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Expert Opinion on the Effects of the Israeli Military Rule and Settlement Expansion in the City of Hebron from an International Law Perspective

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After the invasion of the West Bank by Israel in 1967, a number of events and of actions by Israel as the occupying power, and by Jewish settlers who established themselves in the Hebron area, have had a profound impact on the living conditions of the Arab, i.e. Palestinian population of that area. The purpose of this Expert Opinion is an international legal assessment of the Israeli measures taken in the Hebron area, including omissions where action would have been legally required. Different areas of international law have to be taken into account:

- The law of belligerent occupation;
- Human rights;
- The law relating to the use of force in international relations: the prohibition of annexation, be it formal or *de facto*;
- The right to self-determination;
- Rules ensuring compliance with international law.

I. The occupation regime applicable to the Hebron area – an overview

1. The occupation regime in and around Hebron

Hebron is a site of historic clashes between the Arab population of Palestine and the "new" Jewish population.[1] After the establishment of the Israeli occupation of the West Bank in 1967, there was a sizeable influx of Israelis into the Hebron area which thus became a hotspot of the controversies about Israeli settlements and Israel's occupation policy. The institutional setup of the occupation regime was fundamentally modified from 1993 onward by series of international treaties between the State of Israel and the Palestinian People, then represented by the PLO, the so-called Oslo Accords after 1993: in accordance with the Oslo II Agreement of 1995, implemented by the Hebron Protocol of 1997,[2] the area of Hebron became subject to a particular regime. It was divided in two areas: H1 came under the control of the Palestinian Authority, H2 became subject to exclusive Israeli control.[3] Yet the dividing line between the two areas has gradually become blurred as Israeli measures have extended into the H 1 area.[4] In contradistinction to the Eastern part of Jerusalem, this area was not formally annexed, i.e. it was not formally made part of the territory of Israel. But a governmental structure and a *de facto* situation was created which made a decent life of the remaining Arab population impossible, at least unbearable. There are five relatively small settlements in the area, but they re situated within a densely populated Palestinian urban area. It is Israel's policy to keep Palestinian away from, the vicinity of these settlements. In 2015, the regime was even rendered more restrictive by declaring large parts of the H 2 area a closed military or restricted area.[5] All this has lead to a massive displacement, a squeeze out of the Arab population of the Old City of Hebron. Formerly thriving Arab businesses had to close down, Arab Palestinians were practically forced to leave their homes where the families had lived for decades and more. The quantitative

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[1] NRC, *Driven out. The Continuing Forced Displacement of Palestinian Residents from Hebron's Old City,* May 2013, 12 *et seq.*

[2] Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (Oslo II), 28.09.1995, Annex III, Art. VII; Protocol concerning the Redeployment in Hebron, 17.01.1997 (Hebron Protocol).

[3] Sec. 2.a. Hebron Protocol; OCHA, *The Humanitarian Situation in the H 2 Area of Hebron City. Finding of Needs Assessment,* April 2019; B'Tselem, *Ghost Town: Israel's Separation Policy and Forced Evictions of Palestinians from the Center of Hebron,* May 2009, 11; S. Reynolds, *Coercive Environments: Israel's Forcible Transfer of Palestinians in the Occupied Territory,* BADIL, February 2017, 15.

[4] *Ghost Town,* note 3, 11 *et seq.*, 17, 36.

[5] OCHA, *H 2,* note 3, 5.

dimension of this situation is somewhat difficult to exactly clarify. According to a survey undertaken in 2006, 42% of the Palestinian housing units had been vacated, 1829 businesses closed.[6] This Opinion will show how this move of Israeli expansion and the ensuing displacement or squeezing out of the Arab population violates various fundamental norms of international law.

2. The law of belligerent occupation – basic issues

This process is, as will be shown, the cumulative result of a number of acts and omissions of the occupying power, most of which constitute in and of itself violations of applicable rules of international law, i.e.. of the law of belligerent occupation and of human rights. The following reasoning will evaluate the lawfulness *vel non* of these single acts and omissions before proceeding to a judgment on their cumulative effect.

The law of belligerent occupation is to a large extent customary law. Art. 43 *et seq.* of the Hague Regulations on Land Warfare are generally considered to constitute a valid formulation of that customary law.[7] Based on the experience of the Second World War, important additions to that pre-existing law of belligerent occupation have been made by the Fourth Geneva Convention of 1949 (GC IV). Its provisions bind Israel in relation to the OPT. Israel's contrary position (theory of the "missing reversioner") is fundamentally flawed and rejected by the great majority of the international community. The view that the GC IV binds Israel as a matter of treaty law is maintained in international legal doctrine,[8] in resolutions of the United Nations General Assembly and the Security Council,[9] and last not least by the ICJ in its Advisory Opinion in the *Wall* case.[10] The Opinion is not legally binding, but it constitutes an authoritative statement of relevant international law. Furthermore, the

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[6] *Ghost Town,* note 3, 14.

[7] E. Benvenisti, 'Occupation, Belligerent', sec. 3, in R.Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law,* available at www.mpepil.org. (hereinafter MPEPIL); Y. Dinstein, *The International Law of Belligerent Occupation,* 2nd ed. CUP 2019, 5 *et seq.*

[8] For recent analysis see S. Jabarin, 'The Occupied Palestinian Territory and international humanitarian law', (2013) 95/890 *IRRC* 415-428.

[9] UN General Assembly Res. 72/86, OP 2; Security Council Res. 2334, 23.12.2016.

[10] International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion, 9 July 2004, paras. 89 *et seq.* with references (hereinafter *Wall* case).

essential content of GC IV nowadays also constitutes customary law[11] which binds Israel anyway.

The basic obligation of an occupying power is in a somewhat archaic way formulated in Art 43 of the Hague Regulations: The occupying power must (according to the French text which is the only authoritative one) ensure "l'ordre et la vie publics" (public order and life). Translated into modern parlance, it means a duty to provide for the welfare of the population of the territory in a way which is similar to the tasks of a modern government. This is a duty of good governance.[12] It has been recognized in the case law of the Supreme Court of Israel.[13] For example, the Supreme Court held:[14]

> "The obligation of the military administration, defined in regulation 43 of the Hague Regulations, is to preserve the order and the public life of the local population ..."

This general obligation entails a number of specific duties. Activities of members of the population for the purpose of pursuing a normal gainful life have to be facilitated and may not be prevented. Normal ways of access to essential goods and services may not be cut. It is also concretized by a number of specific duties of the occupying power, and corresponding the rights of the population. These rights include human rights as enshrined, for instance, in the UN Human Rights Covenants.

These rights have in many ways been violated by Israel.

There is, on the one hand, the prohibition of transferring parts of the occupying power's own population into the occupied territory (Art. 49 GC IV and a corresponding norm of customary law), an obligation systematically violated by the establishment, maintenance and expansion of Israeli settlements in the occupied Palestinian territory, in particular in the H 2 area of Hebron.

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[11] M.E. O'Connell, 'Historical development and legal sources' in D. Fleck (ed.), The Handbook of IOnternational Humanitarian Law, 3rd ed. OUP 2013, 1-42, at 27.

[12] M. Bothe, 'The Administration of Occupied Territory', in A. Clapham/P. Gaeta/M. Sassòli (eds.), *The 1949 Geneva Conventions. A Commentary*, OUP2015, 1455-1484, at mn. 33 *et seq.*

[13] *Beith Sourik Village Council v. Government of Israel and IDF Commander in the West Bank*, Judgment of 30 June 2004, HCJ 2056/04, English translation 43 ILM 1099 (2004), paras. 33 *et seq.* with extensive references.

[14] *Thaj v. Minister of Defence*, HCJ 2977/91, at 474.

There are, on the other hand, a number of specific obligations which imply a prohibition of displacing parts of the local population, in particular the prohibition of displacing parts of the population stated in Art. 49 GC IV, the guarantee of personal rights of members of the population (Art. 27 GC IV), the protection of private property (Art. 46 Hague Regulations) and the freedom of movement guaranteed by Art. 12 ICCPR. These norms have been systematically violated by measures which have made Palestinians move away and close their businesses, and have barred their access to important parts of the H 2 Area.

The duty of good governance and especially applicable human rights also involve a duty of protection for the members of the population, in particular to protect their physical integrity against attacks by private individuals, but also against unlawful violence by public officials belonging to the occupying power. This duty of protection is constantly violated by tolerating, if not favouring, settler violence and by the failure to react to complaints concerning unwarranted police and military use of force or mistreatment of persons arrested or detained.

