

## COMMENTS

# SOVEREIGN EXCEPTION NO MORE: THE IMPACT OF ISRAEL'S POTENTIAL ANNEXATION OF THE JORDAN RIVER VALLEY ON ISRAEL'S OBLIGATIONS UNDER THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

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### ABSTRACT

*On July 1, 2020, the international community released a collective breath as embattled Israeli Prime Minister Benjamin Netanyahu announced a temporary halt to his election promise to formally annex (or, in his words, apply sovereignty to) the occupied Jordan River Valley. Just forty-three days later, a victorious Netanyahu announced that as part of a peace accord with the United Arab Emirates, he agreed to drop his annexation plans. While Israel's flirtation with official annexation appears to be over for the moment, the momentum gained over the last two years is unlikely to disappear. Further, many, including Palestinians, argue that Israel's de jure annexation is nothing more than political theater, as Israel has de facto annexed the territory via its fifty-three-year occupation.*

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*If—and most likely when—Israel moves forward with annexation, Palestinian citizens in the annexed territory theoretically should gain additional rights under the international human rights treaties that Israel is a party to, namely, the International Covenant on Civil and Political Rights (ICCPR). However, despite a 2004 advisory opinion from the International Court of Justice finding that Israel exercised a critical amount of effective control in the Palestinian territories to not only subject Israel to liability for violations of its treaty obligations, but also hold it liable for affirmatively upholding the rights of Palestinians in the occupied territories, Israel has thus far escaped any liability. Israel deploys a complex legal argument in order to exempt itself from applying either international human rights law or international humanitarian law to the Palestinian territories, and it argues for a narrow reading of the ICCPR’s scope clause that would also release it from its obligations under the Covenant.*

*If or when Israel annexes the Jordan River Valley, the ICCPR will apply in the annexed territory, holding Israel liable for future violations of the principles of the ICCPR and requiring it to uphold its positive obligations to protect the human rights of both the Palestinian and Israeli citizens of the Jordan River Valley. Building on a body of established international jurisprudence, the situation warrants a broad reading of the ICCPR’s scope clause due both to the effective control Israel asserts over the territory and the fulfilment of the Covenant’s object and purpose. By stating that it will “apply sovereignty,” Israel has defeated its own defenses to the application of the ICCPR to the Palestinian territories. Unfortunately, an analysis of Israeli Supreme Court Jurisprudence reveals that despite the strong argument in favor of the ICCPR’s application, international law lacks a legal status in Israel, and therefore the Palestinian citizens of the Jordan River Valley will be unlikely to find relief in Israeli courts.*

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## INTRODUCTION

On January 28, 2020, Israel's Attorney General formally indicted Prime Minister Benjamin Netanyahu on corruption charges.<sup>1</sup> A few hours later, the Prime Minister appeared alongside impeached U.S. President Donald Trump as the President unveiled his long-awaited "deal of the century" to end the notorious conflict between Israel and Palestine.<sup>2</sup> While this plan was only the most recent in a long line of U.S.-brokered peace deals, it prompted a new dynamic that past peace deals have not—Israel's serious proposition to annex the Jordan River Valley.<sup>3</sup> This proposition ultimately did not come to fruition, as Prime Minister Netanyahu, who no longer needed annexation as a political crutch,<sup>4</sup> abandoned the cause by agreeing to suspend Israel's annexation plans as part of a peace accord with the United Arab Emirates (UAE), which the parties announced on August 13, 2020.<sup>5</sup> Nonetheless, because of Netanyahu's careful framing of the announcement as a temporary suspension of annexation and continued support for annexation amongst the Israeli public, there remains a realistic possibility that plans for official annexation will surface again.

This Comment argues that Israel's potential annexation of the Jordan River Valley would require Israel to comply with the International Covenant on Civil and Political Rights (ICCPR) in the annexed territory. Application of the ICCPR would hold Israel liable not only for any future violations of the principles of the ICCPR, but also for any failure to uphold its positive obligations to protect the human rights of both the

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1. Oren Liebermann & Amir Tal, *Israel's Netanyahu Indicted in Corruption Cases, Hours Before Mideast Peace Plan Announced*, CNN (Jan. 28, 2020, 7:55 AM), <https://www.cnn.com/2020/01/28/middleeast/israel-netanyahu-withdraws-immunity-request-intl/index.html> [<https://perma.cc/KV4U-9A4W>].

2. *Id.*; *Full Text of Netanyahu's Speech: Today Recalls Historic Day of Israel's Founding*, TIMES ISR. (JAN. 28, 2020, 10:40 PM), <https://www.timesofisrael.com/full-text-of-netanyahus-speech-today-recalls-historic-day-of-israels-founding> [<https://perma.cc/X3NB-2ZAT>].

3. Andrew Carey, *Trump's Plan Gives Israel a Green Light to Annex Part of the West Bank. Here's What that Looks like*, CNN, (Jan. 29, 2020, 1:18 PM), <https://www.cnn.com/2020/01/29/world/trump-map-israel-annexation-meanwhile-in-america-january-29-intl/index.html> [<https://perma.cc/54Y7-ANPR>].

4. See *infra* Section I.B.1 (discussing Prime Minister Netanyahu's annexation plans and their relation to his political ambitions).

5. Maha El Dahan et al., *Israel, UAE to Normalize Relations in Shift in Mideast Politics; West Bank Annexations on Hold*, REUTERS (Aug. 13, 2020, 10:55 AM), <https://www.reuters.com/article/us-israel-emirates-trump/with-trumps-help-israel-and-the-united-arab-emirates-reach-historic-deal-to-normalize-relations-idUSKCN25926W>.

Palestinian and Israeli citizens of the Jordan River Valley. This Comment further explains that despite Israel's obligations if it annexes the territory, citizens in the annexed territory would likely be unable to find justice in Israel's judicial system. Despite a traditionally strict reading of the ICCPR's scope clause that could preclude the clause's application to annexed or occupied territory, international courts have interpreted the clause more broadly, particularly when the treaty would offer beneficial protections to civilians in the territory.<sup>6</sup> However, because of the Israeli Supreme Court's reluctance to find customary or treaty-based international law binding in its decisions,<sup>7</sup> it is unlikely that Palestinian citizens of the Jordan River Valley will be able to bring a cause of action under the ICCPR in the Israeli Supreme Court should Israel annex the territory.

Part I of this Comment begins with a high-level overview of the history and context of the Israeli-Palestinian conflict, Israel's constitutional framework, and the recent history of Israel's annexation plans, including an examination of President Trump's Peace Plan and the peace agreement between the UAE and Israel. This Part continues with an overview of relevant sources of international law and methods for treaty interpretation, and it provides international tribunal case studies regarding the extraterritorial application of treaties. Part II argues that, due to the effective control that Israel exerts in the Jordan River Valley, the ICCPR and its provisions should apply to the annexed territory. Part II also demonstrates why Israel's likely future *de jure* annexation of the Jordan River Valley warrants a broader interpretation of the ICCPR's scope clause. Further, this Part addresses and dismantles Israel's defenses to the application of the ICCPR to the Palestinian Territories, including Israel's "sovereign exception." Finally, Part III offers an overview of Israeli jurisprudence to illustrate why, despite the strong argument in favor of applying the ICCPR to the annexed territory under international law, Israel's judiciary will likely never enforce the provisions of the ICCPR.

## I. BACKGROUND

This Part provides an overview of both the relevant history of the Israeli-Palestinian conflict and the current (and former) iterations of annexation,

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6. See *infra* notes 208–19 and accompanying text (discussing the phrase "within its territory" as used in the ICCPR).

7. See *infra* notes 375–81 and accompanying text (explaining the likelihood that domestic remedies would fail litigants).

and it introduces key international law concepts and documents. The Part begins with an as-concise-as-possible history of the conflict beginning with the British Mandate of Palestine, before offering insights into Israel's constitutional framework (or lack thereof) and the implications of Israel's judicial structures on the domestic status of international law in Israel. Then, this Part details political developments in 2019 and 2020 that implicated the potential for annexation: namely, the Israeli elections, President Trump's peace plan, and the Abraham Accords. This Part also provides detail on the Jordan River Valley. Finally, this Part discusses the relevant bodies of international law, including treaty interpretation and case law from various international tribunals on the extraterritorial application of treaties.

### A. *Israel and Palestine*

#### 1. *Brief history*<sup>8</sup>

In 1917, towards the tail end of World War I, the British seized land, known as Palestine, from the Ottoman Empire.<sup>9</sup> When establishing the British Mandate of Palestine, the International Court of Justice (ICJ) held that “two principles were considered to be of paramount importance: the principle of non-annexation and the principle that the well-being and development of . . . people [not yet able to govern themselves] form[ed] ‘a sacred trust of civilization.’”<sup>10</sup> Subsequently, in November 1917, United Kingdom Foreign Secretary Arthur Balfour sent a letter, which came to be known as the Balfour Declaration, to a British Jewish leader:

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8. Offering a comprehensive political history of the Israeli-Palestinian conflict over the last seventy-two years is extraordinarily difficult and far beyond the scope of this Comment. This Section offers a brief overview of relevant history and political context that will inform this Comment's analysis. Scholarship on the law of occupation contains a plethora of writing on the Israeli-Palestinian conflict, as the status of the Palestinian Territories has been the main dispute among the international community when discussing issues between Israel and Palestine, including annexation. However, this Comment does not address the status of the Palestinian Territories in relation to occupation or statehood beyond addressing Israel's defenses to the assertion that it has sovereignty over areas of the West Bank.

9. *Israel Profile—Timeline*, BBC NEWS (Apr. 9, 2019), <https://www.bbc.com/news/world-middle-east-29123668> [<https://perma.cc/YJ97-SGHT>].

10. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶ 70 (July 9) [hereinafter *Wall Opinion*] (quoting *International Status of South West Africa*, Advisory Opinion, 1950 I.C.J. Rep. 128, at 131 (July 11)).

His Majesty's Government view with favor the establishment in Palestine of a national home for the Jewish people, and will use their best endeavors to facilitate the achievement of this object, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country.<sup>11</sup>

With this declaration, the British Government acknowledged the Jewish people's right to the land that would become the State of Israel and expressed its willingness to help establish a Jewish state in Palestine.<sup>12</sup>

From 1917 to 1948, Jewish migration to the Mandate of Palestine increased.<sup>13</sup> As World War II raged in Europe, European Jewish migration to Palestine swelled.<sup>14</sup> Meanwhile, in Mandatory Palestine, "Jewish armed groups in pursuit of [an] independent Jewish state" fought the remaining British forces, and tensions brewed between the native Palestinian Arabs and the European Jews, who both asserted they had a legitimate claim to the land.<sup>15</sup>

In 1947, the United Nations recommended partitioning Palestine into separate Jewish and Arab states and placing the hotly contested gem of Jerusalem under international control.<sup>16</sup> The Jewish residents of Mandatory Palestine accepted the deal, while the Palestinians viewed it as "an extension of a long-running Jewish attempt [to] push them out of the land."<sup>17</sup>

When the British Mandate of Palestine expired in 1948, Israel declared its independence.<sup>18</sup> During the war that followed, in which the newly established State of Israel fought a coalition of Arab forces, 700,000

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11. LEONARD STEIN, *THE BALFOUR DECLARATION* at frontispiece (1961). Despite the inclusion of language regarding the civil and religious rights of non-Jewish inhabitants of Palestine, the legacy of the Balfour Declaration is its commitment to a "national home for the Jewish people," rather than any protections it purported to supply to native Palestinians.

12. The Levy Commission Report on the Legal Status of Building in Judea and Samaria, *translated by* Ruchie Avital, ¶ 7 (June 2012), <https://www.regavim.org/wp-content/uploads/2014/11/The-Levy-Commission-Report-on-the-Legal-Status-of-Building-in-Judea-and-Samaria2.pdf> [<https://perma.cc/Y3YJ-AL4C>] [hereinafter Levy Commission Report].

13. *Israel Profile—Timeline*, *supra* note 9.

14. *See id.*

15. *Id.*; Zack Beauchamp, *How Did Israel Become a Country in the First Place?*, VOX (May 14, 2018, 10:20 AM), <https://www.vox.com/2018/11/20/18080016/israel-zionism-war-1948> [<https://perma.cc/5YY5-QFQF>].

16. *Israel Profile—Timeline*, *supra* note 9.

17. Beauchamp, *supra* note 15.

18. *Israel Profile—Timeline*, *supra* note 9.

Palestinians fled or were forced to flee from their homes, creating a still-unsolved refugee crisis that has been at the center of subsequent peace negotiations between the Israelis and the Palestinians.<sup>19</sup> Palestinians refer to the Israeli forces' "mass eviction" during the 1948 war as the Nakba—Arabic for "catastrophe"<sup>20</sup>—while Israel claims that Palestinians fled voluntarily.<sup>21</sup> By the end of the war, Israel possessed seventy-seven percent of the land, whereas the 1947 U.N. partition plan guaranteed Israel only fifty-six percent of the land.<sup>22</sup> The territory that was left was either controlled by Jordan (the West Bank and East Jerusalem) or Egypt (the Gaza Strip).<sup>23</sup> Over the next ten years, around one million Jewish refugees and immigrants, including about 250,000 Holocaust survivors, settled in Israel.<sup>24</sup>

In June 1967, after months of tension, Israel launched a preemptive attack on Egypt that sparked the Six-Day War.<sup>25</sup> After defeating the armies of Egypt, Syria, and Jordan, Israel took control of the formerly Egyptian- and Jordanian-occupied West Bank, Gaza, and East Jerusalem, the Syrian Golan Heights, and the Egyptian Sinai Peninsula.<sup>26</sup> In the years that followed, Israel established Jewish settlements in these territories.<sup>27</sup> Israel also engaged in peace negotiations with Egypt, which ultimately led to Israel's withdrawal from the Sinai Peninsula in 1982.<sup>28</sup>

In 1981, Israeli military commanders of the West Bank and Gaza established the Civil Administration for Palestinians.<sup>29</sup> This action allowed Jewish inhabitants of the settlements in the West Bank and

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19. Beauchamp, *supra* note 15.

20. Zack Beauchamp, *What Is the Nakba?*, VOX (May 14, 2018), <https://www.vox.com/2018/11/20/18080030/israel-palestine-nakba>. Palestinians also assert that Zionist forces planned the Nakba and other notorious massacres, such as Deir Yasin, as ethnic cleansings to force Palestinians into fleeing or facing death. Paul Scham, *Modern Jewish History: Traditional Narratives of Israeli and Palestinian History*, JEWISH VIRTUAL LIBR., <https://www.jewishvirtuallibrary.org/traditional-narratives-of-israeli-and-palestinian-history> [<https://perma.cc/MCZ6-9EJX>] (summarizing conflicting Israeli and Palestinian narratives of different historical events).

21. Scham, *supra* note 20.

22. Beauchamp, *supra* note 15.

23. *Id.*

24. *Israel Profile—Timeline*, *supra* note 9.

25. *Id.*

26. *A Timeline of the Mideast Conflict*, NPR, <https://legacy.npr.org/news/specials/mideast/history/timeline.html> [<https://perma.cc/4689-E7JP>].

27. *Israel Profile—Timeline*, *supra* note 9.

28. *A Timeline of the Mideast Conflict*, *supra* note 26.

29. Raja Shehadeh, *From Tel Aviv to Jerusalem: An Embassy Move as the Crucible for Contested Histories*, 53 REV. MIDDLE E. STUD. 6, 10–11 (2019).



Gaza to benefit from Israeli laws and direct rule, while Israel continued to strictly apply wartime emergency regulations to the Palestinian residents of those same areas.<sup>30</sup> In 1987, Palestinians launched the First Intifada—one of two significant Palestinian uprisings against Israeli control—due to the strict restrictions from the Israeli military on Palestinians living in the West Bank.<sup>31</sup>

To formally end the First Intifada and initiate a plan for Palestinian self-governance, Palestine Liberation Organization leader Yasser Arafat and Israeli Prime Minister Yitzhak Rabin signed the Oslo I Accord in 1993.<sup>32</sup> As a result of the Oslo Accords, the West Bank is divided into three areas: A, B, and C.<sup>33</sup> The Palestinian Authority, a new interim Palestinian government that resulted from the agreements, had limited governance powers in Areas A and B, while Israel had full control of economic, civil, and security matters in more than sixty percent of the West Bank, designated as Area C.<sup>34</sup> In 1994, Jordan and Israel signed a peace treaty,<sup>35</sup> which not only established cooperation between the neighboring countries on economic, environmental, and security matters, but also “defined Jordan’s western borders clearly and conclusively for the first time, putting an end to the dangerous and false Zionist claim that ‘Jordan is Palestine.’”<sup>36</sup> Then, in 1995, a Jewish extremist assassinated Rabin, prompting the conservative Likud Party’s return to power under Benjamin Netanyahu in 1996.<sup>37</sup>

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30. *Id.* (likening the Civil Administration to apartheid, with Jewish settlers “immune from the restrictive laws applicable to the Palestinian residents”).

31. Zack Beauchamp, *What Were the Intifadas?*, VOX (May 14, 2018, 10:20 AM) <https://www.vox.com/2018/11/20/18080066/israel-palestine-intifadas-first-second>. “Intifada” translates to “shaking off” in Arabic. *Intifada (Palestinian Uprising)*, ALJAZEERA: PALESTINE REMIX, <https://interactive.aljazeera.com/aje/palestineremix/intifada.html> [<https://perma.cc/4E6B-PCC3>]. The First Intifada consisted mainly of nonviolent mass actions, such as boycotts and strikes, as well as some attacks on Israelis using rocks, Molotov cocktails, and small arms. Beauchamp, *supra*. The Israeli military responded with heavy force, leading to a disproportionate number of Palestinian casualties. *Id.*

32. *Israel Profile—Timeline*, *supra* note 9; *see also* Declaration of Principles on Interim Self-Government Arrangements, 32 I.L.M. 1525 (1993).

33. *What Are Areas A, B, and C of the Occupied West Bank?*, ALJAZEERA (Sept. 11, 2019) <https://www.aljazeera.com/news/2019/09/areas-occupied-west-bank-190911093801859.html> [<https://perma.cc/4L7V-9KKB>].

34. *Id.*

35. *Israel Profile—Timeline*, *supra* note 9.

36. Archived Introduction to *The Jordan-Israeli Peace Treaty*, CYBER LIBR. JORDAN, <http://www.kinghussein.gov.jo/peacetreaty.html> [<https://perma.cc/TQM5-26D4>].

37. *Israel Profile—Timeline*, *supra* note 9.

