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Israeli Courts and the Paradox of International Human Rights Law

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Abstract

This article offers the first comprehensive mapping of the place of international human rights law (IHRL) in Israeli case law. It explores how Israeli courts use IHRL, based on quantitative and qualitative content analysis of all decisions, in all courts, referring to IHRL between 1990 and 2019. It reveals that Israeli courts mobilize IHRL predominantly with respect to children's rights and due process, seldom invoking IHRL in relation to ethnic and gender equality. It further shows that a significant portion of references to IHRL serve to justify state action. We discuss possible explanations for these patterns of use of IHRL and argue that, overall, these findings illustrate the paradox of IHRL being amenable to uses that are both emancipatory and protective of power.

How do Israeli courts use international human rights law (IHRL)? Legal scholars recognize that domestic courts are important 'compliance partners' of international human rights courts and bodies and are also able to limit the effects of international rulings in the domestic order.[1] Yet despite keen public and scholarly attention to Israel's human rights practices, including the role of the legal system in

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[1] Kunz, 'Judging International Judgments Anew? The Human Rights Courts before Domestic Courts', 30 *European Journal of International Law* (2020) 1129. See generally D. Sloss (ed.), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (2009), at 1–60; A. Nollkaemper, *National Courts and the International Rule of Law* (2011); D. Shelton, *International Law and Domestic Legal Systems: Incorporation, Transformation and Persuasion* (2011).

the continued occupation of the Occupied Palestinian Territories (OPT),[2] there is no comprehensive study of Israeli courts' uses of IHRL. The few scholars who, to date, have explored the Israeli courts' deployment of IHRL have either focused on specific rulings[3] or on the body of Supreme Court rulings in public law cases[4] or limited themselves to Israeli courts' uses of international jurisprudence.[5] Due to Israel's control of the OPT, and to the fact that Israel's position has long been that international humanitarian law (IHL) is applicable in the OPT to the exclusion of IHRL,[6] there is extensive writing on, and criticism of, the Supreme Court of Israel's interpretations of IHL.[7] Similar sustained attention to the Israel court system's treatment of IHRL is lacking.

Israel is a jurisdiction amenable to a more systematic exploration of domestic court uses of IHRL. While it ratified the principal universal human rights treaties in the early 1990s, Israel, as a small country, produces a manageable amount of case law, and most case law in Israel has been digitally available from 1990 onward. This study is based on a search of all references to human rights treaties and institutions in all Israeli courts between 1990 (from which time legal search engines are complete) and 2019. The search yielded 819 decisions. Building such a comprehensive database has allowed us to map the presence of IHRL and changes thereto over time. Having mapped all references to IHRL, we assessed the substantive implications of courts' references to IHRL through a qualitative content analysis of the use of each reference.[8] We asked, among other questions, whether the court invoked IHRL to protect an individual or to justify state action.

This detailed, systematic analysis unearths a series of novel findings about IHRL in Israeli courts. Existing studies of the Supreme Court have pointed to the pre-eminence

2 D. Kretzmer and Y. Ronen, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (2nd edn, 2021); N. Perugini and N. Gordon, *The Human Right to Dominate* (2015), at 71–100; Ben-Natan, 'Self-Proclaimed Human Rights Heroes: The Professional Project of Israeli Military Judges', 46 *Law and Social Inquiry* (2021) 755; Ben-Naftali, Gross and Michaeli, 'Illegal Occupation: Framing the Occupied Palestinian Territory', 23 *Berkeley Journal of International Law* (2005) 551; H. Viterbo, *Problematizing Law, Rights, and Childhood in Israel/Palestine* (2021).

3 E.g. Laursen, 'Israel's Supreme Court and International Human Rights Law: The Judgement on "Moderate Physical Pressure"', 69 *Nordic Journal of International Law* (2000) 413.

4 Barak-Erez, 'The International Law of Human Rights and Domestic Law: A Case Study of an Expanding Dialogue', 2 *International Journal of Constitutional Law* (2004) 611; Medina, 'Domestic Human Rights Adjudication in the Shadow of International Law: The Status of Human Rights Conventions in Israel', 50 *Israel Law Review* (*ILR*) (2017) 331; Cohen, 'International law in Israeli Courts', in C.A. Bradley (ed.), *The Oxford Handbook of Comparative Foreign Relations Law* (2019) 494.

5 Ronen, 'The Use of International Jurisprudence in Domestic Courts: The Israeli Experience', in M. Wind (ed.), *International Law and Domestic Politics* (2018) 296.

6 Kretzmer and Ronen, *supra* note 2; Hostovsky Brandes, 'The Diminishing Status of International Law in the Decisions of the Israeli Supreme Court Concerning the Occupied Territories', 18 *International Journal of Constitutional Law* (*IJCL*) (2020) 767.

7 Ben-Naftali, Gross and Michaeli, *supra* note 2; Kretzmer and Ronen, *supra* note 2; Viterbo, *supra* note 2, at 18–25.

8 Hall and Wright, 'Systematic Content Analysis of Judicial Opinions', 96 *California Law Review* (2008) 63.

9 Medina, *supra* note 4, at 350; Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) 1950, 213 UNTS 222.

of the European Convention on Human Rights (ECHR) in citation practices,[9] to the deployment of IHRL to develop doctrine in the area of social rights[10] and to an overall superficial engagement with IHRL.[11] In addition, they have found a practice of invoking IHRL to justify state action.[12] We find that courts refer to IHRL primarily with respect to children's rights and due process, seldom invoking IHRL in relation to ethnic and gender equality. That is, Israeli courts refer to IHRL predominantly in relation to those issues and actors least challenging to the political order in Israel – in effect, barging through already open doors. Moreover, we confirm that a significant portion of the references to IHRL serve to justify state action, by invoking exceptions to rights or limitations clauses, buttressing narrow interpretations of rights or imposing state obligations to deploy criminal proceedings. While that practice has been reduced over time in the Supreme Court, we reveal for the first time that it has increased in the lower courts.

We explain these patterns of use of IHRL by reference to judicial politics and the limitations of IHRL. As to the latter, we suggest that limitations clauses, international human rights body interpretations of IHRL as requiring criminal proceedings and the fragmentation of the field that offers Israeli courts a range of interpretations from which to choose all facilitate conservative uses of IHRL. By 'conservative', we mean protective of the *status quo* in terms of power relations (citizens *vis-à-vis* the state as well as ethnic, gender and other power relations). In this analysis, IHRL is not, on its own, emancipatory or conservative. Rather, some of the features of this field of international law enable its conservative deployment.

