5-1-2003

Punitive House Demolitions, the Prohibition of Collective Punishment, and the Supreme Court of Israel

Shane Darcy

Follow this and additional works at: http://elibrary.law.psu.edu/psilr

Recommended Citation
Available at: http://elibrary.law.psu.edu/psilr/vol21/iss3/4

This Article is brought to you for free and open access by Penn State Law eLibrary. It has been accepted for inclusion in Penn State International Law Review by an authorized administrator of Penn State Law eLibrary. For more information, please contact ram6023@psu.edu.
Punitive House Demolitions, the Prohibition of Collective Punishment, and the Supreme Court of Israel

Shane Darcy*

1. Introduction

The relationship between an Occupying Power and the local population under its control is somewhat unnatural. Pursuant to the laws of occupation, an Occupying Power has almost complete authority over the local population and that population must for all intents and purposes accept that dominance. The relationship between Israel and the population of the West Bank and Gaza Strip since 1967 has been strained at the best of times. International humanitarian law seeks to regulate this relationship, by guaranteeing the rights of the population under occupation, while taking into account the genuine security concerns of the Occupying Power. Striking the correct balance between these two has often proved elusive in the Israeli-Palestinian conflict.

Israel has been reluctant to accept the full applicability in the Occupied Territories of international humanitarian law, in particular the rules set out in the Fourth Geneva Convention of 1949, Relative to the Protection of Civilian Persons in Time of War.1 Post-Oslo, Israel might argue that it has relinquished much of its responsibility in parts of the Occupied Territories and thus its obligations under international human

---

* B.A. (Law & Accounting), University of Limerick (2001); LL.M in International Human Rights Law, National University of Ireland, Galway (2002). The author is currently a doctoral fellow at the Irish Centre for Human Rights at the National University of Ireland, Galway. This article is based on a report written by the author during an internship with Al-Haq, the West Bank Affiliate of the International Commission of Jurists in December 2002. The author would like to express his thanks to Dr. Kathleen Cavanaugh for her comments on an earlier draft of this article.

rights law do not extend to those areas.\textsuperscript{2} The cumulative effect is that Israel effectively denies the justiciability of many of the rights accruing to the Palestinian population in the Occupied Territories under international law. Frequently, this has translated into a misapplication of the powers of the occupying army, often in the form of actions taken in response to Palestinian violence, by the Israeli Defence Forces (IDF).

The ongoing practice of demolishing houses as a punitive measure for actual or suspected unlawful activity is a case in point. This article will examine Israel's controversial house demolition policy in light of the State's obligations under international law. In particular, these actions will be assessed with regard to the legal prohibition of acts of collective punishment. Section II will examine the domestic legal basis relied upon by Israel for house demolitions. Section III will then set out the prohibition of collective punishment under international law. Following this, Section IV will explore the case-law of the Supreme Court of Israel which has addressed the house demolition issue. The final section of this article will ask whether these house demolitions in the Occupied Territories amount to serious violations of international law.

\textit{A. Empirical data relating to punitive house demolitions and sealings}

Exact figures for the number of punitive house demolitions which were carried out during the first half of Israel's occupation of the West Bank and Gaza are unavailable, although it is widely known that the Israeli authorities employed this sanction extensively. A variety of sources point to the widespread use of house demolitions as a means of punishment during these early years. The former Israeli Defence Minister, Moshe Dayan, told the Knesset that 516 houses had been demolished, expropriated or sealed between June 1967 and December 1, 1969.\textsuperscript{3} The International Committee of the Red Cross reported in 1978 that 1,224 houses had been demolished since 1967, a thousand of which had taken place in the first five years of the occupation.\textsuperscript{4} The number of demolitions dropped during the mid 1970s and approximately one hundred houses were demolished or sealed from this time until the early


\textsuperscript{4} \textit{EMMA PLAYFAIR, DEMOLITION AND SEALING OF HOUSES IN THE ISRAELI-OCCUPIED WEST I} (1987).
1980s.\textsuperscript{5} As Table 1.1 demonstrates, demolitions and sealings became much more frequent in the period beginning in 1985. With the onset of the first \textit{intifada} at the end of 1987, the Israeli authorities escalated the implementation of the punitive house demolition policy with considerable fervor.

Between 1987 and the end of the first \textit{intifada} the Israeli authorities completely demolished nearly four hundred houses and either partially demolished, sealed or partially sealed another four hundred as punishment. The demolition policy employed by Israel during the first \textit{intifada} led to the destruction or putting beyond use of over 3,500 individual rooms and caused the displacement of approximately eight thousand Palestinians.\textsuperscript{6} Use of demolitions as a punitive measure waned with the falling levels of violent resistance during the mid 1990s, to the point where no demolitions or sealings were carried out between 1998 and 2000. During 2001 and over the course of the past year, the Israeli authorities have once again renewed their punitive house demolition policy in the face of the violence of the second \textit{intifada}. From August 2002 to March 2003 the army carried out over two hundred punitive house demolitions in the West Bank and Gaza.\textsuperscript{7} This represents the highest number of demolitions in such a short period for over a decade.

There is an unsettling difference in Israel’s demolition policy between the two \textit{intifadas}. Since the resumption of this policy during the second \textit{intifada}, the Israeli authorities have favored the most severe sanction of total demolition. Taking the figures in the table into account, it is clear that whereas during the first \textit{intifada} 57\% of those houses affected were demolished, either completely or partially, during the second \textit{intifada} 98\% of houses affected have been totally demolished. There have only been three cases of houses being sealed and one of partial demolition in the past two years. The number of demolitions has not yet reached the level witnessed during the first intifada, although recent months in particular have shown a marked increase in the use of demolitions as a means of punishment. Opting for complete demolition over the less harsh, and reversible, sanction of sealing displays a worrying trend in the Israeli authorities employment of this policy.


\textsuperscript{6} Source: Al-Haq database.

### Table 1.1
Punitive Demolitions and Sealings
January 1981 – March 2003

<table>
<thead>
<tr>
<th>Year</th>
<th>Demolished</th>
<th>Partially Demolished</th>
<th>Sealed</th>
<th>Partially sealed</th>
<th>Annual Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1981</td>
<td>14</td>
<td>-</td>
<td>1</td>
<td>1</td>
<td>16</td>
</tr>
<tr>
<td>1982</td>
<td>6</td>
<td>3</td>
<td>3</td>
<td>4</td>
<td>16</td>
</tr>
<tr>
<td>1983</td>
<td>6</td>
<td>2</td>
<td>11</td>
<td>14</td>
<td>33</td>
</tr>
<tr>
<td>1984</td>
<td>3</td>
<td>-</td>
<td>1</td>
<td>3</td>
<td>7</td>
</tr>
<tr>
<td>1985</td>
<td>24</td>
<td>-</td>
<td>24</td>
<td>7</td>
<td>55</td>
</tr>
<tr>
<td>1986</td>
<td>12</td>
<td>1</td>
<td>10</td>
<td>25</td>
<td>48</td>
</tr>
<tr>
<td>1987</td>
<td>6</td>
<td>-</td>
<td>15</td>
<td>18</td>
<td>39</td>
</tr>
<tr>
<td>1988</td>
<td>118</td>
<td>23</td>
<td>38</td>
<td>22</td>
<td>201</td>
</tr>
<tr>
<td>1989</td>
<td>119</td>
<td>29</td>
<td>61</td>
<td>27</td>
<td>236</td>
</tr>
<tr>
<td>1990</td>
<td>103</td>
<td>27</td>
<td>79</td>
<td>23</td>
<td>232</td>
</tr>
<tr>
<td>1991</td>
<td>50</td>
<td>5</td>
<td>37</td>
<td>26</td>
<td>118</td>
</tr>
<tr>
<td>1992</td>
<td>3</td>
<td>-</td>
<td>23</td>
<td>10</td>
<td>36</td>
</tr>
<tr>
<td>1993</td>
<td>5</td>
<td>2</td>
<td>20</td>
<td>14</td>
<td>41</td>
</tr>
<tr>
<td>1994</td>
<td>1</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>1</td>
</tr>
<tr>
<td>1995</td>
<td>2</td>
<td>1</td>
<td>-</td>
<td>-</td>
<td>3</td>
</tr>
<tr>
<td>1996</td>
<td>11</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>11</td>
</tr>
<tr>
<td>1997</td>
<td>6</td>
<td>-</td>
<td>2</td>
<td>-</td>
<td>8</td>
</tr>
<tr>
<td>1998-2000</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>2001</td>
<td>8</td>
<td>1</td>
<td>-</td>
<td>-</td>
<td>9</td>
</tr>
<tr>
<td>2002</td>
<td>190</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>190</td>
</tr>
<tr>
<td>2003</td>
<td>73</td>
<td>-</td>
<td>3</td>
<td>-</td>
<td>76</td>
</tr>
<tr>
<td>Totals</td>
<td>760</td>
<td>94</td>
<td>328</td>
<td>194</td>
<td>1,376</td>
</tr>
</tbody>
</table>

