The Pathology of a Legal System: Israel's Military Justice System and International Law

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> *'International law is not designed to protect and grant rights to saboteurs and criminals. The defendants have no right except to stand trial in court, and be tried in accordance with the law and with the facts established by the evidence, in proceedings with the requirements of ethics and International Law…'*[1]

1. *Introduction*

Despite the burgeoning literature on the consequences in international law of Israeli practices and policies in the territories it has militarily occupied since 1967, there has been only limited legal consideration of the intentions that drive Israel's practices and the underlying structures within which these practices occur – intentions about the effects of its policies, but also the status of international law rules as such.[2] This essay

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[1] Israeli military court pronouncing on its own jurisdiction to try members of the Popular Front for the Liberation of Palestine (PFLP); cited in I Mann, 'Gunneflo Book Symposium (1) – Israel and the Forever War' (Völkerrechtsblog, 8 March 2017) <voelkerrechtsblog.org/gunneflo-book-symposium-part-1/>.

[2] Human Sciences Research Council, 'Occupation, Colonialism Apartheid? A re-assessment of Israel's practices in the occupied Palestinian territories under international law' (May 2009) <www.alhaq.org/attachments/article/236/Occupation_Colonialism_Apartheid-FullStudy.pdf>. See on the role of settlements in bringing about de facto annexation, Human Rights Council, Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian

offers a way forward for filling that gap by assessing Israel's administration of justice in the occupied Palestinian territory in light of Hart's category of the 'pathology of legal systems,'[3] which offers a normative perspective on the ends and means of a state's relationship to international law(s). A diagnosis of the pathology of a wrongdoer's legal system is necessary to understand the normative rigidities that drive its actions: the reasons for such actions, their frequency and likelihood, and their intended effects. The focus of this analysis is the posture Israel has adopted towards the applicability of international law, and the way the structures it has established in occupied territory enable and indeed mandate its authorities to act in contravention of international norms.

A pathology of a legal system is diagnosed, according to Hart, when a domestic legal order incorporates and uses 'rules of recognition, change, and adjudication,' to determine the validity of domestic legal rules in a manner that is intended to circumvent and subvert its obligations under international law.[4] In cases where a domestic legal system accepts, encourages or even mandates conduct that is internationally unlawful, the diagnosis of a pathology focuses attention on the means, or rules of recognition, by which that legal system gives effect to facts and situations deemed unlawful by another legal system. In the case of Israel's military justice system, its pathology is manifest not only in its actions in contempt of these norms, or its institutions' refusal to accept the applicability of international law, but also in efforts intended to revise the content of international norms. Ben-Naftali labels Israel's administration of the occupied Palestinian territory as a 'Patholawgical occupation': the structural underpinnings of its legal and administrative order were designed to contravene its normative premises, inter alia by revising the demographic composition of the territory (rejecting Palestinian rights) and seeking the territory's permanent acquisition by force (rejecting the status of 'occupied territory').[5]

Golan, UN Doc A/HRC/34/L.41, adopted on 21 March 2017 (by 36 votes in favour, including the Netherlands, Germany, Switzerland and Belgium).

[3] HLA Hart, *The Concept of Law* (OUP 1961) 120 ff.

[4] ibid 121.

[5] O Ben-Naftali, A Gross, K Michaeli, 'Illegal Occupation: The Framing of the Occupied Palestinian Territory' (2005) 23 Berkley J Intl L 551. See also, Y Ronen, 'Illegal Occupation and Its Consequences' (2008) 41 Israel L Rev 201-245.

In assessing Israel's administration of justice in the Occupied Palestinian Territories, this essay analyses the structures of the military justice system within the context of the Israeli legal system. First, it identifies the domestic legal system's rules of recognition and criteria of validity for international laws; i.e. whether and to what extent this system considers international law to be valid law. Israeli authorities use law, legal process, and administrative practice to sanction and perpetrate acts that amount to violations of international law. Since many domestic laws are inherently based on wrongful interpretations of international norms (and may indeed be intended to provide cover for internationally wrongful acts), international law violations result from habitual obedience to domestic law. The practice of Israel's military justice system thus also recognises and gives effect to internationally unlawful facts. It is argued that these structures of internationally unlawful legislation and administrative practice are responsible for the recurrence of individual violations.

