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Legality of Israel's Policy Regarding the Revocation of Residency in East Jerusalem

Legal Expert Opinion

1. The issues explored by the expert opinion

Following the occupation of the Palestinian territories in 1967 and the subsequent unilateral annexation of East Jerusalem, Israel began extending its own legal order over East Jerusalem. As a consequence, under the 1952 Entry into Israel Law, Palestinians who were physically present and residing in East Jerusalem did not obtain Israeli citizenship, but were rather granted the status of "permanent residency".[1] Permanent residency status is typically granted to immigrants and bestows significantly inferior protections and entitlements than that of "citizenship" or "nationality".

Nevertheless, for a considerable number of persons, the Government of Israel has "revoked" this permanent residency status, and furthermore has increasingly pronounced revocations as a punitive measure and explores plans for mass revocations as retaliatory measure.

The legality of these measures must be evaluated in two respects:

- The revocation involves a change in the status which Palestinians enjoy in East Jerusalem. What does that change mean in legal terms? Is that change of status lawful or not under relevant rules of international law?
- What practical consequences (e.g. expulsions, denial of access) could be derived from that change of status, and are these consequences lawful or not under applicable rules of international law?

It will be shown that both the revocation of the legal status as such and its practical implications render these revocations internationally unlawful.

These questions cannot be answered without first summarizing the main elements of the controversy concerning the status of East Jerusalem and ensuing personal status questions according to international law.

2. The status of East Jerusalem and its impact on applicable law: occupation v. annexation

[1] See *Israel: Law No. 5712-1952, Entry into Israel Law,* 5 September 1952.

East Jerusalem is that part of the municipality of Jerusalem, as it was under the British Mandate, which according to the 1949 Armistice Agreement between Israel and Transjordan (as it then was) was situated to the east of the Armistice Line, encompassing approximately 6.4 square kilometers. Transjordan annexed the Palestinian territory between the Jordan River the Armistice Line (now the "West Bank"). In 1967, Israel conquered and militarily occupied these territories. Israel did not treat East Jerusalem the same way as the rest of the occupied Palestinian territory (oPt), but took a number of special measures regarding its status. Under legislation adopted in 1967, it extended the law, jurisdiction and administration of Israel to East Jerusalem[2] and incorporated 28 villages of the surroundings, an area of 64 square kilometers, into the municipality of Jerusalem, increasing the area of East Jerusalem to 70.4 square kilometers.[3] In 1980, Israel declared all of Jerusalem to be its undivided capital. All these measures amounted, for all practical purposes, to a manifestation of the annexation of the Eastern parts of the city.

Since then, the status of East Jerusalem is a matter of controversy between Israel and most of the rest of the world. While the Government of Israel and Israel's Supreme Court[4] regard East Jerusalem as part of the territory of the State of Israel, most countries of the world[5] and the United Nations[6] consistently hold that the annexation of East Jerusalem declared by Israel is legally invalid and that therefore the change of territorial status which Israel tried to achieve after 1967 has, as a matter of law, not occurred. There is thus an international consensus, expressed in State practice and numerous pronouncements of the UN, confirmed by the ICJ, that East Jerusalem is and remains a territory under Israeli occupation.

The solution of this controversy has considerable consequences for the law applicable in respect of the question which is the subject of this opinion. This expert opinion is based on the position held by the world community at large. According to this position, the relevant

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[2] 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.

[3] Hamoked, Center for the Rights of the Individual, 'Unseen Barriers to Everyday Life in East Jerusalem: 1967 Until Today', 2011, available at www.hamoked.org; B'Tselem, Legal Status of East Jerusalem and its Residents, 2010, available at http://www.btselem.org/jerusalem/legal_status; NRC, The Legal Status of East Jerusalem, 2013, available at http://www.nrc.no/arch/_img/9199028.pdf.

[4] *Temple Mount Faithful et al. v. Attorney General et al.,* Israel Supreme Court, 23 September 1993, 45 Catholic ULR 861 (1996).

[5] For that reason, countries restrict the territorial jurisdiction of their embassies in Israel to the territory of Israel to the West of the Green Line. Most of them now maintain representations with the Palestinian Authority which are technically separate from these embassies. Their status in relation to Israel is a difficult question which has found practical solutions. The practice of the United States does not follow this general international attitude, see the U.S. Jerusalem Embassy Act 1995, Public Law 104-45.