8. Figures up to 1996 were obtained from Al-Haq’s database. Figures from 1996 onwards are supplied by B’tselem, the Israeli Information Center for Human Rights in the Occupied Territories, available at http://www.btselem.org/english/House_Demolitions/Statistics.asp (last visited April 2003).
II. Domestic Legal Basis Relied Upon for Demolitions

A. Regulation 119(1) of the Defence (Emergency) Regulations, 1945

The demolition of the houses of those persons who have, or are suspected to have been involved in acts prejudicial to the security of the State of Israel is carried out pursuant to Regulation 119(1) of the Defence (Emergency) Regulations, 1945.\footnote{9} This legislation was enacted by the British government during the time of its mandate over Palestine and pursuant to Article 43 of the 1907 Hague Regulations\footnote{10} and Article 64 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War.\footnote{11} The Israeli authorities contend that these laws remain "part and parcel" of the penal law in the Occupied Territories.\footnote{12} Falling within a section of the Regulations entitled "Miscellaneous Penal Provisions," Regulation 119(1) sets down, \textit{inter alia}, that:

A Military Commander may by order direct the forfeiture to the Government of Palestine of any house, structure, or land from which he has reason to suspect that any firearm has been illegally discharged, or any bomb, grenade or explosive or incendiary article illegally thrown, detonated, exploded or otherwise discharged, or of any house, structure or land situated in any area, town, village, quarter or street the inhabitants or some of the inhabitants of which he is satisfied have committed, or attempted to commit, or abetted the commission of, or been accessories after the fact to the commission of, any offence against these Regulations involving violence or intimidation or any Military Court offence; and when any house, structure or land is forfeited as aforesaid, the Military Commander may destroy the house or the structure or anything in or on the house, the structure or the land.

Israel’s continued reliance on these Regulations generally, and on Regulation 119(1) in particular, has been subject to heavy criticism on several fronts.

Regarding the Defence (Emergency) Regulations themselves, it has been pointed out that these were repealed by the British immediately prior to the termination of their mandate by the Palestine (Revocations) Order-in-Council of 1948.\footnote{13} Thus, the Israeli authorities cannot rely on these Regulations for the demolition of houses.

\footnotesize{10. Regulations annexed to Convention IV Respecting the Laws and Customs of War on Land, signed at The Hague, Oct. 18, 1907 [hereinafter 1907 Hague Regulations].}
\footnotesize{11. Fourth Geneva Convention, \textit{supra} note 1.}
\footnotesize{12. \textit{See} Shamgar, \textit{supra} note 1, at 275.}
\footnotesize{13. \textit{See} Cohen, \textit{supra} note 3, at 94-96; \textit{see also} Martin B. Carroll, \textit{The Israeli...}
thereupon, as the Regulations were not the “laws in force in the country,” pursuant to Article 43, at the time the State of Israel came into existence. The Israeli position is that the failure of the British Government to publish the revocation order in the official Palestine Gazette prevented the Regulations from being repealed. Similarly, the implicit nature of a revocation made by the Jordanian authorities in May 1948 is viewed by Israel as also having failed to nullify those laws. Both the British and Jordanian Governments have clearly and repeatedly stated that their view is that these laws were repealed by them in 1948.

Article 64 of the Fourth Geneva Convention specifies that local law may only remain in force provided that it is not “an obstacle to the application to the Present Convention.” The official commentary elaborates that, “when the penal legislation of the occupied territory conflicts with the provisions of the Convention, the Convention must prevail.” It is necessary, therefore, to establish whether the provisions of the Defence (Emergency) Regulations, specifically Regulation 119(1), are compatible with the norms set down in the relevant treaties of international humanitarian law.

B. Regulation 119(1) and International Law

Regulation 119(1) allows for the seizure of any “house, structure, or land” and for the subsequent destruction of “the house or the structure or anything in or on the house, the structure or the land” as a punitive measure for the commission of illegal acts. Such punishment can be imposed where any hostile activity has been carried out from within that building itself or by inhabitants of other houses “in any area, town, village, quarter or street.” Therefore, a Military Commander may order the demolition of a house, or houses, on the suspicion that some inhabitants of a town have committed, or abetted the commission of, or

18. Supra note 9.
19. Id.
been accessories to the commission of offences; the provision demands no link between the perpetrators and those to be punished other than mere geographical proximity. Article 53 of the Fourth Geneva Convention, to which Israel is a signatory and to which it is bound as an Occupying Power, prohibits the destruction of property, "except where such destruction is rendered absolutely necessary by military operations."\(^{20}\) Similarly, Article 23 of the 1907 Hague Regulations stipulates that it is "especially forbidden" to "destroy or to seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war."\(^{21}\) By the very fact that housing demolitions are carried out as a punitive measure would defeat any claim that such actions can be justified as being an absolute military necessity.

The then Attorney General for Israel, Meir Shamgar, addressed the issue of house demolitions as "personal punitive measures" in 1971.\(^{22}\) He maintained that these demolitions could be based, "in appropriate circumstances," on Article 53 of the Fourth Geneva Convention, citing military requirements of two kinds. Firstly, there is the necessity of destroying "the physical base for military action when persons in the commission of a hostile military act are discovered."\(^{23}\) Shamgar contends that "[t]he house from which the hand grenades are thrown is a military base, not different from a bunker in other parts of the world."\(^{24}\) Secondly, there is the need to deter future law-breaking, to "create effective military reaction."\(^{25}\) While there may be limited scope for the destruction of a house during the course of military operations, demolitions that are carried out punitively with the stated goal of deterrence cannot be regarded as being imperative military necessities. The fact that inhabitants are, on occasion, given advance warning that the demolition is about to take place, allowing for their evacuation and the retrieval of personal effects removes the immediacy that is demanded by the military necessity requirement. Draper has concluded that

\[ \text{[t]o appeal to the humanitarian element by stating, which is true, that the inhabitants are first removed before blowing up the house, destroys the very basis of the argument for the application of Article 53 under its exceptive clause.} \]