Secondly, this essay observes the intent (mental element) or wrongful object and purpose of specific wrongful acts: the knowledge of illegality, and the intention to alter the interpretation of international law so as to render legal what is illegal. Drawing on archival material recently unearthed by the non-governmental group Akevot – Institute for Israeli-Palestinian Conflict Research, it considers how Israel's legal practice constitutes an 'assault' on the international rule of law,[6] which in turn pursues the 'normalisation' and entrenchment of 'structural violence'.[7] Israel's legal practice is both a cause of widespread and systematic violations of fair trial rights and due process guarantees, as well as the engine of an 'unlawful' rule of law (or legal regime).[8] The essay concludes with a set of observations on the potential utility and contribution of this analytical category of a pathology of a legal system to the international law on state responsibility and to accountability more broadly.

[6] See J Ohlin, *The Assault on International Law* (OUP 2013).

[7] M Gunneflo, *Targeted Killing: A Legal and Political History* (CUP 2016). See also, L Hajjar, *Courting Conflict* (U California Press 2005). A Baker, A Matar, *Threat: Palestinians Prisoners in Israel* (U Chicago Press 2011).

[8] U Mattei, L Nader, *Pillage: When the Rule of Law is Illegal* (Blackwell 2008).

2. *The structures of a pathology*

This section provides an overview of the 'rules of recognition' of the Israeli military justice system and its institutional practice, and examines two of its effects: the erosion of individual and collective Palestinian rights; and the undoing of the special status of the Palestinian territory as 'occupied territory' in international law, and of Palestinians as a 'protected population' under international humanitarian law (IHL). Israeli authorities administering justice in the occupied Palestinian territory give effect to internationally unlawful acts and internationally invalid facts (*ipso jure*) through their very application of Israeli laws that enjoin the military courts to undertake law enforcement. This legislative and administrative regime is the cause for many specific violations of international law and rights abuses.

2.1. *Rejecting the status of 'occupied territory'*

The military law that establishes and defines the powers of Israeli military courts and law enforcement authorities causes harm to Palestinian rights, but it also represents an unlawful re-definition of the internationally-recognised status of Palestinian territory. The basis for Israel's military administration of justice in the occupied territory is the rejection of the applicability of occupation law, and refusal of the territory's international status as 'occupied territory'. Israel has long rejected the applicability of occupation law to the Palestinian territory, arguing that there was no sovereign Palestinian state before 1967.[9] Its firm public position is that the territory is 'disputed'.[10] Israel's Supreme Court decisions have, at times, affirmed the applicability of the 'humanitarian' provisions of the

[9] On Israel's 'absent reversioner' claim, Y Blum, 'The Missing Reversioner: Reflections on the Status of Judea and Samaria' (1968) 3 Israel L Rev 283. See also, T Meron, 'The West Bank and International Humanitarian Law on the Eve of the Fiftieth Anniversary of the Six-Days War' (2017) 111 AJIL 4-5.

[10] See on Israel's position that the territory is not occupied, Ministry of Foreign Affairs, 'Disputed Territories: Forgotten Facts about the West Bank and the Gaza Strip' (February 2003) <mfa.gov.il/MFA/MFA-Archive/2003/Pages/DISPUTED%20TERRITORIES%20Forgotten%20Facts%20About%20the%20We.aspx>. The Israeli government has spelled out its need to avoid the use of legal terms enumerated in the convention, such as 'occupied territories' and 'occupying power'; Akevot, 'Cautionary remarks with respect to the use of certain terms' <akevot.org.il/ en/article/comay-memo-terminology/>.

