscale London clinic. The eighty-two year old Chilean leader, frequent visitor to Baroness Thatcher, found himself transformed overnight from esteemed dignitary to criminal detainee. Pinochet was placed under house arrest, where he remained for seventeen months while a series of unprecedented legal events took its course.

Pinochet's arrest was startling. Still more startling was the final ruling by the House of Lords, Britain's highest court, that a former state leader could be held accountable by another state's courts for torture and other violations of international human rights law. The Law Lords denied Pinochet immunity as a former head of state, applying the controversial idea that certain actions exceeded even the long-established bounds of sovereign immunity. The Pinochet case was not only the highest-profile case to date involving international human rights law, in many ways it was also the most groundbreaking. It marked the first time that a former ruler was subjected to the judicial processes of another state for human rights abuses—outside of the direct control and, to a

large extent, the wishes of the executive branch of several states and other political actors. It was a striking blow to the concept of sovereignty and a resounding victory for human rights, giving effect to the idea that international human rights have legal as well as rhetorical power. And although he was ultimately released on humanitarian grounds, this legal precedent continues.

The Pinochet case marks the continuing advancement of the domestication process following the efforts of U.S. courts. Like the American cases, it highlights the idea that judges now operate as autonomous actors in an international context in which they respond to the post Cold War changes in the international system. As the last chapter showed, U.S. courts paved the way for this development by extending the court's role as rights protector to the sphere of international law. The ATCA decisions made great advances in establishing concrete definitions of international human rights norms as legal norms, but the fact that they were civil cases that could not be easily enforced limited their effects. With Pinochet, a domestic court for the first time had to contend with a case that had not only rhetorical implications but significant real-world repercussions as well: the fate of Pinochet would directly affect key aspects of state relations and the fundamental concepts of sovereignty, sovereign immunity, and acts of state. And while the ATCA decisions were relatively unknown, the world was watching and waiting for the Pinochet decision. As the Law Lords deliberated, the debate over the use of international human rights law moved from academic halls into the public consciousness.

How did human rights win out over state sovereignty? The answer to this question rests on understanding the U.K. rulings within the larger global environment. Looking only to the domestic context provides an incomplete account of events. Although the

final ruling ultimately rested upon the technicalities of domestic legislation, it would be a mistake to say that the Law Lords were simply interpreting domestic law as members of Britain's highest court, for they were also interpreting the norms of international human rights law as members of the global judiciary. In fact it is only in this latter role that the outcome in the Pinochet case can be understood.

The Law Lords could not resolve the questions of Pinochet's immunity and accountability without examining the status of these issues in international human rights law. Nor could they avoid the clear prohibitions against torture, coupled with an expanding system of individual accountability, which had emerged as part of the human rights system. Thus, although the final ruling represented a bold judicial move, it was also firmly in keeping with the international norms established through state practice as understood by the global judiciary. To rule in favor of Pinochet, the Law Lords would have had to rely on the waning traditional understanding of international law, and its preference for absolute sovereignty, without acknowledging the evolution and growing role of human rights norms in international law. Instead, the Law Lords incorporated the evolving meanings of these norms—giving domestic effect to their vision of the global normative order.

The Pinochet case rests on a complex set of legal issues involving both international law and the domestic law of three states—Chile, Spain, and Britain. The complexities and extended hearings, with a broad array of interested parties presenting arguments, prompted Lord Brown-Wilkinson to declare at one point: “Even the Pinochet case must come to an end” (cited in Brody and Ratner 2000: 14). The next section will give a brief overview of the legal and political events surrounding the Pinochet affair, highlighting the role of judicial autonomy. The following section will provide a more

detailed analysis of both the initial High Court ruling and the two decisions of the Law Lords, emphasizing that the Lords were employing a modern understanding of sovereignty and state obligations in the international system. The third section will return to these rulings to show how the legal reasoning emerged from a belief that the Lords had a duty to fulfill within the international community, namely, to give legal effect to the values of this community as expressed in the international human rights discourse. The final section will discuss the implications of the decision for international human rights law. These sections highlight the fact that the outcome in the Pinochet case can only be understood by turning to the international context—the meaning the global judiciary has given to the norms of the international human rights discourse and the identification of national judges as members of this judiciary.

### **The Background**

The events surrounding the Pinochet case highlight the importance of the judiciary in empowering international human rights law—a process largely immune from executive branch interference. The case was initiated and almost entirely controlled by judicial actors, despite the opposition of other state actors. As legal events took their course, political leaders sought a variety of avenues to end the divisive case. At the same time, they made sure to distance themselves from a controversial outcome that they could not control by emphasizing that the issue was solely in the hands of the judiciary. In this way, a situation of judicial autonomy in which judges became actors in the international arena, removed from more immediate state interests, resulted in the triumph of human rights norms.

Spain's case against Pinochet was the result of an *acción popular* (popular action), a Spanish legal principle that allows individuals to initiate criminal suits in the

public interest. It was brought by Juan Garcés, a former Allende advisor, along with the Salvador Allende Foundation and a number of Chilean citizens. Their action was joined with an earlier complaint filed by the Progressive Association of Prosecutors, a private organization in Spain, charging Pinochet and military officials in Argentina with genocide, terrorism, torture, and murder. Judge Garzón issued the Interpol warrant after the Allende Foundation told him that Pinochet was in London, having itself been informed by Amnesty International (HRW 1999). Because the initial arrest warrant did not cover extraditable crimes under British law, a second warrant adapted to fit British law was issued a week later. The second warrant included charges of torture and hostage-taking, as well as conspiracy to commit murder, torture, and hostage-taking.

Despite the arrest, the extradition effort faced significant legal and political obstacles. Legally, Spain's case rested on the principle of universal jurisdiction, which holds certain crimes to be so abhorrent that they offend all nations and threaten the international order. States have a shared interest in preventing and punishing these crimes, wherever they may occur, as their perpetrators are considered "enemies of all mankind." Israel employed this principle to prosecute Adolf Eichmann for his participation in the Nazi genocide. In 1986, the Third Restatement on Foreign Relations Law pronounced that universal jurisdiction, "for certain offenses recognized by the community of nations as of universal concern," existed for piracy, slave trade, hijacking, genocide, war crimes, and possibly certain acts of terrorism (American Law Institute 1986). Domestically, Spain had passed legislation establishing universal jurisdiction for genocide, providing explicit authority for its courts to try this crime regardless of where it occurred.

Even so, the application of universal jurisdiction, first employed under

Nuremberg, remains controversial. It has almost never been applied by domestic courts, with the exception of Israel's prosecution of Nazi war criminals and a small number of cases following the atrocities in Rwanda and the former Yugoslavia, for which international tribunals were also established. Inside Spain, the head prosecutor for the highest court, the Audiencia Nacional, or National Court, and other members of the Public Prosecutor's Office challenged Garzón's jurisdiction to pursue extra-territorial acts committed by non-citizens, acts it maintained fit neither the legal definition of genocide nor of terrorism (HRW 1999).

Politically, the extradition request had to be approved by both the conservative Spanish government and by Britain's Home Secretary, Jack Straw.<sup>40</sup> The Spanish government, led by Prime Minister Jose Maria Aznar, expressed displeasure with Garzón's actions, particularly in light of Spain's plans to expand business investments in Argentina and Chile. Nonetheless, recognizing that he could not exercise full control over the situation, the Prime Minister emphasized that it was a judicial matter and was out of his hands (*New York Times* 10/18/98). The British government similarly tried to distance itself by stressing the judicial nature of the issue, even as the situation heightened political divisions. The conservative opposition accused the Labor party of manipulating the legal system for political reasons and creating "a huge diplomatic embarrassment" for England (*New York Times* 10/19/98). Former Prime Minister Thatcher denounced the judiciary for kidnapping Pinochet in a manner "which would do credit to a police state" (*New York Times* 10/9/99). These conservative critics also made the political argument that Pinochet had supported the U.K. in its war against Argentina in the Falklands.

---

<sup>40</sup> Britain's Home Office is in charge of internal affairs. Extradition matters fall under its crime reduction and community safety mandate ([www.homeoffice.gov.uk](http://www.homeoffice.gov.uk)).

The arrest sparked protests, at times violent, by both sides of a divided Chilean population. Even some opponents of Pinochet questioned the right of Spain's judiciary to bring back old demons that the country had tried to exorcise (*New York Times* 10/25/98). Chile's government protested Britain's actions and argued that it had no authority to challenge the immunity conferred by Chile in making Pinochet a senator. It cancelled its plans to purchase military ships from England (Kornbluh 1998), twice recalled its ambassador in Madrid, and launched several formal protests with both the U.K. and Spain on the grounds that its sovereignty and sovereign immunity were being violated. The clinic housing Pinochet was at the center of the drama, with right wing government officials from Chile paying calls to the high-profile detainee while his opponents, many of whom had been forced into exile in Europe following the coup, protested outside and displayed photos of missing relatives (*New York Times* 10/27/98).

On October 28, England's High Court, an appellate-level court, ruled that Pinochet was immune from prosecution as a former head of state but ordered him detained pending appeal to the Law Lords, a panel of twelve senior judges in the House of Lords who serve as England's highest court. Two days later, the eleven senior judges in Spain's National Court ruled unanimously that Spain's extradition request to prosecute Pinochet was legally sound, rejecting the Public Prosecutor's interpretation of the Genocide Convention as limiting jurisdiction to the state in which the genocide occurred.<sup>41</sup> The court also extended the definition of genocide to include political repression, arguing that politically targeted killing fell under the customary law definition of genocide (HRW 1999). And it maintained that Spain's jurisdiction was not limited to

---

<sup>41</sup> Article 6 of the Genocide Convention reads: "Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."

crimes committed against Spanish citizens but applied to genocide committed against any nationality. The judges endorsed the principle of universal jurisdiction, pointing to its inclusion in treaties outlawing genocide and torture, as well as precedents involving the prosecution of Nazis. These treaties, in their view, created a legal obligation to prosecute perpetrators of these crimes irrespective of territorial or nationality issues. The Pinochet case, however, would mark the first time that the principle would be applied by a state, as opposed to an international tribunal, with regard to a person not in state custody (*New York Times* 10/31/98). Crucially, the Court also upheld Spain's jurisdiction over torture, the crime that was to be the focal point of the Law Lords' deliberations.

The Spanish ruling legitimized the efforts of Judge Garzón, who had been characterized as a maverick embarked on a wild pursuit. And it altered the legal environment in which the appeal to the Law Lords took place. Now, if the Law Lords were to tread on uncharted legal territory, they had the support of another state's highest court. They could point to the ruling to bolster their own legal reasoning. The National Court decision also enabled Spain to continue pursuing Pinochet wherever he went, regardless of the outcome in Britain. A second ruling upholding Spain's jurisdiction in September 1999 further complicated matters for Spain's conservative government, forcing it to formally back the extradition request even as it hoped that Pinochet would not be extradited (*New York Times* 9/27/99).

The five-member panel of the Law Lords took the unusual step of granting several organizations joint leave to participate in the hearings, including Amnesty International and the Medical Foundation for the Care of Victims of Torture, as well as a British victim of Pinochet's torture and the family of a Briton who disappeared in Chile. Human Rights Watch was granted a separate leave to intervene via written submissions

regarding the status of international law. The Lords also requested that an outside expert provide written and oral assistance as an *amicus curiae*, or friend of the court, because the case involved complex issues of international law.

The Lords emphasized that they would restrict their deliberations to the judicial issues at hand. They would not consider Pinochet's arguments regarding his self-amnesty, pending cases in Chile, or the effect of the case on Britain's diplomatic relations with Chile. These were political issues that should be considered by the Home Secretary, in the Court's view. Pinochet's lawyer, in turn, attempted to paint the entire case as political, arguing that the logic that allowed Pinochet's extradition would also allow Queen Elizabeth II to be extradited to stand trial in Argentina for the deaths of Argentine soldiers in the 1982 Falklands War (*New York Times* 10/27/98).

On November 25, the Law Lords ruled, 3-2, against Pinochet's immunity and recognized universal jurisdiction for crimes against humanity, citing Spain's National Court decision asserting universal jurisdiction for crimes of torture, genocide, and terrorism. Chile then filed a legal petition with Jack Straw and the country's foreign minister flew to London, explaining that his actions were not in defense of Pinochet but in defense of the country. Straw, however, was unmoved and ruled that the extradition proceedings could continue in the British courts, emphasizing that his decision was a judicial not a political one. He agreed with the Law Lords that Pinochet was not entitled to immunity. He also cited Britain's obligations under the European Convention on Extradition (*New York Times* 12/10/98). Appearing in court a few days later, Pinochet, who referred to himself as a political prisoner, defiantly testified, "I do not recognize the jurisdiction of any other court, except in my country, to try me against all the lies of Spain" (*New York Times* 12/12/98).

Controversy soon arose after it was revealed that one of the Law Lords who ruled against Pinochet had failed to disclose his ties to Amnesty International, a participant in the hearings. In an unprecedented move, the Law Lords vacated their decision and convened all seven remaining members to issue a new ruling. The rare convening of a seven-member panel was indicative of the case's importance. In vacating their decision, the Law Lords emphasized that their concern was not actual bias on the part of Lord Hoffmann, but the appearance of bias, particularly given the extent of international attention focused on the case, the high degree of emotion surrounding it, and the fundamental issues of international law that were at stake (House of Lords 1/15/99). In the re-hearing, Chile joined as an intervener and presented arguments in support of immunity and the act of state doctrine.

The new ruling upheld, 6-1, the earlier determination the Pinochet lacked immunity for the crimes in question. This dealt an even greater blow to the concept of sovereign immunity, as it now meant that nine of Britain's highest judges had ruled against the longstanding principle. But the new ruling also greatly narrowed the scope of extraditable crimes, limiting them to those committed after December 1988, when the Torture Convention became domestic law in Britain and torture became a prosecutable crime. Although individual cases of torture prior to 1988 could not be considered on their own, they still could be used to support the conspiracy charge that held that Pinochet had created a widespread and systematic institutional framework of torture. Disappearances were also included as extraditable crimes, on the basis that they represented a continuing crime as long as the fate of the disappeared was unknown. The reliance on domestic legislation greatly reduced the scope of the charges. But it also placed the precedent, revolutionary in its effects, on more solid ground by basing it, in the

words of the prosecution, squarely in the realm of “black-lettered U.K. law” (*New York Times* 9/28/99). The ruling meant that torture and disappearances that were committed in Chile, or elsewhere, constituted crimes in Britain—a fundamental reconceptualization of sovereignty.

Nonetheless, the Law Lords called on Home Secretary Straw to reconsider his decision to extradite in light of the significantly reduced scope of charges. The Home Secretary issued a second Authority to Proceed with the extradition process in April 1999, and the Queen’s Bench denied Pinochet’s motion for judicial review. In the meantime, Spain’s prosecutor filed a second challenge to the case in Spain, which was again rejected by the National Court. An extradition hearing in the U.K. soon followed, in which a formal list of charges against the former head of state was read out loud, a process that lasted fifteen minutes. The thirty-five charges included details of beatings, rape, sodomy, electric shock, the use of hallucinogenic drugs, and the forcing of family members to watch and participate in these activities. The names of the victims were also read out loud. After decades of efforts by his victims, this process marked the first formal accounting of the abuses they suffered under Pinochet (*New York Times* 9/28/99). In October, the Magistrates’ Court, led by a right-wing and pro-police judge who was once a Conservative party candidate for parliament, ruled that the charges constituted extraditable crimes under British law and that the extradition process could go forward (Brody and Ratner 2000).

In January 2000, Straw indicated that he was inclined to drop the extradition proceedings against Pinochet on the grounds that his deteriorating health made him “unfit to stand trial” (Press Statement 1/11/00). A group of six organizations, including Human Rights Watch and Amnesty International, filed a joint application seeking an independent

medical examination and a review of the procedures by which Straw would release General Pinochet. Belgium also sought such a review (HRW 1/31/00). Spain, for its part, rushed to declare that the decision was an administrative one and, therefore, political in nature, in order to block Judge Garzón from launching a legal challenge (Brody and Ratner 2000). A British court then ordered the release of the medical data, basing its decision on the gravity of the issue and the fact that it dealt with the future of an alleged “enemy of all mankind.”<sup>42</sup> Belgium and the human rights organizations submitted comments based on this information to Straw, but on March 2 Straw released Pinochet from British custody. Hours later, a Chilean military plane—one that had made several previous flights back to Chile with no cargo—carried the General home.

The Pinochet affair had a significant impact on the global environment and on the development of international human rights law. Pinochet’s arrest unleashed a wave of similar proceedings, and the “Pinochet Precedent” caused leaders to rethink trips abroad. The former president of Chad, for example, was indicted in Senegal and a colonel from Mauritania was arrested in France. The former Indonesian leader Suharto cancelled a trip to Germany, where he had regularly undergone medical treatment, after discovering that Portuguese lawyers were working to bring him to trial for murder (*Boston Globe* 10/14/99). Belgium also asserted universal jurisdiction and launched several actions against foreign officials for human rights abuses.

The events altered political conditions in Chile as well. During the Pinochet affair, the Chilean government had strongly protested what it characterized as an intervention in the internal matters of the state. At the same time, international legal

---

<sup>42</sup> The justices noted that the Home Secretary’s decision to release Pinochet had great international significance, given the nature of the charges involved, and would likely mark the end of judicial proceedings against him (Queen’s Bench Division 2/15/2000).

experts had filed submissions with the Law Lords maintaining that there was absolutely no chance that Pinochet would be prosecuted in Chile. But the country underwent a sea change during the course of events in the U.K. Pinochet's arrest emboldened Chile's judges and younger military officers, resulting in a wave of arrests of former military officers on charges of murder, torture, and kidnapping. Jose Miguel Vivanco, a Chilean lawyer who heads the Americas Division of Human Rights Watch, said of the arrests: "The recent developments in the courts signify very important progress in human rights in Chile that we never dreamed of before Pinochet's arrest" (*New York Times* 10/2/99).

The intense international scrutiny of Pinochet and his era of human rights abuses embarrassed the Chilean government and complicated efforts to block domestic judicial proceedings. In his May 1999 State of the Nation address, President Eduardo Frei declared: "The insufficiencies of our democracy have become patent for all to see, and the drama of the 'disappeared,' whose whereabouts have remained unknown for more than twenty years, remains like an open sore in the national soul. The whole world knows this, and does not forget" (HRW 1999). And the Socialist Party Leader Ricardo Lagos, who would later become President, declared: "The international community just handed us a yellow card" (HRW 1999). Privately, government officials expressed concern that Pinochet's return would unleash new pressures for justice, increasing divisions and threatening the country's stability (HRW 1999).

As it emerged on the global scene, the Pinochet affair was framed as a judicial issue. Consequently, the gaze of the public fell squarely on Chile's courts. Judicial action was further pushed along by the timing of the British proceedings against Pinochet, which coincided with internal judicial reforms in Chile. Prior to Pinochet's arrest, there had been little prospect for justice in Chile. The courts had remained

populated by Pinochet-era judges, a situation exacerbated by a judicial history of conservatism and a Supreme Court requiring conformity with its conservative values (Hilbink 2003). Between 1973 and 1999, 5000 judicial complaints for human rights abuses were filed. Only eight resulted in any sort of punishment, and in no case was Pinochet implicated (Garretón statement 1/12/99).

Shortly after the new President took power in 1990, the Supreme Court issued a unanimous ruling upholding the constitutionality of the military amnesty for disappearances. This ruling rejected the applicability of international law, including the Genocide, Torture, and Geneva Conventions, all of which Chile had ratified. In 1996, the Inter-American Commission on Human Rights ruled that Chile was in violation of the American Convention on Human Rights because of its amnesty law and its refusal to prosecute cases of disappearance, extra-judicial execution and torture (Bhuta 1999).

The Supreme Court allowed military courts to exercise jurisdiction over the majority of human rights cases on the grounds that the abuses were committed in the course of military activities. It also continued to take disciplinary actions against judges who took a more progressive stance on human rights cases; these judges were often expelled or forced to retire (those who demonstrated sufficient contrition and obsequiousness would be reinstated) (Hilbink 2003). In 1991, a judge brought charges against a military officer who had refused him access to a military barracks to investigate whether victims of executions had been buried there. The Supreme Court responded by reprimanding the judge for exceeding his functions and transferring the case to a military court (Garretón statement 1/12/99).

It was not until the judicial reforms of 1997 and the appointment of eleven new Supreme Court justices in 1998, as well as the shining of an international spotlight on the

Pinochet era of abuses, that Chile's judiciary started taking a more proactive human rights role. The newly populated Supreme Court abandoned its longstanding practice of upholding the military's self-imposed amnesty for acts committed between the 1973 coup and March 1978, citing the Geneva Conventions. In July 1999, adopting the logic employed by the Law Lords, the Court upheld a lower court decision that characterized disappearances as "continuing crimes" to which the amnesty did not apply and began reopening disappearance cases that had been closed by military courts. This reasoning also opened the courts to prosecutions related to those still missing as a result of the October 1973 Caravan of Death, in which military officers traveled the country, dragging political prisoners from the jails and either killing or disappearing them. In July 1999, the Supreme Court upheld the indictments of five army officials charged with leading the Caravan of Death (*New York Times* 10/2/99). Other former Pinochet officials were also convicted and sentenced to life in prison for murder.

These changes even began to influence the military. The case against Pinochet's chief of the secret police, for the murder of a labor leader, had been stalled for years by a judge with close ties to the military. In March 1999, however, an appeals court reopened the case and dismissed the judge for sitting on evidence. When the accused attempted to hide in an army base, officers ordered him to surrender (*New York Times* 10/2/99). In addition, the military began talks with human rights lawyers in August 1999—talks that would not have been possible, according to government officials, before Pinochet's arrest (*New York Times* 10/2/99). In 1990, President Patricio Alwyn had been forced to use executive authority to establish a truth commission, after failing to win legislative support. Ten years later, the military itself agreed to search for the remains of 1200 disappeared (Wedgwood 2000).

Thus, Pinochet faced a significantly altered domestic situation when he returned to Chile. On the day of his release, Chile's foreign minister blamed the General for his predicament and offered little support: "This has been a matter that has tarnished the image of Chile abroad and the main responsibility lies with the person who had drawn discredit from international public opinion" (*New York Times* 3/2/00). But significant obstacles to holding Pinochet legally accountable remained. These included his immunity as a senator for life, a proposed constitutional reform that would give former heads of state permanent immunity, a five-year statute of limitations on torture, and the wide jurisdiction given to military courts (HRW 3/2/00). And, despite the apparent progress, Pinochet received a warm welcome from the military, which promised him "permanent support and solidarity." (*New York Times* 3/7/00)

Nonetheless, three days after Pinochet's return, a judge asked the Santiago Court of Appeals to strip him of his immunity as Senator for Life. Judge Juan Guzman faced almost insurmountable odds when he first opened his investigation in January 1988. The number of domestic lawsuits against Pinochet then stood at sixty-six. These suits charged Pinochet with kidnapping, murder, and torture. By the time the appeals court ruled to lift his immunity in May 2000, the number of suits had risen to 110 and later reached 187. The ruling lifting immunity was upheld by the Supreme Court, 14-6, marking the third time in thirty-five years that an effort to lift immunity in Chile was successful (HRW 8/8/00). Human Rights Watch's Vivanco believed that "this outcome would have been hard to imagine had British courts not broken the spell of Pinochet's immunity by declaring him subject to international justice" (HRW 8/8/00). What aided British courts, in turn, in taking this bold step was the fact that U.S. courts had already broken the spell of sovereign immunity with regard to international human rights norms,

as will become clear in the case analysis below.

On December 1, 2000, Judge Guzman ordered Pinochet placed under house arrest after indicting him on charges of kidnapping and the disappearance of nineteen prisoners swept up in the Caravan of Death. Guzman labeled the General the “intellectual author” of the Caravan (*New York Times* 12/1/00). The charges were temporarily dismissed on technical grounds but were soon reinstated. The judiciary faced significant pressure from pro-Pinochet forces and suffered increased public scrutiny. Some judges faced retaliatory allegations of general improprieties. The pressures against prosecution increased after President Ricardo Lagos made the issue one of national security by convening a meeting of the National Security Council, a body with a strong military presence (HRW 12/12/00). The Minister of Interior tried to limit future investigations by arguing that prosecuting Pinochet would unleash a spate of human rights cases that would threaten national unity and social peace (Amnesty International 2/19/01).

The Pinochet saga came to a close on July 1, 2002, when the Second Chamber of the Supreme Court made permanent, in a vote of 4-1, the temporary suspension of legal action against Pinochet imposed a year earlier by the Santiago Court of Appeals on the basis of Pinochet’s declining mental health. But the investigations against other members of the armed forces have continued, as have extradition requests from other countries, including Spain and Argentina. Chile has responded to these requests by instituting domestic legal proceedings. Thus, although the dismissal brought to an end the efforts of an Argentine judge to have Pinochet extradited for the murder of his predecessor in the military, General Carlos Prats, legal action in Chile continued against Pinochet’s subordinates. Prats and his wife had been living in exile in Buenos Aires when they were killed by a car bomb in 1974. The Supreme Court, after rejecting extradition requests for

the former head of the Directorate of National Intelligence (DINA) and four of his agents in connection with the murders, ordered that they be tried in Chile. In February 2003, they were indicted (HRW 2/25/03).

Following Spain's lead, a French judge issued an international arrest warrant for a former Chilean military official in connection with the disappearance of five French nationals during and after the coup. Interpol arrested the official in Buenos Aires in September 2002, and Argentina began considering France's extradition request (HRW 2003). Spain's Judge Garzón also issued an arrest warrant for Chile's defense minister under Pinochet, Julio Brady Roche, in connection with the 1976 murder of a Spanish citizen who was working for a United Nations economic commission in Santiago when he was kidnapped, tortured, and killed by Chile's secret police. And he sought the arrest of former Argentine officials for their actions during the "Dirty War" (*New York Times* 5/14/01). Thus, although Pinochet himself escaped punishment, his arrest unleashed a new set of forces that could not be stopped simply by sweeping aside the Pinochet affair. The concepts of sovereignty and sovereign immunity had ended their reign of supremacy. A closer look at the rulings will shed light on how this outcome was achieved.

### **The Rulings**

The Pinochet rulings highlight the evolution and domestication of international human rights law—a process begun in U.S courts. The competing arguments of the minority and majority Lords further illustrate the clash between the traditional notion of international law as a state-centric set of rules meant to preserve state sovereignty and the recent expansion of international law's norms. As a result of developments in the post-Cold War world, these norms no longer reflect only the narrowly defined interests of states, but also represent broader values based on human dignity and the notion of

individual rights held against the state. Under the traditional approach, states had complete freedom to act in the absence of an express rule outlawing a specific act. This was the view endorsed by the minority Lords, who took unlimited sovereignty as their starting point. Sovereignty, in their view, could only be limited by explicit state consent. The majority Lords, in contrast, embraced an interpretive approach aimed at giving effect to universal norms derived from state practice and international law. They chose to limit sovereignty, even in the absence of an explicit rule, on the grounds that such limitations were necessary to fulfill the more fundamental values espoused by the international community. The following section will show how the Law Lords abandoned the positivist approach, which relies on express rules, and adopted a natural law approach aimed at fleshing out ambiguities in pursuit of overarching values or ideals. In doing so, the Lords sought to fulfill the goals of the international human rights system, turning to global developments for guidance and transforming these human rights norms into an enforceable legal system.

### **The High Court Decision**

The first ruling, by Britain's High Court, affirmed the traditional approach and asserted the primacy of sovereignty and sovereign immunity (Queen's Bench 10/28/98). The court accepted that Pinochet had committed "punishable acts," which included giving orders and using state power to eliminate, torture, kidnap, and cause to disappear Chilean citizens and non-citizens, both inside and outside of Chile. Nonetheless, the justices believed that customary diplomatic practice conferred continuing immunity upon former heads of state with regard to official acts undertaken at the time that the subject was head of state, a practice that grew out of international comity and the act of state doctrine. The ruling deferred to state interests under the view that international law

served the purpose of regulating state interactions. To employ this law in order to limit state sovereignty while promoting justice for individuals interfered with this purpose. The Court was aware that this approach might not stand, however, and ordered Pinochet detained pending appeal.

The High Court considered previous rulings, in both foreign and international courts, that had supported human rights norms. It acknowledged that the Nuremberg Tribunal, as well as the special tribunals for the former Yugoslavia and for Rwanda, had established the principle that head-of-state immunity did not apply to certain crimes, including those allegedly committed by Pinochet. But this was not an applicable precedent, in the Court's view, because it had been established by international tribunals. The jurisdiction of these tribunals, which enabled them to strip state actors of immunity, was created by international agreement—in other words, explicit state consent—and therefore did not violate the principle of sovereignty. No such jurisdiction was conferred on domestic courts. And, the court pointed out, these tribunals did not infringe upon the act of state—which barred one state from sitting in judgment on the acts of another state—but a ruling by the U.K.'s courts would. Turning to U.S. rulings that had rejected the applicability of the act of state doctrine with respect to violations of international human rights law, specifically *Filartiga* and the rulings against former Philippine leader Ferdinand Marcos and his daughter, the court argued that these cases were not comparable.<sup>43</sup> It therefore declined to incorporate the over-arching norms that these tribunals and courts were developing, instead adopting a narrow view of the norm-formation process based on an explicit act of consent that applied to a specific set of

---

<sup>43</sup> The court explained that *Filartiga* did not involve a head of state or former head of state. The *Marcos* decisions rested on the U.S. Foreign Sovereign Immunities Act, which differed greatly from U.K. legislation. In addition, the Philippine government had given permission for the case to proceed.

circumstances.

The court explained that governments that violated democratic practices did not lose immunity. In ruling on the official nature of the acts in question, Justice Collins contradicted the determination in *Filartiga* and adopted a virtually unlimited delineation of acts that qualify as official:

The submission was made, as my Lord has indicated, that it could never be in the exercise of such [head of state] functions to commit crimes as serious as those allegedly committed by the applicant. Unfortunately, history shows that it has indeed on occasions been state policy to exterminate or to oppress particular groups. One does not have to look very far back in history to see examples of that sort of thing having happened. There is in my judgment no justification for reading any limitation based on the nature of the crimes committed into the immunity which exists (10/28/98).

The court determined that, although these may have been criminal acts, the fact that they were committed in the course of exercising public functions endowed them with sovereign immunity. Moreover, the nature of the acts was such that they could only have been carried out by a head of state and, as such, had to be considered acts of state. The justices found no norm of international law suspending these doctrines in the case of human rights violations.

### **The Law Lords—Decision I**

On appeal, the Law Lords rejected the traditional approach to international law and instead interpreted sovereign immunity in light of the evolving norms of international human rights law (House of Lords 11/25/98). Following the logic of the ATCA cases and citing the U.S. Restatement on Foreign Relations Law (American Law Institute 1986) that both reflected and contributed to the evolution of the law in the ATCA rulings, the Lords held that torture and hostage-taking fell outside of the functions of heads of state. Since these acts did not qualify as official acts, they were not subject to the sovereign

immunity protection conferred upon former heads of state.

The ruling gave effect to the idea that international law did not simply to regulate state interactions; it also served higher goals, including the fulfillment of human dignity, which involved protecting individuals against the state. As such, it functioned as a legal as well as a political mechanism, a notion that had been established by U.S. courts. In making their determination, the majority Lords did not see themselves as state actors within the international system, advancing the primary state interest in sovereignty. Instead, as autonomous international actors, they felt an imperative to give effect to the higher goals of the international community—those embodied by the system of international human rights law—where states failed to fulfill these goals.

Two of the Lords, Lord Slynn and Lord Lloyd, still maintained the traditional perspective that the punishable acts were committed in the course of carrying out the functions of a head of state and thus qualified as official conduct subject to immunity. Pinochet's cooperation, as head of state, with other governments to eliminate his opponents and his use of the police and the secret service to achieve these means made his acts sovereign in nature (Lord Lloyd). Ironically, under this view the very fact that he had access to the mechanisms of state that empowered him to set up a comprehensive system of abuse also rendered his acts protected.

Both Lords employed older texts on international law and diplomacy that recognized absolute immunity from civil and criminal jurisdiction for a former head of state. They also cited older U.S. cases upholding immunity while ignoring the more recent ATCA cases characterizing certain human rights violations as falling outside of the scope of acts of state and therefore not protected by sovereign immunity.<sup>44</sup> The Lords

---

<sup>44</sup> The only ATCA case they cite is Marcos, and here they point to the Philippine government's approval of the case as the distinguishing feature. Among the older cases they cite: *Hatch v. Baez* (1876), *Underhill v*

pointed to the specific exclusion of head-of-state immunity in numerous tribunals, including Nuremberg, the International Criminal Tribunal for the Former Yugoslavia, and the International Criminal Tribunal for Rwanda, as evidence that sovereign immunity is the norm unless specified to the contrary. They maintained that it was not for the courts to find otherwise in the absence of state practice. They also concluded that the Torture Convention's reference to public officials did not include heads of state, given that the Genocide Convention, the Nuremberg Charter, and the Yugoslav and Rwanda tribunals found it necessary to explicitly mention heads of state as a separate category. They also disagreed with Spain's National Court and held that the Genocide Convention requires that the accused be charged either in the state where the genocide was committed or in an international tribunal, thereby excluding the prospect of trial in another state.

These Lords held a strict, literalist view of state practice that did not allow for broader developments to contribute to the norm-formation process. Taking unfettered sovereignty as their starting point, they characterized the recognition of certain crimes as falling outside the scope of immunity as an emerging or embryonic norm of international law, even an aspiration. The norm had not yet crystallized in their view. Nor did the practice of international tribunals have any bearing on this question, as these tribunals dealt with crimes in specific situations and did not, as such, constitute recognition of the general principle, particularly with regard to national courts. In fact, they believed that the need to establish these tribunals in the first place indicated that domestic courts were not empowered to carry out such trials. Accordingly, the extra-territorial enforcement of international crimes in domestic courts would constitute a departure from the established

---

Hernandez (1897), and *Banco Nacional de Cuba v Sabbatino* (1962). Lord Lloyd also cites *Siderman de Blake v. Republic of Argentina* (1992) but makes no mention of the fact that the ruling distinguishes between suing states and suing individuals who are former heads of state, outlawing only the former.

norms of sovereignty and the act of state.

The remaining Lords took a more expansive view of state practice in which stated commitments, even if violated in practice, contributed to customary international law. Under this approach, they accepted that Pinochet was entitled to immunity as a sitting head of state but denied him continued immunity, as a former head of state, over the acts in question. Their determination rested on the question of the official nature of the alleged acts. Turning to both domestic and international legislation,<sup>45</sup> the Lords concluded that their decision should be based on the recognized functions of a head of state under international law, not the state's domestic law. Neither torture nor hostage-taking was a recognized head-of-state function under international law. Adopting the logic employed in *Filartiga*, the Lords argued that all states, even those that still employed torture, denounced its use as unlawful and abhorrent. States may disagree about the lawful functions of a head of state, but certain acts were universally condemned:

International law has made plain that certain types of conduct, including torture and hostage-taking, are not acceptable conduct on the part of anyone. This applies as much to heads of state, or even more so, as it does to everyone else; the contrary conclusion would make a mockery of international law (Lord Nicholls).

The Lords did not find a specific law suspending sovereign immunity. Instead, they looked to the over-arching values of the international system and sought an outcome that was consistent with these values. To rule otherwise would, in their minds, “make a mockery of international law.” Rejecting a more politically oriented understanding of international law rooted in maintaining friendly state relations, their decision focused exclusively on the legal status of the crimes in question. Given the *jus cogens* status of

---

<sup>45</sup> These laws were, respectively, The State Immunity Act (1978) and the Vienna Convention on Diplomatic Relations (1961)

the prohibition against torture, they concluded that it would be “difficult to maintain that the commission of such high crimes may amount to acts performed in the exercise of the functions of a head of state” (Lord Steyn).

The majority Lords adopted a broad view of the sources contributing to the norm-formation process. They looked to the Nuremberg Charter and subsequent UN General Assembly Resolutions—sources rejected by Lords Slynn and Lloyd as not indicative of state practice—to demonstrate that these prohibitions, which include genocide, torture, hostage-taking, and crimes against humanity, have long existed in customary international law and pre-date the 1973 coup. They also turned to the U.S. Restatement (1986), which asserts that the act of state doctrine does not apply where the claim is based on a violation of international human rights law. These sources point to the existence of a customary norm of international law that upholds human rights over sovereign immunity for certain recognized violations of international human rights law. In turning to these broad sources, the Lords abandoned the more restrictive notion of state consent. Their question was not what has the state explicitly agreed to be bound by; instead, they asked, what are the norms of the international community that we should uphold, irrespective of state behavior.

### **The Law Lords—Decision 2**

In the second ruling, the Law Lords engaged in a more painstaking examination of the two distinct issues at stake – the question of universal jurisdiction, and that of sovereign immunity for former heads of state (House of Lords 3/24/99). In contrast to the vacated decision, these Lords were reluctant to rely on customary international law alone to answer these questions. The oral hearings included extended discussions of what exactly constituted customary international law. Lord Browne-Wilkinson, in fact,

confessed to a long-standing confusion, dating back to when he was a student, as to when a practice became part of customary international law. Recognizing the potential scope of judicial power to essentially discover existing law, he asked:

But in one sense does it come to this: that if we say that it is part of international law, it will be, and if we say it is not, it will not be? It seems a very powerful position and not one we normally occupy (Proceedings, in Brody and Ratner 2000: 223).

Given the intense public attention and the significance of the case, the Lords expressed a reluctance to use the broad powers conferred by customary international law, which would subject them to criticism that they had over-stepped their judicial role.

In light of these considerations, the majority Lords settled on a more tempered approach that sought to give effect to the ideal of international justice while at the same time remaining grounded in the notion of explicit state consent. Thus, they agreed that torture was prohibited under customary international law, but they determined that this prohibition in itself was insufficient as a basis to establish Spain's right to exercise jurisdiction and to make a determination regarding former head-of-state immunity. Instead, the Lords turned to the Torture Convention to establish these elements. They concluded that despite the prohibition against torture in customary international law, it only became a crime that was punishable extra-territorially, one for which there was no immunity, with the passage of the Convention. And although the Convention generally established jurisdiction, the Court took the position that it was not until the U.K. passed legislation implementing this treaty that the commission of torture in another state by a foreign national became a prosecutable and therefore an extraditable crime in the U.K.<sup>46</sup>

---

<sup>46</sup> The debate centered around whether the act had to be prosecutable in the U.K. only at the time the extradition request was made, or whether it had to already have been prosecutable in the U.K. at the time it was committed. For a view that challenges the Court's interpretation, see Ratner (1999).

In effect, this meant that Pinochet could be extradited only for crimes that were committed after the implementing legislation came into force in December 1988. It also meant that the Lords were adjudicating on somewhat safer ground by basing their decision in domestic legislation, albeit legislation that was implementing an international treaty.

By relying on the Torture Convention, the Law Lords were able to minimize the perceived implications for sovereignty, pointing to the Convention as evidence of explicit state consent. All three states —Spain, Chile, and the U.K.—had ratified the Convention by December 1988, the date marking Pinochet’s accountability. Yet even with this circumscribed period of accountability that gave some deference to the state, the Lords were breaking new ground. As described in the introduction, treaties are rarely directly enforced in domestic courts. Moreover, they are drafted with deliberately vague language so that states may limit (or easily circumvent) the obligations they willingly undertake, obligations that come at the expense of sovereignty. In order to give concrete meaning to these obligations, the Lords turned to an interpretive approach that defined the treaty norms in light of broader developments in international relations and international law. Thus, even though the Lords were basing their decision on a treaty that Chile had ratified, they were adopting a more fluid notion of consent—drawing on emerging international norms of human rights to interpret the provisions to which states had bound themselves in the Torture Convention and creating unanticipated levels of obligation.

At the time that Chile signed on to the Torture Convention, it could not conceive of the possibility of its human rights treaty obligations arising in a judicial, as opposed to a political, arena. In fact, Chile did not consider itself bound by these obligations,

characterizing them as mere aspirations. So when the Lords issued a ruling on the basis of this Convention, it had wide-reaching effects. At the same time, because the ruling was linked to explicit consent via the treaty process, the Lords were able to lessen the perception that they were exceeding their powers and creating law where none existed. Rather than holding Pinochet accountable to an abstract norm of customary international law that they themselves discovered, they were instead giving effect to a norm created by treaty, even as they looked to outside sources to give meaning to this norm.