In recent years, scholars of international law and international relations have engaged in a heated debate about IHRL. While scholars from both the political left and right have challenged the field's legitimacy, effectiveness and unintended consequences,[13] others have rallied to the field's defence.[14] Yet even enthusiastic defenders of IHRL concede that, in practice, IHRL's contribution to the protection and emancipation of individuals and communities is limited. In particular, discussing domestic implementation, constructivist international relations scholars have emphasized the importance of the resonance of human rights ideas with local cultural frames and the better reception of human rights treaties that are perceived as non-political.[15] It appears that, paradoxically, IHRL is most successful where it is least challenging to local

[10] Barak-Erez, *supra* note 4.

[11] Medina, *supra* note 4, at 333; Ronen, *supra* note 5.

[12] Barak-Erez *supra* note 4; Medina, *supra* note 4.

[13] Third world and critical legal scholarship critiques include Mutua, 'Savages, Victims, and Saviors: The Metaphor of Human Rights', 42(1) *Harvard International Law Review* (2001) 241, at 241–245; Kennedy, 'The International Human Rights Movement: Part of the Problem?', 15 *Harvard Human Rights Journal* (2002) 101, at 101–125. Prominent critics drawing on rationalist approaches to international relations are E. Posner, *The Twilight of International Human Rights Law* (2014), and S. Hopgood, *The Endtimes of Human Rights* (2014).

[14] B. Simmons, *What's Right with Human Rights*, Winter 2015, available at http://democracyjournal.org/magazine/35/whats-right-with-human-rights/; De Búrca, 'Human Rights Experimentalism', 111 *American Journal of International Law* (2017) 277; K. Sikkink, *Evidence for Hope* (2017).

[15] B.A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (2009), at 12–19, 351–368.

discursive frames and sites of power. To this paradox must be added another: the state-centric framework of IHRL ends up demanding more services from the state in response to human rights violations and, thus, strengthening state power,[16] as critics of the 'carceral turn' in IHRL have recently emphasized.[17] Hence, scholars from various fields point to a set of paradoxes in the domestic deployment of IHRL, of which the commonality is that IHRL serves conservative uses at the same time as it is emancipatory. We suggest that the principal findings presented in this article illustrate the paradox of IHRL as it applies to court rulings.

Section 1 details our case study methodology, including the database we created and the method of analysis we developed, drawing on systematic content analysis techniques. Section 2 presents our findings and possible legal and political explanations therefor. It emphasizes, in particular, the ways in which our findings illustrate the paradox of IHRL. The conclusion discusses directions for further research.

1 Methodology

A *Israeli Courts and IHRL: Doctrinal Background*

Israel has ratified the main human right instruments: in 1979, it ratified the 1965 International Convention of the Elimination of All Forms of Racial Discrimination (CERD);[18] in 1991, the 1966 International Covenant on Civil and Political Rights (ICCPR),[19] the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR),[20] the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),[21] the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)[22] and the 1989 Convention on the Rights of the Child (CRC);[23] and, in 2012, the 2008 Convention on the Rights of Persons with Disabilities.[24] At least since the early 1990s, then, Israel has been formally committed to the central norms of IHRL. Customary international law is considered to be part of Israel's domestic law as long as it does not explicitly conflict with legislation and, in practice, is applied in Israel primarily through court rulings.[25] While treaties only become part of domestic law once they are incorporated through legislation,[26] the Israeli Supreme Court has applied a 'presumption of compatibility' – both with regard to customary law and to treaties – according to which domestic

16 S.E. Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (2006), at 5.
17 K. Engle, Z. Miller and D.M. Davis, *Anti-Impunity and the Human Rights Agenda* (2016); N. Mavronicol and L. Lavrysen (eds), *Towards a Coercive Human Rights Law? Positive Duties to Mobilise the Criminal Law under the ECHR* (2020).
18 660 UNTS 195.
19 999 UNTS 171.
20 993 UNTS 3.
21 1249 UNTS 13.
22 1465 UNTS 85.
23 1577 UNTS 3 (CRC).
24 2515 UNTS 3.
25 CrimA (Israel) 174/54, *Shtamper v. Attorney General*, 10 PD 5.
26 CA (Israel) 25/55, *Custodian of Absentee Property v. Samra*, 10 PD 1825.

legislation should be interpreted as far as possible as being compatible with international law.[27]

As stated above, due to Israel's control of the OPT, and to the fact that the Israeli Supreme Court generally recognizes standing and admissibility in cases involving IHL, the Supreme Court frequently engages with international law and has the ability to navigate its sources and norms.[28] The Supreme Court's interpretations of international law in relation to the OPT have been the subject of criticism, and scholars describe how Israeli courts have interpreted both IHRL and IHL so as to justify state violence against Palestinians.[29]

Finally, most case law in Israel has been digitally available from 1990 onward. This availability coincides with Israel's ratification of five major human rights treaties in 1991. Human rights treaty ratification, together with the adoption of basic laws protecting human rights in 1992, led some legal scholars in the 1990s to expect, and to advocate for, the increased invocation of IHRL by the Israeli courts.[30] Court ruling availability allows us to examine the use of IHRL not only by the Supreme Court, as a number of studies of Israel have already done,[31] but by all lower courts as well. References to IHRL by higher courts tell a partial story about the prevalence of IHRL among a select and small group of jurists and may not accurately portray the manner in which the court system as a whole employs IHRL. The availability of all case law and the relatively small number of cases referring to IHRL allowed us to quantitatively and qualitatively examine all decisions delivered in the period examined rather than to rely on a sample.

B *Quantitative and Qualitative Content Analysis*

We explored the uses of IHRL in Israeli courts through the content analysis of decisions, a method that is apt for descriptive and analytical projects documenting what

[27] High Court of Justice (Israel) 2599/00, *Yated v. Ministry of Education*, 56(6) PD 834. One question that remained open is whether constitutional norms are required to be interpreted in a manner consistent with international law where they do not explicitly contradict such law. While the claim that such presumption should apply to the Basic Laws has been argued before the Court, the Court has, to date, chosen to leave it open. High Court of Justice (Israel) 5555/18, *Hasson v. Knesset* 2021, (8 July 2021), Nevo Legal Database (by subscription, in Hebrew).