1949 Fourth Geneva Convention and 1907 Hague Regulations that codify the law of occupation. But it has never in its judicial practice challenged the government's claim that the Geneva Conventions do not apply *de jure* or *en bloc*.[11] The recent 'Regularisation' Law, that bestows legal status on previously unauthorized settlements (called outposts) under Israeli law,[12] affirms Israel's long-standing position that it is not bound by the 1949 Fourth Geneva Convention, and hence can act in contravention of occupation law's working assumptions with regards to the status of the territory. It also reveals the Israeli legislature exercising its domestic jurisdiction over the occupied territory.[13]

The military justice system was constituted soon after the occupation began, as part of the implementation of a policy of absorption of Palestinian *territory* into Israel, through *de facto* annexation of the Palestinian territory for the construction of Israeli civilian settlements, and at once the administration of the Palestinian population was carried out under military law.[14] The enactment of military laws from the first days of the occupation entailed wholesale revisions and reforms to the Palestinian legal and political order, including the displacement of its courts' jurisdiction and the exclusion of its law enforcement authorities from operating in the majority of the territory.[15] The military courts' jurisdiction is

[11] Meron (n 9) 6.

[12] I Fisher, 'Israel Passes Provocative Law to Retroactively Legalize Settlements' *New York Times* (6 February 2017). 'Voting "Yes" For Theft' *Haaretz* (6 February 2017).

[13] The Israeli government has arguably based its domestic legal jurisdiction over the West Bank on legislative instruments from the British Mandate such as the Area of Jurisdiction and Powers Ordinance No. 29 from 1948, which provides: 'Any law applying to the whole of the State of Israel shall be deemed to apply to the whole of the area including both the area of the State of Israel and any part of Palestine which the Minister of Defence has defined by proclamation as being held by the Defence Army of Israel.' Area of Jurisdiction and Powers Ordinance (passed by the Knesset September 22, 1948) <israellawresourcecenter.org/israellaws/fulltext/areajurisdictionpowersord.htm>.

[14] Israeli law and domestic public bodies' jurisdiction extends to settlements; Association for Civil Rights in Israel (ACRI), *One Rule, Two Legal Systems: Israel's Regime of Laws in the West Bank* (2014). Emergency Power (Detention) Law 5739-1979 <www.btselem.org/sites/default/files/1979_emergency_powers_law_detention_ 0.pdf>. See also, L Yavne, *Backyard Proceedings: The Implementation of Due Process Rights in the Military Courts in the Occupied Territories* (Yesh Din, December 2007) 43 <www.yesh-din.org/site/images/BackyardProceedingsEng.pdf>.

[15] S Weill, 'The Judicial Arm of the Occupation: The Israeli Military Courts in the Occupied Territories' (2006) 866 Intl Rev Red Cross 395.

constituted on the basis of these unlawful revisions.[16] In this sense, Israel's military legal system is a rejection of the protections owed by Israel as an Occupying Power to the Palestinian population in the occupied territory, and of the limitations on its temporary, special-purpose *de facto* administrator status.

The blurring of jurisdictional and territorial lines is also seen in the composition and jurisdiction of Israel's military law enforcement authorities. Military law is enforced not only by Israel's army but also by its national police force, headquartered in the occupied territory of East Jerusalem. The General Security Agency, Israel's main internal security service, is also involved in the interrogation and detention of Palestinians subject to Israel's military administration. A number of military orders, including the Order Regarding Administrative Detentions, unify the enforcement systems between Israel and the occupied territory including East Jerusalem, and authorise law enforcement authorities, military and domestic, to detain inside Israel proper persons arrested in the West Bank,[17] in contravention of the absolute prohibition of such transfers in international humanitarian law (IHL).[18]

The basis for the laws and administrative practice of Israel's military justice system is a manifestly wrongful interpretation of the permission given to occupying states to militarily administer justice in the occupied territory: it has used this permission to create a pretence of territorial and jurisdictional separation between the Israeli domestic legal system and that which governs Palestinians. In reality, as discussed below, Israel has used its exercise of personal jurisdiction under domestic law over Israeli citizen-settlers to administer two populations in the occupied territory in a manner that regularly pits the rights, security and wellbeing of one against the other, while rejecting the indigenous population's internationally recognised right to independence in that territory. The result is that

[16] The jurisdictional scope of Israel's application of military law which extends to the entirely of Area C (over 60% of the West Bank excluding East Jerusalem which Israel formally annexed) for matters including civil affairs such as domestic violence and many non-security acts in Areas A and B.