Taken together, these Israeli measures and activities sum-up to a political concept which is contrary to the fundamental principle of the law of occupation, namely that belligerent occupation is a provisional status where no measures may be taken to create *faits accomplis* concerning a final solution to be reached after the conclusion of the conflict.[15] It is a political design to perpetuate Israeli presence in Hebron, mainly through the establishment, maintenance and expansion of settlements, and to displace the Palestinian population of the Old City of Hebron through a policy of separation for that very purpose.[16] This political design (unlawful as such) is a kind of mosaic composed of many stones, themselves constituting unlawful acts.

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[15] Bothe, *loc.cit.* note 12, mn. 14 *et seq.*

[16] See Y. Mizrachi, *Tel Rumeida: Hebron Archeological Park,* Emek Shaveh 2014, 16 *et seq.* (hereinafter Emek Shaveh Report); *Driven out*, note 1, at 55.

II. The practice of the occupation regime – a detailed analysis

1. The law of belligerent occupation

1.1. The establishment and expansion of Israeli settlements

After 1967, the creation of Israeli settlements in the area in and around the Old city of Hebron started rather soon.[17] They were made a political objective of Israeli policy. Over the following years, the position of these settlements was strengthened by the Israeli authorities, by restricting the rights of the Palestinian population and by facilitating in other ways the life and existence of the settlements and of the settlers.

The various elements of this development were as follows: The settlements are all situated in the H2 Area, five of them (Beit Hadassah, Avraham Avinu/Hay Al-Yahud, Beit Romano, Tel Rumeida, Al Rajabi House, also called House of Peace) in the Old City of Hebron, the biggest and oldest one, Kiryat Arba, in the outskirts of Hebron.

The Kyryat Arba settlement was approved by an Act of the Knesseth in 1970 and the fist families moved in in 1971. The settlement was built on land seized by Israeli authorities allegedly for security reasons, on land which had been declared "state land" and on land bought by a subsidiary of the Jewish National Fund. Kiryat Arba has expanded, land around the settlement was confiscated. Givat Ha'svot in the old city is considered as a "neighbourhood" of Kiryat Arba. The whole settlement of Kiryat Arba, together with the neighbouring settlement Givat Ha Harsina, is presently inhabited by more than 7,000 persons.

Beit Hadassah was founded in 1979 by a group of women and children coming from Kiryat Arba. Early in 1980, it was formally recognized by the Israeli Government. It consists of a cluster of houses, the current population being less than 150 persons.

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[17] For an overview of the development, see *Driven out,* note 1, 13 *et seq.*; *Ghost Town,* note 3, 9 *et seq.* ; OCHA, *H 2,* note 3, 1; *Forced Population Transfer. The case of the Old City of Hebron,* BADIL August 2016, 17 *et seq.*

Avraham Avinu/Hay Al-Yahud was built in the early 1980ies around the site of the Old Jewish Quarter and the original synagogue with the support of the Israeli government. Its estimated population is less than 200 settlers.

Beit Romano essentially consists of a religious school (yeshiva), based on a decision of the Israeli government taken in 1980.

Tel Rumeida is located on a hilltop overlooking Hebron. In 1984, seven families moved to the place in temporary trailers. The establishment of permanent constructions for settlers was controversial as the site is of high archeological value.[18] In 1998, the Israeli government approved the construction of permanent buildings.

The Rajabi House is a four story apartment building, which settlers in 2014 were allowed to take possession of by the Israeli Defense Minister after a legal battle of some years and also settler violence.[19]

Even though the initiative to establish the settlements did not always come from the Israeli government, they all owe their permanent existence to a decision of the Israeli government. In addition to these decisions directly approving and facilitating the five settlements, there has been and continues, as part of the Israeli settlement policy, a systematic practice supporting and strengthening the settlements by collateral measures. They are mostly prompted by the specific situation of the Hebron settlements, i.e. relatively small units within an urban area densely populated by Palestinians. The Israeli answer to that perceived difficulty to ensure the viability of the settlements includes action designed to keep Palestinian away from the settlement as part of a policy of separation. These were measures closing down economic activities in the vicinity of the settlements (closure of shops and markets),[20] closing roads to any entry by Palestinians, entry by car even as pedestrians,[21] and completely reserving their use to the Israeli settlers, travel restrictions for Palestinians on further roads and streets, and enforcing this regime by a system of checkpoints. The most recent Israeli measure to strengthen the settlements and to

[18] Emek Shaveh Report, 6
[19] *Driven our,* note 1, 26 *et seq.*
[20] See below II.1.3., notes 36-42; *Ghost Town,* note 3, 14.
[21] *Ghost Town,* note 3, 23; see also note 33 *et seq.*

safeguard the interests of the settlers is the establishment of a special and separate system of municipal government for the settlers.[22] This constitutes an unlawful petrification of the unlawful systematic establishment of Israeli settlements in the Hebron area. It is not a formal annexation, but its practical result is a *de facto* annexation.[23] For many Israeli politicians, all this should lead to extending Israel's sovereignty to the City of Hebron or at least to the settlements established therein.[24]

To summarize, the establishment, continuous maintenance, expansion and augmentation of, and support for, the settlements in and around Hebron constitutes a violation of Art. 49 GC IV and of a corresponding rule of customary international law. The Hebron Protocol[25] cannot be interpreted as excluding the unlawfulness of these Israeli acts. To the contrary, both parties are committed "maintain normal life throughout the City of Hebron and to prevent any provocation or friction that may affect the normal life in the city:"[26] Yet the effect of the Israeli measures is exactly the opposite of what this commitment is meant to ensure. Furthermore, if the Protocol could be interpreted justifying the settlement policy, it would be invalid as it would constitute a renunciation to the protection of the Convention which is prohibited by Art. 8 GC IV, and also a violation of *ius cogens*.[27]

1.2. The duty of good governance

The duty of good governance is a generic rule. The occupying power must provide for the wellbeing of the local population. This includes the obligation to respect a number of particular rights, which in the law of belligerent occupation are specifically guaranteed in Art. 46 Hague Regulations and Art. 27 GC IV. The duty of good governance also means respect for the human rights of the members of the population. The respect of these particular guarantees is analyzed below. It will be shown that the cumulative effect of the violations of these guarantees leads to the conclusion that the duty of good governance is violated by

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[22] IDF, Decree no. 1789, A Decree concerning the Civil Services Administration (Judea and Samaria) 5777 – 2017.

[23] See below II.3.

[24] T. Stoff, 'Likud minister, Knesset speaker call for extending Israeli sovereignty to Hebron', The Times of Israel, 4.9.2019.

[25] Note 3.

[26] Sec. 7 of the Protocol.

[27] Below sec. III.3.

Israel. The cumulative effect of these violations makes the life of the Palestinian population unbearable and has made a great number of Palestinians move away from the Old City.[28]. These violations thus lead to a result which is exactly the contrary of what the duty of good governance imposes upon the occupying power.

Another element of the duty of good governance is the respect of applicable international legal protections, including the protective regime of the UNESCO Heritage Convention,[29] to which both Israel and Palestine are parties. Before the admission of Palestine as a member of UNESCO, UNESCO and the World Heritage Committee held the view that the Old Town of Hebron (together with other sites situated in Palestine) were part of the Palestinian cultural heritage which Israel as the occupying power had to respect.[30] After the admission of Palestine to UNESCO, the Old City of Hebron/Al Khalid, including the Ibrahimi Mosque, was placed on the Heritage List pursuant to an application submitted by the State of Palestine.[31] This has led to a dispute between Israel and Palestine,[32] in particular due to Israeli construction works and settler activities threatening the protection of the Mosque. Although Israel withdrew from UNESCO when the membership of the State of Palestine was accepted by the organization, it remained a party to the Heritage Convention alongside with Palestine. Being a party to the Heritage Convention does not require membership in UNESCO.[33] Therefor, Israel remains to be bound by the Convention and is thus obligated to respect the cultural value of the Old City of Hebron, and in particular not to violate the protection of the Ibrahimi Mosque as required by Art. 6 (3) of the Heritage Convention. Israeli construction works in the vicinity of the Mosque undertaken with a view to promote a settlement put this protection into jeopardy and are therefor a violation of the Heritage Convention. This protection is also required by the Hague Convention on the protection of cultural property in times of armed conflict,[34] to which both Israel and Palestine are parties. According to Art. 5, the occupying power has to support the competent national authorities of the occupied territory "in safeguarding and preserving its cultural property", which is in sharp contrast to

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[28] *Ghost Town,* note 3, 13 *et seq.*
[29] Convention concerning the Protection of the World Cultural and Natural Heritage, 21.11.1972.
[30] See World Heritage document WHC-12/36.COM/11, 11.05.2012.
[31] World Heritage Committee, Decision 41 COM 8B.1, 2017.
[32] See State of Palestine, *State of Conservation Report (2019) for Hebron/Al-Khalil Old Town – Palestine (Ref. 1565),* 5, 11, 15 *et seq.*
[33] Art. 32 Heritage Convention.
[34] Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14.05.1954, 249 U.N.T.S. 240.

the actual Israeli activities. Respect for cultural property also constitutes an obligation under customary law.[35]

1.3. The prohibition of population transfers

A fundamental component of the duty of good governance is the right of the members of the population not to be forced to leave the place of their usual abode and work, i.e. the prohibition of population transfers stipulated in Art. 49 GC IV and in customary law. This prohibition is violated by a number of Israeli measures directly or indirectly forcing Palestinians to move away, or by the cumulative effect of these measures.