[28] Benvenisti, 'The Influence of International Human Rights Law on the Israeli Legal System: Present and Future', 28 *ILR* (1994) 136; Zilbershats, 'The Adoption of International Law into Israeli Law: The Real Is Ideal', 25 *Israel Yearbook on Human Rights* (1995) 243, at 278–279; Benvenisti, 'The Attitude of the Supreme Court of Israel towards the Implementation of the International Law of Human Rights', in B. Conforti and F. Francioni (eds), *Enforcing International Human Rights in Domestic Courts* (1997) 207.

[29] Benvenisti, 'The Influence of International Human Rights Law on the Israeli Legal System: Present and Future', 28 *ILR* (1994) 136; Zilbershats, 'The Adoption of International Law into Israeli Law: The Real Is Ideal', 25 *Israel Yearbook on Human Rights* (1995) 243, at 278–279; Benvenisti, 'The Attitude of the Supreme Court of Israel towards the Implementation of the International Law of Human Rights', in B. Conforti and F. Francioni (eds), *Enforcing International Human Rights in Domestic Courts* (1997) 207.

[30] Benvenisti, 'The Influence of International Human Rights Law on the Israeli Legal System: Present and Future', 28 *ILR* (1994) 136; Zilbershats, 'The Adoption of International Law into Israeli Law: The Real Is Ideal', 25 *Israel Yearbook on Human Rights* (1995) 243, at 278–279; Benvenisti, 'The Attitude of the Supreme Court of Israel towards the Implementation of the International Law of Human Rights', in B. Conforti and F. Francioni (eds), *Enforcing International Human Rights in Domestic Courts* (1997) 207.

[31] Barak-Erez, *supra* note 4; Medina, *supra* note 4; Ronen, *supra* note 5; Cohen, *supra* note 4.

judges actually do.[32] For these purposes, we identified 28 international and regional human right treaties, 16 international and regional human rights declarations and 19 human rights institutions (listed in the online Appendix 1) and defined them as IHRL. We did not include non-binding standards in this list of sources. In the first, quantitative, stage, three research assistants – all law students – searched the Nevo legal database for decisions referring to IHRL. We searched all publicly available decisions of Israeli courts delivered between 1 January 1990 and 31 December 2019. It should be noted that many decisions of military tribunals and family courts are not published.[33] A total of 819 decisions referencing at least one IHRL source were found, out of a total of 4,588,329 decisions published in Israel between 1990 and 2019 (0.02 per cent of all decisions overall).[34] Once the database was formed, two of the research assistants each coded half of the decisions for content that did not require interpretation: date, court, name of judge(s) referring to IHRL, instrument or institution mentioned and article or decision mentioned.

The second stage consisted of qualitative content analysis, which aimed to uncover the uses to which courts put IHRL – in particular, whether such uses were rights favourable. In order to understand the courts' uses of IHRL, we also sought to uncover the prescriptive status that judges assigned IHRL in the decisions. Our approach was initially descriptive and inductive in nature. Rather than begin with hypotheses about the specific uses to which IHRL was put and testing them, we formulated seven questions, with a varying number of possible answers associated with each question (see the online Appendix 2). The questions relevant to the present study were the following, starting from the least to the most interpretative:

> Q1: Was IHRL referred to by the majority or by the minority judges or by the judge in a single-judge bench?

This question offered one indicator of whether the references to IHRL formed part of the reasoning that was determinative of the outcome of the trial (in the majority judgment or by the judge in a single-judge bench) or was more marginal (in a minority judgment).

> Q2: Was IHRL invoked only as part of the parties' arguments?
> Q3: Was IHRL invoked in association with a previous decision or an external source (for instance, as part of a quote from an academic article)?

Because the Nevo database does not publish party briefs for all rulings, we did not search briefs and therefore could not trace for each decision in our database whether a party or a judge was the first to introduce a reference to IHRL in the course of legal proceedings. However, we could observe whether the court in its ruling discussed IHRL only as part of the parties' arguments or in association with a previous decision or external source. These questions, like Q1, offered indicators of the weight of

[32] Hall and Wright, *supra* note 8, at 88–89.
[33] Viterbo, *supra* note 2, at 39.
[34] This figure is based on data provided to us by Nevo, the leading legal database in Israel, after deducting decisions of various governmental bodies such as the patent registrar.

the reference to IHRL in judicial reasoning. A reference to IHRL that only appeared in a judge's presentation of the parties' arguments or through reference to a previous decision or external source is less central to the judge's reasoning than a reference the judge grappled with directly. Even so, we do not see this type of indirect reference to IHRL as being meaningless as the judge chose to quote or refer to this aspect of the parties' argument, previous decision or external source.

Q4: What normative status was IHRL assigned in the decision?

Where courts present IHRL as binding custom or applicable through the presumption of compatibility of legislation with Israel's international commitments, they formally assign IHRL stronger status than when they present it as comparative (and, therefore, foreign) law. Israeli courts do not always clearly indicate what status they assign to IHRL or to any other international law source; hence, this question required in some cases subtle interpretation on the part of the coders.

Q5: For the benefit of which party was IHRL invoked?

Here, we interpreted how the reference to IHRL was invoked by the courts and, more specifically, whether the judges used it in a manner that supported the protection of individual rights (distinguishing among the rights of various types of actors) or the justification of state action. We expected to find this practice in Israel based on previous analyses of Supreme Court rulings referring to IHRL[35] and the extensive literature documenting Israeli officials' deployment of the human rights discourse to justify violence towards Palestinians.[36] It should be noted that we did not purport to trace the link between a particular reference to IHRL and the outcome of a case. In many cases, the precise role of IHRL as a matter of legal doctrine was extremely difficult to extract from the decisions. Instead, Q5 asks how each reference to IHRL was used regardless of the judge's ultimate ruling in the case (for instance, whether the reference appears in the judgment as part of a list of considerations in favour of a possible outcome of the litigation, regardless of the actual outcome in the case).

To gain a deeper understanding of the phenomenon of IHRL being invoked to justify state action, and to distinguish between rights-favourable and more troubling uses of IHRL within this category of cases, decisions within the category were subsequently coded to indicate the more specific ways in which state action was legitimated. Four categories emerged, ground up, from the decisions: (i) legitimation of state action that is itself favourable to individual rights; (ii) recognition of limitations or exception to rights; (iii) narrow interpretation of rights; and (iv) justification for criminal proceedings.

Q6: Was the state of Israel a party to the case?

