Would Jordan Valley annexation tip scales in war crimes fight? - analysis

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If Prime Minister Benjamin Netanyahu makes a postelection announcement [annexing the Jordan Valley](https://www.jpost.com/Israel-News/Prime-Minister-Netanyahu-expected-to-announce-annexation-of-Jordan-Valley-601207) will it tip the scales against Israel at the International Criminal Court?

For those who have forgotten,  [ICC](https://www.jpost.com/Middle-East/ICC-to-open-war-crimes-case-against-Israel-breaking-600396) is likely into the last year of a five-year preliminary review of war crimes allegations against Israelis.

Nine months ago, the ICC Prosecution’s report said it had moved its decision on war crimes allegations relating to Israel and “Palestine” to the final track – suggesting there may be a decision by December.

In that same report, the ICC Prosecution appeared to maneuver more strongly than ever to set the stage for accusing Israelis of war crimes regarding the settlement enterprise.

Until that report, there had been hope from top Israeli government lawyers – a hope bolstered by former ICC chief prosecutor Luis Moreno Ocampo in an exclusive interview with The Jerusalem Post – that Israeli Supreme Court decisions ordering some Israeli settlements demolished and some changes in the West Bank security barrier might protect Israel from ICC involvement.

But the ICC Prosecution seemed to say in that report that it would view Supreme Court decisions as narrowly limited to instances in which it ruled, leaving any West Bank land dispute where it did not rule – meaning most of the land – open to ICC jurisdiction.

As a backdrop to all of this is the fundamental question of whether the ICC trusts Israel’s rule of law and believes that its West Bank policies comply with international law.

If it does, then the ICC’s own Rome Statute would prohibit it from getting involved.

If it believes that the government and Supreme Court do not enforce and comply with international law, then the path to a conflict with Israel over alleged war crimes becomes easier to take.

How would a Netanyahu declaration work into this? The truth is that a Netanyahu declaration, in and of itself, would probably not be terribly meaningful either to the ICC or to Israelis domestically.

In order to apply Israeli law to the Jordan Valley in any meaningful way, Netanyahu would, at a bare minimum, need a vote of the cabinet to take concrete actions.

The internal debate in Israel is whether that would suffice or could be summarily ignored or easily struck down by a Supreme Court ruling.

Many say that for Israel to actually annex even a centimeter of some new area of the West Bank, a Knesset law would need to be passed, as Israel did with Jerusalem and the Golan Heights.

Presuming Knesset action would be necessary to annex the Jordan Valley, the real question is whether such a Knesset law would tip the scales of the ICC against Israel or whether the Supreme Court would intervene and strike down such a law before the ICC could act.

The Supreme Court did freeze the Settlements Regulations Law around two years ago, to some extent taking that off the table as a weapon the ICC might use against Israel.

Curiously, the Supreme Court has never gotten around to actually ruling on the constitutionality of the law, though a two-year freeze – along with Attorney-General Avichai Mandelblit’s opposition to that law – makes it clear that the court is not a fan.

But anyone who thinks that the Supreme Court would strike down or freeze a Knesset annexation law regarding the Jordan Valley did not carefully read Mandelblit’s opposition to the Settlements Regulations Law.

Among other objections, Mandelblit and his international law advisers argued that the law could not be implemented, because Israeli domestic law had a decades-long precedent of treating the West Bank as belligerent occupied and disputed territory.

Israel might very well acquire ownership of the land in diplomatic negotiations, but it could not randomly legalize Israeli settlements that were built on land claimed by the Palestinians as privately owned.

But Mandelblit and his advisers had an “unless” – unless the Knesset decided to annex.

Mandelblit’s advisers were clear that the Knesset has the sovereign power to pass a law reversing decades of policy and choosing to take full responsibility for annexing aspects of the West Bank. They simply were not prepared to pretend that Israel views the West Bank as disputed, while picking and choosing times to ignore that status.

This means that the same Supreme Court – which seems to have permanently frozen piecemeal, roundabout annexation-like moves – might very well accept straight-up annexation by the Knesset as binding its hands.

That is the scenario where the ICC might finally slant against Israel over the settlement enterprise.

Of course, Israel would have a range of counterarguments: Israel did not ratify the Rome Statute; Israel still disputes that Palestine is even a state which can ask for ICC intervention; no one in history has ever been probed for the “war crime” of building a house; and the specific areas being annexed might be generally acknowledged as staying with Israel even if there is a peace deal.

This last point is debatable regarding the Jordan Valley, though it seems the Palestinians were ready in 2014 to agree to Israeli control for several years or more even after a deal.

But unquestionably, annexing the Jordan Valley without a peace deal would carry risks before the ICC.