Establishing that extra-territorial torture was a crime in the U.K., however, did not resolve the question of sovereign immunity. All of the Lords agreed that criminal proceedings could not be instituted against a sitting head of state. This proscription fell under long established norms of immunity, diplomacy, and the act of state doctrine. But the question remained whether instituting criminal proceedings against a former head of state for actions undertaken while he was head of state was also a violation of the act of state doctrine. Moreover, if former head-of-state immunity only applied to official acts, how were such acts to be defined?

The appellants argued that immunity did not apply to an act that was prohibited by international law, especially in light of the fact that the Torture Convention had established individual criminal responsibility for torture. Citing *Filartiga*, they further argued that the Convention merely codified existing customary international law and that torture was an international crime for which there was no immunity. Even if one did not accept that torture was an international crime, widespread and systematic torture constituted a crime against humanity, an international crime that fell under universal jurisdiction. U.S. practice, as well as the 1986 Restatement, made it clear that the act of state doctrine did not exclude judicial proceedings against torture; the doctrine did not

hold with respect to behavior that was universally condemned because no state had the prerogative to engage in such behavior. To lend authority to this view, Amnesty International pointed out that the Committee Against Torture—a UN body established under the Torture Convention—recommended that criminal proceedings be initiated in Britain should the decision be made not to extradite. According to Amnesty, this recommendation constituted an authoritative statement on universal jurisdiction and sovereign immunity under the Torture Convention.

The government of Chile, which had become a party to the proceedings, argued that its assertion of immunity did not promote impunity but instead preserved the norm of sovereignty. Only Chile had the right to assert jurisdiction or to waive immunity. The defense did not believe that the Torture Convention relinquished this right, with Pinochet's lawyers claiming that "it takes more than one Convention to overturn hundreds of years of practice in the area" (Defense Lawyer Clare Montgomery). Accordingly, they maintained that no new norm based on state practice had emerged to overturn the doctrine of absolute immunity. Moreover, even though torture was illegal in Chile, they argued that it was still a sovereign act if undertaken in the course of official duties.

Chile maintained that the universal condemnation of torture represented an aspiration only and was not indicative of state practice. It took the unique position that a Convention was not part of international law in the absence of extensive and uniform state practice over an extended period of time:

The practice emerges when all the aspirations expressed in the convention or resolution are accepted by states and acted upon. When a high ideal, e.g. to prosecute crimes against humanity, is expressed, the practice is often the opposite – to give complete immunity to certain categories of people without carving out a human rights exception. In the face of such contrary practice it is impossible to

say that immunity is overridden (Defense Lawyer Clare Montgomery).

Chile believed that state practice only suspended sovereign immunity for crimes that threatened the peace or world order; that these crimes were limited to genocide, war crimes, and crimes against humanity; and that, by definition, they occurred only in the context of armed conflict. Under these criteria, torture was not an international crime, nor did it qualify as a crime against humanity in the absence of armed conflict.

The majority Law Lords rejected Chile's characterization of crimes that were subject to international criminal responsibility under international law. They held that the concept of individual responsibility, firmly established by the Nuremberg Charter and the subsequent General Assembly resolution adopting the Charter, has applied to a growing range of crimes, among them torture, divorced from armed conflict. To support this contention, they listed a host of sources including the Rome Statute of the International Criminal Court, the statutes of the special tribunals established for crimes in Rwanda and the former Yugoslavia; the *Eichmann* (1961), *Demjanjuk* (1985), and *Siderman* (1992) cases; General Assembly resolutions; reports of the International Law Commission and its Draft Code of Crimes Against the Peace and Security of Mankind; and legal writings by international law scholars. All of these sources point to the legal norm that torture was an international crime subject to punishment, even if the crime was committed in the course of official duties by a head of state or other government official.

Even after reviewing these sources, establishing universal jurisdiction to punish torture prior to the Torture Convention proved tricky for four of the Lords. Although they suggested that such jurisdiction did in fact exist, they were unwilling to follow through with this assertion in the absence of more explicit state consent. Lord Browne-Wilkinson, for example, turned to the above sources to establish that torture was an international crime, declaring that "the *jus cogens* nature of the international crime of

torture justifies states in taking universal jurisdiction over torture wherever committed.” A few pages later, however, he expressed “doubts whether, before the coming into force of the Torture Convention, the existence of the international crime of torture as *jus cogens* was enough to justify the conclusion that the organisation of state torture could not rank for immunity purposes as performance of an official function.” He concluded: “Not until there was some form of universal jurisdiction for the punishment of the crime of torture could it really be talked about as a fully constituted international crime.” In other words, only the Torture Convention endowed national courts with explicit jurisdiction to punish acts committed abroad (Ratner 1999). Lords Hutton, Phillips, and Hope similarly believed that even the *jus cogens* prohibition against torture could not be enforced in the absence of a mechanism enabling domestic courts to exercise extra-territorial jurisdiction, and the Torture Convention provided this mechanism.

The Convention, however, said nothing specifically about universal jurisdiction or head-of-state liability for the crime of torture. The Law Lords adopted a purposive conception of international law, turning to the negotiating history of the Convention to determine the framers’ goals and give them effect. In particular, they relied on a handbook written by one of the framers and by the chairman of the UN Working Group on the Torture Convention. The handbook explained that the purpose of the Convention was not to create a new international crime but to provide a mechanism for punishment so that “a torturer does not escape the consequences of his acts by going to another country” (Burgers and Danielus 1988). That mechanism was to extradite or punish, laid down in Article 7. The Lords noted that in the absence of such a mechanism, torturers such as Pinochet would go unpunished, given the high likelihood that their own states would pass amnesty legislation, as was the case in Chile. After the Convention was

passed, however, they believed that no signatory state could invoke sovereign immunity. This was true even in the case of a former head of state. Once torture was criminalized under international law, it could no longer be characterized as an official function, despite the fact that by definition it requires an official nexus. The Lords rejected Chile's contention that it was a sovereign act if carried out by a head of state: "The official or governmental nature of the act, which forms the basis of the immunity, is an essential ingredient of the offence. No rational system of criminal justice can allow an immunity which is coextensive with the offence" (Lord Millett).

Although the majority relied on the Convention, two of the Lords—Lord Millett and Lord Phillips—believed that the widespread and systematic use of torture was an international crime for which there was no sovereign immunity even before the Torture Convention came into effect. Only Lord Millett, however, maintained that universal jurisdiction existed prior to the Convention. He argued that state immunity, as expressed in customary international law, did not extend to acts that were themselves prohibited by international law. Both *Eichmann* (1961) and *Demjanjuk* (1985) had recognized the principle of universal jurisdiction. Moreover, the UN Charter and subsequent resolutions had established that crimes against humanity, including widespread torture, represented threats to the international order. And violations of a *jus cogens* norm on a scale that threatened the international order were subject to universal jurisdiction. He argued that the systematic use of torture fit these criteria and sat alongside piracy, war crimes, and crimes against the peace as an international crime of universal jurisdiction. In Lord Millett's view, this status had been acquired by the time of Pinochet's 1973 rise to power. The Convention's sole effect was to broaden the definition of torture as an international crime to include isolated instances of torture. He also noted that it created an obligation

to exercise jurisdiction where previously only a right had existed. Lord Millett, then, took an even broader view of consent, one based on custom rather than on the explicit consent expressed by signing and ratifying a treaty. The remaining Lords were reluctant to broaden the notion of consent in this way.

In the most radical departure from the traditional approach, Lord Phillips reversed the usual judicial logic by placing human rights norms above those of sovereignty. Rather than starting from the point of sovereign immunity, he abandoned this premise altogether and took the existence of *jus cogens* human rights norms as his starting point. Accordingly, he used the fact that this case was the first of its kind to argue that no applicable norm of immunity had yet developed. He challenged Chile's claim to sovereign immunity on the grounds that the norm of immunity had developed in the 19<sup>th</sup> century; because there was no concept of extra-territorial international crimes during this period, there could not be any customary norm of immunity for a former head of state with regard to these crimes. He added that Chile was unable to support its view with reference to any judicial decisions on the subject. There was no judicial precedent or state practice that established former head-of-state immunity for international crimes. With regard to universal jurisdiction, however, Lord Phillips took the deferential approach of his peers. Accordingly, he was unwilling to assert universal jurisdiction in the absence of an express grant of jurisdiction like that found in the Torture Convention.

The lone dissenter, Lord Goff, adopted a more restrictive understanding of state behavior and of the norm-formation process. He did not believe that the sources cited by the other Lords, including the Nuremberg Charter, the Rome Statute, the statutes for the Rwanda and Yugoslavia tribunals, and the International Law Commission's Draft Code of Crimes Against the Peace and Security of Mankind, were indicative of state practice in

the absence of armed conflict, at least not until after 1989 (the latest date under consideration in the case). Nor did they provide any insight as to the status of immunity in national courts, as they all dealt with criminal responsibility before international tribunals. He believed that this was the case even with respect to crimes against humanity, adding that what constituted a crime against humanity was not yet settled.

Lord Goff was unwilling to suspend immunity in the absence of a precise rule. He believed that a subject such as sovereign immunity would have been explicitly mentioned in the Torture Convention had it been the intention of the signatories to exclude immunity with respect to torture. Instead, he maintained that the negotiators purposely avoided the issue of immunity in order to gain more widespread support for the treaty. He also rejected the contention that torture falls outside of the scope of immunity for official acts. A criminal act performed by a head of state was still governmental, in his view, even a crime as serious as torture. Seemingly ignoring the current situation, he maintained that states would in any case be inhibited from asserting immunity for fear of provoking international condemnation and that, in the event that they persisted, diplomatic and moral pressure could dissuade them. In support of the traditional approach treating international law as a political rather than a legal mechanism, Lord Goff concluded that any exclusion of immunity for a former head of state could create a dangerous situation resulting in politically motivated prosecutions.

Lord Goff's dissent notwithstanding, the two rulings issued by the House of Lords mark a departure from longstanding judicial practice upholding sovereignty in the absence of a clear rule instructing judges to do otherwise. In the past, the primacy of sovereignty had been the starting point: "Courts would be expected to apply an assumption that the international community of states had not intended to fetter sovereign

freedom” (Sands 2001: 536). This was the approach adopted by Lords Slynn and Lloyd in ruling against Pinochet’s extradition. This was also the approach suggested by Lord Goff, citing the 1989 *Amerada Hess* decision, in which the U.S. Supreme Court had been unwilling to rule against the prevailing norm of sovereignty in the absence of an explicit rule.<sup>47</sup> Turning to this decision, Lord Goff warned against the unanticipated effects of the modern, interpretive approach to international law: “How extraordinary it would be, and indeed what a trap would be created for the unwary, if state immunity could be waived in a treaty *sub silentio*.”

Ultimately, the Lords adopted a mixed approach that placed the norms of human rights above those of sovereignty but turned to state consent via treaty to uphold this assertion. Nevertheless, their use of treaty law was progressive: they relied on an interpretive approach that looked beyond the specific treaty language to broader developments in the international system in order to give meaning to the treaty norms. In this way, they were able to incorporate the evolution of the international human rights discourse and to implement their vision of the values of the international community while still paying appropriate deference to the sovereign prerogative. Chile had exercised this prerogative in ratifying the Torture Convention. But, while the state viewed this as a political act, the Law Lords transformed this exercise of sovereignty into a legal act, one that would in turn limit the state’s ability to undertake future sovereign acts. By treating international law as a binding set of legal norms, rather than as a political instrument of states, the Lords acted as members of the global judiciary—giving effect to the norms and values of the international community. Recognizing that the Pinochet affair

---

<sup>47</sup> The Court determined that it could not exercise jurisdiction over Argentina for the bombing of a commercial Liberian oil tanker during the Falklands War, ruling that the explicit exceptions to sovereignty provided in the FSIA were the sole basis for exercising jurisdiction.

represented a situation where human rights abuses had gone unaddressed, the Lords felt it was their role to remedy this failure. In doing so, they were responding not to a domestic, but to an international audience. The next section will highlight how the ruling reflects this role.

### **The Global Judiciary**

The central theme running through the decisions of the majority Lords was how to achieve the outcome that would fulfill the goals of the international community; such was their obligation. In *Pinochet I*, these objectives were inferred from customary international law. In *Pinochet II*, the Lords limited their identification of the goals of the international community to those that could be discovered in the Torture Convention, although their reading of this convention was informed by a wider range of sources in both customary and treaty law. The fundamental purpose, they determined, was “to provide an international system under which the international criminal—the torturer—could find no safe haven” (Lord Browne-Wilkinson 3/24/99). Following this logic, the conservative magistrate who later ruled that the extradition could continue took note of the purposes of the international community, as represented by the Torture Convention, notably, “to combine together to outlaw crimes which are abhorrent to society” (Metropolitan Magistrate Bartle 10/8/99).

*Pinochet*’s defense team had turned to a piece of domestic legislation, the State Immunity Act. It argued that this act protected *Pinochet* from prosecution and would even have given Hitler immunity (Kornbluh 1998). The Law Lords, however, were not content to rely on U.K. legislation alone to make their determination regarding *Pinochet*’s immunity and looked to international law for guidance. Although ensuring that their decision squared with the domestic act, they were more fundamentally concerned with

how it represented the norms of the international community. The Lords turned to a variety of international law sources—both hard and soft law – to interpret these norms. And during the written and oral proceedings, both the prosecution and the *amicus curiae*, and subsequently the Lords themselves, relied on the ATCA cases for guidance, as well as on the U.S. Restatements on international law.

As a statement on global norms, the decision said less about the particularities of the Pinochet case and more about the evolution of the system of human rights in holding state leaders accountable under international law. The Lords made this intent clear: “We are not, however, concerned only with this applicant. We are concerned on the arguments advanced with a principle which will apply to all heads of state and all alleged crimes under international law” (Lord Slynn 11/25/98). In adopting this purpose, the Lords could only partially be characterized as British judges ruling on a matter of domestic law. More significantly, they were ruling as global judges on a matter of international law, establishing a principle that other courts would in turn adopt as members of this global judiciary.

After looking to global developments and the evolution of the international human rights discourse, the majority Lords concluded that “the idea that individuals who commit international crimes are internationally accountable for them has now become an accepted part of international law,” an idea first established under Nuremberg (Lord Browne-Wilkinson 3/24/99). It was this objective of individual accountability that they sought to realize. Moreover, they believed that the international community “is under a duty to bring to justice a person who commits such crimes” (Lord Hutton 3/24/99). As members of the global judiciary, they no longer limited their role to the application of the positive laws expressly endorsed by states. Instead, they aspired to achieve the goals and

obligations of the international community. Accordingly, their ruling represented a fulfillment of the international community's duty to bring international criminals to justice, an obligation that had until then gone unmet with respect to Pinochet (see, e.g., Reichman 2001).

How, specifically, did the Lords understand their duty with regard to the international system? They took note of the movement away from the traditional understanding of international law, adopting an interpretive approach that led them to seek guidance in broader developments at the international level in support of international justice. Noting the evolution of international human rights law, Lord Millett stated: "It is a cliché of modern international law that the classical theory [in which the rights of individuals were not the subject of international law] no longer prevails in its unadulterated form." He added:

The fundamental human rights of individuals, deriving from the inherent dignity of the human person, had become a commonplace of international law. Article 55 of the Charter of the United Nations was taken to impose an obligation on all states to promote universal respect for and observance of human rights and fundamental freedoms (3/24/99).

As the judicial branch of the state, the Lords had a duty to fulfill this obligation to "promote universal respect for and observance of human rights." And in fulfilling this obligation, he noted, the judiciary must also be aware that these norms are continuing to evolve.

Lord Phillips adopted a similar view regarding the role of the court in fulfilling the goals of the international community, and the evolution of these goals:

My Lords, this is an area where international law is on the move and the move has been effected by express consensus recorded in or reflected by a considerable number of international instruments. Since the Second World War states have recognised that not all criminal conduct can be left to deal with as a domestic

matter by the laws and the courts of the territories in which such conduct occurs. There are some categories of crime of such gravity that they shock the conscience of mankind and cannot be tolerated by the international community.... In these circumstances it is desirable that jurisdiction should exist to prosecute individuals for such conduct outside the territory in which such conduct occurs (3/24/99).

In light of this evolution, Lord Phillips concluded that extra-territorial jurisdiction over such crimes overrides the act of state doctrine. In other words, international human rights norms have superseded the norms of sovereignty where international crimes are concerned.

To resolve the conflict between state sovereignty and individual criminal responsibility, the Lords concluded that the former only holds where the state in question fulfills its duties to the international community, which involve advancing the system of international human rights. In this case, Chile had failed in its obligation to punish the international crime of torture, making it necessary for the courts of another state to step in. Otherwise, the goals of the international community would not be met. Given the establishment of torture as an international crime, the majority Lords concluded that "it would be wrong for the English courts now to extend the act of state doctrine in a way which runs counter to the state of customary international law as it existed in 1973" (Lord Steyn 11/25/98). In other words, the international community did not intend for acts of torture to go unpunished, even those committed by former heads of state.

The court's understanding of its function in the international community meant that when the norms of state sovereignty came into conflict with the norms of individual human rights, the latter prevailed. This choice did not reflect an internal British decision. Rather, it reflected the perceived intent of the international community and was, in turn, binding on this community. In considering the norms of the international community and their role with respect to these norms, the Lords concluded: "In future those who commit

atrocities against civilian populations must expect to be called to account if fundamental human rights are to be properly protected. In this context, the exalted rank of the accused can afford no defence” (Lord Millett 3/24/99). In this view, the norms of the international human rights discourse were a legal resource to be employed by the courts in protection of fundamental human rights.

### **The Impact of the Pinochet Affair**

The Pinochet decision bolstered the role of national courts in strengthening and developing international human rights norms. Despite the significant foreign policy and political issues, the process occurred entirely in the judicial arena, outside of legislative or executive control, until it entered its last stage. Private parties and an independent magistrate initiated the Spanish case, in the absence of government support, and in opposition to the public prosecutor. As one of Pinochet’s lawyers explained: “A junior judge was able to launch the extradition process with serious and controversial political consequences” (Nicholls 2000: 150).

The case marks a milestone in judicial autonomy and in the development of enforceable legal norms within the international human rights discourse. In the words of Lord Browne-Wilkinson:

It is of considerable general importance internationally since, if Senator Pinochet is not entitled to immunity in relation to the acts of torture alleged to have occurred after 29 September 1988, it will be the first time so far as counsel have discovered when a local domestic court has refused to afford immunity to a head of state or former head of state on the ground that there can be no immunity against prosecution for certain international crimes (3/24/99).

The ruling marked the first of its kind. But just how far did it go in breaking new ground?

The outcome was hailed by both sides, a result that the Lords may have been

seeking given the political firestorm surrounding the case. The moderated outcome enabled both sides to spin it to their advantage. For example, Chile's President, Eduardo Frei, praised the Law Lords for greatly limiting the scope of the charges and recognizing "the sovereignty of Chile" (*New York Times* 3/25/99). On the other side, Reed Brody, then the advocacy director with Human Rights Watch, expressed his satisfaction with even the limited outcome: "The very fact that he was arrested, and that his crimes were enumerated in a court of law, has already changed the calculus of dictators around the world. The Pinochet case signified the beginning of the end of their impunity" (HRW 1/12/00). The reliance on the Torture Convention, and the subsequent decision to limit the time period for which Pinochet could be held accountable, have been characterized as elements in a deliberately chosen conservative path aimed at avoiding controversy (Ratner 1999). But this so-called conservative path led to a radical outcome: the ruling discarded longstanding rules governing sovereignty and non-interference in a state's internal actions. As a result, human rights abusers can no longer hide behind positions of power to avoid prosecution. This radical redefinition of sovereignty, moreover, was not instigated by states. Instead, it was achieved through the efforts of domestic courts acting autonomously at the international level.

The Law Lords' reading of the Torture Convention rests on a progressive interpretation of the Convention that gives concrete, legal meaning to the norms found therein. As mentioned, the Convention is silent on head-of-state immunity. But the Lords reasoned that the Convention's norms would be meaningless if immunity held. Nonetheless, they could just have easily reasoned the opposite way (Wedgwood 2000). In fact, the minority Lords relied on a literal reading of a narrow, more traditional set of legal sources. The majority Lords, by contrast, turned to a broader set of sources in

seeking to fulfill the over-arching values of the international community. While the minority used the lack of precise norms as an indication that these values could not be fulfilled, the majority used this same ambiguity as an opportunity to give the norms meaning and concrete legal effect.

The Law Lords found that state power was not unlimited. They established the principle that government officials, including heads of state, could no longer hide behind sovereign immunity, the act of state, or any other long-existing barrier based on state sovereignty to escape accountability for human rights abuses. Although the norms evoked by the Law Lords existed in the international human rights discourse, they had been applied only in a limited number of criminal cases by specially established international tribunals. Universal jurisdiction, existing in theory, now existed in practice as well.

At an international law conference, Clive Nicholls, Pinochet's lead counsel in the U.K., explained the significance of the decision for international law. It established the principle that head-of-state immunity did not exist for the international crime of torture and it established universal jurisdiction over this crime: "From the decision it follows that any official (or former official), irrespective of rank, is amenable to the jurisdiction of any national court for any act of torture" (2000: 146). He added that such acts need not be part of a systematic policy of torture. But he doubted whether the ruling, as one of a national court, had the same judicial authority as a decision by an international court; consequently, he believed that the principle suspending immunity was not solidly established. Moreover, he did not believe that the decision firmly established the principle of universal jurisdiction since it was grounded in domestic legislation.

In making this assessment, Nicholls remains rooted in a traditional approach to

international law. He discounts the effect of an emerging global judiciary increasingly making use of an interpretive approach to international law. The important aspect, in this respect, is not the establishment of a precedent in a strictly legal sense. Rather, the significance rests on a broader notion of precedent based on the advancement and specification of international human rights norms by globally oriented justices. For it is to the latter, rather than the former, that justices now accord greater significance. And just as this process equipped the Law Lords to rule against Pinochet, their ruling will likely influence future judicial deliberations and advance the process still further. As national judges continue to identify as part of a global community, they will also continue to draw upon a shared international human rights discourse emerging from judicial interpretations of these norms by domestic and international judiciaries alike. And these judicial interpretations will be geared toward this global audience, as the Pinochet decision was: “England had at stake here not only the particular allegations of murder, torture, and hostage-taking, but also the future of general international judicial assistance in criminal cases” (Wedgwood 1999: 289).

The fact that Pinochet was ultimately allowed to go free does not diminish the significance of the ruling with respect to international law. Ironically, some scholars have argued that Pinochet’s release aided the human rights movement by establishing the principle of criminal responsibility without the risks of an actual trial, which would have raised the possibility of acquittal and could have presented the negative image of lawyers hounding a frail, elderly figure (Bosco 2000). Moreover, the dictator’s ultimate release was not the result of a legal decision at all, but of a political one. More significant than his release is the fact that the ruling gave concrete effect to the norms of the international human rights discourse, placing them above those of sovereignty. Even the narrowed

scope of the charges did not diminish the case's impact on the evolution of international human rights norms, resting as it did on a technicality of domestic law. The Law Lords, however, did not themselves discover these norms. Their substantive development was part of a larger domestication process, as U.S. court decisions provided a foundation for the Law Lords to find a former head of state criminally liable for a violation of international human rights law.

A more positivist reliance on strict treaty interpretation would likely have led to a ruling that Pinochet was immune. Such a conclusion, however, would not have been in tune with the human rights norms being advanced by the global judiciary. The international judicial environment promoted a new understanding of human rights and state sovereignty. The Lords were aware that the eyes of the world were upon them. The Pinochet affair was front-page news. The first judgment was broadcast on CNN and seen around the world. An article in *The Nation* characterized it as "one of the most dramatic human rights rulings of modern times" (Kornbluh 1998). A participant in the proceedings described the atmosphere upon hearing the verdict:

Within the Chamber it felt like a moment in which the traditional international legal order had been transformed. The order, which I had been brought up on, which gave primacy to the interests of the state, had been replaced by one which recognised and gave practical effect to the interests of the victims of torture (Sands 2001: 532).

In the end, the judges identified, not as representatives of a particular state, but as members of a global movement whose duties transcended national borders and who saw their role as one of developing and applying the system of norms meant to protect human rights. And in the process of transforming international human rights law, they transformed judicial autonomy as well, creating a significant role for themselves in the international community.

## Chapter 4

### Israel: Palestinian Rights and The Limits of Judicial Activism

The different facets of the Israeli state—Jewish, democratic, occupying power—have placed the judiciary in a unique position. Where these conflicting identities have confronted one another, it has fallen upon the Supreme Court to reconcile the legal and political norms promoted by each. As the arbiter of last resort, the Court's rulings reflect its association with the global judiciary, linking its activism to the norms of liberal democracies. But the Court also identifies with Israel's unique security situation as an occupying power confronting terrorist acts inside the state. The Court has tried to allow for these security concerns while maintaining the democratic character of the state. In practice, however, this has meant compromising its global identity by selectively employing international and domestic law to legitimize the state's security policy.

This chapter brings this practice to light while also pointing to factors undermining these efforts, specifically, the effects of the Court's attempts to validate Israel in terms of international legal norms. The Court's demonstrated reluctance to challenge security policy, despite the constant Palestinian human rights claims reaching its docket, illuminates this struggle to validate government policy. Unwilling to fully abandon its place in the global judicial community, however, the international context ultimately forced the Court into a final confrontation with regard to the international norm of torture. The decision outlawing torture represents a new dimension in the domestication process; the Court's position in the international community directly influenced a ruling affecting domestic security policy. In the absence of the domestication process and the rulings of previous courts, notably those of the U.S. and the U.K., the Israeli justices would have faced a different international context in which

they could more easily have reinforced the state's security policy even with regard to torture. To understand how the domestication process influenced the Court, it is first necessary to understand both the Court's activism with regard to civil rights and its complicated relationship with the laws of occupation, specifically its treatment of Palestinian rights claims.

Israel's attempt to conduct its extended occupation of the West Bank and Gaza under the cloak of legitimacy has resulted in a unique legal situation. In an extraordinary move, the Supreme Court agreed to hear petitions from within the territories at the start of the occupation. At first, the Court indicated a willingness to defer to the government regarding its jurisdiction over petitions originating in the territories (Shamir 1990, see also *Hilu* 1972). However, the government, itself desiring the appearance of legality in the territories, opted not to challenge the Court's jurisdiction. By the early eighties, the Court had begun simply asserting a right to review the acts of state agents regardless of where they occurred (*El Masulia* 1982). The multiple sources of law comprising Israel's legal system, however, and the lack of a written constitution, served to complicate Palestinian rights claims in the courts.

The absence of a written constitution coupled with the ambiguous legal status of the territories (which were not technically part of Israel) led Palestinians to rely on international law in pursuit of basic rights. As this chapter will demonstrate, these efforts were on the whole unsuccessful prior to the Court's unexpected and revolutionary ruling outlawing the torture of suspected terrorists during interrogation, handed down in September 1999. Until this decision, the Court had taken at best an ambivalent approach toward international law. At worst, it had manipulated the law to provide a veneer of legitimacy to questionable government policies in the territories. Despite increasing and

far-reaching judicial activism with regard to civil liberties, the Court had remained strikingly inactive where Palestinian rights were concerned. Its rulings acquiesced to government interests in the vast majority of cases. It was against this backdrop that the Court passed down its decision outlawing torture—a radical departure from its existing jurisprudence, and one that can only be understood by looking to developments at the international level.

This chapter will provide a review of the Court's history both inside and outside of the Green Line in order to underscore the significance of the torture ruling that is the subject of the next chapter. Three central points will be emphasized. First, the Court has become extremely activist with regard to civil rights, promoting these rights even in the absence of concrete legal or statutory guarantees. This process has resulted in increased judicial autonomy relative to the other branches of government. Second, this activism has not extended beyond the Green Line. The Court's autonomy has stopped short of challenging government security policy in the territories, even where Palestinian civil rights have been clearly violated. Third, although the Court has been largely ambivalent toward international law and its direct application in the territories, it has relied on universal or Western legal principles such as democracy and the rule of law to promote fundamental freedoms. In this way, it has employed an interpretive approach with regard to the overarching values found in Israel's domestic law. In order to establish and give meaning to these supra-legal values that have not been legislated, the Court has turned to outside legal sources. These include the jurisprudence of other Western democracies, as well as international documents and the writings of legal scholars. As a result, legal developments in other countries and at the international level increasingly have influenced the Court's reasoning. It is this third point, in combination with the larger

domestication process and the court's activism, that proved crucial to the Court's decision outlawing torture.

This chapter begins with a brief discussion of the legal sources of Israeli law and the positioning of the Court relative to the other branches of government. A review of early cases will show that the Court initially adopted a formalist judicial approach with very narrow conceptions of standing and justiciability. Gradually, however, the Court became increasingly activist by expanding the scope of these concepts. It began actively promoting civil rights, at times challenging key government interests. After analyzing these cases, the chapter turns to a review of cases dealing with the territories. This section will show that the developments described in the previous section had little effect on Palestinian cases—the Court consistently privileged security concerns over Palestinian rights until the groundbreaking torture ruling in 1999. The next two sections shed doubt on the notion that the torture ruling represents the culmination of a gradual evolution by the Court. First, a review of the handful of successful Palestinian rights claims suggests that they did little to improve the general situation of the Palestinians. Next, the chapter turns to the impact of the passage of the Basic Law: Human Rights and Dignity. While this law revolutionized the concept of civil rights, it had little effect on Palestinian rights claims prior to the 1999 torture ruling. With regard to cases both inside and outside the territories, however, the Court's deliberations occurred as part of an international judicial context in which outside sources influenced the adjudication process, paving the way for the broader domestication process to influence its rulings.

### **History and Early Jurisprudence of the Court**

Israel's highest court operates in two capacities. As the Supreme Court, it serves as a court of final appeal from the lower courts. In its second capacity as the High Court

of Justice (HCJ), it has original jurisdiction over government bodies and administrative actions, meaning that these cases do not pass first through lower courts. The HCJ hears cases “in which it deems it necessary to grant relief for the sake of justice” (Basic Law: The Judiciary: Ch. 3). If an individual feels that the government has violated his or her rights, he or she may petition the Court and request that the government undertake or refrain from certain activities. The Court will intervene where it determines that fundamental liberties and individual rights are at stake. It is in this role that the Court has considered constitutional questions and has adopted an activist stance regarding civil rights, which have been largely judge-made, rather than legislated. It is also in this role that the Court has allowed Palestinian petitions from the Occupied Territories, a development that is neither required by international law nor entirely recognized under Israeli law (Shamir 1990, Hofnung 1996).

The complex historical origins of Israel’s legal system have contributed to the precarious rights’ situation of the Palestinians. At the time of statehood, five sources of law existed: Ottoman law; British Mandate legislation; British common law and equity; Israeli legislation; and religious law, including Muslim, Jewish, and Christian law. The newly independent state faced the question of codification amidst this legal backdrop. The fact that the Israeli system was in flux—partly as a result of massive immigration, and partly because of more immediate security concerns—gave rise to a movement to postpone both codification and the enactment of a constitution. Opponents of codification argued that rather than establishing laws in a vacuum, legal principles should be allowed to evolve (Tedeschi and Zemach 1974). Other interests also prevented the adoption of a constitution. The new government worried about limits on its power. Liberal notions of individual rights did not play a big role in the Zionist ideology that was

shaping the state (Gross, 1998). In addition, religious factions feared that a constitution promoting civil rights would replace religious law and the Torah as the fundamental law of the Jewish state. As a result of these competing interests, Israel decided to keep in force all existing laws while gradually developing an Israeli jurisprudence to replace the hybrid system.

The constitutional debate resulted in a compromise known as the Harari Resolution. Under this plan, a series of Basic Laws to be passed by the Knesset, Israel's parliament, would eventually form a constitution. Until 1992, nine Basic Laws were passed, none dealing with civil rights.<sup>48</sup> These laws had no legal supremacy over regular laws, with the exception of specific entrenched articles that required an absolute majority, as opposed to a plurality, to be overturned.<sup>49</sup> In a small number of cases, the Supreme Court relied on entrenchment to outlaw subsequent Knesset legislation, reasoning that the absolute majority requirement had not been met (see, e.g., *Bergman* 1973, *Agudat Derekh Eretz* 1981, *Rubinstein M.K. et al* 1982). These rulings, however, were the exception to the Court's otherwise limited power to review legislation.

Because the legal system is structured around the concept of legislative supremacy, the judiciary has been limited in its ability to challenge state policy. The legal structure has hindered the Court's ability to overturn parliamentary legislation. With the exception of the few entrenched clauses, the Knesset can with a simple majority enact or amend any law, even if that creates a conflict with a previous Court ruling (Hofnung 1996). While other civil law countries have established constitutional courts or

---

<sup>48</sup> Basic Law: President of the State; Basic Law: the Knesset; Basic Law: The Government; Basic Law: The Judiciary; Basic Law: The Israel Defense Forces; Basic Law: Jerusalem; Basic Law: Israel Lands; Basic Law: The State Comptroller; Basic Law: The State Economy.

<sup>49</sup> Before 1992, the only entrenched clause was Section 4 of the Basic Law: the Knesset, which defined the method of parliamentary elections. Entrenched clauses were later included in Basic Law: Freedom of Occupation (1992) and Basic Law: the Government (1992, 2001).

alternative mechanisms to establish a check on legislative power, the Israeli parliament has maintained an unhindered legislative supremacy and has expressly denied the courts any power to challenge this supremacy. There has been no formal recognition of judicial review of legislative acts. Moreover, Israeli judicial institutions have developed in the absence of two traditional limits on legislative authority that have granted some authority to the courts—a constitution and a formal legal code. This situation changed somewhat with the passage of two Basic Laws in 1992, but the Court’s power of judicial review still lacks formal recognition.

Early decisions strictly adhered to the separation of powers doctrine (Kretzmer 1990). The Court expressly defined its role as interpreting and applying existing law, while refraining from any judgment on the laws themselves: “the law of the Knesset as legislature is law and the court must interpret and apply the law and not abrogate or change it” (*Kaniel* 1973). The latter was deemed a legislative function. In *Zeev v. Gubernik* (1948), the Court explicitly denied itself the power to rule on the basis of reasonableness in connection with the requisitioning of property as part of emergency regulations issued under the Defence Regulations. In *Jabotinsky* (1951), the Court refused to rule on the substance of law relating to the President’s role in the formation of a government, deeming it non-justiciable and arguing that the question was one for the executive and legislative branches. Early conceptions of standing also were very narrow—the Court could provide relief for a specific wrong but was not competent to take up general injustices (Kretzmer 1990, see also *Association of Life Insurance Companies Ltd* 1971).

Despite this circumscribed role, political developments soon gave rise to judicial activism (see, e.g., Maoz 1988, Kretzmer 1990, Hofnung 1996, Edelman 1994). The lack

of a written constitution and a Bill of Rights and the increasingly divisive nature of parliamentary politics created a space for the judiciary to intervene. In the absence of statutory protections, the Court assumed the responsibility of a guarantor of individual rights in accordance with natural justice and democratic freedoms, turning to the constitutional jurisprudence of other countries to give meaning to these supra-legal principles. It also began stepping in where the legislature or government no longer could act effectively. Despite the express denial of any power of judicial review over legislative acts, the HCJ began expanding its role through statutory interpretation and administrative review. This expansion resulted in the functional equivalent of judicial review of legislation by the 1980's, bringing the Court increasingly into conflict with both the legislative and executive branches.

Initially, the Court avoided direct confrontation with the other two branches by relying primarily on administrative review and statutory interpretation (Hofnung 1996). More direct challenges began emerging in the 1970s and 1980s. Aeyal Gross attributes this change to events in Israeli society, including the erosion of trust in the government following the Yom Kippur War and the emergence of civil rights organizations presenting new types of claims before the Court. In addition, six justices retired between 1975 and 1980, and two justices who were to be highly influential on the Court's jurisprudence were appointed — Meir Shamgar in 1975 and Aharon Barak in 1978, both of whom would serve as President (Lahav 1993, Gross 1998). Political stalemates brought about by the infighting accompanying coalition politics and the need to establish national unity governments that required cooperation among rival powers also provided the Court with more opportunities to make decisions where the Knesset proved unable (Hofnung 1996). Gradually, the Court increased its powers of statutory interpretation by

expanding notions of standing, justiciability, reasonableness, and the ability to review administrative decisions on their merits. The result was *de facto* judicial review.

### **Judicial Activism in a Global Context**

In the absence of constitutional protections, the HCJ started stepping in to promote civil rights a few years after the establishment of the state. This activism grew out of its belief that the judiciary should promote fundamental freedoms and the rule of law in a democratic system. Accordingly, the Court adopted an interpretive approach in which it relied on broader judicial norms to fill legislative gaps. Specifically, it turned to principles of natural justice in order to guarantee individual rights, deriving these “extrastatutory legal norms” from the general principles laid out in the Declaration of Independence (Maoz 1988; Edelman 1994; see also, e.g., *Yardor* 1965, *Ha’aretz* 1974 and *Neiman* 1984).

Legal writings by Judge Shamgar and Judge Cohen in the 1970’s reflected this activist stance rooted in the advancement of fundamental rights (Woods 2001). This was particularly true after 1977, when there was no longer a majority party in the Knesset and political divisions increased. Other judges, especially Justice Barak, have continued to advance the Court’s rights-based activism. Barak, who became President of the Court in 1995, has called on the judiciary to apply the principles that are in keeping with Israel’s heritage, including liberty, justice, ‘rightness’ and peace, in order to compensate for the missing Bill of Rights (1988). To give substantive meaning to these principles, the Court has turned to outside legal sources, including U.S. and international law (see, e.g., *Kol Ha’Am* 1953, *Bergman* 1969, *Ha’aretz* 1974, *Sa’ar Adv. et al.* 1979, *Levy and Amit* 1983, *Arjov* 1985).<sup>50</sup>

---

<sup>50</sup> Published Israeli Supreme Court decisions (*Piskei Din*) begin each case with a list of both the foreign and international cases cited. See also Maoz (1988) on the influence of American case law on the Court’s

As a result, the HCJ provides a striking example of the explicit adoption of the public law mantle and the judicial policymaking that accompanies this role, as the cases in this section will demonstrate. Adopting this mantle in the absence of a constitution heightened the HCJ's reliance on outside legal sources. This reliance, in turn, ultimately limited the options available to the Court in justifying the security policy of the state where this policy conflicted with fundamental rights guarantees, as will become clearer in the next chapter.

The decisive case establishing judicial recognition of civil rights weighed the value of free speech in a democracy against the competing security interest in connection with a Communist newspaper that was temporarily shut down (*Kol Ha'Am* 1953). Following the U.S. standard of clear and present danger, the Court ruled that such actions required a "near certainty" of risk to public safety. Moving away from its positivist approach, the Court did not confine itself to existing Israeli law to make its determination. Instead, it linked its decision to the promotion of the values associated with Israel's identity as a democracy, ushering in what was to become the common HCJ practice of promoting civil rights by privileging the supra-legal values of democracy over competing interests.

According to Aeyal Gross, the ruling influenced subsequent decisions by means of three key contributions (1998). First, it resulted in the judicial creation of rights, a path that the Court would follow by drawing upon the general principles of Israel's Declaration of Independence in order to incorporate basic civil rights into the legal system. Second, while the Court did not strike down specific legislation (something it did only when such legislation was in conflict with an entrenched clause of a Basic Law),

---

practice with respect to civil liberties.

it was in effect exercising judicial review. Third, the Court initiated the practice of balancing individual rights with conflicting collective interests such as security or public safety. The general values associated with democracy as represented in Western jurisprudence influenced this balancing process.

Later cases further clarified the status of fundamental freedoms in the legal system. In a case involving freedom of expression and freedom of the press, Justice Shamgar explained the nature of these extrastatutory rights:

The absence in the state of Israel of a single statutory enactment bearing a superior legal status and consolidating constitutional principles does not mean that we lack statutory provisions of a constitutional nature or that our system does not possess constitutional judicial principles, which define basic rights of the individual and citizen. The law in force in Israel embraces...basic rules concerning the existence and preservation of individual freedoms (*Ha'aretz* 1974).