After ousting Netanyahu in 1999, newly elected Israeli Prime Minister Ehud Barak continued Israel's negotiations with Arafat in July 2000 at Camp David under U.S. President Bill Clinton's mediation, but the two leaders failed to reach an agreement on "final status issues"<sup>38</sup>—including borders of an eventual Palestinian state, Palestinian refugees and the right of return, settlements, and Jerusalem.<sup>39</sup> After Likud leader and future Prime Minister Ariel Sharon visited Al-Haram al-Sharif, also known as The Temple Mount, a key Jerusalem holy site in 2000, the Second Intifada erupted.<sup>40</sup> In 2002, at the height of the Second Intifada, Israel began building a barrier,<sup>41</sup> commonly referred to as "the Wall," citing its desire to stop Palestinian attacks.<sup>42</sup> The Palestinians view the Wall as "a tool to grab land[, as the r]oute . . . frequently deviates from [the] pre-1967 ceasefire line into [the] West Bank."<sup>43</sup>

In May 2018, in a stunning reversal of decades of U.S. policy, the Trump Administration moved the U.S. embassy from Tel Aviv to Jerusalem, cementing its December 2017 recognition of Jerusalem as Israel's capital.<sup>44</sup> Then, in March 2019, President Trump recognized Israeli sovereignty in the Golan Heights.<sup>45</sup> The combination of these two acts of approval led Israeli leaders to believe they now have both

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38. *A Timeline of the Mideast Conflict*, *supra* note 26.

39. Zack Beauchamp, *What Is the Israeli-Palestinian Peace Process?*, VOX (May 14, 2018, 10:20 AM), <https://www.vox.com/2018/11/20/18080090/israel-palestine-peace-process> [<https://perma.cc/X6DH-33S2>].

40. *A Timeline of the Mideast Conflict*, *supra* note 26. The Second Intifada was much bloodier than the first, as "Palestinian tactics centered on suicide bombings, rocket attacks, and sniper fire[,] which Israel met with even deadlier force." Beauchamp, *supra* note 31. By 2005, when Israel had mostly suppressed the Intifada, 1000 Israelis and 3200 Palestinians had been killed. *Id.*

41. This barrier has many different names. This Comment refers to it as "the Wall," similar to the International Court of Justice's (ICJ's) 2004 advisory opinion, which this Comment discusses in detail. *Infra* notes 264–69 and accompanying text.

42. *Israel Profile—Timeline*, *supra* note 9.

43. *Id.*

44. Efraim Inbar, *Build Jerusalem*, JERUSALEM INST. STRATEGY & SECURITY (May 13, 2020), <https://jiss.org.il/en/inbar-build-jerusalem>; see Ivan Levingston, *Israeli Settlements*, BLOOMBERG (Jan. 30, 2020, 1:16 PM), <https://www.bloomberg.com/quicktake/israeli-settlements> [<https://perma.cc/4GMG-TNQF>] (noting that the new U.S. policy breaks with the positions of the European Union and the ICJ).

45. Vanessa Romo, *Trump Formally Recognizes Israeli Sovereignty over Golan Heights*, NPR (March 25, 2019, 6:18 PM), <https://www.npr.org/2019/03/25/706588932/trump-formally-recognizes-israeli-sovereignty-over-golan-heights> [<https://perma.cc/9H37-3J83>].

justification and support from the United States to annex parts of the West Bank.<sup>46</sup>

As of January 1, 2020, there are approximately 463,000 Israelis living in settlements in the West Bank and an additional 300,000 living in East Jerusalem.<sup>47</sup> “Settlers regard themselves as inhabiting land that is rightfully theirs,” and the Israeli government views the settlements as consistent with international law, despite international condemnation.<sup>48</sup>

## 2. *Israeli constitutional framework*

Due to the unique circumstances of its founding,<sup>49</sup> Israel neither has a complete written constitution nor a bill of rights, and instead uses leftover regulations from the British Mandate of Palestine and the Ottoman Empire.<sup>50</sup> The lack of a written constitution puts the judiciary in a precarious position, fluctuating between strict interpretation of Israel’s Basic Laws<sup>51</sup> and judicial activism to fill in the gaps in the Basic Laws.<sup>52</sup> While constitutions of some other countries specify the domestic

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46. Cf. Levingston, *supra* note 44 (pointing out that Prime Minister Netanyahu only publicly announced the plan for annexation after President Trump “effectively endorsed” the move in the President’s proposed resolution of the Israeli-Palestinian conflict).

47. *Id.*; see *West Bank Settlements Report Rapid Growth in 2019*, TIMES ISR. (Jan. 28, 2020, 6:34 PM), <https://www.timesofisrael.com/west-bank-settlements-report-rapid-growth-in-2019> [<https://perma.cc/F2Z4-SYM8>].

48. See Levingston, *supra* note 44 (“Israel says the [Fourth Geneva Convention] isn’t applicable to the West Bank because Jordan, which held the territory for [nineteen] years before Israel, was never recognized as the sovereign power there, and the area was captured in a defensive war.”). *But see* Wall Opinion, 2004 I.C.J. Rep. 136, ¶ 120 (July 9) (finding that Israeli settlements violate Article 49 of the Fourth Geneva Convention, which prohibits an occupying power from transferring its civilians into territory it occupies, thus formally recognizing Israel’s status as an occupier).

49. See *Constitution for Israel: Introduction*, KNESSET, [https://knesset.gov.il/constitution/ConstIntro\\_eng.htm#:~:text=Israel%20has%20no%20written%20constitution,which%20enjoy%20semi%2Dconstitutional%20status](https://knesset.gov.il/constitution/ConstIntro_eng.htm#:~:text=Israel%20has%20no%20written%20constitution,which%20enjoy%20semi%2Dconstitutional%20status) (explaining that when the Jewish community in the former British Mandate of Palestine elected a Constituent Assembly in Israel’s first general elections in 1949, the Assembly members disagreed on whether Israel should have a constitution and whether the time was ripe to create one).

50. See, e.g., *The Judiciary: The Court System*, ISR. MINISTRY FOREIGN AFF., <https://mfa.gov.il/mfa/aboutisrael/state/democracy/pages/the%20judiciary-%20the%20court%20system.aspx> (last visited Oct. 9, 2020).

51. The Basic Laws are Israel’s foundational laws and the closest analogy to a constitution that Israel has. See *The State: The Law of the Land*, ISR. MINISTRY FOREIGN AFF. (Nov. 28, 2010), <https://mfa.gov.il/MFA/AboutIsrael/State/Pages/THE%20STATE-%20The%20Law%20of%20the%20Land.aspx>.

52. See *The Judiciary: The Court System*, *supra* note 50.

status of international law, Israel's Basic Laws are silent on the issue.<sup>53</sup> Therefore, the domestic application of international law in Israel and Israel's obligations under international treaties to which it is a party are left to judicial interpretation.<sup>54</sup>

Israel has a system of courts of general jurisdiction.<sup>55</sup> There are three levels of courts: the supreme court, district courts, and magistrate courts.<sup>56</sup> Magistrate and district courts are trial courts, and the Supreme Court is the country's lone appellate court.<sup>57</sup> The Supreme Court also operates as the High Court of Justice (HCJ), a "court of first and last instance [that] exercises judicial review over the other branches of government, and has powers . . . to grant relief in the interests of justice [that] is not within the jurisdiction of any other [domestic] court or tribunal."<sup>58</sup>

### 3. *Ratification of international human rights treaties*

Israel had a "constitutional revolution" in the mid-1980s with a shift towards judicial activism.<sup>59</sup> This shift inspired Israel's ratification of five

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53. Barak Medina, *Domestic Human Rights Adjudication in the Shadow of International Law: The Status of Human Rights Conventions in Israel*, 50 *ISR. L. REV.* 331, 335 (2017) (suggesting that Israeli courts took a formalistic approach, holding that international law only applies in international relations and lacks domestic status); *see also* Yuval Shany, *How Supreme Is the Supreme Law of the Land? Comparative Analysis of the Influence of International Human Rights Treaties upon the Interpretation of Constitutional Texts by Domestic Courts*, 31 *BROOK. J. INT'L L.* 341, 356–66 (2006) (finding that, among common-law countries, only Canada has adequately incorporated international human rights norms into its domestic law).

54. Medina, *supra* note 53, at 335–36. Justice Zussman illuminated the Court's view on the intersection of international law and the domestic judiciary:

[T]he courts of this country derive their judicial power from the laws of the state rather than from the international legal system. Thus, a person who is charged for violating the law of the state cannot find a defense in international law, as the courts rule on the relations between individuals and the state based exclusively on domestic laws.

CrimA 5/51 Steinberg v. Attorney General 1951 PD 5, 1061 (1951) (Isr.) (translation from Medina, *supra* note 53, at 335 n.11); *see also infra* Part III.

55. Basic Law: The Judiciary, 1110 LSI 78 (1984) (as amended) (Isr.); *The Judiciary: The Court System*, *supra* note 50.

56. *See The Judiciary: The Court System*, *supra* note 50.

57. *Id.*

58. *Id.* The High Court of Justice often hears cases challenging acts of top government officials. *Id.*

59. Medina, *supra* note 53, at 346.

major human rights treaties in 1991.<sup>60</sup> It also led Israel to pass the Basic Law: Human Dignity and Liberty.<sup>61</sup>

Israel ratified the following international human rights law (IHRL) treaties in 1991<sup>62</sup>: (1) the ICCPR,<sup>63</sup> (2) the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),<sup>64</sup> (3) the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),<sup>65</sup> (4) the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>66</sup> and (5) the Convention on the Rights of the Child (CRC).<sup>67</sup> The impetus behind the mass ascendance was the Israeli government's recognition that ratifying the treaties was an important outward expression of Israel's self-proclamation as a liberal democracy; it wanted to express, at the international level, its existing practice and culture of respecting human rights.<sup>68</sup> While Israel is a signatory to these treaties and therefore is responsible for enforcing their provisions, it has never incorporated any enforcement mechanisms for the treaties into its domestic laws.<sup>69</sup> Therefore, Israeli Supreme Court jurisprudence suggests that while the Israeli judiciary recognizes the treaties as a possible source for interpreting domestic law, they are not considered binding sources that the judiciary must address when interpreting the law.<sup>70</sup>

In 1992, the Knesset (Israel's parliament) passed The Basic Law: Human Dignity and Liberty, which functions as the Israeli bill of rights.<sup>71</sup> It states: "The purpose of this Basic Law is to protect human

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60. *Id.*

61. *Id.*; see Basic Law: Human Dignity and Liberty, 5754-1994, SH No. 1454 (as amended) (Isr.).

62. *UN Treaty Body Database: Ratification Status for Israel*, U.N. HUMAN RIGHTS OFFICE, HIGH COMMISSIONER, [https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=84&Lang=EN](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=84&Lang=EN) [<https://perma.cc/32TH-ZFKF>].

63. Dec. 16, 1966, 999 U.N.T.S. 171.

64. Dec. 10, 1984, 1465 U.N.T.S. 85.

65. Dec. 18, 1979, 1249 U.N.T.S. 13.

66. Dec. 16, 1966, 993 U.N.T.S. 3.

67. Nov. 20, 1989, 1577 U.N.T.S. 3.

68. See Medina, *supra* note 53, at 347.

69. See *supra* Section I.A.2.

70. See Medina, *supra* note 53, at 333.

71. Basic Law: Human Dignity and Liberty, 5752-1992, SH No. 1391 (as amended) (Isr.). Because Israel does not have a written constitution or bill of rights, the protection of civil liberties was left to the judiciary to enforce. See *Constitution for Israel: Introduction*, KNESSET, [https://knesset.gov.il/constitution/ConstIntro\\_eng.htm#:~:text=Israel%20has%20no%20written%20constitution,which%20enjoy%20semi%2Dconstitutional%20status](https://knesset.gov.il/constitution/ConstIntro_eng.htm#:~:text=Israel%20has%20no%20written%20constitution,which%20enjoy%20semi%2Dconstitutional%20status). While Basic Law: Human Dignity and Liberty was the Israeli legislature's first

dignity and liberty, in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state.”<sup>72</sup> However, while the language of the bill reflects many of the values of the IHRL treaties that Israel signed the year before,<sup>73</sup> the bill couches the treaties in very broad terms, which cannot be easily enforced and which are subject to wide interpretation by the judiciary.

Basic Law: Human Dignity and Liberty was a key part of Israel’s constitutional revolution in two ways: (1) it strengthened judicial oversight of the executive branch with respect to human rights; and (2) it elevated the Basic Laws to the position of Israel’s supreme law, allowing the judiciary to review and invalidate legislation that conflicted with the Basic Laws.<sup>74</sup> These changes made the newly ratified treaties nearly irrelevant as the Court valued its own laws above international agreements.<sup>75</sup>

### B. Area C and Current Plan for Annexation

#### 1. 2019–2020 Israeli elections and annexation

On April 6, 2019, three days before what would become the first of three Israeli elections in a one-year span,<sup>76</sup> Prime Minister Benjamin

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attempt to codify human rights, it does not provide an exhaustive list. *Human Rights and the Rule of Law*, ISR. MINISTRY FOREIGN AFF. (June 1, 1999), <https://mfa.gov.il/mfa/mfa-archive/1999/pages/human%20rights%20and%20the%20rule%20of%20law.aspx>.

72. Basic Law: Human Dignity and Liberty, 5754-1994, SH No. 1454 p. 90 (as amended) (Isr.). The law goes on to explicitly refer to several rights that are protected under it, including preservation and protection of life, body, and dignity; protection of property; personal liberty; leaving and entering Israel; and privacy. *Id.*

73. Despite the temporal proximity between the ratification of the IHRL treaties and the passing of the Basic Law: Human Dignity and Liberty, the law was not inspired by the treaties as the drafting process began in the 1980s, pre-ratification. *See Medina, supra* note 53, at 346–47.

74. *Id.*

75. *Id.*

76. After Prime Minister Netanyahu’s coalition fell apart in the wake of the April 2019 elections, Israel held a snap election in September 2019. Gil Hoffman & Lahav Harkov, *Israel Goes Back to Elections as Netanyahu Fails to Form Coalition*, JERUSALEM POST (May 30, 2019, 1:02 PM), <https://www.jpost.com/Israel-News/Elections-set-for-Sept-17-after-coalition-talks-fail-591044>. After the September 2019 election, Netanyahu failed to form a government, and his main rival, Benny Gantz of the Blue & White Party, also failed to form a coalition. David M. Halbfinger & Isabel Kershner, *Israel Heads to Record Third Election, Extending Deadlock*, N.Y. TIMES (Dec. 11, 2019), <https://www.nytimes.com/2019/12/11/world/middleeast/israel-election-vote-netanyahu.html> [<https://perma.cc/6Y5N-AZUN>]. Therefore, the Knesset was dissolved in December 2019, and new elections were scheduled for March 2, 2020. *Id.*

Netanyahu spoke on his policy regarding the West Bank: “I will ensure that we’ll control all the area West of the Jordan [R]iver. Will we move to the next stage? The answer is yes, we will move to the next stage—to the gradual extension of Israeli sovereignty in [the West Bank].”<sup>77</sup> Then, the week before the September 2019 election,<sup>78</sup> Netanyahu announced that he planned to seize the “historic opportunity” of a sympathetic Trump White House to annex the Jordan River Valley immediately after forming a new government.<sup>79</sup> While Netanyahu had previously indicated that he intended to extend Israeli sovereignty to parts of the West Bank, he was much more precise in September, stating that, because of his “personal relationship with President Trump, [he] will be able to annex all the settlements in [the Jordan River Valley].”<sup>80</sup> In December 2019, Netanyahu reiterated his intention “to apply Israeli sovereignty to the Jordan [River] Valley,” stating that the settlements in Area C “will be part of the State of Israel.”<sup>81</sup> In early 2020, Netanyahu vowed not only to annex the Jordan River Valley and

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77. Yuval Shany, *Israel’s New Plan to Annex the West Bank: What Happens Next?*, LAWFARE (May 6, 2019, 9:06 AM) (quoting Interview by Israeli TV Channel 12 with Benjamin Netanyahu, Prime Minister, Isr. (Apr. 6, 2019)), <https://www.lawfareblog.com/israels-new-plan-annex-west-bank-what-happens-next> [<https://perma.cc/97G3-3344>]. While Prime Minister Netanyahu did not specifically mention annexation, the use of the phrase “applying sovereignty” is understood as synonymous with annexation, as “[t]he meaning of annexation is acquiring sovereignty. [By contrast,] application of law doesn’t necessarily mean annexation.” Raphael Ahren, *How Would Netanyahu Go About Annexing the Settlements? An Explainer*, TIMES ISR. (Sept. 11, 2019) (alteration in original) (quoting Alan Baker, a former legal advisor to Israel’s Foreign Ministry), <https://www.timesofisrael.com/how-would-netanyahu-go-about-annexing-the-settlements-an-explainer> [<https://perma.cc/KW42-C4JN>].

78. See *supra* note 76 and accompanying text.

79. David M. Halbfinger, *Netanyahu, Facing Tough Israel Election, Pledges to Annex a Third of West Bank*, N.Y. TIMES (Sept. 10, 2019, 5:39 PM), <https://www.nytimes.com/2019/09/10/world/middleeast/netanyahu-israel-west-bank.html> [<https://perma.cc/Q7LR-KLCN>].

80. *Id.* In June 2019, U.S. Ambassador to Israel David Friedman said that while Israel likely did not have the authority to annex all of the West Bank, it did have the right to annex at least some of the area. David M. Halbfinger, *U.S. Ambassador Says Israel Has Right to Annex Parts of West Bank*, N.Y. TIMES (June 8, 2019), <https://www.nytimes.com/2019/06/08/world/middleeast/israel-west-bank-david-friedman.html> [<https://perma.cc/H9D9-FG5A>].

81. Noa Landau et al., *Gantz Vows to Annex Jordan Valley; Netanyahu Wants Sovereignty Without Exception*, HAARETZ (Jan. 21, 2020), <https://www.haaretz.com/israel-news/elections/.premium-gantz-calls-for-jordan-valley-annexation-hopes-trump-releases-peace-plan-soon-1.8432081>.

Area C, but also to “apply Israeli law to all Israeli settlements ‘without exception’” in the future.<sup>82</sup> Both Netanyahu and Benny Gantz, Netanyahu’s main opponent from Israel’s Blue and White Party, refer to annexation indirectly, instead calling Israel’s actions “applying sovereignty,” and insist the process will comply with international law.<sup>83</sup>

Understanding the implications of Prime Minister Netanyahu’s statements and the motivations behind them requires an assessment of the timing of the announcements. Given their proximity to Israel’s elections, these announcements were likely an election stunt, as Netanyahu had previously used threats of annexation to rally his base.<sup>84</sup> The upcoming elections were particularly crucial for Netanyahu as he faces prosecution for corruption charges<sup>85</sup> and therefore sought to use his power to change the Basic Laws to give him immunity in the proceedings.<sup>86</sup>

After Israel’s third election in the span of a year on March 2, 2020 also delivered an unclear result, Israeli President Reuven Rivlin gave Gantz the first opportunity to form a government.<sup>87</sup> Gantz experienced the same level of difficulty in forming a governing coalition as Prime Minister Netanyahu had, and ultimately, with response to COVID-19

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82. *Id.*

83. *Id.* (indicating that Gantz supported extending sovereignty over settlements only if it could be done legally and with international coordination).