This question allowed us to assess the findings resulting from Q5 since it allowed us to exclude from the analysis cases where the state of Israel was not a party. IHRL can

[35] Barak-Erez, *supra* note 4; Medina, *supra* note 4.

[36] Perugini and Gordon, *supra* note 2, at 71–100; Ben Natan, *supra* note 2, at 755–759; Viterbo, *supra* note 2, at 74–79.

be invoked in cases in which the state is not involved, such as private law litigation, labour litigation between employee and employer or discrimination litigation between individuals and private service providers.[37]

Q7: In relation to what right(s) was IHRL invoked?

As mentioned in the introduction, constructivist scholars claim that rights perceived as less directly constraining of the state, or that resonate with local discourses, are better received domestically. Q7 aimed to allow us to assess these claims by disaggregating findings by right. For these purposes, we did not attempt to objectively determine which right was being discussed in the decision but, rather, to interpret how the judges themselves presented the discussion. Thirty rights, listed in Table 2, emerged in a grounded manner from the decisions. The research questions were formulated tentatively and revised and finalized through six pilot rounds, the first three of which comprised five cases each, while the last three comprised between 50 and 100 cases. In the first three pilot rounds, two research assistants and both authors individually coded the decisions for all questions. We reviewed the results together with the entire research team until agreement was reached as to the proper coding, and a coding sheet with instructions was produced. In the last three rounds, the two research assistants (hereinafter referred to as the 'coders') coded the decisions in accordance with the instructions, and their results were tested for inter-coder reliability with regard to each question. To test inter-coder reliability, Krippendorf's *alpha* test was applied.[38] After reliability was achieved, all 819 decisions were coded, including the 215 decisions that had formed part of the pilots and that were recoded in accordance with the updated coding instructions. The coding of the four subcategories of justification of state action (Q5) took place at a subsequent stage. The research assistants did not conduct inter-coder reliability tests for that stage, as the coding process was more collaborative.[39]

The findings constitute the database for analysing the manner in which Israeli courts refer to and apply IHRL. This database, which is in the Hebrew language, is publicly available.[40] We examined the findings for each research question on their own as well the relationship between the findings in different categories using the descriptive statistic functions in SPSS. We are aware that this type of analysis does

[37] On the relevance of international human rights law (IHRL) to family law, see Halperin-Kaddari, 'Parenting Apart in International Human Rights Family Law: A View from CEDAW', 22 *Jerusalem Review of Legal Studies* (2020) 130.

[38] This test reflects the level of agreement beyond what is expected by chance. Hall and Wright, *supra* note 8, at 113. We considered as reliable any result over 0.6. If sufficient reliability was not reached, the question was revised and re-examined in the following pilot. Questions for which the coders could not reach reliability after three rounds were taken out of the study and are not reported here, except the coding of Q7 on the rights to life, property, freedom of thought and privacy.

[39] Due to the fact that the categories were elicited inductively from the cases, the coders interpreted a third of the relevant cases (191 cases in total) jointly, without a pre-determined set of categories, until they reached agreement as to the identified categories and their content. With respect to the remaining two-thirds, they frequently consulted with each other and with the authors on the correct coding.

[40] IHRL in Israeli Courts, November 13, 2022, available at https://docs.google.com/spreadsheets/d/1_d0GrZ_kelAoSivKk_nsDKrm09Phlq7nnXJVjiGmgxU/edit?usp=sharing (in Hebrew).

not grasp the role that IHRL may play in setting novel, important precedents, usually laid down by the Supreme Court. Indeed, content analysis techniques offer a thinner understanding of decisions than the conventional legal methods of interpreting a ruling in light of existing doctrine.[41] However, such precedents have already received much attention in scholarship. As pointed out by Mark Hall and Ronald Wright, 'content analysis can augment conventional analysis by identifying previously unnoticed patterns that warrant deeper study, or sometimes by correcting misimpressions based on ad hoc surveys of atypical cases'.[42] Our methodology allows for the examination of the day-to-day uses of IHRL by all Israeli courts.

2 Findings

We found that Israeli courts refer to IHRL primarily in relation to those issues and actors that are least controversial in Israel, in effect barging in through already open doors. Moreover, while the majority of references to IHRL are invoked to protect the individual, a significant portion serve to justify state action, whether by invoking exceptions to rights or limitations clauses, narrow interpretations of rights or state obligations to prosecute rights violations. In this section, following a presentation of general descriptive statistics emerging from the database, we discuss each of these findings in turn.

A *General Findings*

As indicated above, our search yielded 819 decisions (comprising 0.02 per cent of all decisions overall and, in 2010–2019, a reduction from 0.09 per cent in 1990–1999).[43] Overall, the references to IHRL form part of judges' reasoning. In only 8.7 per cent of cases do the references appear in the decision solely in the presentation of the parties' arguments. In only 3.7 per cent of the cases was it mentioned by a judge in the minority, the overwhelming majority of references being included in single judges' decisions (59.1 per cent of cases) and judges sitting in the majority in a split bench (38.8 per cent). Moreover, courts assign IHRL strong prescriptive status: 70 per cent of the decisions citing IHRL invoke it as binding custom and/or through the presumption of compatibility.[44] In addition, references to IHRL are not the province of a small number of judges, reflecting idiosyncratic preferences. Over the three decades covered by our database, references to IHRL spread from the Supreme Court (whether acting as a court of appeals for lower courts or as the High Court of Justice hearing public law petitions in the first instance) to lower courts, as can be seen in Table 1.

41 Hall and Wright, *supra* note 8.

42 *Ibid.*, at 87.

43 This figure is based on data provided to us by Nevo, the leading legal database in Israel, after deducting decisions of various governmental bodies such as the patent registrar.

44 In total, 4.3 per cent of the decisions refer to IHRL as part of the presumption of compatibility, while 13.9 per cent refer to it as binding custom; 55 decisions do both. It should be noted that the ECHR and the European Court of Human Rights are overwhelmingly discussed as comparative law (62.8 per cent of references to the convention, and 97 per cent of references to decisions of the Court).

Table 1: Courts' share of citations to IHRL by decade

Decade	Number of decisions (% of total Nevo database)	Magistrate Court (%)	District Court (%)	Supreme Court as court of appeals (%)	Supreme Court as High Court of Justice (%)
1990–1999	51 (0.09)	19.6	33.3	21.6	25.5
2000–2009	339 (0.05)	36.9	32.7	15	15.3
2010–2019	429 (0.01)	41.7	29.6	14.7	14

Moreover, out of 296 judges who referenced IHRL, 93 did so at least three times, of which 28 were Supreme Court justices. To give an indication of the extent of the practice within the Israeli judiciary, in the year 2019, there were 737 judges in Israel, not including military judges or judges in religious courts,[45] and, in that year, 28 different judges referenced IHRL in 31 decisions. It should also be noted that family courts comprise a significant portion of the database (205 decisions in total), and this despite the fact that many decisions delivered by family courts are unpublished.