[17] See, the judicial challenge by rights groups of the internationally unlawful basis for detention of Palestinians from the West Bank in Israel; HCJ 2690/09 *Yesh Din et al v IDF Commander in the West Bank* (judgment of 28 March 2010) <www.hamoked.org/files/2010/111511_eng.pdf>.

[18] Art 76, 1949 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949 (hereinafter: Fourth Geneva Convention 1949).

the Israeli military justice system's authority is based on the erosion of Palestinian collective and sovereign rights and systemically permits, or indeed mandates, international law violations through the trial of civilians by military courts, and the furtherance of the diminishment of Palestinian individual rights in favour of the protection of settler rights.

2.2. *Rejecting Palestinian protections*

IHL obliges the occupying power to protect the 'fundamental guarantees of protected persons' as part of its duty-bound mandate of *de facto* administration.[19] These IHL protections are complemented by international human rights law (IHRL). But in situations of occupation where IHL is not fully implemented, as is the case with Israel's administration, purported rights protections can amount to rights abuses. The Israeli supreme court defines the 'local population' whose rights must be protected in the occupied territory to include both settlers and Palestinians; with Israeli settlers enjoying the elevated status of Israeli citizens. Israeli law enforcement authorities therefore balance Palestinians' and settlers' rights, as Gross remarks, in a 'purportedly equal' manner – Israeli settlers benefit from civil laws, whereas Palestinians are subject to military rule.[20] This apportioning of rights diminishes the special protection of Palestinians as 'protected persons'. The Israeli judiciary's assessment has itself found such internationally unlawful acts as requisitioning Palestinian land to be harmful but 'proportional' to the goal of ensuring Israeli settlers' security with barriers and bypass roads.[21] Israel's application of human rights standards enshrined in Israeli law – and the simultaneous rejection of the extraterritorial applicability of IHRL – to an occupation which continuously violates core IHL norms is intended to legitimise and

[19] Art 27, Fourth Geneva Convention 1949. Art 43, Regulations concerning the Laws and Customs of War on Land (The Hague, 18 October 1907) (hereinafter: Hague Regulations 1907).

[20] A Gross, 'Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?' (2007) 18 Eur J Int L 1. See also, A Gross, 'The Righting of the Law of Occupation', in N Bhuta (ed) *The Frontiers of Human Rights* (OUP 2016).

[21] See for a review of cases dealings with conflicting rights of Palestinians and Israelis, ibid 28-37.

reclassify other violations while undermining the essential basis for Palestinian individual and collective rights. The permissive attitude of Israeli law enforcement towards land grabs[22] by settlements and settler groups that engage in life-threatening violence against Palestinians[23] is collateral to this rights-diminishing arrangement.

Palestinian rights protections are undermined by the non-implementation and indeed rejection of the applicability of IHL by Israeli authorities. IHL prohibits the annexation[24] of any part of the occupied territory, and the undertaking of demographic changes.[25] However, the reach of Israel's domestic legislative, executive and judicial jurisdiction in law and practice, means that Israeli military authorities are mandated to give legal effect to the right of habitual residence of Israeli settlers in Palestinian territory. This and other structural violations of IHL form the basis for the application of Israeli military law, and guide the decisions of Israeli military courts on security matters involving Israeli settlers, Palestinians, and the Israeli army. Israel's administration of the occupied territory is predicated on the juxtaposition of settler and Palestinian rights under one rule, but through two systems.[26] While settlers enjoy status as rights-holders under Israeli law, the Palestinian population falls under the control of the military justice system, its laws and administration of justice, which have as a primary objective the protection of settlers from the threat that Palestinians are socially constructed to represent within the Israeli national system.[27]

The Israeli group Akevot recently released a 1967 presentation to the Knesset by Military Attorney General (MAG) Col Shamgar, the army's top legal official, who viewed military law as a tool for 'controlling the [Palestinian] population through the law'.[28] An example of Israeli practice that vitiates IHL protections is the abuse of administrative detention.

