Israel Law Review **50**(2) 2017, pp 139–176. © Cambridge University Press and The Faculty of Law, The Hebrew University of Jerusalem, 2017.
doi:10.1017/S0021223717000061

Constitutional Mindset: The Interrelations between Constitutional Law and International Law in the Extraterritorial Application of Human Rights

Smadar Ben-Natan[*]

Applying human rights beyond state borders is thorny. Which law governs the property rights of a Palestinian whose orchard lies across the Israeli border, or the cross-border shooting of a Mexican citizen by a United States border control agent? This article explores the relationship between constitutional law and international law in the extraterritorial enforcement of human rights by offering a typology of models: the American, European and Israeli models. These models are analysed comparatively, highlighting their chosen legal source of rights: the American model applies constitutional law, the European model uses international law, and Israel combines the two.

The article argues that the choice between constitutional and international law is important as it affects the nature and scope of rights, and reflects the relationship between the state and the territory it controls or within which it acts. The dynamic formation process of the Israeli model demonstrates the multiple possible ways to combine these two sources of law and formulate the relationship between them.

All three models share a 'constitutional mindset': the use of basic legal concepts and reasoning in legally grey zones. However, these transnational processes are not deterministic and could result in original concepts, contradictions and discrepancies, as well as serve different political visions.

Keywords: extraterritoriality, human rights, constitution, law of occupation, comparative analysis

1. Introduction

A Palestinian woman is the owner of an orchard in the West Bank, part of the Occupied Palestinian Territories (OPT), adjacent to the 'green line' beyond which lies Israeli sovereign territory. Israeli security forces deem it necessary to uproot the trees in order to allow better protection of the home of the Israeli defence minister, located only a few dozen metres away from the orchard, in Israeli territory. Which law governs the rights of the Palestinian owner vis-à-vis Israeli authorities? The Israeli Supreme Court applied Israeli constitutional law, which protects the right to property.[1] However, this decision remains contested. In a subsequent case, a panel of 11 Supreme Court judges applied Israeli constitutional law to Israeli settlers in the OPT, while

[*] PhD Candidate, Zvi Meitar Center for Advanced Legal studies, Tel-Aviv University; Visiting Scholar, Center for the Study of Law and Society, University of California – Berkeley; smadar1@post.tau.ac.il. I wish to thank Doreen Lustig for her inspiring guidance in respect of my work on this article, as well as Leora Bilsky, Aeyal Gross, Amichai Cohen, Adam Shinar, Eyal Benvenisti, Natalie Davidson, Christopher Tomlins, Itamar Mann and Mickey Zar for their comments and assistance. I thank the anonymous readers of the Israel Law Review and the American Journal of International Law for their excellent comments, the participants of the PhD Colloquium at Tel-Aviv University, and the Minerva Center for Human Rights at Tel-Aviv University for their support of this research project.

[1] HCJ 7862/04 *Abu Daher v Commander of IDF Forces in Judea and Samaria* 2005 PD 59(5), para 8, Israeli constitutional law was applied alongside international humanitarian law.

leaving the question of its application to Palestinians undecided and still awaiting a future decision.[2] The United States (US) Supreme Court is about to hear a claim by the family of a Mexican teenager, shot to death by a US border control agent across the US–Mexico border.[3] The claimants argue that the 'border with Mexico is not an on/off switch for the Constitution's protections against the unreasonable use of deadly force'.[4] These cases trigger the question of the extraterritorial application of human rights obligations, which has become a hotly debated subject in both international and national fora. The US Supreme Court applied the constitutional right of habeas corpus to detainees in Guantánamo Bay, but the DC Circuit did not extend the same right to detainees in Bagram prison in Afghanistan.[5] The European Court of Human Rights (ECtHR) held that the United Kingdom (UK) is responsible not only for the rights of prisoners it held in Iraq but also for civilians who were affected by its air strikes.[6] Novel and contested decisions of the ECtHR, the UK House of Lords and the US Supreme Court on these issues – following mainly from the occupation of Iraq, Afghanistan and the 'War on Terror' – have attracted much scholarly attention.[7]

Some authors have analysed and commented on the extraterritorial application of international human rights treaties;[8] others have focused on the application of domestic constitutional law beyond state borders.[9] They have all taken for granted the source of law. The literature has hardly addressed the extraterritorial application of constitutional law and international law under a single framework.[10] In this article, I examine the choice and the relationship between constitutional law and international law in the extraterritorial enforcement of human rights. This choice can affect the nature and scope of rights that are applied, and should deal with possible

[2] HCJ 1661/05 *Gaza Coast Regional Council v The Knesset* 2005 PD 59(2), [79]–[80]. By 'OPT' I refer, throughout this article, to the West Bank and the Gaza Strip. Some of the decisions refer only to one of those regions. Israel withdrew its forces from the Gaza Strip in 2005 and subsequently maintains that it is no longer occupied territory. However Israel continues to maintain control over it from the outside, controlling entries and departures, as well as the population registry and other vital infrastructure such as electricity and the flow of commodities. The controversy over the status of the Gaza Strip does not directly concern us here, as most of the decisions discussed here preceded the 2005 withdrawal. It is obviously not disputed that Gaza is outside Israeli sovereign territory.

[3] *Hernandez v Mesa* 785 F 3d 117 (5th cir 2015) cert granted 2016.

[4] Adam Liptak, 'An Agent Shot a Boy Across the US Border: Can His Parents Sue?', *The New York Times*, 17 October 2016.

[5] *Boumediene v Bush* 128 US 2229 (Sup Ct 2008); *Al Maqaleh v Gates* 605 F 3rd 84 (99 DC Circuit 2010).

[6] ECtHR, *Al-Skeini v United Kingdom*, App No 55721/07, 7 July 2011.

[7] See generally Marko Milanovic, *Extraterritorial Application of Human Rights Treaties* (Oxford University Press 2011); Gerald Neuman, 'Understanding Global Due Process' (2009) 23 *Georgetown Immigration Law Journal* 365; Galia Rivlin, 'Constitutions Beyond Borders: The Overlooked Practical Aspects of the Extraterritorial Question' (2012) 30 *Boston University International Law Journal* 135.

[8] Milanovic (n 7); Karen da Costa, *The Extraterritorial Application of Selected Human Rights Treaties* (Martinus Nijhoff 2012); Orna Ben-Naftali and Yuval Shany, 'Living in Denial: The Application of Human Rights in the Occupied Palestinian Territories' (2003) 37 *Israel Law Review* 17.

[9] Chimène I Keitner, 'Rights Beyond Borders' (2011) 36 *Yale Journal of International Law* 55; Rivlin (n 7); Jenny S Martinez, 'New Territorialism and Old Territorialism' (2014) 99 *Cornell Law Review* 1387.

[10] Gerald Neuman ((n 7) 382–98) discusses the extraterritorial jurisprudence of the US Supreme Court, providing some comparative analysis with European states and suggesting a method for combining international law with the US Constitution; Sarah H Cleveland, 'Our International Constitution' (2006) 31 *Yale Journal of International Law* 1, 33–35, 44–49, discusses more broadly the relationship between constitutional law and international law in constitutional interpretation, and dedicates some attention to territorial questions. Both of them concentrate on the US.

contradictions between these two sources. It may also reflect the type of control that the state is exercising over territories outside its borders but within its reach – either by way of temporary control or control of a more permanent nature that de facto incorporates them.

I examine this question through a comparative analysis of three courts, implementing three models for extraterritorial human rights: the European model, the US model and the Israeli model. The US model centres on constitutional law, while the European model centres on international law.[11] The formation process of a possible third model by the Supreme Court of Israel combines these two sources. I am describing here actual models of actual courts and not ideal types. Nonetheless, it is right to infer that they correspond analytically with ideal types of an international law model, a constitutional law model, and a hybrid model, which demonstrate the spectrum of possible models. The dynamic process in the Israeli Supreme Court is helpful for understanding the plurality of possible models along that spectrum. It also demonstrates how particular circumstances, history and legal tradition – like the Israeli occupation of the Palestinian territories, with its unique characteristics and the legal tradition that was created around it – blur sharp doctrinal argumentation and affect the model that eventually crystallises. As I will demonstrate, the Israeli jurisprudence currently results in an unclear model, shifting between international and constitutional law, but also relying on administrative law and international humanitarian law. This indeterminacy is reflective of the undecided character of the control Israel applies to these territories.

Neither constitutional law nor international human rights law (IHRL) provides explicit rules on their extraterritorial application. Each generally speaks in personal terms, applying rights to people rather than to territory. Still, the territorial question arises, since it would be unreasonable to conclude that states are obligated to ensure the human rights of every person, wherever she or he might be. Some connection with the state is required, but what should this connection be? In fact, constitutional law and international law might give different and even contradictory answers to this question. International law originally applied between states, and therefore seems more appropriate for extraterritorial application. However, IHRL applies between states and individuals, which makes the answer less straightforward. For example, in extraterritorial situations, individuals might be subject to more than one sovereign state at the same time, or the extraterritorial state might deny any obligation towards non-citizens. Additionally, many extraterritorial situations involve occupation of territory. The international law of occupation provides that states should not change the local law in an occupied territory and should not apply their own laws to it.[12] Therefore, it seems to exclude the application of the occupying state's constitution to occupied territory. According to IHRL, human rights treaties impose obligations on occupying

[11] For a comparative analysis of domestic jurisprudence on the application of domestic law see Keitner (n 9).
[12] Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (entered into force 21 October 1950) 75 UNTS 287 (GC IV), art 64; Jean S Pictet, *Commentary on the IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (International Committee of the Red Cross 1958) 334–35; Marco Sassòli, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers' (2005) 16(4) *European Journal of International Law* 661, 677; Yoram Dinstein, *The International Law of Belligerent Occupation* (Cambridge University Press 2009) 49.

https://doi.org/10.1017/S0021223717000061 Published online by Cambridge University Press

states in occupied territories.[13] From the point of view of international law, this is the only relevant source of human rights obligations. From the perspective of domestic law, as well as of international principles of sovereignty, state law is generally presumed to apply territorially unless the law explicitly indicates otherwise.[14]

Moreover, the constitution is often perceived as a social contract, reflecting the values and commitments of a particular political community, thus possibly excluding others who do not belong to the same polity. The application of constitutional law is taken to imply inclusion in the political community or, on the other hand, legal imperialism, applying legal concepts of powerful states to the less powerful. Yet constitutional law generally enjoys more legitimacy within the state, and is embedded in the legal conceptions and imagination of domestic courts to the extent that they perceive fundamental constitutional rights as universally valid, even beyond state borders. As we shall see, constitutional courts have been applying at least some parts of their constitutions extraterritorially.

The rules of international and constitutional law, then, do not spell out the conditions of their own extraterritorial application, and the answer to the question is not clear. Yet different courts do answer it, in different ways. Martti Koskenniemi has suggested that when judges face the need to decide which rules to apply where no rule clearly applies, they do so with a 'constitutional mindset': the use of basic legal concepts and principles in legally grey zones and the denial of legal 'black holes':[15]

> [E]ven where legal materials run out, legal reason will continue to operate … the application of any one rule presumes the presence of principles about how to determine the rule's validity, whom it binds, how to interpret it, and what consequences might follow from its breach.

The extraterritorial application of human rights raises many questions to which the law does not provide clear answers. First, what is the applicable law and which court has jurisdiction? Then, should these applicable rights be enforced fully or partially? Finally, if enforcement is partial, what should be its guiding principle? However, as Koskenniemi argues, even with a constitutional mindset there could be a few possible answers to these questions, affected by many factors: '[A]n architectural project, constitutionalism, just like the rule of law, is compatible with many kinds of politics and it is far from clear who might currently stand to benefit'.[16] Because of the particular conceptions and histories of each context, the road eventually taken may not

[13] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion [1996] ICJ Rep 226; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Rep 136 (*Wall*); *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v Uganda*), Judgment [2005] ICJ Rep 168.

[14] With some exceptions to this presumption. For the presumption of territoriality, or against extraterritoriality, see *Kiobel v Royal Dutch Petroleum Co* 133 S Ct 1659 (2013); HCJ 2612/94 *Sha'ar v State of Israel* 1994 PD 48(3) 675, 680; Martinez (n 9).

[15] Martti Koskenniemi, 'Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization' (2007) 8(1) *Theoretical Inquiries in Law* 9, 19–22; Keitner (n 9) 110–11 also finds that domestic courts are reluctant to leave 'law-free zones'.

[16] Koskenniemi, ibid 18.

https://doi.org/10.1017/S0021223717000061 Published online by Cambridge University Press

necessarily be in line with mainstream authoritative interpretation of international law, nor with some perceptions of human rights.

In an attempt to tackle these questions, the literature has offered several conceptualisations of the fundamental approaches to the extraterritorial application of rights.[17] These taxonomies have very much in common. In all there is a *territorial approach* (also called municipal/country) by which a state owes obligations in a territory under its effective control; a *political status approach* (membership/personal/compact) by which obligations are based on a social contract conception and rights are determined by membership – citizenship or other status of the affected person; and a *universal approach* by which the state owes obligations with regard to its own actions whenever it is acting beyond its borders (universal/state agent authority/conscience). According to this principle, the obligation to respect human rights applies to government officials when exercising their authority because they and their actions are subject to and guided by the law of the state. Gerald Neuman has proposed a categorisation of four approaches: universalism; membership; municipal law – territoriality; and the balancing approach, or 'global due process'. Marko Milanovic offered three guiding principles: territorial, personal, and state agent authority. Chimène Keitner suggested categorising the approaches as country, compact, and conscience. Each of the models I will describe attempts to answer the question by which of these three principles, or their combination, should rights be applied extraterritorially.[18]

However, there are two additional questions that each model faces once a court asserts jurisdiction. The first is what should be the legal source of rights: constitutional law or international law? This is a question typically posed by domestic courts, as is apparent from the following discussion on the position of the US and Israeli Supreme Courts, and in other jurisdictions, including Canada, Germany and France.[19] The second question is whether to apply the rights recognised in the constitution or convention fully or only partially, distinguishing between rights that are more appropriate or less appropriate for extraterritorial application. For example, are some rights more fundamental than others? Should positive and negative obligations be applied equally? Should political rights and freedoms be distinguished from economic and social rights? Should rights that are more culturally particularistic be applied? I therefore argue that all three questions of legal source, total or partial application of rights and guiding principle make up a model of extraterritorial human rights. This is so even if the question of the source of law is not explicitly dealt with in an extraterritorial context, or not dealt with by the judiciary because it has been decided

[17] Gerald L Neuman, 'Whose Constitution?' (1991) 100 *Yale Law Journal* 909; Milanovic (n 7).