[6] In particular Security Council: Res. 298, 25 September 1971; 476, 3 June 1980; 478, 20 August 1980. UNGA Res. 63/30, 2009; 67/19, 29 November 2012.
International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion dated 9 July 2004, paras. 78, 120.

rules of international law are those regulating belligerent occupation. But *arguendi causa,* the legal situation will be discussed, too, which would be applicable if the view of the Government of Israel concerning the status of East Jerusalem were correct. Relevant rules would be the norms of international law regarding the consequences of territorial changes, in particular those concerning the impact of such change on the personal status of the inhabitants of the territory in question, and in particular in respect of the human rights of the members of the affected population.[7]

On that basis, the legal evaluation of the measures described will first address the questions of the international humanitarian law of occupation and then human rights issues (both in the case of belligerent occupation and, hypothetically, in that of a valid annexation), questions of nationality or statelessness being treated in a separate section.
Before proceeding to this evaluation, the various measures taken by Israel have to be described in detail.

3. Restrictive residency policies of Israel concerning the Arab population in East Jerusalem

The starting point of the analysis is that in 1967, the Palestinian[8] inhabitants of the West Bank including East Jerusalem had Jordanian nationality according to the Jordanian Citizenship Law of 1954.[9] After 1967, Israel conducted a census in East Jerusalem and granted a right of permanent residency to Palestinian Jerusalemites present in the municipality. It also offered to them, under certain conditions, the option to apply for and obtain Israeli nationality which the vast majority of Palestinians refused to do. Thus, the regular status of a Palestinian living in East Jerusalem is that of a permanent resident. These permanent residents have certain political rights in municipality affairs. Yet since 1995, Israel has taken a number of measures to revoke the residency status of these persons.
The legal bases for these revocations, invoked or discussed by Israeli authorities, are threefold:

- The (British) Defense Regulations (in times of emergency) 1945, giving sweeping powers to the military commander to maintain order;[10]

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[7] G. I. Hernández, 'Territorial Change, Effects of', MN 5 et seq., in Rüdiger Wolfrum (ed.), Max Planck Encyclopedia of Public International Law (MPEPIL), available at www.mpepil.org. .
[8] The designation "Palestinian" is used for persons belonging to the Arab population of Palestine. This corresponds to their status under national (Jordanian and Palestinian) and international law.
[9] The British Palestine Citizenship Order of 24 July 1925 gave a Palestinian citizenship to the habitual residents of the Mandate territory. After the Armistice Agreement of 1949, the Jordanian Council of Ministers granted Jordanian nationality to Palestinian citizens residing in the territory administered by Jordan (now the West Bank). The new Jordanian Citizenship Law of 1954 granted Jordanian citizenship to the Palestinian living in the West Bank and to refugees having fled from the war.
[10] These provisions are used in particular to justify house demolitions.

- The Israeli Citizenship Law 1952, (not directly applicable to a right of residency) providing for a revocation of the grant of citizenship if the person lacks loyalty vis-à-vis the State of Israel;
- The Entry into Israel Law 1952 and the Entry into Israel Regulations 1974, which provide for a revocation of a residency in cases of prolonged absence, in particular pursuant to the so-called "Center of Life" policy.[11]

Whether these provisions have been correctly applied, or could be correctly applied in the future is a matter of controversy. This is not the object of the present Opinion, which is limited to the international legal aspects, except to the extent that the application of these laws is relevant for the evaluation of the measure under international law. In this respect, as will be shown under Section 4., the controversy concerning the status of East Jerusalem is of fundamental importance.

The first type of measures employed the revocation of the right of residency to persons who could not prove that their center of life had been, and remained, Jerusalem for at least seven consecutive years. This was based on the Israeli legislation concerning entry into Israel.[12] It excluded in particular a right of return of persons who had gone abroad for some time or had received residence status elsewhere. This policy was implemented with varying degrees of intensity.

The second type of measure is punitive or retaliatory. They are revocations of residency against persons involved in "terrorist" activities, or suspected of being so, as well as against their families.[13] In these cases, the legal basis used by the Israeli authorities is the provision of the Israeli Citizenship Law of 1952 regarding a revocation of citizenship based on breach of allegiance.[14]

Over the years, these measures have added up to a considerable number of revocations which have rightly been called, in particular in the light of the practical consequences thereof, a policy of "silent deportation".[15] While these measures so far only relate to specific

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[11] This policy was upheld by the Israeli High Court in *Mubarak Awad v. Shamir, Prime Minister and Minister of the Interior, and Police Minister,* HCJ 282/88, in particular para. 15, English translation in www.hamoked.org/files/2010/1430_eng.pdf. This jurisprudence was further developed in the case of *Fathiya Shiqaqi*, decided by the High Court June 6, 1995; see https://al-shakaba.org/commentaries/israels-dangerous-new-transfer-tactic-in-jerusalem. See further U. Halabi, 'The Legal Status of Palestinians in Jerusalem', 4 Palestine-Israel Journal of Politics, Economics and Culture (1997), available at www.pij.org/details.php?id=505.