Reinforcing the doctrine established in *Kol Ha'Am*, Justice Shamgar considered the “supra-judicial status” of freedom of expression, which he deemed fundamental to the protection of all other rights and thus an essential principle in any judicial interpretation of entrenched law. This supra-judicial status meant that “freedom of expression should take precedence over any statutory provision tending to restrict it.” The Court subsequently applied this argument to freedom of assembly, procession, and demonstration as well (*Sa'ar Adv. et al.* 1979). Such freedoms find expression through the general legal principles, such as justice, equality and liberty, guaranteed in Israel's Declaration of Independence; they find practical meaning through the jurisprudence of foreign courts.

When the Knesset passed a law providing public financing for the upcoming election campaign only to parties already present in the outgoing Knesset, the Court declared this law invalid based on its conflict with the equality of elections clause in the

Basic Law: The Knesset (*Bergman* 1969). Section 4 of this law requires that elections be “general, national, direct, equal, secret, and proportional.” The justices determined that the term ‘equal’ in this section had the broader meaning of equality of opportunity and thereby encompassed not just the right to elect but the right to be elected as well. It identified the principle of equality of all persons before the law as “the soul of our entire constitutional regime” despite its never being expressly written in either a constitution or an entrenched provision of a basic law (*Bergman* 1969; see also *Agudat Derekh Eretz* 1981 and *Rubinstein M.K. et al* 1982).

As the Court developed its public law role in ensuring democratic values, it also greatly expanded its narrow conceptions of standing and justiciability. In the *Ressler* case, the petitioners challenged the legality of the exemption of Yeshiva students from military service (1986). Several earlier petitions had raised this issue, but they all had been dismissed on the basis of standing and non-justiciability (*Becker* 1970; *Ressler* 1981, 1982). The Court had deemed that the exemptions were a public issue, not a private harm, thereby denying standing to the petitioners. Eventually, the petitioners were granted standing on the grounds that the drafting of Yeshiva students would ease the burden of their reserve service. Nonetheless, then President Landau dismissed the case as non-justiciable (*Ressler* 1982). Echoing the sentiment of previous justices, President Landau noted that the issue was an ideological one, and the Court was “not designed to serve as an arena for public and ideological disputes” (1982).

Eventually, Justice Barak took up the issue and rejected the Court’s earlier conceptions of standing (*Ressler* 1986). In a lengthy exegesis on judicial approaches to standing, he adopted a “flexible liberal approach,” in which he pointed to the public petitioner as the means through which the Court could fulfill its role of ensuring the rule

of law. When an issue is a constitutional one of public importance, he argued, the petitioner need not show a more personal interest. Barak's explanation signaled that the Court was no longer merely an arena for dispute settlement. Instead, "courts in a democratic society should undertake the role of safeguarding the rule of law," a role that requires a broad recognition of public action via standing (Para 23). His conception of a Western legal tradition rooted in the principles of democracy and the rule of law informed his broad view of standing, a view that enabled Palestinian rights claims as well.

These same principles guided his consideration of justiciability. Again, he significantly expanded previous Court doctrine, arguing that every action could be considered within a legal framework—"the fact that a matter is 'clearly political' cannot negate its existence as a 'legal matter'" (Para. 36). On this basis, he rejected the non-justiciability decision of *Jabotinsky* (1951). Further, he maintained that all conduct could be examined on the basis of reasonableness. Even issues of foreign policy and security were subject to judicial review on these grounds. The HCJ would not be able to fulfill its role as the defender of the rule of law, he argued, as long as the doctrine of non-justiciable 'political questions' existed. Judicial review of government action, in his view, safeguarded the separation of powers, the democratic regime, and the rule of law.

Concurring opinions in the *Ressler* (1986) case did not adopt Barak's expansive view of standing and justiciability, but the Court did become increasingly activist. The HCJ began reviewing a broad range of government actions on the basis of reasonableness. In a case that considered the scope of presidential privilege, the justices threatened to repeal a presidential pardon if a proper political investigation were not carried out, despite the guarantee of legal immunity for the president where his duties and

powers were concerned (*Barzilai* 1986). In a related case, the Court struck down the Housing Ministry nomination of an individual who had been implicated in two cover-ups involving members of the General Security Service. Although the individual in question had never been convicted, the Court ruled that the nomination decision was so unreasonable as to be null and void (*Eisenberg* 1992).

The Court's expanded review doctrine extended to security issues as well. In *Schnitzer* (1988), it weighed security considerations against freedom of expression. The HCJ had in *Zeev v. Gubernik* (1948) refused to rule on the reasonableness of actions taken under the Defence Regulations. Forty years later, the Court showed no such reluctance to rule on the substance of government action:

The Mandatory Defence Regulations must be interpreted against the background of Israel's values. In interpreting them one must balance state security and public safety and order, on the one hand, and freedom of expression, on the other. This balance means that freedom of expression can be restrained, as a last resort, only when there is a near certainty of substantial danger to state security and public order (*Schnitzer* 1988: 17).

Security, the justices noted, was not an end in itself but a means to the end of a democratic system that protects individual rights. Aware that judges had in the past shied away from reviewing security-related decisions, the justices identified an evolving understanding, notably in British law, which had eliminated the taboo against reviewing such decisions. The Court had early in its career relied on a British decision that showed deference to security considerations (*Liversidge* 1941) in order to limit its own power of review in security issues (*Alayubi* 1950). In *Schnitzer* (1988), the Court took note of the fact that this decision no longer reflected the prevailing view in Britain and that British courts had begun reviewing security decisions, including actions that were based on defense or emergency regulations.

Having established justiciability, the Court then examined the reasonableness of the military censor's decision to prevent publication of an article. The Court based its determination on the values of the state of Israel, values that flowed from its identity as a democracy. Employing the balance cited above, the Court ruled that the censor did not give sufficient weight to freedom of expression and that his assessment of a real threat to state security was not reasonable: "a reasonable censor, functioning in a democratic regime and required to strike a balance between security and freedom of expression, would not arrive at the same conclusion" (1988: 33). In weighing the interest of security against other interests, the justices noted that the overarching goal was a democratic system with respect for fundamental rights and the rule of law. Security was just one means among many to achieving this end and had to be weighed against other means, including freedom of expression. As judicial policymakers, the justices weighed these competing interests and sought an outcome that would promote their vision of the democratic social order.

The Court employed similar reasoning in a case involving denial of a demonstration permit to peace protestors because of the fear of an outbreak of violence, which had occurred at a previous demonstration (*Levy and Amit* 1983). Justice Barak characterized the right to demonstrate as a basic human right, an unwritten right deriving from the democratic nature of Israel: "it is recognized, alongside the freedom of expression, and derived therefrom, as belonging to the freedoms that shape our democratic regime" (Para. 2).

In all of these cases, the Court's legal reasoning was based on its construction of democracy as the central feature of Israel's identity, and its associated inferences regarding the defining norms of democratic states—the latter based in an interpretive

approach that looked to outside legal sources. Democracies respect the separation of powers and the rule of law. Democracies guarantee fundamental freedoms, including freedom of expression, freedom of the press, and freedom of assembly, as well as the basic principle of equality. The Court saw itself as the guarantor of the democratic character of Israel, a character that was grounded in the promotion of fundamental human rights. As such, the universal norms advanced by the global judiciary influenced the Court's jurisprudence, ultimately leading it to challenge the government in areas where it had previously refrained—most notably in the security arena.

Having rejected its earlier restricted role, the Court began to see itself as a participant in political decisions and constitutive questions of law alongside the executive and legislative branches (Hofnung 1996). And its adoption of a public law role encouraged it to ignore common law rules and limitations where infringements of justice, civil rights, and the rule of law were concerned (Maoz 1988). Accordingly, the Court expanded its reach by developing expansive notions of standing, justiciability and reasonableness. These advances, however, have not been without their limits. The Court only has been able to overturn legislation when it has come into direct conflict with an entrenched clause of a Basic Law. Review of administrative acts also has been constrained where the will of the legislature has been clear, preventing the Court from interpreting precisely drafted legislation in accordance with the rights found in the Declaration of Independence (Gross 1998; see also Kretzmer 1992).

More significant for Palestinian rights claims, the Court's use of the Declaration of Independence has not resulted in the advancement of liberal values alone. Aeyal Gross has noted that the Court employs not just the liberal tenets of the Declaration, but also its Zionist component, defining Israel as a Jewish state. He summarized general HCJ

policy:

The established perimeter is not security-related but ethnic. There were cases of petitions against security bodies in which the HCJ not only agreed to rule, but also ruled in favor of the petitioners. For example, the case of the paper “Ha’eyr” against the Head Censor in relation to the Head of the Mossad, or the petition of Alice Miller, the youth who asked to be accepted to flight school, against the Air Force. When speaking of security matters involving only Jews, the HCJ is ready to examine the reasonableness of the security considerations. When speaking of matters involving Palestinians, from Israel or from the territories, the HCJ prefers not to interfere—even if related to purely civil issues (cited in *Ha’arets* 6/27/99 [*Hebrew*]).

Gross maintained that the Court deliberates within a ‘Jewish-Zionist’ perspective, in which every case involving a Palestinian or an Israeli Arab is deemed a security matter. By contrast, cases in which Israeli citizens have challenged the security establishment have been framed as civil rights issues.

As a result, growing judicial activism had little effect on Palestinian and Arab legal claims before the torture ruling. The Court’s jurisprudence in the territories was striking in its departure from its established doctrines of judicial activism where civil liberties were concerned. It was unwilling to review government actions in the territories and rarely challenged the reasonableness of a decision. The HCJ unquestioningly supported the Military Government’s restrictions on fundamental liberties virtually without exception. It upheld deportations, house demolitions and sealings, prolonged curfews, land requisitions, the establishment of Jewish settlements, election suspensions, school and business closings, limitations on freedom of communication and assembly, and obstacles to family reunification and the right of return. In contrast to the cases in the previous section establishing the supra-judicial status of freedom of movement, of expression, and of the press, these freedoms were all restricted in the territories in the interest of security (*Badir* 1985, *Dahar* 1985, *Atamallah* 1987 [freedom of movement];

*Al-Talia* 1978, *Mala'by* 1979, *Kassem* 1987 [freedom of express and of the press]).

Palestinians achieved little judicial relief because the Court accepted the government's framing of these cases as matters of national security that were not subject to judicial determination. This allowed the collective interest of security to trump the question of rights (Gross 1998).

The next section will review Palestinian rights cases prior the torture ruling, illustrating the Court's deference to security concerns with respect to the territories. Even as the Court interpreted international norms to support state policy, however, it could not entirely escape the implications of its adoption of a public law role, particularly as it relied on international legal norms as interpreted by the global judiciary. This reliance constrained the Court's freedom to wholly support security policy in the territories and ultimately led it to directly challenge this policy with regard to torture.

### **Legal status of the territories and the sources of law**

The Israeli Defense Forces (IDF) have ruled the territories since 1967. The international laws of occupation, however, were not drafted with extended occupation in mind, creating a situation of legal ambiguity in the West Bank and Gaza. As a result, the legal status of the territories has evolved through legislation and jurisprudence as the HCJ has defined the framework within which the Military Command operates (see *Cooperative Society* 1982 for a summary of the Court's jurisprudence on the territories through 1982). The Court has explained that it reviews military action on the basis of the laws of war and of belligerent occupation, of existing laws in the region, and of Israeli administrative law, including democratic principles of law and respect for human rights (Cohen 1986). In considering the legality of IDF activities with far-reaching effects in the territories, the Court has determined that the Military Command is temporary, but that

its duration is in no way limited by international law. In addition, the actions of the Military Commander must be based on immediate military needs alone, not on the national, economic, or social interests of the state, nor its broader national security policies (*Abu Aita* 1981, *Cooperative Society* 1982). As seen below, however, the distinction between immediate military needs and broader national security goals has become blurred.

The unique legal situation of the territories, which denies Palestinians the basic protections found in Israeli law, has heightened the role of international law. Palestinians have called upon international law in virtually every case originating in the territories. Before the 1999 torture ruling, the HCJ had adopted two approaches to dealing with alleged violations of international law. Either it interpreted the law in a manner that enabled it to refute that a violation had occurred, or, alternatively, it simply rejected the premise that the law was justiciable in Israeli courts.

The Court initially put forth an all-encompassing approach to the incorporation of international norms, both customary and treaty-based, in the *Stampfer* case (1954). But this early approach was soon restricted by security considerations. A few months after *Stampfer*, the Court clarified its position in the *Samra* case (1956), adopting the dualist system in which only customary law was justiciable (Benvenisti 1993). Under this system, customary international law is automatically incorporated into domestic law, but treaties do not become part of domestic law until implementing legislation has been passed. Even though treaties are not directly enforceable in the Court, however, the justices have sometimes relied upon unincorporated treaty law or declarations such as the Universal Declaration of Human Rights to aid in the interpretation and decision-making process (Lapidoth 1990, Benvenisti 1993, see, e.g., *Shtreit* 1963).

In two early cases (*Kurtz and Latushinski* 1967, and *The American Beth-El Mission* 1967), the Court took a broad view of custom that included both the International Covenant on Civil and Political Rights (ICCPR) and the Universal Declaration of Human Rights (UDHR). But as the Court faced the competing interests of observing enlightened international standards and also accommodating security considerations, it began to adopt a more restrictive view of custom and increased the burden of proof for establishing a customary norm. Justice Shamgar established a standard of such overwhelming acceptance (*Abu Aita* 1981) that it constituted a practically insurmountable barrier (Benvenisti 1993). And even on the rare occasions where the Court did grant the existence of a customary norm, it nonetheless interpreted the norm in a manner that would be consistent with government policy.

According to Eyal Benvenisti, the Court severely restricted the applicability of international law because it could not rely on common avoidance doctrines such as non-justiciability, political questions, and the Act of State doctrine (1993). Both the Court and the government had an interest in allowing judicial review of acts in the territories to bolster their legitimacy. By appearing to uphold international standards, Court decisions gave the executive branch the appearance of legitimacy under international law and, at the same time, left it free to pursue its desired security policy.

One way that the Court has been able to maintain this veneer of legitimacy is by arguing that general customary international human rights protections, including those found in the ICCPR and the UDHR, apply only in times of peace and, as such, are not applicable to the territories, which exist in a state of war. This despite the fact that the preamble to the 1907 Hague Convention Respecting the Laws and Customs of War on

Land specifically requires adherence to the norms of customary international law.<sup>51</sup> The Court also has ruled that the UDHR is not a legally binding document and, as such, has no judicial force (*Taha [Minor]* 1988). This leaves the laws of belligerent occupation, found in both customary and conventional international law and encompassed by two key documents—the 1907 Hague Regulations and the 1949 Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War. The HCJ has ruled that the protections in the Hague Regulations constitute customary norms, but the protections found in the Geneva Convention do not. The Court has thus effectively eliminated all human rights treaties from its purview except for the Hague Regulations, which it considers in the majority of cases involving the territories.

The Israeli government, for its part, has denied that a state of belligerent occupation exists in the West Bank and Gaza, thereby denying the applicability of the Fourth Geneva Convention and the Hague Regulations. The government has rejected the notion that Gaza and the West Bank qualify as occupied territory under the Fourth Geneva Convention for fear that this would constitute a recognition of Egyptian and Jordanian sovereignty in Gaza and the West Bank, respectively. Meir Shamgar, writing as Attorney General, justified the government's position, arguing that "there is no existing rule of international law according to which the Fourth Convention applies in each and every armed conflict whatever the status of the parties. Territory conquered does not always become occupied territory to which the rules of the Fourth Convention apply" (1971: 263). Stated government policy, however, is to act in accordance with the

---

<sup>51</sup> The Preamble reads, in part: "Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience."

humanitarian provisions of the Convention.

Court doctrine, by contrast, has classified the territories as occupied under the Geneva Convention. But this interpretation has had no practical effect. The Court has ruled that it is unable to apply the Convention because treaties require domestic legislation to be justiciable. An individual occupant of the territories only has rights under customary international law, or treaty law that has been incorporated into domestic legislation (*Ayub* 1978). Accordingly, the legal system in the territories has been based on two sources: *de facto* observance of the humanitarian provisions of the Fourth Geneva Convention and the Hague Regulations; and “observance of the basic principles of natural justice as derived from the system of law existing in Israel, whether or not these rules have found expression in the Fourth Convention” (Shamgar, 1971).<sup>52</sup> This reference to natural justice suggests that the Court might follow the same path it has followed in cases outside the territories—relying on the basic principles of natural justice that find expression within democratic systems in order to promote fundamental human rights. In practice, however, the Court has relied on questionable interpretations of international law alongside the security argument in an effort to satisfy the competing interests arising from its domestic and global identities, as the cases below will demonstrate. The Court has attempted to reconcile its allegiance to international norms upholding human rights with its identification with the security situation of the state; accordingly, it has neither fully ignored nor fully adhered to the dictates of international law.

In addition to the general sources of law laid out by the Court, the Military

---

<sup>52</sup> The Court initially held that both the Hague Regulations and the Geneva Conventions were non-justiciable. Following a 1973 article by Professor Yoram Dinstein arguing that the Hague Regulations were declaratory of customary international law, the court reviewed the arguments of other legal scholars and adopted this view (*Ayub* 1978).

Administration governs by a series of security enactments. The HCJ has ruled that international law authorizes such security legislation in the territories:

The Military Commander and the entire Military Administration derive their powers from the actual control of the occupied area and from rules of public international law, namely, from the laws of war which also define the content and scope of these powers. According to the laws of war, the power of a Military Commander is not limited to application of the local law in force, so that he is authorized to express his powers by means of security legislation, which is also defined by the laws of war (*Taha [Minor]* 1988).

The Court added that the military administration is subject to review on the basis of both international law and administrative law. The Court may review the actions of the members of the military government in their capacity as public officials. The scope of this review, however, is limited by the distinction between activity in civilian matters and that in military matters. The scope of review in military matters, the Court has emphasized, is very restrictive (*Cooperative Society* 1982).

In general, the HCJ has been reluctant to question the security arguments of the military:

In a dispute such as this, involving questions of a military-professional character in which the Court does not have its own founded knowledge, it will presume that the professional arguments... of those actually responsible for security in the occupied areas and within the green line are valid. This presumption may only be rebutted by very convincing evidence to the contrary (*Amira* 1979).

Despite this stated deference to security considerations both inside and outside the Green Line, this approach departs from the Court's demonstrated willingness to challenge security policies outside the territories in the cases described earlier. In the majority of cases involving Palestinians, by contrast, the Court has unquestioningly accepted the military administration's security argument without weighing the competing issues of justice (see, e.g., *Taha* 1980, *Al-Sayad* 1980, *Baransa* 1981, *Tzalum* 1986, *Nazal* 1988,

*Shav* 1990).

In many early cases, the HCJ did not take up the question of the validity of the Hague Regulations and Geneva Convention in the territories, instead ruling that the actions in question did not violate these laws (*Christian Society* 1971, *Electric Corporation for Jerusalem* 1972, *Hilu* 1972). For example, when the legality of the internment of men deemed security threats in a camp in South Lebanon was challenged, the Court ruled that the Military Command acted in accordance with Article 78 of the Geneva Convention, which allowed internment for security reasons (*Tzemel Adv.* 1982).

In another case challenging the competence of military courts to determine prisoner of war status, the judgment hinged on the requirement in Article 5 of the Geneva Convention that a “competent tribunal” determine such status (*Jab’r* 1981). Turning to U.S. and British practice, the Court accepted military courts as competent tribunals, even though an individual had no right to appeal the decisions of these tribunals to a higher court. The Court concluded that the legal system in the territories required only that a convicted person be able to submit an appeal and application to the Military Commander. The requirement of a “competent tribunal” did not create a judicial right of appeal (see also *Shamgar* 1971).

Petitioners in a later case argued that the right of appeal was a fundamental right guaranteed in the International Covenant on Civil and Political Rights (ICCPR), the Hague Regulations, and the Fourth Geneva Convention (*Arjov* 1985). Reviewing precedent and legal literature, the HCJ declined to establish this right as an extrastatutory legal norm, reasoning that “the right of appeal is not one of the basic rights recognized in our legal system, which derive from basic legal concepts forming an essential part of our law, such as freedom of speech or freedom of employment” (1985). Instead, and in

contrast to its approach with respect to basic rights outside the territories, the Court concluded that the creation of the right required a statutory provision. Where the stakes involved a security question related to the territories, the Court proved unwilling to extract a fundamental right of appeal from the general principles of law found in the Declaration of Independence. Nor did it turn to other legal sources to affirm the right, noting instead that although the right of appeal is found in the ICCPR, it is found in neither the Universal Declaration of Human Rights nor the European Convention for the Protection of Human Rights and Fundamental Freedoms. The HCJ concluded that the petitioner thus had no claim, since Israel was not a contracting party to the ICCPR and the right was not yet a customary norm.<sup>53</sup> Moreover, the right of appeal as found in the ICCPR could be suspended in times of public emergency.

After reviewing the analyses of legal scholars, the Court interpreted the obligation found in the Geneva Convention as demanding only the maintenance of an existing appellate system rather than the introduction of such a system. Further examination of the works of legal scholars and American military manuals led the Court to the conclusion that the right of appeal did not require the existence of a court of appeal as such, but only that there be some sort of appeal procedure, either judicial or administrative. No customary norm for the establishment of a military appellate tribunal could be identified.

In considering the right of appeal, the justices continued their practice of turning to outside legal sources to give meaning to the general principle. Only they did not employ these sources to actively and expansively promote civil rights as fundamental

---

<sup>53</sup> Israel ratified the ICCPR in 1991. This has had little tangible effect on Palestinian rights claims, given the Court's previous interpretation that this treaty applies only in times of peace and thus does not apply to the territories.

elements of democracy. Rather than give meaningful expression to the right of appeal, they struck at its very core. By denying the judicial element of the right, they provided little more than a hollow guarantee—appellants were guaranteed only administrative, not judicial recourse. The justices did recognize that the right of appeal was a fundamental element of due process, and they recommended the establishment of a judicial appeals process in the military courts. But they did not go so far as to establish this themselves as a legal requirement.

### **Hague Regulation 43: Public order and the local law doctrine**

The Court increasingly has relied on the Hague Regulations to assess the legality of actions in the territories. These regulations center around two key concerns—ensuring the legitimate security needs of the occupant and guaranteeing the needs of the civilian population of the territories. Specifically, the Court has employed the public order and safety requirements laid out in Regulation 43:

The authority of the power of the State having passed de facto into the hands of the occupant, the latter shall do all in his power to restore, and ensure, as far as possible, public order and safety, respecting at the same time, unless absolutely prevented, the laws in force in the country.

In balancing these concerns, the Court has taken a permissive view of what falls into either legitimate security considerations or the needs of the civilian population (see, e.g., *Christian Society* 1971, *Electric Corporation for Jerusalem* 1972).

This regulation, in combination with the security argument, has legalized a broad range of questionable activities under the guise of maintaining public order and safety. The Court has refused to review the security decisions of the Military Administration and has accepted that these decisions serve the interest of public order and safety laid out in Regulation 43. In cases where government actions may be in violation of other parts of

the Hague Regulations, the Court has selectively invoked Regulation 43 to legalize these actions, privileging the general obligation to ensure public order and safety over more specific obligations to refrain from particular practices.<sup>54</sup>

The Court has progressively expanded the scope of Regulation 43, applying the obligation to maintain order and security to a growing list of military actions in situations of varying urgency. It has accepted the military necessity argument to legalize the building of roads on private land (*Tabib* 1981). It also has accepted the Military Commander's argument that a highway served the needs of the civilian population even when the population itself challenged the activity (*Cooperative Society* 1982). And the Court upheld the army's forced removal of Bedouin tribes from their land—which was undertaken to prevent terrorist activities that had been occurring in the area—under the doctrine of military necessity (*Hilu* 1972; see also *Arnon* 1972, *Salame* 1978, and *Amira* 1979).

Gradually, the Court began to reject the distinction between strict military needs (the standard under international law) and general security needs or military logistic needs, the latter justifying a broader range of activities including preventive measures in areas where acts of sabotage had not yet occurred (*Ayub* 1978; see also *El Nazer* 1981 and *Goha* 1989 on the legality of land seizures; and *Abu Ryan* 1988 on the expanded definition of security needs). Even land requisitions and the establishment of civilian settlements could be construed to serve security needs where a state of belligerency existed (*Ayub* 1978, *Amira* 1979). To bolster its contention that land requisition for preventive security purposes was legal under the Hague Regulations, the Court employed

---

<sup>54</sup> In one example, the Court upheld taxation in the territories, determining that it contributed to the general obligation to serve the local population found in Regulation 43 and that this obligation prevailed over a more specific ban against taxation, found in Articles 48 and 49 (*Abu Aita* 1981).

the arguments of selected legal scholars. It also turned to the *British Manual of Military Law* (1958) to justify the destruction of private property for reasons of military necessity (Timraz 1991).

In short, the HCJ developed an expanded security doctrine in which the standard of military necessity, meant to respond to a concrete threat, began to encompass the more far-reaching objectives of general military and logistic needs. The HCJ advanced this doctrine by emphasizing that the classification of an imperative military necessity was solely within the discretion of the military authority and could not be determined by the Court. Contrary to its practice with respect to activities inside of the Green Line, the Court declined to review the security arguments of the military.

At times, the Military Administration has chosen to rely on local laws whose enactment pre-dated the occupation to achieve its security goals. The Court has relied on Article 64 of the Fourth Geneva Convention to determine the validity of these local laws:

The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention.

The Court also has employed Regulation 43 to determine the extent to which local laws apply against conflicting security enactments or international law. In practice, this has meant negating local laws that interfere with security policy. For example, the Court upheld the suspension of local election laws on the grounds that the municipal authorities were engaged in political activity viewed as threatening to the occupying forces (*Amar* 1983). The expanded security doctrine described above has granted the Military Administration wide latitude to interfere in local political affairs in the territories under the Regulation 43 requirement to uphold public order and safety. At the same time, the

general obligation to ensure order has also been used to justify the application of local laws that support military policy, even if their legality under international law is questionable. The local law doctrine has been used, in particular, to justify deportations and demolitions, ignoring the fact that these practices violate the Convention.

### **Deportations**

Between 1967 and 1987, over 1000 orders of deportation from the territories were issued. During the first five years of the *intifada*, Israel deported 481 Palestinians from the territories (B'Tselem).<sup>55</sup> Deportations are authorized under local law, based on Regulation 112 of the Defense Emergency Regulations. These regulations were enacted by the British Mandatory Government and have remained in effect. According to the Court, deportations carried out to maintain public order do not violate the ban on deportations found in Article 49 of the Fourth Geneva Convention (*Abu Awad* 1979, *Nazal* 1985). This ban, in its view, was intended to prevent the type of atrocities and mass transfers committed by the Germans during World War II, as distinguished from individual deportations. The latter are allowed if necessary for public security and order, which the occupier has an obligation to ensure under Regulation 43 (*Afu* 1987).

In his role as Attorney General, Shamgar clarified the legality of deportations:

It seems that Article 49 does not apply either in terms of its wording or in terms of its intent and purpose. On the other hand, Article 64 of the Convention, according to which the Defense Regulations remained in force, is effective and permits the further use of Regulation 112 of the Defense Regulations according to local law and without contradicting any of the norms of the Geneva Convention (1971: 275).

Shamgar characterized the application of local laws legalizing deportations as a fulfillment of the duties outlined in Hague Regulation 43 and Article 64 of the Geneva

---

<sup>55</sup> Israel has not deported any residents of the territories since December 1992.

Convention. The local law doctrine has thus enabled the HCJ to uphold deportations as legal under international law.

In a concurring opinion, Justice Bach disagreed with the Court's deportation jurisprudence (*Afu* 1987). He argued that the language of Article 49 clearly prohibited individual as well as mass deportations, even where there was a security risk. Nonetheless, he joined the majority in upholding the deportations because of the non-justiciability of the Geneva Convention. But he reminded the government of its oft-stated position to uphold the humanitarian provisions of the Geneva Convention even though they were not enforceable in Israeli courts. In a similar dissent in a later case, however, he argued that the articles prohibiting deportation were not predominantly humanitarian in nature (*Sagdia* 1988).

The HCJ also disputed that any violations of Article 49 had occurred in considering the deportation to Lebanon of 415 inhabitants of the territories (*Association for Civil rights in Israel [Twelve Petitions]* 1992). The Court determined that the orders did not constitute mass expulsion but were individual in nature. It then took up the question of the right to be heard before the orders were carried out. Although it recognized this right, the Court accepted the government's argument, based on Court precedent, that military necessity and the need to safeguard human life prevailed over the right to be heard. The Court departed from its activist promotion of civil rights and cited British and American law affirming that the norms of natural justice, although fundamental to democracy, could be denied in the interest of national security. The right to be heard, the Court concluded, could be applied after the deportations had taken place.

The HCJ limited itself to administrative review of deportation decisions. It declined to rule on the manner in which deportation orders were carried out, presuming

that the Minister of Defense would act in accordance with the law (*Shahayin* 1985; see also *Maslam* 1991). It also denied itself an appellate role in reviewing deportation decisions, arguing that such decisions lie solely within the discretion of the military authority—its expansive notions of justiciability inside the Green Line notwithstanding.

The 1988 publication of an article critical of Israel's deportation practice by an Israeli legal scholar (Dinstein 1988) sparked a renewed challenge to the Court's interpretation of Article 49 ([*Second Phase*] *Matur* 1988). But rather than review its earlier decision upholding the legality of deportations (*Afu* 1987), the Court maintained that the Fourth Geneva Convention was not enforceable in Israeli courts, rendering such a review pointless (*Matur* 1988; see also *Nassaralla* 1988). It also chose not to review the evidence on which the deportation order was based, opting to rely on the reasonableness of the decision made by the IDF commander and the Advisory Board. The Court made a similar non-justiciability argument in a case challenging the transfer of prisoners to detention in Israel, maintaining that domestic law governed the issue (*Sagdia* 1988).

### **Family Reunification**

The Court has also denied the justiciability of the Fourth Geneva Convention in family reunification cases. Specifically, it has construed Article 49, which holds that protected persons may not be expelled from occupied territories, as constitutive rather than declarative of an international norm (*Abu El-Tin* 1972). Because the norm was created by treaty, it does not contain a justiciable right in the absence of implementing legislation. Justice Etzioni nonetheless analyzed the treaty and ruled that the government was not in violation, as the issue was not deportation but rather the right of return, a right he did not believe the treaty guaranteed. This same reasoning was employed in a number of family reunification cases. When the petitioners relied on the right of return

found in the Universal Declaration of Human Rights, the Court responded that the UDHR did not apply to circumstances of belligerent occupation (*Mustafa* 1982). In keeping with its general jurisprudence in the territories, the Court both denied the applicability of the relevant law and denied that there was a violation of the law in any case.

In one family reunification case, the petitioners submitted the opinions of two well-known legal scholars (*Shaine* 1986). Both scholars argued that Israel was in violation of the Fourth Geneva Convention and of customary international law. They cited numerous international human rights documents, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, The European Convention for the Protection of Human Rights and Fundamental Freedoms, the American Convention on Human Rights, and the Hague Regulations, as well as decisions by the European Commission on Human Rights and the European Court of Human Rights. The Court rejected their assertions and responded that neither the Hague Regulations nor the Geneva Convention specifically mentioned family reunification:

The subject of reunion of families has always been regarded as a purely humanitarian one, regulated individually in each case, by means of ad hoc arrangements, made according to the changing security and political conditions (*Shaine* 1986).

The Court also found no custom regarding the right of aliens to enter a state, labeling this right an “innovation” of one of the scholars. In its attempt to validate government policy in accordance with international norms, the HCJ interpreted international law in a manner that enabled it to refute that a violation had taken place.

The Court added that the human rights treaties cited by the authors did not govern the territories in any case, as they were governed by the laws of war found in the Hague

Regulations and the Fourth Geneva Convention. Moreover, even the human rights treaties contained clauses allowing derogation in times of war or public emergency. Again, the Court denied both the applicability of the relevant international law and the existence of a violation in the event that the law was applicable. It accepted the general application of the Military Administration's policy restricting family reunification on the basis of security considerations in the region without regard to the circumstances of a specific case (see also *El Saudi* 1986). The Court made clear that it would question the reasonableness of a decision only in a case of exceptional humanitarian circumstances (*Sharab* 1987).

### **House sealings and demolitions**

Perhaps the issue that the Court has taken up more than any other has been punitive house demolitions (Simon 1994). Demolishing the home of a terrorist's family has been a common "deterrent" measure employed by the Military Commander, as authorized under Article 119 of the 1945 Defense Emergency Regulations.<sup>56</sup> The practice reached its height during the first *intifada*, with 125 houses demolished and 41 sealed in the first year alone (Simon 1994). Between 1987 and 1997, 451 complete demolitions and sixty-two partial demolitions occurred (B'Tselem). In the ninety-four demolition cases decided between 1979 and 1991, only three demolition orders were overturned (Simon 1994).

---

<sup>56</sup> Article 119 states, in part, that "A Military Commander may by order direct the forfeiture to the Government of Palestine of any house, structure or land from which he has reason to suspect that any firearm has been illegally discharged, or any bomb, grenade or explosive or incendiary article illegally thrown, detonated, exploded or otherwise discharged, or any house, structure or land situated in any area, town, village, quarter or street the inhabitants or some of the inhabitants of which he is satisfied have committed, or attempted to commit, or abetted the commission of, or been accessories after the fact to the commission of, any offense against these Regulations involving violence or intimidation or any Military Court offense; and when any house, structure or land is forfeited as aforesaid, the Military Commander may destroy the house or the structure or anything in or on the house, the structure or the land."

As Attorney General, Shamgar justified house demolitions under the local law doctrine. He also upheld their legality under the military necessity doctrine found in both the Hague Regulations (Rule 23) and the Geneva Convention (Article 53). In his view, military necessity allowed the destruction of homes when they were part of the base of military action. More than this, military necessity even legalized their destruction to further “effective military reaction,” or deterrence (Shamgar 1971).

Dan Simon has identified three stages in HCJ demolition jurisprudence (1994). Before 1979, no demolition cases reached the Court because the military carried out demolitions without warning. The second stage began in 1979 with the *Sakhawil* case, in which the Court first sanctioned sealings and demolitions under Regulation 119. It was not until 1989, however, that the Court applied the right to be heard to demolitions and began reviewing almost all demolition orders.

In *Sakhawil* (1979) the Court rejected the petitioner’s argument that sealings violated the Geneva Convention, ruling that “there is no contradiction between the provisions of that Convention... and the use of the authority vested in the respondent by legislation which was in force at the time when the Judea and Samaria Region was under Jordanian rule and which has remained in force in Judea and Samaria to this day” (see also *Khamamra* 1982, *Alfasfus* 1988, and *Daka* 1989). Putting aside the justiciability of the Geneva Convention, the justices argued that the sealing of a room belonging to the petitioner’s son was legal under Jordanian emergency regulations still in force in the region. Since article 64 of the Geneva Convention called for the maintenance of local law, the Court concluded that sealings did not violate the Convention. Relying solely on this article, the justices ignored the other humanitarian provisions of the Convention and the Hague Regulations. These guarantees provided for due process and prohibited

collective punishment as well as confiscation or destruction of private property (Simon 1994).

Until 1982, HCJ decisions dealt with room sealings, not with house demolitions. This changed with the *Khamri* case, where the Court ruled that the demolition of homes was not an unreasonably drastic measure (1982). The ruling gave the army a green light to begin favoring demolitions over sealings (Simon 1994). The army had to this point relied on sealings in an effort to avoid a critical judgment from the HCJ. Once the *Khamri* ruling dispelled this fear, demolitions became more common.

Subsequent cases broadened the scope given to the Military Government to undertake sealings and demolitions. The Court allowed demolitions of rented homes and multi-apartment buildings for deterrence purpose (Simon 1994). It also adopted a broad view of residency and of the authority granted under Regulation 119, permitting the demolition of homes belonging to individuals who had nothing to do with the commission of the crime (*Hagba* 1990, *Alamrin* 1992). The Court ruled that the suffering inflicted upon relatives from sealings or demolitions was insufficient grounds to deny its use as a warning and as a deterrent measure (*Ahlil* 1988, *Ragabi* 1989, *Kahavagi* 1989, *Hizran* 1991). Emphasizing the deterrent purpose of Regulation 119, Justice Elon argued that while the suffering endured by family members sharing a residence with the suspect was regrettable, it was akin to the suffering endured by relatives as a result of criminal convictions (*Bakhari* 1989).

With demolitions, like with other government actions in the territories, the HCJ sought to legitimize otherwise questionable government policy by selectively interpreting international law rather than simply disregarding it. When the International Committee of the Red Cross submitted a legal opinion holding that Regulation 119 was in violation

of international conventions, particularly the Fourth Geneva Convention, the Court responded that the practice was in fact legal according to these conventions (*Jab 'r* 1986). Ignoring Article 64 (calling for local laws to be compatible with the Convention), the Court responded that compatibility with the Convention was irrelevant because Regulation 119 constituted part of the local law in force upon the IDF's entry into the territory, and it remained in force as called for by the Hague Regulations and the Geneva Convention (*Sakhawil*1979, *Khamri* 1982). In other words, the HCJ used international law to uphold the local laws validating demolitions, while ignoring the fact that the same international law made the demolitions themselves invalid. This despite that fact that Justice Barak had stated in a previous decision that the application of local law must be in conformity with Israeli administrative law and with the international law of belligerent occupation (*Cooperative Society* 1982).

The HCJ also has ruled that demolitions do not constitute collective punishment, which is prohibited both in Regulation 50 of the Hague Regulations and in Article 33 of the Fourth Geneva Convention. Because the terrorist is tied to the house to be demolished, the Court has reasoned that the occupants of the house are connected to the act of terrorism: "A demolition of a terrorist's house cannot be considered a 'collective punishment' because the house about to be demolished is connected to the terrorist, and not to people unconnected with the matter" (*Dagalis* 1985, excerpted in *IYB* 1987: 316). In ninety-four cases involving 145 homes, only seven homes were owned by the offender (Simon 1994). One reason these demolitions were carried out with ease is that Regulation 119 contains no provision guaranteeing judicial process, leaving the decision to the discretion and reasonableness of the Military Commander.

The denial of judicial process changed in 1989, when the Court began reviewing

demolition orders following a case brought by the Association for Civil Rights in Israel (*ACRI* 1988). The petitioners argued that the right to be heard was a fundamental part of the legal system. Justice Shamgar agreed, deciding that as an administrative officer, the Military Commander was bound by Israeli administrative law, customary international law, and the humanitarian rules of the Fourth Geneva Convention and that the principles of natural justice, of which the right to be heard was one, were an integral part of Israeli administrative law. Consequently, actions under Regulation 119 became subject to judicial review as administrative acts. Justice Shamgar, however, limited the scope of this review in deference to security considerations. He excepted military-operational circumstances that called for immediate action (see also *ACRI* 1990). And he did not extend the right to be heard to the sealing of rooms, as this was a reversible process. Finally, he distinguished between judicial review of the Military Commander's discretion and review of the evidentiary basis. A later ruling again emphasized that the right to be heard did not mean that the Court would substitute its own discretion for that of the Military Commander (*Aga* 1989). The HCJ confined itself to examining the reasonableness of the Commander's decision without itself reaching an independent determination based on the evidence. The only requirement was that a reasonable person consider the evidence sufficient. Accordingly, the HCJ reviewed the reasonableness of demolition orders, but did not question their legality (*Khamri* 1982).

The *ACRI* case ushered in what Simon deemed the third stage in the Court's jurisprudence on demolitions. Since this case, the Court has reviewed almost all demolition orders. Judicial review has alleviated the severity of the practice, resulting in the substitution of sealings and partial demolitions for full demolitions, as well as the withdrawal of some demolition orders. This stage also saw division within the HCJ, with

the Court splintering into three different views — continued support for demolitions, indirect criticism of the practice by finding of fault in specific orders, and direct condemnation of the practice via outright dissent (Simon 1994). In many of these indirect challenges, the Justices went against their earlier opinions, although they did not overturn them.