\(^{20}\) Supra note 1.
\(^{21}\) Supra note 10.
\(^{22}\) See Shamgar, supra note 1.
\(^{23}\) Id., at 276.
\(^{24}\) Id.
\(^{25}\) Id.
Pursuant to Regulation 119(1) a Military Commander has complete discretion in deciding to exercise this particular authority; there is no provision made for any judicial process prior to the imposition of the prescribed sanctions. Even more troubling is the fact that the suspicion of the Military Commander that an offense has been committed is all that is needed to trigger these extra-judicial sanctions. Under the laws of occupation, an Occupying Power is not prevented from imposing punishment on persons who have been found to have committed an offense. However, international humanitarian law demands that a suspect be afforded a judicial hearing prior to the imposition of any penal sanction. The Fourth Geneva Convention establishes the due process rights which must be observed by an Occupying Power. These include the right to a regular trial; the right to be promptly informed of the charges in writing; the right to representation; the right to present evidence and to call witnesses; and the right of appeal. When the power to demolish a house rests solely with an official of the executive, with a limited right to have this decision reviewed (although not provided for in Regulation 119(1)), there is a clear infringement of the international legal rule that punitive measures cannot be imposed extra-judicially. The right to judicial review of demolition orders, which had previously existed, was effectively removed by a recent decision of the Supreme Court of Israel.

In addition to being a violation of property rights and a form of extra-judicial punishment, the demolition of Palestinian homes can also be seen as a form of cruel, inhuman or degrading treatment or punishment. Such acts are prohibited by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and, also, the International Covenant on Civil and Political Rights, both of which Israel has ratified. Article 16 of the former treaty specifies that States Parties to the convention "shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in

27. Fourth Geneva Convention, supra note 1, Article 71.
28. Id.
29. Id., Article 72.
30. Id.
31. Id., Article 73.
32. See detailed discussion in Section IV, below.
The hardship and suffering that is caused by punitive house demolitions is indeed palpable. The loss of one’s home and belongings undoubtedly causes severe mental anguish for the former inhabitants, in addition to rendering them physically homeless. Rather than seeking to prevent this form of cruel and inhuman treatment, Israel had adopted the practice of punitive house demolitions as an official State policy. Recently, the United Nations Committee against Torture addressed Israel’s continued practice of house demolitions. This body found that these demolitions, in certain circumstances, may amount to instances of cruel, inhuman or degrading treatment or punishment in violation of Article 16 of the Convention. The Committee called upon Israel to “desist from the policies of closure and house demolition where they offend article 16 of the Convention”. As the punitive house demolition policy has been applied exclusively against Palestinians it may also be possible to argue that this policy is discriminatory.

One of the most serious indictments that can be made of this policy, and the primary focus of this article, is that punitive house demolitions punish persons for offenses committed by others. When a house is demolished for the illegal activities of one of the inhabitants, all the other inhabitants suffer the effects of those actions that have been taken. Punitive house demolitions bear all the hallmarks of acts of collective punishment.

III. The Prohibition of Collective Punishment Under International Law

It is a fundamental legal principle that individuals may only be punished for offenses which they have personally committed. The corollary to this is that persons or groups of persons may not be punished for acts which have been committed by others. Punishment must be personal and individual. International law proscribes punishing persons on a collective or non-individual basis. Within both international human

35. Article 1 defines torture as:

... any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as... punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

36. Concluding observations on Third Periodic Report submitted by Israel, CAT/C/XVII/Concl.5 of Nov. 23, 2001, para. 6 (j).

37. Id., para. 7 (g).

38. There are no recorded instances of the demolition of houses as punishment for crimes committed by Israeli citizens.
rights law and international humanitarian law the individual nature of punishment has been constantly stressed.

A. International Human Rights Law

Under the international human rights law regime the prohibition of non-individual punishment is generally found within the sphere of due process guarantees. Article 5(3) of the American Convention on Human Rights sets out that "[p]unishment shall not be extended to any person other than the criminal."\(^{39}\) The African Charter on Human and Peoples' Rights also affirms, in Article 7, that "[p]unishment is personal and can be imposed only on the offender."\(^{40}\) Subjecting persons not convicted of any offense to collective (or any) punishment may also conflict with the right to be given a fair trial\(^{41}\) and contravenes the presumption of innocence.\(^{42}\)

B. International Humanitarian Law

International humanitarian law lays down a similar, but decidedly more comprehensive prohibition on the use of collective punishment. A number of this legal regime's principal instruments expressly proscribe any measures that would punish persons for offenses which they did not personally commit. Article 87 of the Third Geneva Convention, which protects prisoners of war, prohibits "[c]ollective punishment for individual acts."\(^{43}\) The Additional Protocols to the Geneva Conventions, adopted in 1977, contain a common provision which sets out that "no one shall be convicted of an offence except on the basis of individual penal responsibility."\(^{44}\) Both Additional Protocols also specifically

---

42. Guaranteed by Article 11 of the Universal Declaration; Article 14(2) of the International Covenant on Civil and Political Rights; Article 8(2) of the American Convention; Article 6(2) of the European Convention; and Article 7(1)(b) of the African Charter.
prohibit the imposition of collective punishments "at any time and in any place whatsoever."\(^4\) Article 4(b) of the Statute of the International Criminal Tribunal for Rwanda expressly enumerates collective punishment as a crime for which persons may be prosecuted by the Tribunal.\(^4\) However, it is in the two treaties which guarantee the protection of civilians in occupied territory, the 1907 Hague Convention and the Fourth Geneva Convention, that humanitarian law offers the most substantial and detailed prohibition on the imposition of collective punishments.

Article 50 of the 1907 Hague Regulations establishes that:

\[\text{No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible.}\] \(\text{47}\)\n
Article 33(1) of the Fourth Geneva Convention provides a more concrete and absolute prohibition of collective punishment by emphasizing the principle of individual responsibility:

\[\text{No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.}\] \(\text{48}\)

Article 50 demands a very high degree of responsibility, that of being "jointly and severally responsible" before punishment may be imposed, and it does offer a considerably high degree of protection from collective punishment [emphasis added].

Article 33(1) of the Fourth Geneva Convention is derived from Article 50 of the Hague Regulations but provides a much clearer and unambiguous prohibition of collective punishment than its predecessor. It sets down that "no protected person may be punished for an offence he or she has not personally committed." This provision re-affirms the individual nature of punishment, that "[r]esponsibility is personal and [that] it will no longer be possible to inflict penalties on persons who have themselves not committed the acts complained of."\(^4\) In the Commentary to the Fourth Geneva Convention, Pictet points out that the

---

\(^4\) Article 75(2)(d) of Additional Protocol I and Article 4(2)(b) of Additional Protocol II.
\(^4\) Supra note 10.
\(^4\) Supra note 1.
49. COMMENTARY TO THE FOURTH GENEVA CONVENTION, supra note 17, at 225.
prohibition of collective punishment in Article 33(1) "does not refer to punishments inflicted under penal law, i.e. sentences pronounced by a court after due process of law, but penalties of any kind inflicted on persons or entire groups of persons." The scope of the prohibition is thus quite broad, encompassing "penalties of any kind" whether inflicted by a court or by any executive organ of government. The official Commentary to the Additional Protocols similarly advocates that "[t]he concept of collective punishment . . . should be understood in the widest sense, and concerns not only penalties imposed in the normal judicial process, but also any other kind of sanction." It is clear, therefore, that persons must be personally responsible for the commission of an offense before any punishment may be meted out upon them for that crime.

