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# ISRAELI DEMOLITION OF PALESTINIAN HOUSES AS A PUNITIVE MEASURE: APPLICATION OF INTERNATIONAL LAW TO REGULATION 119

*Brian Farrell\**

## I. INTRODUCTION

Since the 1967 Israeli occupation of the West Bank and Gaza, Israel has employed the practice of demolishing civilian houses as a response to offenses committed in these territories. The use of demolitions as a punitive measure has generated considerable opposition in the international community and among legal experts. These scholars argue that the demolition of houses is impermissible under existing international law.

This article examines the practice of punitive housing demolition by Israeli forces in the West Bank and Gaza and draws conclusions as to its legality under international law. Part II reviews the legal structure in the territories and explains the role of the Israeli courts. Next, Part III discusses the policy behind housing demolition, the justifications given for this measure, and the implementation of this practice. Parts IV and V analyze the provisions of international law relating to housing demolition. Part IV discusses human rights law, while Part V examines humanitarian law as contained in the Hague Regulations and the Fourth Geneva Convention. Both parts review the Israeli application of international law in the West Bank and Gaza before engaging in an independent analysis on their applicability. Finally, the legality of housing demolition will be reviewed in light of the specific provisions of the Hague Regulations and Fourth Geneva Convention.

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## II. LEGAL REGIME IN THE WEST BANK AND GAZA

Prior to World War I, the Ottoman Empire controlled the territory of Palestine, which now consists of Israel and the Occupied Territories. Following the war and the fall of the Empire, the region was entrusted to Great Britain as a League of Nations mandate.<sup>1</sup> With this mandate set to expire, the British Government sought the counsel of the United Nations ("UN"), which recommended the partition of Palestine into separate Arab and Jewish states.<sup>2</sup> Unable to reach a compromise satisfactory to all of the parties, the British nonetheless announced their intention to terminate the mandate on May 14, 1948.<sup>3</sup> In response, Jewish leaders immediately declared the establishment of the State of Israel, and war ensued.<sup>4</sup> Emerging victorious from the war, Israel encompassed all of mandatory Palestine, with the exception of the West Bank and Gaza, which were administered by Jordan and Egypt, respectively.<sup>5</sup>

These 1948 borders left Israel vulnerable to attack. As a result of an Egyptian military buildup on its border with Israel, in

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1. See generally LEAGUE OF NATIONS COVENANT, art. 22, available at <http://www.yale.edu/lawweb/Avalon/leagcov.htm> (last visited May 20, 2003) (establishing the mandate system). The Covenant provided for "advanced nations" to administer territories controlled by the defeated powers at the end of World War I. *Id.* The mandate was to continue until such time as the territory could stand alone.

2. See G.A. Res. 181(II), UN GAOR, 2d Sess., at 131, UN Doc. A/519 (1947). The UN plan called for separate states bound together in an "economic union." *Id.* Britain had already expressed its support for "the establishment in Palestine of a homeland for the Jewish people." Ardi Imseis, *On the Fourth Geneva Convention and the Occupied Palestinian Territory*, 44 HARV. INT'L L.J. 65, 73 (2003) (citing Letter from Arthur James Balfour, Foreign Secretary of Great Britain, to Lord Edmond de Rothschild (Nov. 2, 1917). This letter, referred to as the *Balfour Declaration*, stated that this support was contingent on the understanding that "nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine." *Id.* at 73 n.74.

3. Emma Playfair, *Introduction*, in INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES 4 (Emma Playfair ed., 1992) [hereinafter Playfair, *Introduction*].

4. ANTHONY COON, AMNESTY INTERNATIONAL, ISRAEL AND THE OCCUPIED TERRITORIES: DEMOLITION AND DISPOSSESSION: THE DESTRUCTION OF PALESTINIAN HOMES 6 (1999).

5. Playfair, *Introduction*, *supra* note 3, at 4. Jordan (then known as Transjordan) annexed the territory of the West Bank in 1950. *Id.*

1967, war erupted between Israel and its neighbors.<sup>6</sup> Israel once again emerged as the victor and its forces occupied both Gaza and the West Bank, including East Jerusalem, at the conclusion of the brief Arab-Israeli War of 1967.<sup>7</sup> The Israeli Knesset quickly took action to annex East Jerusalem into Israel.<sup>8</sup>

The status of Gaza and the remainder of the West Bank has been, however, less clear. Israel has denied that its control over these territories is an “occupation,” thus, denying that Jordan and Egypt had previously exercised sovereignty over them.<sup>9</sup> Rather, Israel has referred to its role in the West Bank and Gaza as an “administration” of these territories.<sup>10</sup>

The volatile history of the West Bank and Gaza resulted in the existence of a rather complex legal regime. In order to analyze the issues relating to housing demolition, this regime must be examined.