Justice Or indirectly challenged the practice of demolition in his majority opinions in the *Nasman* (1989) and *Nimer* (1990) cases. In *Nasman*, the Court ordered the Military Government to reconsider the demolition order because of factual inconsistencies. In *Nimer*, the Court departed from its previously broad designation of residency and annulled a demolition order on the grounds that the offender was not in fact a resident of the petitioner's house, despite sleeping there at times. In both cases, decisions upholding the demolition orders would have been consistent with Court doctrine.

The Court also began questioning the demolition of rented homes and indicated that it might begin to narrow the scope of the practice (Simon 1994; see also *Caracra* 1990). In one instance, the Court ordered that a room be sealed rather than demolished because the time lapse of two years since the event had greatly diminished the deterrent effect of Regulation 119 (*Hodli* 1991). This was a departure from the Court's argument in *Gabrin* (1991), where it had ruled that a one-year time lapse did not in itself void the security needs of Regulation 119.

The HCJ also began to consider the proportionality between the deterrent effect of a demolition and the consequent suffering of the relatives residing in the targeted home (*Turkman* 1992). For the first time, it concluded that the deterrent effect of demolishing the entire house for the acts of one of its inhabitants was disproportionate to the suffering

caused to another inhabitant with a wife and child, and thereby unreasonable. Accordingly, it ordered the sealing of two rooms instead of the demolition of the entire house—despite the fact that in previous cases where the proportionality standard had been employed, the Court had upheld the demolition orders (*Khamri* 1982, *Gabrin* 1991, *Alamrin* 1992). Noting the broad power granted by Regulation 119, the Court emphasized that “every authority, no matter how extensive, has to be exercised in a reasonable way” (1992).

Although the HCJ began limiting demolitions under some circumstances, it nonetheless upheld the legality of the act itself. In several dissenting opinions, however, Justice Cheshin, who joined the Court in 1991, more directly opposed the practice. Maintaining that demolitions constituted collective punishment, he disagreed with the Court’s decision to demolish an entire house divided into separate living units but with shared living rooms, kitchens, and bathrooms (*Hizran* 1991). He made a similar argument in *Alamrin* (1992), adding that a more restrictive interpretation of Regulation 119 was consistent with the enlightened values of the state of Israel, as opposed to the values in place when the Regulation was passed during the Mandate. In particular, he cited the newly passed Basic Law: Human Dignity and Liberty.

Despite this dissent, the HCJ ultimately proved unwilling to examine the substantive aspects of demolitions, instead deferring to the judgment of the Military Government on security grounds. The majority of demolition judgments have been very short and have not addressed all of the arguments raised by the petitioners, particularly those related to international law (Simon 1994). HCJ jurisprudence has served to legitimate the practice, masking its severity. Yet, even with this sanctioning effect, government officials and ministries have lobbied for legislation barring the Court from

reviewing demolition orders or decisions of the Military Government (Simon 1994).

With respect to its jurisprudence in the territories, the above cases demonstrate that the HCJ has employed international law in its rulings without actually challenging government policy. It has done this in two ways. First, it has denied the justiciability of certain international norms on two grounds—that the norm in question is part of treaty rather than customary law and is therefore not directly enforceable in Israel's courts, and that the norm in question does not operate during times of war, which applies to the state of occupation. In using the non-justiciability argument to support government policy, the Court has rejected prevailing views that have established certain norms as part of customary international law. Second, the Court has argued that where such law is justiciable, the contested practices do not violate this law. It has done this by relying on the local law doctrine and by adopting a broad conception of security needs. The security imperative does in fact legalize certain otherwise illegal actions in international law. But it is generally conceived far more narrowly than the HCJ conception.

This broad conception has even overridden the Court's active promotion of the fundamental value of human dignity. Where this interest has clashed with that of security, the Court has given primacy to the security provision. In cases concerning Israeli citizens, by contrast, these fundamental standards have been forcefully applied as part of the basic values of democracy. Justice Barak, for example, outlawed the use of stomach pumps in prisons, noting that every person has a right to bodily integrity and human dignity, and that this right extends to detainees and prisoners as well (*Katalan*1979). The extension of human dignity, however, seems to have stopped at the threshold of security prisoners. Thus, although the Court agreed that administrative detention should not be employed where ordinary criminal proceedings were available, it

concluded that such ordinary proceedings could not be used in security cases (*Oubeid* 1988). The Court also accepted the security argument of the prison service in its denial of beds to Palestinian prisoners, ruling that security considerations took precedence over the observance of minimal standards of life in prison (*Darwish* 1980). The Court has extended this logic still further in upholding a decision to bar a public funeral for a Palestinian who died during interrogation, maintaining that the denial of human dignity was justified by security concerns (Barkhat 1992).

### **Understanding Successful Legal Outcomes**

As the above cases illustrate, the HCJ has for the most part validated the actions of the Military Administration in the territories. Yet, in a handful of cases the HCJ has ruled against the government. Do these cases signal a willingness by the Court to challenge government policy in the territories? If so, how can they be reconciled with broader HCJ doctrine in the territories? A brief review of these cases indicates that their effects have in fact been limited. In every case where the Court has overturned specific measures taken against Palestinians, the ruling has challenged only the specific implementation of the measures rather than the policy itself (Benvenisti 1993, for an alternative view regarding the Court's activism in the security arena, see Bracha 1991).

One of the most significant cases in which the Court challenged the Military Administration is the *Dweikat*, or Elon Moreh case (1979). In this case, the Court limited the scope of military necessity and barred the seizure of private land for a civilian settlement, despite previously having upheld land confiscations and the establishment of civilian settlements for military purposes (*Hilu* 1972, *Ayub* 1978, *Amira* 1979). Employing the customary norm of military necessity found in the Hague Regulations, it ruled that the primary consideration for the establishment of the settlement in this

instance was political; the military consideration was secondary. Such a determination marked a departure from general HCJ doctrine that had unquestioningly accepted the military necessity/security argument offered by the government.

The outcome is less anomalous, however, when other factors are taken into consideration. Of particular significance is the fact that military personnel, including the Minister of Defense, submitted numerous affidavits questioning the military necessity of the settlement. Since these affidavits placed the judgment firmly within the bounds of accepted military views, the decision cannot in fact be characterized as a direct challenge to security policy. In addition, the settlers themselves provided an affidavit denying that their settlement had anything to do with military considerations and proclaiming that it represented the destiny of the people of Israel. So while some scholars of the Court have hailed this decision as an assertion of judicial independence (Cohen 1986, Maoz 1988), the ruling challenged neither security policy nor general settlement policy. It only rejected the implementation of this policy in a particular set of circumstances (Benvenisti 1993).

The HCJ again challenged a security decision in a deportation case (*Kawasme* 1980). The government argued that security needs justified the immediate deportation to Lebanon of three mayors from the West Bank. In a rare subordination of security concerns, the Court argued that the standards of natural justice required that the right of appeal be exercised before the deportation was carried out. Justice Landau dismissed the government's arguments justifying immediate expulsion. He held that the petitioners had been illegally denied of their statutory right to appeal to an Advisory Board:

Even if the respondents considered that, due to pressing security grounds, it was very desirable for the deportation to be carried out without any delay, this could not constitute a justification for their intentionally ignoring the duty to observe the

law, which is binding on every authority of the State, including the Military Administration (*Kawasme* excerpted in *IYB* 1981: 345).

Rather than overturn the deportation orders, however, the Court opted for an alternative remedy — providing the petitioners with a mechanism to apply to the Advisory Board from Lebanon. And even this partial remedy was denied the third petitioner based on his status as a security threat: the Court reasoned that his incendiary speeches made an application to the Advisory Board moot, as there was no chance an appeal would be granted.

In his dissent, Justice Cohn more directly challenged the government and argued that the deportation orders should be annulled. Even if they were valid under Regulation 112, he maintained that the orders were nonetheless rendered illegal by the denial of the right to appeal. He also disagreed with the decision to deny the third petitioner a right to appeal on the supposition that his appeal would be denied, arguing that such predictions are irrelevant:

It is common knowledge that the gates of this Court are wide-open for every person, be he the most despicable, dangerous and corrupt criminal—and the numerous petitions brought before us by prisoners prove this. Just as this Court would not tolerate the illegal deprivation of a legal right by a State authority from a law-abiding person, so will it not tolerate that a legal right should be illegally denied a criminal or a person suspected of crime (excerpted in *IYB* 1981: 348).

Justice Cohn asserted that the right of appeal was a legal right, a right the Court as a whole had been unwilling establish (see, e.g., *Jab 'r* 1981, *Arjov* 1985).

After the Advisory Board rejected the appeals, the petitioners returned to the High Court to challenge the legality of the deportation order itself under Regulation 112, forcing the Court to consider whether a citizen from the West Bank could be deported to another state (*Kawasme* 1980). The Court cited its earlier determination in the *Abu Awad* case (1979) that Regulation 112 was valid and did not violate Article 49 of the Geneva

Convention. Justice Landau, however, rejected the justiciability of the Geneva Convention, citing legal scholarship from the fifties and sixties and the 1958 British *Manual of Military Law*. As such, he refused to consider the legality of deportations under Article 49 of the Convention. Regarding the government's stated policy to abide by the humanitarian provisions of the Convention, Justice Landau characterized this policy as a political decision with no legal implications. In contrast, Justice Bach understood the policy declaration as a legal commitment under administrative law (see also, Bach's dissenting opinions in *Afu* 1987, *Sagdia* 1988). Justice Landau's majority opinion, however, deferred to the government's security interest, and he emphasized that the Court would not interfere with the Military Commander's discretion regarding matters of public safety.

Again, Justice Cohn strongly dissented and called for the deportation orders to be annulled (1980). Disagreeing with the Court's interpretation of Article 49, he maintained that the prohibition on deportation was absolute, and was not meant to apply solely to mass transfers. This distinction is important in that, while the provision regarding mass transfers was a direct response to the events of World War II and was therefore constitutive, the general prohibition was declaratory of existing customary international law. Justice Cohn backed his finding of custom with several sources, including the opinions of legal scholars, the jurisprudence of national and international courts, and many national constitutions. Nonetheless, Justice Landau believed that state practice was insufficient to establish the existence of a customary norm.

Occasionally, the HCJ has questioned the reasonableness of a security decision in the territories. In response to a petition regarding a permit for permanent residence (*Samara*1979), the Military Commander argued that the criteria for family reunions were

based on security considerations and that these considerations were at the absolute discretion of the Commander. As such, they could not be subject to judicial review. Justice Barak rejected this assertion, holding that such decisions were subject to review as administrative law. He ruled that the particular circumstances of this case were humanitarian, in that they involved a husband and wife, and exceptional, in that the petitioner had been prevented from using a previous permit due to illness. The Court maintained its position that it would not substitute its discretion for that of the Military Commander's but held that it was entitled to review the legality and reasonableness of the decision. It granted the petition and ordered that the petitioner be given a permit of permanent residence.

Many of these cases are inconsistent with the Court's previous jurisprudence in similar cases. The ruling in *Samara*, for example, reached an opposite conclusion from that reached in *Abu El-Tin* (1972), in which the right of return in cases involving family reunification had been denied. The *Jerusalem District Electric Company* case (1980), in which the Court prevented the military acquisition of a Palestinian electric company, had previously been heard in 1972, at which time the Court had upheld the Military Commander's right to provide Hebron with electricity. Esther Rosalind Cohen attributes these reversals to growing judicial skepticism toward claims of military necessity (1986). She links this skepticism to a deportation case in which the orders were carried out on the day that the Court met to discuss their legality (*El Natashe* 1976). According to Cohen, the Justices interpreted this as an affront to their prestige and they began to question future claims of military necessity. The fact that these cases constituted the exception, rather than the rule, however, casts doubts on Cohen's explanation.

Ronen Shamir offers an alternative explanation for these rare "landmark cases"

(1990). Shamir argues that in order to maintain its legitimacy both domestically and internationally, the Court occasionally has asserted its independence and overruled government policies in some cases. Having demonstrated its judicial independence, the Court can legitimate the government as a whole in the domestic and international sphere by upholding the majority of government actions as legal and reasonable. The government is thus able to justify its policies, pointing to independent judicial decisions that prove their legality. Shamir notes that of the 557 Palestinian petitions that were submitted between 1967 and 1986, only sixty-five were adjudicated and only five of those upheld, at least in part, the petitioners' arguments. Moreover, all five were decided between 1979-80, making it hard to argue that they were indicative of a broader trend or change in the Court. Finally, although seemingly confrontational, none of the cases actually constituted a direct challenge to government policy.

The *Elon Moreh* case may in fact have had a detrimental effect on Palestinian rights by establishing a distinction between public and private land. This distinction limited the basis for future challenges of land seizures and successive cases were dismissed (Shamir 1990). Other cases provided little cause for celebration as well. The *Al-Assad* case (1979) defended freedom of expression as a value of a democratic state, overruling the government's decision to deny a permit to publish a magazine in Jerusalem on the basis of inflammatory contents. Yet in later cases with similar circumstances, government decisions limiting freedom of speech were upheld. The decision in the *Jerusalem District Electric Company* case (1980) also had no substantive or long-term effects.

Nor did *Kawasme*, seen by some as a response to the earlier deportation case in which the government had attempted to "outsmart" the Court (*El Natashe* 1976), alter

overall deportation policy (Cohen 1986, Shamir 1990). Subsequent cases challenging deportations, including the second *Kawasme* case, upheld the deportations. Similarly, *Samara* (1979) constituted an isolated decision and was at least in part a reaction by the HCJ to the state's argument that the Court had no power to review the administrative decisions of the Military Commander (Shamir 1990). In at least four of these cases, the Court was reacting to circumstances that threatened to limit its participation or limit its discretion (*Al-Assad* 1979, *Samara* 1979, *Kawasme* [first and second case] 1980).

These isolated decisions, according to Shamir, contributed to a “myth of rights,” but they had no substantive effects. Their primary role was symbolic, enhancing the stature and legitimacy of the Court as an independent judicial body. Each of these decisions was hailed by the press and in scholarly writings. As a result, the government was able to point to these decisions of what was widely perceived to be a legitimate body, a guarantor of human rights and democracy, in defense of actions that were upheld by the Court.

### **The Basic Law: Human Dignity and Liberty**

The decisions described above preceded the passage of two laws that heralded a new era in Israeli jurisprudence. In 1992, Israel underwent what is often referred to as a constitutional revolution. The Knesset passed two Basic Laws on human rights—Basic Law: Human Dignity and Liberty, and Basic Law: Freedom of Occupation. These laws were a compromise solution devised to deal with the impasse surrounding agreement on a comprehensive bill of rights. In 1992, Knesset member and constitutional law scholar Amnon Rubinstein suggested enacting a series of Basic Laws to protect those rights on which secular and religious political interests could agree (Gross 1998). These two laws

were the result.<sup>57</sup>

The new basic laws were hailed as providing Israel with a much-needed, albeit limited, Bill of Rights. But the question remained whether they granted the Court the power to overturn legislation that violated the rights contained therein. The HCJ previously had held that Basic Laws do not supersede regular laws except where entrenched provisions grant them superior status. While the Basic Law: Occupation does contain an entrenchment clause, the Basic Law: Human Dignity and Liberty does not. However, Section 8 of this law reads:

The rights according to this Basic Law shall not be infringed except by a statute that befits the values of the State of Israel and is directed towards a worthy purpose, and then only to an extent that does not exceed what is necessary.

The degree to which this section empowers the Court to exercise judicial review is not entirely clear (see, e.g., Kretzmer 1992, Benvenisti 1994a, Hofnung 1996, Gross 1998).

The President of the Supreme Court, Aharon Barak, was at the forefront of those touting a constitutional revolution. He praised the new Basic Laws as placing Israel on par with democracies in which human rights enjoy a constitutional status (Barak 1992, 1993, 1997a). Their passage, he explained, signaled the end of legislative supremacy by subjecting the legislative and executive branches to constitutional limitations. Most significantly, he believed that a regular law could not violate the rights protected in the Basic Law: Human Dignity unless it met the requirements of Section 8.

Barak credited the judiciary with bringing about this revolution through its leading role in promoting human rights:

The constitutional revolution in the field of human rights is built upon the foundation of judicial precedent. In exercising its constituent authority, the

---

<sup>57</sup> Rubinstein initially proposed at least five Basic Laws on human rights, but the process was suspended after passage of just two (Gross 1998).

Knesset adopted a number of judicially formulated rights and conferred upon them a supra-statutory constitutional status. Without the judicial underpinning the constitutional change could not have been effected.... Without the contribution of the case law, it would not have been possible to erect the constitutional structure in the area of human rights. Without judicial human rights, constitutional human rights would be unknown to us.... It follows then, that the constitutional revolution in the area of human rights is the product of the jurisprudential developments in human rights protection. Upon the jurisprudential foundation, the constitutional structure was erected (*Gal* 1995 excerpted in *ILR* 1997: 778).

The judiciary, according to Barak, had been in the vanguard in recognizing these rights. Now with the passage of the Basic Laws, these rights had acquired formal constitutional status.

These constitutional human rights were not without their limits, however. The newly guaranteed rights could be infringed upon in fulfillment of social or national aims. Nonetheless, these powers of infringement were for the first time subject to constitutional control. Prior to the Basic Laws, the political process alone constrained legislative attempts to limit human rights. Now, such limitations were subject to the criteria set out in Section 8, and to review by the Court (Barak 1997a). According to the HCJ, the Court determined whether a law was consistent with the values of the State of Israel. In effect appointing itself a policymaker, the HCJ explained that it would determine what constituted a worthy purpose and what was necessary as laid out in Section 8 (*Gal* 1995). In making these determinations, it would base its identification of the values of Israel on the state's democratic character.

This self-conception has shaped the weighing of collective interests against individual rights in HCJ deliberations. Justice Barak explained their relationship in a democracy: "Our Constitutional Revolution is intended to authorize limitations on Human Rights in order to preserve the social structure which protects the Human Rights" (1997a: 7). Barak emphasized that the limitations on rights came from the same source

as the rights themselves and served the same purpose — human dignity. Human dignity itself was a non-derogable right (1997a, see also 1993, 1994). Admittedly, the task of balancing majority rule with fundamental human rights carried political overtones. But for Barak, the judicial considerations were nonetheless legal and constitutional in nature (*Gal*1995).

In its constitutional role, the Court would be required to balance and control state organs and to serve as the guardian of human rights. President Barak called on his fellow judges to adapt to the idea that the legislator could not pass any law, to recognize the new power with which they had been endowed, and to act responsibly with this new power to declare laws unconstitutional (1994). It was up to the Court to give meaning to the norm of human dignity and to establish a suitable balance between the values of Israel as a Jewish state and the values of Israel as a democratic state—in other words, to impose its vision of the social and moral order. For President Barak, there was no longer any doubt regarding the Court's power of judicial review. The Court's role was both to interpret laws and to determine their legality. These changes were given legal effect in the pivotal *Gal* decision (1995). In this ruling, the HCJ established the supra-statutory constitutional status of the two Basic Laws, the power of judicial review, and the power to declare regular legislation unconstitutional.

While these developments were indeed revolutionary, they had little effect upon Palestinian rights' claims. In part, this was due to the content of the Basic Laws themselves. The Basic Law: Occupation contains a provision holding that existing legislation would be subject to review under the Basic Law after a two-year grace period. The Basic Law: Human Dignity and Freedom contains no such provision. To the contrary, Section 10 reads: "Nothing in this Basic Law affects the validity of law that

existed prior to the coming into force of this Basic Law.” This clause protects the Emergency Regulations governing the territories, which otherwise would come into conflict with the new human rights protections (Kretzmer 1992).

The Court has held that the laws pre-dating the Basic Laws should nonetheless be interpreted in light of these Basic Laws (Gross 1998). For example, it ruled that the Criminal Procedure Law should be read in accordance with the Basic Law: Human Dignity and Freedom, giving rise to a more restrictive power of arrest (*Ganimat* 1995). The Court, however, has been unwilling to employ this method in equality cases for Israeli Arabs or in cases involving the territories.<sup>58</sup> In two demolition cases, the Court refused to consider the Basic Law: Human Dignity and Liberty on the grounds that the Emergency Regulations pre-dated the Basic Law (*Nazal* 1994, *Natahsa* 1994, discussed in Gross 1998). The passage of the Basic Laws then, hailed as Israel’s constitutional revolution, did little to improve the human rights situation of the Palestinians prior to the 1999 torture ruling. Nor did their passage result in a flood of new Palestinian rights’ claims in the HCJ.

Although the Palestinian situation remained unchanged, the constitutional revolution strengthened the Court’s practice of calling upon universal or liberal norms in an effort to situate itself with the global judiciary. It also fostered even greater judicial policymaking as the Court sought to fulfill its public role in giving meaning to legislative gaps in pursuit of broader social values. As the HCJ developed along these lines, it would prove increasingly difficult to keep this identity completely separate from its consideration of Palestinian rights claims, or to convincingly employ global norms to justify the deprivation of rights in the name of security.

---

<sup>58</sup> One of the few exceptions is Judge Cheshin’s dissent in *Alamrin* (1992).

**Conclusion: The Effect of the Court in the Territories**

Assessments of the Court's contribution to the Palestinian situation prior to the torture ruling have been mixed. The Court has upheld the legality of government practices, but it also has created some procedural barriers, such as the right to judicial appeal of deportation and demolition orders. These barriers may have resulted in the abandonment of certain practices (Dotan 1999). Undoubtedly, the procedural requirements have provided limited relief. But they also may have had the opposite effect—reinforcing the actions of the Military Government by skirting the moral and legal questions surrounding these policies—policies that, for the most part, were upheld (Bisharat 1995).

Defenders of the Court have argued that political constraints prevented the Court from directly challenging the authority of the Military Government in the territories. But they maintain that upon closer examination, the Court did in fact help to alleviate the harsh conditions imposed upon the Palestinians. MK Amnon Rubinstein, former Chair of the Knesset Law, Justice and Constitution Committee, believes that the HCJ mitigated the situation by preventing even greater human rights violations (personal interview 2/2/00). The Head of B'tselem, a leading Israeli human rights organization critical of the government, agrees that the fact that the Court has been open to Palestinians has inhibited the state from undertaking more serious human rights abuses: "We hear, after all, that State representatives ask themselves, from time to time, if this decision or another will stand up to HCJ review" (Feldner, in *Ha'aretz* 6/27/99).

Yoav Dotan has argued that although Palestinians achieved a low official rate of success with petitions filed in the HCJ, out-of-court settlements and informal procedures proved more favorable (1999). Dotan explains that the Court preferred the lower level of

exposure from out-of-court settlements for fear that decisions against the government would create a counter-reaction and threaten the Court's institutional autonomy.

Exposure does seem to be a concern of the Court, particularly in light of the backlash over its decisions upholding liberty at the expense of religious interests:

HCI justices do not want to get into an additional battle on values and principles with the Israeli public. The battle with the religious is enough for them. Thus, they prefer to accept the position of the arms of the Government and to refrain from reviewing their decisions. They apparently understand that if and when they review them, they will rule against the State (Friedman, in *Ha'aretz* 6/27/99).

Despite this reluctance to review security decisions, Dotan believes that the army has felt constrained by the HCI. This tacit deterrent effect has resulted in fewer demolitions, deportations, and confiscations (1999).

Perhaps the most disappointing aspect of the Court's record in the territories has been its treatment of international law:

With the Court's disregard of treaty-based laws, its strict definition of customary law, and its broad interpretation of the occupant's power 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 (Benvenisti 1993: 182).

The Court has opted to review government action on the basis of administrative rather than international law. Even where it has acknowledged the applicability of international law, its expansive conception of military necessity has rendered these international protections ineffective.

The HCI has used international law out of expedience rather than as a tool to become more activist in protecting basic rights in the territories (Benvenisti, personal interview 8/18/99). When asked how the Court goes about defining a customary norm, one judge replied that he identifies a custom when convenient and ignores it when

inconvenient (Benvenisti interview 8/18/99). Human rights lawyers agree that the justices only use international law where it strengthens their position in reinforcing government policy. Otherwise, they ignore it (Yakir, personal interview 3/14/00). One lawyer said that in the roughly sixty to seventy petitions a year she presents, the judges completely disregard the international law arguments (Pacheco, personal interview 9/7/99). Although President Barak has touted the importance of international law in his writings, his judgments with regard to the territories have largely ignored international norms and turned to domestic law instead (Yakir 3/14/00).

Some decisions involving the territories have included powerful rhetoric about the importance of international law. Nonetheless, these judgments have usually included a security loophole so that the international protections have had no practical effect. In general, the Court's interpretations of international law have legitimized the government's security policies. Accordingly, in addressing the tension between domestic legislation and international law, the Court has accepted the validity of existing domestic legislation where it has served the government's purpose, as seen in the demolition and deportation decisions. And it has employed international law to justify this approach. But the Court also has ignored the local law in force when convenient, for example in order to validate the government's requisition of land, which was based on the duty to ensure public order and safety as directed by Article 43 of the Hague Regulations (*Tabib* 1981). Thus, the Court has selectively upheld local laws in certain instances and outlawed them in others, using international law to justify each outcome.

Lawyers representing the Palestinians have been highly critical of the Court's jurisprudence. In May 1990, Felicia Langer, a leading human rights lawyer who had represented Palestinians in the Israeli courts since 1968, closed her law practice.

Explaining her decision, Langer said that the legal situation had deteriorated to such an extent that she felt she could no longer help and that continuing to try would only sanction the system (1990). Langer noted a change in the HCJ following the *intifada*—the justices did not want to interfere at all. The Court chose to disregard the opinions of well-known experts in international law. For Langer, it was “clear that the Israeli Supreme Court is not a place where the Palestinians have any hope to get a judicial remedy in the most vital issues with which they are confronted” (1990: 33).

Despite this strong condemnation, the Court has been a key actor in rights’ promotion inside Israel proper. Although limiting its role following the creation of the state, the HCJ after a few years began increasing its power vis-à-vis the legislature and the executive by creatively finding means of reviewing government actions via expanded notions of standing and justiciability. The Court’s self-defined role as the protector of human rights and democratic values was reflected in its activism. Following the 1992 “constitutional revolution,” the Court more explicitly embraced this role, actively promoting human dignity as a fundamental constitutional value that bounded judicial deliberations. The Court has taken on both the religious establishment (Woods 2001) and the security establishment inside the Green Line.

The Court’s willingness to confront the security establishment in its promotion of civil rights, however, has stopped short of upholding Palestinian rights. The implied threat of judicial interference, as well as out of court settlements, may have mitigated human rights abuses. Nonetheless, the Court has not been particularly progressive inside the territories and has to a large degree legitimized the policies of the occupation. The trend has been to reinforce rather than challenge government policy, a stance that has been in line with general public opinion regarding the territories and national security.

This policy is aptly summarized by Etan Felner, head of B'tselem, in his discussion of the “schizophrenic” character of the Court:

On one side, it [HCJ] fills one of the more important functions in preserving human rights in Israel inside the Green Line. Some of its judgments in areas like religion and state, the rights of women, or the status of homosexuals and lesbians, revealed positions of much greater consideration than those of the other arms of the government. On the other side, every time that a case relating to human rights in the territories is brought before the Court, its judgment is like a rubber stamp for the decisions of the army and the security forces. It's basically a fixed position. The judges of the HCJ do not deal with human rights in the territories in a serious manner. Almost every time that state representatives come and say to them that the decision is based on security considerations, the justices refrain from judging these bodies and dismiss the petition (*Ha'aretz* 6/27/99).

Yet in one of the most sensitive security issues, torture during GSS interrogations, the Court issued a bold challenge to government policy and went against domestic public opinion. This astonishing departure is explored in the next chapter.

## Chapter 5

### Israel Redux: The Global Judicial Identity Trumps the Domestic

It is thus decided that this order nisi [temporary stay] be made absolute, as we declare that the GSS does not have the authority to shake a man, to hold him in the “Shabak” position (including the combination of means discussed in paragraph 30), to force him into the “frog crouch” and to deprive him of sleep in a manner that is not required as an inherent part of the interrogation (Para. 40) *High Court of Justice, Monday, September 6, 1999, 9:30 am.*

What was it like, that moment at 10 o'clock on Monday morning when you turned off the deafening music, at once removed the sacks from all the downcast heads, unlocked the handcuffs and removed them from swollen and bruised wrists, and raised dozens of distorted bodies from those twisted stools? How was it when you detached the chains hanging from the ceiling and allowed the painfully stretched bodies to collapse and relax? *Human rights lawyer Lea Tsemel to the head of the General Security Service, September 6, 1999.*

The concluding words of Israel's High Court of Justice ruling outlawing torture surprised scholars and associates of the Court alike. In an open letter to the head of the General Security Service (GSS) following the ruling, a lawyer for the plaintiffs wrote: “It was as total a surprise for me as for you. We were sitting in the Supreme Court disbelieving, as Judge Matza read out the unanimous decision of the nine judges” (Tsemel 9/6/99). Immediately following the ruling, the head of the GSS issued a directive barring investigators from using physical pressure in interrogations (*Ha'aretz* 9/7/99a).

For years the HCJ had refused to take up the issue of torture. The question of GSS interrogation methods struck at the heart of Israel's security concerns, an area in which the Court had been reluctant to interfere. As seen in the previous chapter, standard HCJ practice had been to reinforce government security policy toward the Palestinians. Moreover, while actions such as house demolitions and land requisitions had been challenged by the Israeli left, even progressive Israelis remained relatively silent on the

methods used to interrogate suspects in a “ticking time bomb” situation. The daily threat of terrorist attacks in Israel had fostered general support for GSS methods, viewed as necessary to save lives. Why, then, did the Court go against its existing doctrine, flouting both public opinion and government interests, in support of Palestinian human rights?

Given the domestic environment and the Court’s history with respect to security matters, the decision appears to be an anomaly. Only by exploring developments at the international level and understanding that the Court operates in an international context as a member of the global judiciary can the HCJ decision be understood. As described in the previous chapter, the Court had developed a public law role in which it constructed itself as a defender of human rights, employed rhetoric upholding global norms and values, and looked to outside sources to fill in the gaps of domestic legislation. One way in which the court gave substance to Israel’s democratic values was by turning to the legal decisions of other countries. These foreign courts, themselves participants in the global judiciary, had increasingly granted greater legal status to human rights norms. Their decisions contributed to an international environment in which the norm of human dignity had begun to trump the bulwark of state sovereignty.

The HCJ too had incorporated universal norms into its legal framework and had actively promoted human dignity, but it had done so only in cases involving Israeli citizens. Yet, as developments in the U.S., the U.K. and elsewhere altered the legal environment by endowing human rights norms with substantive meaning and increasing their efficacy, these norms ultimately influenced the legal discourse in Palestinian rights cases as well. Having subscribed to the general principles advanced by the global judiciary, HCJ justices were compelled to integrate the evolving substance of these principles and norms. And the norm against torture had been solidified perhaps more

than any other. Since *Filartiga* (1980), domestic courts have promoted the idea that acts of torture fall outside of the range of what is permitted under the sovereign authority of the state. A few months before the HCJ ruling, Britain's highest court had concluded that the norm against torture had evolved to such a degree as to merit extradition of a former head of state to face criminal charges of torture. The HCJ incorporated this and other developments into its decision, even as domestic pressures pushed in the opposite direction. With international attention focused on the Court, its reputation as a member of the global judiciary was at stake.

The clarity of the norm against torture in international law, specified in both treaty and custom, coupled with the crystallization of international pressure on Israel with respect to torture, pushed the Court into addressing an issue it would have preferred to leave untouched. The growing consensus that Israel was in fact committing torture made it difficult for the High Court to continue pleading ignorance and refusing to take up the question of GSS interrogation methods, particularly since the issue was so closely linked to the fundamental value of human dignity. But unlike the Palestinian rights cases in the previous chapter, the progression of the norm against torture in international law left the Court with little room to maneuver. While the status and application of the Hague Regulations and the Fourth Geneva Convention allowed for differing interpretations, there was universal agreement that the international community had established an absolute ban on torture.

Thus, the continued evolution of human rights norms, alongside the domestication process, had a significant effect on the outcome in the torture ruling. The Court's legal reasoning was influenced by the judges' identities both as Israelis and as members of an international legal community. In previous decisions involving Palestinians, they had

gone to great lengths to reconcile these two identities. In the case of torture, domestic security concerns came into direct and irreconcilable conflict with the overwhelming global consensus. Faced with a choice between adopting the global consensus at great domestic cost and jeopardizing their status in the international community, the justices chose international interests over domestic ones. The torture ruling illustrates that the domestication process can have a significant impact—even when global human rights norms are pitted against fundamental questions of security, universal legal norms can triumph.

To demonstrate the role of global processes in determining outcomes, this chapter will examine the torture ruling in three sections. The first section provides a brief review of the issue of torture in Israel prior to the HCJ ruling. It shows that the Court attempted to sanction government policy without taking on the issue directly. It also highlights the Court's reluctance to assume a policymaking role in a situation where its global and domestic visions were in conflict. The second section examines the ruling itself and demonstrates how changing meanings of universal norms such as human dignity and the nature of democracy influenced the Court's legal reasoning. The third section describes both the domestic and international contexts and the Court's role in each. It emphasizes the Court's identification with universal norms over particularistic domestic ones. This does not mean that the justices were not worried about the domestic situation. It is precisely because they shared the security concerns of all Israelis that this case is instructive. Where the justices were unable to reconcile the government's security practices with international norms, the domestication process and the Court's identification with the global judiciary proved decisive.

### **The Torture Status Quo and Early Legal Challenges**

The GSS had used torture against suspected terrorists, ostensibly to gather information about imminent terrorist attacks, since the birth of the state. For roughly forty years, until the 1980's, these methods were kept hidden from the public. The veil was lifted after two shocking incidents — the 1984 Bus 300 incident and the Nafsu affair. In the first case, GSS agents captured two terrorists who had hijacked a bus and shot them afterward. They then lied about what had happened, claiming that all of the terrorists had been killed in the storming of the bus. In the second incident, IDF officer Izat Nafsu spent seven years in jail for spying after being tortured by GSS agents and falsely confessing to passing information and equipment to the Palestinian Al-Fatah organization. GSS interrogators under oath had denied Nafsu's allegations of torture, and he was sentenced to eighteen years in prison in 1980. A 1985 inquiry into the Bus 300 affair, however, raised questions regarding Nafsu's interrogation after a senior GSS official involved in the Bus 300 incident acknowledged the use of the same interrogation methods described by Nafsu. In 1987, a new GSS chief launched an investigation that brought to light the physical pressure applied to Nafsu, and he was released.

In the wake of the Nafsu scandal, the government convened a Commission of Inquiry to examine two issues—GSS investigation methods in relation to terrorist activity and GSS court testimony with respect to these investigations. The Landau Report, named for Moshe Landau, the head of the Commission and then President of the Supreme Court, was issued in October of 1987. The examination revealed that physical methods of interrogation and false testimony regarding these methods were standard GSS practice.

Until 1971, GSS investigators were never called to testify in court. After defense lawyers began challenging the validity of their clients' confessions on the basis of GSS

interrogation methods, however, prosecutors were forced to call the interrogators to the stand to testify as to the circumstances of the interrogation and confession. The Landau Commission found that interrogators had adopted the practice of lying under oath in order not to expose the methods of interrogation, claiming that exposure would jeopardize the effectiveness of investigations. In addition, the GSS had a clear interest in terrorist convictions, and it feared that confessions would be thrown out if details of the interrogation were revealed. Military courts and the HCJ, the Commission noted, never questioned GSS testimony.

The report also described the general process of obtaining confessions. The GSS would provide the police with a summary of the confession obtained during the interrogation. The police would then take a similar confession to submit to the Court. Although the methods of interrogation were concealed, the HCJ had ruled that a confession taken by use of excessive pressure was not automatically disqualified without an investigation into its truthfulness (*Mu'adi* 1984). And even if a confession was deemed inadmissible, evidence obtained as a result of this confession was still allowed. The Report added that Israeli law did not uphold the right to remain silent. The Commission, reluctant to place too many limitations on the GSS, encouraged the growing tendency of the Court to accept confessions gained by questionable means. It concluded that “our survey of the development of these [Supreme Court] rulings shows that confessions obtained by means of interrogation methods which appear to us to be justified, as explained above, will also be able to pass the test of the flexible rules of admissibility” (1987: 83).

The Landau Report strongly condemned the practice of giving false testimony. GSS investigators, however, received a green light to continue employing physical means

during interrogations. Recognizing that a degree of physical pressure was necessary for effective interrogations, the Commission carefully detailed the permitted physical methods of interrogation in a classified section of the report. It based its guidelines on its examination of international human rights law, existing Israeli legislation, and the standards of other democracies confronting terrorism. The government then pointed to the Commission's reliance on international sources to defend against subsequent international criticism challenging GSS interrogation methods.

Although the Commission sanctioned the use of physical methods of interrogation, it called for the strict regulation of these methods, insisting that physical pressure should never reach the level of torture, maltreatment, or deprivation of human dignity. The methods should be clearly defined, along with their limitations, via binding directives. Interrogators should be strictly supervised when carrying out interrogations. Superiors should punish any violations through disciplinary measures and, in more serious cases, by initiating criminal proceedings. And the Commission instructed interrogators to consider the possibility of less severe measures.

Despite the fact that the use of force was illegal under Israeli penal law, the Commission determined that the use of "moderate physical pressure" in GSS interrogations was authorized by the defense of necessity, found in Section 22 of the Penal Law. The Commission's interpretation of this principle replaced the commonly accepted imminent danger standard with the criterion of the lesser of two evils: "the harm done by violating a provision of the law during an interrogation must be weighed against the harm to the life or person of others which could occur sooner or LATER [emphasis in original]" (1987: 57). The necessity defense, in its view, depended on this weighing process:

The deciding factor is not the element of time, but the comparison between the gravity of the two evils—the evil of contravening the law as opposed to the evil which will occur sooner or later; and as was already stated above, weighing these two evils, one against the other, must be performed according to the concepts of morality implanted in the heart of every decent and honest person. To put it bluntly, the alternative is: are we to accept the offence of assault entailed in slapping a suspect's face, or threatening him, in order to induce him to talk and reveal a cache of explosive materials meant for use in carrying out an act of mass terror against a civilian population, and thereby prevent the greater evil which is about to occur? The answer is self-evident (1987: 60).

The Commission also believed that assessment of the weighing process should be based not on the actual situation, but on the reasonable belief of the actor.

The Commission further maintained that GSS interrogation methods did not violate international law, specifically the prohibitions against torture found in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the European Convention of Human Rights, adding that Israel is not formally bound by any of these conventions in any case.<sup>59</sup> It characterized the GSS methods as 'moderate physical pressure,' which it differentiated from outright torture. This semantic distinction proved trickier with regard to the Fourth Geneva Convention's general ban on physical coercion against protected persons (Article 31). So the Report pointed to Article 5 of this Convention, which contains a limited security exception.

In defense of its position, the Commission observed that the European Commission and Court on Human Rights had upheld certain interrogation techniques, including sleep deprivation, exposure to loud noise, reduced food and drink, and covering the head with a bag. The European Court had ruled that these acts, "as applied in combination," reached the level of cruel and unusual punishment (*Ireland v U.K.* 1978). The Landau Commission concluded from these words that such acts did not reach the

---

<sup>59</sup> Israel did not ratify the International Covenant on Civil and Political Rights and the United Nations Convention Against Torture until 1991.

threshold of torture or cruel and unusual punishment when committed in isolation. It also maintained that the methods authorized in the classified second section of the Report were less severe than those employed by the British in Northern Ireland and thus were not in violation of international law.

The Commission's contention that GSS interrogation methods were legal under international law is difficult to support. The absolute prohibition on torture is widely established in both treaty and customary international law. Article 5 of the Universal Declaration of Human Rights, a document that is not in itself a binding treaty, but whose contents are widely accepted as binding customary international law, reads: "No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment." Article 7 of the International Covenant on Civil and Political Rights is identical. Article 4(2) of this Convention explicitly states that no derogation from Article 7 is allowed, even in times of public emergency. The Geneva Conventions outlaw torture, cruel treatment, humiliating and degrading treatment, and other infringements of human dignity (Common Article 3). The Fourth Geneva Convention also explicitly prohibits the use of physical or moral coercion, especially to obtain information (Article 31). The Nuremberg Charter (1945) lists "inhumane acts" under the category of crimes against humanity. Finally, the Rome Statute of the International Criminal Court (1998) lists torture as a crime under the categories of war crimes and of crimes against humanity. And even if certain acts do not constitute torture, they may nonetheless be prohibited as cruel, inhuman or degrading treatment.