The first and still most important measure of this type is the closure of roads for all Palestinian travel, allegedly for security reasons.[36] This started with the closure of Shuhada Street in 1994. In 2000, during the second intifada, certain roads were also closed for pedestrians.[37] The shops along this street were no longer accessible for vehicles, thus the necessary commercial traffic was cut, the shops had to be closed. Private apartments were no longer accessible from the street front. Access to them became excessively complicated, if not impossible. For obvious practical reasons, Palestinians had to leave these homes. In 2015, the Tel Rumeida area became the object of even more restrictive measures as it was declared a closed military area.[38]

A group of measures short of closing entire roads has been access restrictions through various kinds of physical obstacles. There are more than 120 such obstacles, including 21 permanently staffed checkpoints in the H 2 area. Not all of them can be passed by vehicles.[39] About 89% of the Palestinian population is reported to be unable to reach their homes by vehicle.[40]

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[35] J.-M. Henckaerts/L. Doswald-Beck/ICRC, *Customary International Humanitarian Law,* CUP 2005, vol. I, 132 (Rule 40).
[36] For a list of relevant events see *Ghost Town,* note 3, 37 *et seq.;* OCHA, *H 2,* note 3, 2
[37] *Ghost Town,* note 3, 23, 29.
[38] *Ghost Town*, note 3, 23; OCHA, *H 2,* note 3, 5.
[39] OCHA, *H 2,* note 3, 5.
[40] OCHA, *H 2,* note 3, 5

An effect similar to these street closures was achieved through curfews since 2000. The ensuing impossibility to move around at different times made a regular life practically impossible.[41]

Since 1994, shops and markets, for example the wholesale market in the vicinity of the Avraham Avinu/Hay Al-Yahud settlement, situated in the very heart of the Old City, were closed for alleged security reasons.[42]

A final reason for leaving the area was the constant harassment of Palestinians, including Palestinian children, by settlers, using intimidation and threats, physical assault, stoning, access prevention and even shooting.[43] The Israeli authorities took practically no measures to protect Palestinians against such violent harassments.[44]

All these different Israeli acts and omissions created a coercive environment driving Palestinians out of their homes and businesses and out of the H2 area.[45] This was not a mere coincidence, it corresponded to a political plan to promote and secure the presence of the settlements in the area and to strengthen them by a policy of separation.[46] This amounts to a population transfer prohibited by Art. 49 GC IV and by the customary law of belligerent occupation. Security reasons are not a valid counter-argument. The position of the Israeli High Court in relation to the security argument, often put forward by the State of Israel in litigation concerning the settlements, can be characterized as cautious. At least, the Court did not unreservedly accept the security plea.[47] The security of the settlements cannot justify these restrictive measures as these settlements are themselves unlawful. In any event, these measures went far beyond what could be considered as necessary and proportionate. Consequently, they cannot legitimize any limitation of the relevant rights.

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[41] *Driven out*, note 1, 29 *et seq.*
[42] *Ghost Town,* note 3, 33 *et seq.*; see also www.hebronapartheid.org/index.php?settlement=3.
[43] OCHA, note 3, 5 and 7.
[44] *Ghost Town,* note 3, 41 *et seq.*
[45] For figures, see note 6.
[46] *Coercive Environments,* 26.
[47] For an analysis see D. Kretzmer, *The Occupation of Justice. The Supreme Court of Israel and the Occupied Territories,* State of New York University Press: New York 2002, 79 *et seq.*

1.4. The general protection of the rights of the Palestinian population.

The practice of searches in houses and also the various elements of the coercive environment constitute a violation of the right to family life protected both by Art. 27 GC IV (respect for their family rights) and by Art. 46 Hague Regulations (family honour and rights).

A related problem is the respect for the religious convictions of the population, also guaranteed by Art 27 GC and Art. 46 Hague Regulations. This means that the exercise of religion must be free. In this respect, the situation at the Ibrahimi Mosque is a hotspot of violations. It is a sensitive place, as the cave under the Mosque is also Important for Jewish religious history. But this fact does not justify a restriction of the use of the Mosque by Muslim as a place of worship. The Mosque was the site of a massacre of Palestinians committed by a Jewish extremist in 1994. Yet that event did not lead, as it should have done, to action by the Israeli authorities protecting Muslim worshippers, but rather to the restrictive measures against Palestinians, already described, and to a policy of separation for protecting the interests of the settlers.[48] The exercise of religious freedom was thereafter frequently hindered or prevented by settlers disturbing the use of the site by Palestinians, a practice condoned by the Israeli authorities. On various occasions, the occupation authorities closed the access to the Mosque, an outright violation of the freedom of religion, most recently in September 2020.[49]

A further recurrent violation of personal rights is the frequent use of excessive force by Israeli police and soldiers. This includes searches of Palestinian homes by Israeli forces, using methods of harassment and intimidation, including physical assault.[50] Abusive interrogations, beating of persons controlled or detained, even arbitrary killing, not justified by self-defense,[51] including the unwarranted use of life ammunition to enforce curfews[52] have occurred. Numerous complaints have been brought against these incidents, but usually without meaningful success.

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[48] *Driven out,* note 1, 13 *et seq.*

[49] 'Hebron: Ibrahimi Mosque closed by Israeli forces for second day in a row', Middleeast Monitor, September 21, 2020, available at www.middleeastmonitor.com/20200921-hebron-ibrahimi-mpsque-for-second-day-in-a-row.

[50] OCHA, *H 2,* note 3, 6.

[51] *Driven out,* note 3 , 36 *et seq.*

[52] *Ghost Town,* note 3, 21; OCHA, *H 2,* note 3, 6.

The protection of personal rights guaranteed by GC IV and the Hague Regulations also involves a duty to protected members of the population, "protected persons", against the violation of these rights by private actors. There are regular incidents of settler violence against Palestinians, including school children, where such protection was not forthcoming.[53] This constitutes a violation of Art. 27 GC IV. Not conducting investigations in cases of violations by the agents of the occupying power is also a violation. 2005 to 2014, only 7,4% of Israeli investigations have resulted in indictments.[54] This failure to grant protection is an omission engaging the international responsibility of Israel.[55]

1.5. The protection of property

The right of private property has been violated by Israel in a number of different ways:

- preventing commercial activities;
- deprivation of the use or other forms of enjoyment of lawful possessions.
- demolitions, punitive or for lack of building permit;
- seizure, allegedly for security reasons.

According to Art. 46 of the Hague Regulations, "private property" has to be respected. Property in this sense is not restricted to formal ownership, but beneficial ownership and the right to use certain movable or immovable property are also protected.[56] Such is for instance the trend of the modern jurisprudence of human rights courts where the definition of protected property also matters.[57] This means that the closures described above[58] and other measures which made private owners or lawful users move away from their homes or places of business[59] constituted a violation of the guarantee of the private property of the affected

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[53] *Ghost Town*, note 3, 41 *et seq.*; Human Rights Council, Report of the Special Rapporteur on the situation of Human Rights in the Palestinian territories occupied since 1967, UN Doc. A/HRC/40/73, 15.03.2019, para. 15, and in particular *idem*, A/HRC/44/60, 15.07.2020, para. 8; see also the regular reports by the Hebron Rehabilitation Committee, Legal Unit, available at www.hebronrc.org; on procedural details see W. Mosse, *Impunity for settler violence: systemic discrimination and the need for international justice*, Jerusalem Legal Aid and Human Rights Center 2015, 16 *et seq.*, on the duty of protection at 27.

[54] *Coercive environments*, note 3, 24.