[22] Y Din, 'Crime Without Punishment: Failure to Prosecute Israelis Involved in Illegal Construction in the West Bank' (February 2017) <www.yesh-din.org/en/crime-without-punishment/>.

[23] M Pahlmblad, 'Israeli settler violence in Palestine, Directorate General for External Policies' (Policy Department, December 2012).

[24] Arts 7, 8 and 47, Fourth Geneva Convention 1949.

[25] Arts 47 and 49, Fourth Geneva Convention 1949.

[26] ACRI (n 14).

[27] Gross (n 20).

[28] Akevot, 'Briefing to Knesset by Military Advocate General, Col Shamgar July 1967' <akevot.in/MAGbrief>.

The permissible scope of the use of administrative detention in occupation law is limited to imperative reasons of security. The mere invocation of security considerations does not obviate the non-derogable obligation of all states including occupying powers to protect fundamental fair trial guarantees.[29] Yet, especially during a steep increase in the number of detainees, Israeli legal practice has turned the exception into a rule; using administrative detention as a preferred alternative to criminal proceedings because it is less demanding in terms of the detainee's basic fair trial rights such as the right to access and challenge evidence and witnesses as part of an effective defense.[30]

By choosing to default in the enforcement of the rule of law in occupied territory, and meanwhile exploiting local military rules that permit arrest, detention and punishment of Palestinians without fair trial rights, Israel's military justice system operates for settlers and against Palestinians. The public interest in a person's liberty is understood through the eyes of an Israeli settler, and not that of the Palestinian public whose members are brought before the court.[31]

3. *Pathological intentions*

States that obey international law transform it into domestic law and internalise the imperative of compliance with international law.[32] But the inverse is also true. The Israeli military justice system is based as noted on rules and practice that mandate Israeli entities to reject the status of Palestinians as a protected population and the status of the territory as 'occupied' (as is the case under international law). This pathology of this legal system entails a certain posture and attitude towards Israel's legal

[29] Although it is not listed as a non-derogable right in art 4 of the ICCPR, the Human Rights Committee has treated it as such: General Comment No 29, States of Emergency (Article 4) UN Doc CCPR/C/21/Rev.1/Add.11 (31 August 2001) para 11. See also, A Bianchi, 'Human Rights and the Magic of Jus Cogens' (2008) 3 Eur J Intl L 3 491. See also, Office of the High Commissioner for Human Rights, 'Basic Human Rights Reference Guide: Right to a Fair Trial and Due Process in the Context of Countering Terrorism' (October 2014) para 14.

[30] B'Tselem, 'Administrative Detention in the Occupied Territories' (1 January 2017) <www.btselem.org/administrative_detention/occupied_territories>.

[31] Yavne (n 14).

[32] HJ Koh, 'Transnational Legal Process' (1996) 75 Nebraska L Rev 181.

obligations under international law that predetermines the ability of its authorities to will action in compliance with international law in good faith. The nature and quality of states' acts or practice of non-compliance – what international law sociologists have called 'labelling'[33] – depends on the frequency and severity of violations, and on the ways they are justified by its legal and administrative order. A map of a legal system's deep-seated normative rigidities, therefore, can reveal the intention behind certain practices and the effect of certain domestic laws that displace the applicability of relevant international law. It also explains the quality of the state's institutional practice in terms of its international legal argumentation.[34] That is, its tactical utilisation of international legal argument to deflect criticism, cover-up for potential violations, and give a sense of banality to certain unlawful acts.[35]

Since the observance of international law is not merely about putting in place the necessary laws, by-laws and administrative practices, but also about having the requisite intent,[36] a state's bad faith should be accounted for in determining the nature of the wrongs its practices produce.[37] Under the secondary rules of internalisation, states have a duty of care to absorb international law in good faith, by appropriately constructing intent to guarantee compliance.[38] That is, it must put in place the structures and processes in domestic law that guarantee its observance of international law (without prejudice to potential violations that may occur as a result of a potential system error). To assess the specific intentions of Israel's military justice system, we must therefore consider what an Occupying Power can lawfully intend vis-à-vis the territory and people

[33] See on labeling, M Hirsch, *Invitation to the Sociology of International Law* (OUP 2015) 169-171.