#### A. Legislation and Administration

The following Part will outline the legal system that has developed in the territories, with particular attention paid to Israel’s legal predicates for the demolitions. This part will first address the legislative and administrative regime that has developed in the West Bank and Gaza. It will then examine the judicial system that has existed in the territories since 1967. Finally, it will take a close look at the validity of the British

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6. See DAVID KRETZMER, *THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES* 4 (2002).

7. *Id.* at 5.

8. See generally Law and Administration Ordinance (Amendment No. 11) Law, 5727-1967, 1966-1967 S.H. 74, translated in 21 L.S.I. 75 (1966•67); Law and Administration Order (No. 1), 5727-1967, 1966-1967 Kovetz Ha Takkanut (K.T.) (decreeing Israeli law, jurisdiction, and administration to be applicable in East Jerusalem). The legality of this annexation under international law was disputed by various persons and organizations, including the United Nations. See, e.g., S.C. Res. 252, U.N. SCOR, 23d Sess., 1426th mtg. at 9, U.N. Doc. S/RES/252 (1968). Israel subsequently enacted further legislation formally annexing Jerusalem. See Basic Law: Jerusalem, Capital of Israel, 1979-80 S.H. 186, translated in 34 L.S.I. 209 (1979-80), available at [http://www.knesset.gov.il/laws/special/eng/basic10\\_eng.htm](http://www.knesset.gov.il/laws/special/eng/basic10_eng.htm).

9. See Playfair, *Introduction*, supra note 3, at 5.

10. See *id.* The term “occupied” will be used in this article, consistent with its understood meaning in international law. See generally, *id.*, *Introduction*, supra note 3, at 3-22.

Defense (Emergency) Regulations of 1945 as a source of law today.

The applicable law in the West Bank and Gaza from 1967 to present has been influenced by a number of sources each leaving their imprint — local, imperial, and military law. This section will focus on the effect of each source on the Defense (Emergency) Regulations of 1945 and the sources of legislation in the territories since 1967.

### 1. Mandatory Palestine

Pursuant to the League of Nations mandate, Great Britain was responsible for administering the territory of Palestine.<sup>11</sup> The British administration in Palestine operated under the general structure and rules of the English legal system. Even so, the system retained elements of Ottoman law and was also influenced by Islamic *Shari'a*.<sup>12</sup>

During the mandate period, both Jewish and Arab elements within Palestine resisted British control.<sup>13</sup> Much of the government's policy was, therefore, directed toward maintaining control and preserving civil order. In 1921 and 1929, ordinances sought to alleviate Arab fears of losing property to recent Jewish settlers in the region, while the laws made in 1936 were in direct response to revolutionary activity in Palestine.<sup>14</sup>

By 1945, British officials faced growing opposition of the Jewish underground movement.<sup>15</sup> In direct response to this threat, the authorities adopted the Defense (Emergency) Regulations of 1945 pursuant to the Palestine (Defense) Order-in-Council of 1937.<sup>16</sup> The 1945 Regulations granted the government broad powers to crush paramilitary activity.<sup>17</sup> Applicable throughout mandatory Palestine, authorities were given powers to suspend basic rights, order detention and deportation, limit free expression, association, and movement, order the forfeiture or demoli-

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11. *Id.*

12. *See id.* at 9.

13. *Id.*

14. George E. Bisharat, *Land, Law and Legitimacy in Israel and the Occupied Territories*, 43 AM. U. L. REV. 467, 500, & 515 (1994).