[18] Neuman (n 7) and Milanovic (n 7) each offer a balanced approach, which answers this question and does not strictly comply with any of the three approaches. Neuman offers the global due process approach, which complements the universal approach with a judicial discretion not to apply rights when their application would be 'impracticable and anomalous'; this resembles the approach taken in *Boumediene v Bush* (n 5). Milanovic offers to take a territorial approach but to limit the scope of obligations to those of a negative nature (not to violate) and not to positive obligations (to actively grant rights to the whole population). This approach generally resonates with the ECtHR approach in *Al-Skeini v United Kingdom* (n 6) that rights could be 'divided and tailored'.

[19] See Neuman (n 7) 383–84 (Germany and France); Milanovic (n 7) 65 (Canada); Keitner (n 9) 81–91 (Canada).

elsewhere.[20] The following discussion will demonstrate how each of these questions is dealt with, explicitly or implicitly, while some remain unanswered.

Focusing on the question of the legal source of rights, I will argue that the possible choice between various legal sources and the possible relations between them make this question crucial to the model of extraterritoriality, for the reasons I have just discussed above. Additionally, the nature and scope of rights could be different under international or constitutional law, as well as the limitation of rights. IHRL might protect rights more comprehensively and in a more universalistic manner, appropriate for extraterritorial application. Constitutional law might contain more particularistic rights (such as the right to trial by jury); some of them depend on citizenship, and may not protect other rights that are recognised in IHRL (such as women's right to equality).

Constitutional law and international law are not necessarily alternative legal sources. In fact, they both apply within the territory of a state. Each legal system adopts a theory of reception of international law and finds different ways to align it with domestic law and concepts.[21] In Israel, for example, like some other common law jurisdictions, customary international law is automatically incorporated and enforceable in domestic courts, unlike non-customary treaty law, which is binding only once it is incorporated through legislation. There is also an interpretative presumption of compatibility of local law with non-binding international law, unless an explicit contradiction arises and domestic law prevails. It is therefore the relationship between them that needs to be resolved.[22] Therefore, we cannot rule out the development of models that give weight to both international law and constitutional law. As the systems and institutions of global, transnational and international law have strengthened, a range of legal systems have emerged and states have lost the monopoly over lawmaking.[23] The transnational legal process is complex and multilayered, involving a range of state and non-state entities, and various legal fora inside

[20] Another question that occasionally arises is the potential conflict between the legal obligations of the extraterritorial power and the legal system of the territorial state. However, this question seems less fundamental than the others since none of the courts or scholars suggest a full extraterritorial application of law that conflicts with local law. Enforcement of such obligations is left with the courts of the extraterritorial state.

[21] Broadly speaking, there are two conceptual approaches to relations between these different systems of law. The constitutional approach creates a clear hierarchy of norms on the global level, analogous to an autonomous state legal system. In the pluralistic approach, multiple legal sources, without a clear hierarchy, maintain relations of dialogue and mutual influence: Jean L Cohen, 'Constitutionalism Beyond the State: Myth or Necessity? (A Pluralist Approach)' (2011) 2(1) *Humanity* 127.

[22] For examples of different formulations of the relations between international law and constitutional law see, on the US, Harold Hongju Koh, 'International Law as Part of Our Law' (2004) 98 *American Journal of International Law* 43; Gerald L Neuman, 'The Uses of International Law in Constitutional Interpretation' (2004) 98 *American Journal of International Law* 82; Cleveland (n 10). On the UK, Canada and the US, see Keitner (n 9). On Israel, see Daphne Barak-Erez, 'The International Law of Human Rights and Constitutional Law: A Case Study of an Expanding Dialogue' (2004) 2 *International Journal of Constitutional Law* 611; Amichai Cohen, 'Unequal Partnership? The Internalization of International Law into Israeli Law by the Israeli Supreme Court: The Case of the Territories' (2007) 6 *Mozney Mishpat* [*Netanya Academic College Law Review*] 157 (in Hebrew).

[23] Anne-Marie Slaughter, 'Disaggregated Sovereignty: Towards the Public Accountability of Global Government Networks' (2004) 39 *Government and Opposition* 159; Eyal Benvenisti, 'Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts' (2008) 102 *American Journal of International Law* 241; Cohen, ibid.

and outside the state.[24] The relations between state, international and transnational systems of law remain unresolved.[25] The formation process of an Israeli extraterritorial model, by which international and transnational rules are interpreted and applied, demonstrates this complicated relationship, the growing power of these rules, the absence of a clear hierarchy of legal orders, and the loss of state exclusivity in creating and interpreting the law.[26] At the same time, it reveals the dominance of domestic law, which always serves as a yardstick for domestic courts.[27] The discussion itself allows us to follow a transnational legal process in the making, to imagine possible models beyond those currently prevailing, and to further reflect on those models and the possible relations between them.[28]

This article begins with a review of the two principal models of extraterritorial human rights: the European model and the US model. The following section (Section 3) describes the jurisprudence of the Supreme Court of Israel, separately addressing its application of human rights conventions and constitutional law, and compares it with the prevailing models. Section 4 presents the shared aspects of these transnational processes and the constitutional mindset expressed in them. Drawing on insights from the evolving Israeli model and its comparison with the other models, I critically examine the way in which transnational legal processes should be viewed, and explore the deeper meanings of the choice between international and constitutional law and the relationship between them.

Some preliminary observations are needed before I reach the extraterritorial models, the first of which concerns the use of the term 'constitutional' throughout this article. I use the term in three distinct ways. The first and most obvious refers to 'constitutional law'. The second borrows Martti Koskenniemi's term 'constitutional mindset', used to describe the judicial non-positivistic conception according to which, even in new, previously unrecognised or ambiguous situations, there is never a legal void. In such a mindset the void is always already filled with underlying rules and principles.[29] The third and less dominant way refers to a 'constitutional approach' to the relationship between domestic law and international law, ordering them hierarchically, as opposed to the pluralistic approach.[30]

The second observation concerns closely related but different questions from those discussed here. The relationship between IHRL and the laws of war or international humanitarian law (IHL) is one of them. The question of the extraterritorial application of IHRL is often related to its parallel application with the laws of war, since war is a typical situation in which states operate outside their own territory. However, there are other situations, unrelated to war, in which the question is relevant – for example, law enforcement agents operating in another state to conduct

[24] Harold Hongju Koh, 'Transnational Legal Process' (1996) 75 *Nebraska Law Review* 181.
[25] Cohen (n 22).
[26] Slaughter (n 23); Benvenisti (n 23); Cohen (n 22).
[27] Michael F Sturley, 'International Uniform Laws in National Courts: The Influence of Domestic Law in Conflicts of Interpretation' (1987) 27 *Virginia Journal of International Law* 729.
[28] Koh (n 24).
[29] Koskenniemi (n 15).
[30] Cohen (n 22).

https://doi.org/10.1017/S0021223717000061 Published online by Cambridge University Press

law enforcement activities, extralegal operations such as abductions and renditions, or when forces or officials are deployed and carry out a role with the consent of the other state. Thus, the extraterritorial question extends beyond the obligation to protect human rights during armed conflict. It is this general extraterritorial question, and its relationship with constitutional law, that this article addresses. In Israel, though, the question of extraterritorial application is relevant mostly to the OPT,[31] where, according to the International Court of Justice (ICJ) and the dominant scholarly view, IHRL and IHL are mutually applicable.[32] The question of this mutual application often comes to mind, then, but it is not the question addressed here.[33]

Another closely related question is the use of international law by domestic constitutional courts, either domestically or extraterritorially. International law is used mainly in two ways: (i) it can be applied directly as a binding rule (when a treaty is incorporated into law or otherwise considered binding and enforceable; a customary or a *jus cogens* international rule); or (ii) as a non-binding interpretative or comparative tool.[34] Under the models suggested here, a court implementing the European/international model will recognise the binding force of international law; a hybrid model can exercise both usages; and a court using the US/constitutional model will see the constitution as binding but might still use international law as an interpretative/comparative tool. In my discussion I ask to what extent the relevant courts see international law or constitutional law as binding legal sources for extraterritorial application. Other usages of international law come into play, but I will not explore and develop this aspect.

The third preliminary observation relates to Israeli constitutional law. Israel does not have a single written constitution, but a series of Basic Laws that are intended to progressively form a constitution. The earlier Basic Laws concerned the structural and institutional parts of the constitution and did not include a bill of rights. The jurisprudence of the High Court of Justice acknowledged and protected many basic human rights, in what was termed the 'judicial bill of rights'. In 1992, the Israeli parliament (the Knesset) enacted two Basic Laws concerning human rights – Basic Law: Human Dignity and Liberty, and Basic Law: Freedom of Occupation. These laws marked a change in both entrenching human rights and in stating the

[31] The legal system in Israel has also encountered cases of extrajudicial extraditions or abductions, such as in the cases of Adolph Eichmann, Mordechai Vanunu, Sheikh Obeid and others, but most of the legal debate has not been devoted to this point.

[32] *Nuclear Weapons* (n 13); *Wall* (n 13); *Congo v Uganda* (n 13) [216]–[219]; Ben-Naftali and Shany (n 8).

[33] For a discussion of the question of mutual applicability and relations of IHRL and IHL see, for example, Cordula Droege, 'The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict' (2007) 40 *Israel Law Review* 310; Aeyal M Gross, 'Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?' (2007) 18 *European Journal of International Law* 1; Naz K Modirzadeh, 'The Dark Sides of Convergence: A Pro-Civilian Critique of the Extraterritorial Application of Human Rights Law in Armed Conflict' (2010) 86 *US Naval War College International Law Studies* (*Blue Book Series*) 349; Orna Ben-Naftali, *International Humanitarian Law and International Human Rights Law* (Oxford University Press 2011); Noam Lubell, 'Human Rights Obligations in Military Occupations' (2012) 94(885) *International Review of the Red Cross* 317; Aeyal Gross, 'The Righting of the Law of Occupation' in Nehal Bhuta (ed), *The Frontiers of Human Rights: Extraterritoriality and Its Challenges* (Oxford University Press 2016) 21.

[34] A great body of literature examines this question in general and in different contexts. See Sturley (n 27); Keitner (n 9); as well as references in n 22.

https://doi.org/10.1017/S0021223717000061 Published online by Cambridge University Press

normative supremacy of these Basic Laws over regular laws.[35] However, both the partial codification of constitutional human rights and the judicial bill of rights have not created a comprehensive bill of rights. Some very important rights are either not recognised explicitly (social and economic rights), partially recognised in a non-human rights context (the right to a fair trial) or do not enjoy constitutional supremacy (the right to equality). The lack of a comprehensive bill of rights is apparent in a comparative perspective: the protection of rights in Israeli constitutional law is not equivalent to that provided by comprehensive constitutions or by human rights conventions, and is potentially weaker. The term 'constitutional law' in the Israeli context is thus far more fluid and undetermined. In what follows, I will not analyse and compare the protection provided by Israeli constitutional law versus human rights conventions;[36] my aim is not to search for an optimal model for the protection of rights. I also do not discuss the effectiveness of the Supreme Court enforcement of human rights in the OPT, which has been the subject of fierce and generally justified criticism.[37] My account will be descriptive and explanatory rather than normative, with the aim of comparing and situating the different models in a broader context, highlighting the importance and the relevance of the source of law that is applied.

As I will elaborate more in the beginning of the second part, the characterisation of the models as 'European', 'US' or 'American', and 'Israeli' – and their comparative analysis – requires justification, given the institutional differences between them. Arguably, I could have characterised the European and US models as a regional international court model and a federal supreme court model, or as an international law model versus a constitutional law model.

The first of these two options is an inaccurate generalisation, as the construction of the extraterritorial model is not determined solely by the institutional nature of the court. Both international courts and federal or non-federal supreme courts can apply both international law and constitutional law, and thus develop different extraterritorial models. The doctrine of the extraterritorial application of rights is very different in the US Supreme Court, the Canadian Supreme Court and the German Supreme Court – all of which are federal supreme courts – and so are the doctrines of other domestic supreme courts.[38] Although international courts are premised on international law, they can also develop different relations with the constitutional

[35] Aharon Barak, 'The Constitutional Revolution: Protected Basic Rights' (1992) 1 *Mishpat Umimshal* [*Law and Government*] 9 (in Hebrew); Aeyal M Gross, 'The Politics of Rights in Israeli Constitutional Law' (1998) 3(2) *Israel Studies* 80.

[36] For discussion on this point see Yaël Ronen, 'Applicability of Basic Law: Human Dignity and Freedom in the West Bank' (2013) 46 *Israel Law Review* 135.

[37] For some of this criticism see Ronen Shamir, '"Landmark Cases" and the Reproduction of Legitimacy: The Case of Israel's High Court of Justice' (1990) 24 *Law & Society Review* 781; David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (SUNY Series on Israeli Studies 2002) 19–29; Gross (n 33); Shiri Krebs, 'Lifting the Veil of Secrecy: Judicial Review of Administrative Detentions in the Israeli Supreme Court' (2012) 45 *Vanderbilt Journal of Transnational Law* 639.