[34] See, eg, ZI Búzás, 'Evading International Law: How Agents Comply with the Letter of the Law But Violate Its Purpose' (2016) 23 Eur J Intl Relations 857.

[35] I Kalpouzos, I Mann, 'Banal Crimes Against Humanity: The Case of Asylum Seekers in Greece' (2015) 16 Melbourne J Intl L 1.

[36] See, R Howse, R Teitel, 'Beyond Compliance: Rethinking Why International Law Really Matters' (2010) 2 Global Policy 127.

[37] I Scobbie, 'Assumptions and Presuppositions: State Responsibility for System Crimes', in A Nollkaemper, H van der Wilt (eds) *System Criminality in International Law* (CUP 2009) 270-297.

[38] See on intentions as part of the obligation to observe international law in good faith, S Reinhold, 'Good Faith in International Law' (2013) 2 UCL J Intl L Jurisprudence 40.

of the occupied territory. As noted, a situation of occupation in international law is predicated on a presumption of temporariness, exceptionality and the limited duty-bound mandate granted to an Occupying Power under the law of occupation – a *de facto* administration that does not enjoy even 'an atom of sovereignty'.[39] It commits the Occupying Power to act in a manner that assumes the sovereign status of the local population over their territory, and their entitlement to individual and collective rights.

An essential window on intentionality (intentional action)[40] is the wrongdoing authority's 'knowledge of illegality,' from which arise its premeditated and deliberate internationally unlawful acts. That is, the state is acting to exploit the indeterminacy of international law, with the belief and conviction that its political motives and domestic interests trump its international legal obligations. The relevance of this analytical category was recalled in the wake of the release of the committee summary of the CIA's torture methods report in December 2014.[41] The report indicated that both US legal advisors and political officials involved in the use of torture knew that their acts were unlawful, and proceeded to actively seek legal cover and *ex ante* waivers of prosecutions.[42] Indeed, throughout the years the US administration requested opinions to cover-up for violations including through wrongful interpretation of its international legal obligations.[43] The wrongful intent inherent to such actions includes not only an intent to perpetrate the violation, but also the intent to act in contravention of international law and engage in its wrongful interpretation and perhaps also implicitly its (long-term) revision.

In Israel's case, this intent vis-à-vis the rules of international law can be gleaned from the claim by former head of the Military Advocate General's international law department, Col. Daniel Reisner, that Israel has

[39] L Oppenheim, 'The Legal Relations between an Occupying Power and the Inhabitants' (1917) 33 L Quarterly Rev 364. See also, A Pellet, 'The Destruction of Troy Will Not Take Place', in E Playfair (ed) *The Administration of Occupied Territory in International Law* (Clarendon Press 1989).

[40] DC Dennet, 'Intentional Systems' (1971) 68 J of Philosophy 87.

[41] J Sifton, 'They Knew It Was Illegal' Just Security (10 December 2014).

[42] Senate Select Committee on Intelligence, Committee Study of the Central Intelligence Agency's Detention and Interrogation Program (3 April 2014) 5 <www.amnestyusa.org/pdfs/sscistudy1.pdf>.

[43] J Dill, 'Abuse of Law on the 21st Century Battlefield: A Typology of Lawfare', in ML Gross, T Meisels (eds) *Soft War: The Ethics of Unarmed Conflict* (CUP 2017).