[55] *Customary International Humanitarian Law*, note 35, vol. I, 532, referring *inter alia* to a British Military Court decision in the *Essen Lynching case* (failure to protect prisoners against harassment by a crowd) .

[56] Dinstein, *op.cit.* note 7, 243.

[57] Y. Arai-Takahashi, 'Protection of Private Property', in Clapham/Gaeta/Sassòli (eds.), note 12, mn. 6, 36.

[58] See above II.1.3., notes 36-42; *Ghost Town*, note 3, 14.

[59] Above sec. I.1.3.

shop owners. This protection of property is part of the personal rights guaranteed by Art. 27 GC IV to which protected persons cannot renounce (Art. 8 GC IV).

Pursuant to the international law of state responsibility, Israel is obliged to restitute this property (Art. 35 ARS). Only where restitution is physically impossible compensation is a lawful form of reparation of the injury suffered by the victims (Art. 36 ARS).[60]

A related form of violation of property rights is the prevention of the use and in particular or the rehabilitation of buildings. The measures rendering the use of apartments and houses difficult and even impossible are not only unlawful as forced displacement,[61] they also constitute a violation of the property of the owner or the person living in the house. The use of that property is also rendered difficult by denying access to the users. This is the effect of settler violence tolerated by the Israeli authorities or of acts taken by Israeli authorities themselves, which hinder and prevent rehabilitation of buildings.[62] Suchctions make it impossible to bring in workers and building materials.

Nearly everywhere in the oPt, also in Hebron, there is a frequent Israeli practice of destroying houses of Palestinians.[63] These demolitions have for a long time been the object of regular international critique.[64] The general rule on the destruction of real or personal property is stated in Art. 53 GC IV: it is prohibited except where such destruction is rendered absolutely necessary by military operations. The said practice is not "rendered necessary by military operations". Various other justifications are put forward, the main ones being punitive, lack of building permits and military or security considerations. The two former ones are based on the application of the law pre-existing in the occupied territory which the occupying power has to apply, at least in principle (Art. 43 Hague Regulations).

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[60] Art. 34 *et seq.* of the ILC Articles on the Responsibility of States for internationally wrongful acts (hereinafter ARS).
[61] See above text accompanying note 46.
[62] OCHA, *H 2*, note 3, 15.
[63] See *Israeli practices affecting the human rights of the Palestinian People in the Occupied Palestinian Territory, including East Jerusalem,* Report of the Secretary General, UN Doc A/75/36, paras. 34 *et seq.*
[64] Report of the Secretary General, note 63, paras. 33 *et seq.* On the quantitative dimension, see OCHA Occupied Palestinian Territory, Data on demolition and displacement in the West Bank, htpps://www.ochaopt.org/demolitions : 2009-2021 7,275 structures demolished, 10.969 people displaced, in Hebron 1,085 structures demolished, 1,752 persons displaced as a consequence.

Punitive demolitions: Houses are torn down because they belong to relatives of persons charged with "terrorist" acts. The justification derived from the alleged criminal acts of a member of the family of the owner is forbidden by Art. 50 Hague Regulations (prohibition of collective punishment). Even if such demolitions would have been lawful under British Mandate law, being the preexisting law of Palestine[65] this cannot prevail over the clear rule of international law of belligerent occupation. Furthermore, measures taken to ensure the safety of the occupying power are subject to the principle of proportionality. This justification used by Israeli authorities throughout the oPt, is of little relevance for the Hebron area. It may not be confused with general security considerations.

Lack of building permits: In the Hebron area, this justification was used for the demolition of three water cisterns serving Hebron, which had been funded by the EU and its Member States.[66] In two of these cases, the legal basis was Military Order 1797. A petition filed against this Order had been rejected by the Israeli High Court in April 2019. It is a widespread Israeli practice to demolish new buildings erected without building permit, including buildings funded by relief organization.[67] This practice is unlawful because the impossibility to obtain building permits is due to an unlawful policy of Israel as occupying power, violating the duty of good governance.

Seizure for military purposes:[68] There is only one particular type of such seizure regulated and permitted by the Hague Regulations, namely "requisition". This is a form of taking of property which is strictly limited by law and has not been used by Israel, as far as information is available. The occupying power may "requisition" property "for the needs of the army of occupation" (Art. 52 Hague Regulations). This may legitimize a requisition for the purpose of building, for example, a military camp. The purpose of acquiring land for establishing a settlement or for protecting such a settlement is not a purpose legitimizing a requisition, as this is not a "need of the army of occupation". In addition, requisitions may

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[65] On punitive house demolitions see UN Doc. A/HRC/28/78, paras. 50-53. The legal basis used by Israel are the (British) Defense Regulations 1945 for times of emergency. On demolitions for the construction of the Wall: ICJ, *Wall* case, note 10, paras. 132 *et seq.*; on collective punishment *inter alia* GA Res. 71/98, 23.12.2016, PP. 24.

[66] OCHA, *West Bank Demolitions and Displacement: an Overview*, July 2019, available at www.ochaopt.org.

[67] For the recent practice see *Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and the Occupied Syrian Golan,* Report of the Secretary General, UN Doc. A/75/376, 01.10.2020, paras. 37 *et seq.*

[68] *Ghost Town,* note 3, 59.

only be made against compensation (Art 52 para. 3 Hague Regulations). No information is available to the author of this Opinion whether any compensation was paid or offered. In the absence of a legitimate purpose, these seizures are a violation of the right to property protected by Art. 46.

As a rule, the seizures of property which have taken place in the Hebron area have not been in conformity that legal framework.[69] They were mainly based on Israeli security legislation enacted for the oPt. From the point of view of international law, such legislation is not sufficient to justify such seizures. They must conform to the international rules protecting property in occupied territories. Some of the seizures may have served as training grounds or rooftop observation post. This could serve the needs of the army of occupation and thus be permissible if appropriate compensation were paid for their temporary use. But many of them for used to create safety areas or buffer zones around the settlements. That purpose does not constitute a valid justification for the seizures. These seizures are thus unlawful.

1.6. Conclusion concerning the law of belligerent occupation

Taken together, the Israeli measures regarding the City Center of Hebron amount to a systematic and intentional dispossession of the Arab population, even openly declared as such by Israeli authorities, for the purpose of safeguarding the interests of the settlers.[70] This policy contravenes many specific guarantees. It is part of an overall design violating of the most fundamental principles of the law of belligerent occupation.

2. Human Rights

International human rights law also applies to acts or omissions of an occupying power in an occupied territory. International human rights law binds states not only in their internal sphere, but also in situation where a state exercises a *de facto* control outside its territory,[71] which includes the situation of occupation. Despite the fact that Israel still maintains a

[69] *Driven out,* note 1, 39 *et seq*.
[70] *Ghost Town,* note 3, 6.
[71] Dinstein, *op.cit.* note 7, 80 *et seq.* with detailed discussion of the relevant issues.

different view,[72] the rule is now generally recognized in international practice. It was stated in detail by the ICJ in the *Wall* Advisory Opinion[73] and upheld by the Human Rights Committee.[74] In such a situation, international human rights law and international humanitarian law must be applied concurrently.[75] This entails *inter alia* the application of the ICCPR and the ICESCR, of the Convention against Torture and of the Convention on the Rights of the Child in the oPt.

The following human rights provisions are relevant in this context:

2.1. The Covenant on Civil and Political Rights

Art. 6 ICCPR – Right to life

Art. 6 prohibits the "arbitrary deprivation of life." As described above, there is a practice of extra-judicial killing, in particular by the unwarranted use of lethal force to enforce curfews[76]. These killings are "arbitrary" and thus a violation of Art. 6.

Art. 7 ICCPR – Prohibition of torture or cruel, inhuman or degrading treatment

There are many reports on brutal acts of violence committed against Palestinians by Israeli police or military personnel.[77] They constitute forbidden inhuman or degrading treatment. The same applies to certain restrictions imposed during curfews.[78]

Art. 9 ICCPR – Right to personal freedom and security

Excessive use of force by the police or the military,[79] including the unwarranted use of deadly force to enforce curfews,[80] amounts to a violation of this guarantee.

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[72] Fifth periodic report submitted by Israel under Art. 40 of the Covenant pursuant to the optional reporting procedure, 30.10.2019, Doc. CCPR/C/ISR/5, paras. 22-25.

[73] *Loc.cit.* note 10, paras. 107 *et seq.*; see also ICJ, *Case concerning Armed Activities in the Territory of the Congo (Congo v. Uganda),* Judgement of 19 December 2005, para. 216.