Israel ratified the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment in 1991, four years after the Landau Report was published, but it did not pass implementing legislation. The treaty defines torture as:

Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity (Article 1[1]).

It further states that “no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture” (Article 2[2]).

That international law prohibits torture is not subject to much debate in the international community. More importantly, the prohibition also is acquiring the status of a *jus cogens*, or peremptory norm of international law. A *jus cogens* norm is one so fundamental that no state may claim a right to engage in the restricted practice, nor can any state produce a contradictory treaty or customary norm. A *jus cogens* norm is non-derogable (1969 Vienna Convention on the Law of Treaties: Article 53). While states legally may opt out of upholding treaty or customary law under certain conditions, they may not opt out of upholding a *jus cogens* norm. Other *jus cogens* prohibitions include slavery, genocide, and piracy. A United States court declared in 1992 that “the right to be free from official torture is fundamental and universal, a right deserving of the highest status under international law, a norm of *jus cogens*” (*Siderman* 1992; see also *Demjanjuk* 1985 and *Pinochet* 1999). Even Justice Landau has accepted the *jus cogens* status of the prohibition against torture (CAT/CSR.295 9/4/97: Para. 33).

The Commission attempted to evade the unequivocal ban on torture in international law by creating the category of “moderate physical pressure” and then determining that such pressure was allowed under exceptional circumstances. These exceptional circumstances gave rise to a dilemma between the fundamental survival of

the state and its citizens, and the preservation of the character of the state as a law-abiding one that upholds basic moral principles:

Acts of terrorism have as their aim to deprive citizens of the State of a basic right, namely the right to life and to physical integrity. Organizations which set this as their goal have no moral right to demand that the State for its part maintain towards them the usual civil rights. Nevertheless, it is incumbent upon the State and its authorities, including the GSS, to preserve humanitarian behaviour and human dignity in their treatment of terrorists, in order to uphold the credo of the State itself as a law-abiding State grounded in fundamental concepts of morality. Any infringement of these basic concepts, even as against those who would destroy the State, is liable to recoil on us by engendering internal moral corruption (1987: 79).

In the end, the Commission reasoned that the use of “moderate physical pressure” was necessary to combat terrorism but that these physical methods could not be allowed unfettered expression outside the bounds of law. Instead, it suggested that the interrogation methods be incorporated into the legal framework, a solution the Commission believed would strengthen the moral character of Israeli society and uphold the rule of law.

The government adopted the Landau Report to regulate GSS procedure, although it never passed legislation formally codifying the Commission’s guidelines. It did, however, establish a special ministerial committee to oversee the GSS. This committee authorized the use of additional “enhanced physical pressure” in 1994. These additional measures, adopted following a wave of terrorist attacks, were intended to be temporary. The committee periodically reviewed their use, but it extended them every time (B’Tselem 1997). A 1992 bill proposed to explicitly outlaw the Landau guidelines and ban the use of the confidential interrogation techniques never made it past the preliminary reading (*Ha’aretz* 9/7/99b).

Human rights organizations began turning to the courts to challenge the policy

established by the Landau Commission in the early nineties. In 1991, the Public Committee Against Torture in Israel (PCATI) petitioned the HCJ to invalidate the Landau Report and to make public the classified section. The Court rejected the petition on the grounds that there was no concrete dispute justifying the Court's intervention, despite having developed broad notions of standing in order to protect fundamental rights (*Salhat*1991). PCATI argued that this rejection went against previous Court precedent holding that, even in the absence of a concrete dispute, the HCJ would intervene where state actors were violating general principles of law (*PCATI* 1994). The Court saw no such violation, citing an earlier ruling in which it had found that the Landau Commission guidelines offered the correct solution for the question of GSS interrogation methods (*Anonymous Persons*1991). And it accepted the GSS explanation that the practices under question arose from the security needs of the interrogation and did not constitute torture (*Mubarak* 1996).

PCATI filed another petition in 1994, asking the Court to issue an *order nisi* (show cause order) to the government regarding the authority of the GSS, the ongoing classified status of the second part of the Landau Report, and the use of moderate physical pressure (*PCATI* 1994). The petition challenged both the general authority of the GSS to conduct interrogations and its use of physical means to extract information. The HCJ issued an *order nisi* but did not set a hearing date. Then in April 1995, Abdel Samad Harizat died in custody as a result of being violently shaken during interrogation. The autopsy showed that the shaking had caused a fatal brain injury. The Association for Civil Rights in Israel (ACRI) petitioned the Court for an *order nisi* requesting that the government explain its continued use of the shaking method. ACRI also requested an interim injunction preventing the GSS from violently shaking suspects until the Court

issued its ruling (*ACRI*1995). The Court granted the *order nisi* but did not grant the injunction. Again, no hearing date was set. When the Court did finally consider the general question of the use of physical means during interrogations, these two cases served as the basis.

Alongside these general challenges to GSS interrogation methods, detainees were simultaneously filing individual petitions. The general HCJ response to these petitions was to issue a temporary injunction barring the GSS from using physical force against the petitioner while avoiding a ruling. Because its investigations were usually completed by the time that these injunctions were issued, the government did not challenge them (Avram, personal interview 3/15/00). In two cases, however, the Court annulled its previously issued interim injunctions at the request of the government (*Bilbeisi* 1995, *Hamdan* 1996). In both rulings, the Court based its decision on information provided by the GSS that the suspects had knowledge of imminent terrorist attacks in Israel and that getting them to reveal this information would save lives. But Court made it clear in these rulings that it was taking no broader position on questions of principle regarding GSS interrogations.

In response to the *Hamdan* decision, which received widespread media attention, the United Nations Committee against Torture requested a special report from Israel, as authorized by Article 19(1) of the Torture Convention. The Committee requested that Israel submit, “as a matter of urgency,” a report regarding the High Court decision and what it meant for the implementation of the Convention against Torture in Israel (B’Tselem 1997).

PCATI submitted two additional petitions in December 1997. It petitioned the HCJ for an *order nisi* regarding the torture of Abed Al-Rahman Ghanimat. The next day,

it requested an *order nisi* regarding the incommunicado detention and torture of Fuad Qur'an. Both petitions also requested interim injunctions to stop the torture and incommunicado detention. On December 28, the Court ordered the state to provide an official reason for holding Qur'an shackled to a small chair in a painful position during the so-called "waiting periods" between interrogations. His attorneys believed that this unprecedented Court order was a reaction to the government's evasiveness during oral arguments and that this decision ultimately led the HCJ to review the issue of torture (Pacheco 1999). The Court decided on January 5, 1998, to join the *Qur'an* and *Ghanimat* cases. On January 8, the Court heard oral arguments in front of an expanded nine-judge panel. It decided in favor of the GSS, unanimously rejecting the interim injunction to stop Qur'an's incommunicado detention and ruling 5-4 against the interim injunction to stop the torture of Ghanimat, whose interrogation had lasted 109 days (Justices Barak, Levin, Or and Dorner dissenting).

But the Court decided to consider the broader question of GSS authority under the necessity defense. It joined the two earlier petitions (*PCATI* 1994, *ACRI* 1995) and added two additional pending cases (*Zaidah* 1995, *Al-Ka'aqeh* 1996). A hearing was set for May 20, 1998, four years after the submission of the initial PCATI petition. The HCJ denied a state request to postpone the hearing because of pending legislation that would have legalized GSS interrogation methods, and the full panel of nine justices heard the case on May 20. During this hearing, the justices made it clear that it was not the Court's role to legalize GSS interrogation methods. Instead, they gave the government time to pass the necessary legislation, the so-called "Shabach<sup>60</sup> Law" (Pacheco 1999).

The potential legislation regulating the GSS had to confront the thorny issue of

---

<sup>60</sup> The Hebrew name for the GSS is the Shabach.

legalizing physical methods of interrogation, making Israel the only state to effectively legislate torture. Although the Justice Ministry defended the use of moderate physical pressure, it feared that legislating these methods would subject Israel to further international criticism (*Ma'ariv editorial* 2/9/98). When the Knesset dissolved in January 1999, any possibility of passing this legislation disappeared. The Court then held another full panel hearing on January 13 to hear the state's arguments in support of GSS interrogation methods. The government's attorney argued that moderate physical pressure did not constitute torture. He also maintained that even torture would be justified in a ticking time bomb situation by the necessity defense, which allows the commission of an illegal act to prevent a greater danger (B'Tselem 1/14/99). The attorney then announced slight changes in some of the interrogation practices, including looser shackles and a less stifling bag. He emphasized that the use of these measures arose out of necessity. They were not intended to "burden" the detainees (*NYT* 1/25/99).

Retreating from its policymaking role, the Court voiced reluctance to rule on the question of torture when it reconvened on May 26 to hear the petitioners' arguments. Chief Justice Barak expressed dismay that the issue was given to the Court rather than to the legislature, where it belonged:

Whoever wants to do these acts must have the power to go to the Knesset and say, "Give me the authority to do this." This is the correct way. But you don't agree with this. You don't go to the Knesset. The Shin Bet [GSS] does not go to the Knesset. But you push the whole matter onto us. You want the High Court to do you a favor and take the bull by the horns (Cited in B'Tselem 9/5/99).

Justice Cheshin was equally critical of the matter being placed in the hands of the Court:

I understand that it is not pleasant to arrange this by statute. So, the High Court approves this while the Knesset keeps its hands clean (B'Tselem 9/5/99)?

The HCJ preferred that the Knesset pass the appropriate legislation and take the matter

out of its hands, hoping to avoid a case that would bring its domestic and international interests into direct conflict. But it grew increasingly difficult to wait for this legislation to be passed. While the general petitions were pending, Israeli human rights lawyers were strategically flooding the Court with urgent individual petitions. From January 1998 until the final ruling on September 6, 1999, over 125 such petitions were filed. As the situation became untenable, the Court unexpectedly issued its final ruling. At no time during this process were interim injunctions issued to stop the torture that was in progress.

Before the Court's ruling, there had been little public debate regarding GSS interrogation methods. Reports of torture began to surface in European newspapers and human rights organizations as early as the 1970s, but they were dismissed outright. The liberal *Ha'aretz* newspaper labeled one such report by the Swiss League of Human Rights the work of a "hostile organization" (cited in *Ha'aretz* 9/13/99). Israeli human rights groups pushing to bring torture to light and end the practice were similarly branded as traitors and enemies. Asking why torture was allowed to continue with little public debate for so many years, Israeli columnist Gideon Levy attributed it to public indifference and dismissal of what it perceived as the "radical left" (*Ha'aretz* 9/13/99).

Even events that were widely covered by the press such as the Bus 300 incident and the Landau Commission Report did not spark significant discussion. In part, this was because the measures employed by the GSS remained confidential. One notable exception occurred during the August 1995 deliberations over the renewal of the special interrogation measures, first put into place by a special ministerial committee following an October 1994 bus bombing in Tel Aviv and expanded in January 1995 following another attack. The public discussion centered on two factors. First, the death of Harizat

a few months earlier exposed the use of shaking as an interrogation method and led to questions regarding its use in light of the committee's pending decision. Second, a Jerusalem bus bombing occurred on August 21, 1995 while the extension of the use of special measures was being deliberated. The GSS and Prime Minister Rabin went public with accusations that "legal constraints" had prevented the GSS from obtaining information from a suspected Hamas terrorist that could have thwarted both the Jerusalem bombing and another bus bombing a month earlier. A few days later, Rabin called for an end to public debate between the GSS and the legal establishment for fear that continued revelations would impede security efforts (*Jerusalem Post* 8/27/95). When the special ministerial committee again renewed the special measures in October 1995, even voices on the left took up the security argument. MK Yossi Sarid, a member of the ministerial committee and a representative and future head of the left-wing opposition party Meretz, explained: "As long as there are extremists intent on destroying the peace process, we need these measures" (*Jerusalem Post* 10/20/95).

Aside from this debate over the interim measures, a survey of the Israeli press during this period shows limited coverage. Press stories appeared infrequently and primarily consisted of brief updates on Court hearings and rulings. More frequent press coverage did not begin until 1999. Israelis were aware of the fact that the GSS used physical means to interrogate Palestinian terror suspects but avoided probing the details. The issue was generally viewed as a security matter not meant for public debate. Most Israeli preferred that these methods be allowed to occur out of sight and out of mind (Kremnitzer and Segev 1994). The Court had enabled this situation to continue. When the ruling was unexpectedly issued in 1999, it disrupted this status quo and gave rise to a contentious national discussion.

## The Torture Ruling

The final ruling outlawing torture encompassed seven petitions— the two public petitions brought by the Public Committee Against Torture in Israel and the Association for Civil Rights in Israel and five individual petitions (*Zaidah* 1995, *Al-Ka'aqeh* 1995, *Ghanimat* 1997, *Qur'an* 1997, *Batat* 1999). The Court began the ruling with an explanation of its long-standing silence on the issue of torture. It noted that although numerous individuals had filed petitions over the years, the majority of these had been withdrawn after the state declared that it did not use physical means against the petitioners. The HCJ also defended its past failure to take a more general position on the legality of GSS interrogation methods, insisting that there had not been sufficient information to undertake a comprehensive discussion accounting for all of the complexities of the situation. Without offering any explanation for the change in circumstances, the HCJ declared that the current petitions provided a more comprehensive picture.

The state's defense of GSS interrogation methods took two forms — denial and justification. The government and the GSS eventually acknowledged the use of practices such as shaking, sleep deprivation, and the “shabach” position.<sup>61</sup> But they maintained that such practices did not constitute torture: “*The definition of ‘torture’ is limited to extreme cases of inhuman and forbidden physical acts, like electric shock, extracting fingernails, rape, harming sexual organs, penetrating objects into the body, and the like,*” adding that “even harsh physical violence is not necessarily considered ‘torture’” (cited in B’Tselem 2000: 23, emphasis in original). The state argued that GSS methods were

---

<sup>61</sup> In this position, a detainee is seated on a small, low chair with one hand tied behind him and placed between the chair's seat and the back and the other hand tied behind the chair against the back support. The chair is tilted forward, loud music is played, and his head is covered with an opaque sack.

justified because of the unique Israeli situation and the constant threat of terrorism.

These conditions created a ticking time bomb situation in which the use of moderate physical pressure had to be weighed against the lives of Israel's citizens. An assistant state attorney expressed this view:

Look, I see myself as a liberal, as a defender of human rights. But there is the question of the right of people in Israel, Jews and Arabs, to life. That is more important than other rights. We cannot do without moderate physical pressure. I think it's very courageous of the court to act as supervisor on this, and not to just say, 'It's out of our jurisdiction' (cited in *NYT* 5/8/97).

The government emphasized the ticking time bomb situation every time that it was called upon to defend the practice, particularly in front of the UN Committee Against Torture. The GSS told the Committee that it had foiled ninety terrorist attacks between 1995 and 1997 as a result of its interrogations, although this claim could not be verified (CAT/C/33/Add.2/Rev.1 2/18/97).

For several years, the HCJ itself had adopted this argument in allowing GSS interrogation methods to continue. In a 1996 hearing regarding the interrogation of a prisoner, the justices posed the ticking time bomb question to the prisoner's lawyer. When the lawyer objected to the use of torture against a hypothetical prisoner who knew how to stop an impending bomb explosion, Justice Cheshin, who had dissented in the judgments upholding demolitions, exclaimed: "That's the most immoral and extreme position I've ever heard in my life!" (cited in *NYT* 5/8/97).

A former GSS deputy head claimed that force was never used on an innocent man (*NYT* 5/8/97). But attorneys for the detainees rejected this claim, arguing that torture had become standard practice against Palestinians in every situation, ticking time bomb or not. According to B'Tselem, eighty-five percent of the roughly 1250 Palestinians who were interrogated every year were tortured (1/12/99). In 1995, Prime Minister Yitzhak

Rabin revealed that 8,000 detainees had been subjected to “shaking,” suggesting that it had become routine practice (B’Tselem 1997). The urgency suggested by the ticking time bomb argument also was rendered dubious by the fact that the detainees generally were held for prolonged periods, were not questioned on the weekends when the interrogators were at home, and were often released without charges.

The petitioners challenged GSS interrogation techniques on three grounds. First, they questioned the underlying authority of the GSS to conduct interrogations at all. Since independence, the GSS has operated as an extra-legal body whose authority has never been legislated. It has functioned as an executory arm of the government, carrying out its residual jurisdiction to defend state security.<sup>62</sup> The petitions challenged the interrogation authority of the GSS, given that this authority was explicitly given to other bodies, including the police, the IDF, and the prison authority. No such powers were ever expressly given to the GSS. The state maintained that authority for GSS interrogations stemmed from Israel’s Basic Law: the Government, from the Criminal Procedure Statute, and from the Penal Law.

Second, the petitioners challenged the Landau Commission’s understanding of the necessity defense, arguing that it could not be a source of jurisdiction for an administrative body. In their view, the necessity defense was a post facto defense meant to avoid criminal liability. As such, it could not provide advance authorization for interrogations. Moreover, despite the state’s contention that this defense authorized GSS investigators to use ‘moderate physical pressure’ as a last resort to prevent concrete injury to human life or safety, the petitioners claimed that these methods were not in fact

---

<sup>62</sup> This residual jurisdiction is found in Section 29 of the Basic Law: Government: “The government is authorized to carry out in the name of the state, and in accordance with all laws, any activity whose execution is not provided for by law to another authority.”

confined to specific cases of necessity.

Third, the petitioners challenged the interrogation methods themselves on several grounds. They argued that these methods were illegal under the Basic Law: Human Dignity and Liberty, which protected individuals from violations of life, body or dignity. They cited the *Katalan* (1979) decision asserting an Israeli prisoner's right to dignity of person and body as preserved in the Judicial Bill of Rights. They maintained that the use of force was illegal under Israeli criminal law. Finally, they argued that the case was justiciable under customary international law, citing several declarations and treaties, as well as the U.S. *Filartiga* case (1980).

The state denied that the interrogation methods caused pain and suffering, or constituted torture, cruel and inhuman treatment, or degrading treatment. It argued that some degree of physical force was permitted by international law, citing a book by two international law scholars to support this view (Evans and Morgan 1998). In response, the petitioners obtained affidavits from the authors rejecting this interpretation of their work and maintaining that necessity could not justify physical force. Similarly, when the state earlier had argued that British law allowed torture, the petitioners obtained affidavits from distinguished British lawyers showing that English law in fact bans torture (see Amnesty International Press Release 5/25/99).

For the first time, the Court considered all of the arguments raised by the petitioners, starting with the general authority of the GSS to conduct interrogations. It then questioned whether such general authority would authorize the physical methods employed by the GSS and weighed the petitioners' claim that these methods violated human dignity and constituted criminal offenses. The justices also considered whether the existence of unique circumstances of necessity that required immediate action to save

human lives from a grave attack authorized the GSS to employ physical means of interrogation.

The HCJ accepted the state's argument that the GSS, as part of the executive branch, acquired residual powers as defined in Article 40 of Basic Law: the Government.<sup>63</sup> But it noted the absence of a specific statute authorizing GSS interrogations and concluded that such a special statute was required for the infringements of liberty associated with these interrogations. Residual power alone was not sufficient to authorize such infringements. Here the Court's practice with respect to broader legal norms proved decisive; it based its conclusion on Israel's identity as a democracy and cited former Supreme Court President Shamgar's ruling in a case establishing fundamental rights:

There are activities that are not within the scope or powers of the government. Employing them without statutory authority goes against our basic normative understanding that is derived from our system's very nature. Thus it is in respect to our basic rights that they are a part of our positive law, whether they have been spelled out in our basic law or whether that has not yet been done. Thus the government will not have it in its hands, for example, the authority to shut down a newspaper on the basis of an administrative decision, in the absence of explicit legal directives to this effect, even if there has not yet been legislated a basic law that protects freedom of speech. Such an act would conflict with our basic outlook regarding individual liberty and the nature of our system, which provides that liberty may only be limited by explicit statute... meaning that the basic law of freedom of speech, that is part of our positive law, creates an exception binding the hands of the executive branch and does not allow her to make an exception, without statutory authorization, from the prohibition against infringing upon guaranteed human liberty (*Federman* 1994, cited at Para. 19).

The Court explained that residual power, because it was general in nature, could not sanction infringements on human rights in the absence of a statute (citing Zamir 1996). It added that the GSS guidelines issued in response to the Landau Report were merely

---

<sup>63</sup> This became Article 32 after a new Basic Law: the Government was drafted in 2001.

internal regulations. They were not equal to a statute and could not stand if they were in conflict with the Basic Law: Human Dignity and Liberty.

The justices concluded that GSS interrogators were equal to police officers in the eyes of the law, a departure from previous Court doctrine granting state actors broad authority to carry out security policy with respect to Palestinians. In the absence of specific legislation, GSS authorization to conduct interrogations originated in the Criminal Procedure Statute that empowered police officers and any other class of officers to conduct interrogations. This general authority, however, did not authorize the use of physical means.

The judgment then considered the state's argument that such authority was rooted in the necessity defense, found in Article 34 of the Penal Law:

A person will not bear criminal liability for an act that was immediately required to save the life, liberty, body, or property, of either himself or another, from imminent danger of serious harm, that is the result of the given situation at that time and for which he had no other means [of preventing the harm] but to do it (Para. 33).

The state maintained that the necessity defense authorized the use of physical means to prevent a terrorist attack in the absence of alternative means and that this served the interest of society by preventing a greater harm from occurring. The state even argued that the use of physical means was not only legitimate but that it was actually a moral obligation falling upon GSS investigators charged with maintaining public safety.

The Court agreed that a GSS investigator charged with a crime for using physical means in a ticking time bomb situation could avail himself of the necessity defense to avoid criminal liability. But it rejected the state's contention that the necessity defense authorized the use of physical means during interrogations, citing an Israeli legal scholar: "The defense of Necessity does not define a code of primary normative behaviour.

Necessity is certainly not a basis for establishing a broad detailed code of behaviour” (Enker 1995, cited at Para. 36). In other words, it did not authorize investigators to violate human rights by employing physical means to fulfill their duties in circumstances of necessity. Breaking from previous interpretations of the Landau Report in which the necessity defense had provided the GSS with wholesale authority to employ physical means, the HCJ argued that the necessity defense was not a blanket authorization, a view it believed the Landau Commission shared. The Commission, in the Court’s interpretation, had presented the necessity defense as a *post facto* legal defense that was available to an investigator who had chosen physical methods of interrogation as the “lesser evil.”

The ruling considered the fact that interrogations bring into conflict two basic values or interests of the regime: public interest vs. individual dignity and liberty. Neither of these is absolute. The Court again turned to Israel’s democratic identity to resolve this conflict: “A freedom-loving, democratic society is not prepared to accept that investigators will use any means for the purpose of revealing the truth” (Para. 22). Illegal investigations not only harm an individual’s dignity, they harm the character of democratic society as well. The HCJ noted that, “at times, the price of truth is so high that democratic society is not prepared to pay it” (Para. 22). As such, infringements upon human dignity and liberty are acceptable only to the extent that they are undertaken for an appropriate purpose and do not exceed what is necessary. A reasonable investigation in a democratic society, the Court maintained, was one that was free from torture and free from cruel, inhuman, or degrading treatment. Breaking with previous doctrine in which it had placed security considerations above those of human dignity (see, e.g., *Darwish* 1980, *Barkhat* 1992), the Court now asserted that “human dignity includes the human dignity of

the individual being interrogated” (Para. 23). This principle had been established in *Katalan* (1979), but the torture ruling marked the first time the Court had applied it to Palestinians.

The justices believed that the norm of human dignity, a fundamental democratic norm, undermined the state’s claim that moderate physical pressure was legal under international law. The growing justiciability of international human rights norms based on the concept of human dignity shaped the Court’s understanding as it sought to give meaning and substance to the general principle. No understanding of human dignity could fail to acknowledge that the prohibition against torture was evolving into a *jus cogens* norm of international law. The judgment, accordingly, emphasized that principles upholding human dignity were tied to international law prohibitions on torture, cruel and inhuman treatment, and degrading treatment, as found in treaties to which Israel was a signatory. These prohibitions were absolute:

There are no exceptions. They are not subject to balancing. Indeed, violence directed against the suspect’s body or spirit does not constitute a reasonable means of investigation. The use of violence during an investigation may lead to criminal liability and discipline for the investigator (Para. 23).

The justices maintained that interrogations, although inherently unpleasant, could be conducted without employing violence. This assertion was in direct conflict with the state’s ticking time bomb argument that held that violence was necessary under certain circumstances.

The Court’s consideration of the physical means employed by GSS investigators comprised two parts. The first part considered and rejected the use of violence as a reasonable means of interrogation. In short, the ticking time bomb argument was rejected. The second part examined the state’s contention that certain means employed by

the GSS arose under normal interrogation procedures.

The Court considered the following methods of interrogation: violent shaking; waiting in the “shabach” position; the frog crouch, involving prolonged crouching on the tips of the toes; excessively tightened handcuffs; and sleep deprivation. The state claimed that each of these methods was necessary and that none constituted torture. The HCJ concluded that these methods fell outside of the scope of the general authority to interrogate, went beyond their stated purposes, and violated human dignity. None was deemed to be part of a reasonable and fair investigation.

The Court rejected the use of exceptional methods such as shaking that were defended on the grounds of necessity. The state had argued that the shaking method was vital to the war on terrorism, that it was used only as a last resort, and that the death of Abdel Harizat was the result of a rare complication. When the petitioners submitted an expert opinion outlining the dangers of shaking, the state responded with its own expert opinion rejecting these findings.<sup>64</sup> Noting that the state did not claim that shaking was an “ordinary” interrogation method but arose from necessity, the justices prohibited its use: “It damages the suspect’s body. It violates his dignity. It is a violent method that does not constitute part of a legal investigation” (Para. 24). The frog crouch position similarly was prohibited as degrading and infringing upon human dignity, while serving no purpose inherent to the interrogation. With regard to sleep deprivation, the Court ruled that this was an accepted method of interrogation only as a side effect of a normal but lengthy interrogation, not as an end in itself. A reasonable investigation did not allow for the intentional deprivation of sleep in order to tire the suspect and break his spirit, as this harmed the suspect’s rights and dignity beyond what was required by the interrogation.

---

<sup>64</sup> The petitioners’ opinion noted that the GSS manner of shaking would cause serious brain damage, spinal cord injury, loss of consciousness, uncontrollable vomiting and urination, and serious headaches.

The state defended each aspect of the “shabach” position as serving the security needs that arose during the course of an interrogation. It maintained that suspects’ hands were tied for safety and security reasons. The loud music and head covering were meant to prevent contact between the suspects. The state denied that it purposely tightened handcuffs or used anything other than standard issue handcuffs. The Court previously had accepted these arguments, agreeing, for example, that the painful shackling of suspects was necessary to protect the interrogators, as was the covering of the suspect for hours with an opaque sack that sometimes resulted in suffocation. On this the Court had ruled: “We are satisfied that this measure is used in a reasonable manner for the purposes of interrogation, and it does not deprive the interrogee of proper ventilation and normal breathing, and it does not, either by its intention or in actual practice, cause pain which constitutes torture” (*Mubarak* 1996). Now the Court considered and rejected each aspect of the “shabach” position in turn, ruling that each of the practices constituted a violation of human dignity, physical integrity and basic rights, and went beyond the degree necessary to conduct a reasonable investigation.

The justices denounced the method of cuffing associated with the “shabach” position, in which one hand was placed in the gap between the back of the chair and the seat, and the other hand was tied behind and against the back of the chair. Preventing the suspect from fleeing and ensuring the safety of the investigator could be achieved without inflicting such pain and suffering in their view. They also reasoned that seating the suspect in a low chair tilted forward was not an integral part of the interrogation and caused the suspect pain and suffering. They flatly rejected the state’s argument that suffocating a suspect with an opaque sack was necessary to prevent contact between suspects. They insisted that less severe measures be adopted, such as placing the suspect

in a detention cell or covering only his eyes without causing physical suffering. Moreover, the Justices rebuffed as insufficient the state's declaration that it would make an effort to find a better-ventilated sack. Covering the head in any manner, as opposed to covering the eyes, was beyond the scope of the general authority to interrogate. Finally, the Court prohibited the playing of loud music for hours while in the "shabach" position as causing undue suffering.

In anticipation of the domestic backlash that could arise from outlawing the interrogation methods upon which the GSS had long relied, methods that were closely linked to the security of Israeli citizens, the justices attempted to discount the revolutionary aspect of their ruling. The final section of the decision, discussed below, set out to assuage some of the potential concerns. The HCJ tried to minimize the fact that its decision was in many ways groundbreaking by placing itself firmly within the judicial establishment and demonstrating that its conclusion was the ineluctable outcome of legal reasoning. Similar reasoning, the justices pointed out, had been employed by more conservative legal figures. The justices also sought to distance themselves from a policymaking role by placing primary responsibility for the issue in the hands of the legislature.

To avoid being perceived as adjudicating policy, the Court emphasized the fact that legislative shortcomings had prevented it from reaching an alternative decision. If the state wished to empower GSS investigators to employ physical means during interrogations, the Court explained, such authority must be explicitly legislated. The rule of law required that any infringement of human rights be authorized by statute. Moreover, the issue at hand raised fundamental questions of law and society, ethics and policy, and security. The justices stressed that the legislative branch was the most

appropriate body to answer such questions, as required by the fundamental operating principles of a democracy—the separation of powers and the rule of law. By placing responsibility in the hands of the Knesset in this way, the Court could assert that it was not in fact entering the policymaking arena. Instead, it presented its decision as a simple reflection of the law as it stood, in view of the legislature’s reluctance to make policy in accordance with its democratic function.

Finding themselves forced to contend with this legislative gap, the justices acknowledged the unique and difficult situation facing Israel and recognized that their decision would make dealing with this reality more problematic. To defend their position, they emphasized the state’s democratic character:

This is the destiny of democracy, that not all means are legitimate in its eyes and not all the practices employed by its enemies are open before it. Sometimes democracy fights with one hand tied behind it. Nonetheless, democracy has the upper hand, in that preservation of the rule of law and recognition of individual liberty constitute an important component in its understanding of security. At the end of the day, they strengthen its spirit and its strength and allow it to overcome its difficulties (Para. 39).

The ruling, nonetheless, left open the door for the legislature, as the representative of the will of the people, to legalize what the Court had just outlawed as it tried to evade a policymaking role: “the decision regarding the question whether it is appropriate for Israel, because of her security difficulties, to allow physical means in interrogations, and the question of the scope of these means that deviate from regular rules of interrogation” rests with the legislature (Para. 39).

It is not clear how the Court would reconcile the legalization of physical means with its statement that the prohibition against torture and cruel, inhuman, and degrading treatment was absolute, and that violence could not be part of a normal investigation. Were the state to pass such legislation, it would surely come into conflict with both

international law obligations and the Basic Law: Human Dignity and Liberty. The justices did note in their conclusion that any laws must meet the requirements of this Basic Law. It is difficult to imagine that any law legalizing physical interrogation methods would meet such requirements based on the standards of human dignity established by the Court. This inconsistency calls into question the seeming deference the Court showed the legislature on this sensitive issue. The absence of legislation rendered this deference purely theoretical. It is not clear how far this deference would extend in practice were the Knesset to actually legislate the use of physical methods of interrogation.

Despite its admonitions to the Knesset, the Court recognized that it would be accused of entering the political arena. In anticipation of this characterization, it defended its decision as wholly legal in nature:

Deciding on these applications weighed heavily on us. True, from the legal point of view our path was smooth. But we are part of Israeli society. We know its difficulties and we live its history. We are not in an ivory tower. We live the life of this country. We are aware of the harsh reality of terror in which we are immersed at times. The fear that this decision will hinder the proper dealing with terrorists and terrorism disturbs us. We are, however, judges. It is required of us by our fellow man that we act according to the law. This is also the requirement that we set for ourselves. For when we sit to judge, we are also being judged. We must act in pure conscience when we decide the law (Para. 40).

The justices turned to the words of Justice Landau, a well-respected legal figure, to preempt criticism. They cited a decision authored by Landau (*Dweikat* 1979) in which he had warned that the public would view the Court as entering into the realm of public debate even if its decision were guided solely by the law. Such was the nature of judging. Clearly anticipating a negative public reaction to a decision so deeply affecting Israeli security concerns, the Court took pains in its judgment to be seen as a neutral

arbiter of the law removed from political considerations while, at the same time, emphasizing that it shared the security concerns of the Israeli public.<sup>65</sup>

The justices further assured potential detractors that their conclusions were largely in agreement with the arguments put forth by the Landau Commission. The Commission had confronted the same dilemma that the justices faced — guaranteeing security vs. preserving the democratic character of the state. The justices maintained that the Commission had denied both that the fight against terrorism could be allowed to occur in the recesses of the law and that one should hold a blind eye to acts forbidden by law but occurring in practice. This left the Court with no choice but to outlaw the physical means of interrogation described in the petitions.

Human rights advocates have been critical of the ruling for outlawing only specific methods of interrogation and leaving potential loopholes for the state to exploit (see, e.g., Pacheco 2000, PCATI 2001). It is true that the Court only considered the specific methods of interrogation outlined above. At the same time, however, it established general principles that would apply beyond the confines of the specific case. It rejected the ticking time bomb argument and held that security considerations could not trump considerations of human dignity in a democracy. The prohibition on torture, cruel and inhuman treatment, and degrading methods was ruled absolute, as was the rejection of violence as an acceptable method of interrogation. And, while the Court did leave the door open for the Knesset to pass legislation legalizing certain methods of interrogation, such legislation would have to be in agreement with these general principles and with the Basic Law: Human Dignity and Liberty. It is unlikely, then, that torture could make a

---

<sup>65</sup> Noting these security concerns, Justice Kedmi wrote a concurring opinion in which he suggested suspending the judgement's entry into force for one year in order to give the GSS and the Knesset the opportunity to adjust to the new situation.

legal comeback. The executive director of PCATI, although critical of the ruling, similarly acknowledged that the ruling condemned the conduct of GSS investigators and clearly established that Israel has international legal obligations (Friedman, personal interview 3/12/00).

### **Understanding the Ruling at the Domestic and International Level**

Why did the justices depart from existing doctrine and decide to outlaw torture, having sanctioned GSS methods in previous rulings, including rulings from earlier that year? Does the ruling represent another “landmark” case in support of Palestinian rights, similar to those discussed in the previous chapter (Shamir 1990)? A detailed examination of the decision shows that it does not in fact share the characteristics of other landmark cases. Those cases, while overturning the disputed act in a specific situation, ultimately had the effect of sanctioning the contested practice. The torture ruling, by contrast, constituted a general and far-reaching ban on physical methods of interrogation, regardless of the situation. Unlike the landmark cases, this judgment did not enable and legitimize the continuation of a questionable practice in circumstances outside of the particular case. Instead, for the first time, the Court took on a policymaking role with respect to the territories. An examination of domestic and international factors will show that the Court was in fact adjudicating as an actor in the international system, as a member of the global judiciary. This factor, in combination with the HCJ’s long-established activist role—stepping in to fill legal gaps in accordance with broader judicial and universal norms—explains why the Court chose to confront the issue of torture.

Lawyers for the petitioners agree that the decision represented a radical and courageous step for the Court. The ruling overturned state policy on a security matter and embarrassed the government (MK Amnon Rubinstein, personal interview 2/2/00).

One human rights lawyer described how in previous torture cases she had been met with blank stares and distracted looks by the judges, who simply did not want to touch the issue (Pacheco, personal interview 9/7/99). The Court had continually postponed the hearings, hoping that “someone would come and take the chestnuts out of the fire” (Rubinstein 2/2/00). But, eventually, this situation became untenable. As it waited for legislation that never came, it became increasingly difficult for the Court to maintain that the Israeli government was not engaging in torture, and the Court found itself pushed into the role of policymaker. While the HCJ had not shied away from this role in promotion of civil rights, it found this function much more difficult where domestic concerns shared by all Israelis came into direct conflict with the Court’s international identity.

Interviews with Israeli human rights lawyers revealed varying degrees of cynicism regarding what motivated the Court to finally outlaw torture. But all agree that two factors played a significant role: growing international pressure and condemnation and a new awareness of the facts that made continued evasion of the issue impossible (Avram, Friedman, Pacheco, Yakir). For a long time, the Court had managed to avoid confronting the incongruence between the legal situation and the factual situation. But international pressure and scrutiny were mounting. Eventually, the justices had to face the fact that GSS interrogation methods did not meet international standards (Friedman 3/12/00) and that, as the guardians of Israel’s democratic values, they were being held accountable for this failure to live up to international human rights norms. The public role that the Court had carved out for itself—preserving Israel’s democratic character; filling in legislative gaps in accordance with fundamental global values; identifying itself and its rulings with enlightened democracies and legal norms—was incompatible with the continued sanctioning of GSS interrogation methods given the degree to which the

domestication process had advanced the norm against torture.

If the Court was responding to international pressure, it also was going against domestic currents. Aside from the small domestic human rights community that brought the case, and a few isolated members of parliament, politicians and the public alike supported GSS interrogation methods. And although the Torture Convention had been ratified, even some of its supporters rejected its applicability to the situation at hand. Following the ruling, only one Israeli paper, the left-leaning *Ha'aretz*, praised the decision as bringing Israel on par with democratic states that had signed the Torture Convention (9/7/99c; see also *Ha'aretz* editorial on proposed legislation legalizing torture 12/13/99). A separate commentary in this paper, however, accused the justices of going too far. It called for legislation legalizing the methods outlined in the Landau report and suggested a statement in this legislation explaining that “the Knesset was forced to pass the law in the wake of the High Court’s excessive involvement in matters from which its counterparts in other democratic nations tend to distance themselves” (Margalit 12/23/99). Two other papers were highly critical of the decision. The centrist *Ma'ariv* feared that the ruling could result in Israel losing the “war against terrorism” and supported legislation authorizing GSS interrogation methods (9/8/99). The right-leaning *Hatzofeh* called for a new method of selecting Supreme Court justices to produce “judges who recognize reality in Israel and also see it beyond the luxurious and patronizing windows of the Supreme Court” (9/8/99).

The ruling sparked an intense debate over legislating the GSS methods restricted by the Court. Prime Minister Ehud Barak established a Commission to examine legal options as a result of the ruling. Parliament member (MK) Reuven Rivlin proposed a bill that would, in effect, have legalized the Landau guidelines, and it gained the support of

more than half of the members of parliament. Within the Labor government, some members supported legalizing the use of certain methods under extreme circumstances, while others were opposed to distinguishing Israel as the only democracy to legislate torture. The former group included Prime Minister Barak and Attorney General Elyakim Rubinstein. The latter group included Justice Minister Yossi Beilin; MK Dan Meridor, who was responsible in his previous post as Justice Minister for Israel's ratification of the Torture Convention; and parliament member Amnon Rubinstein, who chaired the Knesset Law, Justice and Constitution Committee.

This limited support aside, the Court had positioned itself against virtually every segment of the public and the political establishment. Activists who had fought against the torture of Palestinian suspects were viewed as a radical fringe:

In Israel, there is general support for the use of torture during the interrogation of Palestinian suspects. So, we're starting from below zero; we're not starting from zero. That's why it was revolutionary when the court said even Palestinian suspects have the right to human dignity (Pacheco 2000; see also Cohen 1992 and *Ha'aretz* 9/13/99).

The results of a survey released one month before the ruling indicated that sixty-five percent of the Jewish citizens of Israel were willing to "surrender" democracy and the rule of law in exchange for security. Only twenty percent believed that the rule of law trumped security interests in every instance (*Yediot Ahronot* 8/6/99).