'progresse[d] international law through violations' in its policy of 'targeted killings'.[44] It also derives from archival documents from the very outset of the occupation, which attest to the fact that the Israeli government knew that its positions and plans for the administration of the occupied territory were predicated on internationally unlawful acts. Prominent amongst these is the Israeli government's rejection, in 1968, of the 'top secret' opinion of its then legal advisor, later ICTY Judge Theodore Meron, which insisted on the applicability of the 1949 Geneva Conventions to the Palestinian territory and the illegality of settlements under international law.[45] The 1968 Comay and Meron Cable, a top secret cable sent by the Israeli government to the Israeli ambassador in Washington D.C., acknowledges that 'there is no way to reconcile [Israeli] actions in Jerusalem with the restrictions emanating from the Geneva Conventions and The Hague Regulations.'[46] A further document discovered by Akevot is a backgrounder sent by the deputy director of the Israeli MFA department of international organizations in 1971, asserting that Israel's principled 'fundamental and proclaimed' position on the non-applicability of the Fourth Geneva Convention is indeed necessitated by the fact that Israel's own actions contravene the Convention and the potential of interference by protecting parties.[47]

[44] Y Feldman, U Blau, 'Consent and advise' *Haaretz* (5 February 2009) <www.haaretz.com/hasen/spages/1059925.html>. See also, MG Kearney, 'Lawfare, Legitimacy and Resistance: The Weak and the Law' (2010) 16 Palestine YB Intl L 79.

[45] Akevot, 'Geneva Convention: Blasting homes and deportation' <akevot.org.il/en/article/theodor-meron-opinion/?full>.

[46] The Cable acknowledged that in order to 'leave all options regarding borders open, we must not acknowledge that our status in the administered territories is simply that of an occupying power.' Akevot, 'The Comay-Meron Cable reveals reasons for Israeli position on applicability of 4th Geneva Convention' <akevot.org.il/en/article/comay-meron-cable/?full>. See also Meron (n 9).

[47] It recalls that the ICRC had by that point already engaged in repeated attempts to convince the Israeli government to accept the applicability of the Convention. It also recalls the minister of defense's statement of July 1968 that 'IDF units in the 'territories' operate in accordance with rules and regulations acceptable in Israel and that accord with Geneva Four.' Position Paper in light of the visit of Victor H Umbrict, member of the Presidential Council of the ICRC, 4-8 December 1971, sent on 31 November 1971 by A Hassin 3-4 (unpublished; courtesy of Akevot).

4. *Analysing pathologies*

An analysis of the pathology of a legal system looks to account for the thick background rules that underpin the specific acts that that system justifies and mandates. It investigates and interrogates the way a particular domestic legal order understands its obligations under international law and how it accounts for their potential effect on domestic law and legal process through 'critical common standards of official behaviour' that bind its authorities, and may in turn impact the conduct of domestic legal subjects.[48] This analysis is directed at the social structure and cognition of the Israeli domestic system in terms of their ability to accommodate and mandate appropriate compliance with international norms. A 'pathological' analysis of Israel's administration of justice in the occupied Palestinian territory steps back from the classical approach to the assessment of violations, which is limited to specific international wrongs, and instead appropriately seeks to analyse the 'structural violence' that its military justice system constitutes and perpetuates.[49]

The analytical category of a pathology of a legal system generates both empirical and conceptual knowledge about Israel's administration of justice. It exposes common misperceptions about the interpretation and application of international law by Israeli authorities. Viewed in the context of its basis in Israel's domestic law and its posture vis-à-vis international law, the actions and decisions of Israel's administration of justice in occupied territory substantiate a broader claim about Israel's unwillingness and inability (under its current legal system) to act within its duty-bound authority as Occupying Power. This analytical vantage point reveals that Israeli authorities, including its military courts and law enforcement officials, cannot be relied on to interpret and apply their international law obligations as these are understood by other states and international actors. Such a divisive legal practice of international law cannot be adduced as state practice for the purpose of tracing the development of international law rules.

A diagnosis of a pathology of a legal system may also enable a more granular analysis of state responsibility: it illuminates the patterns

[48] Hart (n 3) 117.