B *Barging through Open Doors*

Israeli courts refer to IHRL primarily in relation to those issues where state behaviour is least problematic. The CAT is referenced in only 2.8 per cent of cases, the CERD in only 2.4 per cent of cases and the CEDAW in only 2.2 per cent of cases. Each of these treaties relates to a right that has been identified by external reports as being poorly respected in Israel since at least the 1980s.[46] Each of these rights is highly controversial in Israel, where the state and conservative actors have consistently justified harsh interrogation practices against detainees on grounds of national security[47] and have presented aspects of both racial and gender equality as undermining the Jewish

[45] Government of Israel Central Bureau of Statistics, Judges, Judges in Rabbinical Courts, Lawyers, Israel Police, and Israel Prison Service, 31 August 2021, available at www.cbs.gov.il/he/publications/doclib/2021/8.shnatoncrimeandjustice/st08_02.pdf.

[46] Mann and Shatz, 'The Necessity Procedure: Laws of Torture in Israel and Beyond, 1987–2009', 6 *Unbound: Harvard Journal of the Legal Left* (2010) 59; Public Committee against Torture in Israel, Torture in Israel 2021: Situation Report (2021), available at https://stoptorture.org.il/en/torture-in-israel-2021-situation-report/; Committee on the Elimination of Racial Discrimination, Consideration of Reports Submitted by States Parties under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination-Israel, Doc. CERD/C/ISR/CO/14-16, 9 March 2012, available at www2.ohchr.org/english/bodies/cerd/docs/CERD.C.ISR.CO.14-16.pdf; Committee on the Elimination of Racial Discrimination, Concluding Observations on the Combined Seventeenth to Nineteenth Reports of Israel, Doc. CERD/C/ISR/CO/17-19, 12 December 2019, available at https://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/ISR/INT_CERD_COC_ISR_40809_E.pdf; Committee on the Elimination of Discrimination against Women, Concluding Observations on the Sixth Periodic Report of Israel, Doc. CEDAW/C/ISR/CO/6, 17 November 2017, available at www.ecoi.net/en/file/local/1424914/1930_1519221687_n1739444.pdf; US Bureau of Democracy, Human Rights, and Labor, 2020 Country Reports on Human Rights Practices: Israel, West Bank and Gaza (2020), available at www.state.gov/reports/2020-country-reports-on-human-rights-practices/israel-west-bank-and-gaza/.

[47] Simmons, *supra* note 15, at 296.

character of the state.[48] In contrast, the most cited source is the CRC, cited in 49 per cent of all cases and in 33.6 per cent of the cases issued by courts other than family courts.[49] Ironically, the CRC is also the human rights instrument that, formally, least requires direct citations: many of its provisions have been formally implemented in domestic legislation following the appointment in 1997 at the Ministry of Justice of a committee to verify Israeli law's compliance with the convention and to formulate legislative reforms to give effect to the convention.[50] No equivalent effort was put into place in relation to other human rights conventions in Israel.

Could the paucity of references to IHRL in relation to torture and racial and gender equality be due to the fact that Israeli courts can rely on existing domestic norms? The right to physical integrity is expressly protected in the Basic Law: Human Dignity and Freedom, which was enacted in 1992, and, since at least the mid-1990s, courts have interpreted the right to dignity protected under that constitutional legislation as including the rights to gender and racial equality.[51] Moreover, women's right to equality before the law has been protected in legislation since the 1950s, as has racial equality since the early 1990s.[52] As a result, the Israeli Supreme Court has developed an extensive jurisprudence on equality. Nevertheless, we have dismissed the view that the existence of domestic sources is likely to be the main factor influencing the invocation of IHRL. Israeli legislation does not expressly prohibit torture – a right rarely invoked in our database – and the landmark 1999 ruling outlawing certain 'physical' forms of interrogation of detainees draws substantially on IHRL.[53]

Conversely, those rights most invoked by Israeli courts are enshrined in domestic constitutional law and/or ordinary legislation. As can be seen in Table 2, across all instruments, the three human rights most invoked by far by the courts are children's rights (47.6 per cent of cases), due process (14.9 per cent) and the right to liberty (13.4 per cent). While the state has actively sought to implement the CRC, as indicated above, courts have since the early 1990s also developed extensive protections for due process and liberty – both in connection with the criminal process – under

[48] A. Bakshi, *Symposium on the Basic Law: Nationality and the Overcoming Clause: Does the Nation-State Law Deny the Right to Equality?* (2018), available at https://bit.ly/31vHzgx (in Hebrew); Tirosh, 'Diminishing Constitutional Law: The First Three Decades of Women's Exclusion Adjudication in Israel', 18 *IJCL* (2020) 821, at 829–832; Shafran-Gittleman, 'Women in the IDF and the Joint Service Order', 143 *Policy Research* (2020) 7, at 138 (in Hebrew).

[49] The CRC is the most-cited instrument even outside of family courts.

[50] Cohen, Filberg and Shany, 'The Impact of Human Rights Law on The Israeli Legislative Process', 10 *Hukim* (2017) 69, at 81–82 (in Hebrew).

[51] Basic Law: Human Dignity and Liberty [adopted in 1992] SH 1391; High Court of Justice (Israel) 4541/94, *Miller v. Minister of Defense*, 49(4) PD 94; High Court of Justice (Israel) 6698/95, *Ka'adan v. Israel Land Administration*, 54(1) PD 258; High Court of Justice (Israel) 453/93, *Israel Women's Network v. Government*, 48(5) IsrLR 425; High Court of Justice (Israel) 2671/98, *Israel Women's Network v. Minister of Labor & Social Affairs*, 52(3) IsrSC 630.

[52] Equal Rights of Women Act 1951, SH 82; Arrangements in State Budget Law (Legislative Amendments) 1992, SH 1377, s. 3A; Civil Service Law (Appointments) 1959 (Amendment no. 11, 2000), SH1767 Art. 15A; Prohibition of Discrimination in Products, Services and Entry into Entertainment and Public Places Law 2000, SH 1765; Equal Employment Opportunity Law 1988, SH 1240.