15. KRETZMER, *supra* note 6, at 121.

16. *Id.*

17. Diana Vincent-Daviss, *The Occupied Territories and International Law: A Research Guide*, 21 N.Y.U. J. INT'L L. & POL. 575, 584 (1988–89).

tion of property, and establish military courts.<sup>18</sup> These regulations met with harsh criticism from Jewish political leaders and lawyers.<sup>19</sup>

Prior to the expiration of the mandate, the Palestine (Revocations) Order-in-Council of 1948 was signed in London.<sup>20</sup> This order-in-council acted to repeal the Palestine (Defense) Order-in-Council of 1937 and the regulations promulgated pursuant to it, including the Defense (Emergency) Regulations of 1945.<sup>21</sup> The effective date of repeal was May 14, 1948, the final day of the mandate.<sup>22</sup> The Palestine (Revocations) Order-in-Council of 1948 was published in the *Government Gazette* in London.<sup>23</sup> It was not, however, published in the official publication for the territory, the *Palestine Gazette*.<sup>24</sup> Furthermore, the Defense (Emergency) Regulations of 1945 were never explicitly repealed or modified by the Jordanian or Egyptian governments that administered the West Bank and Gaza, respectively, from the expiration of the mandate in 1948 until 1967,<sup>25</sup> nor were housing demolitions carried out by these authorities.<sup>26</sup>

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18. See generally Defense (Emergency) Regulations (1945), 1945 PALESTINE GAZETTE (no. 1442) (Supp. 2) 1055.

19. See KRETZMER, *supra* note 6, at 121; EMMA PLAYFAIR, AL-HAQ, DEMOLITION AND SEALING OF HOUSES AS A PUNITIVE MEASURE IN THE ISRAELI-OCCUPIED WEST BANK 10–11 (1987) [hereinafter PLAYFAIR, AL-HAQ]. For example, at a meeting of the Jewish Lawyers association in 1946, Dr. Yaacov Shimson Shapiro claimed the regulations were “unparalleled in any civilized country” and destroyed “the very foundations of justice in this land.” SABRI JIRYIS, THE ARABS IN ISRAEL 12 (1968).

20. KRETZMER, *supra* note 6, at 121.

21. See Palestine (Revocations) Order in Council (1948) S.I. 1948/1004, at 1350–51.

22. *Id.*

23. KRETZMER, *supra* note 6, at 121. In the view of the British Government, this publication effectively repealed the Palestine (Defense) Order-in-Council of 1937. In a 1987 letter, the British Foreign Ministry confirmed that “in view of the Palestine (Revocations) Order in Council 1948, the Palestine (Defense) Order in Council 1937 and the Defense Regulations 1945 made under it are, as a matter of English law, no longer in force.” PLAYFAIR, AL-HAQ, *supra* note 19, at 33 (citing Letter from British Minister of State for Foreign and Commonwealth Affairs, to al-Haq (Apr. 22, 1987))

24. KRETZMER, *supra* note 6, at 121.

25. See ESTHER COHEN, HUMAN RIGHTS IN THE ISRAELI-OCCUPIED TERRITORIES: 1967–1982, at 94 (1985); Julius Stone, *Behind the Cease-Fire Lines: Israel's Administration in Gaza and the West Bank*, in OF LAW AND MAN: ESSAYS IN HONOR OF HAIM H. COHN 79, 83 (Shlomo Shoham ed., 1971).

## 2. Occupation

Upon entry into the West Bank and Gaza in 1967, the Israeli Defense Forces issued proclamations regarding the governance of each area.<sup>27</sup> The Proclamation of Assumption of Government by the Israeli Defense Forces ("IDF") ("Proclamation No. 1") stated that as a result of its effective possession of the areas, the IDF had assumed governance over those areas.<sup>28</sup> This proclamation formed the basis for the exercise of military government in the West Bank and Gaza.

The basis for Israeli administration and legislation in the West Bank and Gaza was the Proclamation Regarding Government and Law ("Proclamation No. 2") issued in each area. Proclamation No. 2 was issued by General Haim Herzog in each area on the day in which Israeli forces entered that area.<sup>29</sup> Under this proclamation, all legislative and administrative powers in areas controlled by the Israeli Defense Forces were concentrated in the hands of the military commander for each area. It stated that:

- (a) All powers of government, legislation, appointment, and administration in relation to the area or its inhabitants shall