[38] For a description of the Canadian and German doctrines see Neuman (n 7) 383–84 (Germany); Milanovic (n 7) 62–65 (Canada); Keitner (n 9) 81–91 (Canada). Keitner's article is a comparative analysis of extraterritorial application of constitutional law in three jurisdictions: the US, Canada and the UK, demonstrating among other things the differences between them and the role given to international law in both Canada and the UK (Keitner (n 9) 85–91, 96–97) as well as arguing for the relevance of their comparative analysis, although only the UK is subject to the regional system of the ECtHR.

law of member states. The ECtHR doctrine of the margin of appreciation is one such example, where the Court allows states some leeway in determining certain issues according to their domestic constitutional concepts.[39] In fact, one of the main arguments of this article is that the interrelations between constitutional law and international law allow for such a diversity of different models.

The second option – of an international law model versus a constitutional law model – is more appealing and is actually quite correct. The European model and the US model are very close to representing such models. However, putting it this way would be describing ideal type models, and this is not my intention. In what follows, I am describing actual models of actual courts and not ideal types. The actual models are not static but dynamic, contain contradictions and are affected by politics, culture, history, and many other factors.

2. A TALE OF TWO CONTINENTS

The US model and the European model for the extraterritorial application of human rights diverge on the legal source of extraterritorial legal obligations, and the conditions for their application. The European model applies the European Convention on Human Rights (ECHR or 'the Convention'), and the US model applies the US Constitution. The ECtHR is part of a regional human rights system that subjects the states of the Council of Europe to the ECHR, and its rulings are binding upon member states.[40] The United States could also be part of a regional human rights system, since it is a signatory to the American Convention on Human Rights (ACHR),[41] but has not ratified it. However, since it has not ratified the ACHR, it is not subject to the Inter-American Court of Human Rights, the decisions of which in any event lack binding force on state parties. The regional human rights system is thus almost meaningless for the United States, the world's superpower.[42] The US Supreme Court thus conducts the debate at the level of domestic law, with the US Constitution serving as the principal normative legal source for the extraterritorial application of rights.

Naturally, each forum operates in accordance with the applicable law under its jurisdiction, but in extraterritorial cases it is not always obvious what the applicable law is. The US Supreme Court implements a pragmatic approach in deciding on the extraterritorial application of the Constitution in each case, taking into account the citizenship and status of the affected person, the location of the

[39] George Letsas, 'Two Concepts of the Margin of Appreciation' (2006) 26 *Oxford Journal of Legal Studies* 705.
[40] European Convention on Human Rights and Fundamental Freedoms (entered into force 3 September 1953) 213 UNTS 222 (ECHR), art 46; Marie-Bénédicte Dembour, *Who Believes in Human Rights? Reflections on the European Convention* (Cambridge University Press 2006) 22–25.
[41] American Convention on Human Rights, Pact of San Jose, Costa Rica (entered into force 18 July 1978) 1144 UNTS 123 (ACHR).
[42] According to art 62 ACHR, recognition of the authority of the Inter-American Court of Human Rights is conditional upon a declaration by the state, and the US has not recognised the Court's authority: Organization of American States, Inter-American Commission on Human Rights, 'Signatures and Current Status of Ratifications', *Basic Documents Pertaining to Human Rights in the Inter-American System* (2007) 51, https://www.oas.org/dil/treaties_b-32_american_convention_on_human_rights_sign.htm.

https://doi.org/10.1017/S0021223717000061 Published online by Cambridge University Press

event, the degree of control of the US over that territory, and practical obstacles to the enforcement of the right.[43] The ECtHR has stated repeatedly that the ECHR imposes obligations on the state signatories outside their territory in relation to anyone 'under [their] jurisdiction' and where the state has effective control, but not necessarily in its full scope of rights.[44] Both fora, then, consider the degree of control of the territory as a relevant factor.

A comparative consideration of doctrines employed by these two fora is not without difficulties. I am comparing the doctrine of a national federal supreme court with that of an international regional court. The ECtHR is a court that deals exclusively with the enforcement of human rights, as does the ECHR, while the US Supreme Court is concerned with the entire scope of legal issues, and the Constitution encompasses not only the Bill of Rights but also the structure and authority of the branches of government. The ECtHR is a relatively new court, operating according to a convention made in 1950, while the US Constitution is 230 years old. The differences are enormous. This variation necessarily limits the conclusions to be drawn from the comparison.

However, despite the differences I maintain that the comparative analysis suggested here on the issue of extraterritorial human rights is useful. First, there are some important similarities between the two institutions. On the issue of human rights, these courts review and determine the legal policies of the world's powerful nations. They both preside over a huge geographical area, divided into states. While the Council of Europe is not a federal system, European states are bound by the decisions of the ECtHR and in some cases they incorporate the Convention into their domestic legislation. In this sense the ECHR and the Court create a quasi-constitutional European system.[45] Second, and most importantly, the subject of the inquiry – international and constitutional law in extraterritorial cases – makes the comparison analytically valuable. Both Courts deal with the same question, and theoretically could have given similar answers to it. The ECtHR could have determined that the Convention applies only within or between European states,[46] and that each state could determine the extraterritorial application of its own constitution. Similarly, the US and its Supreme Court could have taken a different position on the status and enforceability of the American Convention on Human Rights and of other human rights conventions that the US has joined. Both the US and European states are parties to the ICJ, which has dealt with the extraterritorial application of international human rights conventions.[47] The ICJ began with the temporal and material question of the parallel application of

[43] *Boumediene v Bush* (n 5). In this case the Court stated that the constitutional right of due process of law applies, under certain conditions, outside the US and to non-citizens, referring to Guantánamo Bay detainees, but see *Al Maqaleh v Gates* (n 5), in which it was decided that detainees held by the US in Bagram prison in Afghanistan are not entitled to the same rights.

[44] ECtHR, *Loizidou v Turkey*, App no 15318/89, Merits, 18 December 1996; ECtHR, *Cyprus v Turkey*, App no 25781/94, 10 May 2001; ECtHR, *Issa v Turkey*, App no 31821/96, 16 November 2004; ECtHR, *Al Saadoon v United Kingdom*, App no 61498/08, 2 March 2010; *Al-Skeini v United Kingdom* (n 6).

[45] Anne-Marrie Burley and Walter Mattli, 'Europe Before the Court: A Political Theory of Legal Integration' (1993) 47 *International Organization* 41.

[46] Such an approach was implied by the ECtHR in *Banković v Belgium*, App no 52207/99, 12 December 2001, para 80, stating that the Convention was intended to apply within the *espace juridique* of Europe.

[47] Like the courts that have addressed this, I use this term to refer primarily to the following conventions: the International Covenant on Civil and Political Rights (entered into force 23 March 1976) 999 UNTS 171

https://doi.org/10.1017/S0021223717000061 Published online by Cambridge University Press

IHL and IHRL.[48] In the advisory opinion concerning the wall built by Israel in the Palestinian territories and in its decision in *Congo v Uganda*, the ICJ added the territorial aspect and ruled that human rights conventions are binding on a state in territories that it occupies outside its own borders.[49] Finally, the models I suggest and describe represent two poles of the same spectrum; therefore, they can contribute analytically to our understanding of the various possible models along that spectrum.

With these qualifications in mind, I will turn to discuss each model and the answers it provides for the gaps in the extraterritorial enforcement of human rights: the court's jurisdiction; the source of applicable law; the full or partial application of that source; and the guiding principle for application (territory/person/action).

2.1. EUROPE

The European Convention on Human Rights obligates the states to secure the rights of anyone under their jurisdiction.[50] The central decisions on extraterritoriality of the ECtHR address human rights obligations during military occupation and military activity. The rulings have evolved from a situation of occupation (which is relatively clear in terms of the effective control of the occupying state) to 'greyer' areas of exercising authority, military force and law enforcement. In two early decisions, the ECtHR determined that the ECHR imposes obligations on Turkey in Cyprus, where it occupies substantial territories, towards the populations of these territories.[51] In *Banković v Belgium*, the Court stipulated that the ECHR did not apply to the NATO bombings during the war in the former Yugoslavia because, unlike earlier cases, the events occurred where the state concerned did not have effective control.[52] In addition, it held that the territorial state (Yugoslavia) was not a party to the Convention, which is regional in essence and does not reflect a universal concept of human rights that should be implemented outside the European *espace juridique*. According to the Court, the various obligations in the Convention cannot be 'divided and tailored'. Therefore, its application means a comprehensive commitment to ensure all of the rights in the Convention, which is impractical. This decision created confusion with regard to both the outcome and the reasoning, which is highly controversial. It meant that states acting outside Europe, or even within Europe in states that have not joined the Convention, could be free from their commitment to the human rights of civilians and from judicial review of their actions. However, in subsequent decisions, the ECtHR has determined that states are

(ICCPR), the International Covenant on Economic, Social and Cultural Rights (entered into force 3 January 1976) 993 UNTS 3 (ICESCR), and the Convention on the Rights of the Child (entered into force 2 September 1990) 1577 UNTS 3 (CRC). As a rule, the same principles apply to other conventions, such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (entered into force 26 June 1987) 1465 UNTS 85 (CAT), but they raise other specific issues pertaining to the definition of their application.

[48] *Nuclear Weapons* (n 13).

[49] *Wall* (n 13); *Congo v Uganda* (n 13).

[50] ECHR (n 40) art 1.

[51] *Loizidou v Turkey* (n 44); *Cyprus v Turkey* (n 44).

[52] *Banković v Belgium* (n 46).

https://doi.org/10.1017/S0021223717000061 Published online by Cambridge University Press

responsible in extraterritorial contexts, particularly in cases of the arrest and imprisonment of civilians.[53] In the *Issa* case, the guiding principle on this subject was formulated: the Convention does not permit a state to commit, outside its territory, violations of human rights that would not be allowed in its own territory:[54]

> Moreover, a State may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully – in the latter State … Accountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory.

The subsequent case of *Al-Skeini v United Kingdom* involved a number of incidents in which Iraqi civilians were killed by British forces and one case of an Iraqi civilian killed while in custody in a UK detention facility.[55] The House of Lords determined that the UK was responsible only for the civilian held in custody and not for other civilians who were hurt as passers-by during military activity, because it distinguished between the levels of control the UK had in the different situations. However, the ECtHR ruled that the UK was responsible for all of the incidents. Contrary to *Banković*, the Court stated that it is possible to distinguish between various rights under the Convention and to apply only some of them. Since the UK was an occupying power in Iraq, assuming responsibility for the well-being of the population, it was responsible under the Convention for the rights of Iraqi civilians at that time. However, its responsibility was limited to the areas in which its agents exercised their authority. The Court ruled that the application of the Convention is primarily territorial, but that there are exceptions to this rule.

The first exception is state agent authority and control (SAA), which represents the universal principle. This exception applies also in the absence of full control in the territory, when the state's agents exercise authority with or without the consent of the territorial state, including via diplomatic and consular representatives, or in the case of consent to foreign presence, military or other. This exception has been applied in cases of arrest and imprisonment by one state in the territory of another state, as well as in cases of arrest and transfer to the arresting state.[56] These cases entail the exercise of authority over a person and not over territory; accordingly, the state's responsibility concerns a person on whom the state exercises authority. The second exception is effective control over territory, although this applies in parallel with the IHL rule that the existing laws in an occupied territory must remain in effect and human rights obligations must be applied in a way that is consistent with local law.

In conclusion, with regard to the source of law, the ECHR dictates that the source of law used by the ECtHR is the European Convention, and establishes the jurisdiction of the Court. However,

[53] *Issa v Turkey* (n 44); *Al Saadoon v United Kingdom* (n 44).
[54] *Issa v Turkey* (n 44) para 71.
[55] *Al-Skeini v United Kingdom* (n 6).
[56] *Öcalan v Turkey*, App no 46221/99, 12 May 2005; *Issa v Turkey* (n 44); *Al Saadoon v United Kingdom* (n 44).

it does not preclude consideration of member states' constitutional concepts, although these were not considered in the extraterritorial cases. The current position of the ECtHR with regard to the other questions is that the obligations contained in the ECHR apply extraterritorially, but not in their full scope and not in all cases. They apply primarily in cases of effective control over territory or concerning the actions of a state agent. The ECtHR has thus accepted the territorial and universal approaches, ignoring even the possibility of a personal approach. It also takes into consideration the law of occupation and the respect for local laws that it entails. It did not consider the possible conflict with constitutional law, as its application was not considered.

2.2. The United States

The debate in the US jurisprudence is completely different in nature and focuses on applying constitutional rights outside US borders. The United States has ratified the International Covenant on Civil and Political Rights (ICCPR), among other human rights conventions. Although the Supremacy Clause of the US Constitution establishes that treaties made under the authority of federal law constitute part of the supreme law of the land, the Supreme Court distinguishes between self-executing and non-self-executing treaties. According to this doctrine, only self-executing treaties have immediate effect and are enforceable in US courts as federal law. Non-self-executing treaties are not enforceable unless and until Congress incorporates them into law.[57] Furthermore, the United States declares in its reservations to international treaties, including human rights conventions to which it is party, that the conventions are non-self-executing, and thereby not enforceable by US courts independently of the Court's interpretation.[58] This makes human rights conventions unenforceable in US courts for territorial and extraterritorial application alike, although the US remains committed to them on the international level. With regard to the extraterritorial application of human rights treaties, the government's long-time position has been that they are not binding outside US borders.[59] However, a first crack in this wall appeared when the US announced a change in its position with regard to the Convention Against Torture (CAT), in the 2013 meeting of the United Nations (UN) Committee Against Torture.[60] However, this change does not affect the unenforceability of the

[57] *Foster v Neilson* 27 US 253 (1829); *United States v Percheman* 32 US 51 (1832); Carlos Manuel Vázquez, 'The Four Doctrines of Self-Executing Treaties' (1995) 89 *American Journal of International Law* 695.

[58] See, eg, US Reservations, Declarations and Understandings, International Covenant on Civil and Political Rights, 138 Cong Rec S4781-01, 2 April 1992; *Medellin v Texas* 552 US 491 (Sup Ct 2008).