[53] High Court of Justice (Israel) 5100/94, *Public Committee against Torture v. Government of Israel*, 53(4) PD 817.

Table 2: Rights invoked by Israeli courts

Right	Percentage of database
Children's rights	47.6
Due process	14.9
Liberty	13.4
Family life	7.3
Life	5.3
Property	5.1
Freedom from torture or cruel, inhuman or degrading treatment or punishment	4.5
Free speech	4.2
Privacy	3.9
Ethnic equality	3.4
Social security	3.3
Freedom of movement	2.9
Freedom of association	2.7
Education	2.3
Gender equality	2
Religious freedom	1.5
Equality [other]	1.3
Work related	1.3
Health	1.1
Political participation	1
Sexual orientation equality	0.9
Religious equality	0.9
Freedom of thought	0.9
Intellectual property rights	0.7
Disability	0.7
Water	0.6
Freedom of contract	0.4
Environmental	0.2
Indigenous	0.2
Minority rights	0.1

Israeli constitutional law.[54] The lacunae of domestic law can therefore not explain the choice to refer to IHRL. Neither is it possible to clearly determine that some rights are by nature more linked to domestic law than to international law.

Because we could not search party submissions and oral arguments, we were unable to firmly dismiss the possibility that the differences among rights result from differences in activism – namely, that in the area of torture and gender and racial equality, petitioners invoke IHRL less frequently. However, we have little reason to believe that this is the case as the leading non-governmental organizations (NGOs) that bring cases concerned with such rights (the Public Committee against Torture in Israel,

[54] Barak, 'The Constitutionalization of the Israeli Legal System as a Result of the Basic Laws and Its Effect on Procedural and Substantive Criminal Law', 31 *ILR* (1997) 3; Gur-Arye, 'Human Rights and Substantive Criminal Law', 50 *Mishpatim* (*Hebrew University Law Review*) (2021) 759 (in Hebrew).

the Association for Civil Rights in Israel and Adalah) have invoked IHRL frequently in publicly available campaign material.[55] Some of the differences among rights and sources may be explained by the extent of litigation on the relevant issues; it is reasonable to believe that there are many more cases brought to Israeli courts involving children's rights than torture and lesser forms of cruel, inhumane and degrading treatment (CIDT), despite the extensive expansions of the purview of those norms in IHRL[56] and the fact that violations of even the more traditional understandings of torture and CIDT are, according to NGOs, widespread in Israel.[57] Yet this explanation does not account for the paucity of references to gender and ethnic equality, norms that have the potential to be invoked in a wide range of cases.

We therefore suggest that judicial politics have strong explanatory force. Most rights are protected both by IHRL and by domestic constitutional law. In these cases, the resort to IHRL can be characterized as a choice, as it may not be warranted in order to reach the decision. In assessing the meaning of that choice, it should be remembered that domestic courts are both state agents and members of a transnational professional community.[58] Their rulings may therefore be addressed to a variety of audiences, both international (international institutions, foreign rulers, peers in the legal profession) and domestic (public opinion, other branches of government, NGOs). By invoking IHRL outside the controversial areas of torture and racial and gender equality, Israeli courts are able to shore up the legal system's international legitimacy without addressing (and, therefore, without exposing) profound injustice. To the extent that Israeli court rulings do challenge racial and gender inequality, it may appear to them easier to make domestic audiences swallow the pill of a challenge to the *status quo* by grounding those rulings in domestic norms than by appealing to international norms. To illustrate more concretely, in *Ka'adan*, the High Court of Justice ruled for the first time that the state could not give preference to Jews when allocating land. Chief Justice Aharon Barak briefly invoked the CERD in support of the Court's ruling, while devoting much more space to an argument that the Jewish character of the state favours a norm of non-discrimination.[59]

In terms of the individuals whose rights are invoked, the findings also point to uses by courts that do not deeply challenge power relations in Israel/Palestine: an overwhelming majority of the cases in which these rights are invoked concern Israeli

[55] Adalah *et al.*, Follow-up Report Submission to the United Nations Committee Against Torture in Relation to Israel's One-Year Follow-up Response to the Committee's Concluding Observations from May 2016 (2017), available at www.adalah.org/uploads/uploads/Full_CAT_Submission_August_2017.pdf; Association for Civil Rights in Israel, Situation Report: The State of Human Rights in Israel and the OPT 2014 (2014), available at https://law.acri.org.il/en/wp-content/uploads/2014/12/Situation-Report-2014.pdf; High Court of Justice (Israel) 8276/05, *Public Committee against Torture v. Government of Israel*, 62(1) PD 507.

[56] Davidson, 'The Feminist Expansion of the Prohibition of Torture: Towards a Post-Liberal International Human Rights Law?', 52 *Cornell International Law Journal* (2019) 109.

[57] Public Committee against Torture in Israel, Torture in Israel 2021: Situation Report (2021), available at https://stoptorture.org.il/en/torture-in-israel-2021-situation-report/.

[58] Slaughter, 'A Global Community of Courts', 44 *Harvard International Law Journal* (2003) 191, at 193–194, 201.

[59] *Ka'adan*, *supra* note 51; *Miller*, *supra* note 51.

citizens, with Palestinian non-citizens involved in only 8.1 per cent of the cases in the database, despite the consensus among human rights organizations that Israel routinely violates the rights of Palestinian detainees, including minors.[60] Yet, here, the primary explanation for the small number of cases involving Palestinians is doctrinal: the vast majority of petitions by Palestinians are addressed under IHL. Israel's position, rejected by international bodies, has long been that IHL is an exclusive framework and that it is not bound by IHRL in the OPT. While the Israeli Supreme Court has applied IHRL in the OPT, it has done so selectively, and IHL remains the dominant normative framework.[61]

Thus, Israeli courts mobilize IHRL primarily in those domains, and with respect to those groups, that least challenge the political order. These findings provide additional evidence for Beth Simmons' claim that effectiveness is higher for 'non-political' treaties – that is, treaties that do not directly constrain state power.[62] However, our findings suggest that, contrary to Simmons' assumption, the 'non-political' is not a universal category. For instance, Simmons presents CEDAW as a typical non-political treaty.[63] However, in Israel, due to the objection of religious parties to gender equality, it is one of the most contentious IHRL instruments,[64] and our analysis reveals that it is one of the least-cited IHRL instruments. What is considered 'political' therefore differs from place to place. Our findings thus offer a stark reminder of the limitations of human rights. If the domestic reception of IHRL depends on both cultural and political resonance, then its potential for profound change is severely constrained.[65]