A former GSS head represented the views of much of the public in denouncing the "theoretical" debate over the battle against terrorism:

The source of our pride is in being a democratic country concerned for the rights of its citizens, even if they are Hamas terrorists who also have the right to appeal to the High Court of Justice. But let us not forget that the citizens of Israel have an even more elementary right, to protect their personal security, which is subject to the threats of those whose complaints are taking up the time of the nine Supreme Court justices. The limited ability of GSS interrogators in this stubborn

war against murderers must not be taken from them, thereby neutralizing Israel's ability to fight terrorism (Gillon, *Yediot Ahronot* 1/12/98).

For most Israelis, the issue was inherently linked to the fundamental survival of the state and its citizens.

Even before the ruling, the Court often was accused of overstepping its bounds. The criticism centered on the global orientation of the justices and the image of them as too far removed from the particulars of day-to-day life in Israel (see, e.g., Woods 2001). Following the ruling, two prominent legal figures went public with their sentiments. In an interview with *Ha'aretz*, Moshe Landau criticized the activism of the Court. He accused it of entering arenas reserved for the legislature and "taking control of Knesset legislation." The justices, he warned, were compromising judicial neutrality and integrity by pursuing their own agendas. Landau stated that he had previously warned Justice Barak that the Court was not paying sufficient attention to public sentiment. His criticism centered on the fact that the Court was so concerned with its vision of public law that it had abandoned its function as an arena for resolving disputes:

[The] problem deriving from that same activism is that many lawyers and citizens are getting the feeling that the court is too busy pondering the weighty matters of the world, and not sufficiently interested in the more mundane, daily matters affecting ordinary citizens. People have the sense that the justices prefer to compose lengthy dissertations defining values and dealing with general philosophy, and that they're not as interested in the less glamorous side of judicial work and in settling conflicts (10/6/00).

Landau agreed with the legal basis of the Court's decision, but he favored legislation authorizing the interrogation methods outlawed by the Court: "No other nation is in as dangerous a security situation as is Israel.... Here we're talking about the very existence of the state and its citizens' right to live."

Two months after the ruling, an interview with Hebrew University law professor

Ruth Gavison, one of the founders of the Association for Civil Rights in Israel appeared in *Ha'aretz* (11/12/99). Gavison accused the Court of being self-protective, arrogant, and elitist. In particular, she cited its global orientation as leading to decisions far removed from the domestic situation. She likened the Court to a philosopher-king for its attempts to impose Western, secular, liberal values on a society that did not necessarily identify with these values:

I think it is proper for the court to give expression to our common values, such as the basic human rights. But I do not think it is right for the court to make use of its power to give priority to the values of one group in society at the expense of the values held by other groups. I do not think it is right for the court to decide in favor of Westernism and against traditionalism; or in favor of modernity and individualism and against communitarianism.... I also do not think that it is the court's role to be the supreme moral arbiter of society.... There is nothing in their training that affords them the right, the authority or the ability to determine moral norms, to be the teachers of the generation (*Ha'aretz Weekend Magazine* 11/12/99).

Gavison was also highly critical of Barak's expansionist view in which virtually everything was justiciable. And she questioned his assertion of the Court's power of judicial review.

Gavison's remarks sparked a debate in the Knesset that led to a resolution rejecting Barak's all-encompassing view of justiciability and asking the Court not to interfere in legislative issues. The non-binding resolution called on the Court "to avoid becoming involved in value-based, halachic [Jewish law], ideological or political issues" (cited in *Ha'aretz* 11/30/99). After criticism from secular and leftist factions in the Knesset, a second more moderate resolution was passed. Still, this second resolution included the following passage: "The Knesset expects the Supreme Court to display great sensitivity when dealing with sensitive issues involving values which are dear to the hearts of large and diverse publics in Israel" (cited in *Ha'aretz* 12/2/99).

Gavison and other Court critics have been uncomfortable with the supra-legal or universal values that the justices have advanced. Criticism of the Court often pits the Western, liberal values that the judges promote against the particular situation of Israel and its unique citizenship. Chief Justice Barak has responded to these criticisms by emphasizing that the Court is not a representative body: “The Supreme Court must be served by the best judges available who can reflect the values and principles of the society in the best possible manner” (cited in *Ha’aretz* 12/12/99). Emphasizing the Court’s public law role, he explained that it is up to the judges to identify the deeply-rooted values of society, values that may not necessarily correspond with the majority view. In this function, the Court is in effect fulfilling a policymaking role—imposing its vision of the social and moral order:

The judiciary must be aware of the fundamental values of the people. It must balance them in accordance with the views of the ‘enlightened general public’ in Israel. It must reflect the general public’s conscience, the social consensus, the legal ethics and the value judgments of society with regard to acceptable and unacceptable behavior. Constitutional interpretation should not be formalistic or pedantic. It should be purposive (Barak 1997a: 5).

Invoking the activist Warren Court and *Brown v. Board of Education* for illustration, Barak explained that the Court must sometimes take bold steps that go beyond the determination or reflection of a ‘deep public consensus.’ At times, “a court must crusade for a new consensus” (Barak 2002: 29).

Accordingly, the Court has challenged the domestic consensus by evoking global notions of the democratic community of states and the rule of law. For example, it repeatedly has taken on the rabbinical authorities for failing to uphold general principles of equality. As a result, the HCJ has been characterized as an enemy of the Jewish people and has even received death threats (Woods, 2001). But while the Court has long

demonstrated a willingness to take on the religious establishment, the torture ruling marked the first time that it was willing to take on the security establishment on an issue involving Palestinians.

As Chief Justice, Barak's views, expressed in his writings about constitutional issues, have had a significant influence on the Court (see, e.g., Woods 2001, Bazelon 2002). Justice Landau has remarked that Barak's "judicial dictatorship" extends beyond the Court to academia and the legal media (*Ha'aretz* 10/6/00, see also Bazelon 2002). Barak's vision of the Court stems from his construction of an enlightened public associated with the universal values espoused by the West. He views the Israeli legal system as part of Western legal culture. He has made clear his belief that judges, who play a central role in creating legal norms, must turn to universal values—liberty, justice, equity and peace—not to Jewish law (Barak 1997b). In other words, he identifies as part of a global judiciary. As a result, the orthodox community has labeled him a "dangerous enemy" more powerful than the police, the executive and the legislature (cited in Woods 2001: 143).

The Court's global association comes through in its discussion of constitutional issues. In particular, the Basic Law: Human Dignity and Liberty has provided Barak with the opportunity to more firmly place the Court among the enlightened judiciary in the West. With its passage, he proclaimed that Israel had "joined the democratic, enlightened nations in which human rights are awarded a constitutional force" (1997a: 3). In every discussion of the significance of these laws, he has compared the situation to that in the United States, Canada and Europe, and he has directed attention to international documents including the Universal Declaration of Human Rights and the European Convention of Human Rights (1992, 1994, 1997a). He defined the new responsibility

facing the Court accordingly:

The mission imposed on the judge in a democratic society weighs heavily in every part of the world. The mission imposed upon the Israeli judge is particularly heavy. The state is in a struggle for its existence. Its society is in a struggle for its identity. The regime is struggling for its character. Under these circumstances there exists a tendency toward extremism.... Now that the people have given us the tools, we will do the work (1992: 35 [*Hebrew*]).

To complete this mission, Barak has called for the passage of more basic laws on human rights to bring Israel in line with its international human rights commitments (*Ha'aretz* 12/12/99).

The HCJ has not only sought to place itself alongside other democracies. It also has employed the constitutional jurisprudence of these democracies in its rulings, a process that has allowed for the influence of global norms (Benvenisti 1994a). This global jurisprudence has both contributed to and been influenced by the strengthening of global human rights law. As a result, the evolving meanings of these legal norms have been reflected in the Court's jurisprudence. MK Amnon Rubinstein, who chaired the Knesset's Law, Justice, and Constitution Committee at the time of the torture ruling, explained that Israel operates within a changing international context characterized by numerous human rights treaties, particularly in Europe, and he pointed to Israel's identification with the European example. Alluding to the domestication process, Rubinstein expressed the belief that a new atmosphere had emerged in which international law had become more than well-meaning but ineffective documents. And he was certain that the justices felt this changing atmosphere as well (personal interview 2/2/00).

The HCJ experience with regard to the torture issue demonstrates the effects of the global judiciary at work. The justices have strong ties abroad. Barak lectured at New

York University Law School in the 1970s. In the 1980s, he began spending at least a month annually in residence in American law schools, including Yale, Harvard, and the University of Michigan. In 1996, he initiated the Israeli “Judges in Residence” program at American University’s Center for Human Rights and Humanitarian Law. Under this program, Israeli judges from both the Supreme Court and lower courts spend their sabbaticals at the Center studying human rights. He sits on the advisory board of the Center for International and Comparative Law at the University of Michigan Law School. He has received honorary degrees from Yale, the University of Michigan, and Oxford University, among others. Each time an honor is bestowed, his role as a leader in human rights is touted. Other High Court justices have also regularly taught in law schools in the U.S. and the U.K.

His considerable presence abroad, however, also has exposed him to burgeoning criticism of the Court’s record on Palestinian rights. During his many public appearances abroad before the torture ruling, he faced mounting questions about the Court’s continued sanctioning of torture. Announcements that Barak was to receive an honorary degree or legal award were often met with letters of outrage. Each time, the Court’s continued legalization of torture played a substantial role in the dissent. Several prominent human rights groups protested the International Association of Judges’ decision to award Barak the International “Justicia en el Mundo” or “Justice in the World” award in May 1999. Barak has been largely unmoved by domestic criticism of the direction he has been leading the Court. He has blamed the attacks on the critics’ misunderstanding of the judicial process, what his critics have termed the “ignoramus thesis” (Woods 2001: 246). His identification with a global legal community, however, has made him sensitive to international criticism. During frequent appearances abroad, Barak and the other justices

had been growing increasingly aware of a general attitude that they were acting against the global norm regarding torture, an awareness that human rights organizations sought to exploit (Avram, personal interview 3/15/00).

Human rights lawyers in Israel agree that the international human rights community had a major influence on the Court's decision as a result of the justices' concern with their status abroad. In fact, the Court was quick to translate the torture decision into English and post it on its website for international consumption. One lawyer believes that the justices never would have challenged the government's security argument in the absence of international pressure (Pacheco interview 9/7/99). These pressures may have weighed more heavily on Justice Barak because his 1998 decision upholding the use of detainees from Lebanon as hostages or bargaining chips had been heavily criticized (Yakir interview 3/14/00). A former clerk of his credits the criticism he faced abroad and concern with his international image as the main factors leading to his subsequent reversal of this decision (Woods 2001). The later decision rejected the legality under the Emergency Powers Law of holding individuals in administrative detention to use as bargaining chips. Justice Barak opined that "a state that honors freedom and dignity" could not uphold a practice that did such harm to these principles (cited in *Ha'aretz* 4/18/00),

Internationally, GSS interrogation practices were universally condemned as torture, with little debate. The local human rights community's strategy involved making sure the judges were aware of this international condemnation. In an example that points to the influence of transnational advocacy networks upon the global judiciary, human rights organizations in Israel worked with the United Nations and international human rights organizations to pressure not only the Israeli government, but the HCJ as well

(Friedman interview 3/12/00). As one lawyer explained, “I’m not engaged in normal lawyering. I’m not arguing the Israeli legal context; I’m arguing the international legal context” (Pacheco interview 9/7/99).

Critics of the Court have also recognized that the justices operate in an international rather than a domestic context:

The highest legal institution of the Jewish state is cutting itself off from the life and existential needs of the Jews in this country and is clinging... to the formal, inflexible and irrelevant body of precedent that ignores the constraints of existence of the nation at this time and on this difficult and dangerous strip of land. Ill winds from the Western world, where none of the dangers that threaten us here exist, are what are leading the High Court of Justice to rule on every aspect of life. It does not content itself simply with preferring the rights of the individual Israeli to the interests of the collective. Now it is spreading its sheltering wing over individuals who belong to the enemy camp, and is coming out, by force of this *global body of law*, against the instinct of Jewish existence. And thus, by force of the new religion, the judicial religion, it has also become the supreme arbiter in conflicts between the state and the enemies that rise up against it [italics mine] (Harel 4/27/00).<sup>66</sup>

In a similar vein, MK Reuven Rivlin criticized the Court for being removed from reality and accused those who supported outlawing torture of worrying about “what the goyim will say” (cited in *Ha’aretz* 11/1/99). Gavison expressed a similar sentiment: “If I have to identify the sources of pressure and the kinds of community that the justices are trying to please, I would not locate them in Israel but in the international community” (cited in Woods 2001: 166).

Recognizing the judges’ identification with global norms and their concern with their status in the international community, human rights organizations made a calculated decision that “the battle was most effectively fought in the Courts” and abandoned their efforts to sway public opinion through letters and other lobbying tactics (Friedman

---

<sup>66</sup> This commentary was written in response to the HCJ ruling that Lebanese hostages could not be held as “bargaining chips.”

interview 3/12/00). In 1997, the domestic Public Committee Against Torture in Israel filed fifteen cases in the Supreme Court. In 1998, this number jumped to seventy-eight. Between January 1999 and the September ruling, PCATI filed fifty-five urgent petitions. Because they dealt with individual cases, the Court was forced to discuss these urgent petitions quickly. Their frequency, week after week, inundated the Court, ultimately forcing it to address the general petitions on torture (filed by PCATI and ACRI) that it had previously deferred (Yakir interview 3/14/00).

Human rights lawyers were aware that the justices were reluctant to be perceived as assuming a law-making function by enforcing customary international law (Avram interview 3/15/00). So they called on the Court to interpret domestic law in accordance with customary international law, an approach that removed the justices from the law-making arena by relying on the interpretation of existing law. The Court's history of using just such an interpretive approach to establish fundamental civil rights inside the Green Line lent some hope to this tactic. Using the Court's self-identification to their advantage, the lawyers drew upon the body of global legal norms that the justices themselves employed. They framed their arguments to say, "Here is a body of principles that every democratic country accepts; our law should be compatible with these principles" (Avram 3/15/00). Yet past practice with regard to Palestinian rights claims suggested that the justices would reinterpret this representation of international law to lend legitimacy to the government's existing security policy, as the previous chapter demonstrated. For the first time, this did not happen. The Court faced a norm against torture that was so clearly specified that no alternative interpretation of this norm was available. Confronted with the reality of torture in Israel, the HCJ had no choice but to outlaw it or ignore international norms altogether.

Several factors contributed to bringing this reality to light. The justices had probably become aware of the contents of a highly critical 1995 state comptroller report on GSS interrogations methods that had been sealed for security reasons (Comptroller Audit Report 1995 [summary released 2000]). PCATI had submitted a petition in 1998 to make public the report's findings. The report, which examined the GSS investigative system from 1988-1992, found severe breaches of the law and of the Landau Committee guidelines. It held that investigators routinely exceeded the bounds of moderate physical pressure established by the Committee. GSS officials did nothing to prevent the systematic use of interrogation methods that the Landau Report had emphasized were to be used only in exceptional circumstances. The comptroller found that methods not specified in the Landau Report also were regularly employed, and that GSS investigators continued to lie while giving testimony. The comptroller flatly rejected the GSS claim, made to the Landau Committee, that a strict code of truth existed in the organization.<sup>67</sup> She concluded that the abuses that had led to the convening of the Landau Committee remained in effect. The Landau Report had had no effect on GSS operating procedure.

At the international level, every body or official that had considered GSS interrogation methods had rejected both Israel's assertion that that these methods did not constitute torture or ill-treatment and its argument that Israel's security situation allowed the use of such extraordinary methods (B'Tselem 2000). Every international and regional human rights body without exception had emphasized the absolute prohibition on torture regardless of circumstances (PCATI 2001). Human rights lawyers included copies of these reports, condemning Israel for committing torture, with their petitions (Avram interview 3/15/00).

---

<sup>67</sup> In an October 2000 interview, Landau revealed that he felt betrayed by the GSS in the years following the release of his report (*Ha'aretz* 10/6/00).

For several years, the United Nations Committee Against Torture (UNCAT) had published highly critical reports on Israeli interrogation methods. In 1994, Israel submitted its initial report to the Committee as part of its treaty obligations under the Torture Convention. The Committee responded: “It is a matter of deep concern that Israeli laws pertaining to the defences of ‘superior orders’ and ‘necessity’ are in clear breach of that country’s obligations under article 2 of the Convention against Torture” (Concluding Observations 12/6/94: 167). Following international coverage of its interrogation methods, Israel submitted a revised version of a special report that it had composed in response to UNCAT criticism. The government clarified its position: “Disproportionate exertion of pressure on the suspect is not permissible—pressure must never reach the level of physical torture or maltreatment of the suspect, or grievous harm to his honour which deprives him of his human dignity” (CAT/C/33/Add.2/Rev1 2/18/97: 9[1]).

Despite UNCAT requests, Israel refused to reveal its interrogation methods, ostensibly for security reasons. The Committee, barred from undertaking investigations itself, already had adopted the practice of relying on country information provided by credible human rights organizations. UNCAT based its conclusions on this information. It deemed that GSS methods, the same ones later considered by the HCJ, constituted torture and were illegal even under exceptional circumstances (Concluding Observations 5/9/97: 257-8).<sup>68</sup> Moreover, it singled out the Court for suspending the interim injunction in the 1996 *Hamdan* case. This development, the Committee complained, not only allowed for the continued use of illegal methods, but also legitimated them. A record of the public meeting contains the following condemnation:

---

<sup>68</sup> The Committee also found Israel to be in violation of Article 16 outlawing cruel, inhuman or degrading treatment.

Mr. Pikis explained that the Supreme Court's judgment had caused consternation within the Committee because, besides indicating that the Committee's earlier recommendations had been ignored, it gave legal backing to interrogation practices which the Committee had denounced. Recapitulating articles 1, 2 and 16 of the Convention, he emphasized that it was the responsibility of the judiciary to uphold the rule of law and ensure that any coercive action taken by the authorities against citizens was lawful. The Supreme Court's judgment was unsupported by any principle and was concerned only with allowing the police to proceed as it saw fit. It made no reference to chapter 9 of Penal Law 5737-1977, which did conform to the Convention. The judgment, which placed the General Security Service above the law of the land by authorizing it to commit a crime prohibited under the Penal Code, struck at the very foundations of the rule of law (9/4/97: 44).

This censure of the Court placed it under growing scrutiny of its handling of the torture issue. The Court no doubt felt the sting of this rebuke. Although the Israeli public views the UN and all its organs as biased against Israel, the justices are aware of the distinction between the politicized General Assembly and the human rights committees made up of professional jurists. The reporting process had become a public relations issue and a source of international pressure for the Court (Avram interview 3/15/00).

In its reports to UNCAT, the government consistently pointed to the HCJ to lend credence to its contention that the state was not committing torture (Special report 2/18/97; see also reports from 2/4/94, 5/15/97, 9/4/97). The Court, as the guarantor of democratic values and human dignity, investigated all petitions alleging torture. The government made it clear to the international community that the Court would outlaw torture if it were, in fact, occurring, a tactic that ultimately backfired. The HCJ, placed on the defensive and seeing its reputation in jeopardy, found it increasingly difficult to go along with government deniability. The public role it had built for itself left the Court with few options after information surfaced regarding GSS interrogation methods, given that international opinion had crystallized around the characterization of these methods as

torture.

In the November 1998 meeting between UNCAT and Israel, the Israeli delegation emphasized that the HCJ was set to hold hearings on GSS interrogation methods in an unusual nine-judge panel that reflected the importance of the issue (CAT/C/SR.336). The Court no doubt was aware that it bore the weight of resolving this issue, and that all eyes, domestic and international, rested upon it. International human rights organizations such as Amnesty International brought in observers. Israeli human rights groups, mindful of the fact that the justices viewed themselves as part of an enlightened legal community, brought jurists from all over the world to observe the hearings. They sent letters to all the universities and organizations where Chief Justice Barak and the other justices made appearances (Friedman interview 3/12/00). Before the May 1999 hearings, Human Rights Watch called on the Court “to meet its responsibility as the highest judicial authority” by outlawing torture. Recognizing the Court’s reluctance to rule because it regarded the issue as a legislative one, the organization emphasized that the failure of the other branches of the government to outlaw torture created an even greater obligation for the Court to step in (HRW Background Briefing 5/25/99).

With the international community focused on the Court as the body that would resolve this issue, the justices grew increasingly uncomfortable with their previous decisions. In this environment, they found it difficult to rule in favor of the government (Friedman 3/12/00). In earlier rulings, the Court had used a lack of concrete information to avoid ruling against the state:

The presumption may be raised that most members of Israeli society, including High Court Justices, prefer not to know the unpleasant details of how citizens of the state are protected from terrorist acts. Since no one disputes the importance of the fight against terrorism, and since it is clear that there is no elegant way to cope with it—the easiest way is to give a free hand to those in charge of performing

that mission, without supervising their activity (Kremnitzer and Segev 1994).

But the claim of ignorance had become hard to maintain. By the time the Court issued its ruling in 1999, the justices faced an undeniable set of facts involving GSS interrogation methods. They could no longer willingly plead ignorant to avoid confronting the issue.

This new situation also altered the judicial approach toward international law. In each of the interim decisions that preceded the final ruling, the HCJ had relied solely on domestic law, making no reference to international norms. It chose not to employ the Landau Commission's argument that its guidelines were consistent with international law, relying instead on the necessity defense. In a 1997 article, Eyal Benvenisti argued that this outcome was to be expected. He defined two approaches to the ban on torture—the conceptual approach and the self-defense approach. The conceptual approach supports an absolute ban on torture, distinguishing it from 'lesser' forms of violence. It hinges upon identifying acts that constitute torture. This is the approach that has been adopted by the international community. The self-defense approach, by contrast, does not require that one clearly establish which acts constitute torture. It begins with a ban on the use of physical means during interrogations but provides a defense for their use under extreme circumstances, such as the ticking time bomb situation. The question is not whether the act in question constitutes torture, as in the conceptual approach, but whether the circumstances merit the use of physical means.

Benvenisti explained that the international community adopted the conceptual approach because of its need to set a universal standard that sent a clear message. Domestically, however, national courts would be inclined to adopt the self-defense approach because they were uncomfortable branding public officials as torturers. This perspective provides the courts with the more politically tenable option of finding state actors guilty of illegally using force during an interrogation. Benvenisti concluded that

the domestic level was best served by the self-defense approach. In fact, he agreed with the Court's reluctance to make real-time decisions regarding interrogations. But he called on the justices to undertake a more thorough retrospective review of specific interrogations and to provide remedies in certain instances, intending for this review to be consistent with the self-defense approach (1997). Yet, when the Court did undertake such a review, it abandoned this approach and adopted the international community's perspective. Rather than examine the specific circumstances of the interrogation, the ruling established an absolute ban on torture and considered the specific interrogation methods to determine whether they constituted banned activities. In short, the Court abandoned the domestic position in favor of the international.

### **Conclusion**

As a democracy, Israel has strived to put a legal face on its occupation and related battle against terrorism. Both the government and the Court have emphasized the legality of state actions with respect to the territories and their Palestinian inhabitants. At an inauguration ceremony for new judges in February 2002, Barak stressed that the war against terror could not be conducted outside the law (*Jerusalem Post* 2/1/02). This rhetoric caught up with the Court in the case of torture. Having given the human rights discourse a prominent role in its judgments, the Court was left with little room to maneuver once particular norms within that discourse had assumed an unequivocal meaning that allowed for no derogation.

Israel's policy of targeted assassinations provides an informative comparison for understanding the outcome in the torture case. In January 2002, the HCJ threw out a petition challenging targeted assassinations. Then Foreign Minister Shimon Peres justified these assassinations by labeling the targets as ticking bombs that must be

intercepted before they blow up innocent civilians. The argument was strikingly similar to that employed to justify torture during interrogations. Peres continued:

Israel is a land of law. We cannot permit ourselves overlooking law – international and otherwise. All what we are doing is being checked carefully from a legal point of view and we asked our legal advisors in Israel and abroad. They say for self-defense you can intercept killers (Appearing on the Charlie Rose Show 2/4/02).

Israel was determined to justify to the world that its actions were legal in the fight against terror. With respect to GSS interrogations, this position became untenable once the norm against torture became so clearly specified. Targeted assassinations, on the other hand, although illegal under international law, have not been so clearly defined. Unlike the issue of torture, there is no treaty or international body centered on targeted assassinations. Nor does any human rights treaty make direct reference to or specifically outlaw this practice.<sup>69</sup> And although human rights groups have condemned the practice, there has been relatively little international condemnation, and none to date has been aimed at the Court.<sup>70</sup> By contrast, with world attention focused on Israel's incursion into the Jenin refugee camp in April 2002, the HCJ barred the Israeli Defense Forces from beginning a cleanup. Widespread charges of a massacre (see, e.g., *The Guardian* 4/12/02, *NYT* 4/14/02, *BBC* 4/18/02) and calls from human rights organizations and the international community for an international investigation prompted the Court to institute an agreement allowing for Red Cross and Red Crescent participation in the burial of bodies (*Barakeh* 2002).

This trend has continued. In April 2000, the Court outlawed the indefinite

---

<sup>69</sup> These assassinations fall under the category of extra-judicial executions, which are illegal under international law. But there is no explicit mention of "targeted assassination," leaving the Court with legal maneuverability.

<sup>70</sup> The international community did strongly condemn the March 2004 assassination of Hamas leader Sheik Ahmed Yassin, but it is too soon to tell what effect this will have.

imprisonment of Lebanese hostages as bargaining chips in exchange for information about Israeli prisoners in Lebanon, reversing its 1997 decision upholding the practice. The decision hinged on the interpretation of the detention law in accordance with international law, even though the relevant prohibitions regarding detentions were to be found in treaty rather than customary law. In the ruling, Justice Barak admitted that his previous decision had been wrong and noted, “it seems there is no state in the western world that employs administrative detention for someone who does not himself pose a threat to national security” (cited in Cassel 2000). In December 2001, the Court ruled that a former GSS official could not serve as Prime Minister Ariel Sharon’s counter-terrorism advisor because of his involvement in the Bus 300 affair.

Both inside and outside the territories, HCJ jurisprudence has been based on its construction of Israel as a democracy representing universal or western liberal values. The government has relied on the Court to legitimize the occupation and its related security policy. And HCJ decisions stemming from this policy generally reinforced the government’s contention that its actions were legal under international law, in large part because the Court shared that state’s broader security concerns. When the Court outlawed torture, it suddenly defied government policy and domestic opinion, betraying its own domestic concerns in response to international level factors. The HCJ ruling demonstrates the extent to which domestic courts, acting as participants in the global judiciary, have begun to matter. And as this identity grows stronger and encourages greater judicial activism, courts may find themselves entering the policymaking arena even in areas they would prefer to avoid in an attempt to preserve this global identity.

## Chapter 6

### Conclusion

In *The Hollow Hope*, Gerald Rosenberg concludes that to pin one's hopes on the courts as a force for social change "is to cloud our vision with a naïve and romantic belief in the triumph of rights over politics" (1991: 343). Siding with the view first presented by Alexander Hamilton in the Federalist Papers, he believes that the judiciary, lacking both force and will, is dependent on the other branches of government and cannot be effective without their support (Federalist No. 78, 1788). The judiciary has long been viewed as the weakest branch of government. Moreover, what influence has been acknowledged has been limited to the domestic realm. Yet remarkably, the domestic judiciary has emerged as a significant actor on the international stage. Around the world, domestic courts are issuing rulings that hold state and non-state actors accountable in new and unanticipated ways, unanticipated because these rulings are based on international law—a phenomenon I have termed the domestication process. Before they discovered otherwise, most of the defendants in these rulings shared the widely held belief that international law, especially international human rights law, exists in name only and does not function as an actual legal system. Through their decisions, domestic courts have replaced this vision of international law with a more meaningful version. International human rights norms have begun to provide the citizens of the world with basic legal protections that they can enforce judicially. These cases illustrate that the triumph of rights over politics is not always a naïve belief. For many victims, it has become a reality.

This dissertation has traced the evolution of this process: from the relative isolation of U.S. tort law, where the seminal transformation of international norms into practical legal protections received little notice; to the halls of Britain's highest court,

where the entire world watched as the Law Lords determined the fate of a former head of state; to the culmination in Israel's highest court, which issued a direct challenge to its own executive and legislature on a fundamental matter of security. Seeking to account for the domestication process, this dissertation has identified the central factors that these cases have in common. First, as activist judiciaries engaged in public law litigation, these domestic courts began to promote a more internationally oriented rights discourse. Second, they seized on the opportunity to expand their rights-based activism by incorporating international norms based on democracy and individual rights. These norms were in ascendancy after the end of the Cold War gave rise to newly democratizing states. Domestic courts took note of the widespread recognition of democracy during this period and transformed this recognition into a set of substantive legal obligations. Finally, what all of these cases have in common is that the courts were acting as members of an international community of justices—the emerging global judiciary.

### **International Precedent**

These cases show that the national judiciaries responsible for carrying out the domestication of international law have begun to identify less as actors within particular countries and more as participants in a global community of judges. These judges are engaged in a shared enterprise based on justice and the rule of law and on the recognition of a common set of global norms. In the cases discussed in the preceding chapters, the judges made it clear that they viewed their rulings not merely as decisions on isolated questions of domestic law, but as a statements on issues of international justice meant to influence the international community. Chapters 2 and 3 in particular show how these judges framed their arguments to provide a precedent not just for their colleagues in the

U.S. and the U.K., but also for judges around the world dealing with the same international human rights norms. Even though the U.S. rulings were based on a domestic statute, the ATCA, these judges explicitly avoided a purely domestic interpretation of the norms in question. Their jurisdiction to hear these cases may have been rooted in a unique domestic statute, but their rulings on international human rights norms were meant to be authoritative statements on the global legal status of these norms. Similarly, the British Law Lords, though ruling on domestic extradition law, were more fundamentally concerned with providing “an international system under which the international criminal—the torturer—could find no safe haven” (Lord Browne-Wilkinson 3/24/99).

In Chapter 5, it was precisely these internationally targeted judgments on the legal status of international human rights norms that led the Israeli judges to rule the way they did. Going against domestic interests as represented by the government and public opinion, the High Court of Justice issued a decision that severely restricted the domestic security service on the basis of the international norm against torture. Like their counterparts in the U.S. and the U.K., Israel’s judges addressed an international community of justices in their rulings. But the human rights issues raised by the state’s prolonged occupation of the West Bank and Gaza meant that these justices were acting from a more defensive position. Whereas American and British justices sought to develop and promote human rights norms in order to create an effective legal system of international rights protection, Israel’s justices were responding to these norms to maintain their legitimacy within this global legal community. Their responsiveness, in turn, was based on the fact that they themselves had been actively promoting shared global judicial principles in civil rights cases outside of the territories. As global legal

precedents grew stronger, the justices could not defend judicial activism that stopped at the Green Line.

### **Judicial Activism: The Judge as Policymaker**

The domestication process is an outgrowth of rights-based judicial activism. The activism of U.S. court in the sixties and seventies is well-documented (Chayes 1976, 1982; Fiss 1978, 1979). This activism spread to judiciaries in other countries as they underwent similar rights revolutions (Epp 1998). International human rights law presented the courts with a unique opportunity for activism precisely because it was conceived as an abstract set of guiding norms rather than as a binding collection of legal rules. Seeking to avoid specific commitments and limitations on their sovereignty, states drafted these norms to be relatively broad and indeterminate. Ironically, this left a space for the activist judiciary to fulfill its public role and fill in gaps in these laws in accordance with what it viewed as the goals and values of the international community. As the cases described demonstrate, activist courts have abandoned the legal positivism that limited their ability to restrict state activity. Instead, they have adopted an interpretive approach that has enabled them to give concrete meaning to these vaguely defined norms by turning to a variety of domestic and international sources.

More than this, however, these judges have engaged in what Feeley and Rubin have described as judicial policymaking (1998). Policymaking goes beyond interpretive jurisprudence in that the content of the legal decision has no concrete link to any judicial source. Rather than interpreting the law to fill legal gaps, judges are in effect making policy where none exists. As such, they impose their vision of the social order to give effect to what they have determined to be the normative values of the community. While Feeley and Rubin conceived of this community as domestic in scope, courts identifying

with the global judiciary have begun to make policy on the basis of the values of the international community.

When American judges began ruling on the basis of the Alien Tort Claims Act, the executive and legislative branches had begun to bring human rights concerns into foreign policy. Nonetheless, legislative policy contained little to suggest that international human rights norms were to be treated as legal guarantees. The courts determined, however, that this is what the international community intended and ruled accordingly. In fact, it was only after federal judges developed this policy with respect to international human rights law that Congress followed suit with legislation codifying it—the Torture Victims Protection Act (1991).

The determination that Pinochet could be held liable for human rights violations under international law also points to some degree of judicial policymaking, even in the face of executive branch opposition. Chile opposed the prospect of Pinochet standing trial for violations of international human rights law but had no control over legal events occurring elsewhere. The executive branches of Spain and Britain expressed disapproval but at the same time limited their involvement in the case. This reluctance to get involved left an issue with serious repercussions on state sovereignty squarely in the hands of Britain's judiciary. In effect, it was up to the Law Lords to determine global legal policy regarding the prosecution of former heads of state for human rights violations under international law. But it would be a mistake to view this as a voluntary ceding of power to the judiciary. A Spanish judge's activism in requesting Pinochet's extradition first forced the matter into the judicial arena and, eventually, onto the docket of the House of Lords. Once the process had begun, the executive branches of Spain and Britain recognized that they could not easily step in and make the matter go away.

Instead, they tried to distance themselves from the prospect of an undesirable outcome that they could not control—a ruling against Pinochet—by publicly framing the issue as a judicial one.

Like their American counterparts, the Law Lords engaged in policymaking within the context of rights-based activism and the global judiciary. As a result, their determination regarding Pinochet's liability was based less on their perception of domestic policy interests and more on their vision of the socially desirable outcome as envisioned by the international community. According to this vision, Pinochet's crimes fell into the "categories of crime of such gravity that they shock the conscience of mankind and cannot be tolerated by the international community" (Lord Phillips, 3/24/99). Like the judicial policymaker described by Feeley and Rubin (1998), the Law Lords were motivated by the desire to put an end to what they deemed to be an intolerable situation.

In Israel, political developments gave the HCJ an opportunity to adopt a greater policymaking role. The fact that no party achieved a majority in Parliament after 1977 left difficult political decisions unresolved, creating a space for the Court to fill. But the Court initially adopted this role only with respect to issues that did not involve the territories. Eventually, the inability of the legislature to deal with the continuing question of GSS interrogation methods put the issue of Palestinian rights vs. security in front of the Court. The Court was aware that even though the government was unwilling to actually legislate torture, it was strongly in favor of allowing the GSS to continue its physical methods of interrogation in the interest of security. In the context of its rights-based activism and its identification with the global judiciary, the Court went against this interest and gave effect to the values of the international community. The absence of

legislation governing the GSS meant that it had been able to operate outside of the law. Finding this situation intolerable, the HCJ imposed limits on the actions of this body.

### **Do Courts Matter?**

The system of international rights protection has always been weak because, from a strategic perspective, states simply have no reason to care about the way another state is treating its citizens. States may express outrage, but historically they have been unwilling to jeopardize other interests in order to prevent human rights abuses. As a commentary in the *New York Times Magazine* observed:

The human rights movement has assumed that establishing norms will lead to a better world. But can anyone be confident that developing the 'right' norms will lead to effective enforcement? (Rieff 8/8/99).

In this context of executive inaction, domestic courts have become extremely important actors in international rights protection. In the domestic context, public law scholars have asked both whether and in what ways courts matter. The domestication process offers new answers to these questions by looking to the international level.

Rosenberg maintained that court decisions do not in fact bring about social change unless there already exists a supportive political and legal culture (1991). He also questioned the mobilizing potential of judicial decisions. The cases described here, occurring in an international context, suggest an alternative picture. To begin with, even if one cannot identify domestic legal precedent, such a precedent may exist at the international level. In the case of human rights enforcement, a supportive legal culture has emerged as a result of the precedent advanced by the global judiciary. Moreover, these cases challenge Rosenberg's contention that a supportive political culture is a necessary element in judicially-linked progress. Rosenberg questioned the very notion that the judicial branch could initiate progress. He emphasized that the significance of

American court decisions depends on executive and legislative branch support and tends to reflect rather than bring about a change in attitudes. Yet, in many of the cases described here, activist judiciaries were challenging accepted political standards and deeply held attitudes regarding sovereignty. While the distinction may hinge on how much political support is actually necessary, the domestication process suggests that the picture is more complex than that presented by Rosenberg.

In the U.S., friend of the court briefs showed that the executive did not always support the promotion of international human rights law by its courts. But the courts continued to advance these norms even in the face of opposition. In Israel, the government itself was the defendant and the HCJ ruled directly against its interests. The case against Pinochet sparked protest from executives and the public alike. In Britain, the executive expressed public indifference but privately wished the matter would go away. The Spanish government also expressed dismay that a lone judge had sparked international controversy and it attempted to limit the progress of the legal proceedings. Ironically, in Chile the government was forced to publicly protest Pinochet's detention, but many officials privately expressed satisfaction that the former dictator was being called to account for his human rights abuses (Birns, personal interview 5/9/03). None of the governments involved in the case expressed outright support. And governments around the world feared the repercussions that such a case held for the principle of sovereignty. These decisions, then, defy Rosenberg's contention that courts are necessarily inhibited by a lack of independence from the other branches of government.

Rosenberg did not believe that legal decisions influenced political elites, arguing that these decisions generally reflected rather than initiated change. The cases discussed here, however, have influenced both the judicial deliberations of other courts and the

actions of the executive and legislative branches. In the U.S., Congress decided to codify and extend the progress made in the ATCA cases by passing the Torture Victims Protection Act. The ATCA cases also contributed to a legal atmosphere in which Pinochet, a former head of state, could be held accountable for human rights violations made illegal by international law. And as a result of the proceedings against him, Chile suspended his immunity. Moreover, since the Pinochet case, several countries have abandoned policies that avoided dealing with the human rights abuses of past governments. After a period of inaction, these countries, which include Mexico, Paraguay and Argentina, have begun taking legal action against former government and military officials implicated in human rights abuses.

Perhaps the starkest example of the effect of these rulings is the decision by Israel's Supreme Court to outlaw torture. It is hard to imagine that the Court would have made such a bold decision in the absence of the strong precedent outlawing torture that had been established by the global judiciary. And despite widespread opposition from the other branches of government and from the public, the security service in Israel stopped using torture, and the Knesset has been unable to pass any laws legalizing the use of these methods.

These cases also depart from Rosenberg's conclusions in that they did in fact mobilize activists to pursue further judicial recognition of international human rights. The Pinochet case in particular galvanized activists from all over the world. Following its participation in this case, Human Rights Watch created a program on international justice to bring human rights charges against other exiled leaders or those enjoying amnesty in their own states. The organization presented the UN Human Rights Commission with a list of former leaders living in exile that it wanted to be tried for

human rights abuses. The high-profile Pinochet case offered new hope to victims of human rights abuses. As one advocate with HRW related: “After the British House of Lords ruled in favor of Pinochet’s extradition, we started getting calls from victims of other dictatorships all over the world asking us how they could do what Spain has done” (Reed Brody, *NYT* 6/22/99). These developments support the legal mobilization model, which argues that litigation may serve a mobilizing function by providing a discourse for the articulation of demands and by increasing leverage against institutional actors, altering the balance of power (McCann 1994).

These cases also altered the balance of power by influencing the calculations and future plans of former dictators and human rights abusers. These individuals can no longer freely traverse the globe. The ATCA cases have made the U.S. out of bounds for human rights abusers, who often came here to study or live. The Pinochet case and its progeny have also caused current and former officials to rethink travel plans. For example, the former Guatemalan dictator Efraim Rios Montt canceled a trip to France in April 2000 after lawyers warned him he could be arrested on international arrest warrants stemming from a Spanish investigation (AP 4/18/00). Similarly, before traveling to Europe for a French-African summit meeting, Congo’s President Laurent Kabila sent a delegation to Belgium to gain assurances that no arrest warrant awaited him (*New York Times* 11/29/98). And speculation about Henry Kissinger’s liability under international human rights law for events in Chile and Argentina prompted his lawyers to advise him against traveling to some European countries. He already had cancelled a March 2002 trip to Brazil amid suggestions of possible judicial action (*Miami Herald* 8/30/02). Judges in both Spain and France had issued official requests to question him as part of their investigations into human rights violations in Latin America, and Chile and

Argentina also sought to question him (Amnesty International 4/23/02). In July 2001, Israel's Foreign Ministry issued an advisory to government, army and security officials warning them to exercise caution in traveling abroad to avoid arrest for human rights violations stemming from the Palestinian situation. Understanding that international justice no longer has borders, the Foreign Ministry started tracking countries that recognize universal jurisdiction for certain crimes (*New York Times* 7/27/01).