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An argument has been raised that certain provisions of the Regulations are inconsistent with the Jordanian Constitution of 1952 and were, therefore, implicitly repealed in the West Bank. This argument was addressed and dismissed by the Israeli Supreme Court in *Awwad v. Military Commander of Judea and Samaria*, 33(3) P.D. 309 (1979), and *Kawasme v. Minister of Defense*, 35(1) P.D. 617 (1980). A similar argument was raised in Gaza, based on the 1955 Basic Law for the Gaza Strip and the Constitution of Gaza of 1962, enacted by Egypt. These arguments were also dismissed by the Israeli Supreme court in *Maslam v. IDF Commander in Gaza*, 45(3) P.D. 444 (1991). For a discussion of these cases, see KRETZMER, *supra* note 6, at 122–24. See also Mazen Qupty, *The Application of International Law in the Occupied Territories as Reflected in the Judgments of the High Court of Justice in Israel*, in INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES 107 (Emma Playfair ed., 1992) (discussing *Qawassmeh v. Minister of Defense*, 35(1) P.D. 617 (1980), in which the Court questioned whether the Defense (Emergency) Regulations of 1945 had, in fact, been repealed by the Jordanian Constitution).

26. See PLAYFAIR, AL-HAQ, *supra* note 19, at 10.

27. See COHEN, *supra* note 25, at 92.

28. *Id.*

29. See Mona Rishmawi, *The Administration of the West Bank under Israeli Rule*, in INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES 271–72 (Emma Playfair ed., 1992).

henceforth be vested in me alone and shall only be exercised by [the Military Governor] or by persons appointed by me for that purpose or acting on my behalf.

(b) Without derogating from the generality of the foregoing it is hereby provided that any duty to consult, obtain consent and the like, prescribed in any law as a condition-precedent for legislation, enactment or appointment, or as a condition for the entry into force of any legislation or appointment — is hereby repealed.<sup>30</sup>

Since 1967, Proclamation No. 2 has remained the source of all governmental power in the West Bank and Gaza. These powers have been wide-ranging, and include control over real estate transaction,<sup>31</sup> use of natural resources,<sup>32</sup> issuance of professional licenses,<sup>33</sup> travel,<sup>34</sup> and all security matters. Even when a civilian administration was established in the West Bank in 1981, it was established by and under the authority of the area commander.<sup>35</sup> Thus, the military government retained final and absolute control over the territories.

### 3. Preservation of Pre-Occupation Law

One feature of the military government in the West Bank and Gaza was the retention of laws in effect prior to the occupation. This decision was evident from the 1967 proclamations establishing military rule. Proclamation No. 2 stated that:

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30. Proclamation on Government and Law (Area of West Bank) (Proclamation No. 2) § 3 (June 7, 1967); Proclamation on Government and Law (Gaza Strip and Northern Sinai) (Proclamation No. 2) § 3 (June 8, 1967).

31. See Military Order 25 (1967), summarized in *English and reprinted in* JAMIL RABAH & NATASHA FAIRWEATHER, *ISRAELI MILITARY ORDERS IN THE OCCUPIED PALESTINIAN WEST BANK* 4 (Jerusalem Media & Communication Centre, 1993). The reader should note that the military orders have not been published in their entirety in English or Hebrew. This is one of the reasons that there is frequent criticism about the transparency of the military government's actions. Thus the compellation by the Jerusalem Media & Communication Centre is the best source of these orders in one volume. See *id.*

32. See *id.*; Military Orders 58, 59, & 92, summarized in *English and reprinted in* RABAH & FAIRWEATHER, *supra* note 31, at 9, 14.

33. See *id.* Military Orders 260, 324, & 437, summarized in *English and reprinted in* RABAH & FAIRWEATHER, *supra* note 31, at 34, 42, & 56.

34. See, e.g., Military Order 153, summarized in *English and reprinted in* RABAH & FAIRWEATHER, *supra* note 31, at 22.

35. See Rishmawi, *supra* note 29, at 275–81 (discussing establishment of a civilian administration in the West Bank in 1981).



The law which existed in the area on 7 June 1967 shall remain in force in so far as there is nothing therein repugnant to this Proclamation, any other Proclamation or Order which will be enacted by [the Military Governor], and subject to such modifications as may result from the establishment of the rule of the I.D.F. in the area.<sup>36</sup>

Thus, generally speaking, the laws that existed in the West Bank and Gaza prior to June 7, 1967, remained in force unless amended or repealed by the area commander. An order promulgated shortly after the occupation began further stated that, to avoid doubt, any emergency regulations previously in place remained in force unless *explicitly* repealed.<sup>37</sup> These orders left a system of Ottoman, British Mandatory, Jordanian, and military law in the West Bank, and Ottoman, British Mandatory, Egyptian military, and Israeli military law in Gaza.