[12] Hamoked, loc.cit. supra note 3.

[13] ACRI, 'Situation Update: Revocation of Status', 3 November 2015, www.acri.org.il/en/2015/11/03/situation-update-revocation-of-status/

[14] Nationality Law, 5712-1952, as amended, Sec. 11 (a): "Where a person, having acquired Israeli nationality by naturalization, ... (3) has committed an act of disloyalty against the State of Israel, a District Court may, upon the application of the Minister of the Interior, revoke such person's naturalization."

[15] Hamoked, note 3, p. 2.

persons, there is, in addition, a discussion concerning a more sweeping revocation of residency rights for whole parts of the Palestinian population.[16]

The practical consequence of these measures is, generally speaking, a loss of any possibility of secure existence. The person subject to these measures has no more place where to live safely. Formulated in terms of human rights, it is severe *de facto* restriction of the freedom of movement, as moving from one place to the other in and around East Jerusalem and the oPt is strictly controlled through a number of checkpoints. It has been exacerbated by the construction of the so-called Security Barrier. If a person whose residency right is revoked while outside Israel, he or she will be denied re-entry into Israel and East Jerusalem. If such a person has to cross a checkpoint in one direction or the other for whatever purpose, he or she will be prevented from returning into East Jerusalem. In the case of persons living in the municipality of Jerusalem East of the Security Barrier, they will not be allowed to go to the city center.

A further limitation of the status of permanent residency, which Israel has granted, is due to the fact that this status is not automatically inherited by the children of the person having that right. If this is strictly applied, children must apply separately for a new right of residency.[17] This treatment of family union or separation has been modified in various directions over the years.

The revocation of residency has grave consequences for the conditions of life in many respects. In many cases, it prevents access to essential services such as health care and education. Employment is impossible or impeded if a checkpoint has to be crossed on the way between the employer and the person's domicile. For the same reason, family life is severely impaired. This is in particular true where children and spouses do not also hold status of permanent resident.

4. Basic rights of the population under the law of occupation

The law of belligerent occupation is part of customary international humanitarian law, essential parts of it being codified in the Hague Regulations on Land Warfare of 1899/1907 (HReg.). Relevant provisions of the Fourth Geneva Convention (Art. 27 et seq., 48 et seq. GC IV) grant additional significant protections to those contained in the Hague Regulations. Israel denies the applicability of GC IV to the oPt, a view which is rejected by the international community[18] and by the ICJ.[19] In addition, the provisions of GC IV also

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[16] Gilead Sher, 'The Residency Status of East Jerusalem's Palestinians', INSS Insight no. 759, 28 October 2015, www.inss.org.il/index.aspx?id=4538&articlaeid=10860

[17] Hamoked, loc.cit. note 3.

[18] SC Res. 681, 20 December 1990; 799, 18 Dec. 1992; 904, 18 March 1994.

[19] ICJ, *loc.cit.* note 6, para. 101.

constitute customary law and may apply as such even where their application as treaty law is challenged.

4.1. The Hague Regulations

4.1.1. The question of the application of Israeli law

The basic provision concerning the rights and duties of the occupying power is Art. 43 Hague Regulations, which imposes on this power the duty to restore and ensure public order and safety, which in modern terms is understood as a duty to ensure good governance.[20] It must do so "respecting, unless absolutely prevented, the laws in force in the country". This amounts to a prohibition to extend the law of the occupying power to the occupied territory or to enact new laws unless they are necessary to ensure the wellbeing of the protected population of the occupied territory.

In the sense of Art. 43, the Defense Regulations of 1945 constitute "law in force in the country" as they applied to the entire territory of Palestine under British Mandate. They are "local" pre-occupation law. Yet the Israeli Nationality Law of 1952 and the Entry into Israel legislation[21] have a different status. If applied to the oPt, they constitute legislation by the occupying power which is unlawful because it is not justified by any need of the population of the occupied territory. Therefore, the application of the said Israeli legislation in occupied East Jerusalem constitutes a violation of Art. 43 of the Hague Regulations.

4.1.2. The duty of good governance

In general terms, the duty of good governance means a duty to ensure and promote the wellbeing of the population. The occupying power must conduct its administration of the territory according to what is expected of the modern State, which is a welfare State with a broad range of regulatory responsibilities. Whatever these responsibilities are, creating conditions which make the existence of many persons precarious is the contrary of promoting the wellbeing of the population. It is therefore a violation of the duty of good governance.