The "Pinochet Syndrome" has proved bothersome to human rights abusers seeking medical care as well. An Iraqi official had to flee a Vienna hospital where he had gone for treatment after a city councilman filed a criminal complaint against him for his alleged involvement with the 1998 Kurdish slaughter and the torture and killing of Iraqi citizens (*NYT* 8/22/99). And former Indonesian leader Suharto has stopped traveling to Germany, where he once regularly received medical treatment (*Boston Globe* 10/14/99).

As Pinochet discovered, officials can no longer be assured that amnesty agreements will protect them. Four months after West African leaders brokered a peace agreement in Liberia in which former warlord and President Charles Taylor was offered exile in Nigeria, a coalition of human rights groups in West Africa, as well as human rights groups in the West, called for Nigeria to hand him over to a special tribunal in Sierra Leone that had already indicted him for crimes against humanity. Following the precedent established by other human rights cases, they argued that an indicted war criminal could not legally receive asylum (*NYT* 12/21/03).

These cases also point to the central role of the courts in mobilizing transnational advocacy networks that focus attention on the international human rights discourse and the rules that bind states (Keck and Sikkink 1998; Risse, Ropp and Sikkink 1999). The Pinochet case, for instance, attracted activists from all over the globe. These activists

drew attention to the international human rights laws that Pinochet had violated and called for him to be held to account. Some of them, notably Amnesty International and Human Rights Watch, even directly participated in the legal proceedings. Similarly, in order to heighten awareness that Israel's security services were torturing Palestinian terror suspects, domestic human rights groups in Israel worked with international human rights organizations. These networks mobilized around the prospect of a judicial ruling and undertook advocacy efforts that targeted Israel's highest court. By focusing attention on the Court and emphasizing the normative context, they were able to influence judicial deliberations.

While the transnational mobilization literature contributes to an understanding of the cases described in this dissertation, its limited treatment of the courts as arenas for transnational advocacy efforts does not go far enough. Domestic courts are more than just arenas of transnational mobilization. They are also participants in it. The domestication process points to increased transnational communication between courts. These courts communicate directly through face-to-face meetings. More importantly, they speak to each other through their rulings, giving rise to a global judiciary in which one court's decisions on international norms are referenced by other courts. Existing literature on transnational mobilization has not taken into account the direct participation of domestic courts in this transnational movement. The emergence of the domestic judiciary as an international actor highlights an entirely new way in which courts matter—these courts have created an effective system of international human rights law, an area of law creation that has gone unnoticed in the literature on courts and social change.

### **The Progress of Domestication**

The cases described in this dissertation represent a trend toward domestication and human rights enforcement. These types of cases have steadily been increasing, particularly after the well-publicized Pinochet case. Around the world, the decisions of domestic courts continue to give effect to the interest of the global community in enforcing international human rights. A recent decision by the House of Lords allowing the Northern Ireland Human Rights Commission to submit comment on human rights issues before Northern Ireland's courts was based on the recognition of domestic courts as a venue for the promotion and implementation of human rights law (Amnesty International 6/20/02).

Prosecutions of human rights abuses are underway in several countries. In Latin America, proceedings have begun against human rights abusers who had previously enjoyed impunity and were often protected by amnesty agreements in their countries. In December 2000, a Paraguayan judge issued an arrest warrant and extradition request for former Paraguayan dictator Alfredo Stroessner, who had obtained political asylum in Brazil. The judge also requested the arrest and extradition of an official in Stroessner's government residing in Honduras (HRW 12/11/00). In 2001, Colombia began prosecuting Colonel Jesus Maria Clavijo, who headed a unit responsible for massacres and paramilitary executions.

Following on the heels of Pinochet, Spain continued to issue extradition requests for former military officials involved in human rights abuses in Latin America. After a January 2001 lower court ruling, Mexico's Foreign Ministry authorized the extradition of an Argentine naval captain to face charges of genocide, torture, and terrorism. Mexico's Supreme Court upheld this decision on appeal, although it eliminated torture from the

charges because under Mexican law, the statute of limitations for this crime had expired. The official, Ricardo Miguel Cavallo, was extradited to Spain on June 28, 2003 and is currently awaiting trial (Lutz and Roht-Arriaza 2003).

In November 2001, an Argentine court upheld the decision of a lower court and unanimously ruled that Argentina's amnesty laws, implemented by the democratically elected government of Raul Alfonsin, were unconstitutional and violated international norms. In its ruling, the court noted that it had an obligation to provide justice. Although they did not directly intervene, government officials revealed opposition to the rulings in interviews with the press (HRW 12/12/01). Nonetheless, the legislature voted to annul these laws in August 2003. A month earlier, President Nestor Kirchner had repealed a decree that barred the extradition of Argentines to stand trial for human rights abuses committed as part of the "Dirty War." Spain, Italy, France and Germany had all issued extradition requests. In October 2003, Argentina's foreign minister stated that the government would likely allow the extradition of a former navy officer to stand trial in France for crimes committed under the military dictatorship if the court ruled in favor of extradition (*NYT* 10/11/03). At the same time, a Buenos Aires federal court reopened a case against some of these same individuals who were involved with the Navy Mechanics School, an infamous torture center. The Supreme Court has yet to rule on an appeal of the lower court ruling invalidating the amnesty laws. But after meeting with some of its judges, Human Rights Watch believed that the Supreme Court would uphold the lower court decision and that other top military officials whose extradition had been requested would probably be tried in Argentine courts for human right abuses (HRW Monthly Email Update 8/03).

In Guatemala, three high-ranking military officials were each sentenced to thirty

years for the 1998 extra-judicial execution of Bishop Juan José Gerardi, who was beaten to death in front of his house two days after he had presented the church's report on military atrocities committed during Guatemala's civil war (Amnesty International 6/8/01). In January 2004, Guatemala's Supreme Court reinstated the thirty-year sentence of Colonel Juan Valencia Osorio for organizing the killing of anthropologist Myrna Mack in retaliation for her efforts to report on the counterinsurgency tactics of the Guatemalan military. Osorio was the head of the Department of Presidential Security, which oversaw military intelligence. In Mexico, the Supreme Court upheld the prosecution of former officials for kidnapping suspected leftists (November 2003), adopting the arguments put forth by U.S. and British courts that disappearances constituted continuing crimes to which the statute of limitations did not apply (HRW 11/5/03). In February 2004 the first of these officials, former federal security chief Miguel Nazar Haro, was arrested. The arrest warrant had been issued by the Special Prosecutor, a position created by President Vicente Fox in November 2001 to prosecute the human rights violations of previous governments.

Judicial progress in human rights enforcement has not been confined to Latin America. The Sri Lankan Supreme Court awarded compensation to a rape victim after determining that rape in custody constitutes torture (Amnesty International 1/28/02). Belgium has several human rights cases pending against current and former officials of various countries on the basis of a law implementing universal jurisdiction. And a Belgian jury found four Rwandan nationals guilty of war crimes and crimes against humanity in the 1994 Rwandan genocide, employing the principle of universal jurisdiction (June 2001). This marked the first time that a jury had employed universal jurisdiction to issue a verdict for crimes against humanity committed elsewhere.

U.S. juries have been breaking new ground as well. A jury in Florida awarded \$54.6 million in damages to three torture victims from El Salvador in July 2002. The victims brought the case against two retired Salvadoran generals under the Torture Victims Protection Act. The generals had denied knowledge of the abuses carried out by their troops and argued that in the chaos of the civil war, they could not fully control the men in their command. A lawyer representing the plaintiffs explained that it was one of the only times since World War II that a civilian jury held military officials responsible for torture and this was even more significant because the military had been given amnesty in El Salvador. The ruling also gave the plaintiffs leverage with which to challenge El Salvador's amnesty law (*NYT* 7/24/02).

A year later, another Florida jury for the first time ruled on crimes against humanity and issued a \$4 million damage award against a Chilean army officer who had tortured and killed a Chilean economist as part of the Caravan of Death. The officer, Armando Fernandez Larios, had served five months in prison in 1987 for covering up the assassination in DC of former Chilean foreign minister Orlando Letelier and his American assistant Ronni Moffitt. The sentence had been part of a plea agreement in which federal prosecutors had promised not to extradite him to Chile, where fellow participants in the Caravan of Death are now on trial. When the civil case was filed, he had been living freely in Miami (*HRW* 10/16/03). Argentina has also sought his extradition in connection with human rights violations, further limiting his residential options.

The strengthening of human rights norms in pursuit of international justice has resulted in a supportive legal environment that has reinforced the efforts of international

tribunals as well, enabling them to overcome some of their initial shortcomings.<sup>71</sup> The trial of the former Serbian head of state, Slobodan Milosevic, at the Yugoslav tribunal in the Hague was once thought to be extremely unlikely (see, e.g., Penrose 2000; HRW 4/1/01). But Milosevic was handed over to the tribunal in June 2001 and his trial began on February 12, 2002. He faces charges of war crimes, crimes against humanity and genocide for events in Bosnia, Croatia, and Kosovo, marking the first time that a head of state has been tried for war crimes. In July 2001, the tribunal handed down its first genocide ruling, against Bosnian Serb General Radislav Krsti for the mass killings at Srebrenica. Nonetheless, some of those most responsible for egregious human rights violations, including Bosnian Serb leader Radovan Karadzic, remain at large despite being indicted.

The International Tribunal for Rwanda, which began work in 1995, has also advanced global human rights norms. As of March 2004, it had handed down thirteen verdicts stemming from the 1994 genocide. Although the tribunal's progress has been slow, it has issued some significant decisions. The Prime Minister of Rwanda during the genocide, Jean Kambanda, was found guilty of genocide and sentenced to life imprisonment in 1998. In another landmark ruling, the tribunal found 3 media executives guilty of genocide, incitement to genocide, and crimes against humanity in connection with radio broadcasts urging Hutus to slaughter Tutsis (December 2003).

### **The Backlash against Domestication and the War on Terror**

In its 2004 World Report, Human Rights Watch took note of the great progress made in international justice during the 1990's. It then warned: "In the last few years, opposition to this nascent 'system' of international justice has intensified and today the

---

<sup>71</sup> The Security Council also implemented structural changes that facilitated the operation of these tribunals.

landscape is less hospitable to the types of advances that took place in the 1990s” (Dicker and Keppler: 194). This inhospitable landscape exists at both the domestic and the international level. Despite progress in global norm enforcement, international courts still face considerable obstacles. The special tribunals for Yugoslavia and Rwanda remain overburdened and under-funded. The establishment of the International Criminal Court offers new hope for bringing human rights violators to justice. But U.S. efforts to undermine the court’s power have called its effectiveness into question. Even if successful, the ICC will not be able to prosecute crimes that took place before July 1, 2002, when the treaty establishing the court went into effect. Nor will it be able to act against violations occurring in a state that has not accepted its jurisdiction. Thus, the domestication process remains an important component in the advancement of an effective system of international human rights protection.

The global activism of domestic courts has sparked a backlash against the domestication process in several countries. For the first time, the U.S. Supreme Court is hearing arguments regarding the scope of the ATCA (*Sosa v. Alvarez-Machain* 2004). In an *amicus* brief, the Bush administration challenged the jurisdictional grant provided by the ATCA, arguing, as Judge Bork did in *Tel Oren*, that such suits have no authority to proceed in the absence of additional legislation. The administration also argued that these cases infringe upon the separation of powers doctrine by interfering with the President’s ability to conduct foreign policy, an argument considered and dismissed by lower courts in their ATCA jurisprudence. Oral arguments in the *Alvarez-Machain* case began on March 30, 2004.

In Belgium, a 1993 law recognized universal jurisdiction for genocide, war crimes, and crimes against humanity. The law allowed Belgian courts to try individuals

accused of these crimes, regardless of where the crimes occurred, without requiring that either the victim or the perpetrator is Belgian. Under this law cases were filed against both sitting and former heads of state, including Fidel Castro, Yasser Arafat, and former Chadian dictator Hissène Habré. But the event that has drawn most attention is the filing of war crimes and genocide charges against Israeli Prime Minister Ariel Sharon in 2001. The charges hold him responsible for the 1982 massacre of Palestinians in the Sabra and Shatila refugee camps in Lebanon, carried out by a Christian Phalangist militia under his command as Minister of Defense. The Belgian Supreme Court subsequently ruled that as a sitting head of state, Sharon enjoyed immunity but added that this immunity only applied while he held this position (February 2003). In making its determination, the court no doubt was influenced by an ICJ ruling against Belgium a year earlier that declared that an arrest warrant based on the same law could not proceed against an official from the Congo because the defendant was a sitting foreign minister at the time the arrest warrant was issued. The Belgian Supreme Court, however, ruled that the case could continue against Sharon's co-defendant, former army chief of staff Amos Yaron.

The charges against Sharon, filed by a private group of survivors from Sabra and Shatila, embarrassed the Belgian government. Similar charges against other heads of state, including former President George Bush, subjected Belgium to international pressure and prompted an amendment to the law. The amendment requires that where the victim or perpetrator has no direct link to Belgium, a state prosecutor must decide whether the suit is valid. It also allows the government to step in and send the complaint to the accused's home state if that state guarantees the right to a fair trial. The government used this power in referring a case against U.S. General Tommy Franks to the U.S. It has not interfered with the case against Yaron. The Belgian government has

also said it will not stop the case against Habré, whom Senegal has continued to hold pending an extradition request. The government of Chad has said that it will waive any immunity claimed by Habré.

The events of September 11, 2001 also have slowed the forward progress of international human rights protection. Governments now enjoy greater latitude to infringe upon civil and human rights in what has become a global war on terror. It is not yet clear how domestic courts will react to these developments and what the effect will be on the domestication process. The degree to which domestic courts privilege the global human rights norms they have advanced, as participants in the global judiciary, over domestic interests will determine their willingness to challenge government security policy.

In Israel, the fact that the world has joined in the fight against terror has encouraged the government of Ariel Sharon to pursue a more hard-line policy. One of the most controversial aspects of this policy is the 2002 decision to erect a barrier separating Israel from the West Bank, what the government has called a “terrorism prevention fence.” Israel’s claim that the fence is meant to prevent incursions by would-be suicide bombers has been called into question by the barrier’s path; rather than following the Green Line, parts of the fence have been built inside Palestinian areas, cutting residents off from their land and livelihood. This has raised suspicions that Israel is in fact seeking to incorporate the land around the settlements in order to influence subsequent political negotiations. In February 2004, Israel’s High Court of Justice began hearing petitions from two Israeli human rights groups challenging the legality of the fence under international human rights law. The International Court of Justice also began hearings on the fence in February after the UN General Assembly requested an advisory

opinion on the legal implications of the barrier. The Israeli government decided not to appear at the hearings and instead submitted a written brief maintaining that the court had no authority to deliberate on the issue.

Significantly, Israel's security forces have not resumed the use of torture during interrogation of suspected terrorists. Although the practice has not been entirely eliminated, the Israeli human rights organization B'Tselem declared that the "the High Court's decision brought about meaningful change in GSS interrogation policy, and torture is no longer practiced routinely" ([www.betselem.org](http://www.betselem.org)). Some of the methods employed by the GSS, however, have allegedly resurfaced as part of the American war on terror. An investigation by the *Washington Post* revealed that the American government is using methods similar to those outlawed by the HCJ in its interrogation of al-Qaeda detainees in Afghanistan (*Washington Post* 12/26/02). Human Rights Watch was critical of the Bush administration's response to these allegations, which declared only that torture was illegal without commenting on the specific methods being employed (4/17/03). This response leaves available the defense that these methods are in fact legal because they do not constitute torture, an argument with overtones of the "moderate physical pressure" category previously employed by Israel to defend against allegations of torture.

The U.S. has also invoked the war on terror in an attempt to overturn the *Filartiga* precedent and the use of the Alien Tort Claims Act for human rights protection. In a brief challenging the legality of the case against Unocal for human rights violations in Burma in association with its pipeline project, the Justice Department and Attorney General John Ashcroft argued that the ATCA did not provide aliens with a right to sue. Reverting to the long-abandoned views of Judge Bork in the *Tel Oren* case, the brief

claimed that international human rights law was not part of the law of nations and that cases with no connection to the U.S. should not be heard by U.S. courts. In addition, the brief argued that these cases had “serious implications” for the war on terror. A lawyer for the plaintiffs expressed confidence that the 9<sup>th</sup> Circuit would not accept the government’s arguments, noting that a similar brief had been filed during the case against Marcos to no effect. But the earlier case did not occur in the context of the war on terror.

Nonetheless, two recent rulings suggest that U.S. courts will not give the government free rein to combat terrorism. In December 2003, the 2<sup>nd</sup> Circuit ordered the release of Jose Padilla, a U.S. citizen who had been arrested in Chicago and held for eighteen months as an enemy combatant on the order of President Bush. The court ruled that the President’s role as commander-in-chief did not give him broad authority to declare an American citizen an enemy combatant and to hold him indefinitely without access to legal counsel. The same day, the 9<sup>th</sup> Circuit (which is also considering the case against Unocal) ruled that denying detainees on Guantanamo Bay access to legal protections violated international law and U.S. constitutional law (*Gherebi*). At the time of this writing, the Supreme Court had agreed to hear both cases on appeal. The Court also agreed to rule on the detention of Yaser Hamdi, a U.S. citizen held with Padilla as an enemy combatant. Unlike Padilla, Hamdi was arrested in Afghanistan as a suspected Taliban soldier. The Fourth Circuit Court of Appeals in Virginia ruled that President Bush had the authority under wartime to detain him as an enemy combatant and to deny him access both to a lawyer and to legal proceedings (2003).

### **Future Research**

The cases in this dissertation point to a greater role for courts in the international system than previously envisioned. While the war on terror raises new questions about

the domestication process, it also provides a valuable opportunity to examine the dominant conceptions of the state in international relations. If courts are willing to challenge security policy in the global war on terror, this willingness would offer further support for the contention that the component parts of the state may act independently and pursue their own interests in the international system (Slaughter [Burley] 1993, 2002a). Continued attention to the courts will show just how far the development of the global judiciary has advanced, highlighting the substantive effects of this development. In particular, the current context offers an opportunity to determine if the case where participation in the global judiciary has had the most far-reaching domestic effects is in fact unique—the case of Israel’s judicial challenge to security policy. As other domestic judiciaries face similar dilemmas, their decisions will either further this trend or point to its limits.

These findings can be incorporated into future research on legal mobilization and transnational networks. In the past, legal research has focused almost exclusively on the courts (Feeley and Rubin 1998) while ignoring the role of the support structure (Epp 1998), or else the courts have dropped out altogether (Sarat and Scheingold 2001; Risse, Ropp and Sikkink 1999). Future research should recognize that transnational mobilization goes hand-in-hand with judicial activism.

The domestication process challenges dominant views of international law, particularly international human rights law. While human rights activists have carried their struggle to the courts, international relations and public law scholars alike have failed to recognize the emergence of a functioning system of rights protections. This development has not occurred at the same pace in every state, nor have all domestic courts been equally willing or equally able to carry out the enforcement of human rights

norms. Future research should more systematically explore the conditions under which courts are likely to further this process and why some courts have been more successful than others.

For the countless victims of human rights abuses, the progress documented in this dissertation has real meaning. These cases have brought an end to an incongruous system of justice in which “if you killed one person, you went to jail, but if you slaughtered thousands, you usually got away with it” (Brody, in *Boston Globe* 10/14/99). While international relations theorists and public law scholars may not yet be aware of this reality, human rights abusers and their victims increasingly are.

### List of References

- Abel, Richard L. 1994. "Transnational Law Practice." *Case Western Reserve Law Review*. 44: 737-870.
- Austin, John. 1875. *Lectures on Jurisprudence; or The Philosophy of Positive Law*, ed. Robert Campbell, New York: James Cockcroft.
- Bahdi, Reem. 2002. "Globalization of Judgment: Transjudicialism and the Five Faces of International Law in Domestic Courts." *George Washington International Law Review* 34: 555-603.
- Barak, Aharon. 1983. "Judicial Lawmaking." *Mishpatim* 13: 25-80 (Hebrew).
- Barak, Aharon. 1988. "Constitutional Law Without a Constitution." In *The Role of Courts in Society*, ed. Shimon Shetreet. Dordrecht, Boston: M. Nijhoff.
- Barak, Aharon. 1992. "The Constitutional Revolution: Protected Basic Rights." *Mishpat Umimshal* 1(1): 9-35 (Hebrew).
- Barak, Aharon. 1993. "Protected Human Rights: Scope and Limitations." *Mishpat Umimshal* 1(2): 253-74 (Hebrew).
- Barak, Aharon. 1994. "Human Dignity as a Constitutional Right." *HaPraklit* 41: 271-90 (Hebrew).
- Barak, Aharon. 1997a. "The Constitutionalization of the Israeli Legal System as a Result of the Basic Laws and its Effect on Procedural and Substantive Criminal Law." *Israel Law Review* 31(1-3): 3-21.
- Barak, Aharon, 1997b. "The Tradition and Culture of the Israeli Legal System." *International Association of Jewish Lawyers and Jurists Justice Magazine* 13: 6-10.
- Barak, Aharon. 2002. "Judging as a Way of Life." *Legal Affairs* (May/June): 28-9.
- Bazelon, Emily. 2002. "Let There Be Law." *Legal Affairs* (May/June): 25-32.
- Benvenisti, Eyal. 1992. "The Applicability of Human Rights Conventions to Israel and the Occupied Territories." *Israel Law Review* 26(1): 24-35.
- Benvenisti, Eyal. 1993. "Judicial Misgivings Regarding the Application of International

Law: an Analysis of Attitudes of National Courts.” *European Journal of International Law* 4: 159-183.

Benvenisti, Eyal. 1994a. “The Influence of International Human Rights Law on the Israeli Legal System.” *Israel Law Review* 28(1): 136-153.

Benvenisti, Eyal. 1994b. “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 States.’” *European Journal of International Law* 5(3): 423-439.

Benvenisti, Eyal. 1997. “The Role of National Courts in Preventing Torture of Suspected Terrorists.” *European Journal of International Law* 8(4): 596.

Bisharat, George. 1995. “Courting Justice? Legitimation in Lawyering Under Israeli Occupation.” *Law and Social Inquiry* (20): 349-405.

Bosco, David. 2000. “Dictators in the Dock.” *American Prospect* 11(18): 26-29.

Bracha, Baruch. 1991. “Judicial Review of Security Powers in Israel: a New Policy of the Courts.” *Stanford Journal of International Law* 28:39-102.

Bradley, Curtis. 2001. “The Costs of International Human Rights Litigation.” *Chicago Journal of International Law* 2 (Fall): 457-473.

Bradley, Curtis A. and Jack L. Goldsmith. 1997a. “Customary International Law as Federal Common Law: a Critique of the Modern Position.” *Harvard Law Review* 110 (February): 815-876.

Bradley, Curtis A. and Jack L. Goldsmith. 1997b. “The Current Illegitimacy of International Human Rights Litigation.” *Fordham Law Review* 66: 319-369.

Bradley, Curtis A. and Jack L. Goldsmith. 1999. “Pinochet and International Human Rights Litigation.” *Michigan Law Review* 97: 2129-2184.

Brody, Reed and Michael Ratner eds. 2000. *The Pinochet Papers: the Case of Augusto Pinochet in Spain and Britain*. The Hague: Kluwer Law International.

Brody, Reed. 2000. “The Case of Augusto Pinochet.” In *The Pinochet Papers: the Case of Augusto Pinochet in Spain and Britain*, eds. Reed Brody and Michael Ratner. The Hague: Kluwer Law International.

- Bull, Hedley. 1977. *The Anarchical Society: a Study of Order in World Politics*. New York: Columbia University Press.
- Burgers, Herman J. and Hans Danielus. 1988. *The United Nations Convention against torture: a handbook on the Convention*. Boston: Martin Nijhoff Publishers.
- Cappelletti, Mauro. 1981. "The Law-Making Power of the Judges and its Limits." *Monash University Law Review* 8: 15.
- Carr, E.H. 1939. *The Twenty Years' Crisis, 1919-1939: an Introduction to the Study of International Relations*. London: Macmillan and Co.
- Cabral, Alberto (pseudonym for Richard Alan White). 1977. "Political Murder in Paraguay." *America* (April 23): 376-78.
- Cassel, Douglass. 2000. "Israel: a New Warren Court?" *World View Commentary No. 65* (4/20/00).
- Chayes, Abram. 1976. "The Role of the Judge in Public Law Litigation." *Harvard Law Review* 89(7): 1281-1316.
- Chayes, Abram. 1982. "Public Law Litigation and the Burger Court." *Harvard Law Review* 96(November): 4-60.
- Chayes, Abram and Antonia Handler Chayes. 1993. "On Compliance." *International Organization* 47(2): 175-205.
- Chayes, Abram and Antonia Handler Chayes. 1995. *The New Sovereignty: Compliance with International Regulatory Agreements*. Cambridge, MA: Harvard University Press.
- Claude, Inis L. 1956. *Swords into Ploughshares: the Problems and Progress of International Organization*. New York: Random House.
- Claude, Richard Pierre. 1983. "The Case of Joelito Filartiga and the 'Clinic of Hope.'" *Human Rights Quarterly* (5): 275-95.
- Claude, Richard Pierre. 1992. "The Case of Joelito Filartiga in the Court." In *Human Rights in the World Community*, eds. Richard Pierre Claude and Burns H. Weston. Philadelphia: University of Pennsylvania Press.
- Cohen, Esther Rosalind. 1986. "Justice for the Occupied Territory? The Israeli High Court of Justice Paradigm." *Columbia Journal of Transnational Law* 24: 471-507.

- Connolly, William. 1993. "Democracy and Territoriality," In *Rhetorical Republic: Governing Representations in American Politics*, eds. Frederick Dolan and Thomas Dumm. Amherst: University of Massachusetts.
- Cooper, Richard, ed. 1989. *Can Nations Agree? Issues in International Economic Cooperation*. Washington, D.C.: Brookings Institution.
- D'Amato, Anthony. 1988. "The Alien Tort Statute and the Founding of the Constitution." *American Journal of International Law* 82: 62-67
- Dezalay, Yves, and Bryant G. Garth. 1996. *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order*. Chicago: The University of Chicago Press.
- Dezalay, Yves, and Bryant G. Garth, eds. 2001. "Constructing Law Out of Power: Investing in Human Rights as an Alternative Political Strategy." In *Cause Lawyering and the State in a Global Era*, eds. Austin Sarat and Stuart Scheingold. New York: Oxford University Press.
- Dezalay, Yves, and Bryant G. Garth, eds. 2002a. *Global Prescriptions: the Production, Exportation, and Importation of a New Legal Orthodoxy*. Ann Arbor: University of Michigan Press.
- Dezalay, Yves, and Bryant G. Garth, eds. 2002b. *The Internationalization of Palace Wars: Lawyers, Economists, and the Contest to Transform Latin American States*. Chicago: University of Chicago Press.
- Dinstein, Yoram. 1973. "The Judgment in the Matter of Pitchat Rafia." *Tel Aviv University Law Review* 3: 934 (Hebrew).
- Dinstein, Yoram. 1988. "Deportation from Administered Territories." *Tel Aviv University Law Review* 13: 403 (Hebrew).
- Donnelly, Jack. 1986, "International Human Rights: a Regime Analysis." *International Organization* 40(3): 599-642.
- Dotan, Yoav. 1998. "Judicial Review and Political Accountability: the Case of the High Court of Justice in Israel." *Israel Law Review* 32(3): 448-474.
- Dotan, Yoav. 1999. "Judicial Rhetoric, Government Lawyers and Human Rights: the Case of the Israeli High Court of Justice During the Intifada." *Law and Society Review*

33(2): 319.

Dotan, Yoav. 2001. "The Global Language of Human Rights: Patterns of Cooperation between State and Civil Rights Lawyers in Israel." In *Cause Lawyering and the State in a Global Era*, eds. Austin Sarat and Stuart Scheingold. New York: Oxford University Press.

Dworkin, R.M. 1977. *Taking Rights Seriously*. Cambridge: Harvard University Press.

Edelman, Martin. 1994. *Courts, Politics and Culture in Israel*. Charlottesville: University Press of Virginia.

Enker, A. "The Use of Physical Force in Interrogations and the Necessity Defense." In *Proceedings of a Seminar on Israel and International Human Rights Law: the Issue of Torture*. Jerusalem: Center for Human Rights, Hebrew University.

Epp, Charles R. 1998. *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective*. Chicago: University of Chicago Press.

Evans, Malcolm D. and Rodney Morgan. 1998. *Preventing Torture: A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*. Oxford: Oxford University Press.

Evans, Peter, Harold Jacobson, and Robert Putnam. 1993. *Double-Edged Diplomacy: International Bargaining and Domestic Politics*. Berkeley: University of California Press.

Falk, Richard. 1992. *Explorations at the Edge of Time: the Prospects for World Order*. Philadelphia: Temple University Press.

Feeley, Malcolm M., and Edward L. Rubin. 1998. *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons*. New York: Cambridge University Press.

Fielding, Lois. 1995. "Taking the Next Step in the Development of New Human Rights: the Emerging Right of Humanitarian Assistance to Restore Democracy." *Duke Journal of Comparative and International Law* 5 (spring): 329-340.

Finnemore, Martha. 1996. "Constructing Norms of Humanitarian Intervention." In *The Culture of National Security: Norms and Identity in World Politics*, ed. Peter Katzenstein. New York: Columbia University Press.

- Finnemore, Martha. 2003. *The Purpose of Intervention: Changing Beliefs about the Use of Force*. Ithaca: Cornell University Press.
- Fiss, Owen. 1978. *The Civil Rights Injunction*. Bloomington: Indiana University Press.
- Fiss, Owen. 1979. "The Forms of Justice." *Harvard Law Review* 93(1): 1-58.
- Franck, Thomas. 1992. "The Emerging Right to Democratic Governance." *American Journal of International Law* 86: 46-91.
- Franck, Thomas. 1994. "The Democratic Entitlement." *University of Richmond Law Review* 29 (winter): 1-38.
- Galanter, Marc. 1983. "The Radiating Effects of Courts." In *Empirical Theories of Courts*, eds. Keith D. Boyum and Lynn Mather, 117-42. New York: Longman.
- Garrett, Geoffrey and Peter Lange. 1996. "Internationalization, Institutions and Political Change." In *Internationalization and Domestic Politics*, eds. Robert Keohane and Helen Milner. New York: Cambridge University Press,
- Gilpin, Robert. 1981. *War and Change in International Politics*. New York: Cambridge University Press.
- Glendon, Mary Ann. 1991. *Rights Talk: The Impoverishment of Political Discourse*. New York: The Free Press.
- Goldstone, Richard. 2001. "The Role of the United Nations in the Prosecution of International War Criminals." *Washington University Journal of Law and Policy* 5: 119-27.
- Goldstone, Richard. 1999. "The Seventieth Annual Cleveland-Marshall Fund Lecture: International Jurisdiction and Prosecutorial Crimes." *Cleveland State Law Review* 47: 473-81.
- Gourevitch, Peter. 1978. "The Second Image Reversed: the International Sources of Domestic Politics." *International Organization* 32(4): 881-912.
- Grieco, Joseph. 1990. *Cooperation Among Nations: Europe, America and Non-Tariff Barriers to Trade*. Ithaca: Cornell University Press.
- Groom, A.J.R. and Paul Taylor, eds. 1975. *Functionalism: Theory and Practice in International Relations*. New York: Crane, Russak.

- Gross, Aeyal. 1998. "The Politics of Rights in Israeli Constitutional Law." *Israel Studies* 3(2): 80-118.
- Haas, Ernst B. 1964. *Beyond the Nation-State: Functionalism and International Organization*. Stanford: Stanford University Press.
- Hamilton, Alexander. 1787. "The Federalist Papers No. 78: The Judiciary Department." In *The Federalist: A Collection of Essays Written in Favor of the New Constitution*. New York: J. and A. McLean.
- Hajjar, Lisa. 1997. "Cause Lawyering in Transnational Perspective: National Conflict and Human Rights in Israel/Palestine." *Law and Society Review* 31(3): 473-504.
- Hajjar, Lisa. 2001. "From the Fight for Legal Rights to the Promotion of Human Rights: Israeli and Palestinian Cause Lawyers in the Trenches of Globalization." In *Cause Lawyering and the State in a Global Era*, eds. Austin Sarat and Stuart Scheingold. New York: Oxford University Press.
- Helfer, Laurence R. and Anne-Marie Slaughter. 1997. "Toward a Theory of Effective Supranational Adjudication." *Yale Law Journal* 107 (November): 273-391.
- Helman, Gerald and Steven Ratner. 1992-3. "Saving Failed States." *Foreign Policy* 89 (winter): 3-20.
- Henkin, Louis. 1979. *How Nations Behave: Law and Foreign Policy*. New York: Columbia University Press.
- Henkin, Louis and Albert J. Rosenthal, eds. 1991. *Constitutionalism and Rights: the Influence of the U.S. Constitution Abroad*. New York: Columbia University Press.
- Hilbink, Lisa. 2003. "An Exception to Chilean Exceptionalism? The Historical Role of Chile's Judiciary and Prospects for Change." In *What Justice? Whose Justice? Fighting for Fairness in Latin America*, eds. Susan Eckstein and Timothy Wickham-Crowley. Berkeley: University of California Press.
- Hofnung, Menachem. 1996. "The Unintended Consequences of Unplanned Legislative Reform: Constitutional Politics in Israel." *American Journal of Comparative Law* 44(2): 585.
- Jepperson, Ronald, Alexander Wendt, and Peter Katzenstein. 1996. "Norms, Identity, and Culture in National Security." In *The Culture of National Security: Norms and*

- Identity in World Politics*, ed. Peter Katzenstein. New York: Columbia University Press.
- Katzenstein, Peter. 1996. *The Culture of National Security: Norms and Identity in World Politics*. New York: Columbia University Press.
- Kaufman, Irving R. 1984. "The Anatomy of Decisionmaking." *Fordham Law Review* 53: 1-22.
- Keck, Margaret and Kathryn Sikkink. 1998. *Activists Beyond Borders: Transnational Advocacy Networks in International Politics*. Ithaca: Cornell University Press.
- Keohane, Robert. 1984. *After Hegemony: Cooperation and Discord in the World Political Economy*. Princeton: Princeton University Press.
- Keohane, Robert and Joseph Nye. 1977. *Power and Interdependence: World Politics in Transition*. Boston: Little Brown and Company.
- Klotz, Audie. 1995. *Norms in International Relations: the Struggle Against Apartheid*. Ithaca: Cornell University Press.
- Koh, Harold Hongju. 1991. "Transnational Public Law Litigation." *Yale Law Journal* 100 (June): 2347-2402.
- Koh, Harold Hongju. 1996. "Transnational Legal Process." *Nebraska Law Review* 75: 181-207.
- Koh, Harold Hongju. 1998. "Is International Law Really State Law?" *Harvard Law Review* 111 (May): 1824-1861.
- Koh, Harold Hongju. 2001. "The Globalization of Freedom." *Yale Journal of International Law* 26 (summer): 305-312.
- Kornbluh, Peter. 1998. "Prisoner Pinochet. The Dictator and the Quest for Justice." *The Nation* (December 21): 12.
- Krasner, Stephen, ed. 1983. *International Regimes*. Ithaca: Cornell University Press.
- Kratochwil, Friedrich V. 1989. *Rules, Norms, and Decisions: on the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs*. Cambridge: Cambridge University Press.
- Kremnitzer, Mordechai and Ram Segev. 1998. "Using Force During Investigations b the

- General Security Service—the Lesser Evil?” *Mishpat Umimshal* 4: 667 (Hebrew).
- Kretzmer, David. 1990. “Forty Years of Public Law.” *Israel Law Review* 24(3-4): 341-55.
- Kretzmer, David. 1992. “The New Basic Laws on Human Rights: a Mini-Revolution in Israeli Constitutional Law?” *Israel Law Review* 26(2): 238-246.
- Lahav, Pnina. 1993. “Rights and Democracy: the Court’s Performance.” In *Israeli Democracy Under Stress*, eds. Ehud Sprinzak and Larry J. Diamond. Boulder: Lynne Rienner Publishers.
- Langer, Felicia and George Moffett III. 1990. “A Judicial System Where Even Kafka Would Be Lost: an Interview with Felicia Langer.” *Journal of Palestine Studies* 20(1): 24-36.
- Lapidoth, Ruth. 1990. “International Law within the Israel Legal System.” *Israel Law Review* 24(3-4): 451-484.
- Lutz, Ellen L. and Naomi Roht-Arriaza. 2003. “The Cavallo Case: One Year Later.” *ACLU International Civil Liberties Report* 2003 edition (13).
- Maoz, Asher. 1988. “Defending Civil Liberties without a Constitution—the Israeli Experience.” *Melbourne University Law Review* 16 (December): 815-836.
- Maoz, Zeev and Bruce Russett. 1993. “Normative and Structural Causes of Democratic Peace, 1946-1986.” *American Political Science Review* 87(3): 624-638.
- McCann, Michael W. 1986. *Taking Reform Seriously: Perspectives on Public Interest Liberalism*. Ithaca: Cornell University Press.
- McCann, Michael W. 1994. *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization*. Chicago: University of Chicago Press.
- Milner, Neal. 1986. “The Dilemmas of Legal Mobilization: Ideologies and Strategies of Mental Patient Liberation Groups.” *Law & Policy* 8: 105-131.
- Mitrany, David. 1946. *A Working Peace System: an Argument for the Functional Development of International Organization*. London: National Peace Council.
- Mitrany, David. 1976. *The Functional Theory of Politics*. New York: St. Martin’s Press.

- Moravcsik, Andrew. 1997. "Taking Preferences Seriously: a Liberal Theory of International Politics." *International Organization* 51(4): 513-53.
- Morgenthau, Hans. 1948. *Politics Among Nations: the Struggle for Power and Peace*. New York: Knopf.
- Nicholls, Clive. 2000. "Reflections on Pinochet." *Virginia Journal of International Law* 41 (Fall): 140-151.
- Olson, Susan M. 1984. *Clients and Lawyers: Securing the Rights of Disabled Persons*. Westport, Conn.: Greenwood Press.
- Pacheco, Allegra ed. 1999. *The Case Against Torture in Israel: a Compilation of Petitions, Briefs and Other Documents Submitted to the Israeli High Court of Justice*. Jerusalem: The Public Committee Against Torture in Israel.
- Pacheco, Allegra. 2000. "Interview." *Palestine Report* 6(32): Palestine Online (February 2, 2000).
- Penrose, Mary Margaret. 2000. "It's Good to be King!: Prosecuting Heads of State and Former Heads of State Under International Law." *Columbia Journal of International Law* 39: 193-220.
- Putnam, Robert. 1988. "Diplomacy and Domestic Politics: the Logic of Two-Level Games." *International Organization* 42(3): 427-460.
- Rabkin, Jeremy. 1998. "First They Came for Pinochet." *The Weekly Standard* November 23): 23.
- Ratner, Michael. 1999. "The Lords' Decision in Pinochet III: a Legal Analysis." At <http://www.humanrightsnow.org>.
- Ratner, Michael. 2001. "Civil Remedies for Gross Human Rights Violations." In *Effective Strategies for Protecting Human Rights: Economic Sanctions, Use of National Courts and International Fora and Coercive Power*, ed. David Barnhizer. Burlington, VT: Ashgate/Dartmouth.
- Reichman, Amnon. 2001. "When We Sit to Judge We are Being Judged: The Israeli GSS Case, Ex Part Pinochet and Domestic/Global Deliberation." *Cardozo Journal of International and Comparative Law* 9 (Spring): 41-103.
- Reisman, Michael. 1990. "Sovereignty and Human Rights in Contemporary

International Law.” *American Journal of International Law* 84: 866-76.