[74] CCPR, General Coment No. 31, 26.05.2004, para. 10.

[75] This is what the ICJ, *loc.cit.* note 10, did in fact, despite a short reference to international humanitarian law being *lex specialis,* para. 106 of the Opinion; for a critical discussion see Dinstein, *op.cit.* note 7, 95 *et seq.* as well as R. Kolb/S. Vité, *Le droit de l'occupation militaire,* Brussels: Bruylant 2009, 333 *et seq.*

[76] For examples see *Ghost Town,* note 3, 21: "lethal curfews".

[77] *Ghost Town,* note 3, 53 *et seq.*

[78] *Ghost Town,* note 3, 18 *et seq.*

[79] See text accompanying notes 50 and 51.

Art. 12 ICCPR – Freedom of movement

The various measures of closing streets and making Palestinians move away amount to violations of the freedom of movement.[81] A particularly grave bar to freedom of movement is the imposition of curfews since the second intifada. Curfews covered the entire H 2 area for months, starting with a three months curfew after the outbreak of the intifada. All Palestinians had to stay at home all the time, with the exception of a few hours per week in order to allow inhabitants to replenish. These measures led for many Palestinian families and businesses to economic devastation. Even taking into account Israeli security interests, they were clearly disproportionate. The practice of imposing curfews for longer periods was discontinued in 2004, and after 2006, curfews were no longer imposed on a regular basis. But the economic devastation caused by earlier curfews has remained.

Art. 14 para. 1 – Right to a fair trial

There is a systematic procedural discrimination of Palestinians bringing formal complaints and legal action asking for redress against settler violence. This amounts to the denial of a right to fair trial.[82]

Art. 17 – Protection of a sphere of private life

Art. 17 prohibits "arbitrary or unlawful interference with [a person's] privacy, family, home or correspondence". Various measures taken by Israel as the occupying power[83] violate different elements of this provision. "Privacy" is interfered with by searches of homes or of persons' bodies. "Family" life is interfered with by closures or other measures practically making living together in a family home excessively difficult, if not impossible.[84] Closures or access denials which make the use of a person's apartment or house difficult or even impossible constitute an interference with that person's home.

Art. 18 ICCPR – Freedom of Religion

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[80] *Ghost Town,* note 3, 21.

[81] *Ghost Town,* note 3, 17 *et seq.*; B'Tselem, *Civilians under Siege: Restrictions on Freedom of Movement as Collective Punishment*, 2001; *Forced population transfer,* note 17, 21 *et seq.*

[82] Mosse, note 53, 24 *et seq.*

[83] Above II.1.3.

[84] OCHA, *H 2,* note 3, 9.

The various measures barring access to the Ibrahimi Mosque[85] constitute a violation of the "right to ... freedom ... in public or private, to manifest his religion or belief in worship, observance, practice and teaching", enshrined in Art. 18.

Violation of protective duties

The human rights guarantees just analyzed also involve a duty of protection if these guarantees are violated by the authorities or by private persons.[86] The fact that no redress could be obtained by the victims of excessive police force,[87] constitutes a violation of the protective duties derived from Art. 7 and/or 9 ICCPR. In the numerous cases of settler harassment or violence, no protective action was taken by the Israeli authorities.[88] This lack of protection is also a violation of these articles.

2.2. The Covenant on Economic, Social and Cultural Rights

According to Art. 2 ICESCR, the States parties undertake "to take steps ... to achieving progressively the full realization of the rights recognized" in the Covenant. Thus, the provisions of the Covenant contain so to say soft obligations, "promotional" obligations. But there is a hard core of these obligations, clarified by the ICJ:[89] actions preventing the enjoyment of the rights enshrined in the Covenant are a violation. This is the case with a number of Israeli measures and practices observed in the Hebron area.[90]

Art. 10 ICESCR – Protection of the family

The measures found to arbitrarily or unlawfully interfere with family life, prohibited by Art. 17 ICCPR,[91] also constitute violations of the duty to protect the family pursuant to Art. 10 ICESCR.

Art. 11 ICESCR – Right to a decent standard of living

[85] Above text accompanying note 49.
[86] Human Rights Committee, General Comment no. 31, para. 8
[87] See above text accompanying notes 51-54.
[88] Above text accompanying note 53.
[89] ICJ, *Wall* case, note 10, para. 112.
[90] For details see also G. Giacca, 'Economic, Social and Cultural Rights in Occupied Territories', in Clapham/Gaeta/Sassòli (eds.), note 12, 1485-1415.
[91] Above II.1.3.

Due to the measures described above, large parts of the Palestinian population lost their source of income, and there is increasing poverty.[92] In their cumulative effect, these measures thus constitute a violation of the right to a decent standard of living.

Art. 12 ICSECR – Right to health

Various measures made access to health services excessively difficult or even impossible.[93] The closure of central streets in the center required Palestinian ambulances to make time consuming detours to get to a patient in need and then bring him or her to a hospital. Thus, emergency medical and rescue services were severely impaired.[94] Settler violence has at times similar effects. Curfews completely barred the access of Palestinians to the medical attention they needed. As a consequence, medical services had to close down. All these measures, therefor, constitute violations of the right to health.

An additional health problem is caused by poor water supply and sanitation.[95]

Art. 13 ICESCR – Right to education

Road closures in the City center have made access to schools for Palestinian pupils difficult.[96] On their way to school, Palestinian children are constantly harassed at checkpoints by Israeli police and also by settlers without receiving the required protection by the competent Israeli authorities. This situation constitutes a major concern regarding education.[97] This behaviour of the Israeli administration, or respectively its failure to take protective action, constitute violations of the children's right to education.

2.3. Conclusion concerning the violation of human rights

On a regular basis, core provisions of the ICCPR are violated by Israel as the occupying power. In particular in light of their frequency and intensity, they cannot be justified by

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[92] *Ghost Town,* note 3, 25; ICRC, Life in Hebron: harassment and increasing poverty, available at www.icrc.org/en/doc/resources/documents/feature/2008/palestine-feature-171108.htm.

[93] OCHA, note 3, 11.

[94] *Ghost Town,* note 3, 27

[95] OCHA, note 3, 14.

[96] *Ghost Town,* note 3, 27.

[97] OCHA, note 3, 10; OCHA, *Dignity denied. Life in the settlement area of Hebron City,* www.ochaopt.org/content/dignity-denied-life-settlement-area-hebron-city ; *Forced population transfer,* note 17, 17 *et seq.*

security concerns. By denying Palestinians the enjoyment of a number of social, economic and cultural rights, a number of provisions of the ICESCR are violated.

3. The prohibition of the use of force – prohibited *de facto* annexation

The prohibition of the use of military force, enshrined in the UN Charter and in customary international law, implies *inter alia* the prohibition of the acquisition of territory based on the use of force, i.e. a prohibition of annexation. An annexation brought about by the use of force may not be recognized.[98] Such an annexation could be achieved through a formal act explicitly declaring it. An annexation may also be achieved through formal acts having the same effect, e.g. a declaration relating to the extension of boundaries, which is the case of the annexation of East Jerusalem by Israel after the Six Days War.[99] The prohibition of annexation also covers acts, or the cumulative effect of acts, which do not involve a formal change of state boundaries, but which have the same effect as a State exercises *de facto* powers of control which are equivalent to a territorial jurisdiction. This is what is called a *de facto* annexation. In its Advisory Opinion concerning the construction of a wall in the oPt, the ICJ held that a change in the demographic structure of the oPt constituted such a prohibited *de facto* annexation.[100]

The various measures taken by Israel which in their cumulative effect have created a coercive environment and have made many Palestinians move away from their places of work and abode in the H2[101] area amount to such a change in the demographic structure and thus to a forbidden *de facto* annexation.[102] By establishing a special system of municipal

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[98] Declaration on Principles of International law concerning Friendly relations and Co-operation among States in accordance with the Charter of the United nations, GA Res. 2625 (XXV), Annex: Principle that States shall refrain from the threat or use of force.

[99] This was done by various acts extending Israel's legislative and administrative jurisdiction to East Jerusalem: Law and Administration Ordinance (Amendment No. 11) – 1948, Laws of the State of Israel No. 499, 28 June 1967, p. 74; The Law and Administration Order (No. 1) – 1967, Israeli Collection of Regulations No 2064, 28 June 1967, p. 2690; Municipalities Ordinance (Amendment No. 6) – 1948, Laws of the State of Israel No. 499, 28 June 1967, p. 74; Order by the Minister of the Interior, Israeli Collection of Regulations No. 2063, 28 June 1967, p. 2670; Municipalities Ordinance (Declaration on the Enlargement of Jerusalem's City Limits), Israeli Collection of Regulations No. 2065, 28 June 1967, p. 2694.