The duty of good governance involves a number of different elements which must not be comprehensively enumerated in the present context.[22] One of them is a functioning system of ensuring respect for the rule of law. This includes prevention and repression of crimes.

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[20] Michael Bothe 'The Administration of Occupied Territory', MN 38 et seq., in Andrew Clapham/Paola Gaeta/Marco Sassòli (eds.), The 1949 Geneva Conventions. A Commentary, OUP 2015, pp. 1455 et seq.
[21] See supra notes 13-14.
[22] See Bothe, MN 36, op.cit. note 20.

The occupying power is therefore entitled and even obligated to prevent and repress terrorist activities. But it may only do so with respect for the rule of law. This means that the procedural rights of any alleged criminal must be safeguarded and that any sanction (criminal or administrative) complies with the principle of proportionality.[23] This sets a clear limit to the revocation of residency permits which causes undue hardship to the sanctionee.

4.1.3. Art. 46: Basic rights

Art. 46 imposes on the occupying power the duty to respect certain basic rights of the population: in particular "family honour and rights" as well as "private property". The restrictions on the freedom of movement which follow from the revocation of residency rights render the enjoyment of the rights impossible in a number of respects. As indicated above, the restrictions prevent families from living together, which is a clear violation of basic family rights.

The restrictions also prevent access to, and use of, a person's property where such use presupposes crossing a checkpoint. An example is the impossibility for a farmer to use his farmland because he is denied access on the basis of the revocation of his residency status. This amounts, for all practical purposes, to a violation of the right to private property. It is mainly on the basis of the denial of access and freedom of movement that the ICJ held that the construction of a wall constituted a violation of various guarantees of international humanitarian law and of human rights law.[24]

Art. 46 of the Hague Regulations is thus violated in several respects.

4.1.4. Art. 45: Prohibition of demanding allegiance

According to Art. 45 Hague Regulations, it is "forbidden to compel the inhabitants of occupied territory to swear allegiance to the hostile Power." If provisions of the Israeli law of citizenship requiring allegiance, and thus allowing revocation of citizenship for lack of allegiance, are applied to the system residency permits in occupied territory, this means *de facto* that those who want to maintain their residency permit are compelled to prove allegiance to the occupying power, a compulsion prohibited by Art. 45. Where residency permits are revoked for lack of allegiance, this is a violation of Art. 45 as allegiance my not be demanded by an Occupying Power.

4.1.5. Art. 50: Prohibition of collective punishment

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[23] See Bothe, MN 59 et seq., op.cit. note 20.

[24] ICJ, Advisory Opinion, supra note 6, paras. 132-134.

Collective punishment, which is forbidden, is a criminal or similar sanction imposed upon a person or persons who have not committed the act which is to be punished.[25] Thus, where a residency right is revoked as a reaction to, i.e. sanction of, unlawful or allegedly unlawful behaviour, in particular "terrorist" activities, such sanction may only be imposed, if at all in the light of the rule of law requirements explained above[26], on persons having themselves engaged in such behaviour, but not on other persons, for instance relatives of the person in question or on entire parts or the population. Thus, the practice of revoking residency rights of members of the family of a suspected terrorist or the sweeping revocation of residency rights in entire areas constitutes a collective punishment and violates Art. 50 of the Hague Regulations.

4.2. Geneva Convention IV

4.2.1. Scope of protection, protected persons

GC IV contains provisions having a different scope of application. There are, first, provisions common to the territory of a party to the conflict and to occupied territory (Art. 27 et seq.). There are, second, provisions applicable only in occupied territory. The beneficiaries of both types of provisions are "protected persons", a notion defined in Art. 4. They are persons who find themselves in the hands of a party to the conflict which is not their own. As indicated above, the Palestinian inhabitants of East Jerusalem were Jordanian nationals at the time the Israeli occupation started, and thus protected persons within the meaning of Art. 4.

However, nationals of a State which is not bound by the Convention are not protected. It has therefore to be asked whether the inhabitants of the West Bank remained protected persons also after Jordan severed its relations with the West Bank on 31st July 1988. From that date, Jordan no longer considered Palestinians residing in the West Bank as Jordanian nationals. But at that time, despite the proclamation of a Palestinian State, there was no Palestinian State recognized by Israel. Thus, at least from the point of view of Israel, and at that time from the point of view of a majority of States, the loss a Jordanian citizenship was either invalid (i.e. that they remain Jordanian nationals) or the Palestinians of the West Bank became stateless persons. In both alternatives, they remained protected persons within the meaning of Art. 4 GC IV.[27]

At a closer look, however, the status of Palestinians as protected persons is now based on the fact that they are nationals of a Party to the Geneva Conventions, namely Palestine.