The second sentence of Article 33(1) sets out that "[c]ollective penalties and likewise all measures of intimidation or of terrorism are prohibited." This prohibition on the use of collective penalties is a simple restatement of the rule set down in the preceding sentence. Laying a prohibition on measures of intimidation or terrorism of protected persons was deemed necessary because of the earlier practice by belligerents of "resorting to intimidatory measures to terrorise the population. . . [in order] to prevent hostile acts." Such collective measures "strike at innocent and guilty alike . . . [and] are opposed to all principles based on humanity and justice." Highlighting the propinquity of collective punishments and measures of intimidation or terrorism is quite apt: frequently a measure that is claimed to be legitimately punitive in nature may often be imposed solely to subjugate a particular group.

C. Customary Status of the Prohibition

Whilst there are various conventional prohibitions against acts of collective punishment, as have been outlined, conventional law only binds parties who have ratified those instruments in which these articles are found, except where those particular provisions are deemed to be declaratory of customary international law. It is necessary, therefore, to establish the customary status of those norms set down in treaty law.

The Statute of the International Court of Justice, in Article 38, paragraph 1(b), describes international custom "as evidence of a general

50. Id.
51. COMMENTARY TO THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 1374 (Claude Pilloud et al. eds, 1987) [hereinafter COMMENTARY TO THE ADDITIONAL].
52. COMMENTARY TO THE FOURTH GENEVA CONVENTION, supra note 17, at 226.
53. Id.
practice accepted as law." Thus, it is State practice and the accompanying *opinio juris* which are the necessary ingredients for the creation of custom. The International Criminal Tribunal for Yugoslavia acknowledged in the infamous *Prosecutor v. Tadic* case the problematic nature of accurately assessing State practice during conflict situations:

> When attempting to ascertain State practice with a view to establishing the existence of a customary rule or general principle, it is difficult, if not impossible, to pinpoint the actual behaviour of the troops in the field for the purpose of establishing whether they in fact comply with, or disregard certain standards of behaviour. This examination is rendered extremely difficult by the fact that not only is access to the theatre of military operations normally refused to independent observers (often even to the ICRC) but information on the actual conduct of hostilities is withheld by the parties to the conflict; what is worse, often recourse is had to misinformation with a view to misleading the enemy as well as public opinion and foreign Governments.\(^5\)

In assessing the customary status of the prohibition of collective punishment it is useful to consider – where State practice is not readily discernible – the level of ratification of the treaties containing those rules and also the approach that has been taken to the issue by international organizations and judicial bodies.

The 1907 Hague Convention and its annexed regulations are unanimously viewed as being declaratory of customary international law.\(^6\) The International Military Tribunal at Nuremberg held that the rules laid down in this convention were, by 1939, declaratory of the laws and customs of war.\(^7\) Therefore, it can be said that Article 50 of the Hague Regulations, outlawing the imposition of penalties on persons who cannot be regarded as "jointly and severally responsible" for the acts of complained of, is a binding rule of customary international law.

The Fourth Geneva Convention is a much more expansive treaty and, as such, not all of its provisions may be customary norms of international law. However, many of the articles in this treaty are restatements or developments of earlier treaty rules and as such may be customary rules; Article 33(1) of the Fourth Geneva Convention is based on Article 50 of the Hague regulations and, thus, its broader protection

---

against collective punishment is, in part, based on established custom. Can it be said that this provision’s establishment of the individual nature of punishment in 1949 has, since then, crystallized into a norm of customary international law? To determine so, it is necessary to look at a number of factors.

As one commentator has noted, “the larger the conventional community, the more the treaty approximates the status of general international law.” 58 In this regard it is worth noting that there has been near-universal ratification of the Fourth Geneva Convention and, in fact, there are presently almost as many States parties to the Fourth Geneva Convention as there are to the Charter of the United Nations. 59 No party to the Fourth Geneva Convention has entered any reservation or declaration toward Article 33(1) and it is extremely doubtful that any party would claim a right to impose punishment on persons who have not committed any offences. Protected persons, those who find themselves “in the hands of a Party to the conflict or Occupying Power of which they are not nationals,” 60 cannot be subjected to collective punishment as a matter of treaty law and, it would also seem, as a matter of customary law.

The customary status of the prohibition of collective punishment in the Fourth Geneva Convention is strengthened by the presence of like provisions in the 1977 Additional Protocols to the Geneva Conventions. At the time of writing, Additional Protocol I has been ratified by 160 States parties, while there are 172 States parties to Additional Protocol II applicable in non-international armed conflicts. 61 Theodor Meron has recommended that for any particular treaty these “ratifications should be evaluated from the perspective of the relevance and weight of the ratifying states.” 62 In this respect, it must be noted that four of the five permanent members of the United Nations Security Council have ratified or acceded to both Additional Protocols: China, the Russian Federation, the United Kingdom, and most recently, France. Seventeen of the nineteen members of NATO have also become parties to these

---

59. At the time of writing there are 191 States parties to the Charter of the United Nations, see http://www.un.org/Overview/growth.htm and 189 States parties to the Fourth Geneva Convention, see http://www.icrc.org/ihl (both sites last visited April 2003).
60. Fourth Geneva Convention, supra note 1, Article 4.
A perusal of the reservations made by States who have ratified the instrument will show no hostility on their parts to the outlawing of collective punishment by Additional Protocols I and II.

Having delineated the nature of the prohibition of collective punishment under international law it is necessary to set out a number of specific requirements which must be satisfied before a measure may be classified as one of collective punishment. Firstly, there must be a tangible connection between the offenses which have been committed and the punishment imposed, that is, the punitive measures have been imposed in direct response to the commission of illegal acts. Secondly, the hardship endured by innocent parties must be substantial and not merely incidental to the suffering of those persons guilty of the offense. For example, lawful imprisonment often causes hardship for an offender’s relatives but such a sanction could never be considered to be one of collective punishment. By setting down these necessary elements it is not intended to adopt an overly strict interpretation of collective punishment, in defiance of the official view that the term be “understood in the broadest sense,” instead, it is done so that incidents of collective punishment may be clearly differentiated from other, possibly unlawful, acts. Such clarity is of absolute necessity because the commission of any act of collective punishment would be considered as being “in defiance of the most elementary principles of humanity.”

IV. House Demolitions and the Supreme Court of Israel

The preceding section has established that various treaties of international humanitarian law and international human rights law prohibit the imposition of collective punishment. The prohibition of such acts during periods of military occupation may be considered a norm of customary international law. Protected persons, those who find themselves in the hands of an Occupying Power of which they are not nationals, may never be punished for an offence which they have not personally committed. Israel’s relationship vis-à-vis the West Bank and Gaza is clearly that of an Occupying power; as a signatory to the Fourth Geneva Convention and owing to the customary status of this prohibition, Israel is legally bound to respect the prohibition against collective punishments. The punitive house demolition policy that has been employed throughout the past four decades of this occupation casts

63. A number of major military powers, specifically the United States, Iran, Iraq, India, Pakistan, Israel and Turkey, have not ratified the protocols. For the United States position, see generally Abraham D. Sofaer The Rationale for the United States Decision, 82 AM. J. INT’L. L. 784 (1988).
64. COMMENTARY TO THE ADDITIONAL PROTOCOLS, supra note 51, at 874.
65. COMMENTARY TO THE FOURTH GENEVA CONVENTION, supra note 17, at 225.
serious doubt over the Israeli authorities commitment to the observance of this important rule of international humanitarian law.