84. See Ahren, *supra* note 77 (citing Prime Minister Netanyahu’s past vows to annex the settlements and “to reform Israel’s electoral system, to demolish the illegally built Palestinian West Bank village of Khan al-Ahmar, and to legislate the death penalty for terrorists”).

85. Israel’s Attorney General indicted Prime Minister Netanyahu on bribery and other corruption charges on November 21, 2019. Liebermann & Tal, *supra* note 1.

86. Abe Silberstein, *After the Election, Avoiding Annexation*, ISR. POL’Y F. (Sept. 16, 2019), <https://israelpolicyforum.org/2019/09/16/after-the-election-avoiding-annexation> [<https://perma.cc/K4HC-RKWD>] (“What made annexation a frighteningly realistic scenario after April’s election was Netanyahu’s apparent willingness to do anything to pass an immunity law, which would protect him from prosecution in three pending corruption cases.”). Many observers, particularly those on the right, do not actually believe Netanyahu supports annexation but that he has made these announcements to polarize the electorate. See *id.* Netanyahu’s “fixation” with immunity essentially precludes a coalition of more moderate parties, as they would not support immunity. *Id.* The absence of the mitigating influence of moderate coalition partners or a U.S. administration that is willing to condemn his conduct leaves Netanyahu without his typical excuses for backing off of past annexation promises. *Id.*

87. Ruth Eglash, *Israel’s President Gives Benny Gantz First Chance at Forming a Government*, WASH. POST (Mar. 15, 2020, 5:00 PM), [https://www.washingtonpost.com/world/middle\\_east/israel-election-gantz-rivlin-netanyahu-liberman/2020/03/15/c5f251d0-66e1-11ea-b199-3a9799c54512\\_story.html](https://www.washingtonpost.com/world/middle_east/israel-election-gantz-rivlin-netanyahu-liberman/2020/03/15/c5f251d0-66e1-11ea-b199-3a9799c54512_story.html) [<https://perma.cc/BBW6-D2PR>].



rapidly becoming a national priority, broke apart his centrist Blue and White Party in order to join Netanyahu's coalition.<sup>88</sup> Netanyahu and Gantz struck a deal that would allow Gantz to become Prime Minister after eighteen months, while Netanyahu would maintain his position as Prime Minister until then.<sup>89</sup> The coalition deal also included a plan for moving forward with the annexation of the Jordan River Valley, allowing Netanyahu to call for a vote on annexation on or following July 1, 2020.<sup>90</sup> However, July 1, 2020 came and went without a vote on annexation, but with an announcement from Netanyahu that annexation is something he "will continue to work on in the coming days."<sup>91</sup> While Gantz has expressed support for annexation in the past,<sup>92</sup> one of the reasons why July 1 passed with no significant action is because Gantz, now Israel's Defense Minister and alternate Prime Minister, expressed his desire for more international backing of the annexation plan before moving forward.<sup>93</sup> Another explanation is that Netanyahu, who has been Israel's Prime Minister for a total of fourteen years and has not taken advantage of past opportunities to push annexation, doesn't actually want annexation, and merely uses threats of annexation to gain support in politically uncertain times.<sup>94</sup>

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88. Ben Sales, *5 Key Takeaways About the Gantz-Netanyahu Deal and Israel's New Government*, JEWISH TELEGRAPHIC AGENCY (Apr. 21, 2020, 5:07 PM), <https://www.jta.org/2020/04/21/israel/5-key-takeaways-about-the-gantz-netanyahu-deal-and-israels-new-government> [<https://perma.cc/H3LA-9NP9>]. Gantz campaigned on Prime Minister Netanyahu's incompetence and often criticized him as unfit for office due to his indictment. *Id.* However, Gantz set aside his disdain for the Prime Minister to address the coronavirus pandemic. *Id.*

89. *Id.*

90. *Id.*

91. Gabe Friedman, *Four Reasons Why Israeli Annexation Is Not Happening July 1*, JERUSALEM POST (July 1, 2020, 10:18 AM), <https://www.jpost.com/arab-israeli-conflict/four-reasons-why-israels-annexation-plans-arent-happening-july-1-633389>.

92. Noa Landau et al., *supra* note 81.

93. Friedman, *supra* note 91.

94. Anshel Pfeffer, *Why Netanyahu Will Never Annex West Bank Settlements and the Jordan Valley*, HAARETZ (July 5, 2020), <https://www.haaretz.com/israel-news/.premium-there-will-be-lots-of-annexation-talk-from-netanyahu-but-no-action-1.8826440> [<https://perma.cc/8DTD-24AW>]. Due to the deal between Prime Minister Netanyahu and Gantz, the Prime Minister's main motivations for supporting annexation are no longer relevant. *Id.* He does not need to rally his base because the deal secures his political future for the next few years, and continuing to push for annexation will not help him escape his impending anti-corruption trial. *Id.* Netanyahu's abandonment of annexation the moment it no longer served a political purpose for him bolsters the suggestion that his support for annexation was never genuine. *See id.*

2. “Peace to Prosperity”: The Trump Administration’s plan for Palestinians and Israelis

On January 28, 2020—ten days after the U.S. House of Representatives impeached him, and facing a trial in the U.S. Senate—President Trump unveiled his long-awaited “deal of the century”—a Middle East peace plan<sup>95</sup> authored by the President’s son-in-law, Jared Kushner.<sup>96</sup> Trump’s plan proposes to shrink the amount of territory in the West Bank left for a future Palestinian state by recognizing Israeli sovereignty over the Israeli settlements in the West Bank and the Jordan River Valley, giving Israel the green light to annex.<sup>97</sup> The Palestinians, who played no role in constructing the plan or presenting it to the public, immediately rejected it.<sup>98</sup> Members of the Arab League and the European Union also condemned the plan.<sup>99</sup> The plan, which Trump touted as a “realistic two-state solution,” would effectively create a Palestinian territory that is surrounded by Israel, with the Israeli government in full control of security.<sup>100</sup> Dan Shapiro, the former U.S. Ambassador to Israel under President Barack Obama, noted the one-sidedness of the plan, saying that “[t]he Trump administration consulted extensively with Israel, and [the plan] strongly supports Israeli preferences.”<sup>101</sup> Other critics recognize the plan as little more than an election stunt for Prime Minister Netanyahu, and as a political move on Trump’s part to pose as the

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95. See generally WHITE HOUSE, PEACE TO PROSPERITY: A VISION TO IMPROVE THE LIVES OF THE PALESTINIAN AND ISRAELI PEOPLE (2020).

96. The plan, which Trump and Kushner boasted as “unconventional,” is apparently a rip-off of a 1979 plan written by Matityahu Drobles, a former Knesset member. Yehuda Shaul, *Trump’s Middle East Peace Plan Isn’t New. It Plagiarized a 40-Year-Old Israeli Initiative.*, FOREIGN POL’Y (Feb. 11, 2020, 1:55 PM), <https://foreignpolicy.com/2020/02/11/trump-middle-east-peace-plan-isnt-new-israeli-palestinian-drobles> [<https://perma.cc/4XM3-MNTY>].

97. Carey, *supra* note 3. Apart from a short southern border between Egypt and the Gaza Strip, Israel would completely encircle the proposed Palestinian state. *Id.*

98. John Haltiwanger, *Trump’s Middle East ‘Peace Plan’ Was Immediately Rejected by Palestine. Critics Said It’s a PR Stunt for Netanyahu Ahead of an Election*, BUS. INSIDER (Jan. 29, 2020), <https://www.businessinsider.com/trump-middle-east-peace-plan-pr-stunt-for-israel-netanyahu-2020-1> [<https://perma.cc/2NFS-TPAF>].

99. Rick Gladstone, *Palestinian Leader Denounces Trump’s Mideast Plan at U.N.*, N.Y. TIMES (Feb. 11, 2020), <https://www.nytimes.com/2020/02/11/world/middleeast/palestinian-trump-plan-UN.html> [<https://perma.cc/VJH7-87KU>] (quoting the U.N. Secretary General’s commitment to two states “living side by side in peace and security within recognized borders on the basis of the pre-1967 lines”).

100. Haltiwanger, *supra* note 98 (noting that President Trump’s plan would prohibit the Palestinians from having their own military or controlling their own airspace).

101. *Id.*

peacemaking statesman while facing impeachment.<sup>102</sup> The United Nations quickly drafted a resolution condemning the plan.<sup>103</sup>

U.S. Ambassador to Israel David Friedman had tacitly approved annexation as early as June 2019, and initially stated that Trump's January 2020 plan authorized immediate annexation—a proclamation that Prime Minister Netanyahu intended to follow by calling on his cabinet to move forward with a vote on annexation just a few days later.<sup>104</sup> However, the Prime Minister was forced to walk back his initial declaration when the Trump Administration clarified that it wanted Israel to wait until at least after the March 2, 2020 elections to take any steps towards annexation.<sup>105</sup> Although momentarily in a holding pattern, Netanyahu made his intentions clear:

We will do this with the agreement of the Americans, because what we are doing is not unilateral . . . Trump said he will recognize sovereignty in the Jordan Valley, the northern Dead Sea, and all the settlements [in the West Bank] . . . It does not depend on the agreement of the Palestinians.<sup>106</sup>

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102. *Id.* However, the announcement of the President Trump's plan only provided Prime Minister Netanyahu with a short-lived political boost, particularly as the Trump Administration strategically back-pedaled its support of immediate annexation. Mehul Srivastava, *Trump's Middle East Peace Plan Falls Flat for Netanyahu Ahead of Israel Election*, FIN. TIMES (Feb. 11, 2020), <https://www.ft.com/content/2bcff144-4be7-11ea-95a0-43d18ec715f5> (suggesting that “[a]s Palestinian and Arab condemnation of the plan grew,” the United States withdrew its support of immediate annexation).

103. Tobias Hoonhout, *U.N. Drafts Resolution to Condemn Trump Admin Middle East Peace Plan*, NAT'L REV. (Feb. 5, 2020, 9:43 AM), <https://www.nationalreview.com/news/u-n-drafts-resolution-to-condemn-trump-admin-middle-east-peace-plan-report> (warning the resolution “raises concerns” about the legality of annexing Palestinian-occupied land).

104. Haltiwanger, *supra* note 98.

105. *Netanyahu Says Settlements, Jordan Valley Will Only Be Annexed with US Consent*, TIMES ISR. (Feb. 10, 2020, 6:45 PM), <https://www.timesofisrael.com/netanyahu-says-settlements-jordan-valley-will-only-be-annexed-with-us-consent> [<https://perma.cc/GW49-XEL8>]. Prime Minister Netanyahu received mixed messages from the Trump Administration, as U.S. Ambassador David Friedman initially told reporters that Israel does not have to wait at all to move forward with annexation on the afternoon of the unveiling of the peace plan. *Id.* However, Kushner later contradicted Friedman, stating that the Administration expected Israel to wait a few months before annexing in order to complete work on detailed West Bank maps. *Id.*

106. *Id.* Prime Minister Netanyahu drew up maps of land to annex in accordance with President Trump's plan. Maayan Lubell, *Israel Drawing up Map for West Bank Annexations*, REUTERS (Feb. 8, 2020, 3:41 PM), <https://www.reuters.com/article/us-israel-palestinians/israel-drawing-up-map-for-west-bank-annexations-netanyahu-idUSKBN2020RA>. In the interim between the failed 2019 and 2020 elections but before the Gantz-Netanyahu deal, Netanyahu “head[ed] a caretaker government,

As the response to COVID-19 became a national priority, and with his political future momentarily secure—and while President Trump’s potentially neared its end—Prime Minister Netanyahu dropped annexation in the wake of the March 2, 2020 elections.<sup>107</sup> While President Trump’s plan provided unprecedented support for annexation that Israel’s ideological right hoped the Prime Minister would take advantage of, Netanyahu likely recognized the potential that he would have to deal with a future President Joe Biden, who is strongly opposed to annexation.<sup>108</sup> Netanyahu, with his sights set on his political future, had already milked the Trump Administration in order to accomplish many of his main political goals: namely, a U.S. withdrawal from the Iran nuclear deal; recognition of Israeli sovereignty over the Golan Heights; and the move of the U.S. embassy Jerusalem.<sup>109</sup> In fact, the clamor over annexation in the months leading up to July 1, 2020 was antithetical to Netanyahu’s body of work over the past few decades of normalizing the status quo in Palestine, as it thrust the Palestinians into the spotlight and made their cause globally relevant once again.<sup>110</sup>

### 3. *The Abraham Accord: Israel and the UAE normalize relations*

Prime Minister Netanyahu’s political demurring paid dividends on August 13, 2020, when President Trump announced the Abraham Accord, an agreement that he helped broker between the UAE and Israel, normalizing diplomatic relations between the two states.<sup>111</sup> As part of this agreement, Israel agreed to suspend its annexation plans that Netanyahu

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whose legal authority to annex territory [wa]s still undecided by [the Israeli judiciary].” *Id.* Another complication of the annexation plan is that it endangers Israel’s lukewarm peace with Jordan; Israeli military officials have reportedly warned that Jordan may take drastic steps if Israel pushes for annexation due to the number of Palestinian refugees living in Jordan. *Israeli Officials Said to Warn Jordan Valley Annexation Would Imperil Amman Ties*, TIMES ISR. (Dec. 3, 2019, 10:56 PM), <https://www.timesofisrael.com/israeli-officials-warn-jordan-valley-annexation-will-imperil-ties-report> [<https://perma.cc/344P-S75U>].

107. See *supra* Section I.B.1.

108. Pfeffer, *supra* note 94.

109. *Id.*

110. *Id.*

111. El Dahan et al., *supra* note 5. The UAE and Israel have long held informal ties, which critics say rejects the narrative that the agreement is “historic” or “groundbreaking.” Sheren Khalel, *UAE Excusing and Accepting’ Israel’s Occupation, Say Palestinian Americans*, MIDDLE EAST EYE (Aug. 13, 2020, 7:50 PM), <https://www.middleeasteye.net/news/uae-israel-occupation-palestinian-americans> [<https://perma.cc/GH2P-LL36>].

had temporarily put on hold in July.<sup>112</sup> A joint statement from President Trump, the Prime Minister, and Abu Dhabi's Crown Prince Sheikh Mohammed bin Zayed stated that “[a]s a result of this diplomatic breakthrough and at the request of President Trump with the support of the United Arab Emirates, Israel will suspend declaring sovereignty over areas outlined in [Trump’s Peace Plan].”<sup>113</sup> Prime Minister Netanyahu, hoping for a political boost, praised the accord, expressing hope that peace agreements with other countries in the region would follow.<sup>114</sup> He also admitted that the agreement “entailed acceding to a request from Trump to ‘temporarily wait’ on implementing his annexation pledge.”<sup>115</sup>

The Palestinians, however, were “blindsided” by the accord, and rejected the agreement as a “betrayal of Jerusalem . . . and the Palestinian cause.”<sup>116</sup> A spokesman for Hamas characterized the deal as “a stab in the back[s]” of Palestinians, noting that “it serves only the Israeli occupation.”<sup>117</sup> Palestinian Americans also denounced the accord; Amer Zahr—President of New Generation for Palestine,<sup>118</sup> a network of Palestinian Americans—called the UAE shameful for championing Israel’s empty promise not to formally annex the Jordan River Valley.<sup>119</sup> Noura Erakat, a Palestinian-American human rights attorney, stated that she was insulted by the UAE’s assertion that the accord has done anything to help the Palestinian people.<sup>120</sup>

While the Emirati government claims that the accord “immediately stops” Israel’s annexation plans, Prime Minister Netanyahu and Israeli officials have used the term “suspend.”<sup>121</sup> This difference in language

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112. Khalel, *supra* note 111.

113. WHITE HOUSE, JOINT STATEMENT OF THE UNITED STATES, THE STATE OF ISRAEL, AND THE UNITED ARAB EMIRATES (2020), <https://www.whitehouse.gov/briefings-statements/joint-statement-united-states-state-israel-united-arab-emirates/>

114. El Dahan et al., *supra* note 5.

115. *Id.* Right-wing Israeli settlers, to whom Prime Minister Netanyahu had promised he would annex the Jordan River Valley, claimed that the Prime Minister “deceived” them. Stephen Farrell, *Israel Hails UAE Deal but Palestinians—and Settlers—Dismay*, REUTERS (Aug. 13, 2020, 2:47 PM), <https://www.reuters.com/article/us-israel-emirates-trump-reactions/israel-hails-uae-deal-but-palestinians-and-settlers-dismayed-idUSKCN2592R5>.

116. El Dahan et al., *supra* note 5.

117. *Id.*

118. *About NGP*, NEW GENERATION PALESTINE, <https://www.ngpalestine.org> [<https://perma.cc/KAT5-MAMJ>].

119. Khalel, *supra* note 111.

120. *Id.*

121. Steven A. Cook, *What’s Behind the New Israel-UAE Peace Deal?*, COUNCIL ON FOREIGN REL. (Aug. 17, 2020), <https://www.cfr.org/in-brief/whats-behind-new-israel-uae-peace-deal> [<https://perma.cc/LDB4-8AHG>].

could be a result of Prime Minister Netanyahu's attempts to mollify Israel's pro-annexation far-right, but it also leaves the future of annexation unclear.<sup>122</sup> Despite the momentary stoppage, it is unlikely that the Abraham Accord this is the end of Israel's attempts to formally annex the West Bank.<sup>123</sup>

#### 4. *Area C and the Jordan River Valley*

The area that Prime Minister Netanyahu and others have reserved for annexation is part of the nearly sixty percent of the West Bank that is under Israeli economic, civil, and security control in Area C.<sup>124</sup> The Jordan River Valley and the northern Dead Sea comprise almost thirty percent of the West Bank, with nearly 65,000 Palestinians and 11,000 Israeli settlers living there.<sup>125</sup> Almost ninety percent of this region is part of Area C,<sup>126</sup> which remains under full Israeli control.<sup>127</sup> The Jordan River Valley and northern Dead Sea comprise nearly forty percent of Area C.<sup>128</sup> The remaining ten percent of the Jordan River Valley and the northern Dead Sea is comprised of Palestinian communities, including the city of Jericho.<sup>129</sup> Area C contains about two hundred settlements,

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122. *Id.*

123. Israel has long claimed a historic right to the land, which is inevitably a portion of its motivation behind annexation. The Levy Commission Report, *supra* note 12, ¶ 5. "The right to establish our sovereign state here, in the Land of Israel, arises from one simple fact: Israel is the birthplace of the Jewish People . . ." Commanders for Isr.'s Sec., *Ramifications of West Bank Annexation: Security and Beyond*, ISR. POL'Y F., [https://israelpolicyforum.org/wp-content/uploads/2015/05/Annexation\\_Study\\_US\\_Version.pdf](https://israelpolicyforum.org/wp-content/uploads/2015/05/Annexation_Study_US_Version.pdf) [<https://perma.cc/A2HF-AXUU>].