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[25] Paul Rabbat/Sigrid Mehring, 'Collective Punishment' MN 1, in MPEPIL, op.cit note 7.
[26] See above Section 4.1.2.
[27] The formulation of Art. 4 GC IV clearly includes stateless persons in the definition of protected persons, see J.S. Pictet, Commentaire, vol. IV, La convention relative à la protection des personnes civiles en temps de guerre, 1956, p. 53.

Palestine declared its statehood in 1988. A wave of recognitions followed, after 1988 first by the Socialist States (as they then were) and by Third World countries. Since 2010, States from other regions followed.[28] By now, 137 States have recognized the Palestinian State.[29] Palestine ratified the Geneva Conventions on 2 April 2014 and is officially listed among the parties thereto. Thus, as of today, the Palestinian Arabs residing in the West Bank (including East Jerusalem) are protected persons being nationals of a party to the Convention.

4.2.2. Art. 27: Humane treatment

As Art. 27 GC IV applies both to the territory of a party to the conflict and to occupied territory, this provision protects Palestinians in East Jerusalem regardless of the question as to whether this is still occupied territory or whether the change in territorial status is accepted. Palestinians are "protected persons" in the sense of Art. 4 and 27 GC IV because they are nationals of a State bound by the Conventions.

According to Art. 27, protected persons are entitled "to respect for their persons, their honour, their family rights ..." As already shown with regard to Art. 46 of the Hague Regulations, the restrictions of the freedom of movement involved in the revocation of residency rights renders in particular the enjoyment of family rights impossible. Therefore, Art. 27 GC IV is violated.

4.2.3. Art. 33: Prohibition of collective punishment

Art. 33 also applies in the territory of a party to the conflict as well as in occupied territory. It prohibits the punishment of protected persons for acts which they have not committed, and in a more general way "collective penalties". The practice of revoking residency permits of relatives of persons suspected of unlawful behaviour, and of entire parts of the population, violates this prohibition.

4.2.4. Art. 49: Prohibition of transfers

Unlike Articles 27 and 33, Art. 49 only applies to occupied territory. It prohibits forcible transfers of protected persons within[30] or to places outside the occupied territory. The revocation of the right of residency will as perforce make it impossible for the person subject

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[28] Argentina 2010, Peru and Paraguay 2011, Guatemala 2013, Sweden 2014, Holy See 2015.

[29] Information provided by the website of the Permanent Mission of Palestine to the United Nations, http://palestineun.org/about-palestine/diplomatic-relations

[30] Vincent Chetail, 'Transfer and Deportation of Civilians', MN 9, in Clapham/Gaeta/Sassòli (eds.), *op.cit.* note 20, pp. 1185 et seq.

to such revocation to continue to live in East Jerusalem, which amounts to a forcible transfer to another place. This is a violation of Art. 49 GC IV.

5. Human rights of the population of East Jerusalem

5.1. Scope of application of human rights law

In a situation of occupation, there is the question of parallel application of human rights law and of international humanitarian law. The U.S. and Israel have refused to accept the extraterritorial application of human rights law. If this view were correct, international human rights law would not be applicable in the case of occupation. However, the International Court of Justice[31] and human rights treaty bodies[32] have consistently upheld the extraterritorial application of human rights and the possibility of parallel application of human rights and international humanitarian law.

If the annexation of East Jerusalem were valid, that problem would not arise. East Jerusalem would have to be considered as Israeli territory to which all human rights treaty obligations of Israel apply.

Thus, regardless of the question of status, human rights law applies to any action Israel undertakes in respect of inhabitants of East Jerusalem. This is the starting point for the following analysis of human rights provisions contained in the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights as well as in the Convention of the Right of the Child.

5.2. ICCPR

5.2.1. Art. 12: Freedom of movement and of the choice of domicile

According to Art. 12 ICCPR,

> "everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence".

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[31] International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion dated 8 July 1996, para. 25; *Legal Consequences of the Construction of the Wall*, note 6, paras. 103 et seq.

[32] Concerning the ICCPR see as recent example Human Rights Committee, 'Concluding observations on the fourth periodic report of Israel, Doc. CCPR/C/ISR/CO/4, para. 5.