Regulation 119(1) of the Defence (Emergency) Regulations, 1945, allows for the demolition of houses as a punitive measure.\(^6\) This legislation does not, however, compel a Military Commander to employ this sanction in response to the commission of illegal acts. Despite the fact that the Israeli authorities' use of these Regulations is questionable, they continue to take measures pursuant thereto. It is clear, therefore, that a Military Commander is not prevented from employing alternative means of punishment as prescribed for by these Regulations, such as imprisonment,\(^6\) imposing a monetary fine,\(^6\) or detention pursuant to Regulation 111. Nevertheless, Commanders of the Israeli forces in the West Bank and Gaza have repeatedly resorted to the power granted to them by Regulation 119(1) to demolish or seal houses as a punitive measure.

On many occasions the Supreme Court of Israel, sitting as the High Court of Justice, has been petitioned by or on behalf of Palestinians whose homes are due to be demolished by the army. The case law demonstrates that the Court has refrained from addressing the legality of the demolitions themselves and has, instead, confined itself to examining whether the Military Commander has exercised his powers in accordance with Regulation 119(1). It has frequently been argued that punitive house demolitions are measures of collective punishment in violation of Article 50 of the 1907 Hague Regulations and Article 33(1) of the Fourth Geneva Convention. The Supreme Court accepts that that the 1907 Hague Regulations, because of their customary status, are binding law in Israel and the Occupied Territories.\(^6\) Despite the fact that Israel is a signatory to the Fourth Geneva Convention the Israeli authorities have refused to accept the *de jure* applicability of this treaty, although the court agrees that it is bound by those provisions of the convention which have been transformed into rules of customary international law.\(^7\)

While acknowledging that innocent persons are adversely affected by demolitions, the Supreme Court has consistently failed to view demolitions as acts of collective punishment. The issue was raised before the Court in *Daghlas et al v. Military Commander of the Judea and Samaria Region*.\(^7\) Justice Ben-Dror delivered the Court's response

\(^6\) Supra note 9.
\(^7\) Id., Regulation 53.
\(^8\) Id., Regulation 56(B).
\(^9\) See Cohen, supra note 3, at 43.
\(^11\) HCJ No. 698/85, 40(2) P.D. 42.
to the petitioners' claim that house demolitions constituted acts of collective punishment:

...there is no basis to the petitioner’s complaint that house demolition is a form of collective punishment. In their opinion, only the terrorists and criminals themselves should be punished, and house demolition punishes additional family members who will be left without shelter. Such an interpretation, if accepted by us, would leave the above Regulation and its orders void of content, leaving only the possibility of punishing a terrorist who lives alone.72

The petitioners’ argument was rejected by the court, not on the grounds that demolitions do not amount to collective punishment but because if they were to be seen as such this particular law would be made redundant. Outlining that the 'underlying legislative policy' of Regulation 119 is "to achieve a deterring effect," Judge Ben-Dror continues by stating that.

[The terrorist] should know that his criminal acts will not only hurt him, but are apt to cause great suffering to his family. From this point of view, the above sanction of house demolition is no different than the punishment of imprisonment imposed on the head of a family, a father whose small children will be without a supporter and a bread winner. Here too, members of the family are affected...the petitioner must take this into account before committing his crime and know that others of his family will be forced to suffer the consequences of his deeds. In the case before it is clear that the terrorists came from certain homes, and these homes – and no others – are about to be demolished. In any case the "punishment" has not been imposed on the homes of uninvolved persons, and it is difficult to understand the origins of the claim that we are here dealing with a case of collective punishment.73

The Court recognizes here that demolitions will cause 'great suffering' for innocent family members, that they are 'forced to suffer' for the offender's individual acts, yet do not subscribe to the argument that this amounts to an act of collective punishment.

Further, the Court lays the illogical claim that house demolitions, as a form of punishment, are no different from imprisonment. The flaws of this comparison are obvious; where a house is demolished all the inhabitants suffer the same fate, whereas when a person is imprisoned, it is only that person that is punished; any negative effects felt by others are merely incidental to the offender's punishment. In the case in hand, the

72. Id., para. 3.
73. Id.
first petitioner’s brother, who had committed one of the offense’s in question, had already been detained. David Kretzmer would contend that in such a scenario, “the immediate aim of demolishing the house is not to deny rights or freedoms of that person but to cause suffering to his family.”

Addressing the Court’s justification that demolitions serve a deterrent purpose, Kretzmer concludes that demolition of a house “could conceivably be effective as a general deterrent (though of course, it may also be counter-productive), but the objection to collective punishment is not that it is not an effective deterrent, but that it is cruel and inhuman.”

Justice Ben-Dror’s concluding comments on the issue of collective punishment are equally implausible. He asserts that because it is only the offender’s home that is demolished, and that the homes of “uninvolved persons” are spared, there can be no claim of collective punishment. No account is taken of the “uninvolved persons” in the house of the offender; the mother of the first petitioner, the second petitioner’s two daughters and her son who had been studying in India and the two sons of the fifth petitioner who had been in West Germany at the time. This approach displays a wholesale failure on the part of the Court to acknowledge that housing demolitions impose punishment on the innocent inhabitants of the offender’s house.

Although counsel for the petitioners did not specifically raise the argument of collective punishment in a subsequent case, Nasman et al v. Commander of the IDF Forces in Gaza Strip, Justice Or acknowledged the suffering of innocent parties:

One must remember that we are talking about the destruction and sealing up of a structure in which other people live, an act as result of which innocent people shall also be hurt.

The Court refused, however, to find demolitions illegal on such grounds and affirmed that they “shall not intervene in the decision of a military commander under Regulation 119 of the Defence Regulations (emergency), 1945, when this decision stands the test of reasonableness.” This assessment, of whether “the respondent, in considering and making his decision, acted properly and reasonably, taking into account the genuine facts of the case,” takes no account whatsoever of the collective nature of the penal sanction prescribed by

75. Id.
76. See Petition to the Court, on file at Al-Haq’s library.
77. HCJ No. 802/89, on file at Al-Haq’s library.
78. Id., para. 4.
79. Id.
80. Para. 3.
Regulation 119(1). This approach has been adopted by the Court in all of its dealings with the issue of punitive house demolitions.

In Hizran et al v. The Commander of the IDF in Judea and Samaria, the hardship imposed on innocent parties was again acknowledged by the Court and it was once again justified as a necessity for achieving effective deterrence. Judge Netanyahu spoke of the ‘extensive’ authority that is given to a military commander by Regulation 119(1). This authority, he stated,

...is not restricted to the living unit of the perpetrator himself. It extends beyond this, to the entire structure (and even the land) the residents of which, or some of the residents of which have committed an offence... I am not overlooking the fact that destroying the structures in their entirety shall hurt not only the petitioners themselves but also their families. However this is a result of the necessity of deterring the public so that they may see and learn that by their criminal acts, they not only harm individuals, endanger public safety and incur severe punishment on themselves, but also bring hardship to the members of their households.

Justice Bach, in Alamarin v. Commander of the IDF Forces in the Gaza Strip, recognized both the extra-judicial nature of the punishment and the fact that is undeniably collective in nature and in effect:

...it clearly follows that the commander’s authority also applies to those parts of an apartment or house which are owned or used by the family of the suspect or others, who have not been proved to have taken part in, encouraged or even been aware of the criminal act of the suspect.

In both of these cases the Court rejected the petitions and upheld the orders for the destruction of the buildings in question. It is of particular interest to note that Justice Cheshin delivered a strong dissenting opinion in both of these cases, voicing his concern at the collective nature of the sanction of house demolitions.