Without analyzing the applicability or enforceability of international law at this point, it is important to note that the Israeli decision to respect prior law conformed to international legal norms. According to the customary international law that was recognized at that time, "the law in force in occupied territory must be respected by the occupying power."<sup>38</sup> This principle is reflected in Article 43 of the Hague Regulations and Article 64 of the Fourth Geneva Conventions.<sup>39</sup>

### *B. Judicial System in the West Bank and Gaza*

The examination of housing demolition requires familiarity with the structure of the judicial system in the West Bank as well as Gaza and in Israel. This section will first review the nature of the judicial system in the territories under military

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36. Proclamation on Government and Law (Area of West Bank) (Proclamation No. 2) § 2 (June 7, 1967); Proclamation on Government and Law (Gaza Strip and Northern Sinai) (Proclamation No. 2) § 2 (June 8, 1967).

37. See PLAYFAIR, AL-HAQ, *supra* note 19, at 10. See generally Military Order 224, art. 3 (1968), *summarized in English and reprinted in* RABAH & FAIRWEATHER, *supra* note 31, at 30.

38. KRETZMER *supra* note 6, at 123.

39. See *infra* Part V. See Hague Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, Annex, U.S.T.S. 539, 2 A.J.I.L. Supp. 90 (entered into force Jan. 26, 1910) [hereinafter Hague Regulations]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 UNT.S. 287 (entered into force Oct. 21, 1950) [hereinafter Fourth Geneva Convention].

government. It will then explain the role and availability of the Israeli Supreme Court in administration of these territories.

### 1. Military Court System

Area commanders established a system of military justice shortly after Israel occupied the West Bank and Gaza.<sup>40</sup> Proclamation No. 3 implemented procedural and substantive law for “security offenses” and also created military courts with jurisdiction to try numerous matters.<sup>41</sup> Preventative detention and warrantless searches were also authorized.<sup>42</sup>

Along with the powers granted in earlier proclamations, this proclamation allowed area commanders to drastically alter the prior structure of the court system. Criminal and civil matters previously tried in civil courts now fell under the concurrent jurisdiction of military courts.<sup>43</sup> In addition, the area commander assumed the power to appoint and dismiss judges and prosecutors, even in civil courts.<sup>44</sup> Finally, the Court of Cassation, the highest court of appeal under Jordanian rule, was dissolved by commanders in the West Bank.<sup>45</sup>

### 2. Israeli Supreme Court

The Supreme Court of Israel is highly regarded both in Israel and abroad.<sup>46</sup> The Court fulfills two roles in the Israeli judicial system. As in many national systems, the Supreme Court of Israel serves as the final court of appeals for decisions by Israeli district courts.<sup>47</sup> The Court also sits as the High Court of Justice.<sup>48</sup>

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40. Raja Shehadeh, *The Legislative Stages of the Israeli Military Occupation*, in *INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES* 152 (Emma Playfair ed., 1992).

41. *Id.* at 153.

42. *Id.*

43. *Id.*

44. See Military Order 129, *summarized in English and reprinted in RABAH & FAIRWEATHER*, *supra* note 31, at 19.

45. See Shehadeh, *supra* note 40, at 153.

46. See Dan Simon, *The Demolition of Homes in the Israeli Occupied Territories*, 19 *YALE J. INT'L L.* 1, 22 (1994).

47. See KRETZMER, *supra* note 6, at 10.

48. *Id.*

The High Court of Justice is a feature of the English legal system.<sup>49</sup> In this system, the High Court of Justice hears petitions seeking review of government action.<sup>50</sup> This second function was retained when the State of Israel was established upon expiration of the British Mandate.<sup>51</sup> Thus, when sitting as the High Court of Justice, the Israeli Supreme Court adjudicates the legality of state actions and its constituent parts.<sup>52</sup>

a. Jurisdiction

The power to review government actions is defined by the parameters of the Israeli Supreme Court's jurisdiction. This power does not necessarily give rise to the review of military actions outside the territory of the State of Israel. Indeed, the courts of some nations have determined that they lack jurisdiction to adjudicate petitions concerning the actions taken by military personnel outside their own sovereign territory.<sup>53</sup>

The Israeli Supreme Court, however, has taken the view that it has jurisdiction to review acts of the military government in the occupied territories when sitting as the High Court of Justice.<sup>54</sup> This authority flows from the Court's *in personam* jurisdiction over individual members of the Israeli Defense Forces acting on behalf of the Israeli Government.<sup>55</sup> Hence, the Court is competent to adjudicate petitions challenging these actions.