The revocation of the right of residency is an outright denial of this very right to choose one's residence. The persons in question are "lawfully within the territory" at the time of revocation.[33]

However, as any other human right, the right is not unlimited. It is subject to restrictions "which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others ...", but only to restrictions fulfilling these well defined conditions. If restrictions are imposed outside the scope of what is required or permitted under the legislation in question, they are not "required by law" and thus not covered by the exception clause of Art. 12 ICCPR. This restriction on restrictions thus raises, first, the question whether the revocations described are really covered by the legislation in question, which is subject to considerable doubt and controversy. Secondly, only those restrictions which are "necessary" are permitted. The restrictions are, in other words, subject to the requirement of proportionality.[34] Proportionality must be judged on a case-by-case basis. Any sweeping or generalized revocation does not meet that requirement.[35] Restrictions must be narrowly interpreted in case of doubt.[36]

Where the revocation of a right to residency leads to a denial of re-entry after a time of absence, this can be a violation of Art. 12 para. 4, providing the right "to enter his own country". Nobody may be "arbitrarily" deprived of that right. A refusal of re-entry is arbitrary if there are no valid reasons for that refusal, a question which also must be decided on a case-by-case basis.[37]

5.2.2. Art. 13: Prohibition of expulsion

Art. 13 constitutes a *lex specialis* in relation to Art. 12. It limits the expulsion of "aliens". The limitations of the power of expulsion are mainly procedural: the conditions must be prescribed by law and there must be a remedy. This amounts to a condition of proportionality.

Persons lawfully residing in a given territory where their ancestors have lived for generations may, however, not become "aliens" due to the simple fact the fact of occupation or

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[33] See CCPR General Comment No.27: Article 12 (Freedom of Movement, CCPR/C/21/Rev. 1/Add. 9, para. 4; Manfred Nowak, U.N. Covenant on Civil and Political Rights, CCPR Commentary, 2nd ed. 2005, Art. 12 MN 8 et seq.

[34] CCPR General Comment No. 27, note 33, para. 14 et seq.

[35] Recognized, yet regretted by Sher, supra note 16.

[36] Nowak, op.cit. note 33, Art. 12 MN 37.

[37] On the notion of "arbitrary", see the discussion concerning arbitrary refusal of relief operations, see Emanuela-Chiara Gillard, 'The law regulating cross-border relief operations', 95 IRRC pp. 351 et seq. (2013. No. 895).

annexation of that territory.[38] Such persons cannot be subject to expulsion in the sense of Art. 13, the general rule of Art. 12 continues to apply to them. The revocation of residency rights can therefore not be justified under Art. 13.

5.2.3. Art. 17: Protection of private life

Art. 17 protects everyone against "arbitrary or unlawful interference with his privacy, family, home or correspondence". Revocation of the right of residency is a denial of the right to home and family.[39] Any measure preventing members of a family from living together, such as measures affecting the right of residency, constitute a violation of the right to family life.[40] "Home" has to be broadly understood. It "symbolizes a place of refuge where one can develop and enjoy domestic peace, harmony and warmth without fear of disturbance."[41] The revocation of a residency permit deprives the addressee of any such refuge. Whether this is "unlawful" depends, as already shown, on the applicability of the legislation mentioned above. The question of "arbitrariness" has already been discussed.

5.2.4. Art. 26: Prohibition of discrimination

The revocation of residency rights may also constitute a violation of the equal protection clause of Art. 26 ICCPR:

> "All persons are equal before the law and entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth of other status.

This provision may be violated in various ways by decisions to revoke a residency right. "Equal protection" does not prohibit distinctions being made. But the distinctions must be based on reasonable and objective criteria.[42] Arbitrary distinctions are prohibited. If distinctions are made between different persons, e.g. by singling out persons for a revocation of residency rights, this is unlawful unless there are valid reasons for the choice.

This entails the question as to what are valid reasons. Art. 26 facilitates an answer to the question by highlighting specific criteria on which distinctions may not be based. Whether, at

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[38] See for similar situations CCPR General Comment No. 27, loc.cit. note 33, para. 20.
[39] See already above sec. 4.1.2.
[40] Nowak, op.cit. note 33, Art. 17 MN 17 et seq.
[41] Nowak, op.cit. note 33, Art. 17 MN 41.
[42] Nowak, op.cit. note 33, Art. 26 MN 38.

a closer analysis, the revocation of a residence permit violates one of these criteria, must be decided on a case by case basis.

5.3. ICESCR

The guarantees contained in the ICESCR are so-called promotional obligations, they rather describe goals to be attained, not hard obligations which must be observed without any variation. States must take steps "with a view to achieving progressively the full realization of the rights recognized" in the Covenant. Yet they nevertheless set clear limits to State behaviour insofar as they do not tolerate State measures which render the attainment of the goal in question more difficult or even impossible. In this sense, the ICJ has used the ICESCR as a basis for its judgment that the construction of the wall in the OPT violated Israel's human rights obligations.[43]

5.3.1. Art. 10: Protection of family life

The effects of revocations of residency rights on family life have been emphasized above. By rendering family life impossible or at least extremely difficult, they constitute a denial of the protection and assistance which States, pursuant to Art. 10, are obliged to grant to the family. Art. 10 is thus violated.