[59] Harold Hongju Koh, then legal adviser to the US State Department, described in his memos from 2010 both the traditional US position that it is not bound by human rights conventions extraterritorially, and his own position to the contrary, which was adopted later with regard to the UN CAT: Harold Hongju Koh, 'Memorandum Opinion on the Geographic Scope of the International Covenant on Civil and Political Rights', 19 October 2010, http://justsecurity.org/wp-content/uploads/2014/03/state-department-iccpr-memo.pdf; Harold Hongju Koh, 'Memorandum Opinion on the Geographic Scope of the International Convention Against Torture and Its Application in Situations of Armed Conflict', 21 January 2013, http://justsecurity.org/wp-content/uploads/2014/03/state-department-cat-memo.pdf.

[60] US State Department, UN Committee Against Torture, Periodic Report of the United States of America, 12 August 2013, http://www.state.gov/documents/organization/213267.pdf.

https://doi.org/10.1017/S0021223717000061 Published online by Cambridge University Press

CAT in US courts.[61] American courts, in addressing extraterritorial questions, comply with the government's position and apply the US Constitution, federal and state law, unless a treaty has been incorporated into law.[62]

In recent years, the discussion has focused on the United States' human rights obligations towards detainees captured in the 'War on Terror',[63] but the US courts had addressed the question of the application of the Constitution outside the US long before that. A series of opinions from 1901 to 1904, referred to as the Insular Cases, focused on the colonial expansion of the United States and discussed the application of the Constitution in newly acquired territories.[64] The jurisprudence distinguished between territories that were to be annexed permanently to the US ('incorporated') and those that were intended to be held temporarily ('unincorporated'). With regard to the former, the Court ruled that the Constitution applies fully without the need for an explicit legislative act. With regard to the latter, the Court ruled that the Constitution would apply only partially depending upon congressional legislation, except for fundamental personal rights that apply even in unincorporated territories. It did not articulate, however, which constitutional rights were fundamental.[65] The question 'Does the Constitution follow the flag?' was answered illustratively by Elihu Root: '[T]he Constitution follows the flag – but doesn't quite catch up with it'.[66]

The US Supreme Court addressed this issue again after the Second World War when annexation was legally out of the question. When German prisoners of war in an American camp in Germany petitioned for the right to habeas corpus proceedings, the Court ruled, in *Johnson v Eisentrager* (1950), that these prisoners were not entitled to constitutional habeas corpus rights as they were foreign enemy nationals outside the United States.[67] A dissenting opinion of three justices argued that the prisoners should be granted constitutional rights because these were basic human rights accorded to every person as a human being, regardless of citizenship or residence:[68]

[61] US courts consider claims of torture under domestic legislation (Alien Tort Statute (28 USC §1350), Torture Victim Protection Act (106 Stat 73)) which in some cases confers on them jurisdiction over acts of torture committed abroad: *Al Shimari v CACI Premier Technology Inc* 758 F 3d 516 (4th Cir 2014).

[62] In *Hamdan v Rumsfeld* 548 US 557 (Sup Ct 2006), the US Supreme Court applied the Geneva Conventions, which are considered customary international humanitarian law, since they were integrated into the national law via the Uniform Code of Military Justice (UCMJ). The US Supreme Court applies a 'presumption against extraterritoriality' to the Alien Tort Statute and domestic legislation in general, according to which 'when a statute gives no clear indication of an extraterritorial application, it has none' unless the facts of the case 'touch and concern' US territory. However, this presumption applies to statutes and not to the Constitution, which is the focus of this article. See *Morrison v National Australia Bank Ltd* 561 US 247 (Sup Ct 2010); *Kiobel v Royal Dutch Petroleum Co* (n 14).

[63] For a review and analysis see Milanovic (n 7) 67–83; Neuman (n 7) 398–401; Gerald L Neuman, 'The Habeas Corpus Suspension Clause after *Boumediene v. Bush*' (2010) 110 *Columbia Law Review* 537.

[64] Neuman (n 7); Cleveland (n 10) 33–35, 44–48; *Boumediene v Bush* (n 5); Martinez (n 9).

[65] In *Dorr v United States* 195 US 138 (Sup Ct 1904) the Court ruled that the constitutional right of jury trial was not fundamental and therefore did not apply to the unincorporated Philippines.

[66] As quoted by Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (2nd edn, Cambridge University Press 2007) 282.

[67] *Johnson v Eisentrager* 339 US 763 (Sup Ct 1950).

[68] ibid 798.

https://doi.org/10.1017/S0021223717000061 Published online by Cambridge University Press

> Our nation proclaims a belief in the dignity of human beings as such, no matter what their nationality or where they happen to live. Habeas corpus … is written into the Constitution. … I would hold that our courts can exercise it whenever any United States official illegally imprisons any person in any land we govern.

On the other hand, in *Reid v Covert* (1957), the Court held that American citizens outside the US (the wives of soldiers residing with their husbands stationed overseas) have a constitutional right to due process and trial by jury, and thus could not be brought to trial in a court martial where they were stationed.[69] Ostensibly, the difference between the two cases was the element of citizenship, which led to the extraterritorial application of constitutional rights only to US citizens. Similarly, in *United States v Verdugo-Urquidez* (1990), the Court decided that a non-US citizen, outside US territory, does not have a constitutional right to due process.[70] This case involved a Mexican citizen, whose home in Mexico was searched for drugs by US agents. The Court ruled that he was entitled to the constitutional protection of his own country and not of the US. In a dissenting opinion, two justices argued that constitutional rights apply whenever US agents exercise their authority, even outside US borders. At this stage, therefore, the Court's jurisprudence established that only US citizens were entitled to constitutional rights in territories outside the US that are neither annexed nor under its control, applying the territorial and personal principles.

The next stage of the US discussion related to detainees held in the Guantánamo Bay naval base.[71] The government's position was that detainees in the 'War on Terror', held outside the United States, do not enjoy the rights provided under the US Constitution and laws because they are non-citizens, outside US territory. The government defined these prisoners as unlawful combatants (not entitled to the status of prisoners of war), arguing that this category also denied their rights as civilians under IHL. Nonetheless, several decisions by the US Supreme Court recognised statutory authority to exercise judicial review of the arrest of such detainees, and minimum rights guaranteed to them under IHL.[72] The decision in *Boumediene v Bush* followed the legislative suspension of all statutory proceedings that were previously acknowledged by the Court as available to non-citizen detainees in Guantánamo Bay. The government argued that in all matters pertaining to non-citizens, the application of the Constitution is only territorial. The Court, however, stated that even in the absence of statutory proceedings, the detainees have a right to habeas corpus proceedings under the US Constitution, since the application of constitutional rights is not limited to the United States and to territories under US sovereignty, but can also stem from the exercise of complete jurisdiction and control extraterritorially.[73] According to the decision, three factors affect the extraterritorial application of constitutional

[69] *Reid v Covert* 354 US 1 (Sup Ct 1956).
[70] *United States v Verdugo-Urquidez* 494 US 259 (Sup Ct 1990).
[71] Other rulings (eg *Hamdi v Rumsfeld* 542 US 507 (Sup Ct 2004)) have discussed the status of American citizens suspected of involvement in terrorism, and the distinction between citizens and non-citizens continues to be made in American court decisions and in the public debate.
[72] *Rasul v Bush* 542 US 466 (Sup Ct 2004); *Hamdan v Rumsfeld* (n 62); *Boumediene v Bush* (n 5).
[73] *Boumediene v Bush* (n 5).

https://doi.org/10.1017/S0021223717000061 Published online by Cambridge University Press

rights: (i) the citizenship and status of the detainee and the adequacy of the process through which that status was determined; (ii) the nature of the sites where the arrest and detention were conducted; and (iii) practical obstacles inherent in exercising the detainee's rights. With regard to Guantánamo detainees, the Court ruled that the detainees are not citizens – but it is disputed whether they are enemy combatants and the process the government conducted to determine their status was not adequate; that Guantánamo is an area within the constant jurisdiction of the US; and that there are no practical obstacles to conducting habeas corpus proceedings. The Court admitted that its ruling was unprecedented, but argued that the historical and geographical circumstances, the long duration of the 'War on Terror' and the detention in Guantánamo were similarly without precedent.

In the United States, therefore, the question of the legal source of rights was determined by the government in declaring human rights treaties to be non-self-executing and therefore unenforceable. However, it could be argued that the doctrine of self-executing treaties was intended to determine the enforceability of treaties inside the US, but not extraterritorially, where the US is still bound by international conventions. Theoretically, then, the Court might not be bound by this doctrine in extraterritorial cases.[74] However, to date the US Supreme Court has used the Constitution as the only relevant legal source. In *Boumediene* it asserted its jurisdiction, and extended the application of constitutional rights to include non-citizens outside US territory, but under the full control of the US – both physically (that is, detained by US authorities) and territorially (that is, present in territory under the complete and exclusive control of the US), although not in all cases. It implemented a personal and territorial approach, but considered also the practical possibility of exercising the rights, including access to a US court or tribunal. This relatively flexible test does not endorse the universal principle, which was acknowledged only in minority opinions. The rejection of the universal approach led the DC Circuit Court to rule that detainees held in the Bagram military base in Afghanistan were not entitled to the same rights.[75] Moreover, constitutional rights were not applied as a package: the decisions, starting with the Insular Cases, applied constitutional rights selectively, distinguishing between fundamental personal rights and other rights. The debate regarding the Guantánamo detainees focused on the right to habeas corpus.

In concluding this consideration of the two principal models, the extraterritorial obligation to respect and ensure human rights derives from different sources of law. According to the American model, this obligation stems from the US Constitution, while according to the European model it derives from the ECHR. The question of the source of law was decided by the political authorities, either positively in the European case, or negatively (by declaring human rights treaties to be non-self-executing) in the US. Both Courts, however, have asserted their jurisdiction over extraterritorial cases. These cases tell us that courts are concerned about

[74] Sarah H Cleveland, 'Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs' (2002) 81 *Texas Law Review* 1, 5 and 8.
[75] *Al Maqaleh v Gates* (n 5); Saurav Ghosh, '*Boumediene* Applied Badly: The Extraterritorial Constitution after *Al-Maqaleh v Gates*' (2011) 64 *Stanford Law Review* 1.

https://doi.org/10.1017/S0021223717000061 Published online by Cambridge University Press

whether there is some judicial forum to which individuals have recourse. The US court seems to be aware of the fact that there is no other judicial recourse for individuals against acts and policies of the United States, and is reluctant to leave these individuals affected by the US completely unprotected.[76] In the ECtHR, the application of the ECHR is essential in order to establish the Court's jurisdiction over extraterritorial acts of state members as it has no power to compel states to act according to their own constitutions.[77] In this case, the jurisdiction comes with the substantive law.

In both models, the way in which human rights obligations are applied extraterritorially is far from being problem free and clear-cut. The rulings in the different fora do not provide uniform answers to the series of questions presented at the outset. Each model combines two of the three principles: territorial, personal or universal, their combination leading to uncertain results. The US jurisprudence is the only one that considers and implements the principle of membership, citizenship or other status.[78] The ECtHR has implicitly answered this question negatively: personal application is not a possibility and citizenship is not a factor. In both models, the scope of obligations is partial, but the distinction between applicable and non-applicable rights is not completely resolved: not all rights necessarily apply, as they could be 'divided and tailored' or checked to determine whether they are fundamental and whether their application is practicable. Both models therefore leave unanswered the question of the application of different rights – for example, negative obligations (to respect human rights and not to violate them) and positive obligations (to guarantee rights). The universal (action) principle applied by the ECtHR reduces the scope of rights because it applies only when authority is being exercised and with regard to it, and thus does not include positive obligations to guarantee human rights where the state has not exercised its authority.

The question, though, is not only analytical but also historical. The US extraterritorial doctrine was initially developed in the age of colonial expansion through the Insular Cases. It dealt with territories that are to be 'incorporated' (that is, annexed) and become part of the United States. On the other hand, the European Convention and Court were created when colonialism and annexation became illegitimate and illegal. The European doctrine was thus developed when annexation, and therefore the imposition of state law extraterritorially, was no longer a legitimate option. The newer conception of sovereignty and use of force limited sovereign expansion and the territorial consequences of conquest, with the definition of occupation as

[76] See text accompanying nn 41 and 42 regarding the US non-recognition of the authority of the Inter-American Court of Human Rights. In addition, the US did not join the ICC Statute (Rome Statute of the International Criminal Court (entered into force 1 July 2002) 2187 UNTS 90) and is not subject to the International Criminal Court. The ICJ does have authority over the US (and the applicable law includes both the human rights conventions and international humanitarian law) but only states or the UN Security Council can approach the Court, and the US wields veto power in the latter. See also Harold Hongju Koh, 'On American Exceptionalism' (2003) 55 *Stanford Law Review* 1479; Keitner (n 9) 71–81, 110–11.

[77] According to art 32 ECHR (n 40), the jurisdiction of the ECtHR is limited to the interpretation and implementation of the Convention and its Protocols. For more on the issue of jurisdiction see Cohen (n 21); Ronen (n 36) 137.

[78] Neal K Katyal, 'Equality in the War on Terror' (2007) 59 *Stanford Law Review* 1365.

temporary and the illegality of annexation.[79] The different models are thus also reflective of the change of times, politics and mindsets.

3. THE MODEL EVOLVING IN THE SUPREME COURT OF ISRAEL

Where is Israel situated between these two poles? On the one hand, Israel is not part of a regional human rights system like the European states, but unlike the United States it is not an international superpower; it is largely dependent on other countries, and influenced by both the US and Europe. As laid down in the previous section, the European model and the US model represent different ideal types, although their model is not derived solely from their institutional nature. The Israeli Supreme Court does not follow either of these models. It practises a rather original and not very systematic combination of constitutional law and international law – a hybrid model, only one of numerous possible hybrids. Following a short overview of the transformation of Israeli doctrine during 50 years of occupation of the OPT, I will describe the early doctrine of extraterritorial judicial review (from 1967 to 1992), and then outline the transformations after 1992, marked by the constitutionalisation of human rights in Israel and the state's ratification of major international human rights conventions. I will devote a separate section to each of these sources. As we shall see, although the Israeli occupation post-dates the ECHR, ideas of annexation still appeal to Israeli society and politics.