Rispin, Sarah. 2002. “Implications of Democratic Republic of the Congo v. Belgium on the Pinochet Precedent: a Setback for International Human Rights Litigation?” *Chicago Journal of International Law* 3: 527.

Risse, Thomas, Stephen C. Ropp, and Kathryn Sikkink, eds. 1999. *The Power of Human Rights: International Norms and Domestic Change*. Cambridge: Cambridge University Press.

Risse-Kappen, Thomas ed. 1995. *Bringing Transnational Relations Back In: Non-State Actors, Domestic Structures, and International Institutions*. Cambridge: Cambridge University Press.

Rosenberg, Gerald. 1991. *The Hollow Hope: Can Courts Bring About Social Change?* Chicago: University of Chicago Press.

Ruggie, John Gerard. 1983. “International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order.” In *International Regimes*, ed. Stephen Krasner. Ithaca: Cornell University Press.

Sands, Philippe. 2001. “Turtles and Torturers: the Transformation of International Law.” *New York University Journal of International Law and Politics* 33 (Winter): 527-559.

Santos, Boaventura de Sousa. 1995. *Toward a New Common Sense: Law, Science, and Politics in the Paradigmatic Transition*. New York: Routledge.

Santos, Boaventura de Sousa. 2002 (2<sup>nd</sup> ed). *Toward a New Legal Common Sense: Law, Globalization and Emancipation*. London: Butterworths LexisNexis.

Sarat, Austin, and Stuart Scheingold, eds. 1998. *Cause Lawyering: Political Commitments and Professional Responsibilities*. New York: Oxford University Press.

Sarat, Austin, and Stuart Scheingold, eds. 2001. *Cause Lawyering and the State in a Global Era*. New York: Oxford University Press.

Schachter, Oscar. 1991. *International Law in Theory and Practice*. Boston: M. Nijhoff.

Scheffer, David J. 1992. “Toward a Modern Doctrine of Humanitarian Intervention.” *University of Toledo Law Review* 23 (winter): 253-93.

Scheingold, Stuart A. 1974. *The Politics of Rights: Lawyers, Public Policy, and Political Change*. New Haven: Yale University Press.

Schimmelfennig, Frank. 2001. "The Community Trap: Liberal Norms, Rhetorical Action, and the Eastern Enlargement of the European Union." *International Organization* 55: 47-80.

Shamgar, Meir. 1971. "The Observance of International Law in the Administered Territories." *Israel Yearbook on Human Rights* 1(1): 262.

Shamir, Ronen. 1990. "'Landmark Cases' and the Reproduction of Legitimacy: the Case of Israel's High Court." *Law and Society Review* 24(3): 781-805.

Shapiro, Martin and Alec Stone. 1994. "The New Constitutional Politics in Europe." *Comparative Political Studies* 26 (4): 397-421.

Short, Aric K. 2001. "Is the Alien Tort Statute Sacrosanct? Retaining Forum Non Conveniens in Human Rights Litigation." *New York University Journal of International Law and Politics* 33 (Summer): 1001-1100.

Sikkink, Kathryn. 1993. "Human Rights, Principled Issue-Networks and Sovereignty in Latin America." *International Organization* 47(3): 411-41.

Sikkink, Kathryn. 2002. "Transnational Advocacy Networks and the Social Construction of Legal Rules." In *Global Prescriptions: the Production, Exportation, and Importation of a New Legal Orthodoxy*, eds. Yves Dezalay and Bryant G. Garth. Ann Arbor: University of Michigan Press.

Simon, Dan. 1994. "The Demolition of Homes in the Israeli Occupied Territories." *Yale Journal of International Law* 19(1): 1-79.

Slaughter, Anne-Marie. 1994. "A Typology of Transjudicial Communication." *University of Richmond Law Review* 29 (winter): 99-137.

Slaughter, Anne-Marie. 2000. "Judicial Globalization." *Virginia Journal of International Law* 40 (summer): 1103-1124.

Slaughter, Anne-Marie. 2002. "Breaking Out: the Proliferation of Actors in the International System." In *Global Prescriptions: the Production, Exportation, and Importation of a New Legal Orthodoxy*, eds. Yves Dezalay and Bryant G. Garth. Ann Arbor: University of Michigan Press.

- Slaughter Burley, Anne-Marie. 1993. "International Law and International Relations Theory: a Dual Agenda." *American Journal of International Law* 87: 205-239.
- Slaughter Burley, Anne-Marie and Walter Mattli. 1993. "Europe Before the Court: A Political Theory of Legal Integration." *International Organization* 47(1): 41-76.
- Stephens, Beth. 2002a. "American Civil Justice in a Global Context." *DePaul Law Review* 52 (winter): 433-472.
- Stephens, Beth. 2002b. "Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations." *Yale Journal of International Law* 27 (winter): 1-57.
- Stephens, Beth and Michael Ratner. 1996. *International Human Rights Litigation in U.S. Courts*. Irvington-on-Hudson, NY: Transnational Publishers.
- Stein, Arthur A. 1983. "Coordination and Collaboration: Regimes in an Anarchic World." In *International Regimes*, ed. Stephen Krasner. Ithaca: Cornell University Press.
- Stone, Alec. 1994. "Judging Socialist Reform: The Politics of Coordinate Construction in France and Germany." *Comparative Political Studies* 26(4): 443-469.
- Tate, C. Neal and Torbjörn Vallinder eds. 1995. *The Global Expansion of Power*. New York: New York University Press.
- Tate, C. Neal. 1995. "Why the Expansion of Judicial Power?" In *The Global Expansion of Power*, eds. Neal C. Tate and Torbjörn Vallinder. New York: New York University Press.
- Tedeschi, G. and Y.S. Zemach. 1974. "Codification and Case Law in Israel." In *The Role of Judicial Decisions and Doctrine in Civil Law and in Mixed Jurisdictions*, ed. Joseph Dainow. Baton Rouge: Louisiana State University Press.
- Teson, Fernando. 1992. "The Kantian Theory of International Law." *Columbia Law Review* 92: 53-102.
- Trubek, David M., Yves Dezalay, Ruth Buchanan and John R. Davis. 1994. "Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas." *Case Western Reserve Law Review* 44: 407-498.
- Vallinder, Torbjörn. 1994. "The Judicialization of Politics—A World-Wide Phenomenon: Introduction." *International Political Science Review* 15 (2): 91-99.

Waltz, Kenneth. 1979. *Theory of International Politics*. Reading, Mass: Addison-Wesley Publishing Co.

Waltz, Kenneth. 1986. "Theory of International Politics." Excerpted in *Neorealism and its Critics*, ed. Robert Keohane. New York: Columbia University Press.

Wapner, Paul. 1995. "Politics Beyond the State: Environmental Activism and World Civil Politics." *World Politics* 47: 318.

Wedgwood, Ruth. 1999. "The United States: Human Rights Leader or Laggard?" *Pace International Law Review* 11 (Spring): 287-298.

Wedgwood, Ruth 2000. "Augusto Pinochet and International Law." *McGill Law Journal* 46 (November): 241-253.

Weiss, Edith Brown. 2000. "The Rise or the Fall of International Law." *Fordham Law Review* 69: 345-372.

Wendt, Alexander. 1992. "Anarchy is What States Make of It: the Social Construction of Power Politics." *International Organization* 46(2): 391-425.

Woods, Patricia J. *Courting the Court: Social Visions, State Authority, and the Religious Law Conflict in Israel*. 2001. Seattle (Dissertation).

Zemans, Frances. 1983. "Legal Mobilization: The Neglected Role of Law in the Political System" in *American Political Science Review* 77: 690-702.

#### **NEWSPAPER ARTICLES**

Irving R. Kaufman. "A Legal Remedy for International Torture?" *New York Times Magazine*. 11/9/80.

News Agencies. "Rabin: End Debate on GSS Methods." *Jerusalem Post*. 8/27/95.

Alon Pinkas. "GSS Special Measures Extended for Another 3 Months." *Jerusalem Post* 10/20/95.

Serge Schmemmann. "Israel Seeks to Justify Physical Coercion of Prisoners." *New York Times*. 5/8/97.

Carmi Gillon. "Permissible Pressure." *Yediot Ahronot*. 1/12/98.

*Ma'ariv* editorial. 2/9/98.

Clifford Krauss. "Britain Arrests Pinochet to Face Charges by Spain." *New York Times*. 10/18/98.

Alan Cowell. "Pinochet's Arrest Raises New Issues on Tracking Rights Crimes." *New York Times*. 10/19/98.

Tim Golden. "Arresting an Ex-Dictator is One Thing. Then it Gets Tough." *New York Times*. 10/25/98.

Marlise Simons. "New Actions on Pinochet Begin in Paris and Geneva." *New York Times*. 10/27/98.

Marlise Simons. "Judges in Spain Assert Pinochet Can Face Trial." *New York Times*. 10/31/98.

Barbara Crossette. "Dictators (and Some Lawyers) Tremble." *New York Times*. 11/29/98.

Warren Hoge. "Briton wont Free Pinochet, Ruling the Case Can Proceed." *New York Times*. 12/10/98.

Warren Hoge. "Only Chile Can Judge Me, Pinochet Tells British Court." *New York Times*. 12/12/98.

Joel Greenberg. "Israel Court Weighs Legality of What Many Call Torture." *New York Times*. 1/25/99.

Clifford Klaus. "In Chile, Opponents and Supporters View Ruling as a Victory." *New York Times*. 3/25/99.

Paul Lewis. "U.N. Committee, Under Pressure, Limits Rights Groups." *New York Times*. 6/22/99.

Aryeh Dayan. "Six Against the HCJ." *Ha'aretz*. 6/27/99 (Hebrew).

Sever Plotzker. "We Want Democracy but Don't Understand it." *Yediot Ahronot Saturday Supplement*. 8/6/99.

David Rieff. "The Precarious Triumph of Human Rights." *New York Times Magazine*.

8/8/99.

Barbara Crossette. "Dictators Face the Pinochet Syndrome." *New York Times*. 8/22/99.

Amos Harel, Moshe Reinfeld and Gideon Alon. "Beilin, A-G Clash Over Need for New Law on Interrogation." *Ha'aretz*. 9/7/99a.

Moshe Reinfeld. "How 'Moderate Physical Pressure' turned into Torture." *Ha'aretz*. 9/7/99b.

*Ha'aretz* editorial. 9/7/99c.

*Hatzofeh* editorial. 9/8/99.

*Ma'ariv* editorial. 9/8/99.

Gideon Levy. "What We Owe the Radical Left." *Ha'aretz*. 9/13/99.

Warren Hoge. "With British Court Hearings Set, Pinochet Will Soon Know Fate." *New York Times*. 9/27/99.

Warren Hoge. "Trial Opens for Pinochet with Listing of 35 Crimes." *New York Times*. 9/28/99.

Clifford Krauss. "Chilean Military Faced Reckoning for its Dark Past." *New York Times*. 10/2/99.

Warren Hoge. "British Court Rules Pinochet Extraditable for Trial in Spain." *New York Times*. 10/9/99.

Reed Brody. "One Year Later, the 'Pinochet Precedent' puts Tyrants on Notice," *Boston Globe*. 10/14/99.

Aryeh Dayan. "A Ticking Time Bomb in the Knesset." *Ha'aretz*. 11/1/99.

Ari Shavit. "Ruth Gavison Loyal Opposition." *Ha'aretz Weekend Magazine*. 11/12/99.

Gideon Alon. "MKs Tell Supreme Court to Back Off Contentious Issues." *Ha'aretz*. 11/30/99.

*Ha'aretz* editorial. 12/2/99.

Gideon Alon. "Judge Barak: Constitution 'Limping.'" *Ha'aretz*. 12/12/99.

*Ha'aretz editorial*. 12/13/99.

Dan Margalit. "What the Court Refused to Understand." *Ha'aretz*. 12/23/99.

Warren Hoge. "Pinochet Leaves Britain After Officials Drop Extradition Proceedings." *New York Times*. 3/2/00.

Associated Press. "Judge Moves to Try Pinochet." *New York Times*. 3/7/00.

*Ha'aretz editorial*. 4/18/00.

Associated Press (AP). "Guatemala's Ex-Dictator Cancels Foreign Trip." 4/18/00.

Israel Harel. "Whose Side is the High Court of Justice On?" *Ha'aretz*. 4/27/00.

Ari Shavit. "Judgment Day—Israel Facing Apocalypse (Interview with Moshe Landau)." *Ha'aretz*. 10/6/00.

Associated Press. "Pinochet Indicted on Kidnapping Charges." *New York Times*. 12/1/00.

Reuters. "Spanish Judge Orders Arrest of Ex-Pinochet Official." *New York Times*. 5/14/01.

Clyde Haberman. "Israel is Wary of Rights Cases Across Borders." *New York Times*. 7/27/01.

Dan Izenberg. "Justice Barak: Fight Terror within the Law." *Jerusalem Post*. 2/1/02.

David Gonzalez. "Torture Victims in El Salvador are Awarded \$54 Million." *New York Times*. 7/24/02.

Tim Johnson. "Argentina's 'Dirty War' Hounding Kissinger." *Miami Herald*. 8/30/02.

Dana Priest and Barton Gellman. "U.S. Decries Abuse but Defends Interrogations." *Washington Post*. 12/26/02.

Linda Greenhouse. "In a Momentous Term, Justices Remake the Law, and the Court." *New York Times*. 7/1/03.

Linda Greenhouse. "Heartfelt Words from the Rehnquist Court." *New York Times*. 7/6/03.

David B. Rivkin Jr. and Lee A. Casey. "Crimes Outside the World's Jurisdiction." *New York Times*. 7/22/03.

Reuters. "Argentina Says it would Extradite 'Angel of Death.'" *New York Times*. 10/11/03.

Juan Forero. "Texaco Goes on Trial in Ecuador Pollution Case." *New York Times*. 10/23/03.

Somini Sengupta. "Lessons from Africa: War Crimes Without End." *New York Times*. 12/21/03.

#### **PRESS RELEASES**

Human Rights Watch (HRW). "Human Rights Watch Calls on Britain to Extradite Pinochet if Lords Rule He is not Immune." 11/18/98.

B'Tselem. "Important High Court Hearing on Torture." 1/12/99.

B'Tselem. "High Court Adjourns without Completing Hearings on Force in Interrogations." 1/14/99.

Amnesty International. "Supreme Court to Rule on Torture and the Holding of Hostages." 5/25/99.

HRW. "Israel High Court of Justice Torture Trial Background Briefing." 5/25/99.

B'Tselem. "Eve of High Court's Ruling on Torture." 9/5/99.

U.K. Home Office. "Press Statement by Secretary of State Jack Straw Regarding Pinochet's Medical Tests." 1/11/00.

HRW. "Pinochet Case a Landmark but Rights Groups Disappointed if no Trial." 1/12/00.

HRW. "U.K. Home Secretary Should Back Justice." 1/31/00.

HRW. "Pinochet Case a Milestone. Chile Urged to Prosecute Ex-Dictator." 3/2/00.

HRW. "Chile Supreme Court Rejects Pinochet Immunity. Verdict a Legal and Symbolic Victory." 8/8/00.

HRW. "Paraguay: Stroessner Extradition Effort Hailed." 12/11/00.

HRW. "Chilean Appellate Ruling on Pinochet Criticized. Mounting Pressure on Chilean Judiciary." 12/12/00.

HRW. "Milosevic Arrest: Corruption Charges Insufficient." 4/1/01.

Amnesty International. "A Victory for Human Rights in the Americas." 6/8/01.

HRW. "Argentina: Support Human Rights Trials." 12/12/01.

Amnesty International. "Chile: Victims of Torture have the Right to Justice." 2/19/01.

Amnesty International. "Sri Lanka: Landmark Judgment on Rape Case." 1/28/02.

Amnesty International. "Chile/UK: UK Shirks its Obligations to Cooperate in Human Rights Investigation." 4/23/02.

Amnesty International. "Human Rights Groups Welcome House of Lords Judgment on Northern Ireland Human Rights Commission." 6/20/02.

HRW. "Chile: Indictments in Prat Case." 2/25/03.

HRW. "U.S. Sidesteps Charges of Mistreating Detainees." 4/17/03.

HRW. "Chile: U.S. Jury Finds Chilean Ex-Officer Liable for Abuses." 10/16/03.

HRW. "Mexico: Highest Court Authorizes Prosecution of 'Dirty War' Cases." 11/5/03.

## **REPORTS**

Landau Commission. *Report of the Commission of Inquiry into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity (Landau Report)*. 1987.

B'Tselem. *Legitimizing Torture: The Israeli High Court of Justice Rulings in the Bilbeisi, Hamdan and Mubarak Cases. An Annotated Sourcebook*. January 1997.

HRW. *The Pinochet Precedent*. 1998.

HRW. *When Tyrants Tremble: the Pinochet Case*. October 1999.

B'Tselem. *Legislation Allowing the Use of Physical Force and Mental Coercion in Interrogations by the General Security Service. Position Paper.* January 2000.

State Comptroller. *Summary of the 1995 Review Report on the Subject of the Methods of Interrogation of the General Security Service.* Report No. 1. 2000 (Hebrew).

Public Committee Against Torture in Israel. *Flawed Defense: Torture and Ill-Treatment in GSS Interrogations following the Supreme Court Ruling.* September 2001.

HRW. *World Report: Chile.* 2003.

HRW. *World Report: Human Rights and Armed Conflict* (Richard Dicker and Elise Keppler: "Beyond the Hague: the Challenges of International Justice). 2004.

#### **OTHER DOCUMENTS**

Jack B. Tate. *Tate Letter.* 1952. (Letter from State Department Legal Advisor to U.S. Attorney General).

American Law Institute. *Restatement of the Law, Third, Foreign Relations Law of the United States* 1987.

Lea Tsemel. *An Open Letter to "Abu Jerry."* Public Committee Against Torture in Israel. 9/6/99.

*Excerpts of Proceedings before the Appellate Committee of the House of Lords in Pinochet III.* 1999. In *The Pinochet Papers: the Case of Augusto Pinochet in Spain and Britain*, eds. Reed Brody and Michael Ratner. The Hague: Kluwer Law International (2000).

*Statement of Ambassador Robert Garretón (Submitted to the House of Lords by Human Rights Watch regarding Pinochet's legal situation in Chile).* 1/12/99. In *The Pinochet Papers: the Case of Augusto Pinochet in Spain and Britain*, eds. Reed Brody and Michael Ratner. The Hague: Kluwer Law International (2000).

*House of Lords Hearings. Excerpts from Legal Submissions, November 1998.* In *The Pinochet Papers: the Case of Augusto Pinochet in Spain and Britain*, eds. Reed Brody and Michael Ratner. The Hague: Kluwer Law International (2000).

HRW. Monthly Email Update. August 2003.

**BRITISH COURT CASES**

*Liversidge v. Anderson* 1941. 3 All ER 338.

*Re: Augusto Pinochet Ugarte, R v. Evans and other ex parte Ugarte*. 1998. Queen's Bench Division (High Court of Justice for England and Wales) 10/28/98.

*Regina v. Bow Street Metropolitan Stipendiary ex parte Pinochet Ugarte*. 1998. Appellate Committee of the House of Lords. 3 W.L.R. 1456. 11/25/98.

*Regina v. Bow Street Metropolitan Stipendiary and others, ex parte Pinochet Ugarte (No. 2)*. 1999. Appellate Committee of the House of Lords. 2 W.L.R. 272. 1/15/99.

*Regina v. Bow Street Metropolitan Stipendiary and other, ex parte Pinochet Ugarte (No. 3)*. 1999. Appellate Committee of the House of Lords. 2 W.L.R. 827. 3/24/99.

*Kingdom of Spain v. Augusto Pinochet Ugarte*. 1999. Bow Street Magistrates' Court. 10/8/99.

*R v. Secretary of State for the Home Department, ex parte the Kingdom of Belgium; R v. Secretary of State for the Home Department, ex parte Amnesty International Limited and others*. 2000. Queen's Bench Division (Crown Office List). 2/15/00.

**ISRAEL HIGH COURT OF JUSTICE CASES**

H.C. 69, 493/81 *Abu Aita et al v. Regional Commander of Judea and Samaria*.

H.C. 97/79 *Abu Awad v. Regional Commander of Judea and Samaria*.

H.C. 550/72 *Abu El-Tin v. Minister of Defense*.

H.C. 401/88 *Abu Ryan v. Commander of IDF Forces in the Judea and Samaria Region*.

H.C. 785/87 *Afu v. Commander of the IDF Forces in the West Bank*.

H.C. 1005/89 *Aga v. Commander of IDF Forces in the Gaza Strip*.

H.C. 246/81 *Agudat Derech Eretz v. Broadcasting Authority*.

H.C. 796/88 *Ahlil v. Minister of Defense*.

H.C. 2722/92 *Alamrin v. Military Commander of Gaza Region*.

H.C. 2/79 *Al-Assad v. Minister of the Interior*.

H.C. 46/50 *Alayubi v. Minister of Defense*.

H.C. 779/88 *Alfasfus v. Minister of Defense*.

H.C. 5188/96 *Al-Ka'aqeh v. General Security Services*.

H.C. 771/80 *Al-Sayad v. Commander of the Judea and Samaria Region*.

H.C. 619/78 *Al-Talia et al. v. Minister of Defense*.

H.C. 774/83 *Amar v. Minister of Defense et al*.

H.C. 103/67 *American-European Beth-El Mission v. Minister of Welfare*.

H.C. 258/79 *Amira v. Minister of Defense*.

C.A. (Criminal Appeal) 532/91 *Anonymous Persons v. General Security Services*.  
H.C. 87/85 *Arjov v. Commander of the IDF Forces in the Judea and Samaria Region*.  
H.C. 507/72 *Arnon et al. v. Attorney General et al.*  
H.C. 358/88 *Association for Civil Rights in Israel v. Commander-in-Chief of the Central Region*.  
H.C. 4112/90 *Association for Civil Rights in Israel v. Commander of the Southern District*.  
H.C. 5973/92 *Association for Civil Rights in Israel (Twelve Petitions) v. Minister of Defense*.  
H.C. 4054/95 *Association for Civil Rights in Israel v. Prime Minister of Israel et al.*  
H.C. 672/87 *Atamallah v. IDF O.C. Northern Command*.  
H.C. 606/78 *Ayub v. Minister of Defense*.  
H.C. 386/85 *Badir v. Minister of the Interior*.  
H.C. 610/89 *Bakhari v. Commander of IDF Forces in the Judea and Samaria Region*.  
H.C. 3114/02 *Barakeh, M.K v. IDF*.  
H.C. 554/81 *Baransa v. IDF O.C. Central Command*.  
H.C. 3933/92 *Barkhat v. Commander of IDF Forces in the Central Region*.  
H.C. 428/86 *Barzilai v. Government of Israel*.  
H.C. 40/70 *Becker v. Minister of Defense*.  
H.C. 98/69 *Bergman v. Minister of Finance*.  
H.C. 231/73 *Bergman v. Minister of Finance*.  
H.C. 7964/95 *Bilbeisi v. GSS*.  
H.C. 2630/90 *Caracra v. Military Commander of the Judea and Samaria Region*.  
H.C. 337/71 *Christian Society for the Holy Places v. Minister of Defense*.  
H.C. 393/82 *Cooperative Society v. IDF Commander in the Judea and Samaria Region*.  
H.C. 698/85 *Dagalis v. Military Commander of the Judea and Samaria Region*.  
H.C. 448/85 *Dahar v. Minister of the Interior*.  
H.C. *Daka v. Minister of Defense*.  
H.C. 221/80 *Darwish v. Prisons Service*.  
H.C. 390/79 *Dweikat v. the Government of Israel*.  
C.A. (Criminal Appeal) 336/61 *Eichmann v. Attorney General*.  
H.C. 6163/92 *Eisenberg v. Minister of Housing*.  
H.C. 256/72 *Electric Corporation for Jerusalem District, Ltd. v Minister of Defense*.  
H.C. 393/82 *El Masulia v. Army Commander*.  
H.C. 159/76 *El Natashe v. Minister of Defense*.  
H.C. 285/81 *El Nazer et al. v. Regional Commander of Judea and Samaria*.  
H.C. 673/86 *El Saudi et al. v. Civil Administration, Gaza*.  
H.C. 5128/94 *Federman v. Minister of Police*.  
H.C. 5667/91 *Gabrin v. Commander of IDF Forces in the Judea and Samaria Region*.  
H.C. 236,537/95 *Ganimat v State of Israel*.  
H.C. 7563/97 *Ghanimat v. Minister of Defense*.  
H.C. 290/89 *Goha v. Military Commander of the Judea and Samaria Region*.

- C.A. (Civil Appeal) 723/74 *Ha'aretz Newspaper v. Israel Electric Corporation Ltd. and Ya'acov Peled.*
- H.C. 5740/90 *Hagba v. Commander of the IDF Forces in the Judea and Samaria Region.*
- H.C. 8049/96 *Hamdan v. GSS.*
- H.C. 302,306/72 *Hilu v. Government of Israel.*
- H.C. 4772/91 *Hizran v. Commander of IDF Forces in the Judea and Samaria Region.*
- H.C. 948/91 *Hodli v. Commander of IDF Forces in the Judea and Samaria Region*
- H.C. 65/51 *Jabotinsky v. Wiezman.*
- H.C. 403/81 *Jab'r v. Military Commander of the Judea and Samaria Region.*
- H.C. 897/86 *Jab'r v. IDF O.C., Central Command and Minister of Defense.*
- H.C. 351/80 *Jerusalem District Electricity Co. Ltd. v. Minister of Energy et al.*
- H.C. 987/89 *Kahavagi v. Commander of IDF Forces in the West Bank.*
- H.C. 148/73 *Kaniel v. Minister of Justice.*
- H.C. 648/87 *Kassem v. Minister of the Interior.*
- H.C. 355/79 *Katalan v. Prisons Service.*
- H.C. 320/80 *Kawasme et al. v. Minister of Defense.*
- H.C. 698/80 *Kawasme et al. v. Minister of Defense.*
- H.C. 274/82 *Khamamra v. Minister of Defense.*
- H.C. 361/82 *Khamri v. Commander of the Judea and Samaria Region.*
- H.C. 73/53 *Kol Ha'am v. Minister of Interior.*
- C.A. (Criminal Appeal) 65/67 *Kurtz and Latushinski v. Kirschen.*
- H.C. 153/83 *Levy and Amit v. Southern District Police Commander.*
- H.C. 733, 848/79 *Mala'by v. Commissioner of Prisons Service.*
- H.C. 1361, 1378/91 *Maslam v. Commander of IDF Forces in the Gaza Strip.*
- H.C. 792/88 (First Phase) *Matur v. Commander of the IDJ in the Judea and Samaria Region.*
- H.C. 792/88 (Second Phase) *Matur v. Commander of the IDF Forces in the West Bank.*
- H.C. 3124/96 *Mubarak v. GSS.*
- H.C. 629/82 *Mustafa v. Military Commander of the Judea and Samaria Region.*
- H.C. 802/89 *Nasman v. Commander of IDF Forces in the Gaza Strip.*
- H.C. 814/88 *Nassaralla et al. v. Commander of IDF Forces in the West Bank.*
- H.C. 6189, 6196, 6190/94 *Natahsa v. Minister of Defense.*
- H.C. 513, 514/85 *Nazal et al. v. Military Commander of Judea and Samaria Region.*
- H.C. 533/88 *Nazal v. Commander of the Judea and Samaria Region.*
- E.A. (Elections Appeal) 2/84 *Neiman v. Central Elections Committee.*
- H.C. 299/90 *Nimer v. IDF Forces in the West Bank Region.*
- H.C. 769/88 *Oubeid v. Commander of IDF Forces in the Judea and Samaria Region.*
- H.C. 5100/94 *Public Committee against Torture in Israel v. the State of Israel.*
- H.C. 7628/97 *Qur'an v. Minister of Defense.*
- H.C. 387/89 *Ragabi v. Commander of IDF Forces in the Judea and Samaria Region.*
- H.C. 448/81 *Ressler v. Minister of Defense.*
- H.C. 179/82 *Ressler v. Minister of Defense.*

H.C. 910/86 *Ressler v. Minister of Defense*.  
 H.C. 141/82 *Rubinstein v. Speaker of Knesset*.  
 H.C. 148/79 *Sa'ar Adv. v. Minister of the Interior and of the Police*.  
 H.C. 253/88 *Sagdia v. Minister of Defense*.  
 H.C. 834, 967/78 *Salame et al. v. Minister of Defense*.  
 H.C. 2581/91 *Salhat v. Government of Israel*.  
 H.C. 434/79 *Sakhawil v. Commander of the Judea and Samaria Region*.  
 H.C. 802/79 *Samra v. Regional Commander of Judea and Samaria*.  
 H.C. 680/88 *Schnitzer v. Chief Military Censor*.  
 H.C. 95/85 *Shahayin v. Minister of the Interior, IDF Commander in the Gaza Strip*.  
 H.C. 58/86 *Shaine v. Commander of IDF Forces in the Judea and Samaria Region*.  
 H.C. 31/87 *Sharab v. Head of the Civil Administration in the Gaza Strip*.  
 H.C. 1113/90 *Shav v. Commander of the IDF Forces in the Gaza Strip*.  
 H.C. 301/63 *Shtreit v. Chief Rabbi*.  
 C.A. (Criminal Appeal) 174/54 *Stampfer v. Attorney-General*.  
 H.C. 202/81 *Tabib v. Minister of Defense, Military Governor of Tulkarem*.  
 H.C. 658, 660-62/80 *Taha v. Minister of the Interior*.  
 H.C. 591/88 *Taha (Minor) et al. v. Minister of Defense*.  
 H.C. 24/91 *Timraz v. Commander of IDF Forces in the Gaza Strip*.  
 H.C. 5510/92 *Turkman v. Minister of Defense*.  
 H.C. 72/86 *Tzalum v. Military Commander of the Judea and Samaria Region*.  
 H.C. 593/82 *Tzemel v. Minister of Defense, Commander of the Antzar Camp*.  
 E.A. (Elections Appeal) 1/65 *Yardor v. Chairman of Central Election Committee*.  
 H.C. 6536/95 *Zaidah v. General Security Services*.

*Association of Insurance Companies Ltd. v. Minister of Finance* 1982. 36(i) *Piskei Din* 230.

*Ha'il Mu'adi v. State of Israel* 1984. 38(i) *Piskei Din* 197.

*United Mizrachi plc. V. Migdal Cooperative Village (Gal)* 1995. 49 (iv) *Piskei Din* 221.  
*Zeev v. Gubernik* 1948, 1 *Piskei Din* 85.

#### **U.S. COURT CASES**

*Abebe-Jiri v. Negewo* 1993 (Northern District of Georgia, Atlanta Division).

*Aguinda v. Texaco* 1994 (Southern District of New York).

*Aguinda v. Texaco* 2001 (Southern District of New York) 142 F.Supp 2d 534.

*Aguinda v. Texaco* 2002 (2<sup>nd</sup> Circuit) 303 F.3d 470.

*Argentine Republic v. Amerada Hess Shipping Corp.* 1989 (Supreme Court) 109 S. Ct. 683.

*Banco Nacional de Cuba v. Sabbatino* 1964 (Supreme Court) 84 S. Ct. 923.

*Brown v. Board of Education* 1954 (Supreme Court) 347 U.S. 483.

*Cabello v. Larios* 2001 (Southern District of Florida) 157 F. Supp. 2d 1345.

*Cabello v. Larios* 2002 (Southern District of Florida).

*Cabiri v. Assasie-Gyimah* 1996 (Southern District of New York) 921 F. Supp. 1189.  
*Chuidian v. Philippine National Bank* 1990 (9<sup>th</sup> Circuit) 912 F.2d 1095.  
*Demjanjuk v. Petrovsky* 1985 (6<sup>th</sup> Circuit) 603 F. Supp. 1468.  
*Denegri v. the Republic of Chile* 1992 (D.C. District).  
*Doe v. Islamic Salvation Front* 1998 (D.C. District) 993 F. Supp. 3.  
*Doe v. Karadzic* 2000 (Southern District of New York).  
*Doe v. Unocal* 1997 (Central District of California) 963 F. Supp. 880.  
*Doe v. Unocal* 2000 (Central District of California) 110 F. Supp. 2d 1294.  
*Doe v. Unocal* 2002 (9<sup>th</sup> Circuit).  
*Dreyfus v. von Finck* 1976 (2<sup>nd</sup> Circuit) 534 F.2d 24  
*Filartiga v. Pena-Irala* 1980 (2<sup>nd</sup> Circuit) 630 F.2d 876.  
*Filartiga v. Pena-Irala* 1984 (Eastern District of New York) 577 F. Supp. 860.  
*Forti v. Suarez-Mason* 1987 (Northern District of California) 672 F. Supp. 1531.  
*Forti v. Suarez-Mason* 1988 (Northern District of California) 694 F. Supp. 707.  
*Gherebi v. Bush* 2003 (9<sup>th</sup> Circuit).  
*Hamdi v. Rumsfeld* 2003 (4<sup>th</sup> Circuit).  
*Hatch v. Baez* 1876 (New York Court of Appeals) 7 Hun. 596.  
*Hilao v. Estate of Ferdinand Marcos* 1994 (9<sup>th</sup> Circuit) 25 F.3d 1467.  
*Hilao v. Estate of Ferdinand Marcos* 1996 (9<sup>th</sup> Circuit) 103 F.3d 767.  
*In re Estate of Ferdinand Marcos Human Rights Litigation* 1995 (District of Hawaii) 910 F.Supp. 1460.  
*ITT v. Vencap, Ltd.* 1975 (2<sup>nd</sup> Circuit) 519 F.2d 1001.  
*Jama et al. v. INS et al.* 1988 (District of New Jersey) 22 F. Supp. 2d 353.  
*Kadic v. Karadzic* 1994 (Southern District of New York) 866 F. Supp. 734.  
*Kadic v. Karadzic* 1995 (2<sup>nd</sup> Circuit) 70 F.3d 232.  
*Kadic v. Karadzic* 2000 (Southern District of New York).  
*Kyler v. Montezuma County, State of Colorado, et al.* 2000 (10<sup>th</sup> Circuit). Colo. J.C.A.R. 554.  
*Lafontant v. Aristide* 1994 (Eastern District of New York) 844 F. Supp. 128.  
*Lawrence v. Texas* 2003 (Supreme Court).  
*Linder v. Calero Portocarrero* 1990 (Southern District of Florida) 747 F. Supp. 1452.  
*Mehinovic v. Vuckovic* 2002 (Northern District of Georgia, Atlanta Division) 198 F. Supp. 2d 1322.  
*Padilla v. Rumsfeld* 2003 (2<sup>nd</sup> Circuit).  
*Paul et al. v. Avril* 1992 (Southern District of Florida) 812 F. Supp. 207.  
*Paul et al. v. Avril* 1994 (Southern District of Florida) 901 F. Supp. 330.  
*Paquete Habana* 1900 (Supreme Court) 20 S. Ct. 290.  
*Republic of the Philippines v. Marcos* 1988 (9<sup>th</sup> Circuit) 862 F.2d 1355.  
*Roe v. Wade* 1973 (Supreme Court) 410 U.S. 113.  
*Salimoff & Co. v. Standard Oil of N.Y.* 1933 (New York Court of Appeals) 262 N.Y. 220.  
*Saltany v. Reagan* 1988 (D.C. District) 702 F. Supp. 319.  
*Schooner Exchange v. M'Faddon* 1812 (Supreme Court) 11 U.S. (7 Cranch) 116.

*Sei Fujii v. California* 1952 (California Supreme Court) 38 Cal.2d 718.  
*Siderman de Blake v. Republic of Argentina* 1985 (Central District of California).  
*Sosa v. Alvarez-Machain* 2004 (Supreme Court) 03-339.  
*Tachiona v. Mugabe and ZANU-PF* 2001 (Southern District of New York) 169 F. Supp. 2d 259.  
*Tel Oren v. Libyan Arab Republic* 1981 (D.C. District) 517 F. Supp. 542.  
*Tel Oren v. Libyan Arab Republic et al.* 1984 (D.C. Circuit) 233 U.S. App. D.C. 384.  
*Trajano v. Marcos et al.* 1986 (District of Hawaii).  
*Trajano v. Marcos* 1989 (9<sup>th</sup> Circuit) 878 F.2d 1438.  
*Trajano v. Marcos and Marcos-Manotoc* 1992 (9<sup>th</sup> Circuit).  
*Underhill v. Hernandez* 1897 (Supreme Court) 168 U.S. 250.  
*Wiwa v. Shell* 1999 (Southern District of New York).  
*Wiwa v. Shell* 2000 (2<sup>nd</sup> Circuit) 226 F.3d 88.  
*Wiwa v. Shell* 2002 (Southern District of New York).  
*Xuncax v. Gramajo* 1995 (District of Massachusetts) 886 F. Supp. 162.

#### **INTERNATIONAL CASES**

*The Tinoco Claims Arbitration: Great Britain v. Costa Rica* 1923. (United Nations Arbitration Panel) 1 U.N.Rep. Int'l Arbitral Awards 369, 375.

*The Case of the SS Lotus: France v. Turkey* 1927. (Permanent Court of International Justice) P.C.I.J. Ser. A No. 10.

*Republic of Ireland v. United Kingdom* 1978. (European Court of Human Rights).

*The Velasquez Rodriguez Case, Submitted by the Inter-American Commission on Human Rights Against the State of Honduras* 1988 (Inter-American Court of Human Rights).

*Application of the Convention on the Prevention and Punishment of the Crime of Genocide. Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro)*. 1993 (International Court of Justice) filed 3/20/93.

*Arrest Warrant of 11 April 2000: Democratic Republic of the Congo v. Belgium* 2002 (International Court of Justice).

#### **UNITED NATIONS DOCUMENTS**

UN GA Res. 2793 (XXVI), 12/7/71.

A/Res/34/22 (GA), 11/14/79.

CAT/C/16/Add.4, 2/4/94.

CAT/C/SR.184, 4/28/94.  
 A/49/44, paras. 159-171 (CAT), 6/12/94.  
 CAT/C/33/Add.2/Rev.1, 2/18/97.  
 A/52/44, paras. 253-260 (CAT), 5/9/97.  
 CAT/C/SR.296, 5/15/97.  
 CAT/C/SR.295, 9/4/97.  
 CAT/C/SR.297/Add.1, 9/4/97.  
 A/53/44/, paras. 232-242 (CAT), 5/18/98.  
 CAT/C/SR.337, 5/22/98.  
 CAT/C/SR.339, 5/25/98.  
 CAT/C/SR.336, 11/20/98.  
 CAT/C/54/Add.1, 7/4/01.

### **PERSONAL INTERVIEWS**

Aeyal Gross. *Faculty of Law, Tel Aviv University*. Tel Aviv. 7/21/99.  
 Yoav Dotan. *Senior Lecturer, Faculty of Law, Hebrew University of Jerusalem*. Jerusalem. 8/8/99.  
 Hassan Jabareen. *General Director, Adalah: the Legal Center for Arab Minority Rights in Israel*. Shafa'amr. 8/9/99.  
 Eyal Benvenisti. *Hersch Lauterpacht Professor of International Law, Hebrew University of Jerusalem*. Jerusalem, 8/18/99.  
 Allegra Pacheco. *Human Rights Attorney*. Bethlehem, 9/7/99.  
 Amnon Rubinstein. *Chair, Knesset Law, Justice and Constitution Committee*. Jerusalem. 2/2/00.  
 Hannah Friedman. *Executive Director, Public Committee Against Torture in Israel*. Jerusalem. 3/12/00.  
 Dan Yakir. *Legal Advisor, Association for Civil Rights in Israel*. Tel Aviv. 3/14/00.  
 Eliahu Avram. *Attorney, Hamoked: Center for the Defense of the Individual (Israel)*. Tel Aviv (phone interview). 3/15/00.  
 Irene Baghoomians. *Attorney, Center for Constitutional Rights*. New York. 5/28/02.  
 Larry Birns. *Director, Council on Hemispheric Affairs (D.C.)* New York. 5/9/03.

**VITA**

Roni Amit earned a Bachelor of Arts degree in Political Economy from Tulane University in 1991 and a Master of Arts degree in international relations from the Elliott School at The George Washington University. In 2004 she earned a Doctor of Philosophy at the University of Washington in Political Science.