5.3.2. Art. 11: Right to a decent standard of living

As the restrictions which are the consequence of the revocation of residency rights make it impossible or at least extremely difficult for East Jerusalem Palestinians to pursue meaningful professional activities, they constitute a denial of the right to an adequate standard of living.[44]

5.3.3. The right to health

The said restrictions of movement also constitute obstacles to accessing health care facilities. This is a particular problem for Palestinians living on Jerusalem territory situated to the East of the Security Barrier. They cannot reach the essential services of the municipality, including health services, without crossing a checkpoint. As they are unable to do this because of the revocation of their residency right, this revocation constitutes a violation of the right to health. Art. 12 is thus violated.

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[43] ICJ, *Legal Consequences of the Construction of a Wall,* supra note 6, para. 134.

[44] In the same sense the conclusion of the ICJ concerning the construction of a wall, loc. cit. supra note 6, para. 134.

5.4. The Convention on the Rights of the Child

Concerning the Convention on the Rights of the Child, to which Israel is a party, the relevant treaty body has also insisted on the application of the convention by Israel in the OPT including East Jerusalem.[45] The Convention contains a number of provisions to safeguard the bond between the child and its parents. In particular, according to Art. 8, States parties must respect the child's right "to preserve his or her identity, including nationality, name and family relations ..." The practice of revoking or not granting residency rights regardless of family relations is a violation of that provision.[46] It disturbs the bond between parents and child which is protected by Art. 8 CRC.

6. Remedies and measures to ensure compliance

It has been shown that the Israeli practice of revoking residence permits violates numerous norms of international humanitarian law and of human rights law. The question arises how to ensure compliance with these norms, taking into account current political conditions.

In the modern international system, measures to ensure compliance with legal obligations depend to a large extent on cooperation between the actor claiming that there is non-compliance (this may be a victim, a non-injured State or an international organization) and the State who is alleged to have violated the law. Therefore, many multilateral agreements design "non-confrontational" compliance procedures. Such procedures may also be created *ad hoc* (negotiation, mediation, conciliation), but in the current political context, Israeli participation in the creation of such a procedure is difficult to envisage, to say the least. Nor is Israel a party to any treaty obliging it to accept a third party settlement. In particular, Israel has not accepted the obligatory jurisdiction of the ICJ according to Art. 36 (2) of the ICJ Statute.

This leads to an additional problem, already indicated above, which is the controversy about the status of East Jerusalem. It has been shown that the legal framework assumed to apply to East Jerusalem differs depending on the view taken concerning its status. Israel will be loath to discuss compliance with norms which would only be applicable in a case of occupation, a situation Israel denies the existence of. It is the advantage of human rights law that it applies both in the case of occupation and in that of a valid annexation, i.e. regardless of the controversy. This sets aside at least one legal argument against cooperative dispute settlement.

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[45] Committee on the Rights of the Child, 'Concluding observations on the second to fourth periodic reports of Israel', Doc. CRC/C/ISR/CO/2-4.
[46] CRC, note 45, paras. 29-30.

The pursuit of compliance mechanisms pertaining to human rights law is thus of major importance. Nevertheless, the role of the ICRC as an agent to promote compliance with international humanitarian law remains vital also in respect of the situation of Palestinian residents of East Jerusalem, as does the role of third States in accordance with their obligation, established by Art. 1 Common to the Geneva Conventions, to ensure respect for the Conventions. The importance of this provision as a basis of obligations to ensure compliance with international humanitarian law is emphasized by the 2016 ICRC Commentary to the Geneva Conventions.[47] It means that all States "must do everything reasonably in their power to ensure respect for the Conventions by others that are Party to a conflict."[48] This includes lawful countermeasures, in particular acts of retorsion.[49] This obligation does not only apply to the Geneva conventions, but also to customary humanitarian law.[50]

Under human rights law, the role of national courts, in this context of the Israeli courts, is important for two reasons. As a matter of principle, international procedures to ensure compliance with human rights presuppose the exhaustion of local remedies, i.e. previous recourse to a competent national court. On the other hand, States are obliged to provide by their legislation a judicial remedy for human rights violations and to guarantee the corresponding rights of a fair procedure. Failure to do so is a violation of human rights law by the State in question. It is beyond the scope of the present Opinion to evaluate the practice of Israeli courts in this respect.

The treaty mechanisms established by the three human rights treaties analyzed above only provide a limited protection. Israel is not a party to the protocols opening the treaty bodies for individual complaints, referred to as "communications", nor has it accepted the interstate complaint procedure under Art. 41 ICCPR. The leverage which these treaty bodies possess is thus mainly based on their reactions to State reports, a possibility which the Human Rights Committee has indeed used in relation to Israel.