C *IHRL as Justification for State Action*

As indicated in section 1, our coders interpreted each reference to IHRL, coding whether the judges invoked IHRL – overall in the decision, regardless of which party prevailed legally – in a manner that justified protecting individual rights, legitimating state action or protecting the rights of a range of legal persons. We found that in 75.7 per cent of the cases (and 67.5 per cent of those in which the State of Israel was a party), IHRL was invoked by judges in the majority to protect an individual. However, alongside these progressive uses, it is notable that in 32.8 per cent of cases in which the State of Israel was a party (22.7 per cent of cases overall), the judges in the

[60] Viterbo, *supra* note 2, at 59–64; Action of Christians against Torture *et al.*, Broken Childhood: Palestinian Minors in the Fire Line of Israeli Repression, March 2016, available at https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/ISR/INT_CAT_NGO_ISR_23470_E.pdf; Miftah, Palestinian Prisoners – Fact Sheet, June 2012, at 2, available at www.miftah.org/Display.cfm?DocId=7209&CategoryId=4; Addameer, Annual Violations Report: Violations of Palestinian Prisoners' Rights in Israeli Prisons – 2015 (2016), at 84, available at www.addameer.org/sites/default/files/publications/website.pdf.

[61] A. Gross, *The Writing on the Wall: Rethinking the International Law of Occupation* (2017), at 338–396; Kretzmer and Ronen, *supra* note 5, at 83–85.

[62] Simmons, *supra* note 15, at 12–19, 351–368.

[63] *Ibid.*, at 202–209.

[64] See note 48 above.

[65] Merry, 'Transnational Human Rights and Local Activism: Mapping the Middle', 108 *American Anthropologist* (2006) 38, at 41.

majority invoked IHRL to legitimate state action. They did so in 49 per cent of criminal cases. Moreover, over 64 per cent of the Supreme Court's invocations of IHRL (split evenly between its holdings as a court of appeals and as the High Court of Justice) justified state action.

The state-favourable use of IHRL is found across most rights, as set out in Table 3. It is particularly strong for some of the basic rights that are rarely invoked, such as the right to life (39.5 per cent, invoked in only 5.3 per cent of the database) and torture (43.2 per cent, invoked in only 4.5 per cent of the database), with significant portions of references to what we identified as more consensual rights – liberty (34.5 per cent) and due process (28.7 per cent) – also serving to legitimate state action. The source with the highest proportion of state-favourable invocations is the ECHR (36.6 per cent of decisions referring to it were coded as having a state-favourable invocation), of which the limitations clauses and narrow interpretations of rights prove useful to Israeli courts.

As indicated in section 1, the coders identified among the decisions four categories of state-favourable uses of IHRL:

i. Legitimation of state action that was ultimately favourable to individual rights. For example, in *Alrai v. Minister of Interior Affairs*, the High Court of Justice referred to Article 15 of the 1948 United Nations (UN) Universal Declaration of Human Rights, which states that every person is entitled to citizenship, to justify the state's refusal to revoke the citizenship of the assassin of the prime minister.[66]
ii. Interpretations of IHRL that allowed for limitations or exception to rights. For example, in rejecting a petition arguing that a decision of the Ministry of Health not to include a specific drug in the subsidized health services violated the constitutional right to health, the High Court of Justice referred to Article 2 of the ICESCR, which states that each state undertakes to take steps to the maximum of its available resources, and concluded that, although the covenant recognizes the right to health, it also recognizes that budgetary constraints play a part in determining its scope and constitutional protection.[67] Similarly, in *John Doe v. State of Israel*, the district Court of Jerusalem sitting as a court of criminal appeals approved the detention of a security prisoner based on the state of emergency exception in the ICCPR.[68]
iii. Narrow interpretation of rights. In *Zada v. Israel*, in determining that the burden of proof required for pre-trial detention is the only reasonable cause to believe that the arrestee has committed the crime, the Supreme Court, sitting as a criminal court of appeal, discussing the right to liberty, referred to Article 5(1)(c) of the ECHR, which requires 'reasonable suspicion' as a prerequisite to the lawful detention of a person.[69]

[66] High Court of Justice (Israel) 2757/96, *Alrai v. Minister of Interior Affairs* 1996, 50(2) PD 18, at 21; Universal Declaration of Human Rights, GA Res. 217A (III), 10 December 1948.
[67] High Court of Justice (Israel) 3071/05, *Luzon v. Government of Israel*, 63(1) PD 1, at 24.
[68] CrimA (Jer) 10116-07, *John Doe v. State of Israel*, 1, at 6 (18 October 2007), Nevo Legal Database (by subscription, in Hebrew).
[69] CrimA (Israel) 8087/95, *Zada v. Israel*, 50(2) PD 133, at 171.

Table 3: Invocations of IHRL to justify state action by right

Right, where State of Israel is a party	Percentage of invocations of this right in the database which legitimate state action	Percentage of invocations of this right in the database that legitimate state action in a way that is favourable to individual rights
Environmental	50	50
Indigenous	50	50
Freedom from torture or cruel, inhuman or degrading treatment or punishment	45.7	0
Life	40.5	4.8
Equality [other]	42.9	14.3
Free speech	40.9	9.1
Freedom of movement	38.1	0
Liberty	35.8	2.8
Property	36.7	10
Privacy	35	15
Due process	32.3	1
Children's rights	33.7	9
Religious equality	40	0
Freedom of thought	33.3	16.7
Health	33.3	11.1
Gender equality	33.3	22.2
Religious freedom	30	20
Political participation	28.6	0
Family life	26	4
Social security	25	0
Ethnic equality	20	0
Disability	20	0
Education	16.7	5.6
Freedom of association	16.7	0
Sexual orientation equality	14.3	14.3
Minority	0	0
Freedom of contract	0	0
Work-related	0	0
Water	0	0
Intellectual property	n/a (no case with the State of Israel as party)	n/a

iv. Justifications for criminal proceedings. In *Israel v. John Doe*, the district court in Tel-Aviv, sitting as a court of severe criminal cases, referred to Article 19(1) of the CRC, which prohibits the use of physical or mental violence against children, to justify an aggravation of the sentence imposed on a father who beat his child.[70]

[70] CrimC (TA) 40066/00, *Israel v. John Doe*, 1, at 5 (13 December 2000), Nevo Legal Database (by subscription, in Hebrew).