[100] ICJ, note 10, para. 121.

[101] See above sec. II.1.3.

[102] ICJ, note 10, para. 121.

government for the area,[103] Israel has taken an additional step of treating the H 2 area like its own territory, and this also constitutes an element of *de facto* annexation. Self-defense as a circumstance excluding the wrongfulness of an act is not available to justify annexation brought about by the use of force.

Yet in addition, there are political plans for a formal annexation of Hebron,[104] which would be a further clear violation of the prohibition of the use of force.

These violations of the prohibition of the use of force cannot be justified by alleging self-defense. Regardless of the controversy about which side was guilty of an illegal use of force in 1967, annexation cannot be a necessary means of self-defense.[105]

4. The violation of the right to self-determination

An act by the occupying power which restrains the free decision of the population of the territory to determine its own political system, including the establishment of a (new?) State constitutes a violation of that people's right to self-determination.[106] Such acts include in particular measures affecting the viability of the State created or to be created in the exercise of the right to selöf-determination. Numerous acts of Israel taken in the oPt are such impediments of the viability of the State of Palestine. The fragmentation of the territory by the construction of a wall, the establishment of settlements[107] and big infrastructure projects serving the benefit of the settlements are such acts violating the right of the Palestinian people to self-determination.

As to Hebron in particular, the way in which the H2 area is administered by Israel, the coercive environment created therein, is part of that overall scheme of fragmentation of the oPt which prevents the viability of the Palestinian State. Hebron is the economic and commercial center of the Southern part of the West Bank, once as such a thriving place.[108]

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[103] Above note 22.
[104] See above note 24.
[105] See also ICJ, note 10, paras. 139 *et seq.*
[106] ICJ, note 10, para. 122.
[107] Human Rights Council, Report of the Special Rapporteur, A/HRC/44/60, 15.07.2020, *supra* note 53, para. 8.
[108] *Ghost Town,* note 3, 13; *Driven out,* note 1, 12.

The fact of cutting out the center of Hebron from the rest of the Palestinian territory means depriving that part of Palestine of its necessary center, which is an essential condition of the viability of the Palestinian State. It thus constitutes a violation of the right of the Palestinian People to self-determination. Furthermore, the measures endangering the Ibraihimi mosque as a Palestinian cultural heritage site are an attack on the Palestinian cultural identity and as such a violation of the right of the Palestinian people to self-determination.

III. Measures to ensure compliance with the law of belligerent occupation and human rights

International law disposes of a rich toolkit of measures to ensure compliance.[109] The following analysis will concentrate on certain specific regimes or institutions (1.), then analyze in more detail the possible role of third States (2.), address the potential of criminal law (3.) and emphasize the role of fact-finding (4.).

1. Relevant institutions and regimes to ensure compliance – an overview

The three areas of international law to be specifically considered in the present connection are international humanitarian law, human rights and, in relation to both, international criminal law.

As to international humanitarian law: The Geneva Conventions and the Protocols additional thereto rely on two[110] different means to ensure compliance. The first one is fact-finding, an inquiry procedure in the earlier Conventions (never used) and the International Humanitarian Fact-finding Commission (Art. 90 AP I, not ratified by Israel). The latter may, however, offer its services to the parties of a conflict even if they are not parties to the Protocol. The second procedural means is the role of the ICRC enshrined in the Conventions and the Protocols additional thereto, and developed in a practice which has become customary law.[111] Attempts to develop more specific compliance procedures for the Conventions and the Protocols have so far failed.

As to human rights: human rights treaties have created specific systems to ensure compliance which are similar for a number of these treaties. There is a "treaty body", a committee composed of persons serving in their personal capacity, not as representatives of States. These committees receive regular reports by the parties to the treaty. This reporting system has become a most important tool for ensuring compliance.[112] As Israel maintains that the human rights treaties binding Israel only apply in the territory of Israel, not outside,

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[109] For an overview see M. Bothe, 'Compliance in international law', in *Oxford Bibliographies*, www.oxfordbibliographies.com.

[110] The role of the Protecting Power has practically fallen into desuetude.

[111] H.-P. Gasser, 'International Committee of the Red Cross (ICRC)', sec. 21-25, in *MPEPIL*.

[112] H. Keller, 'Reporting Systems', paras. 8 and 44, in *MPEPIL*.

i.e. not in the oPt,[113] it denies a duty to submit reports concerning the occupied territory. Nevertheless, it reports on its practice and argues to be in conformity with the ICCPR. The Human Rights Committee, which holds a different view,[114] admits information from the oPt and comments on Israel's reports, including on issues raised in respect of the oPt.[115]

The possibility for the treaty bodies to deal with individual cases of alleged violations varies. Usually a declaration of acceptance or the accession to an additional treaty (protocol) is necessary.[116] Israel has not made any such declaration or ratified any such protocol. Thus, the reaction of the treaty body to Israel's reports remains the only possibility to assess Israel's compliance with the treaty in question.

Another reporting system is the one established by the Heritage Convention.[117] In this case, Palestine is a party to the Convention[118] and thus obligated to report. This procedure also addresses Israel's activities to the extent that that they endanger the protection of the Palestinian heritage site.[119]

In addition to these treaty procedures, UN organs have created a complex system of compliance procedures. As to Palestine, the General Assembly has created the Committee on the Exercise of the Inalienable Rights of the Palestinian People[120] as a subsidiary body which reports annually. A prominent role was first played by the Commission on Human Rights, a subsidiary body of ECOSOC, since 2006 by the Human Rights Council, a subsidiary body of the General Assembly.[121] The council possesses a rich toolkit of compliance measures: specific fact-finding missions, country rapporteurs, thematic rapporteurs, periodic review – to name only a few important ones. Due to the parallel application of human rights and international humanitarian law, these procedures also relate to the latter field of

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[113] See above notes 72.
[114] See above note 74.
[115] Human Rights Committee, Concluding observations on the fourth periodic report of Israel, CCPR/C/ISR/CO/4, 21.11.2014, including punitive demolitions, the blockade of the Gaza Strip, excessive use of force by security forces, settler violence, settlements, freedom of movement, separation of families.
[116] A distinction has to be made between claims raised by States (e.g. Art. 41 ICCPR) and those submitted by individuals (e.g. Optional Protocol to the ICCPR, 16.12.1966).
[117] Art. 29 World Heritage Convention.
[118] See above II.1.2.
[119] See already above text accompanying note 32.
[120] GA Res. 3376 (XXX), 10.11.1975.
[121] GA Res. 60/251, 15.3.2006.

international law. Using different procedures, the Council regularly deals with Israeli practices concerning the occupied territory.[122] The Commission on Human Rights[123] and now the Human Rights Council have appointed Special Rapporteurs for the oPt who yearly report on compliance with human rights and international humanitarian law in the oPt.[124] Fact-finding concerning the respect for international humanitarian law and human rights has played a major role.[125]

Finally, international criminal law has to be considered as a tool of ensuring compliance with the prohibition of the use of force (prohibition of aggression), human rights and the law of armed conflict. It was first developed as a reaction to gross crimes committed by Germany and Japan before and during the Second World War with the establishment of the International Military Tribunals of Nuremberg and Tokyo. The crimes prosecuted before these tribunals were crimes against peace, crimes against humanity and war crimes. In addition, these crimes were then also prosecuted before national courts, the Eichmann trial in Israel being a prominent example. In the decades following the processes of Nuremberg and Tokyo, the international prosecution of these crimes seems to have become a kind of sleeping beauty, who was however woken up in the 90ies of the last century. This led to the establishment of the International Criminal Court.

The precise relevance of criminal law, and of international criminal law in particular, as a means to ensure compliance needs a differentiated analysis. Although its deterrent effect is sometimes put into question, the prosecution and punishment of offenders is important. One of the problems is that without the cooperation of States where alleged perpetrators happen to be, prosecutions have to be conducted in absentia and national prosecution and judgments, where legally at all possible, cannot be executed. Yet experience shows that national prosecution or international arrest warrants serve at least as a travel restriction for alleged perpetrators as suspects want to avoid getting into the jurisdictional reach of certain prosecutors.

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[122] See the recent Resolutions A/HRC/43/L.37/REV.1, A/HRC/43(L.38/REV.1 and A/HRC/43/L.39.
[123] Res. E/CN.4/1993/24.
[124] See already above note 53.
[125] See *inter alia the* Goldstone Report, A/HRC/12/48, 28.09.2009.