124. *See supra* Section I.A.1.

125. *The Jordan Valley*, B'TSELEM (Nov. 11, 2017), [https://www.btselem.org/jordan\\_valley](https://www.btselem.org/jordan_valley) [<https://perma.cc/RJS4-BJWQ>] (accurate as of 2016). Israel could give Palestinians in Area C permanent residency, like the residents of East Jerusalem, which would entitle them "to all rights granted by law to Israeli citizens with the exception of the right to participate in . . . [national] elections." Commanders for Isr.'s Sec., *supra* note 123.

126. There were two other areas created out of the Oslo II Accords in 1995: Areas A and B. Area A, which is the smallest portion of the West Bank, is under full Palestinian Authority control and internal security. *The Israeli-Palestinian Interim Agreement—Main Points*, ISR. MINISTRY FOREIGN AFF. (Sept. 28, 1995), <https://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/the%20israeli-palestinian%20interim%20agreement%20-%20main%20p.aspx>. Area A includes all major Palestinian population centers and cities. *Id.* Area B remains in joint Palestinian Authority and Israeli control, where the Palestinian Authority administers the civil governance (such as education, health, and the economy), while Israel controls internal security. *Id.*

127. *Id.*

128. *The Jordan Valley*, *supra* note 125.

129. *Id.*

which Israel began building as early as 1967.<sup>130</sup> At the time Israel constructed the settlements, it thought that, if Jews settled the area, then Jerusalem—which Israel wanted as its capital—would be in a more central position.<sup>131</sup> Additionally, Israel regards the natural barrier of the Jordan River as “an essential strategic asset” for Israel’s security from potential hostility from Jordan or countries further east and to prevent Palestinian militants from smuggling weapons into the West Bank.<sup>132</sup>

“Much of the area in question is open, arable land that the Israeli army already uses for operations.”<sup>133</sup> As one of the most fertile areas in the region, the Jordan River Valley “has enormous potential for agricultural and energy projects,” and many of the Israeli settlements on the land include industrial farms.<sup>134</sup> Further, the Dead Sea attracts tourists and supports several cosmetic businesses that mine the area for salt and other minerals.<sup>135</sup>

The steps that Israel has taken to establish its presence in the West Bank up until this point have been characterized as a slow, creeping annexation.<sup>136</sup> Changes on the ground, including the building of new settlements, came first, followed by Israel’s extension of its laws to the settlements.<sup>137</sup> This contrasts with the methods of annexation Israel used in East Jerusalem and the Golan Heights.<sup>138</sup> Regardless, as discussed above, the recent discourse around annexation—including Prime Minister Netanyahu’s clear statements of his intent to annex the territory and sudden qualifications to those statements—is unprecedented and warrants a discussion of the law regarding annexation.

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130. Karen Zraick, *A Look at the West Bank Area Netanyahu Vowed to Annex*, N.Y. TIMES (Sept. 10, 2019), <https://www.nytimes.com/2019/09/10/world/middleeast/jordan-valley-israel-netanyahu.html> [<https://perma.cc/H5AV-S9GY>].

131. *Id.*

132. *Id.*

133. *Id.*; see also *Israel: Discriminatory Land Policies Hem in Palestinians*, HUM. RTS. WATCH (May 12, 2020), <https://www.hrw.org/news/2020/05/12/israel-discriminatory-land-policies-hem-palestinians> [<https://perma.cc/Y6T6-66JZ>] (discussing Israel’s zoning of lands adjacent to Palestinian towns as “agricultural” or “green” areas to impede Palestinians from developing the land, but then use of those lands to build roads and other Israeli infrastructure).

134. Zraick, *supra* note 130.

135. *Id.*

136. Shehadeh, *supra* note 29, at 8.

137. *Id.* at 9. Israel’s ability to continue to build settlements on disputed land that it would eventually come to claim is an example of the deployment of the sovereign exception framework discussed *infra* Section I.B.

138. See *infra* Section I.B.6 (explaining the different methods Israel used to annex East Jerusalem and the Golan Heights).

### 5. *International law and annexation*

Annexation is acquisition of territory via the use of force.<sup>139</sup> Unlike military occupation—which involves an acknowledgement that the occupying power is not claiming the occupied territory as its own—annexation involves the additional step of claiming sovereignty over the territory.<sup>140</sup> Seemingly, annexation would alter the annexing state's obligations to the civilians living in the annexed territory, who, in theory, should benefit from the protections and benefits of the annexing state's domestic law.<sup>141</sup> However, while the annexed territory may become a part of the annexing state's territory under the state's domestic law, it would *not* automatically qualify as part of the state's territory under international law due to the illegality of the act.<sup>142</sup>

Article 2 paragraph 4 of the U.N. Charter prohibits the acquisition of territory via the use of force.<sup>143</sup> In order to enforce this prohibition, all states have a positive obligation under customary international law not to recognize the forceful acquisition of territory or any claim to sovereignty over it.<sup>144</sup> There is a general consensus that Israel's proposed annexation would violate international law,<sup>145</sup> so this Comment proceeds under that assumption. Additionally, this Comment sets aside the discourse around whether there is a need to formally annex the Jordan River Valley

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139. Rainer Hofmann, *Annexation*, OXFORD PUB. INT'L L., <https://opil.ouplaw.com/view/10.1093/law/epil/9780199231690/law-9780199231690-e1376?rskey=QJZysX&result=1&prd=MPIL> [<https://perma.cc/5HL5-VD82>] (defining annexation as “forcible acquisition of territory by one State at the expense of another State”).

140. Daniel Costelloe, *Treaty Succession in Annexed Territory*, 65 INT'L & COMP. L.Q. 343, 353–54 (2016).

141. *Id.* at 348–49 (stating that the laws of the state annexing a territory apply to the annexed territory).

142. See Costelloe, *supra* note 140, at 354. This Comment may refer to annexed territory as territory that is not *de jure* or as extraterritorial.

143. U.N. Charter art. 2, ¶ 4.

144. U.N. Int'l Law Comm'n, Responsibility of States for Internationally Wrongful Acts, U.N. Doc A/56/83 (2001).

145. *United Nations Says Committed to Pre-1967 Borders, Stresses Settlements Illegal*, TIMES ISR. (Jan. 28, 2020, 1:57 PM), <https://www.timesofisrael.com/liveblog-january-28-2020> [<https://perma.cc/7KNC-G98W>]. The proposed U.N. resolution condemning Trump's plan raises concerns about “the illegality of the annexation of any part” of Palestinian-occupied land, and “condemns recent statements calling for annexation by Israel.” Hoonhout, *supra* note 103. Here, the United Nations acknowledges not only the illegality of the proposed annexation, but also that, despite Israel's casual language, Israel's plan is annexation. See *United Nations Says Committed to Pre-1967 Borders, Stresses Settlements Illegal*, *supra*.



since many assert that Israel has already de facto annexed the entirety of the West Bank.<sup>146</sup>

#### 6. *East Jerusalem and the Golan Heights*

Prime Minister Netanyahu's plan represents an unprecedented unilateral move to annex territory in the West Bank for the first time, despite the slow, "creeping annexation" that has been occurring.<sup>147</sup> However, Israel has de facto annexed two other territories: East Jerusalem and the Golan Heights.<sup>148</sup>

Israel took East Jerusalem following the Six-Day War in 1967 and extended its jurisdiction to East Jerusalem via governmental decree<sup>149</sup> that was later incorporated into a Basic Law.<sup>150</sup> The 1967 decree expanded Jerusalem's municipal limits and included detailed descriptions of areas in the new Jerusalem municipality that incorporated East Jerusalem for the first time.<sup>151</sup> U.N. Resolution 298 of 1971 condemned the military

146. Ben White, *Israel's 'Creeping Annexation' of West Bank Continues*, AL JAZEERA (Mar. 6, 2018), <https://www.aljazeera.com/news/2018/03/israel-creeping-settlements-continue-expanding-180303201420050.html> [<https://perma.cc/9Y3V-AUTF>]; Amira Hass, *Attention UAE Leaders: Israel Is Advancing De Facto Annexation*, HAARETZ (Aug. 18, 2020), <https://www.haaretz.com/middle-east-news/.premium-to-the-attention-of-uae-leaders-israel-is-advancing-de-facto-annexation-1.9081885> ("The gradual steps of de facto annexation, some of them covertly galloping forward, some done openly, step by step and therefore hardly noticeable, are taking place incessantly.").

147. White, *supra* note 146.

148. See Eugene Kontorovich, *Dutch Supreme Court Ruling on Israeli Criminal Jurisdiction in the West Bank*, LAWFARE (July 15, 2015), <https://www.lawfareblog.com/dutch-supreme-court-ruling-israeli-criminal-jurisdiction-west-bank> [<https://perma.cc/GVW3-FUKK>] (discussing the European Union's response to Israel's de facto jurisdiction in East Jerusalem); Ruth Levush, *Israel: Legal Aspects of Ceding Israeli Territory*, LAW LIBR. CONGRESS 1, 3 (2018), <https://www.loc.gov/law/help/ceding-territory/ceding-israeli-territory.pdf> (examining the extension of Israeli jurisdiction and administration to East Jerusalem and the Golan Heights).

149. Cf. 1967 Protection of Holy Places Law, 5727–1967, (Isr.) (implementing the law to protect "Holy Places," including those in East Jerusalem, and therefore extending Israeli jurisdiction over East Jerusalem). Though Israel and Jordan divided control over Jerusalem following the 1948 Arab-Israeli War, Israel took control of East Jerusalem in 1967 by issuing the Jerusalem Declaration:

The Declaration was issued by the Minister of Interior in accordance with the Law and Administration Ordinance (Amendment No. 11) Law, 5727-1967, which provided that "[t]he law, jurisdiction and administration of the State shall extend to any area of Eretz Israel [referencing the biblical land of Israel] designated by the Government by order."

Levush, *supra* note 148, at 2 (quoting Law and Administration Ordinance (Amendment No. 11) Law, 5727-1967, 21 (1966–67) (Isr.)).

150. Basic Law: Jerusalem, Capital of Israel, 5740–1980, SH No. 980 p. 186 (Isr.).

151. Levush, *supra* note 148, at 2.

conquest of Jerusalem, stating that any “legislative and administrative actions taken by Israel to change the status of . . . Jerusalem . . . [were] invalid.”<sup>152</sup> On December 30, 1980, Israel passed the Basic Law: Jerusalem Capital of Israel,<sup>153</sup> declaring that “Jerusalem, complete and united, is the capital of Israel.”<sup>154</sup> In doing so, Israel de facto annexed East Jerusalem “quietly, almost surreptitiously, in the dead of night without pomp or ceremony, and without once mentioning the word ‘annexation.’”<sup>155</sup> In response to the Basic Law: Jerusalem, Capital of Israel, the United Nations passed Resolution 478 stating that the law violated international law, and restating that the United Nations would not recognize any actions, including passing the Basic Law, that Israel took to “seek to alter the character and status of Jerusalem.”<sup>156</sup>

On December 14, 1981, the Knesset passed a law extending Israeli law to the Golan Heights.<sup>157</sup> Unlike reversal of Israel’s extension of jurisdiction to East Jerusalem via the Basic Law: Jerusalem Capital of Israel, which would require a special majority in the Knesset and a public referendum to amend, there are no specific procedures for the removal of Israeli jurisdiction from the Golan Heights.<sup>158</sup>

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152. S.C. Res. 298, ¶¶ 2–3 (Sept. 25, 1971) (alteration in original).

153. Basic Law: Jerusalem, Capital of Israel, 5740–1980, SH No. 980 p. 186 (Isr.).

154. *Id.* The Basic Law also provided that “[t]he jurisdiction of Jerusalem includes, as pertaining to this basic law, among others, all of the area that is described in the appendix of the proclamation expanding the borders of municipal Jerusalem” (referring to the 1967 Protection of Holy Places Law, 5727–1967). *Id.* In 2000, the Knesset amended Basic Law: Jerusalem Capital of Israel to put in place a procedural barrier to transferring any part of Jerusalem to a foreign power without the support of 61 of the full plenum of 120 Knesset members. Levush, *supra* note 148, at 3. Further amendment in June 2018 increased the majority vote requirement to 80 of 120 members. *Id.*

155. Shehadeh, *supra* note 29, at 7.

156. S.C. Res. 478, ¶ 2, 5 (Aug. 20, 1980).

157. The Golan Heights Law, 5742–1981, SH 5742 No. 1034 (Isr.). The U.N. Security Council responded to this annexation by passing a resolution that declared that “the Israeli decision to impose its laws, jurisdiction and administration in the occupied Syrian Golan Heights is null and void and without international legal effect.” *United States Recognizes Israeli Sovereignty over the Golan Heights*, 113 AM. J. INT’L L. 613, 616 (2019). However, Israel did not comply with the resolution, so “the Security Council considered another resolution that would have” had all the member states take action “to nullify the Israeli annexation”; the United States vetoed the proposed resolution. *Id.*

158. Levush, *supra* note 148, at 3.

*C. Sovereign Exception Framework*

To justify continuing to build settlements in the West Bank, annexing East Jerusalem and the Golan Heights, and building the security barrier between the West Bank and Jerusalem (also known as the Wall) Israel has employed a complex legal argument to avoid serious political or economic consequences, despite widespread condemnation of Israel's actions within the international community.<sup>159</sup> Yehuda Zvi Blum, a Hebrew University Professor, is the main architect behind the legal scaffolding that has allowed Israel to do so.<sup>160</sup> He posits that since Jordan was not a rightful sovereign in the West Bank at the time Israel seized the territory in 1967, the territory that Israel controls is contested, and thus not unlawfully occupied.<sup>161</sup> The 1947 U.N. partition plan proposed to separate the land west of Jordan into two states, one Arab and one Jewish.<sup>162</sup> However, only the Jewish state emerged from the 1948 war and its aftermath.<sup>163</sup> Jordan annexed the territory that would become the West Bank in 1950, but the international community opposed the illegal

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159. The U.N. General Assembly passed five resolutions against Israel in its 74th session alone. Marcy Oster, *In First, 13 Countries Oppose UN Resolution Against Israel*, HAARETZ (Dec. 5, 2019), <https://www.haaretz.com/israel-news/in-first-13-countries-vote-against-a-un-general-assembly-resolution-against-israel-1.8225725> [<https://perma.cc/K4PC-VZRM>]. The ICJ ruled against Israel. Wall Opinion, 2004 I.C.J. Rep. 136, at 200, ¶ 70 (July 9). The European Union has released statements condemning Israel, particularly in regard to settlement construction. *United Nations, EU Condemn Israel Legalizing Settlements on Palestinian Land*, REUTERS (Feb. 7, 2017), <https://www.reuters.com/article/us-israel-palestinians-settlements-react/united-nations-eu-condemn-israel-legalizing-settlements-on-palestinian-land-idUSKBN15M2CH>. The International Criminal Court recently opened an investigation into alleged Israeli war crimes. Tovah Lazaroff, *ICC Prosecutor Says Israel Committing War Crimes, Opens Investigation*, JERUSALEM POST (Jan. 12, 2020), <https://www.jpost.com/Middle-East/AG-No-ICC-jurisdiction-over-Palestinian-war-crimes-plea-against-Israel-611571> [<https://perma.cc/HJ77-CAHH>].

160. NOURA ERAKAT, JUSTICE FOR SOME: LAW AND THE QUESTION OF PALESTINE 79 (2019).

161. *Id.*; see also Shehadeh, *supra* note 29, at 14 (“If Israel were to admit itself to be a belligerent occupant of [the West Bank] and the Gaza Strip, it would be prima facie, admitting that the Fourth Geneva Convention of 1949 relative to the Protection of Civilian Persons in Time of War applies to [the West Bank] and the Gaza Strip as ‘Occupied Territories.’ This then could conceivably be interpreted as a renunciation of sovereign rights by Israel to the areas. After all, one does not ‘occupy’ one’s own territory, and one most certainly is not bound by the international law of Belligerent Occupation.” (quoting David Yahav & Uzi Amit-Kohn, *Israel, the “Intifada” and the Rule of Law* (Tel Aviv: Israel Ministry of Defense Publications, 1993))).

162. G.A. Res. 181 (II), Future Government of Palestine (Nov. 29, 1947).

163. See Levy Commission Report, *supra* note 12, ¶ 8, at 11 (noting the inconsistencies between the promises all parties to the U.N. Partition Plan made and the parties’ actions after the War of 1948).

act and Jordan renounced its status over the area in 1988.<sup>164</sup> As Israel sees it, when Jordan severed its ties with the West Bank, it “restored the legal status of the territory to its original status, i.e. territory designated to serve as the national home of the Jewish people,” but without a rightful sovereign.<sup>165</sup>

Without any legal parallels for the situation, the territory was *sui generis*, allowing Israel to exercise its authority without preserving the sovereign rights of the West Bank’s inhabitants or absorbing them under Israel’s civil jurisdiction.<sup>166</sup> In her book *Justice for Some*, Noura Erakat details how Israel has manipulated its own domestic judiciary and legislature, exempted itself from obligations under international law and the jurisdiction of international courts, and weaponized its international support (particularly from the United States) to maintain a legal vacuum where Israel does not afford Palestinians the protections of either international humanitarian Law (IHL) or international human rights law (IHRL).<sup>167</sup> This is the sovereign exception—a legal fiction Israel has created that allows it to expand its territory without extending legal protections to the territory’s Palestinian inhabitants.<sup>168</sup>

Israel deploys the sovereign exception to argue that it is exempt from international law obligations in the territories because no state previously rightfully controlled the area, and thus, no international laws inform Israel of how to govern the territories.<sup>169</sup> Simultaneously, Israel argues that because Palestine is not a state, Israel and Palestine are not at war,

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164. *Id.* ¶ 8, at 12.

165. *Id.* ¶ 8, at 11–12.

166. *Id.* ¶ 9, at 12.

167. ERAKAT, *supra* note 160, at 1–22.

168. Israel’s justification is clearly articulated in the Levy Commission Report:

After having considered all the approaches placed before us, the most reasonable interpretation of those provisions of international law appears to be that the accepted term “occupier” with its attending obligations, is intended to apply to brief periods of the occupation of the territory of a sovereign state pending termination of the conflict between the parties and the return of the territory or any other agreed upon arrangement. However, Israel’s presence in [the West Bank] is fundamentally different: Its control of the territory spans decades and no one can foresee when or if it will end; the territory was captured from a state (the kingdom of Jordan), whose sovereignty over the territory had never been legally and definitively affirmed, and has since renounced its claim of sovereignty . . .

Levy Commission Report, *supra* note 12, ¶ 5, at 8.