It is worth emphasising again that I am analysing the development of legal doctrine, not of the practice, implementation or enforcement of human rights in the OPT; this legal doctrine is very far apart from realisation. I review landmark cases that have set important precedents and shaped the doctrine, but I do not mean to imply anything about the actual practice, to which other writers have devoted attention.[80]

The contemporary discussion in the Israeli Supreme Court with regard to the application of human rights in the OPT can be understood only in light of its historical development. The Court applied extraterritorial jurisdiction to the OPT very shortly after the occupation of those territories in 1967 and enabled Palestinians to challenge Israeli acts and policies by direct petitions to the High Court of Justice. This doctrine was developed during the first decade of the Israeli occupation, long before the State of Israel joined human rights conventions in 1991, and before the enactment of the Basic Laws in 1992.[81] It did not rely on a constitution, nor on an international convention, and thus not only did it not resemble any of the models described so far, but it was not even situated along the spectrum that their ideal types suggest. It was based on a combination

[79] Charter of the United Nations (entered into force 24 October 1945) 1 UNTS XVI, art 2(3)–(4); UNGA Res 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, 24 October 1970; Dinstein (n 12) 49; Eyal Benvenisti, *The International Law of Occupation* (2nd edn, Oxford University Press 2012) 16.

[80] See sources cited in n 37, as well as Gross (n 33).

[81] The reference is to Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation, which stipulated for the first time the primacy of the Basic Laws and the rights anchored in them compared with regular laws: Barak (n 35); Gross (n 35).

of customary IHL, which imposes obligations on Israel according to its theory of reception of international law, and Israeli administrative law, which was applied extraterritorially.[82]

However, since the late 1980s, international and domestic legal developments have brought international human rights law and Israeli constitutional law to the forefront as additional legal sources. These new sources challenged and blurred the existing doctrine, partially aligning it with more contemporary doctrines and situating it on the spectrum between IHRL and constitutional law. Human rights treaty bodies and the ICJ advisory opinion regarding the separation wall explicitly stated that human rights treaties place obligations on Israel in the OPT,[83] statements to which the Israeli Court has reacted.[84] At the same time, developments in Israeli constitutional law have increased its influence, making it a prominent source from which judges derive substantial human rights and with which they compare rules of IHRL.[85]

Although these two new sources – the conventions and the Basic Laws – could have ostensibly marked a revolution in the field of human rights in the territories, this was not the case.[86] The conventions and Basic Laws did not enter a vacuum; they entered a legal field that had already been filled with substantive law and a court exercising jurisdiction over state actions. They also competed against each other as a possible source for deriving human rights obligations. Once again, then, the result does not follow either of the above described models.

3.1. The Early Israeli Doctrine of Extraterritorial Judicial Review (1967–92)

The early doctrine of the Israeli Supreme Court created limited legal integration between the territories and Israel. The government did not apply Israeli law as a whole to the West Bank and the Gaza Strip, which would amount to annexation and would have required granting full civil rights to the residents of these territories.[87] The Court nonetheless asserted jurisdiction over the OPT, setting the following guidelines:[88]

[82] Kretzmer (n 37) 25–35. As mentioned above, according to Israel's theory of reception, customary international law is automatically binding and enforceable in domestic courts, unlike treaty law which is not domestically binding unless it is incorporated into law.
[83] *Wall* (n 13); Ben-Naftali and Shany (n 8).
[84] Following a long period of hesitation during which human rights treaties were considered non-binding law, the Court stated, without detailed reasoning, that those treaties are binding in the OPT: HCJ 769/02 *Public Committee Against Torture in Israel v Government of Israel* ILDC 597 (IL 2006) [2006] (*PCATI*), which dealt with the targeted assassinations policy. This position was taken contrary to the Israeli government's position.
[85] Especially the Basic Law: Human Dignity and Liberty: Barak (n 35); Gross (n 35).
[86] A number of scholars have argued that since 2000 Israeli law has increasingly relied on international law: Barak-Erez (n 22); Cohen (n 22). The research presented here challenges this argument, at least concerning the OPT, which involved international law from the outset. On an ideology-oriented periodisation of the history of law see Assaf Likhovski, 'Between "Mandate" and "State": Rethinking the Periodization of Israeli Legal History' (1998) 19(2) *Journal of Israeli History* 39.
[87] Israeli law was applied to East Jerusalem and the Golan Heights, which were formally annexed.
[88] For the Court's position, see Kretzmer (n 37) 19–29.

https://doi.org/10.1017/S0021223717000061 Published online by Cambridge University Press

(a) The Supreme Court has jurisdiction to conduct judicial review over the military government's acts in the territories, and residents of the OPT are entitled to petition the High Court of Justice against military and state authorities.[89]
(b) The substantive law that applies includes customary IHL, as well as the humanitarian provisions of the Fourth Geneva Convention, which the state declared it was willing to apply in the territories.[90]
(c) In addition, Israeli administrative law also applies: 'The exercise of authorities by the respondents will be examined according to the criteria this court applies in reviewing the acts or omissions of any other arm of the executive branch but, of course, while taking into account the obligations of the respondents that derive from the essence of their role'.[91]

The Court applied administrative law as an instrument of judicial review of government actions, focusing on procedural rules: exercising legal authority for its intended purpose; granting a fair hearing; reasonableness; proportionality; and so on. The state did not object to the application of Israeli administrative law; similarly, it did not object to the Court's assertion of jurisdiction. In this legal framework, substantial basic rights of the Palestinian population originated in IHL, while procedural rights were grounded in Israeli administrative law.

Although this initial doctrine of administrative law and customary IHL did not change, these sources of law gradually lost their exclusivity as they were joined by other normative sources from the field of human rights. In a lecture on IHL and the Israeli Supreme Court, the former President of the Court, Aharon Barak, described the development of his judicial approach to the territories.[92] According to Barak, although the state agreed to the Court's jurisdiction from the outset, the Court must be convinced that it is indeed empowered with such jurisdiction. Its authority derives from Basic Law: The Judiciary, which authorises the High Court of Justice to provide a remedy for the sake of justice when there is no other legal recourse. The orders of the Court are directed at the state and its agents, whether they are acting inside or outside

[89] HCJ 256/72 *Electric Corporation for the Jerusalem District v Minister of Defence* 1972 PD 27(1) 124. In this, and in an earlier case, the state did not contest the Court's authority to hear petitions from residents of the territories against the military authorities, and the Court adopted this stance without difficulty.
[90] HCJ 390/79 *Duweikat v Government of Israel* 1979 PD 34(1) 1. The Court ruled that customary international rules are expressed in the Hague Regulations of 1907 (Hague Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land (entered into force 26 January 1910) *Martens Nouveau Recueil* (ser 3) 461), to which a number of additional rules were added over the years, such as art 51 of Additional Protocol I (Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (entered into force 7 December 1978) 125 UNTS 3 (AP I)). The state and the Court still do not recognise the formal application of GC IV in the territories: Kretzmer (n 37) 19–29.
[91] HCJ 619/78 *Al Tal'ia v Minister of Defence* 1979 PD 33(3) 505, para 7. See also HCJ 393/82 *Jama'yat Iskan Registered Collective Association in Judea and Samaria v Commander of IDF Forces in Judea and Samaria* 1983 PD 37(4) 785, para 33 (*Jama'yat Iskan*): 'From this perspective, we can say that every Israeli soldier carries with him in his backpack the rules of customary public international law regarding the laws of war and the basic rules of Israeli administrative law'.
[92] Justice Aharon Barak, 'International Humanitarian Law and the Israeli Supreme Court', lecture given at the Minerva Center for Human Rights, Hebrew University of Jerusalem, 3 July 2013; Aharon Barak, 'International Humanitarian Law and the Israeli Supreme Court' (2014) 47(2) *Israel Law Review* 181.

the state. Barak also described his changing attitude towards IHL, initially seeing it as equivalent to administrative law, focused on the lawful exercise of authority, but gradually coming to see it as constitutional law, anchoring basic rights. Barak emphasised that over the years the legislature could have intervened and limited the Court or the application of IHL, but chose not to do so, concluding that the other branches of government have accepted this doctrine.

This development of the judicial conception from administrative law to constitutional law is reflected in Supreme Court decisions since the late 1980s. In *Arjoub v Commander of IDF Forces in Judea and Samari*a, the petitioners demanded the establishment of an appellate court over the Israeli military courts in the territories.[93] The military courts are criminal courts established under Israeli military legislation for Palestinian residents who are criminally charged with offences related to security and public order.[94] Until that time, military law did not permit judicial appeal proceedings, but only authorised the military commander to award clemency or reduce a sentence. The petitioners cited the fact that Israeli law provides a similar right of appeal against military courts operating in Israel.[95] They also relied on IHL and the ICCPR.[96] Despite the fact that Israel had not signed the ICCPR at that time, the Court closely examined the Covenant's directives on the right of appeal, as well as the Universal Declaration of Human Rights (UDHR).[97] In addition, it noted on its own initiative that the right of appeal exists in Israeli constitutional law – not only in the context of military courts, but as a basic right enshrined in Basic Law: The Judiciary.[98] The Court concluded that the right of appeal is not part of customary international law and is therefore not binding, and that none of the sources cited mandated the existence of a military court of appeal with the exception of the ICCPR, which Israel had not joined. Nonetheless, it strongly recommended that the state establish an appellate court, since the right of appeal constitutes 'a substantive component of fair trial',[99] which exists at all levels of the court system in Israel and is a constitutional right:[100]

> Once we accepted the right of appeal to at least one instance as a substantial part of the judicial process in our system … the obvious conclusion is that every legal system we operate should be built according to the same basic structure.

[93] HCJ 87/85 *Arjoub v Commander of IDF Forces in Judea and Samaria* 1988 PD 42(1) 353.
[94] For a description and details, see Lisa Hajjar, *Courting Conflict: The Israeli Military Court System in the West Bank and Gaza* (University of California Press 2005) 1–3; Sharon Weill, 'The Judicial Arm of the Occupation: The Israeli Military Courts in the Occupied Territories' (2007) 89(866) *International Review of the Red Cross* 395.
[95] The argument referred, at least according to what appears in the ruling, to a military court operating under the Defence (Emergency) Regulations of 1945, where Arab citizens of Israel were brought to trial for security offences: Alina Korn, 'Crime and Legal Control: The Israeli Arab Population during the Military Government Period (1948–66)' (2000) 40 *British Journal of Criminology* 574. Thus, the argument refers to the most precise parallel in Israel to the military courts, and not to courts martial in which soldiers are prosecuted, or to civilian courts where there is a right of appeal against any ruling.
[96] n 47.
[97] UNGA Res 217A (III), UN Doc A/810 (1948) 71.
[98] To be precise, the right of appeal was recognised here not as a human right or constitutional right of the accused. Rather, it was recognised as an institutional right of appeal that was stipulated in the Basic Law, which sets the structure of the judicial system.
[99] *Arjoub v Commander of IDF Forces in Judea and Samaria* (n 93) 362.
[100] ibid 379 (Justice Shamgar).

https://doi.org/10.1017/S0021223717000061 Published online by Cambridge University Press

The Supreme Court thus found that the right of appeal in criminal cases is a fundamental component of a fair trial, despite the fact that Israel is not obligated to ensure it in the territories. It based its conclusion primarily on the importance and status of this right in Israeli constitutional law, which should not stop at the state borders, thus urging the government to exercise the same standard internally and externally:[101]

> It is not reasonable that an accused person, who is brought to trial for terrorist activity in Kfar-Saba [in Israeli territory] will enjoy a right of appeal, if convicted, while if the same accused person is charged with committing this act in Qalqilya [in the OPT], adjacent to Kfar-Saba, cannot enjoy such right of appeal. The same applies to Jerusalem versus Bethlehem or Ramallah, and similarly along all state borders.

Following this strong rhetoric and although the petition was denied, Israel established a military court of appeal in the OPT.[102]

Another decision from the same period reflects similar trends of using principles from Israeli constitutional law without deciding on their binding force, as well as citing non-binding sources of international law. *Mustafa Yusef v Warden of the Central Prison in Judea and Samaria* addressed conditions of incarceration in an Israeli prison in the OPT.[103] The Court ruled that every prisoner is entitled to a minimum standard of humane conditions, citing the Standard Minimum Rules for the Treatment of Prisoners by the United Nations.[104] It went on to state that the obligation to ensure humane conditions derives from IHL, from 'the foundations of Israeli administrative law, which accompany all Israeli authorities', and from 'the humane and democratic essence of the Israeli regime'.[105]

In *Sajadiya v Minister of Defence* the Court heard a similar case pertaining to conditions of incarceration and the transfer of prisoners. The case involved the transfer by Israeli authorities of Palestinian administrative detainees to the Ketziot detention facility in Israeli territory during the *intifada* (the Palestinian uprising).[106] The decision focuses on the relationship between IHL and Israeli law. With regard to the duration of the detention proceedings, the Court compared Israeli law relating to administrative detention with the parallel military legislation in the territories, and stipulated that an effort should be made to apply domestic standards to OPT detainees. It did not apply Israeli constitutional law, but rather conducted a comparative analysis, aspiring to adopt the standards it embodies.[107] In a minority opinion, Justice Bach cited the UN Standard Minimum

[101] ibid 380 (Justice Levin).
[102] Amnon Straschnov, *Justice under Fire: The Legal System during the Intifada* (Yedihot Aharonot 1994) 53–61 (in Hebrew).
[103] HCJ 540/84 *Mustafa Yusef v Warden of the Central Prison in Judea and Samaria* 1986 40(1) 567.
[104] United Nations, Standard Minimum Rules for the Treatment of Prisoners, 30 August 1955.
[105] *Mustafa Yusef v Warden of the Central Prison in Judea and Samaria* (n 103) 573 (Justice Barak).
[106] HCJ 253/88 *Sajadiya v Minister of Defence* 1988 PD 42(3) 801.
[107] For a similar trend in the military courts in the territories see Netanel Benichou, 'On Criminal Law in Judea, Samaria and the Gaza Strip: A Window and Trends' (2005) 18 *Mishpat Vetzava* [*IDF Law Review*] 293 (in Hebrew); Smadar Ben-Natan, 'The Application of Israeli Law in the Military Courts of the Occupied Territories' (2014) 43 *Theory and Criticism* 45 (in Hebrew).

https://doi.org/10.1017/S0021223717000061 Published online by Cambridge University Press

Rules for the Treatment of Prisoners, proposing to apply and enforce that standard by virtue of the state-undertaken obligation to apply the humanitarian provisions of the Fourth Geneva Convention.