2. Means to ensure compliance, the role of third States and organizations and the legal characterization of relevant norms

Measures which third States may or must take to ensure compliance with the norms of international law analyzed in the preceding parts of this Opinion flow from the law of State responsibility and international humanitarian law. The following rules are to be considered:

- the duty not to aid or assist to an unlawful act of another State (Art. 16 ARS);
- the duty not to aid and assist in the serious breach of a peremptory norm of international law, and the duty not to recognize as lawful a situation resulting from such breach (Art. 40 and 41 ARS);
- the duty to cooperate to bring to an end any such breach (Art. 41 para. 1 ARS);
- the right (not a duty) to invoke the responsibility of a State having breached an obligation owed to the international community as a whole (*erga omnes* obligation) (Art. 48 ARS);
- the duty to ensure respect for the Geneva Conventions and Protocol I additional thereto.

These rules also create rights and duties for international organization empowered by there constituent treaty to apply and promote human rights, which includes the EU.

Prohibited aid and assistance is any act providing an essential facility or financing for an unlawful act. This could also consist in a substantial support for a private activity furthering such breaches, for example furnishing materials for the constructions in the illegal settlements.

The duty not to aid an assist in a serious breach of a peremptory norm of international law poses similar problems. In this respect, there are specific and special duties to prevent certain acts condemned by the international community, for example torture.[126] This duty to prevent depends on the practical possibility to do so.

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[126] Art. 2, 4-8 Convention against Torture.

The duty of non-recognition means that acts of public authority resulting from the violation of a peremptory norm may not be treated as valid by a third State. An example are takings of property performed in violation of the law of belligerent occupation. Any transfer of such property which might be relevant before the courts of third States may not be enforced or implemented by these courts.

The duty to cooperate to bring a violation of *ius cogens* to an end is a general rule of international law. Its basis is the general obligation of all States to cooperate enshrined in the UN Charter. Cooperation means a concerted and meaningful common action by relevant actors to achieve the said goal. The preferred fora of cooperation are existing international organizations, in particular the relevant organs of the United Nations: General Assembly, Security Council, Human Rights Council. Beyond that, it is an obligation incumbent upon all States.

The fundamental rules enshrined in the Geneva Conventions, in the law of belligerent occupation and the core human rights violated constitute peremptory norms of general international law. All States are thus under the obligation to cooperate to bring to an end these serious breaches.[127] They may not render aid or assistance to maintaining these violations, and may not recognize as lawful any situation arising from these violations. Appropriate fora have to be sought for this cooperation.

All States have the right (but not the duty) to invoke the responsibility of a State for having violated a norm owed to the international community as a whole. The procedural means to do so, expressly enumerated in the ILC ARS, are limited to claiming the cessation of the act and guarantees of non-repetition as well as reparation in favour of the victim of the violation,[128] i.e. the Palestinian victims of the said violations. Customary international law has, however, developed, through a general practice, a right of non-injured States to adopt countermeasures against systematic or large scale breaches of *erga omnes* norms.[129]

All States parties to the Geneva Conventions and the Protocols additional thereto have the duty to ensure the respect for these treaties. They must abstain from any act assisting to, or

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[127] Art. 41 ARS..
[128] Art. 48 ARS.
[129] T. Franck, 'On proportionality of countermeasures in international law', 102 *AJIL* 715 (2008).

supporting, violations of the Conventions. They also must take all steps practically at their disposal to induce other States, parties to a conflict, to abide by their duties under the Conventions.[130] A corresponding rule of customary law imposes a similar duty on relevant international organizations. Rules enshrined in the Geneva Conventions are violated by Israel in the Hebron area, in particular Art. 27, 49 and 53 of GC IV. This triggers the duty of all parties of the Convention, according to Common Art. 1, to ensure the respect of the Conventions, i.e. to take all measures within their power, except the use of force, to induce Israel to cease these violations. There is also a corresponding rule of customary international law. The EU Guidelines on promoting compliance with international humanitarian law[131] are a good inventory of measures which can be taken.

Whether and to what extent prohibition of assistance to violations and the duty to ensure the respect of the Conventions impose on States obligations concerning national judicial procedures is a difficult question of comparative law. There are in particular three types of cases which must be considered: There is, first, the exercise of criminal jurisdiction analyzed below. Second, there are questions of trade in products originating from settlements, a hotly debated issue, where there is European jurisprudence.[132] This problem is mainly relevant for agricultural production of settlements, but not for the Hebron area. There is, third, the issue of private activities supporting the construction of the Wall or the settlements policy, for instance by furnishing building material or by realizing entire infrastructure projects. This involves questions of standing and of the effect of international legal obligations of States (not to support violations of the law of belligerent occupation) on private law rights and obligations. The legal problems involved are for example shown by a French case[133] in which a court of appeal granted the PLO standing to challenge the legality of a private enterprise's involvement in an infrastructure project alleged to be unlawful, but rejected the action on the merits as the defendant enterprise was not the addressee of the relevant international norms. A comprehensive comparative analysis of this question is beyond the scope of the present Opinion.

[130] ICRC, Convention (I), Commentary 2016, Art. 1, sec. 153 *et seq.*

[131] Updated European Union Guidelines on Promoting compliance with international humanitarian law (IHL), 2009/C 303/06, 15.12.2009.

[132] European Court of Justice, *Brita v. Hauptzollamt Hamburg-Hafen,* Case C-386/02, 25.2.2010.

[133] *Association France-Palestine Solidarité et O.L.P. c. Société Alstom Transport et al.,* Cour d'Appel de Versailles, 22.3.2013, R.G.No. 11/05331.

The duty to ensure compliance with the Geneva Conventions and the Additional Protocol also imply a duty of due diligence of all States to take the measures to ensure compliance with the rules relating to belligerent occupation analyzed in this Opinion. They therefor have a duty to ascertain relevant facts (monitoring) and to take action which is reasonably at their disposal. This includes a duty to support and not to obstruct cooperative action in relevant fora which is taken for the purpose of bringing violations of peremptory norms to an end.

In sum, third States have an important potential, both rights and duties, to take measures with a view to inducing Israel to comply with its international legal obligations relating to the oPt. This potential deserves more attention.

3. In particular: perspectives of criminal law

Certain violations which have been stated constitute war crimes or crimes against humanity. They are grave breaches of the Geneva Conventions and as such war crimes (Art. 85(5) AP I). The catalogue of war crimes contained in Art. 8 ICC Statute is a reflection of customary law which binds Israel despite the fact that it is not a party to the Statute.[134]

Israel's policy of separation involving systematic displacement of the Palestinian population of the City of Hebron constitutes a war crime under customary international law, already stated by the International Criminal Tribunal in Nuremberg and reflected in Art. 8(2)(b)(viii) of the ICC Statute.[135] Unlawful deportation and transfer is a grave breach pursuant to Art. 147 GC IV/Art. 8(2)(a)(vii) ICC Statute and also a crime against humanity (Art. 7 para.1(d) and para.2(d) ICC Statute).[136]

The other side of this coin is the establishment of the settlements, which in and of itself constitutes a war crime (Art. 8 para. 2(b)(viii) ICC Statute.

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[134] M. Bothe, 'War Crimes', in A. Cassese/P. Gaeta/J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court. A Commentary,* OUP 2002, vol. I, 379-426, at 386 *et seq.;* Henckaerts/Doswald-Beck/ICRC (note 35), 572.

[135] *Applying International Criminal Law to Israel's Treatment of the Palestinian People,* BADIL's Working Paper 12, 2011, 25 *et seq.*

[136] *Applying International Criminal law,* note 135, 45 *et seq.*

In various ways, taking or destruction of property also constitutes a grave breach of the GC and a war crime.[137] The destruction of property "not justified by military necessity and carried out unlawfully and wantonly" (Art. 8 para. 2(a)(iv) ICC Statute, Art. 147 GC IV) constitutes a grave breach of the Geneva Conventions, destroying enemy property "unless such destruction is demanded by the necessities of war" a war crime under the ICC Statute (Art. 8 para. 2(b)(xiii), which implements Art. 23(g) Hague Regulations).[138]. As to taking of property in a broad sense, Art. 147 GC IV and Art. 8 para. 2(a) criminalizes "extensive appropriation", Art. 8 para. 2(b)(xiii) the "seizure" of enemy property. The latter provision enforces the rules of the Hague Regulations on the protection of property, namely Art. 46 Hague Regulation, including the prohibition of "confiscation". As pointed out above,[139] the rules of belligerent occupation on the protection of property do not only prohibit a physical seizure or a taking away the title to property, but also measures denying the use of property or lawful possession.[140] This raises the question whether the various restrictions on the use of shops and private homes which have occurred amount to "extensive appropriation" or "seizure" and thus constitute a grave breach and a war crime. This has to be decided on a case by case basis.[141]

The excessive use of force by security forces is not only a violation of Art. 27 GC IV,[142] but may, according to the circumstances, also be a grave breach and a war crime (Art. 8)2)(a)(iii(, 8(2)(b)(xxi) ICC Statute. Tolerating or condoning settler violence may be an omission to act where action is legally required, which not only engages the international responsibility of Israel,[143] but also the personal criminal responsibility of the relevant commander or prosecutor.