Only 18.3 per cent of the decisions invoking IHRL to legitimate state action did so in a way that was ultimately favourable to individual rights *vis-à-vis* the state. The bulk of the decisions justifying the state either served to limit rights (29 per cent), interpret rights narrowly (30.1 per cent) or justify criminal proceedings (26.9 per cent), in line with the carceral turn in IHRL. In 31 per cent of decisions in criminal cases, the reference to IHRL justified criminal proceedings (including by justifying sanctions after conviction). It should be noted that Palestinians do not appear to be disproportionately affected by the practice of courts invoking IHRL to legitimate state action.[71]

As can be seen in Table 3, for freedom from torture, the right to political participation, freedom of movement, freedom of association, ethnic equality, religious equality, disability rights, social security rights and even due process, the references to IHRL legitimating state action all do so in a way that is adverse to the individual.

Critics of Israel's treatment of Palestinians have documented Israeli officials' (including judges') invocations of international law and human rights to justify repression and to legitimate the state.[72] Our findings reveal that this practice is prevalent in Israel beyond discussions of the state's actions towards Palestinians and that it affects Israeli victims of human rights abuses as well. While our findings on their own cannot explain why courts engage in this practice, the understanding that judicial politics significantly shapes courts' reasoning is helpful here as well. On the one hand, concerns for international legitimacy and for legitimacy in the eyes of NGOs, who are repeat players in litigation before the courts, can explain judges' willingness to refer to IHRL and assign it prescriptive status. On the other hand, concerns for domestic legitimacy may lead judges to avoid challenging state practices on socially controversial issues. Thus, for those rights of which the enforcement would significantly challenge the *status quo*, we hypothesize that references to IHRL serve primarily a rhetorical, legitimating function for the courts themselves before foreign and domestic elite legal audiences.

Furthermore, we suggest that these conservative uses of IHRL are enabled by characteristics of IHRL: its indeterminacy, expressed in broadly worded limitations clauses; its fragmentation, allowing Israeli courts to choose among a range of international bodies' interpretations and thus to invoke the ECHR and its limitation clauses as well as the European Court of Human Rights' narrower interpretations of rights, despite the fact that the ECHR is not binding on Israel, and its carceral turn, which creates state obligations to criminally prosecute rights violations.

Our findings do provide support, however, for the hypothesis that judges' acculturation over time to human rights norms[73] may attenuate the paradox in the sense of diminishing conservative uses of IHRL and expanding emancipatory ones. It is true that, while Israeli lower courts have over the course of three decades increased their invocation of IHRL (27 cases by magistrates and district courts in 1990–1999

[71] In 23.9 per cent of cases involving a Palestinian party, the Court invoked IHRL to legitimate state action, while the Court did so in 23 per cent of cases not involving a Palestinian party. This is not a statistically meaningful difference.

[72] Ben-Natan, *supra* note 2; Viterbo, *supra* note 2.

[73] R. Goodman and D. Jinks, *Socializing States: Promoting Human Rights through International Law* (2013).

compared to 306 cases in 2010–2019), they have also doubled the frequency of invocations of IHRL that justify state action over this same period: from 10 per cent of magistrate court references in 1990–1999 to 17.3 per cent in 2010–2019 and from 11.8 per cent of district court references in 1990–1999 to 20.5 per cent in 2010–2019. However, once courts gain experience with IHRL, it seems that over time their conservative uses diminish. The percentage of invocations of IHRL to justify state action diminishes over time, constituting 46.4 per cent of cases to which the state is a party between 1990 and 1999 and 29.9 per cent of such cases between 2010 and 2019. The Supreme Court tends to use IHRL less to justify the state than in the past (in line with Barak Medina's analysis)[74]: the percentage of such pro-state uses there went from 82.6 per cent in 1990–1999 to 53.7 per cent in 2010–2019. Finally, in criminal cases, pro-state uses went from 66.7 per cent of cases in 1990–1999 to 36.5 per cent in 2010–2019.

3 Conclusion

In this article, we have presented the first comprehensive mapping of Israeli courts' invocations of IHRL. Drawing on quantitative and qualitative content analysis of all court rulings invoking IHRL between 1990 and 2019, we have argued that Israeli courts' uses of IHRL illustrate what we call the paradox of IHRL – namely, the fact that IHRL norms, while protective of individuals, are most effective in practice where they do not challenge power relations and even reinforce the state's coercive powers. In the Israeli case, the paradox is evidenced by courts' invocation of IHRL predominantly with respect to issues least threatening to the political order and by a substantial practice of invoking IHRL to justify state action. We have explained these judicial practices by reference to judicial politics and characteristics of IHRL that facilitate conservative invocations of rights. We also have pointed to a significant diminishing over time of conservative invocations of IHRL, suggesting that the paradox of IHRL may be attenuated by processes of acculturation.

Our findings may also help shed light on the gap that international relations scholars have identified between states' strong commitment to IHRL and their lack of compliance therewith (in the sense of state behaviour that is adverse to individual rights).[75] Alongside the legislature and other domestic institutions, domestic courts are a key site in which commitment to IHRL intersects with compliance. Domestic case law is one of the ways in which IHRL reaches prescriptive status in a jurisdiction through techniques such as references to IHRL that present it as an authoritative or persuasive source. At the same time, domestic case law is an indicator of compliance with IHRL, at least in those jurisdictions where authorities generally implement court rulings. Through the judicial practices identified in this study, courts might be seen

[74] Medina, *supra* note 4, at 3–5.

[75] Jetschke and Liese, 'The Power of Human Rights a Decade After: From Euphoria to Contestation?', in T. Risse, S.C. Ropp and K. Sikkink (eds), *The Persistent Power of Human Rights: From Commitment to Compliance* (2013) 26, at 27.

as contributing to the gap between commitment and compliance, dampening IHRL's emancipatory potential, though such an analysis should also consider courts' invocations of domestic human rights law in order to be complete.

Beyond questions related to IHRL's domestic reception, this article shows, from a methodological perspective, the benefits of combining quantitative and qualitative analysis when analysing references to international law or to any source invoked in court rulings. In the absence of qualitative content analysis, the finding of references to IHRL would have been assumed to be beneficial to rights. The qualitative layer exposes the justificatory function of some invocations of IHRL. This methodology can thus help map large-scale patterns in judicial practices in international and domestic fora without foregoing substantive analysis.