However, this broad jurisdictional scope was not the product of judicial activism. Rather, the scope resulted from a conscious decision by Israeli authorities not to contest petitions from the West Bank and Gaza on jurisdictional grounds.<sup>56</sup> The government stated that their reason for this policy was to prevent arbitrary actions; however, other motives for this decision — such

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49. *Id.*

50. See Simon, *supra* note 46, at 22.

51. See KRETZMER, *supra* note 6, at 10–11 (discussing the Courts Law, 1957, which replaced the British Mandatory legislation).

52. *Id.*

53. See KRETZMER, *supra* note 6, at 19.

54. *Id.* at 13.

55. See *Khelou v. Government of Israel*, 27(2) P.D. 169, 176 (1972), summarized in *English in 5* ISR. Y.B. HUM. RTS. 384 (1975).

56. See KRETZMER, *supra* note 6, at 20.

as subtly increasing the legitimacy of military rule — have been put forth as well.<sup>57</sup>

The first reported case concerning the actions of military personnel in the West Bank and Gaza, decided in 1972, did not even address the issue of jurisdiction.<sup>58</sup> The second decision merely stated that the government had not contested the issue in earlier cases.<sup>59</sup> Jurisdiction had not been raised as an issue and would not, therefore, be ruled on.

Within a year, the Court changed its approach. Rather than passively ignoring the issue, the Court stated that it believed:

[W]ithout ruling on the matter, that the jurisdiction exists on the personal level against functionaries in the military government who belong to the executive branch of the state, as “persons fulfilling public duties according to the law,” and who are subject to the review of this court under section 7(b)(2) of the Courts Law, 1957.<sup>60</sup>

This view was eventually accepted as a binding rule.<sup>61</sup> Thus, the Court deprived the government of the opportunity to change tactics and contest jurisdiction in a later case.

Other potential challenges to the justiciability of issues arising from the occupation include issues regarding standing, the political question doctrine, and the act of state doctrine.<sup>62</sup> These issues have not, however, been used to prevent non-Israelis in the territories from accessing the Israeli Supreme Court.<sup>63</sup> The Court has, therefore, become an important forum for challenges to the actions of military authorities in the West Bank and Gaza.

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57. *Id.*

58. See *Christian Soc’y for the Holy Places v. Minister of Defense*, 26(1) P.D. 574 (1971), summarized in *English in 2 ISR. Y.B. HUM. RTS.* 354 (1972).

59. See *Electricity Corp. for Jerusalem District v. Minister of Defense*, 27(1) P.D. 124, 136 (1972), summarized in *English in 2 ISR. Y.B. HUM. RTS.* 381 (1975).

60. *Khelou*, 27(2) P.D. at 176.

61. See KRETZMER, *supra* note 6, at 20–21, citing *Ja’amait Ascan v. IDF Commander in Judea and Samaria* 37(4) P.D. 785, 809 (1982).

62. Challenges based on standing, the political question doctrine, and the act of state doctrine have not been used as a wholesale bar to petitions from the Occupied Territories. For a discussion of these issues, see generally KRETZMER, *supra* note 6, at 21–25.

63. *Id.* at 25.

## b. Applicable Law

Despite Israel's initial plans to establish a constitution, one was never adopted. In the absence of a written constitution, the British model of parliamentary supremacy is followed.<sup>64</sup> While the Israeli Supreme Court may review the correctness of the actions of government officials, it cannot pass judgment on legislation passed by the Knesset. Primary legislation is, therefore, the highest form of law.<sup>65</sup>

Pursuant to Proclamation No. 2, all legislative powers in the West Bank and Gaza are concentrated in the hands of the area commander.<sup>66</sup> In an early case from the territories brought before the Israeli Supreme Court, the government argued that military orders should be treated as primary legislation and should therefore fall outside the purview of judicial review.<sup>67</sup> The Court rejected this argument, taking the view that military orders are a form of delegated, rather than primary, legislation.<sup>68</sup> Additionally, the Court later held that as a part of the government administration, military commanders and their actions should be reviewed under Israeli administrative law.<sup>69</sup>

As a national court, the Israeli Supreme Court applies Israeli law. Any challenges brought before the Court must be based on principles recognized in the Israeli legal system. Claims based on public international law can be adjudicated only if the principles of international law relied upon are also a part of Israeli domestic law.<sup>70</sup>

Under the English common law system, customary international law is a part of domestic law to the extent that it does not conflict with parliamentary primary legislation.<sup>71</sup> It can, therefore, be enforced in domestic courts. On the other hand, con-

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64. See Simon, *supra* note 46, at 23.