In these decisions from the 1980s, the Court had already moved beyond Israeli administrative law towards constitutional law. Both the right of appeal and the right to minimal conditions of incarceration are substantive rights that cannot be derived from administrative law alone. In *Arjoub* the Court explicitly stated that the right of appeal is not directly applicable, yet recommends its application because, inter alia, it is an Israeli constitutional right; in *Mustafa*, the Court blurred the distinction between administrative law and constitutional law. In both decisions, the Court referred extensively to non-binding sources of IHRL and IHL. It is not incidental that these decisions deal with due process of law and conditions of detention. Palestinians' procedural rights of due process have received more protection than other rights, at least partially because of the reliance on administrative law.[108] Additionally, such rights seem to be more easily eligible for extraterritorial application.[109] Finally, detention and arrest are classic situations in which courts afford more protection as individuals are deprived of liberty and are under the complete control of the state.[110] Still, these factors do not entirely explain the recourse to international law and constitutional rights, which marks the beginning of a transnational process of doctrinal transformation.

The expansion of the Court's sources of reference and the development of a constitutional approach to the territories continued after Israel enacted the new Basic Laws and signed human rights conventions in the early 1990s. However, this time the state contested the application of these sources. During the formative stage of the early judicial doctrine, the state agreed to the Court's jurisdiction and the use of administrative law and customary IHL, while in the 1990s it explicitly rejected the application of human rights conventions and the Basic Laws to the OPT and sought to stick to the same traditional legal sources.[111] The fact that the question was now a matter of controversy affected the nature of the discussion. In reviewing this discussion below, I devote separate attention to the application of human rights conventions and constitutional law.

3.2. HUMAN RIGHTS CONVENTIONS (AFTER 1992)

The decision that relied most significantly on human rights conventions and other sources of IHRL law is HCJ *Mar'ab v IDF Commander in the West Bank*.[112] This decision examined the legality of military orders prescribing long periods of detention and preventing detainees from meeting counsel during hostilities. The Court referred extensively to numerous sources from IHRL, but did not rule on the formal application of the conventions in the territories. It concluded

[108] Shamir (n 37); Kretzmer (n 37); Gross (2007) (n 33).
[109] *Boumediene v Bush* (n 5); Neuman (n 7). See also Benedict Kingsbury, Nico Krisch and Richard B Stewart, 'The Emergence of Global Administrative Law' (2005) 68 *Law & Contemporary Problems* 15.
[110] *Al-Skeini v United Kingdom* (n 6)*; Issa v Turkey* (n 44); *Boumediene v Bush* (n 5).
[111] Ben-Naftali and Shany (n 8), and in the decisions cited at nn 112–123.
[112] HCJ 3239/02 *Mar'ab v IDF Commander in the West Bank* 2003 PD 57(2) 349.

https://doi.org/10.1017/S0021223717000061 Published online by Cambridge University Press

that the requirement of 'prompt' judicial review of detention is a rule of customary international law and is therefore binding. The Court also determined that domestic Israeli law on this issue is in line with principles of international law. Therefore, the Court explained, it is not necessary to decide on the application of domestic law regarding detention outside Israel. Thus, the Court did not rule on the application of IHRL in the OPT, but applied it in practice – by recognising a customary rule and its consistency with national law.

The decision in *Mara'abe and Others v Prime Minister of Israel* addressed the legality of the separation wall built by Israel in the territories, and was given after the advisory opinion of the ICJ.[113] The ICJ stated, for the first time, that human rights conventions apply and obligate Israel in the OPT, and thus the Israeli Supreme Court explicitly addressed this matter.[114] The Israeli Court reiterated its basic conception that the applicable law is customary IHL and Israeli administrative law. With regard to human rights conventions, the Court was ready to assume that they apply and, therefore, the rights recognised in them should constitute part of the considerations of the military commander. However, the Israeli Court refrained from explicitly ruling on their binding force, stating that there were no differences between the ICJ opinion and the Israeli Court regarding the applicable law, as opposed to the differences in facts and conclusions. One can again infer the application of the conventions from this statement, though this is not stated explicitly.[115] The Court, therefore, refrained from stating the de jure application of the conventions, but treated them as a relevant source of law, offering significant arguments and indications for their application. With regard to the exercise of extraterritorial jurisdiction, the Court stated that it stems from the nature of the violated rights:[116]

> [T]he Court does not refrain from judicial review merely because the military commander acts outside of Israel, or because his actions have political and military ramifications. When the decisions or acts of the military commander impinge upon human rights, they are justiceable … This is appropriate from the point of view of protection of human rights.

The Court took one step further in the *Public Committee Against Torture* case, addressing the practice of targeted killings. Deciding that it cannot determine the overall legality of targeted killings but only evaluate them on a case-by-case basis, the Supreme Court gave its most explicit endorsement of the applicability of IHRL in the territories, complementing IHL when the latter is silent. President Barak describes this in his ruling as follows:[117]

---

[113] HCJ 7957/04 *Mara'abe v Prime Minister of Israel* 2005 PD 60(2) 477.
[114] The *Wall* (n 13); an earlier Supreme Court decision, handed down several days prior to the ICJ opinion, is HCJ 2056/04 *Beit Sourik Village Council v Government of Israel* 2004 PD 58(5) 807. For an analysis of the relationship and differences between this ruling and the ICJ's opinion see Yuval Shany, 'Capacities and Inadequacies: A Look at the Two Separation Barrier Cases' (2005) 38 *Israel Law Review* 230; Aeyal M Gross, 'The Construction of a Wall between The Hague and Jerusalem: The Enforcement and Limits of Humanitarian Law and the Structure of Occupation' (2006) 19 *Leiden Journal of International Law* 393.
[115] *Mara'abe v Prime Minister of Israel* (n 113) 536–37.
[116] ibid, opinion of President Barak, para 31.
[117] *PCATI* (n 84) opinion of President Barak, para 18.

https://doi.org/10.1017/S0021223717000061 Published online by Cambridge University Press

> This humanitarian law is the 'special law' (*lex specialis*) that applies in an armed conflict. Where this law is deficient, it can be complemented by 'international human rights law'.

At the same time, the Court ruled that public Israeli law applies in parallel with international law. In particular, the Court saw the demand for proportionality as stemming from both the laws of war and the requirements of Israeli law.[118] The reference to Israeli law was not limited to administrative law. In the words of Justice Rivlin:[119]

> Two legal systems apply here, and in the words of my colleague President Barak: 'alongside the international law dealing with armed conflicts, fundamental principles of Israeli public law, which every Israeli soldier "carries in his pack" and which go along with him wherever he may turn, may apply'. Indeed, two normative systems require examination on the issue before us – one, the rules of international law, and the other, the legal rules and moral principles of the State of Israel in general, including the basic value of human dignity.

This statement recognises the application of Israeli law, or at least its basic values and principles, in parallel with international law, and leads us straight to a discussion focusing on constitutional rights.

3.3. Israeli Constitutional Law

While the jurisprudence is constantly relying on the rules of Israeli constitutional law, the Court's position is that a decision stating the de jure applicability of the Basic Laws has not been necessary so far.[120] The Court is thus systematically avoiding the question of the formal application of Israeli constitutional law, and blurring its own position, by using open-ended terms such as 'basic values', 'principles' and 'the spirit of the Basic Laws'. The indeterminacy of Israeli constitutional law, which is not embodied in a single document, enables further indeterminacy in its application.

A relatively early ruling that harbingered a constitutional approach to the relations between residents of the OPT and the State of Israel was handed down in *Murkus v Minister of Defence*, which dealt with the distribution of gas masks to OPT residents on the eve of the first Gulf War.[121] While protective kits against chemical attacks were distributed to residents of Israel and to Israeli settlers in the territories, they were not distributed to the Palestinian residents of the territories. The explanation provided by the state was that the Palestinians were at

[118] ibid, opinion of President Barak, para 41. For a similar approach, see also HCJ 5488/04 *A-Ram Local Council v Government of Israel* (2006) Nevo Legal Database (by subscription, in Hebrew).
[119] *PCATI* (n 84) opinion of Justice Rivlin, para 1.
[120] For a thorough examination of the possibilities of applying Basic Law: Human Dignity and Liberty to the residents of the territories and the significance of its application from the perspective of human rights law and the laws of occupation, see Ronen (n 36); Liav Orgad, 'Whose Constitution and for Whom? On the Scope of Application of Basic Laws' (2009) 12 (5770) *Mishpat Umimshal* [*Law and Government*] 145 (in Hebrew).
[121] HCJ 168/91 *Murkus v Minister of Defence* 1991 PD 45(1) 467.

https://doi.org/10.1017/S0021223717000061 Published online by Cambridge University Press

lower risk of an Iraqi attack. The Court accepted the petition and ordered the state to distribute protective kits as soon as possible to the entire population of the territories, without distinguishing between Israelis and Palestinians. The legal analysis began with IHL, which imposes an obligation to protect the local population, but did not stop there. The Court held that the military commander was obligated to act with equality vis-à-vis all residents of this region, Israelis and Palestinians, and not to discriminate between them. This obligation was not drawn from IHL (which does not assume the presence of citizens of the occupying power in the occupied territory), but rather from the principles of Israeli constitutional law guaranteeing equality under the law. The Court rejected the argument that the petition was non-justiciable, stating that a claim of discrimination is always justiciable, thus addressing the obligation to act with equality as a given without citing its precise source, as if the ruling pertained to Israeli territory:[122]

> Indeed, the military commander must act with equality in the region. He is forbidden to discriminate between residents. When the military commander reaches a conclusion that it is necessary to distribute protective kits to the Jewish residents of the region, protective kits should also be distributed to its Arab residents. … [E]ven when the cannons roar, the military commander must follow the law.

Gaza Coast Regional Council v Knesset of Israel challenged the constitutionality of the Israeli disengagement from the Gaza Strip and the evacuation of Israeli settlements. The Court conducted a more in-depth analysis of the applicability of the Basic Laws to the various residents of the territories. It determined that the Basic Laws apply personally to the Israeli citizens living in the territories, and their application to the Palestinian residents was left undecided.[123] It is interesting to note that two earlier decisions recognised the constitutional rights of Palestinians in the territories. These were both handed down by Justice Procaccia, with her colleagues' concurrence, but they contradict the more direct, reasoned and explicit decision in the *Gaza Coast Regional Council* case. In *Hass v Commander of IDF Forces in the West Bank* it was held that the commander of the region is obligated to protect the constitutional rights, such as freedom of movement and religion, of all of the residents of the region: 'This obligation applies to him with regard to all of the residents, without distinction based on their identity – Jews, Arabs or foreigners'.[124] In *Abu Daher v Commander of IDF Forces in Judea and Samaria* – the case of the Palestinian women's orchard with which this article opens – the Court stated, without further reasoning, that the right to property of Palestinian residents of the OPT is a basic constitutional right, protected under Article 3 of Basic Law: Human Dignity and Liberty.[125]

As noted, four other justices concurred in these rulings, without providing separate opinions. They were not thoroughly reasoned decisions and, as mentioned, they were subsequently contradicted. Although, according to the rules of precedent, the later ruling in the *Gaza Coast Regional*

[122] ibid 470.
[123] *Gaza Coast Regional Council v The Knesset* (n 2).
[124] HCJ 10356/02 *Hass v Commander of IDF Forces in the West Bank* 2004 PD 58(3) 443, 460.
[125] *Abu Daher v Commander of IDF Forces in Judea and Samaria* (n 1).

https://doi.org/10.1017/S0021223717000061 Published online by Cambridge University Press

Council case is binding, it is important to see that five Supreme Court justices were ready to determine that Palestinian residents of the territories have constitutional rights under the Basic Laws. In addition, this question was not decided negatively in *Gaza Coast Regional Council* but was left open. There was no formal legal difficulty in deciding that the Basic Laws do not apply sweepingly to all residents of the territories, since Israeli law as a whole was never applied there, in line with the law of occupation. Israeli law was applied personally to Israelis only, and not to Palestinians. The Court refrained from deciding this point, preserving the option of deciding differently in the future.

The rights of Palestinians under Israeli constitutional law were also central to *Adalah v Minister of Defence*, in which the Court overturned an amendment to the Civil Damages (State Liability) Law, which exempted the state from civil liability for damage that occurred in areas declared as conflict zones, including the West Bank and Gaza Strip.[126] The case invoked constitutional rights under Basic Law: Human Dignity and Liberty, as the petition sought revocation of primary legislation, which is possible only on constitutional grounds and not on IHL or IHRL grounds. Thus, it seemed necessary to determine whether such rights are at all applicable to the residents of the territories. However, the question whether or not this was a case of extraterritorial application of the Basic Law was disputed between President Barak and Justice Grunis.

Barak, writing for the majority, held that the case was not extraterritorial as the rights to civil damages were enforceable in Israeli courts and governed by Israeli law according to private international law and conflict of law rules. The application of the Basic Law was thus territorial. Justice Grunis, in the minority, thought that it was an extraterritorial application of the Basic Laws as the damaging acts occurred beyond Israeli borders; the fact that Israeli law was later applied to the case under the choice of law rules did not alter this fact. Faithful to his extraterritorial approach, Grunis mentioned the doctrine of Act of State, which could exempt the state from liability for extraterritorial acts. However, he did not decide on the extraterritorial application of the Basic Law, since the state had argued that such decision was not necessary, and left the question open for future consideration. The amendment was held to be unconstitutional as it exempted the state from compensation not only for collateral damage during combatant activity, which was already exempt, but for all damage that occurs in conflict zones. The Court held that the amendment indeed violated the constitutional rights to property of the injured parties (Palestinians) and to protection of their person, resulting in disproportionate harm to the injured parties, but according to the majority the decision did not involve extraterritorial application of the Basic Law. The reliance on private international law is an example of how the Israeli legal system makes use of private international law rather than public international law to expand the application of its constitutional law (and thus, its sovereignty), while avoiding outright breaches of the law of occupation and the consequence of de facto annexation that public international law would attribute to such actions.[127]

[126] HCJ 8276/05 *Adalah v Minister of Defence* 2006 PD 62(1) 1.