169. See ERAKAT, *supra* note 160, at 1 (reiterating Israel’s position that Palestine cannot be occupied because it lacks a sovereign).

and therefore IHL does not apply.<sup>170</sup> Conversely, Israel uses the sovereign exception to claim that it is fighting a war like no other; therefore, it may derogate its obligations under IHRL.<sup>171</sup> The sovereign exception leaves the Palestinians as a non-juridical people (i.e., a people without collective political and legal rights) in the eyes of Israel, giving Israel room to maneuver by insisting that it is within the bounds of international law, while improvising its own laws that engender its settlement enterprise.<sup>172</sup>

#### D. Customary International Law<sup>173</sup>

International law is unique in that it represents a shared set of norms that several states agree on despite their different governmental structures and geopolitical interests, based on a shared value set.<sup>174</sup> Unlike domestic law, international law has limited enforcement mechanisms, and it often morphs depending on the global political situation at the time or the

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170. *Id.* at 17 (explaining that Israel has used the sovereign exception rule to deny Palestinians their juridical rights); *see infra* note 173 (identifying IHL as traditionally applicable during war).

171. ERAKAT, *supra* note 160, at 185; *see infra* note 171 (explaining that IHRL traditionally applies during peacetime).

172. ERAKAT, *supra* note 160, at 54.

173. This Comment discusses both international human rights law (“IHRL”) and international humanitarian law (“IHL”). While it was once popular convention that IHRL and IHL do not apply contemporaneously (with IHL *only* applying during conflict and IHRL *only* applying during peacetime to a state’s own citizens), the distinction has blurred in recent years and the current paradigm posits that IHRL must also apply during times of conflict. *The Occupied Territories and International Law*, B’TSELEM (Nov. 11, 2017), [https://www.btselem.org/international\\_law](https://www.btselem.org/international_law) [<https://perma.cc/RH4Y-JHF3>]. Here, the ICCPR and other treaties that will be discussed fall under the umbrella of IHRL. Israel abides by some IHL when it comes to military action taken in the Palestinian Territories, but it argues that other IHL, such as the Geneva Convention and the law of belligerent occupation, does not apply because Israel is not technically an occupying power. *See Medina, supra* note 53, at 342 (discussing the Israeli Supreme Court’s ruling that international law is not binding domestically). In terms of IHRL treaties and their application to the Palestinian Territories, “Israel argues it is not bound by [IHRL] in the Occupied Territories, as they are not officially sovereign Israeli territory.” *The Occupied Territories and International Law, supra*. However, the United Nations Human Rights Committee (“HRC”) stated in its 2003 concluding observations that “the applicability of the regime of [IHL] during an armed conflict does not preclude the application of [IHRL].” Human Rights Comm., Concluding Observations of the Human Rights Committee of Its Seventy-Eighth Session, ¶ 11, U.N. Doc. CCPR/CO/78/ISR, ¶ 11 (2003).

174. *International Law and Justice*, UNITED NATIONS <https://www.un.org/en/sections/issues-depth/international-law-and-justice/index.html> [<https://perma.cc/RS27-EEVP>].

need of the states utilizing it.<sup>175</sup> While international law is pliable, it originates in several established sources. Article 38(1) of the ICJ charter<sup>176</sup> describes the four main sources for international law: (1) “international conventions” that “establish[] rules expressly recognized” by the states that are party to them or are contesting them;<sup>177</sup> (2) generally accepted and consistent practices of states, also known as customary international law;<sup>178</sup> (3) “general principles of law recognized by civilized nations”;<sup>179</sup> and (4) the “judicial decisions and the teachings of the most highly qualified [scholars] of the various nations.”<sup>180</sup> All of these sources, aside from the written international conventions, are fairly nebulous; therefore, it is difficult to pinpoint what, exactly, comprises international law.<sup>181</sup>

For the purposes of this Comment, customary international law will be relied on to draw parallels between the hypothetical considered here and other similar situations. Customary international law is not clearly established or memorialized, and often domestic or international tribunals recognize certain aspects of treaties or rulings from other international courts as customary.<sup>182</sup> Therefore, while Israel is not a party to the European Convention on Human Rights (ECHR) and, therefore, not subject to the jurisdiction of the European Court of Human Rights (ECtHR), the Israeli Supreme Court (ISC) sometimes looks to decisions from that court to influence its own jurisprudence.<sup>183</sup> Additionally, the ICJ surveys rulings from different international courts, even if those courts lack jurisdiction over the matter at hand, to opine on what constitutes customary international law.<sup>184</sup>

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175. Jacob Katz Cogen, *Noncompliance and the International Rule of Law*, 31 YALE J. INT'L L. 189, 190 (2004).

176. Statute of the International Court of Justice, art. 38, para. 1, June 26, 1945, 59 Stat. 1031.

177. *Id.* para. 1(a).

178. *Id.* para. 1(b).

179. *Id.* para. 1(c).

180. *Id.* para. 1(d).

181. Cogen, *supra* note 175, at 190.

182. *Uphold International Law*, UNITED NATIONS, <https://www.un.org/en/sections/what-we-do/uphold-international-law> [<https://perma.cc/V43S-FWN3>].

183. *The Impact of Foreign Law on Domestic Judgements: Israel*, LAW LIBR. CONGRESS, <https://www.loc.gov/law/help/domestic-judgment/israel.php> [<https://perma.cc/RH85-THG4>].

184. See Stefan Talmon, *Determining Customary International Law: The ICJ's Methodology Between Induction, Deduction and Assertion*, 26(2) EUR. J. INT'L L. 417, 439–40 (2015) (discussing the ICJ's methodology to find that *uti possidetis juris* was a general principle of customary international law).

1. *Treaty interpretation under customary international law*

The general rules reflected in Article 15 of the 1978 Vienna Convention on State Succession in Respect of Treaties<sup>185</sup> (VCST) and Article 29 of the 1976 Vienna Convention on the Law of Treaties<sup>186</sup> (VCLT), which are customary international law, govern the territorial application of treaties, particularly in the case of a transfer of control of a territory via state succession.<sup>187</sup> VCST Article 15 states:

When part of the territory of a State, or when any territory for the international relations of which a State is responsible, not being part of the territory of that State, becomes part of the territory of another State: (a) treaties of the predecessor State cease to be in force in respect of the territory to which the succession of States relates from the date of the succession of States; and (b) treaties of the successor State are in force in respect of the territory to which the succession of States relates from the date of the succession of States, unless it appears from the treaty or is otherwise established that the application of the treaty to that territory would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.<sup>188</sup>

While this would appear applicable to the situation at hand, VCST Article 6 clarifies that the Convention “applies only to the effects of a succession of [s]tates occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations.”<sup>189</sup> As previously discussed, the annexation of the Jordan River Valley would directly contravene the U.N. Charter; therefore VCST Article 6 creates the presumption that VCST Article 15 would not apply to the annexed territory.<sup>190</sup>

VCLT Article 29 states: “Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.”<sup>191</sup> Many treaties contain their own scope clauses; thus, under customary international law, VCLT Article 29 serves

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185. Vienna Convention on the Succession of States in Respect of Treaties, Aug. 23, 1978, 1946 U.N.T.S. 3 [hereinafter VCST] (entered into force Nov. 6, 1996).

186. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT] (entered into force Jan. 27, 1980).

187. Costelloe, *supra* note 140, at 343–44.

188. VCST, *supra* note 185, at 7.

189. *Id.* at 4; *see also id.* at 19 (“[T]he provisions of the present Convention shall not prejudice any question that may arise in regard to a treaty from the military occupation of a territory.”).

190. *See supra* Section I.B.5.

191. VCLT, *supra* note 186, at 339.

as a general application clause in case a covenant does not have a defined scope.<sup>192</sup> There are no restrictions on VCLT like VCST Article 6, but there is an implication that VCLT Article 29 only applies to de jure territory.<sup>193</sup>

While these two clauses create a presumption against the application of treaties to cases of annexation, they remain relatively untested in determining whether an annexing state's treaties succeed to the annexed territory.<sup>194</sup> State succession does not apply when a state forcibly acquires territory from another state, because under international law, no legal succession occurs in such cases.<sup>195</sup> While neither VCLT nor VCST define "territory," which features in both of their application clauses, the term commonly "refers to territory over which the state's legal title extends."<sup>196</sup> This general consensus is an important factor in consideration of prolonged occupation or annexation where the "transfer of the territory [in question has been] regarded as a *fait accompli* by other states."<sup>197</sup>

In order to find a treaty applicable to an annexed territory under VCLT or VCST, the treaty should be ambiguous about its territorial scope and should contain specific protections that would extend to the citizens of the annexed territory should the treaty be applied.<sup>198</sup> However, the *lex specialis* of the law of occupation may also create a basis for suspending the treaties already in place in the annexed territory "and applying the annexing [s]tate's treaties [instead]."<sup>199</sup> Cases for the application of human rights treaties to annexed territories are particularly strong, as "[b]ona fide interpretation of human rights treaties by the administration and the courts is called for, in accordance with their object and purpose

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192. See *Sanum Invs. Ltd. v. The Gov't of Lao People's Democratic Republic*, 2013-13 PCA Case Repository, at 62-63 (Perm. Ct. Arb. 2003). VCLT Article 29 also serves as a customary norm of how treaty application should be understood, not just in situations where a covenant does not have its own clause on the subject. *Id.*

193. Costelloe, *supra* note 140, at 350.

194. Costelloe, *supra* note 140, at 347.

195. *Id.* at 346.

196. *Id.* at 347.

197. *Id.* This Comment will apply references to states as being applicable to the Palestinian Territories, as the discussion surrounding whether Palestine is a de facto state is outside the scope of this Comment.

198. See Ben-Naftali & Shany, *infra* note 213, at 67; Costelloe, *supra* note 140, at 350.

199. Costelloe, *supra* note 140, at 355.



of promoting human rights, even where such interpretation leads to the extraterritoriality of humanitarian obligations . . . .”<sup>200</sup>

## 2. *International Covenant on Civil and Political Rights*

The U.N. General Assembly adopted the ICCPR in December 1966, and the treaty came into force in March 1976.<sup>201</sup> “The ICCPR recognizes the inherent dignity of each individual and . . . promote[s] conditions within states to allow the enjoyment of civil and political rights.”<sup>202</sup> Specifically:

The ICCPR obligates countries that have ratified the treaty to protect and preserve basic human rights, such as: the right to life and human dignity; equality before the law; freedom of speech, assembly, and association; religious freedom and privacy; freedom from torture, ill-treatment, and arbitrary detention; gender equality; the right to a fair trial; [the] right [to] family life and family unity; and minority rights.<sup>203</sup>

Thus, the ICCPR provides that Israel should recognize rights of Palestinian citizens in Israel to receive “equal protection of the law,” “enjoy their culture,” “practise their religion,” and “[converse] with other members of their community [in their native language].”<sup>204</sup>

The United Nations established the Human Rights Committee (HRC) to monitor the implementation of the ICCPR.<sup>205</sup> All contracting states, including Israel, report to the HRC every four years on the progress of

200. Theodor Meron, *Extraterritoriality of Human Rights Treaties*, 89 AM. J. INT’L L. 78, 82 (1995).

201. *Summary: International Covenant on Civil and Political Rights (ICCPR)*, CAN. CIV. LIBERTIES ASS’N (Oct. 27, 2015), <https://ccla.org/summary-international-covenant-on-civil-and-political-rights-iccpr> [<https://perma.cc/Y3WL-UUMJ>].

202. *Id.*

203. *FAQ: The Covenant on Civil & Political Rights (ICCPR)*, ACLU (Apr. 2019), <https://www.aclu.org/other/faq-covenant-civil-political-rights-iccpr> [<https://perma.cc/6XUV-EEQJ>]. Israel asserts that the rights guaranteed under the ICCPR are reflected in Israel’s Basic Law: Human Dignity and Liberty. *Supra* Section I.A.3. Basic Law: Human Dignity and Liberty provides the baseline for the Israeli Supreme Court to rule in favor of domestic law over its obligations under the ICCPR. Basic Law: Human Dignity and Liberty, 5752-1992, SH No. 1454 p. 90 (Isr.).

204. Omar Dajan & Hiba Husseini, *Past the Point of No Return? A Rights-Based Framework for International Engagement in Israel/Palestine*, NOREF 4 (Oct. 2014), <https://www.files.ethz.ch/isn/185390/798fe4a137177839a210f32ac64c16fe.pdf> [<https://perma.cc/F22C-4WKT>].

205. The United Nations established the HRC when the ICCPR came into force, with the first optional protocol that allowed the HRC to hear victims’ claims of human rights violations. *Supra* note 173.

their implementation.<sup>206</sup> In addition to examining state's reports, addressing the committee's concerns, and providing recommendations to states via "concluding observations," "[t]he [HRC] also publishes general comments[,] which are its interpretation of the content of the treaty's human rights provisions."<sup>207</sup>

*a. Article 2(1)*

Article 2(1) of the ICCPR establishes the scope of the Covenant: "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant . . . ."<sup>208</sup> The inclusion of the words "within its territory" limits and differentiates the application of the ICCPR from other human rights covenants, such as the ECHR.<sup>209</sup> In some tribunals, such as the ECtHR, the inclusion of the term "jurisdiction" represents the threshold for applying the agreement.<sup>210</sup> In *Al-Skeini v. United Kingdom*,<sup>211</sup> the ECtHR stated: "[t]he exercise of *jurisdiction* is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it [that] give rise to an allegation of the infringement of rights and freedoms set forth in the Convention."<sup>212</sup>

However, the inclusion of the phrase "within its territory" in conjunction with the presence of the "jurisdiction" trigger has made the applicability of

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206. *Human Rights Committee: Monitoring Civil and Political Rights*, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R <https://www.ohchr.org/en/hrbodies/ccpr/pages/ccprindex.aspx> [<https://perma.cc/S3ML-63SH>].

207. *FAQ: ICCPR*, *supra* note 203; see *Human Rights Committee: Monitoring Civil and Political Rights*, *supra* note 206.

208. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 (emphasis added).

209. Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 AM. J. INT'L L. 119, 124 (2005); see also Ralph Wilde, *Human Rights Beyond Borders at the World Court: The Significance of the International Court of Justice's Jurisprudence on the Extraterritorial Application of International Human Rights Law Treaties*, 12(4) CHINA J. INT'L L. 639, 657 (2013) ("The ICCPR formulation is slightly different from the others in that applicability operates in relation to those 'within [the state's] territory and subject to its jurisdiction.'").

210. Wilde, *supra* note 209, at 675.

211. 2011-IV Eur. Ct. H.R. 99.

212. Wilde, *supra* note 209, at 657 (emphasis added) (quoting *Al-Skeini*, 2011-IV Eur. Ct. H.R. ¶ 130). "The term 'jurisdiction' in the ECHR, ACHR, CAT and CRC has been interpreted to operate extraterritorially in certain circumstances." *Id.* at 664.

the ICCPR less straightforward than other covenants.<sup>213</sup> The plain meaning of the phrase “within its territory and subject to its jurisdiction” suggests that “every state party is required to ensure the rights in the [ICCPR] only to individuals who are both *within* its territory *and* subject to its sovereign authority.”<sup>214</sup> However, there are conflicting views on whether the phrase is conjunctive or disjunctive,<sup>215</sup> which could lead to an entirely different reading. For example, in its Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion (“Wall Opinion”),<sup>216</sup> “the ICJ held that the ICCPR was in force with respect to acts attributable to Israel in the Palestinian Territor[ies].”<sup>217</sup> In interpreting the ICCPR’s scope clause, the ICJ read the word “and” as disjunctive—a reading that the United States and Israel reject.<sup>218</sup> The Court also pointed to the drafting history of the ICCPR, demonstrating that “in adopting the wording chosen, the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory.”<sup>219</sup>

Due to the potentially narrow reading of Article 2(1) of the ICCPR, the established definitions of both territory and jurisdiction under customary international law, and the interpretation of both VCLT and VSCT that would traditionally exclude annexed territory from territory to which the annexing state’s treaties apply, this Comment turns to

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213. During drafting, the United States proposed to limit the scope to only “within its jurisdiction,” but others expressed concern that “a State should not be relieved of its obligations under the covenant to persons who remained within its jurisdiction merely because they were not within its territory.” Meron, *supra* note 200, at 79, n.6 (quoting MARC J. BOSSUYT, GUIDE TO THE “TRAVAUX PRÉPARATOIRES” OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 53 (1987)). This suggestion was ultimately defeated due to the concern “that failure to mention territory [would] be interpreted as requiring States to ensure the human rights of their nationals abroad in ways other than through regular diplomatic channels.” Orna Ben-Naftali & Yuval Shany, *Living in Denial: The Application of Human Rights in the Occupied Territories*, 37 ISR. L. REV. 17, 68–69, n.178 (2003).

214. Dennis, *supra* note 209, at 122.

215. See Meron, *supra* note 200, at 79 (discussing Professor Thomas Buergenthal’s leading study, which argued that Article 2(1) should be read disjunctively); see also Ben-Naftali & Shany, *supra* note 213, at 71 (noting how the text of the language and the drafting history could arguably allow either a conjunctive or disjunctive interpretation).

216. Wall Opinion, 2004 I.C.J. Rep. 136 (July 9).

217. Costelloe, *supra* note 140, at 370.

218. *Id.*; Wall Opinion, 2004 I.C.J. Rep. ¶ 109. The Court in the Wall Opinion did not accept Israel’s arguments, finding that “the territories occupied by Israel have for over 37 years been subject to its territorial jurisdiction as the occupying Power.” *Id.* ¶ 112.

219. Wall Opinion, 2004 I.C.J. Rep. ¶ 109.

examining when human rights treaties have been applied extraterritorially and why.

3. *Extraterritorial<sup>220</sup> application of treaties*

As discussed above, the texts of VCLT and VCST reflect an understanding that only territory that is de jure part of a state is included for the purposes of succession of treaties.<sup>221</sup>

However, while the provisions do not consider situations where treaties would apply extraterritorially, the provisions do not reject their extraterritorial application, either.<sup>222</sup> In situations of treaty application where VCLT and VCST do not apply (such as occupations and annexations), and in which the treaty in question lacks a specific territorial application clause, “the customary equivalent to the rule reflected in [VCST Article 15] and [VCLT Article 29] applies by default.”<sup>223</sup> Under this default rule, a treaty could arguably apply to a territory that a state controls or claims sovereignty over, even if that claim is unlawful or unrecognized.<sup>224</sup> A court in the Netherlands found that an extradition treaty between the Netherlands and Israel was applicable to East Jerusalem, despite the fact that Israel’s claim to sovereignty over East Jerusalem is not recognized under international law.<sup>225</sup>

While there may be strong arguments on both sides of determining whether to broaden the definition of territory to include annexed areas, “jurisdiction” has been interpreted more loosely.<sup>226</sup> When an application clause references “jurisdiction” instead of or in addition to “territory,” there is a low threshold for states’ requirement to perform treaty obligations.<sup>227</sup> Still, it is easier “to argue that an annexing State may be required to perform specific treaty obligations in the annexed territory than that the treaty as a whole applies . . . to [the annexed] territory.”<sup>228</sup>

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220. This Comment will use “extraterritorial” to refer to territory that falls outside of a state’s de jure territory, including territory that was acquired in contravention of international law.