65. KRETZMER, *supra* note 6, at 21–25.

66. See *supra* text accompanying notes 29–35.

67. See generally Hilu v. State of Israel, 27(2) P.D. 169 (1972), summarized in *English* in 5 ISR. Y.B. HUM. RTS. 384 (1975)

68. *Id.*

69. See Abu Itta v. IDF Commander in Judea and Samaria, 37(2) P.D. 197, 230–31 (1981), summarized in *English* in 13 ISR. Y.B. HUM. RTS. 348 (1983).

70. KRETZMER, *supra* note 6, at 31.

71. See John Dugard, *Enforcement of Human Rights in the West Bank and the Gaza Strip*, in INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES 461 (Emma Playfair ed., 1992).

ventional international law, based on multilateral treaties, is not a part of domestic law unless expressly incorporated by parliament.<sup>72</sup> As a result, conventional law is not enforceable in domestic courts without enabling legislation. Thus, customary international law is applied and enforced by the courts of Israel and conventional international law is not.

*C. Status of Defense (Emergency) Regulations of 1945*

The use of housing demolitions has been justified in Israeli law under the Defense (Emergency) Regulations of 1945.<sup>73</sup> These regulations allow for wide-ranging and draconian security measures that have been highly criticized.<sup>74</sup> Although it has used these powers extensively, Israel has disclaimed responsibility for the continued use of the regulations.<sup>75</sup> Rather, the state contended that the regulations remained in effect at the time the West Bank and Gaza were occupied, and it was thus bound to preserve them.<sup>76</sup>

As provisions of the Defense (Emergency) Regulations of 1945 came to be used by the Israeli Defense Forces in the West Bank and Gaza, questions were raised concerning their continued validity.<sup>77</sup> Several arguments were made that the regulations had been repealed prior to the entry of Israeli forces into the territories.<sup>78</sup> If this was the case, Israel would be denied of its claim that it was bound to preserve the regulations.

Since scholars have argued that Britain effectively repealed the regulations in the Palestine (Revocations) Order-in-Council of 1948.<sup>79</sup> The Israeli Supreme Court rejected this argument, finding that the British Government's failure to publish the revocation order in the official Palestine Gazette was fatal to the argument that the regulations had been repealed.<sup>80</sup> The

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72. See KRETZMER, *supra* note 6, at 31.

73. See Simon, *supra* note 46, at 15.

74. *Id.* at 15–16.

75. *Id.* at 15.

76. *Id.*

77. See COHEN, *supra* note 25, at 94.

78. *Id.* at 94–95.

79. See *supra* text accompanying notes 15–24 (discussing the revocation order).

80. See *Na'azal v. IDF in Judea and Samaria*, 39(3) P.D. 645, 652 (1986), summarized in *English in 16* ISR. Y.B. HUM. RTS. 329 (1986).

Court relied on the principle that “hidden laws” have no validity; therefore, the revocation never took effect.<sup>81</sup>

Scholars also argue that Jordan repealed the Defense (Emergency) Regulations of 1945 in the West Bank between 1948 and 1967.<sup>82</sup> Specifically, the Defense of Transjordan Law was cited as terminating the regulations.<sup>83</sup> This position was also rejected by the Court, which found that the regulations had remained in continual effect since the time they were enacted by the British.<sup>84</sup> Challenges to individual regulations promulgated under the Defense (Emergency) Regulations have also failed.<sup>85</sup>

### III. HOUSE DEMOLITIONS

Since 1967, house demolitions have been utilized as a punitive measure against residents of the West Bank and Gaza.<sup>86</sup> This Part will explore the reasons and justifications for the use of demolitions. It will also describe the circumstances under which demolitions take place.