[127] Iris Canor, 'Israel and the Territories: The Interplay between Private International Law and Public International Law' (2005) 8 *Mishpat Umimshal* [*Law and Government*] 551 (in Hebrew); Michael Karayanni,

https://doi.org/10.1017/S0021223717000061 Published online by Cambridge University Press

In another case, *Kav La'oved* [*Worker's Hotline*] *v National Labour Court*, the Supreme Court decided that Israeli labour laws apply to Palestinians employed in Israeli settlements.[128] This is ostensibly a decision in the realm of private law and does not involve human rights or constitutional rights. However, the Court's reasoning relied on constitutional rights without directly discussing the application of constitutional law or the Basic Laws to Palestinians. As part of its reasoning for applying the more pro-worker Israeli law, the majority opinion cited the principle of equality for Israeli workers employed at the same workplace. As possible sources for applying the principle of equality, the ruling cites public policy, a basic principle of the laws of the forum (*lex fori*) as well as the two Basic Laws, without deciding on the question of the binding source of law. Justice Jubran, in his separate opinion,[129] based his argument mainly on the principle of equality, which he explicitly defined as a constitutional right, also enshrined in the UDHR and the conventions of the International Labour Organization. According to Justice Jubran, this judgment is 'in the spirit of the values of the State of Israel and in the spirit of Basic Law: Human Dignity and Liberty', stating that any discrimination is prohibited and 'violates the basic rights of Palestinian residents'.[130] The principle of equality can be seen as a principle of labour law, which mandates equal pay for equal work, but the question presented to the Court was whether Israeli labour law applied at all. Thus, the principle of equality was applied here either as a constitutional principle or as a fundamental principle of Israeli law, again allowing for further application of Israeli law to the OPT while avoiding the issue of occupation/annexation.

In concluding this consideration of the Israeli model, the Supreme Court started by asserting jurisdiction over the OPT, using customary IHL and Israeli administrative law as binding legal sources. Later, it added IHRL and constitutional law as complementary and not clearly binding sources. It thus does not follow either of the models that rely solely on international law or constitutional law, but still implements a constitutional mindset to fill in the gaps in law and jurisdiction, either with law or with 'values', 'moral principles', 'humane and democratic essence', and the like. The lack of a clear and reasoned decision on the application of IHRL/constitutional law is, inter alia, the result of the existence of the earlier model. The early doctrine provided the Court with significant legal tools for conducting judicial review of the government's actions in the territories. By the 1990s, in the absence of a legal vacuum and with its established jurisdiction, the Israeli Supreme Court was able to avoid clear-cut decisions in this area, which is highly contested.

One of the factors guiding the ICJ and the European jurisprudence, which recognised the simultaneous application of IHRL and IHL, is that IHL is in most cases not enforceable on states. This is because there is no court that asserts jurisdiction to render judgment under this law or proceedings in which the injured parties, especially individuals, can be accorded standing and

Conflicts in a Conflict: A Conflict of Laws Case Study on Israel and the Palestinian Territories (Oxford University Press 2014).

[128] HCJ 5666/03 *Kav La'oved v National Labour Court* 2007 PD 62(3) 264.

[129] With which Justice Procaccia concurred.

[130] *Kav La'oved v National Labour Court* (n 128) 36–37.

https://doi.org/10.1017/S0021223717000061 Published online by Cambridge University Press

a remedy.[131] IHRL, on the other hand, is more enforceable and accessible to individuals through international mechanisms.[132] The non-application of IHRL in these fora would have meant leaving unprotected the rights of individuals who are affected by extraterritorial powers. In Israel, the Court has already established jurisdiction and applied IHL, so the question of the application of the conventions is relevant for determining the substantive rights, and not for establishing jurisdiction. Instead, starting in the late 1980s, human rights conventions were cited as a non-binding source for human rights of Palestinians. Following Israel's ratification of the conventions in 1991, the Court continued to rely on them without stating their de jure application. It was only in the 2006 case of *Public Committee Against Torture* that the Court established the application of human rights conventions in the territories, but did so without providing substantive reasoning as to the principles underlying this application. The status of Israeli constitutional law in the OPT as well as the relations between constitutional law and IHRL currently remain unresolved. Both Israeli constitutional law and IHRL are examined, alongside the traditional sources of administrative law and IHL as well as basic principles of the Israeli legal system, regardless of whether or not they are binding, without giving much weight to the question of their formal application.

The early doctrine represented a universal approach in stating that Israeli administrative law applied to any Israeli government agent exercising authority extraterritorially: every Israeli soldier 'carries [Israeli administrative law] in his backpack'.[133] However, when it came to constitutional law, the Court applied a personal approach, by which Israeli constitutional law applies to Israelis in the OPT but not necessarily to Palestinians in the same territory, a question that was left open. The Court deliberately did not apply a territorial approach at any stage, although it is clear that Israel exercised full effective control over the OPT, because of the annexation implications according to the law of occupation. The Court refrained from conducting a detailed discussion of the policy considerations and principles that would favour or oppose the extraterritorial application of norms. In comparison with the parallel discussions in the European and US courts, the deliberations in the Israeli Supreme Court, with regard to any of the sources of law, are characterised by concreteness, a lack of consistency, policy considerations and legal interpretation of relevant laws and precedents.[134] The question of the legal source of rights beyond the early doctrine remains partially open: constitutional law is applied to citizens beyond state borders; the question of application to non-citizens remains unanswered; the application of human rights treaties was generally recognised, but was not reasoned and did not leave its mark on current jurisprudence. The question of the partial or full application of rights was not even raised.

[131] The ICJ and the ICC can both rule on questions of IHL, but they cannot be addressed directly by individuals and their jurisdiction is, in most cases, based on the consent of states. Israel has not accepted the jurisdiction of either court.

[132] Droege (n 33) 349; Lubell (n 33) 319; Gross (2016) (n 33) 21–22.

[133] *Jama'yat Iskan* (n 91) para 33.

[134] With the exception of the minority opinion of Justice Grunis in *Adalah v Minister of Defence* (n 126), who raises the questions, yet leaves them unresolved.

https://doi.org/10.1017/S0021223717000061 Published online by Cambridge University Press

The Israeli Supreme Court has creatively used private international law and labour law to extend the protection of Israeli law to Palestinians in the OPT, thus blurring the legal boundaries between Israel and the OPT, while avoiding a conflict with principles of public international law and specifically the law of occupation. In this gradual and careful transnational transformation process, the Court has been careful not to make a binding decision to apply the Basic Laws to Palestinians in the OPT, but its decisions have applied some Israeli constitutional rights to Palestinians without declaring a general rule.

The mutual application of constitutional law and international law places Israel along the spectrum between the two ideal type models, but this might not be the only relevant spectrum since IHL and administrative law do not come into play. On this spectrum between international and constitutional law, the latter is more dominant in Israel. All the decisions that apply IHRL also refer to Israeli law, either by comparative analysis or by citing constitutional principles. At the same time, the decisions that rely solely on Israeli law (administrative or constitutional) do not necessarily refer to IHRL.[135] It appears clear that no judicial analysis of human rights obligations can be complete without consideration of domestic constitutional law, which is familiar to judges and parties and routinely exercised by them, enjoys the greatest legitimacy, and thus constitutes the dominant source of the two.[136] International law, therefore, was not used in any case as a single legal source as it is in the ECtHR, but only as a complementary or comparative legal source in addition to Israeli law. This somewhat resembles the uses by the US Supreme Court, although in contrast to the US, the Court recognised human rights treaties as both binding and enforceable.[137] At least de jure, it enables enforcement of human rights conventions, certainly with regard to customary norms and norms that are consistent with Israeli law. Therefore, as the Israeli model continues to crystallise, it will clearly not be identical to any of the monistic models.

It is important to remember that Israeli law has no direct application in the OPT – that is, this type of comparative or analogous examination of Israeli law is not mandated by binding legal doctrine.[138] This type of examination characterises the application of international law within the state via theories of reception or the presumption of compatibility between international and national law, and not extraterritorial application. However, the Court also conducts this same examination with regard to the territories, taking into account Israeli law as a relevant legal source even though it is not formally binding, thus treating the OPT as 'incorporated' into Israel.[139]

[135] In some of its rulings, the Court blurs the distinction between constitutional law and administrative law: *Arjoub v Commander of IDF Forces* (n 93); *Mustafa Yusef v Warden of the Central Prison* (n 103); *Kav La'oved v National Labour Court* (n 128).

[136] For the primacy granted by judges to domestic law in national courts see Sturley (n 27).

[137] On the uses of international law in the US Supreme Court see Koh (n 22); Neuman (n 22); Cleveland (n 10). For the recognition of human rights conventions as binding and enforceable see *PCATI* (n 84).

[138] As opposed to other fields of law where legal doctrine mandates the consideration of the applicable law, such as private international law. On questions of choice of laws in the Israeli/Palestinian context see Karayanni (n 127); Canor (n 127).

[139] For a similar argument with regard to the adoption of this method of examination in the territories by the military courts, which are not at all obligated by Israeli law, see Benichou (n 107); Ben-Natan (n 107), as well as Yaël

What does this mean in relation to the Israeli model? While the Israeli occupation of the Palestinian Territories dates back to 1967, when annexation was already illegal and most formerly colonised territories achieved independence, the option of annexation was never completely taken off the table. Some segments of Israeli society see the control of the territories as a continuation of the Zionist enterprise to return the Jewish homeland to the Jewish people. Others regard it as a temporary military occupation that should be ended, and see its prolongation as a deviation from Zionism and democracy.[140] The Supreme Court continues to maintain the legal framework of occupation, but in the reality of geographical proximity: when hundreds of thousands of Israeli citizens colonise the territories and, on the other hand, tens of thousands of Palestinians work in Israel and thousands of Palestinian prisoners are serving sentences in Israel,[141] the separation between internal and external fades, and the clear-cut territorial and constitutional questions become blurred.[142] The relations between Israel and the territories have been shaped over the years with such intimacy, the legal arrangements being so interwoven and tied to one another, that an analytical discussion of implementing legal doctrines premised on territorial and legal separation is almost impossible. The Court itself has clearly acknowledged this situation in stating: 'Even if two different sources of authority and different sovereign "hats" are concerned, "One father to us all" (Malachias 2:10), meaning – substantively – the State of Israel supersedes it all',[143] and on a different occasion:[144]

> The connection between Israel and the Gaza Strip – and the same applies to the Judea and Samaria [West Bank] – is so close in everyday life that it would be artificial to talk of exercising powers in Gaza as if it were somewhere beyond the seas.

The Israeli Supreme Court's pendulum, swinging between international law and constitutional law, reflects the Israeli indecision regarding the status of these territories.

4. CONSTITUTIONAL MINDSET

Despite the differences between the models, they have much in common. In each model the region or the action outside state borders becomes subject to rules. These rules are drawn from different sources; be it international law, constitutional law or administrative law, they fulfil the same role. The courts are not inclined to leave a field in a vacuum, without substantive norms

Ronen, 'Blind in Their Own Cause: The Military Courts in the West Bank' (2013) 2 *Cambridge Journal of International and Comparative Law* 739.

[140] Kretzmer (n 37) 197.

[141] HCJ 2690/09 *Yesh Din v Commander of IDF Forces in the West Bank*, 2010, Nevo Legal Database (by subscription, in Hebrew).

[142] Orna Ben-Naftali, Aeyal M Gross and Keren Michaeli, 'Illegal Occupation: Framing the Occupied Palestinian Territory' (2005) 23(3) *Berkeley Journal of International Law* 551; Ariella Azoulay and Adi Ophir, *The One-State Condition: Occupation and Democracy in Israel/Palestine* (Stanford University Press 2013).

[143] HCJ 3450/06 *Dweib v The Military Commander* 2008, Nevo Legal Database, 8–9 (by subscription, in Hebrew).

[144] HCJ 2722/92 *Alamarin v IDF Commander in Gaza Strip* 1992 PD 46(3) 693, opinion of Justice Cheshin, para 8.

and judicial review.[145] Martti Koskenniemi called this a 'constitutional mindset', which is separate from the concrete application of laws:[146]

> If the rules of law do not spell out the conditions of their application, however, then their moral virtue (or their political point) cannot rest on the formulations of positive laws or on what they purport to achieve in practice, and any moral, i.e. freedom-enhancing quality, will simply depend on their character as *legal* rules, on the legal *proprium*. The merit of law would then not be that it contains, as it were, the contours of the ideal social relationships suitable for each context and period. These will always be left to the normative imagination of the *auctoritatis interpositio*, whose judgment in the application of the law becomes the visible, public law face of freedom.
> […]
> I think about this in terms of the spirit, or better, *the mindset*, of the legal profession.

Constitutional mindset finds expression in extraterritorial cases, in which no national legal systems formally apply as a whole. Rules are thus evolving in a non-hierarchical and multi-participatory environment. Those gaps in the application of state law, which could be interpreted as the absence of law, are supplemented by drawing on the legal environment and available sources of law, legal logic and analogy: 'Even where legal materials run out, legal reason will continue to operate'.[147] In other fields of law and in other countries as well, when human rights have become an integral part of the judicial worldview, the courts are less and less willing to tolerate a legal vacuum as to basic rights that would leave people, groups or places without protection for fundamental rights, even outside the state.[148] American, European and Israeli rulings all include statements claiming that the application of a particular right is so fundamental to the national or regional legal culture that it cannot stop at the border. Such statements were quoted above from *Arjoub, Eisentrager* and *Issa*. These principles receive universal validity which, in the opinion of some judges, mandates extending their application beyond state borders, even in cases when black-letter law does not do so.