Judge Cheshin began his discussion of this issue in the Hizran case by establishing that “the guiding principle” is that “one must not impose collective punishment or collective sanctions,” that “each of the petitioners, and himself alone, should be punished for his crime.”

81. HCJ No. 4772/5359/91, on file at Al-Haq’s library.
82. Id., para. 5.
83. HCJ No. 2722/92, on file at Al-Haq’s library.
84. Para. 6.
85. Supra note 81, para. 13.
86. Id., para. 14.
However, in his final analysis he interpreted the prohibition on collective punishment as preventing the punishment of persons residing in separate living units of the building to be demolished; he refused to accept that the hardship imposed on persons who shared such a living unit with the offender is clearly also an act of collective punishment. In a later decision, however, he held that only the room in which the person who committed the offences lived, should be affected by the order. While his assertions are a step in the right direction, his opinions have failed to persuade other members of the Court to realize the collective nature of the sanction which they continuously legitimize.

In recent years the Israeli authorities have adopted a policy of demolishing the houses of families of suicide bombers. In *Sabeach v. IDF Commander in Judea and Samaria*, the family argued that only the room in which the offender had stayed should be sealed. The court disagreed, reasoning that “for a terrorist who is planning to blow himself up and commit suicide the fear that the army could afterwards only seal his private room, or even demolish it, would serve no deterrent purpose. In such a situation the respondent’s [house demolition] order would lose all it’s meaning”. In *Nazaal v. IDF Commander in Judea and Samaria*, the argument that demolition amounted collective punishment was again raised but the Court opined that:

The object of using the powers granted to the military commander, according to Regulation 119(1) . . . is to deter potential terrorists from carrying out their murderous acts, as an essential measure for maintaining security. . . . Imposition of the said sanction does indeed have a severe punitive effect, which harms not only the terrorist, but also others, generally members of his family who live with him, but this is not its aim and this is not what is intended to do.

Once again the Court recognizes the direct hardship imposed on innocent family members, but holds that it was justified as a deterrent and because such an effect was not the aim of the measure.

The jurisprudence is clear - the Supreme Court has consistently refused to recognize punitive house demolitions as an act of collective punishment, but rather a sanction necessary for deterrence. This approach fails to take account of the fact that all punitive measures are implicitly deterrent in nature. David Kretzmer has recently assessed the Court’s approach to this issue and drew this harsh conclusion;

89. *Id.*, at 363.
90. See Nazaal, *supra* note 87, at 346.
It would seem that the Court’s decisions on house demolitions typify its jurisprudence on the Occupied Territories. The Court has not seen itself as a body that should question the legality under international law of policies or actions of the authorities, or should interpret the law in a rights-minded fashion. On the contrary it has accepted and legitimised policies and actions the legality of which is highly dubious and has interpreted the law in favour of the authorities.\(^9\)

This is a serious indictment of the highest judicial authority in the State of Israel. The Court’s persistent legitimization of the authorities’ punitive house demolition policy, and the associated failure to recognize and condemn the actions taken thereunder as illegal acts of collective punishment, cast serious doubt on the fairness and independence of that body.

A. Removal of the right to be heard before demolition

In August 2002, the Supreme Court of Israel delivered a judgment relating to Israel’s punitive house demolition policy which was a further assault on the already battered rule of law in the Occupied Territories. The decision in the case of *Amar et al v. IDF Commander of the West Bank*\(^9\) effectively removed the right to judicial review of house demolition orders issued by the occupying army. This case involved ten petitions which were taken by family members of persons who had committed attacks against Israelis and who feared that their houses were going to be demolished by the respondent. The petitioners sought a guarantee from the Court that the respondent would give sufficient time prior to demolition to allow them to petition the Court and seek a decision as to whether the Military Commander had the competence in the particular circumstances to issue a demolition order.\(^9\) The Court made it clear that a Military Commander has the right to demolish houses pursuant to Regulation 119(1) of the Defence (Emergency) Regulations, 1945, and that this was not being contested by the petitioners, whose sole concern was obtaining a guarantee of the right to be heard.\(^9\)

Up to this point the right to be heard had been enforced quite rigorously by the Court. In 1989, the Court held that occupants must be given a hearing prior to demolition and sufficient time to petition the Court if the outcome of the hearing is unfavorable.\(^9\) The argument put forward by the respondent in *Association for Civil Rights in Israel v.*...
Officer Commanding Central Command, that in certain "severe and exceptional circumstances" a hearing could be denied, was rejected by the Court. In such instances, the Court held, the house could be sealed instead of demolished outright and a hearing could then be held to establish if actual demolition may be carried out. Although the Supreme Court had failed to recognize the illegality of house demolitions, it had allowed for sufficient time prior to demolition for families to challenge a Military Commander's decision to demolish.

In Amar et al the respondent argued against allowing inhabitants the right to be heard in all circumstances:

The giving of a warning such as this, on an operational action expected in enemy territory, is liable to endanger in a very real way the lives of our forces, and even endanger the success of the action, as notice will enable the enemy to booby trap the aforementioned houses, to set an ambush for the forces which are to arrive there, and so on. Phenomena such as these have occurred in the past months in various places throughout the territories. For these reasons, as a rule, no military force, employing military-war actions in enemy territory, gives prior warning for operational activity it intends to implement, warning which could put in very real danger the lives of its soldiers and endanger the success of the operation.

President Barak's analysis began from a similar "state of war" premise: "Israel is in the midst of combat activity" and its "army is conducting various combat actions, the goal of which is to return security to the region and the State". He affirmed that the need to undertake "deterrent activities," such as house demolitions, is at the discretion of the army as part of "overall combat activity."

The Court recognized the existence of a fundamental right to be heard, a right which is "applicable in the matter of the destruction of structures in which terrorists live, both in periods of calm and periods of combat activities." Such a right is not, however, an absolute right. It is not applicable in "special or exceptional circumstances," one of which is where there is a risk of injury to body or property "during an operational-military action within the framework of combat activity of

96. The Court did allow for dispensation of the hearing requirement in the case of "operational-military circumstances in which judicial review is incompatible with conditions of place and time or the nature of the circumstances." Id., at 540-541. Rather than referring to punitive demolitions, the exception mentioned is that already enshrined in Article 53 of the Fourth Geneva Convention which allows for property destruction as an absolute military necessity [emphasis added].
97. See Amar et al., supra note 92, para. 2.
98. Id., para. 3.
99. Id.
100. Id., para. 4.
PUNITIVE HOUSE DEMOLITIONS

President Barak then referred to Association for Civil Rights in Israel v. Officer Commanding Central Command where it was held that the right to be heard could be dispensed with during "military-operational circumstances," in which the army might need, for example, "be rid of a barrier or overcome resistance or respond to attacks on the army forces." He cited another case in which a similar rule was upheld in instances of "destruction of structures as part of military-operational activities." He then drew the conclusion that:

In this matter there is no distinction if the damage to property is a side effect of the military action, or if the damage to property is the fundamental target which guided the military action. These are — according to our assumptions — operation activities meant to safeguard the region and the state, which the respondent is authorised to do.

It must be noted that the exceptions in the earlier cases referred to property destruction in the course of military operations, whereas in the case in hand the demolitions are wholly punitive in nature.

President Barak continued:

The right to the right of hearing in the case of a military-operational action is derived from a balance between the right of the individual to be heard in the face of damage to his person or property and the necessary public need in fulfilling the military action — a need behind which stands, amongst other things, the concern for the security of the soldiers and their lives. . . . if there is a serious fear that awarding the right of hearing will endanger the lives of soldiers and endanger the action itself, the right of hearing is cancelled in the face of essential combat needs.