221. See *supra* Section I.D.1. on definitions under VCLT and VCST.

222. Costelloe, *supra* note 140, at 358.

223. *Id.*

224. *Id.*

225. Kontorovich, *supra* note 148.

226. See, e.g., Costelloe, *supra* note 140, at 370 (discussing cases where jurisdiction included annexed territories, such as *Catan v. Moldova*).

227. *Id.* at 371.

228. *Id.* at 372.

In their comprehensive 2003 article on the application of human rights treaties to the Palestinian Territories, Orna Ben-Naftali and Yuval Shany challenged the suggestion that VCLT Article 29 creates a presumption that a treaty's application is limited to a party's de jure territory.<sup>229</sup> Israel takes the position that VCLT Article 29 limits the application of international treaties to a state's metropolitan areas and does not apply extraterritorially.<sup>230</sup> However, the drafting history of the VCLT reveals that the debate centered on the applicability of treaties to territorial units within states rather than the extraterritorial application of treaties.<sup>231</sup> In fact, "[o]nly one delegate [to] the [drafting] conference mentioned the possibility of inferring from the text of [A]rticle 29 that treaties would [only] apply . . . to sovereign territory."<sup>232</sup> Additionally, the U.N. Special Rapporteur concluded that the rule on territorial application "hardly seems open to the construction that by implication it excludes the application of a treaty beyond the territories of the parties."<sup>233</sup>

Even if VCLT Article 29 creates a presumption against the extraterritorial application of treaties, an argument that the strict interpretation of "territory" should not limit the object, purpose, or values the treaty in question represents can rebut the presumption.<sup>234</sup> International law generally requires a wide application of human rights instruments to all people impacted by the power, jurisdiction, and reach of a state, creating an opposite presumption in favor of applying human rights treaties extraterritorially.<sup>235</sup>

Extraterritorial applicability rests on the notion that a state's responsibility can extend beyond where the state holds title.<sup>236</sup> In determining whether a state has an obligation under human rights treaties, physical control over the territory is particularly influential, especially in cases that interpret the meaning of "jurisdiction" in the ECHR.<sup>237</sup> The idea that extraterritorial

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229. Ben-Naftali & Shany, *supra* note 213, at 58.

230. *Id.* at 66.

231. *Id.* at 67 (reviewing the drafting history to show that, during the formation of the VCLT, debates focused on treaties that excluded extraterritorial units).

232. *Id.*

233. Special Rapporteur (Humphrey Waldock), *Sixth Report on the Law of Treaties*, UN Doc. A/CN.4/186 and Add. 1-7 (1966) Y.B. Int'l L. Comm. 51, at 66.

234. Ben-Naftali & Shany, *supra* note 213, at 56-58.

235. *Id.* at 67.

236. Wilde, *supra* note 209, at 662.

237. *Id.*

applicability of human rights treaties depends on a state's exercise of control beyond its borders originated with the ICJ.<sup>238</sup>

More specifically, determining whether a state exerts "effective control," a heightened control threshold, is influential in determining whether a treaty can apply extraterritorially.<sup>239</sup>

It is widely recognised by the [ICJ][,] as well as universal and regional human rights treaty monitoring bodies[,], that the state is required to fully respect and protect its human rights obligations outside its territory in an area over which it exercises "effective control"—this is the case of an occupied or leased territory.<sup>240</sup>

Whether a state exercises effective control is a factual determination that varies by case.<sup>241</sup> In *Ilascu v. Moldova*,<sup>242</sup> the ECtHR held that the "[positive] obligations [undertaken by a Contracting State under the Convention] remain even where . . . the State's authority is limited in part of its territory, so that it has a duty to take all the appropriate measures which it is still within its power to take."<sup>243</sup>

Effective control is the most important factor in evaluating the ICCPR's application.<sup>244</sup> In May 2004, the HRC released General Comment 31, which expanded on states' obligations under the ICCPR and definitively asserted that "a State party must respect and ensure the rights laid down in the [ICCPR] to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party."<sup>245</sup> In sum, the ICCPR imposes obligations on states' conduct when the state holds effective control over, or its actions directly affect, individuals.<sup>246</sup>

#### 4. Case studies

There are several examples of international tribunals interpreting the application clauses of human rights treaties in a manner that would imply that even under a strict reading of Article 2(1) ICCPR, Israel's

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238. *Id.* at 662–63.

239. Antal Berkes, *Human Rights Obligations of the Territorial State in the Cyberspace of Areas Outside Its Effective Control*, 52(2) *ISR. L. REV.* 197, 197–98 (2019).

240. *Id.* at 212–13.

241. *See id.* at 215.

242. *Ilascu v. Moldova*, App. No. 48787/99 *Eur. Ct. H.R.* (2004).

243. *Id.* at 73, ¶ 313.

244. Ben-Naftali & Shany, *supra* note 213, at 76.

245. Human Rights Committee, General Comment No. 31 [80] (The Nature of the General Legal Obligations Imposed on States Parties to the Covenant), 26 May 2004, ¶ 10, UN Doc. CCPR/C/21/Rev.1/Add. 13 (2004).

246. Ben-Naftali & Shany, *supra* note 213, at 72.

obligations as a contracting party include extending the ICCPR's protections to the Jordan River Valley.<sup>247</sup>

*a. ECtHR*

In *Loizidou v. Turkey*,<sup>248</sup> the ECtHR found:

[T]he concept of “jurisdiction” under [a] provision [of the ECHR] is not restricted to the national territory of the . . . Contracting Parties . . . [and that] the responsibility of a Contracting Party may also arise when as a consequence of military action—whether lawful or [not]—it exercises effective control of an area outside its national territory.<sup>249</sup>

The court applied this concept in *Ilascu*, holding that, by virtue of the effective control that the Russian Federation exercised over the region at issue, four Moldovan citizens arrested by Russian-backed authorities in a Russian-occupied Moldovan territory, were within the Russian Federation's jurisdiction, thus satisfying ECHR Article 1, even if they were not present in Russian territory.<sup>250</sup>

In *Al-Skeini*, a claim brought by the relatives of Iraqi civilians killed by British soldiers in Iraq in 2003, the court described extraterritorial application of the ECHR in areas beyond a contracting state's borders where it exercises effective control as an exception to the rule that “jurisdiction” under the ECHR is primarily territorial.<sup>251</sup> The ECtHR confirmed its *Al-Skeini* conclusions regarding extraterritorial jurisdiction in subsequent cases.<sup>252</sup> For example, in *Catan v. Moldova*,<sup>253</sup> the court confirmed that jurisdiction within the meaning of ECHR Article 1 could arise from the effective control of an area outside national territory as a result of unlawful military action, and the controlling state is under an

247. See *infra* notes 248–79 and accompanying text.

248. *Loizidou v. Turkey*, App. No. 15318/89 Eur. Ct. H.R. (1995).

249. *Id.* at 18, ¶ 62. In a subsequent case, ECtHR found “that victims of extraterritorial acts by [NATO] forces in bombing the headquarters of Radio Television Serbia were not ‘within the jurisdiction’ of the member states for purposes of . . . the ECHR.” Dennis, *supra* note 209, at 126. ECtHR defined “Article 2 of the ICCPR as having been ‘definitively and specifically confined.’” *Id.*

250. *Ilascu v. Moldova*, App. No. 48787/99 Eur. Ct. H.R. 92, ¶¶ 392, 394 (2004).

251. *Al-Skeini v. United Kingdom*, 2011-IV Eur. Ct. H.R. 99, ¶¶ 131–32, 138.

252. *E.g.*, *Costelloe*, *supra* note 140, at 369–70 (discussing *Catan v. Moldova*, *Jaloud v. Netherlands*, and *Pisari v. Moldova*).

253. *Catan v. Moldova*, 2012-V Eur. Ct. H.R. 309, ¶ 106. This case was the second in a series of ECtHR cases, following *Ilascu*, regarding Moldovan citizens who resided in a separatist entity, Transdniestria, where both Moldova and Russia exercised effective control and therefore ECtHR found both States responsible for the ICCPR violations. *Id.* ¶¶ 117–21.

obligation to secure the full range of substantive rights for the people under its control.<sup>254</sup>

*b. ICJ*

The ICJ is the principal judicial organ of the United Nations.<sup>255</sup> The ICJ is not a “human rights court” per se, but it does make decisions in the human rights field, “rather like a domestic generalist court with plenary jurisdiction with respect to a legal system which includes human rights.”<sup>256</sup> When the ICJ offered its contribution to this field, it consolidated and supplemented the existing authoritative interpretation on the “important question of whether human rights treaty obligations apply extraterritorially.”<sup>257</sup> The ICJ is uniquely positioned to review questions regarding extraterritoriality because it is not a specific-jurisdiction court, and it can litigate inter-state conflicts.<sup>258</sup> The ICJ is also uniquely positioned to address specific situations, while being able to reference the entire applicable normative framework, as a matter of human rights.<sup>259</sup>

The Namibia Advisory Opinion Concerning South Africa’s Responsibilities to the People of Namibia<sup>260</sup> set the tone for the ICJ’s future decisions on extraterritoriality.<sup>261</sup> The Court decided that both territorial control and territorial sovereignty (i.e., title) trigger state obligations.<sup>262</sup> “Although not a

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254. *Id.* ¶ 106.

255. INTERNATIONAL COURT OF JUSTICE (2020), <https://www.icj-cij.org/en> [<https://perma.cc/SL96-A4UH>].

256. Wilde, *supra* note 209, at 645.

257. *Id.* at 673.

258. *Id.* at 675–76 (observing that, while most courts are limited to the cases within their own state or pertaining to their state’s obligations, the ICJ can evaluate all sources of law, as it did in the Wall Opinion).

259. *See id.* (expanding on how the ICJ is familiar with “crossing such thresholds” because it hears cases on a wide range of law, such as war and occupation).

260. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. Rep. 16, ¶ 118 [hereinafter Namibia Advisory Opinion].

261. *See* Wilde, *supra* note 209, at 661 (explaining that the ICJ built upon the Namibia Advisory Opinion, which established territorial control as the basis for states’ obligations).

262. *Id.* The Court stated that South Africa would be:

accountable for any violations . . . of the rights of the people of Namibia. The fact that South Africa no longer has any title to administer the Territory does not release it from its obligations and responsibilities under international law towards other States in respect of the exercise of its powers in relation to this



determination specifically about international human rights treaty obligations, this broad proposition paved the way for [subsequent] decisions about human rights law . . . .”<sup>263</sup>

In the Wall Opinion, the ICJ held that the territories Israel captured in 1967 are considered occupied under customary international law; therefore, Israel has the status and obligations of an occupying power.<sup>264</sup> The court found that Israel’s construction of the Wall and, in particular, the restrictions Israel implemented on civilian movement to create the Wall, were especially persuasive in determining that Israel was responsible for implementing the ICCPR in the Palestinian Territories.<sup>265</sup> “In [both] the [Wall Opinion] and the [*Democratic Republic of the Congo*] v. *Uganda* judgment[,] the Court affirmed that the ICCPR is capable of extraterritorial application.”<sup>266</sup> Specifically, the court suggested that Israel’s obligations under the ICCPR apply in its occupied territories.<sup>267</sup> Many observers consider the Wall Opinion to be “based . . . on the view that the West Bank and Gaza [a]re part of the ‘territory’ of Israel for purposes of the application of the [ICCPR].”<sup>268</sup> The Court, building on the HRC’s analysis, stated that factors including “*the exercise of effective jurisdiction by Israeli forces [within the territories]*” persuaded it to find Israel responsible for applying the ICCPR to the territories.<sup>269</sup>

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Territory. Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States.

Namibia Advisory Opinion, 1971 I.C.J. Rep. ¶ 118.

263. Wilde, *supra* note 209, at 661.

264. Wall Opinion, 2004 I.C.J. Rep. 136, ¶ 78 (July 9).

265. *See id.* ¶¶ 72, 85. In order to construct the Wall, Israel created a “Closed Area” in the space between the 1967 green line (armistice demarcation line) and the Wall, where residents may no longer remain in it and non-residents may not enter unless they hold an identity card permit issued by Israeli authorities. *Id.* Israel continued expanding the Wall after the ICJ’s 2004 opinion, and, as of 2017, the Wall was sixty-five percent complete. *See The Separation Barrier*, B’TSELEM (Nov. 11, 2017), [https://www.btselem.org/separation\\_barrier](https://www.btselem.org/separation_barrier) [<https://perma.cc/LS37-AKAJ>]. Once completed, the Wall will cut 52,667.7 hectares of land (equal to almost ten percent of the West Bank) off from the West Bank. *Id.*

266. Wilde, *supra* note 209, at 665. “[W]hile the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory.” Wall Opinion, 2004 I.C.J. Rep., at 179, ¶ 109.

267. Dennis, *supra* note 209, at 119.

268. *Id.* at 123.

269. Wall Opinion, 2004 I.C.J. Rep. ¶ 110 (emphasis added).

*c. HRC*

In its 1998 report to the HRC, Israel questioned whether residents of the Palestinian territories were subject to Israel's jurisdiction.<sup>270</sup> The HRC noted that "the long-standing presence of Israel in [the Palestinian Territories], Israel's ambiguous attitude towards their future status, [and] the exercise of effective jurisdiction by Israeli security forces therein" concerned them.<sup>271</sup> After Israel asserted the same position in its 2003 report to the HRC, the Committee concluded:

[I]n the current circumstances, the provisions of the [the ICCPR] apply to the benefit of the population of the [Palestinian Territories], for all conduct by the State party's authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of State responsibility of Israel under the principles of public international law.<sup>272</sup>

In Israel's most recent report to the Committee in 2018, the HRC asked Israel to address the "steps the State party has taken to review its legal position so as to acknowledge the extraterritorial application of the Covenant."<sup>273</sup> In its October 2019 response, Israel reiterated its position that it "believes that [the ICCPR], which is territorially bound, does not apply, nor was it intended to apply, to areas beyond a state's national territory."<sup>274</sup>

In two cases addressing the ICCPR's scope, HRC rejected the state's assertion that the ICCPR and its optional protocol only cover violations occurring within a state's territory.<sup>275</sup>

The reference . . . to "individuals subject to its jurisdiction" . . . is not to the place where the violation occurred, but rather to the relationship between the individual and the State in relation to a violation of any

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270. U.N. Human Rights Comm., 63rd Sess., 1675th mtg., ¶ 21, U.N. Doc. CCPR/C/SR.1675 (July 15, 1998).

271. Human Rights Comm., Concluding Observations of the Human Rights Committee, ¶ 10, U.N. Doc. CCPR/C/79/Add.93 (1998).

272. Human Rights Comm., Concluding Observations of the Human Rights Committee, ¶ 11, U.N. Doc. CCPR/CO/78/ISR (2003).

273. Human Rights Comm., List of Issues Prior to Submission of Fifth Periodic Report of Israel, U.N. Human Rights Comm., ¶ 2(b), U.N. Doc. CCPR/C/ISR/QPR/5 (Sept. 7, 2018).

274. Human Rights Comm., Fifth Periodic Report Submitted by Israel Under Article 40 of the Covenant Pursuant to Optional Reporting Procedure, Due in 2019, U.N. Human Rights Comm., ¶ 24, U.N. Doc. CCPR/C/ISR/5 (2019).

275. *Lopez Burgos v. Uruguay*, Communication No. R.12/52, U.N. Doc. Supp. No. 40 (A/36,40) at 176 (1981) [hereinafter *Lopez Burgos*]; *Casariago v. Uruguay*, Communication No. R.13/56, U.N. Doc. Supp. No. 40 (A/36/40) at 185 (1981) [hereinafter *Casariago*].

of the rights set forth in the Covenant, wherever they occurred. Article 2(1) of the Covenant places an obligation upon a State party to respect and to ensure rights “to all individuals within its territory and subject to its jurisdiction,” but it does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State . . . . [I]t would be unconscionable to . . . interpret . . . article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State [that] . . . it could not perpetrate on its own territory.<sup>276</sup>

Following this clear assertion of the ICCPR’s extraterritoriality, the HRC abandoned the literal reading of Article 2(1) and took the position that the ICCPR extended to anyone “who may find themselves *in the territory or subject to the jurisdiction of the State Party.*”<sup>277</sup>

With the Wall Opinion and the Democratic Republic of the Congo v. Uganda<sup>278</sup> judgment, the ICJ—a body with a formal judicial status—endorsed the HRC’s broad interpretation of the ICCPR’s extraterritoriality generally, and as applied to the two cases.<sup>279</sup>

276. *Lopez Burgos*, No. R.12/52, ¶¶ 12.2–12.3; *Casariago*, No. R.13/56, ¶¶ 10.2–10.3. One HRC member appended an individual opinion to these decisions, criticizing the ICCPR’s broad language and suggesting that the Covenant was never intended to encompass complex situations, such as occupation of a foreign territory. Ben-Naftali & Shany, *supra* note 213, at 73.

277. Dennis, *supra* note 209, at 122–23 (quoting Hum, Rts. Comm., General Comment No. 31, UN Doc. CCPR/C/21/Rev.1/Add.13, ¶ 10 (2004) (emphasis added)); *see also* Wilde, *supra* note 209, at 664 (“The ICCPR was interpreted as applying extraterritorially by the UN Human Rights Committee in Views issues in 1981 and General Comment 31 of 2004.”). However, HRC General Comments are not legally binding. Dennis, *supra* note 209, at 127. Some view their comments and observations as being at odds with the plain meaning of Article 2(1), the practice of states who have ratified the Covenant, and the original intent of the negotiators. *Id.* For example, Professor Christian Tomuschat points out that the plain text of the ICCPR does not support the HRC’s position that Israel is responsible for implementing the ICCPR in territories where it exercises effective control. *Id.* at 131. Tomuschat questions whether the HRC is even authorized to interpret the ICCPR in an authentic fashion, considering the HRC’s lack of judicial standing in comparison to tribunals such as the ICJ. *Id.* However, Tomuschat concedes that states could ignore the plain meaning of Article 2 for long-term occupations. *Id.* at 131, n.85. Moreover, the ICJ’s holdings in the Wall Opinion and Democratic Republic of the Congo v. Uganda, which aligned with the HRC’s views, strengthen the credibility of the HRC’s viewpoint and undermine Tomuschat’s rejectionist view. *See* Wilde, *supra* note 209, at 665.

278. Judgment, 2005 I.C.J. 168 (Dec. 19).

279. Ben-Naftali & Shany, *supra* note 213, at 87 (explaining that support exists for extraterritorial applications of governmental authority in precedent, interpretations of texts, and consensus among scholars).