This process takes into account all of the existing normative sources in the environment in which the relevant court operates. While the application of human rights conventions is critical for international courts in order to exercise their jurisdiction and provide them with substantive

[145] They do not completely refrain from doing so, or from handing down rules that would leave the issue at hand outside of that rule's reach. See, eg, *Banković v Belgium* (n 46); *Johnson v Eisentrager* (n 67); *Al Maqaleh v Gates* (n 5); in Israel, HCJ 4481/91 *Bargil v Government of Israel* 1993 47(4) PD 210, where the Court ruled that the question of legality of the settlements was non-justiciable.
[146] Koskenniemi (n 15) 11–12.
[147] ibid 22.
[148] Benvenisti (n 23); Cohen (n 21). It is also interesting to note in this context that the US Supreme Court in *Boumediene v Bush* (n 5) examined the additional legal defences available to detainees in Guantánamo in order to decide whether it was necessary to extend to them the right of habeas corpus proceedings. The decision regarding the need for this remedy was not formal, but stemmed, inter alia, from the legal vacuum in which the government had placed the detainees. Thus, for example, the Court determined that the German detainees in *Johnson v Eisentrager* (n 67) were given broader rights of a fair trial in the framework of military justice proceedings than those offered in Guantánamo, which 'compensated' for the lack of the right to habeas corpus proceedings.

law, national courts have recourse to additional sources of substantive national law. The formal application of these legal sources is not self-evident with respect to extraterritorial actions; indeed, the basic assumption is that national law is territorial.[149] Nonetheless, the courts in Israel, in the United States and in other countries continue to rely on national law to fill legal gaps outside state borders.[150]

However, this multiplicity requires a proper understanding of the relationship between constitutional law and international law, a question to which courts have given little attention.[151] The Israeli Supreme Court's integrated and comparative way of examining constitutional law against international law, particularly in the *Arjoub, Mustafa, Mar'ab* and *Public Committee Against Torture* cases, is somewhat similar to the global due process model proposed by Gerald Neuman, although the Court has not formulated its reasoning to define a principled approach.[152] Neuman proposes examining whether constitutional rights are also part of international law (as norms that constitute *jus cogens* or obligate the state by virtue of international conventions) in order to decide whether they are appropriate for extraterritorial application. This way, international law serves as a yardstick for the universal recognition of these rights, and for the expectation of reciprocity from other states in applying the same rights.[153] Neuman thus offers a systematic way to formulate and possibly resolve the interrelations between international law and constitutional law.

The constitutional mindset in extraterritorial cases is also an example of a transnational legal process, which involves local, transnational and international rules and standards, in a range of fora.[154] In Israel, this process is fed, inter alia, by the transnational lawyering of human rights NGOs and lawyers, relying more and more on international law to challenge the state's legal frameworks.[155] It is also affected by decisions and deliberations in international and foreign fora, such as the ICJ advisory opinion in the *Wall* case, which was addressed extensively in *Mara'abe*.[156]

While Koskenniemi views this process as open-ended, according to Harold Koh, transnational processes are deterministic in the sense that they lead to recognition, internalisation and conformity with international and transnational law. As my analysis thus far has shown, the result is not necessarily in accordance with IHRL and IHL rules, and cannot be fully predicted. While the ICJ held that Israel is obliged by the ICCPR and other human rights conventions in the OPT, and

[149] *Sha'ar v State of Israel* (n 14); *Kiobel v Royal Dutch Petroleum Co* (n 14); Martinez (n 9).
[150] Keitner (n 9) (US, UK and Canada); Neuman (n 7) 383–84 (Germany and France); Milanovic (n 7) 65 (Canada).
[151] Cleveland (n 10).
[152] Neuman (n 7); Cleveland (n 10) also advances a principled role for international law in constitutional interpretation, which is not specific to extraterritorial application.
[153] Neuman (n 7) 394–96.
[154] Koh (n 24) 183–84.
[155] Hassan Jabareen, 'The Rise of Transnational Lawyering for Human Rights' (2008) 1 *Ma'asei Mishpat* 137 (in Hebrew). Examples of this type of lawyering can be found not only in the cases Jabareen presents, but also in many other cases, such as *Mar'ab v IDF Commander in the West Bank* (n 112); *PCATI* (n 84).
[156] *Wall* (n 13); *Mara'abe v Prime Minister of Israel* (n 113). For a comparative and transnational analysis of the Israeli ruling and the opinion, see Gross (n 114); Shany (n 114).

would have probably stated that Israeli constitutional law does not apply in the OPT, the Israeli Supreme Court has hardly followed this path, relying on constitutional law more than on international law. This transnational process indeed led to recognition of the application of human rights conventions in the territories in the *Public Committee Against Torture* case. However, Israel's quiet and laconic adoption of this statement of law by the ICJ comes with an original supplement pertaining to Israeli constitutional law, which always plays a role in determining the application and content of human rights. This supplement is not mandated by international law, and could generate conflicts between the two, especially with the law of occupation. According to the current jurisprudence, constitutional law might be given primacy over international law, either when Israeli constitutional law does not recognise all of the rights anchored in IHRL or because a certain right is deemed inappropriate for extraterritorial application.[157] It is yet to be seen if Israeli constitutional law will be applied to Palestinians in the OPT and whether the Court will actually give effect to IHRL.

There are further examples of disparities between international law and Israeli law doctrines regarding the OPT, where transnational processes culminate in contradictory interpretations and non-conformity with international law. With regard to the separation wall, decisions of the Israeli Supreme Court did not conform with authoritative decisions in international law, as the Israeli Court continues to maintain, contrary to the ICJ advisory opinion, that the separation wall is legal.[158] Another such example is the State of Israel's attitude toward the formal application of the Fourth Geneva Convention in the OPT. The Security Provisions Order, issued by Israel in June 1967, explicitly recognised, in Article 35, the application of the Fourth Geneva Convention.[159] However, Israel repealed this article a few months later, in October 1967, and has continued ever since to deny the formal application of the Geneva Convention, contrary to the authoritative interpretations of international law. The Israeli Supreme Court has never held that this convention formally applies; instead, it has adopted the state's position of voluntary application of the Geneva Convention's humanitarian directives.[160] The exact content and scope of these humanitarian provisions remains unclear, very much like the fundamental constitutional rights that should be applied in non-incorporated territories, according to the US Supreme Court.[161] Thus, the non-recognition and non-internalisation of international rules held firm in

[157] For example, the right to equality of women in marriage and divorce, or the right to freedom of religion. See also Ronen (n 36) 136; Gross (2016) (n 33).

[158] Gross (n 114) 432; *Mara'abe v Prime Minister of Israel* (n 113); *Beit Sourik Village Council v Government of Israel* (n 114).

[159] Proclamation Re: Entry into Effect of the Order Concerning Security Directives (West Bank Region) (No 3) – 1967, *Collection of Proclamations, Orders and Appointments of the Military Commander of the West Bank Region, Israeli Defence Forces* (*CPOA*) 1, 5. This is one of the main Israeli military orders in the OPT, forming part of the military legislation.

[160] The order that repealed art 35 was the Order concerning Directives (West Bank) (Amendment No 9) (Order No 144) – 1967, *CPOA*, ibid 8, 303. For Israel's position with regard to the application of the Fourth Geneva Convention, see Kretzmer (n 37) 32–35; *Yesh Din v Commander of IDF Forces in the West Bank* (n 141); *PCATI* (n 84).

[161] Cleveland (n 10) 47.

https://doi.org/10.1017/S0021223717000061 Published online by Cambridge University Press

the separation wall case while, with regard to the Fourth Geneva Convention, Israel stepped back from recognising an international rule, and has retained that position ever since.

Koh's description of the transnational process is thus somewhat too optimistic. The extra-territorial case law discussed here shows that Koskenniemi's account, emphasising that the outcome of the legal deliberations is not predetermined and is compatible with many kinds of politics, is more accurate. What can be predicted is only the form of thinking and legal logic that guides the decision making, eliminating the legal vacuum and making use of existing legal tools in an effort to reach an impartial and accepted outcome: 'Even if the law offers a solution to every problem, we cannot know what that solution is'.[162] Thus, a transnational constitutional mindset does not ensure a uniform outcome. It entails a significant probability of an outcome that is consistent with rules that have been laid down elsewhere. However, specifically because of its dynamic and untraditional nature,[163] this process may also result in developing unique and varied solutions, as well as discrepancies and contradictions.

The different solutions are evidently not the same. Applying an international treaty to a foreign territory means dealing with it in terms of the international community, the treaty having been negotiated between nations and which operates on the assumption (not reflecting the reality) of equality between sovereigns. Applying a national constitution to a foreign territory means dealing with it on the state's own terms, which are taken to be valid universally. It might reflect a mindset that is typical to colonial regimes, where the coloniser applies parts of its own laws, which are taken to be somehow superior.[164] I have also pointed to historical connections between colonial era concepts of incorporation and annexation, and the US and Israeli models. However, this does not necessarily mean that any extraterritorial application of constitutional human rights is colonial in nature. This view is over-simplistic for two main reasons. The first is that it gives primacy to the legal aspects over the actual physical aspects of control. The essence of forceful takeover is the actual control – militarily or otherwise obtained and maintained – over territory and population, and not its legal implications alone. The physical control is central, far more so than the application of law, especially human rights law. Avoiding the application of constitutional human rights to an occupied territory because that application would be colonial is therefore both a self-righteous and a self-defeating argument. The question still remains: which part of the law is applied and who stands to benefit?

This brings in the second reason. In most cases, the application of the constitution that is discussed here is only partial. It pertains to the bill of rights rather than the provisions that set the structure and powers of the government. This rather modest application of human rights provisions does not enforce the whole governmental system, concepts and values. When actual control is a fact, applying human rights might alleviate some of its consequences for the civilian population. The colonial nature of the application of law is therefore dependent on the combination of

[162] Koskenniemi (n 15) 21.
[163] Characteristics that Koh (n 24) describes.
[164] Anghie (n 66) 54; Yasuaki Onuma, *A Normative Approach to War: Peace, War, and Justice in Hugo Grotius* (Oxford University Press 1993) 377–81.

https://doi.org/10.1017/S0021223717000061 Published online by Cambridge University Press

actual practices and the content of law that is applied.[165] Finally, the extraterritorial application of human rights conventions can produce similar reactions, as in the case of any imposition of law that is not the result of self-government.[166] This does imply, however, that even beyond the law of occupation, extraterritorial constitutional law is a more risky venture.

5. CONCLUSION

Throughout this article I have discussed the legal source for the extraterritorial application of human rights, and the choice of and the relationship between international law and constitutional law. I have asked what this choice reflects in the connection between the state and the territory it controls, occupies, or in which it operates.

Extraterritorial cases are not clearly governed by a single legal system and therefore touch on many gaps in the law and 'grey' legal zones. When judges and courts have to decide such cases, they do it with a 'constitutional mindset', using general principles and analogies. Judicial practice is aimed at filling ambiguous areas with legal rules, using legal logic and principles perceived as fundamental and universal, and as basic characteristics of the legal system itself. I have discussed the ways in which different courts fill in these gaps, while comparatively analysing three models: the European, the American and the Israeli. Each model faces a series of questions that do not necessarily have a clear answer in the law: the jurisdiction; the source of law; the full or partial application of rights; and the guiding principle for such application. The different outcomes demonstrate that a constitutional mindset is compatible with many kinds of politics and that transnational legal processes are not deterministic but open-ended. They can and do result in original variations and contradictions with international law. Nonetheless, the uniqueness of the development of the various models and the attempt to understand their internal logic enriches the understanding of the diversity of possible outcomes.

The analysis of the different models demonstrates the wide variety of models on the spectrum between international human rights law and constitutional law, represented by the European and US models. Every hybrid model, such as the Israeli version, faces the question of the relationship between international law and constitutional law. To achieve a consistent doctrine, this relationship has to be investigated and formulated. Perhaps this is not even the only spectrum, as other branches of law, such as administrative law and international humanitarian law, can come into play.

Beyond analysis, I hope to have offered some historical and contextual explanations for the differences between the models, although a more comprehensive explanation is beyond the scope of this article and could be the subject of further research. The choice between constitutional and international law actually reflects a tension between temporary control or occasional use of state

[165] For an excellent discussion of these points see Martinez (n 9).
[166] For a critique of applying human rights in armed conflict or occupation see Gross (2016) (n 33); Modirzadeh (n 33) 360–67, who terms the enforcement of human rights by the occupying military forces 'rights at the end of a gun'.

https://doi.org/10.1017/S0021223717000061 Published online by Cambridge University Press

power in a territory, and permanent control or sovereign aspirations towards it. In the case of occupied territory, international law and extraterritorial constitutional law conflict: the law of occupation prohibits the application of the occupier's law and mandates the implementation of IHRL, thus supporting territorial limits to constitutional law. The choice of constitutional law is at a greater risk of imposing foreign concepts in the disguise of human rights, while the use of international law acknowledges and maintains the different status of that territory. That does not mean, however, that any extraterritorial application of constitutional human rights is colonial or annexational. The reality of control does not depend on the application of law, and the result actually depends on which constitutional rights are applied and whom do they benefit.

With regard to the Israeli model, Supreme Court decisions on human rights in the OPT are quite chaotic, not only with regard to the source of law. Considerable effort has been required to trace some logic in the disarray. The Israeli model is swinging and pulling in different directions, and the overall picture presented here undoubtedly blurs some differences that might indeed be irreconcilable. It is clear, though, that constitutional law is the dominant legal source leading the Court. Most decisions that focus on constitutional rights do not mention IHRL at all, while those focusing on international law always cite constitutional and administrative law; they compare and refer to international law as a relevant legal source, but do not address the need to establish rules of interpretation and reconciliation between them. The pendulum of the Israeli Supreme Court between these two poles seems to me to be reflective of the political indecision regarding the status of these territories, the complex and unresolved Israeli state of affairs.