This limited competence of the treaty bodies has prompted a further reaction by the international community, namely the activities of the UN Human Rights Commission, now the Human Rights Council, to strengthen the application of human rights law and of international humanitarian law. The parallel application of human rights law and international humanitarian law is the main basis for a practice which considers international humanitarian law as also coming under the mandate of the HRC. The HRC possesses a number of tools in this respect: the appointment of a Special Rapporteur for a country, a Special Rapporteur for a certain subject, giving rise to thematic reports, and so-called fact-

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[47] ICRC, *Commentary on the First Geneva Convention, 2016,* Art. 1, at present only available online at https://ihl-databases.icrc.org/ihl/full/GCI-commentary,
[48] ICRC, *op.cit.* note 47, Art. 1 para. 153.
[49] ICRC, *op.cit.* note 47, Art. 1 para. 181.
[50] ICRC, *op.cit.* note 47, Art. 1 para. 126.

finding commissions, which in practice have become bodies to determine breaches of human rights or humanitarian law. These procedures are very important to spur the international discourse concerning human rights violations and to build up political pressure against such violations. The practical effect for the victims the present Opinion is concerned with will, however, be minimal as Israel categorically refuses to cooperate with the HRC and to give any effect to its resolutions.

A final option which has to be considered in this respect is reaction by third States. It has played an important role in relation to Israel's settlement policy. The fact that human rights obligations apply *erga omnes* give third States a *droit de regard* concerning human rights violations occurring in any State. Even States who are not injured by a human rights violation may "invoke" the responsibility of the State in question (Art. 48 DARS). They may take countermeasures, but only measures which do not violate international law (Art. 54 DARS, acts of retorsion in the traditional terminology). Diplomatic demarches in favor of East Jerusalem Palestinians and a denial of advantages to which Israel is not legally entitled would be an example of such measures.

7. Conclusion: The current status of East Jerusalem Palestinians – a right to a place whereon to live in peace and safety

It has been shown that Israel's practice of not granting or revoking the right of permanent residency to East Jerusalemites whose families have lived there for generations renders their practical possibility to live in their home city difficult, if not impossible in many respects. The practice renders many of them homeless. It has been shown that this constitutes a violation of different human rights norms which, taken together, result in a fundamental principle of international law: there is a fundamental individual right to a place where the individual can live in decent circumstances. For the Palestinians living in East Jerusalem, this means a secure right of existence in East Jerusalem.

The sources of this fundamental principle have in part been developed in the Opinion. A major source is implied in the rights of freedom of movement: Freedom of access and movement are a precondition of adequate living conditions in many respects, they are guaranteed by diverse provisions of international humanitarian law and of human rights law: the Hague Regulations, GC IV, ICCPR and ICESCR. Another important source is the right to a private sphere and family life, guaranteed by Art. 46 of the Hague Regulations and by Art. 17 ICCPR. Concerning the corresponding provision of the ECHR, the ECtHR held:

> "(T)he decisions taken by States in the immigration sphere can in some cases amount to interference with the right to private and family life secured by Art. 8 § 1 of the Convention, in particular where the persons concerned possess strong personal or

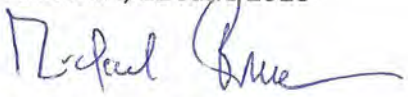
family ties in the host country which are liable to be seriously affected by the application of the measure in question."[51]

This aspect is of particular relevance in the current debate on the right to nationality and the fight against arbitrary deprivation of nationality. It is expressly stated that a deprivation of nationality may never lead to expulsion. [52] A loss of nationality, effected by whatever means, must not destroy the right to family life.

Finally, the same fundamental principle is enshrined in refugee law, in particular in the principle of non-refoulement (Art. 33 Geneva Refugee Convention). A person may not be sent back to a State where he or she is not safe. The international legal order does not tolerate persons being put into an orbit and forced to remain there. Every person must have a place on Earth whereon to live.

This fundamental legal principle provides a solid legal defense against the policies of Israel designed to make Palestinian existence in East Jerusalem so troublesome.

Frankfurt, 22 June 2016



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[51] *Kuric v. Slovenia,* Appliction 26828/06, European Court of Human Rights, Third Section, Judgement of 13 July 2010, confirmed by Grand Chamber Judgement of 26 June 2012, para. 351 of the Judgment of 2010.

[52] Human rights and arbitrary deprivation of nationality. Report of the Secretary-General, UN Doc. A/HRC/25(28, 19 December 2013, para.26.