II. IF ISRAEL ANNEXES THE JORDAN RIVER VALLEY, ISRAEL SHOULD BE HELD RESPONSIBLE FOR NOT UPHOLDING ITS OBLIGATIONS UNDER THE ICCPR TO BOTH ISRAELI AND PALESTINIAN CITIZENS IN THE REGION.

Typically, when questions of treaty interpretation arise, states look to VCLT or VCST in order to resolve their disputes.<sup>280</sup> In this unprecedented situation, where a long-term occupation has morphed into de facto annexation, the VCLT and the VCST, though not offering a definition of territory, either explicitly state or imply that the conventions would not cover annexed territory.<sup>281</sup> Due to Israel's intention to apply its laws to the Jordan River Valley and the inevitability of annexation, the presumption under the VCLT that annexed territory does not fall under a state's de jure territory is rebutted.<sup>282</sup> Further, the promotion of human rights that follows the application of the ICCPR to the annexed territory supports the rebuttal.

The ICCPR should apply to the annexed Jordan River Valley because Israel has long had effective control over the area.<sup>283</sup> Although the ICCPR's scope differs from that of the VCLT, and is somewhat more restrictive, the inclusion of the annexed Jordan River Valley under the definition of territory in VCLT is persuasive for interpreting ICCPR Article 2(1).<sup>284</sup> However, Israel's effective control over the Jordan River Valley is the most persuasive factor to determine that the ICCPR should apply extraterritorially in this situation.<sup>285</sup> Additionally, it is anathema to the purpose of human rights treaties to not apply the treaties' provisions broadly, particularly when the state in question has the capacity and infrastructure to implement safeguards to ensure those rights are protected, as Israel can here.<sup>286</sup>

Finally, annexation would erase the sovereign exception that Israel has carved for itself. By blatantly announcing that Israel is extending

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280. Costelloe, *supra* note 140, at 343–44.

281. *See supra* Section I.D.2.

282. *See* Wall Opinion, 2004 I.C.J. Rep. 136, ¶ 109 (July 9) (finding that a state may exercise jurisdiction beyond its national territory).

283. *See The Separation Barrier*, *supra* note 265 (presenting data on Israel's control over the Jordan River Valley from 2017).

284. *See* Meron, *supra* note 200, at 79 (explaining that scholars recognize that Article 2(1) does not support a narrow territorial construction).

285. *See id.* (asserting that the ICCPR yields a broad territorial construction that includes individuals in the territory where a party to the ICCPR has effective control).

286. *See id.* at 78, 82 (challenging that the U.S.'s treatment of Haitians falls under the ICCPR because human rights treaties can have an extraterritorial effect).

its sovereignty to the Jordan River Valley, Israel can no longer claim those areas as contested and, therefore, beyond the scope of IHRL. By Israel's own actions and definitions, the Jordan River Valley will be both within its jurisdiction and within its territory. Additionally, Israel will have a difficult time arguing that a state of emergency exists such that it should be allowed to derogate its obligations under IHRL; not only is the standard for derogation high, but Israel also asserts an oppressive amount of control over the Palestinian territories that has stifled any widespread insurgency since the end of the Second Intifada. If Israel were to claim that defense, it would also have to suspend IHRL protections for the Israeli settlers living in the annexed territory or face further allegations of disparate treatment.<sup>287</sup>

*A. A Wider Reading of VCLT Article 29 Warrants a Broader Interpretation of the ICCPR.*

The VCST, which governs the treaties with respect to the succession of states, is not applicable to this situation. VCST Article 6 clarifies that the Convention “applies only to the effects of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations.”<sup>288</sup> The presumption against the application of VCST Article 15 to annexed territories is strong due to this specific restriction.<sup>289</sup>

However, the VCLT, which supplies a general application clause for cases in which a treaty does not have its own application clause,<sup>290</sup> lacks explicit limitations like VCST Article 6, and instead presumes that VCLT Article 29 applies strictly to de jure territory.<sup>291</sup> VCLT Article 29 not only serves as a backup scope clause, but it also represents a default norm under customary international law.<sup>292</sup> Israel argues that VCLT Article 29 implies that the application of international treaties is limited to a state's metropolitan areas and does not apply to extraterritorially.<sup>293</sup> However, the presumption VCLT Article 29 creates can be—and, in this

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287. Ben-Naftali & Shany, *supra* note 213, at 49 (stating that emergency provisions are often non-derogable in IHL).

288. See VCST art. 6.

289. Costelloe, *supra* note 140, at 359.

290. See *supra* note 192 and accompanying text.

291. See *supra* note 193 and accompanying text. “Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party with respect of its entire territory.” VCLT art. 29.

292. Costelloe, *supra* note 140, at 359.

293. Ben-Naftali & Shany, *supra* note 213, at 66.

case, has been—rebutted.<sup>294</sup> While VCLT does not contain a working definition of territory, it is implied that it refers to territory to which a state's legal title extends.<sup>295</sup> With the intention of extending Israel's sovereignty and applying Israeli law to the Jordan River Valley, the annexed territory falls within the definition of territory under VCLT Article 29.

The default rule reflected in VCLT Article 29 has not been tested often in terms of extraterritorial application.<sup>296</sup> However, the drafting history reveals that only one committee delegate assumed that VCLT Article 29 would apply only to sovereign territory,<sup>297</sup> and the U.N. Special Rapporteur questioned the construction that would imply a narrow reading.<sup>298</sup> Additionally, courts have found treaties applicable to areas that Israel annexed in the past, such as East Jerusalem.<sup>299</sup> In light of the drafting history, VCLT's applicability to annexed territory should be viewed in a light most favorable to the construction that it would apply extraterritorially.

An important factor in determining whether VCLT should apply extraterritorially or to areas not traditionally part of the state's *de jure* territory is the inevitability of a transfer of the territory.<sup>300</sup> Israel's contested occupation of the West Bank is the longest ongoing military occupation.<sup>301</sup> Since many states have regarded the annexation of the Jordan River Valley (and the broader West Bank) as inevitable for years, there is no question that the transfer of this territory was foreseeable.<sup>302</sup>

The law of occupation forms a *lex specialis* that creates a basis for suspending the treaties already in place in the annexed territory and

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294. *Id.*

295. *See supra* note 196 and accompanying text.

296. *See Costelloe, supra* note 140, at 367 (noting that the ECtHR developed most of the jurisprudence regarding extraterritorial application of treaties).

297. Ben-Naftali & Shany, *supra* note 213, at 67.

298. *See supra* note 233 and accompanying text.

299. Kontorovich, *supra* note 148 (examining a case in the Netherlands that held that the extradition treaty between the Netherlands and Israel was applicable to East Jerusalem even though international law does not recognize East Jerusalem as a *de jure* part of Israel's territory); *see supra* note 148 and accompanying text.

300. *See supra* note 197 and accompanying text.

301. Servet Gunerigok, *UN Expert: Israeli Occupation 'Longest' in Modern World*, ANADOLU AGENCY (Oct. 23, 2019), <https://www.aa.com.tr/en/middle-east/un-expert-israeli-occupation-longest-in-modern-world/1624297> [<https://perma.cc/N3YR-ESQP>].

302. *See id.* (describing the perspectives of Palestinians in Gaza, the West Bank, and East Jerusalem).

for applying the annexing state's treaties instead.<sup>303</sup> A reading of VCLT that includes the annexed Jordan River Valley as part of Israel's de jure territory promotes the positive application of human rights and thus creates a strong argument in favor of its inclusion.<sup>304</sup> International law requires a wide interpretation of human rights instruments to all impacted by the power, jurisdiction, and reach of a state.<sup>305</sup> Therefore, not only is the presumption against the extraterritorial applicability of VCLT rebutted here, but there is also an opposite presumption in favor of applying human rights treaties to the annexed Jordan River Valley due to the benefits the treaties would bring the residents of the annexed territory.<sup>306</sup>

Although VCLT is not directly applicable to this situation, its status as customary international law makes the convention influential when interpreting other scope clauses, such as Article 2(1) of the ICCPR. Therefore, the presumption that VCLT Article 29 creates, favoring applying human rights treaties such as the ICCPR to the annexed Jordan River Valley, is influential in interpreting the scope of the ICCPR.

*B. Israel's Effective Control Over the Jordan River Valley Is Persuasive in Requiring the Extraterritorial Application of the ICCPR.*

As established, due to the *lex specialis* of the Jordan River Valley and the reasons demonstrated above, the annexed Jordan River Valley would qualify as part of Israel's de jure territory under VCLT Article 29.<sup>307</sup> Since the ICCPR contains its own scope clause—Article 2(1)—that clause governs despite VCLT's influence.<sup>308</sup> Article 2(1) differs from both VCLT Article 29 and ECHR because it references both territory *and* jurisdiction.<sup>309</sup> Further, Israel's effective control over the

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303. See *supra* note 199 and accompanying text.

304. Ben-Naftali & Shany, *supra* note 213, at 56–58.

305. See *supra* note 235 and accompanying text.

306. Such benefits are particularly relevant to the ECHR when residents have no other recourse to vindicate human rights guaranteed in treaties. See Ben-Naftali & Shany, *supra* note 213, at 79–80 (“[Denying Turkish jurisdiction over Northern Cyprus] would result in a regrettable *vacuum* in the system of human-rights protection in the territory in question by removing from individuals there the benefit of the Convention's fundamental safeguards and their right to call a [state] to account for violation of their rights in proceedings before the Court.”).

307. See *supra* note 199 and accompanying text (recognizing the *lex specialis* basis for treaty suspension).

308. Dennis, *supra* note 209, at 126 (describing the scope of the ICCPR as “having been ‘definitively and specifically confined’ by the drafters” in Article 2).

309. Costelloe, *supra* note 140, at 370.

Jordan River Valley, combined with the likelihood that the object and purpose of the ICCPR would be satisfied should it be applied extraterritorially, collectively demonstrate that the annexed Jordan River Valley would be included under Article 2(1) of the ICCPR.

Debate over whether Article 2(1) is disjunctive or conjunctive is unsettled. The inclusion of the words “within its territory” within the broader phrase “within its territory and subject to its jurisdiction” is the main basis behind textualist arguments that Article 2(1) is conjunctive and therefore ICCPR should apply strictly to de jure territory and not extraterritorially.<sup>310</sup> However, the prevalence of those who argue for a disjunctive reading and the body of case law support a disjunctive reading.<sup>311</sup> The disjunctive reading warrants a separate analysis of both parts of the phrase: territory and jurisdiction.

Jurisdiction can be, and has been, interpreted broadly,<sup>312</sup> whereas the definition of territory is more nuanced. However, as extraterritorial applicability assumes that a state’s responsibility can extend beyond where the state holds title,<sup>313</sup> effective physical control over territory is the most persuasive measure of whether a state has obligations under human rights instruments.<sup>314</sup> There is a solid body of case law from various international courts that supports the “proposition that extraterritorial applications of governmental authority, including the exercise of control over occupied territories, should be viewed as falling under the jurisdiction of the state parties to the relevant convention.”<sup>315</sup> Nevertheless, the ICJ has supported other courts’ interpretation of “jurisdiction” as including an extraterritorial dimension<sup>316</sup> and it is generally understood that “jurisdiction” includes control over either territory *or* individuals.<sup>317</sup> Finally, effective control is dominant in evaluating the application of the

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310. See *supra* note 209 and accompanying text (discussing the differences between ICCPR and ECHR in terms of scope); *supra* note 214 and accompanying text (demonstrating the textualist reading of ICCPR Article 2(1)); *supra* note 277 (abandoning the textualist reading of ICCPR Article 2(1)).

311. See Meron, *supra* note 200, at 79 (summarizing a leading study by Professor Thomas Buergenthal that argued that Article 2(1) should be read disjunctively); Ben-Naftali & Shany, *supra* note 213, at 69 (emphasizing that the disjunctive interpretation is the leading interpretation by the HRC and U.N. rapporteurs).

312. See *supra* Section I.D.3.

313. See *supra* note 236 and accompanying text.

314. See *supra* notes 237–38 and accompanying text.

315. Ben-Naftali & Shany, *supra* note 213, at 87.

316. Wilde, *supra* note 209, at 661.

317. *Id.* at 664.



ICCPR.<sup>318</sup> The ICJ first introduced the importance of effective control in its Namibia Advisory Opinion when it established that territorial control, rather than title alone, should be the basis for a state's obligations.<sup>319</sup> Whether a state exercises that control and thus subjects itself to human rights obligations is a factual determination.<sup>320</sup>

Effective control defeats any arguments that annexed territory is not considered part of *de jure* territory under international law.<sup>321</sup> Even before annexation, the ICJ found that Israel had effective control over the occupied territories, and therefore that IHRL was applicable in those areas, including areas not scheduled for annexation.<sup>322</sup> In the Wall Opinion, Israel's ability to construct a barrier and restrict movement around that barrier persuaded the ICJ to find that Israel had effective control over the area and thus had the status and obligations of an occupying power.<sup>323</sup> Since 2004, Israel's construction of the Wall has continued, and its grip on the occupied territories has strengthened.<sup>324</sup> Given that the Wall Opinion was pre-annexation, the argument for effective control would only strengthen post-annexation when considering both the expansion of the Wall and Prime Minister Netanyahu's plans.<sup>325</sup>

Additionally, ICJ read the word "and" as disjunctive, whereas Israel and the United States read "and" as conjunctive.<sup>326</sup> While some academics argue for a narrower interpretation of Article 2(1) of ICCPR,<sup>327</sup> they hold the minority view, especially in light of the Wall Opinion and *Democratic Republic of the Congo v. Uganda*.<sup>328</sup> Therefore, the ICCPR should be construed to impose obligations on Israel with regard to the Palestinian and Israeli citizens of the annexed Jordan River Valley because they are either directly under the effective control of the Israeli government or because the Israeli government's actions affect them.

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318. See *supra* note 244 and accompanying text.

319. Wilde, *supra* note 209, at 661; see *supra* note 262 and accompanying text.

320. See *supra* Section I.D.3.

321. See *supra* note 264.

322. See *supra* Section I.D.4.b (reviewing the ICJ's Wall Opinion).

323. See *supra* note 265 and accompanying text.

324. *Supra* note 265 and accompanying text.

325. See *supra* note 265 and accompanying text.

326. Costelloe, *supra* note 140, at 370.

327. See *supra* Section I.D.2.a (providing an overview of Article 2(1)).

328. See Wall Opinion, 2004 I.C.J. Rep. 136, ¶ 78 (July 9) (holding that Israel, as the occupying power, is responsible for upholding its Convention-based obligations under international law); *Armed Activities on Territory of Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. Rep. 168 ¶¶ 178–80 (Dec. 19) (finding that Uganda had obligations to ensure respect for IHL and IHRL in the occupied Ituri Province).

The body of case law from the ICJ, ECtHR, and HRC support a finding that, even under a strict reading of ICCPR Article 2(1), Israel has positive obligations to protect the human rights of residents of the annexed Jordan River Valley. In both the Wall Opinion and Democratic Republic of the Congo v. Uganda, the ICJ affirmed that the ICCPR can and should be applied extraterritorially in circumstances where a state exercises effective control.<sup>329</sup> The Court's holding in the Wall Opinion, as discussed, is the most influential (and precedential) source of case law on the annexation issue—the ICJ cited to Israel's "exercise of effective jurisdiction" as persuasive in the court's finding that the ICCPR should apply to the occupied territories.<sup>330</sup> The Court also cited to Israel's lengthy presence in the Palestinian Territories as persuasive, a presence which has continued for sixteen years post the Court's opinion.<sup>331</sup> As the ICJ is the venue for the enforcement of violations of the ICCPR, its Wall Opinion is as close to binding as possible for an advisory opinion. Considering that many of the factors the court considered persuasive in its findings of effective control have either stayed consistent or strengthened in the past sixteen years, the ICJ should find similarly if Israel annexes the Jordan River Valley and the case returns to the ICJ's docket.

The HRC has also held on multiple occasions that extraterritorial exercises of a government's authority fall under its jurisdiction in determining whether there has been a violation of the ICCPR.<sup>332</sup> While HRC precedents are "not formally binding, [they] do carry significant weight, as the HRC is the most prominent international organ responsible for overseeing compliance with the ICCPR."<sup>333</sup> In two cases interpreting the scope of the ICCPR, the HRC rejected the idea that the ICCPR's application should be linked to physical territory and instead referred to the relationship between the individual and the state in question.<sup>334</sup> Following these decisions, the HRC cast a rather clear vote in favor of a disjunctive reading of Article 2(1) by declaring that the ICCPR's protections extend to anyone in the territory *or* subject to the jurisdiction

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329. See *supra* note 266 and accompanying text.

330. See *supra* note 269 and accompanying text (highlighting the characteristics of occupation that contributed to the ICJ's decision).

331. Wall Opinion, 2004 I.C.J. Rep. ¶ 111.

332. Ben-Naftali & Shany, *supra* note 213, at 71.

333. *Id.*

334. See *supra* note 276 and accompanying text (discussing *Lopez Burgos v. Uruguay* and *Casariago v. Uruguay*).

of the state.<sup>335</sup> The HRC's conclusions significantly lower the burden for a finding of either effective control or jurisdiction. Based on the ICJ's previous findings in the Wall Opinion, the HRC would grant standing to Palestinian or Israeli citizens in an annexed Jordan River Valley under its optional protocol.<sup>336</sup>

Finally, ECtHR has addressed the issue of the extraterritorial application of ECHR several times and found in favor of extraterritorial application often.<sup>337</sup> While ECtHR has no jurisdiction in this matter, its findings can be instructive. In *Al-Skeini*, ECtHR recognized that there are certain acts a party to the convention could take outside of its de jure territory that still constitute an exercise of jurisdiction within Article 1 of ECHR.<sup>338</sup> To determine whether a state has effective control over an extraterritorial region, the Court looked to the strength of the state's military presence in the area, as well as other relevant indicators, such as "the extent to which its military, economic and political support for the local subordinate administration provides it with influence and control over the region."<sup>339</sup> In *Ilascu*, the ECtHR created the irrebuttable presumption that a state maintains jurisdiction under ECHR Article 1 in areas of its territory where it cannot exercise the full weight of its authority.<sup>340</sup> This presumption provides that states are still responsible for their obligations under human rights treaties when not in complete control of parts of their territory.<sup>341</sup> The Jordan River Valley is distinguishable here because, even pre-annexation, it is under the complete military control of Israel.<sup>342</sup> Therefore, Israel has positive, irrebuttable responsibilities under

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335. See *supra* note 277 (providing the HRC's position).

336. See *supra* note 277 (expanding on the extraterritorial interpretations of the ICCPR). Israel, however, did not sign the optional protocol. *UN Treaty Body Database: Ratification Status for Israel*, *supra* note 62.

337. See Costelloe, *supra* note 140, at 367–68 (illustrating the ECtHR's refusal to limit the term "jurisdiction" to national territory).

338. See *id.*, at 370. "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention." ECHR art. 1. "Examples [of those acts] include acts of diplomatic and consular agents, the exercise of public powers through consent, invitation or acquiescence of the government of the territory, and the use of force by a State's agents in another State's territory where such acts bring an individual under the control of the [invading] State's authorities." Costelloe, *supra* note 140, at 369.