Concerning criminal law as a means to ensure compliance, there are two different types of jurisdiction available: national and international. As to national jurisdictions, the courts of

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[137] For a discussion see S. Karmi-Ayyoub, 'Legal advice on Hebron closure case', Internal paper on file with the author.
[138] Bothe, note 134, at 403.
[139] Sec. I.1.5.
[140] See above text accompanying notes 57-60.
[141] See Karmi-Ayyoub, note 137, para. 38 *et seq.* of the paper.
[142] See above notes 53 and 55.
[143] Henckaerts/Doswald-Beck/ICRC, note 55, vol 1, at 532.

the occupying power are of course an option. This would and should primarily apply to the repression of the occupying power's police misbehavior and settler violence.

As to the role of third States, there is the possibility to trigger national investigation and prosecution on the basis of universal jurisdiction.[144] It is the duty of all States parties to the GC to prosecute persons alleged to have committed grave breaches thereof or to extradite these persons to another party willing to do so (Art. 146 para. 2 GC IV). Under customary law, there exists a right to exercise universal jurisdiction in respect of war crimes.[145] The criminal law of many States nowadays provides for the exercise of universal jurisdiction in such cases.[146]

Israel is not a party to its Statute, but Palestine has first accepted the jurisdiction of the Court and then ratified the Statute. If this ratification is valid, the ICC has jurisdiction over crimes committed on Palestinian territory after ratification, regardless of the nationality of the alleged perpetrator. Israel denies the validity of that ratification, as the possibility to become a party to the Statute is reserved to States, and argues that Palestine is not a state in the sense of international law. Apparently, this view is still shared by certain States, their number not being clear. Yet after the General Assembly has accepted Palestine as Observer *State*,[147] it is difficult for UN organs and for the Court itself to deny the quality of Palestine as a State and thus to deny the validity of its ratification of the Statute. The current state of the ICC proceedings is that of preliminary examination.

4. Ascertaining facts

It appears from the foregoing analysis that a fundamental issue in addressing and redressing violations of relevant international law is clarity and security about relevant facts. Therefor, fact-finding procedures are a very important element in the toolkit of means to ensure

[144] See Karmi-Ayyoub, para. 5 *et seq.* of the paper.
[145] J.-M. Henckaerts/L. Doswald-Beck/ICRC, *op.cit.* note 55, vol. 1, 604 (Rule 157).
[146] For Germany § 1 International Law Criminal Code, for the United Kingdom Geneva Conventions Act, sec. 1 para. 1; for a discussion of the latter legislation see Karmi-Ayyoub, note 137, para. 6 *et seq.* of the paper.
[147] UNGA Res. 67/19, 29.11.2012.

compliance.[148] Non-governmental organizations have become important players (compliance actors) in this field.

In relation to the situation in and around Hebron, the International Presence provided for in the Hebron Protocol performed significant fact-finding activities.[149] With the withdrawal of the ITPH, for reasons probably related to this role which was not welcome to the occupying power, an important compliance actor has left the scene.[150]

[148] M. Bothe, 'Compliance', *MPEPIL*.
[149] *Driven out*, note 1, 16.
[150] OCHA OPT, *Dignity denied: life in the settlement area of Hebron City*, 20.2.2020.

IV. Conclusions and recommendations

The norms violated by the occupying power in and round Hebron can be summarized as follows: Israel systematically pursues a policy of separation, of squeezing out the Palestinian population of the Hebron area. This policy is designed to secure and to petrify the Israeli presence in the area, it thus amounts to an unlawful *de facto* annexation which is intended to facilitate the formal annexation, thus violating the right to self-determination of the Arab population. This policy is carried out by a coherent array of measures which are unlawful under the law of belligerent occupation and human rights law.

As to the law of belligerent occupation: the violations to be emphasized are the establishment, maintenance and expansion of the settlements, forced displacement of the Palestinian population effected by an array of measures making Palestinians leave their homes and businesses, violations of a number of personal rights of Palestinians, in particular property, family, religious and cultural rights.

As to human rights, various provisions of the ICCPR and the ICESCR have been violted.

Measures to ensure compliance with the norms thus violated and to restore a situation corresponding to the rule of law must not only address the overall design of that policy, but also the single unlawful component parts of that policy.

a. The law of belligerent occupation, an important part of international humanitarian law, has been violated: Art. 27, 49 and 53 GC IV and a corresponding rule of customary humanitarian law, as well as Articles 43, 46, 50 and 52 of the Hague Regulations which constitute customary law. This fact triggers the duty of all parties of the Convention, according to Common Art. 1, to ensure respect of the Conventions, i.e. to take all measures within their power, except the use of force, to induce Israel to cease these violations and to restore the situation as required by law.

Therefor, appropriate ways and means must be pursued to remind all States, especially States having a leverage on Israel, of this obligation.

b. A practical consequence of the duty flowing from common Art. 1 is the duty to prosecute perpetrators of grave breaches of the Convention. For that purpose, States have the right and duty to exercise universal jurisdiction.

> **Therefor, all parties to the Convention have to be reminded of this obligation. Civil society organizations should monitor compliance. Where perpetrators are found in the territory of a State, appropriate steps should be taken vis-à-vis public prosecutors, and criminal action should be brought where admissible under relevant national law.**

c. The duty to ensure compliance with the Conventions involves a duty to abstain from any act supporting violations. This means, *inter alia*, a duty to prevent the enforcement of any act strengthening or favouring measures which are illegal under the law of belligerent occupation, such as the building of the wall in the oPt.

> **It is a task of civil society organizations to monitor where such situation arises and to consider legal action where possible under the respective national law.**

d. A right to prosecute war crimes and violations of human rights also exists in relation to unlawful acts which do not constitute grave breaches of the Conventions.

> **Such situations should also be monitored by civil society organizations. Measures to support action by the International Criminal Court, such as *amicus curiae* briefs, should be developed.**

e. International humanitarian law in general, and in particular the law of belligerent occupation, consists of obligations owed to the international community as a whole. This triggers the right of all States to invoke the international responsibility of Israel by claiming the cessation of the internationally wrongful acts described, assurances and guarantees of non-repetition and the payment of compensation to the beneficiaries of the violations breached, i.e. the Palestinian victims of the said violations.

Therefor, appropriate ways and means must be pursued to remind all States, especially States having a leverage on Israel, of this right.

f. Essential human rights have been violated: Art. 6,7, 9 and 12 ICCPR, Art. 10, 11, 12, 13 ICESCR. These norms also create *erga omnes* obligations.

Therefor, appropriate ways and means must be pursued to remind all States, especially States having a leverage on Israel, to invoke Israel's responsibility.

g. The international legal prohibition of annexation, including *de facto* annexation, as well as the right of the Palestinian people to self-determination have been violated. These prohibitions, too, establish *erga omnes* obligations.

Therefor, appropriate ways and means must be pursued to remind all States, especially States having a leverage on Israel, to invoke Israel's responsibility.

h. The fundamental rules enshrined in the Geneva Conventions, in the law of belligerent occupation and the core human rights violated constitute peremptory norms of general international law. All States are thus under the obligation to cooperate to bring to an end these serious breaches. They may not render aid or assistance to maintaining these violations, and may not recognize as lawful any situation arising from these violations.

Appropriate fora have to be sought for this cooperation. Appropriate means have to be developed to remind all States of their duty to cooperate and not to render assistance to the said violations.

i. The human rights norms violated entail specific compliance procedures, e.g. general or specific comments adopted by the Human Rights Committee.

An adequate input into the deliberations of the Human Rights Committee is important.

j. Several UN organs are also important compliance actors.

Appropriate initiatives should be taken to bring those violations to their attention and to induce members of those organs to prompt action by those organs.

Frankfurt, 28 January 2021

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