Where such a danger doesn't exist, the right to a hearing must be upheld. Barak asserted that even in circumstances where the right will not be upheld "in its entirety," it must be upheld "partially," such as allowing a hearing before the military commander "on the spot before the property is damaged." He found that it could never be determined in advance whether circumstances would allow for the granting of a hearing, that "[e]verything is dependent on the circumstances of the

101. Id.
102. Id.
103. HCJ No. 4112/90, Association for Civil Rights in Israel v. Southern Commander, 640.
104. See Amar et al, supra note 92, para. 4.
105. Id., Para. 5.
106. Id.
matter, and on the correct balance between the right of hearing and the
danger (to soldiers) and the chance (of fulfilling the action). Finding
this petition too general, the Court decided that it could not grant a right
to judicial review in all circumstances. The Court concluded that the
responsibility for determining whether to grant a hearing prior to
demolition rests with the IDF Commander. Hence, the petitions were
rejected.

The decision reached by the Supreme Court in this case continues in
their approach of giving a margin of discretion to the IDF for their
actions in the Occupied Territories. At the outset, punitive house
demolitions, those which do not take place during combat activity but,
rather, in the aftermath of the commission of illegal activities, are
described by the Court as actions of a military character. The Court then
asserts that during such operations it is the military commander who is
best placed to decide on whether to delay a demolition and allow a
hearing. In effect, the Court absolves itself of having to deal with
decisions taken by the army in the Occupied Territories. Military
commanders are thus given complete discretion; not only as to whether
to demolish a house punitively, but also as to whether they should allow
their order of demolition to be challenged before a judicial body. The
Court again upholds the extra-judicial nature of the punishment and has
removed the one semblance of adherence to the rule of law that had
previously been present: the right to judicial review of house demolition
orders.

The following day nine separate petitions were submitted to the
Court on the issue of punitive house demolitions. In response to all
nine petitions, the Court delivered one, extremely brief, judgment. The
Court held that:

... [persons] who fear that their homes will be damaged due to
actions of their family members as terrorists who caused injury to
human life, can at their own initiative turn to the respondent. They
will pass to the respondent data which in the opinion of the family
members could influence his decision. As much as possible a plan of
the house will also be given, and a map indicating its location. In
initiated actions planned enough ahead of time, the respondent will
not carry out the demolition actions prior to weighing this
information. This proposal is acceptable to the respondent. In our
opinion, with this the principle practical problem is solved.

Once again, the Court relinquishes full discretion for carrying out
demolitions to the military commander; he is under no obligation to reply

107. Id., para. 6.
108. HCJ No. 6868/02, on file at Al-Haq's library.
to the petitioners and it is highly unlikely that a mere letter will alter his decision to demolish. The "principle practical problem" is far from solved by this decision.

V. Serious Violations of International Law

A. Grave Breaches of the Fourth Geneva Convention

The Fourth Geneva Convention, in Article 147, sets out a number of the most serious violations of international humanitarian law. These violations are referred to as "grave breaches" of the convention:

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly. ¹⁰⁹

Pursuant to Article 146 of the Fourth Geneva Convention, High Contracting Parties to that treaty are obliged to act in the face of the commission of grave breaches by either their own citizens or by the citizens of another State's party to the convention. This article states, inter alia, that:

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. ¹¹⁰

Persons who commit, or order the commission of, grave breaches must be held individually responsible for their criminal acts. It has been shown that Israel's punitive house demolition policy is in violation of international humanitarian law; has this violative action reached the level of a grave breach of the Fourth Geneva Convention?

Israel's house demolition policy throughout the occupation would

¹⁰⁹. Supra note 1.
¹¹⁰. Id.
seem to fit the grave breach of "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly," set out in Article 147. The demolition of houses has undoubtedly been carried out extensively and, as it has been shown above, any measure that is expressly punitive in nature cannot be justified as an absolute military necessity. That punitive house demolitions are unlawful under international law has also been clearly established. Destruction that is carried out wantonly refers to destruction that is "extensive, unnecessary and willful." Thousands of Palestinian homes have deliberately been demolished or sealed as a punitive measure. Ostensibly these demolitions have been carried out as a deterrent against future illegal activities. Apart from the issue of the legality of the actions, the strategy behind the use of the house demolition policy must also be questioned. Despite the widespread use of house demolitions as a deterrent measure, Palestinians have continued to mount armed attacks against Israeli citizens and members of the occupying army. Israel's pursuit of its punitive house demolition policy has led to extensive destruction of property, not justified by military necessity and which has been carried out unlawfully and wantonly.

Israel's punitive house demolition policy amounts to a grave breach of the Fourth Geneva Convention, to which Israel is a signatory and to which it is bound as an occupying power. The international community - the majority of States are High Contracting Parties to the Fourth Geneva Convention - has a clear duty to investigate, prosecute, and punish those members of the IDF who have committed or ordered the commission of punitive house demolitions.

B. Extensive Property Destruction as a War Crime

On occasion, it has been contended that the demolition of houses in the Occupied Territories is lawful under the laws of occupation, as these have been carried out on the basis of military necessity. The Attorney General for Israel put forward this argument in 1971. It has already been shown that punitive measures cannot satisfy the military necessity

---

112. See Welchman, supra note 15, at 45; see also John Quigley, The Legal Consequences of the Demolition of Houses by Israel in the West Bank and Gaza Strip 13 (1994).
requirement under international humanitarian law for property destruction. Can it be concluded that under international criminal law house demolitions amount to the war crime of extensive property destruction not justified by military necessity?

Article 6(c) of the Charter of the International Military Tribunal at Nuremberg enumerated the "wanton destruction of cities, towns or villages, or devastation not justified by military necessity" as a war crime.\(^\text{114}\) The recently entered-into-force Rome Statute of the International Criminal Court expressly holds grave breaches of the Geneva Conventions to be war crimes within the jurisdiction of the Court.\(^\text{115}\) Article 8(2)(a)(iv) stipulates that the grave breach of "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly" is a war crime. The Statute of the International Tribunal for the Former Yugoslavia has also enumerated the grave breach of extensive property destruction as a war crime.\(^\text{116}\) The elements of the war crime of extensive property destruction in the Rome Statute have been set out as follows:

1. The perpetrator destroyed or appropriated certain property

2. The destruction or appropriation was not justified by military necessity.

3. The destruction or appropriation was extensive and carried out wantonly

---

\(^{114}\) Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of International Military Tribunal, Annex, (1951) 82 U.N.T.S. 279. The extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly has also been specified as a grave breach in Article 50 of the Geneva Convention I for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, Aug. 12, 1948, 75 U.N.T.S. 31 and Article 51 of the Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1948, 75 U.N.T.S. 85.

\(^{115}\) Rome Statute of the International Criminal Court, (1998) U.N. Doc. A/CONF.183/9, July 1,2002, Article 8 (2) (a). It is worth noting that at the time of writing, there were 139 signatories and 88 States Parties to the Rome Statute, a treaty that was the result of intense negotiations involving between delegations from over 150 countries and dozens of non-governmental organizations. Since July 1, 2002, many States parties to the Statute have taken concrete measures to incorporate this treaty into their own domestic legislation. These developments, reflecting the overall success this major achievement in international criminal law, affirm the authoritative character of the Statute of the International Criminal Court.