339. *Al-Skeini v. United Kingdom*, 2011-IV Eur. Ct. H.R. 99, 60.

340. *Ilascu v. Moldova*, App. No. 48787/99 Eur. Ct. H.R. 1, 73 (2004) (explaining that this presumption applies to cases of rebel-seized territory or foreign occupation).

341. *Id.*; see also *Dem. Rep. Congo v. Uganda*, Judgment, 2005 I.C.J. Rep. 168 (Dec. 19).

342. See *supra* Section I.B.4.

customary international law to enforce the ICCPR in the Jordan River Valley.

Various human rights bodies have held that contracting states to human rights treaties have a positive responsibility to enforce the conventions extraterritorially even if the area is outside its effective control.<sup>343</sup> As particularly relevant for this Comment, the ICJ held that Israel already exercised effective control in the Jordan River Valley *before* it unilaterally extends its sovereignty to the region.<sup>344</sup> When these areas are annexed, Israel will not only have effective control, but also a responsibility to enforce the provisions of ICCPR. An occupying power bears responsibility for the human rights of the inhabitants of occupied territories under IHRL that are subject to its effective control.<sup>345</sup> This human rights norm finds support in the practice and jurisprudence of international judicial bodies.<sup>346</sup>

In addition, the purpose and object of the ICCPR warrants its application to the Jordan River Valley. When determining whether the ICCPR should apply extraterritorially, the primary question is whether a state asserts effective control over a territory, but courts also consider the object and purpose of the treaty at hand and whether applying the treaty to the pertinent territory would promote the treaty's purpose.<sup>347</sup> Here, the ICCPR is the world's premier treaty that protects and preserves basic human rights.<sup>348</sup> Arguments for the application of human rights treaties to annexed territories are particularly strong simply due to their nature as human rights treaties, even if that application is extraterritorial.<sup>349</sup> In fact, one can rebut VCLT Article 29's presumption against extraterritorial application by arguing that a strict reading of territory should not limit the treaty's object, purpose, or values.<sup>350</sup> Therefore, the purpose of the ICCPR in promoting essential

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343. See *The Occupied Territories and International Law*, *supra* note 173 (finding support for this position in the U.N. Declaration on Human Rights; the International Covenant on Economic, Social and Cultural Rights; and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).

344. Hum. Rts. Comm., Concluding Observations of its Sixty-Third Session, U.N. Doc. CCPR/C/79/Add.93, ¶¶ 10–11 (1998).

345. See *supra* note 328 and accompanying text.

346. Ben-Naftali & Shany, *supra* note 213, at 100.

347. See *supra* Section I.D.4.a.

348. See *supra* Section I.D.2.

349. See Meron, *supra* note 200, at 82.

350. See Ben-Naftali & Shany, *supra* note 213, at 66–67.

human rights and the shared international values it represents compel its application extraterritorially to the annexed Jordan River Valley.

*C. Israel Has Defeated Its Own Defenses to Extraterritorial Application*

There is a clear international consensus that the effective control Israel already asserts in the Jordan River Valley requires the positive application of Israel's obligations under the ICCPR.<sup>351</sup> Yet the ICJ held similarly in 2004 in the Wall Opinion<sup>352</sup> and, to date, there has been no accountability. Israel continues to assert two main defenses to the extraterritorial application of the ICCPR (and other IHRL treaties): first, that the territories are not occupied because there is no true sovereign and therefore neither IHL nor IHRL applies, and second, that Israel is in a state of emergency and should thus be allowed to derogate its obligations in accordance with Article 4 of the ICCPR.<sup>353</sup> However, if Israel officially annexes the Jordan River Valley, it will dismantle its own defenses. With a proclamation of its intent to "extend sovereignty" to the Jordan River Valley, Israel is naming itself the sovereign and the territory is therefore no longer disputed.<sup>354</sup> This defeats the sovereign exception framework that Israel built for itself over the past fifty-three years. Secondly, while Israel may be able to claim that the violence that will likely follow annexation would warrant a state of emergency, there have been no examples of states abrogating their duties under the ICCPR, and it is unlikely that the HRC would grant a state of emergency under these circumstances.<sup>355</sup>

*1. Israel's proclamation of its intent to extend sovereignty to the Jordan River Valley by definition allocates the area to Israel's de jure territory, thus defeating the sovereign exception.*

Since 1967, when Israel seized the West Bank from Jordan in the Six-Day War, Israel has employed a complex legal argument to justify its

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351. Hum. Rts. Comm., Concluding Observations of its Sixty-Third Session, U.N. Doc. CCPR/C/79/Add.93, ¶¶ 10–11 (1998).

352. Wall Opinion, 2004 I.C.J. Rep. 136, ¶ 70 (July 9).

353. Human Rights Comm., Concluding Observations of its Sixty-Third Session, U.N. Doc. CCPR/C/79/Add.93, ¶¶ 10–11 (1998).

354. See *supra* note 77 and accompanying text (announcing "the gradual extension of Israeli sovereignty in [the West Bank]"); *supra* note 80 and accompanying text (asserting that Israel "will be able to annex all the settlements in [the Jordan River Valley]"); *supra* note 81 and accompanying text (stating that "[the Jordan River Valley and settlements in Area C] will be part of the State of Israel").

355. Ben-Naftali & Shany, *supra* note 213, at 49 n.106–07, 50.

actions in the territories, from building the Wall—which was the subject of the ICJ’s 2004 Wall Opinion—to continuing to expand its settlement project, and keeping Palestinians under military law.<sup>356</sup> Because the crux of this scaffolding is that since there was no true sovereign in the territories before Israel, and because Israel has not yet claimed sovereignty in the territories, they are without legal comparison, and therefore neither IHL and the law of occupation, nor IHRL have applied.<sup>357</sup> “Israel argues it is not bound by [IHRL] in the Occupied [Palestinian] Territories as they are not officially sovereign Israeli territory.”<sup>358</sup> For example, the Israeli Supreme Court (ISC) did not mention Israel’s obligation under IHRL in its decision on the Wall, rather citing to the Geneva Convention and the Hague Regulations.<sup>359</sup> This is an example of the sovereign exception at work, where the Court bypassed Israel’s obligations under IHRL, which provide expansive protections of a range of human rights, while maintaining the appearance of protecting human rights by citing to IHL, which is far less expansive in its protections of human rights, given that it is meant to only apply during wartime. The HRC has consistently rejected Israel’s arguments that the residents of the Palestinian Territories are not subject to Israel’s jurisdiction.<sup>360</sup> Although the HRC has not yet released its response to Israel’s October 2019 report, the Committee’s history of demanding that Israel apply IHRL treaties to the occupied territories indicates that the HRC will find Israel’s arguments weaker after annexation.

Israel has dismantled its own legal scaffolding by proclaiming its intention to extend sovereignty to the Jordan River Valley and declaring itself sovereign, thereby subjecting itself to the obligations of a sovereign, including enforcing IHRL treaties such as the ICCPR. Where a state has annexed part of another state’s territory (or, in this case, annexed a territory that it has been occupying), the annexing state “cannot consistently maintain its claim to sovereignty over the territory and [simultaneously assert] that its treaties do not apply with

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356. See *supra* Section I.C.

357. *Supra* Section I.C.

358. *The Occupied Territories and International Law*, *supra* note 173.

359. Dennis, *supra* note 209, at 121. The Hague Conventions provide rules governing the means and methods of conducting warfare, while the Geneva Conventions protect war victims, including both civilians and combatants. Richard L. Fruchterman, Jr., *Enforcement: The Difference Between the Laws of War and the Geneva Conventions*, 13 GA. J. INT’L & COMP. L. 303, 304 (1983).

360. See *supra* note 270 and accompanying text.

respect to that territory.”<sup>361</sup> This is particularly applicable when part of the state’s claim to sovereignty is the application of its treaties.<sup>362</sup>

Part of the long-term motivation to annex the Jordan River Valley is Israel’s belief that the Jewish people have a historical claim to the land.<sup>363</sup> Now that Israel intends to act on that belief, while in contravention of international law, Israel cannot rely on its decades-long justification for avoiding its positive obligations under the ICCPR.

2. *While Israel may be able to claim a state of emergency, that state of emergency would not warrant a derogation of its obligations under the ICCPR.*

In 1981, Israeli military commanders in the West Bank and Gaza established the Civil Administration for Palestinians, maintaining strict application of wartime emergency regulations to the Palestinian residents of those areas.<sup>364</sup> These emergency regulations are still in place today as a fundamental piece of the sovereign exception.<sup>365</sup> Israel has used the ongoing violence of Palestinian resistance to the Israeli presence in the West Bank, including the two Intifadas, as a defense against the application of the ICCPR.<sup>366</sup> Because Israel likens the ongoing violence to a state of war, it argues that “[t]he obligations assumed by states under the main international human rights instruments were never intended to apply extraterritorially during periods of armed conflict.”<sup>367</sup> The Wall Opinion recognizes that the *lex specialis* of IHL could exclude the general application provisions of the ICCPR during situations of armed conflict or military occupation.<sup>368</sup> Under various conditions, Article 4(1) of the ICCPR allows parties to derogate certain provisions of the Convention.<sup>369</sup> Israel made use of this derogation in 1991, arguing that it had been in a state of emergency since 1948 thus constituting “a public emergency within the meaning of Article 4(1) of

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361. Costelloe, *supra* note 140, at 372.

362. *See id.* (considering the possible preclusive effect that applying the state’s treaties to its annexed territories would have on the state’s claim to sovereignty).

363. *See supra* note 165 and accompanying text (quoting Levy Commission Report, *supra* note 12, ¶ 8) (arguing that Jordan relinquishing control over the West Bank in 1967 “restored the legal status of the territory to its original status, i.e. territory designated to serve as the national home of the Jewish people”).

364. *See Shehadeh, supra* note 29, at 10–11.

365. *See supra* note 168 and accompanying text.

366. Wall Opinion, 2004 I.C.J. Rep. 136, ¶ 127 (July 9).

367. Dennis, *supra* note 209, at 141.

368. *Id.* at 133.

369. International Covenant on Civil and Political Rights art. 4(1), Dec. 19, 1966, 999 U.N.T.S. 171.

the Covenant.”<sup>370</sup> This seventy-yearlong state of emergency is one pillar of Israel’s sovereign exception that has allowed Israel to employ emergency laws in order to avoid the application of IHRL even though the territories are more analogous to sovereign territory than a warzone.

However, no states have ever derogated their obligations under the ICCPR.<sup>371</sup> There are two theories as to why:

- (1) that states believe that the obligations assumed under the Covenant apply only to individuals “within [their] territory” and not to acts of armed forces executed outside their territory; or (2) that the *lex specialis* of [IHL] suspends the extraterritorial application of the ICCPR during periods of armed conflict and military occupation.<sup>372</sup>

Regarding the first theory, the effective control Israel currently exerts in the Jordan River Valley—as well as the increased control it would exert post-annexation—make the region part of Israel’s territory; thus, Israel will not be able to derogate its obligations under the ICCPR. Second, Israel has been arguing since 1967 that it is *not* occupying the Palestinian territories. To argue for derogation under the second theory posited above would contradict Israel’s claim of sovereignty and rightful ownership of the land. Therefore, Israel is unlikely to argue for a derogation of its responsibilities under the ICCPR.

Additionally, derogation only concerns Article 9 of the ICCPR, which deals with the right to personal liberty and security and lays down rules applicable in cases of arrest or detention.<sup>373</sup> Therefore, the other articles of the Covenant, including respect for the right to life, would remain applicable not only within Israeli territory, but also within any occupied or annexed Palestinian territory.<sup>374</sup> It is unlikely that the international

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370. Wall Opinion, 2004 I.C.J. Rep. ¶ 127.

Since its establishment, the State of Israel has been the victim of continuous threats and attacks on its very existence as well as on the life and property of its citizens . . . In view of the above, the State of Emergency which was proclaimed in May 1948 has remained in force ever since . . . The Government of Israel has therefore found it necessary, in accordance with the said article 4, to take measures to the extent strictly required by the exigencies of the situation, for the defence of the State and for the protection of life and property, including the exercise of powers of arrest and detention. In so far as any of these measures are inconsistent with article 9 of [the ICCPR], Israel thereby derogates from its obligations under that provision.

*Id.* ¶ 127.

371. Dennis, *supra* note 209, at 135–36.

372. *Id.* at 136.

373. Wall Opinion, 2004 I.C.J. Rep. 136, ¶ 127 (July 9).

374. *Id.* ¶ 105.



community would recognize Israel's derogation. Thus, Israel has defeated, by its own logic, its defenses against upholding its positive obligations under the ICCPR in the annexed Jordan River Valley.

### III. ISRAELI SUPREME COURT JURISPRUDENCE

Despite the ratification of five major human rights treaties in 1991, a survey of Israeli Supreme Court jurisprudence over the last twenty-five years “reveals that the human rights conventions almost entirely lack a formal legal status.”<sup>375</sup> Therefore, despite the strong argument in favor of the ICCPR applying in force to the Jordan River Valley post-annexation, domestic litigants, including the Palestinian residents of the Jordan River Valley, would likely lack standing to sue the government for violating the ICCPR in Israeli courts. Even if the plaintiffs manage to overcome the hurdle of justiciability, the case law does not support the positive application of human rights, especially when the obligations under the treaties conflict with domestic law.<sup>376</sup>

The rulings of international tribunals and the opinions of the international community have little impact on Israel, and therefore the willingness of the domestic institutions to implement the positive obligations under the ICCPR is paramount.<sup>377</sup> However, the ISC has ruled that both international treaty-based norms and customary international law are not

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375. Medina, *supra* note 53, at 332. Because the Israeli executive signed the treaties without the legislature's approval, Israel maintains that the treaties' provisions do not directly apply to it. See U.N. Human Rights Comm., *supra* note 274, ¶ 24 (discussing Israel's 2019 report to the HRC). Rather, Israel argues that its own Basic Laws fulfill the same purpose. *Id.* ¶¶ 41–42.

376. See CA 25/55 *The Custodian of the Property of Absentees v. Samara* 10 PD 1825 (1956) (Isr.) (explaining that international treaties are unenforceable in domestic courts); CA 65/67 *Kurtz v. Kirschen* 21(2) PD 20 (1967) (Isr.) (holding that a treaty-based norm is not domestically binding if it contradicts domestic law); CrimA 131/67 *Kamiar v. Israel* 22(2) PD 85 (1968) (Isr.) (noting that when a domestic law contradicts a norm of international law, the Court gives preference to domestic law); HCJ 419/83 *Doron v. Foreign Currency Comm'r* 38(2) PD 323 (1984) (Isr.) (holding that treaty provisions are not applicable law in Israel but rather norms that apply only in the international sphere); HCJ 279/51 *Amsterdam v. Minister of Finance* 6 PD 945 (1952) (Isr.) (ruling that if a domestic law conflicts with customary international law principles, the ISC should enforce the domestic law as long as the legislative intent is clear); CrimA 336/61 *Eichmann v. Attorney General* 16 PD 2033 (1962) (Isr.) (stating that it is the duty of the Court to give preference to local law). *But see* CrimA 41/49 *Shimshon Ltd. v. Attorney General* 4 PD 1, 6 (1950) (Isr.) (finding that commonly accepted international norms—that is, customary international law—could be a source for the Court).

377. Medina, *supra* note 53, at 334.

legally binding domestically, do not bind the legislature, are not directly enforceable against the government, and can only serve as a partial basis for judicial review of legislation.<sup>378</sup> Additionally, incompatibility with international law is not recognized as an independent cause of action.<sup>379</sup> Further, Israel points to its own domestic law, the Basic Law: Human Dignity and Liberty in particular, as more than sufficient to enforce the norms represented by international conventions and therefore claims that international conventions do not apply directly to Israel.<sup>380</sup> In particular, since the Israeli executive branch ratified the treaties without legislative approval, Israel relies on their own set of Basic Laws, other statutes and regulations, and court rulings to implement the norms represented in the ICCPR.<sup>381</sup> Therefore, despite the strong arguments for holding Israel accountable to enforce its obligations under the ICCPR to the Jordan River Valley post annexation, it is unlikely that Israel will implement the protections.

Israel faced resounding international condemnation of its plan to annex the Jordan River Valley.<sup>382</sup> The United States is the only country that has explicitly signaled that it would recognize Israel's claim to the land.<sup>383</sup> If Israel seeks broader approval of its annexation plan, a stringent commitment to upholding its human rights obligations could go a long way in convincing the international legal community that its claims have legitimacy. While Israel's adherence to human rights norms will not satisfy Palestinians, who recognize the devastating impact annexation would have on their desire for self-determination, it may placate the Palestinian residents of the Jordan River Valley to know that they will have some recourse in Israeli courts to protest perceived human rights abuses.

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378. *Id.* at 333.

379. HCJ 103/67 American-European Beth-El Mission v. Minister of Social Security PD 21(2) 325 (1967) (Isr.).

380. *See* U.N. Hum. Rts. Comm., *supra* note 274, ¶ 22.. "According to the Israeli legal system, international conventions, as opposed to customary international law, do not apply directly to Israel unless they were formally legislated." *Id.*

381. *Id.*

382. *See supra* Section I.B.2.

383. *Cf.* Haltiwanger, *supra* note 98 (describing President Trump's Middle East plan as one that "would effectively create a Palestinian territory surrounded by Israel, with the Israeli government in full control of security").

## CONCLUSION

Since 1967, Israel has avoided the application of international human rights treaties in the Palestinian Territories by leaning on the sovereign exception framework it built over the last fifty-plus years. This framework relies on the assumption that there is no rightful sovereign in the Palestinian Territories. However, with unprecedented moves towards annexation in recent years, Israel is unravelling its own sovereign exception.

Although territory gained in violation of the U.N. Charter's prohibition on the acquisition of land by force could be precluded from the protection of human rights treaties due to a strict reading of the word "territory," there are several examples of international tribunals adopting a wider interpretation of the term. This is particularly the case in situations where a broad reading of "territory" would provide additional protections to civilians in the region at issue, or when the state that is a party to the treaty exercises effective control over the region regardless. Due to these factors, coupled with a 2004 ICJ advisory opinion that found Israel to be exercising effective control in the West Bank, the ICCPR and all of its positive obligations and responsibilities should apply to the Jordan River Valley post annexation.

However, it is imperative for domestic courts to enforce the obligations and rights guaranteed by international law. The ISC has a long history of refusing to do so. Therefore, despite a strong international consensus to the contrary, it is unlikely that citizens of the Jordan River Valley will find any relief under the ICCPR. This is one example in a series of instances where Palestinians find themselves on the right side of international law, but without any relief in sight domestically. Perhaps, as Noura Erakat suggests, it is time for Palestinians and the international community to look beyond the international legal framework for solutions.