[49] State violence has a law-preserving role by simply intending to keep the legal order intact; Gunneflo (n 7).

amongst discrete state policies and practices, and can thus reveal policy objectives that may be intentionally obfuscated. Such an assessment of intentionality could be critical to establishing whether a violation was caused by a mistake – incidental to the otherwise 'healthy' internationally lawful administration of justice – or whether it was predictable or even could be said to have been premeditated insofar as it was not prohibited or punishable by domestic law. In addition, to substantiating the inevitability and predictability of wrongful practices, such observations can provide evidence of the involvement of high-echelon political and military officials in the decision-making process for specific wrongful acts. A recasting of the institutionally-embedded characteristics of Israeli wrongdoing could increase scrutiny from international mechanisms including the International Criminal Court to what may otherwise be seen as 'banal international crimes'.[50]

Beyond the sourcing of criminal intent, this analysis can also activate processes of peer enforcement that can both further conformity with international norms and the internalisation of necessary obligatory intent. Obligations of abstention,[51] such as the obligation of non-recognition as lawful of the most serious internationally unlawful acts, i.e. serious breaches of peremptory norms of international law, place the responsibility of warding off practices that erode the international rule of law on all states. Such practices should critically include wrongful interpretations of relevant international norms, or self-serving and divisive arguments to circumvent or revise the law.[52] As part of their participation in the observance of international law, states are implicitly entrusted with ensuring that it is not rendered into disrepute by upholding a standard of compliance by others – particularly significant others. The need for a more diligent enforcement practice by third parties towards Israeli authorities is evident from the predominantly deferentially practice by states and international organisations that upholds the presumption that

[50] See, Kalpouzos, Mann (n 36).

[51] On abstention and the protection of community interests, H Krieger, 'Rights and Obligations of Third Parties in Armed Conflict', in E Benvenisti, G Nolte (eds) *Community Interests Across International Law* (OUP 2017).

[52] Non-recognition also broadens the scope of application of certain rules of international law but making them applicable to legislation and administrative practice, which goes to challenge the legal basis for the operation and mandate of public bodies and other entities. See, Dill (n 43).

Israel is able, and could be made, to will action in compliance with international law. The extent to which states permit themselves to rely on Israeli interpretations of international law, and on Israeli institutional practice for the purpose of their bilateral relations and dealings with Israel and Israeli entities, indicates they have not yet diagnosed and developed an approach to the pathology of the legal system at work.

Third parties engaged in interstate dealings with Israel and Israeli entities involved in international wrongs could also be required to acknowledge that by relying on Israeli practice they may be giving legal effect and wrongfully recognising internationally unlawful facts. Third states that undertake a correct diagnosis of the pathology of Israel's legal system may become (internally) necessitated to revise or terminate certain interstate dealings to protect their domestic legal orders.[53] Examples of such corrective measures abound in the area of EU-Israeli relations.[54] The deadlock in the negotiations of the EUROPOL Israel operational cooperation agreement, for instance, resulted from the EU's inability to accept and rely on Israel's structurally non-corresponding practice of law enforcement, which extends to occupied territory and raises serious human rights concerns.[55]

This analytical approach would provide third parties with a basis to appropriately claim that Israel is not applying international law in good faith, and that indeed it is incapable of doing so under its current legal system. Most accounts of Israeli violations have been fixated on one special body of rules, and one set of facts or violations at the expense of addressing their root causes and the structures that mandate them. This is, for instance, the case with the world-acclaimed judicial practice of the Israeli supreme court, which applies and interprets international law norms in a manner that is subordinate and invariably ends up replicating and legitimising the positions of the legislature and executive.[56]

[53] See for a recent development of this kind, European Council on Foreign Relations (ECFR), 'EU Differentiation and Israeli Settlements' (June 2015).

[54] ibid. See also, KY Nikolov, 'Ashton's Second Hat: The EU Funding Guidelines on Israel as a Post-Lisbon Instrument of European Foreign Policy Making' Diplomacy (6 October 2014).

[55] ECFR (n 53).

[56] D Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (State UNY Press 2002).

The intent to observe international law and to interpret its specific norms in good faith is a policy choice for each state. This policy choice is not merely a hallmark of the politics of legalism, whereby a state's aim to disguise its domestic legal system and practice with a neutral façade that distorts their opposability to the state's prospective acceptance and observance of its international legal obligations. The aim of an analytical perspective focused on the pathology of a legal system is to expose such deep structures of internationally wrongful acts and account for them in the assessment of the state's responsibility in international law.