4. Such property was protected under one or more of the Geneva
Conventions of 1949.

5. The perpetrator was aware of the factual circumstances that
established that protected status.

6. The conduct took place in the context of and was associated with
an international armed conflict.

7. The perpetrator was aware of factual circumstances that
established the existence of an armed conflict.117

The first three elements have clearly been met by Israel’s house
demolition policy: property was destroyed, the destruction was extensive,
it cannot be justified by military necessity and it was carried out
wantonly.118

Element 4 requires that the property in question was protected by
the Geneva Conventions. The houses destroyed punitively are expressly
protected by Article 53 of the Fourth Geneva Convention, which
establishes that “[a]ny destruction by the Occupying Power of real or
personal property belonging individually or collectively to private
persons . . . is prohibited, except where such destruction is rendered
absolutely necessary by military operations.”119 Article 33 (3) of the
same treaty establishes a concrete prohibition on the taking of reprisals
against the property of protected persons. The hundreds of houses that
have demolished or sealed punitively since 1967 were clearly protected
property under the Fourth Geneva Convention. Regarding element 5, the
Israeli authorities know that the homes demolished are those of the
relatives of persons who have, or who are suspected to have, committed
offenses. The affected persons are civilians. In this regard, the Israeli
authorities were aware that the civilian status of these people afforded
their property protection under the Fourth Geneva Convention.

Element 6 demands that the acts took place during an international
armed conflict. The Rome Statute of the International Criminal Court
has made it clear that the term “international armed conflict” includes
military occupation.120 The West Bank and Gaza have been occupied by
Israel since 1967. It hardly needs stating that, in satisfaction of element

117. Article 8(2)(a)(iv), Elements of Crimes Preparatory Commission for the
118. See previous section discussing grave breaches of the Fourth Geneva
Convention.
119. Supra note 1.
A/CONF.183/9, Elements of Crimes, footnote 34 to Article 8(2)(a).
7, the Israeli authorities are aware that they are occupying the lands where the punitive house demolitions are carried out.

Israel's punitive house demolition policy constitutes one of the most pervasive of war crimes. The actions taken under this policy meet all the elements of the war crime of extensive destruction of property, not justified by military necessity, and carried out unlawfully and wantonly. The International Criminal Court has jurisdiction over this and other war crimes, "in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes."\(^{121}\) Although this court will only be able to prosecute crimes committed since the coming into force of the Statute, it is abundantly clear that Israel's punitive house demolition policy is ongoing. Since July 1, 2002, over two hundred houses have been demolished as punishment by the Israeli military forces.\(^{122}\) Under international criminal law, the Israeli authorities have committed and continue to commit serious war crimes in the form of punitive house demolitions.

C. House Demolitions: Collective Punishment as a War Crime

While grave breaches of the Geneva Conventions are the most serious war crimes, other severe violations of the rules of international humanitarian law are also categorized as war crimes. Article 6 of the Nuremberg Charter described war crimes as "violations of the laws or customs of war." The war crimes article of the Rome Statute of the International Criminal Court includes, in addition to grave breaches of the Geneva conventions, "other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law" as war crimes.\(^{123}\) This section will examine the question of whether Israel's violation of the prohibition against collective punishment amounts to a war crime.

It has been shown that Israel's punitive house demolition policy violates both Article 50 of the 1907 Hague Regulations and Article 33(1) of the Fourth Geneva Convention because it punishes persons for crimes they have not personally committed. Furthermore, the widespread imposition of measures of collective punishment against protected persons in occupied territories is a violation of an established norm of customary international law. Section III has shown the customary status of this prohibition, in particular as evidenced by the inclusion of a

\(^{121}\) Article 8 (1).


prohibition of collective punishment in both Additional Protocols I and II and in the Statute of the International Criminal Tribunal for Rwanda. Reinforcing the gravity of violating this norm, Jean Pictet has stated that “other grave breaches of the same character as those listed in Article 147 can easily be imagined,”\textsuperscript{124} following which he makes direct reference to the Yugoslav Penal Code, which had added collective punishment to its list of grave breaches.

Since the adoption of the punitive house demolition policy in 1967, the Israeli authorities have punished thousands of persons for crimes which were committed by others. The overwhelming majority of demolitions and sealings have been clear acts of collective punishment. The acts carried out under this policy are in violation of customary international law and they are committed “as part of a plan or policy or as part of a large-scale commission of such crimes.”\textsuperscript{125} There is a strong case to be made that punitive house demolitions, which punish persons on the basis of the archaic notion of collective responsibility,\textsuperscript{126} may be regarded as war crimes.

VI. Conclusion

The protracted occupation of the West Bank and Gaza Strip has brought with it a real and serious security threat for the State of Israel. The preceding discussion has shown that in seeking to counter this threat, the authorities have often acted in contravention of their obligations under international humanitarian law. The Fourth Geneva Convention makes it very clear that security measures concerning protected persons are limited “at the most . . . to assigned residence or internment.”\textsuperscript{127} The demolition of houses as a form of punishment, as carried out in the Occupied Territories, is not permissible under international law. This demolition policy has involved collective punishment on a massive scale. Many thousands of Palestinians have been made homeless by the actions of the Israeli army. Israel’s Supreme Court has consistently validated those actions and pointedly refused to address the collective punitive nature of these acts. A review of international legal norms suggests that punitive house demolitions, as part of an overall policy, are a grave breach of the Fourth Geneva Convention and that these actions amount

\textsuperscript{124} Commentary to the Fourth Geneva, supra note 17, at 594.
\textsuperscript{125} Rome Statute of the International Criminal Court, supra note 115, Article 8 (1).
\textsuperscript{126} In 1969, the former Defence Minister Moshe Dayan answered affirmatively to the question – regarding the demolition policy – of whether the Ministry of Defence was “acting in such cases according to the principle of collective responsibility of the whole family for one of its members”; cited in Israeli League for Human and Civil Rights, The Shahak Papers 15 (Adnan Amad ed., 1973).
\textsuperscript{127} Supra note 1, Article 78.
to war crimes.

The importance and centrality of the home in any society hardly requires emphasis. In the words of the President of the Supreme Court of Israel:

A person's home is not merely a roof over his head, but it is also a means for the physical and social location of a person, his private life and his social relationships.\(^{128}\)

The demolishing or sealing of a house, therefore, not only destroys one’s place of residence, but also eradicates a focal-point of family and social life. Moreover, and of critical importance in Palestinian society, house demolitions are a means by which the Israeli authorities have destroyed those peoples’ links to their land. When this effect of punitive demolitions is considered in conjunction with the similar effect of administrative house demolitions and the destruction often associated with military operations, it is possible to argue that these practices amount to an effort by the Israeli authorities to sever Palestinian ties to the West Bank and Gaza Strip.

The State of Israel has several legal obligations accruing to it under both conventional and customary international law. These obligations are called into question by the ongoing punitive house demolition policy. In addition, the High Contracting Parties to the Fourth Geneva Convention have a duty to 'respect and to ensure respect for the Convention in all circumstances.'\(^{129}\) These parties also have a legal duty to act in the face of the commission of grave breaches of the Fourth Geneva Convention. All States parties to this convention must fulfill their obligations and take measures toward holding accountable the perpetrators of these serious crimes.

Despite the strong and frequent censure from the international community of Israel for its human rights record in the Occupied Territories, it has continued to act with impunity for a number of years. Punitive house demolitions are one of the most salient examples of Israel’s breach of its binding humanitarian law obligations. The recent resumption of this demolition policy does not bode well for Israeli-Palestinian relations at a time when the parties are set to resume important peace negotiations aimed at bringing about a resolution of this perennial conflict.

129. \textit{Supra} note 1, Article 1.