The phrase “house demolition” refers to the physical destruction of a house or portion of a house by government actors.<sup>87</sup> The Israeli Defense Forces have conducted house demolitions since the time the West Bank and Gaza were occupied.<sup>88</sup> The

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81. *Id.* The Court relied on Military Order No. 160, which stated that “hidden laws” are invalid, but also noted that general principles of law would lead to the same result. *Id.* See generally Military Order No. 160, summarized in English and reprinted in RABAH & FAIRWEATHER, *supra* note 31, at 23.

82. See COHEN, *supra* note 25, at 94.

83. *Id.*

84. See Awad v. Military Commander of Judea and Samaria, 33(3) P.D. 309, 313 (1979), summarized in English in 9 ISR. Y.B. HUM. RTS. 343 (1979).

85. *Id.* at 314 (holding that Regulation 112 was not implicitly repealed by Article 9 of the Constitution of Jordan); Kawasame v. Minister of Defense, 35(1) P.D. 617, 626 (1980), summarized in English in 11 ISR. Y.B. HUM. RTS. 349 (1981) (finding that Military Order No. 224 required express repeal of regulations and, thus, Regulation 112 was still valid in Jordan); Maslam v. IDF Commander in Gaza 45(3) P.D. 444, 455 (1991) (holding that Egyptian enactment of the Basic Law for the Gaza Strip in 1955 and the Constitution of Gaza in 1962 did not contradict Regulation 112).

86. See COON, *supra* note 4, at 2–3.

87. *Id.*

88. See Simon, *supra* note 46, at 7.

measure is rooted in a British military practice dating to the beginning of the twentieth century.<sup>89</sup>

Demolitions are employed for several reasons. First, houses may be demolished because a building permit was not sought prior to their construction.<sup>90</sup> Second, houses are demolished for security reasons as a part of military operations.<sup>91</sup> Finally, demolitions are used as a punitive measure against persons suspected of taking part in criminal activity.<sup>92</sup> It is this punitive measure that will be specifically addressed in this article.

The Israeli military has clearly embraced the use of housing demolitions in the West Bank and Gaza.<sup>93</sup> Israel's civilian governments have also generally supported the policy, albeit to different degrees.<sup>94</sup> However, it is significant that these governments have supported the continued use of housing demolitions, rather than the official adoption of them as policy.<sup>95</sup> This political sleight-of-hand exists because Israel denies that it is responsible for implementation of the demolition policy.<sup>96</sup> Rather, it argues that this policy was thrust upon it and that it is, in fact, obliged to maintain the practice.<sup>97</sup>

#### A. *Legal Justification for Demolitions*

The legal basis for housing demolitions is Regulation 119 of the Defense (Emergency) Regulations of 1945 ("DER 119"), promulgated during the British mandate.<sup>98</sup> This regulation stated that:

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89. *See id.* at 8. House demolitions were first authorized by British commanders in South Africa during the Boer War. *Id.* The practice was exported to mandatory Palestine and was used in response to Arab insurrection. *Id.* Prior to expiration of the mandate, Jewish paramilitary units utilized house demolitions against Arabs in response to attacks. *Id.* at 8. Interestingly, the British never used the practice against Jews in mandatory Palestine. *Id.* at 8–9.

90. For a discussion of this issue, see generally COON, *supra* note 4, at 19.

91. *Id.* at 15–16.

92. *Id.* at 9.

93. *See id.* at 19.

94. *See* Simon, *supra* note 46, at 14.

95. *Id.*

96. *Id.* at 18.

97. *Id.*

98. *See supra* text accompanying notes 15•19 (discussing implementation of the Defense (Emergency) Regulations of 1945 by the British Government).



A Military Commander may, by order, direct the forfeiture to the government of Palestine any house, structure of 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, or 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 offense against these regulations involving violence or intimidation or any military court offenses; 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.<sup>99</sup>

A military commander was thus given the power to forfeit and destroy a personal dwelling from which an attack was made. Moreover, power was also conferred to destroy a house if the inhabitants of that housing area had been involved in violent offenses. Theoretically, this allowed for the destruction of all homes located in a village where a violent act had occurred, regardless of the lack of connection between the house, the inhabitants of the area, and the offense.

The burden of proof required to engage this measure is quite low. The military commander must simply have "reason to suspect" that the house has been used to fire a weapon or throw explosives, or be "satisfied" that inhabitants of an area have committed a violent offense.<sup>100</sup> Additionally, there is no standard regarding the severity of the offense that must be met.<sup>101</sup> Even relatively minor actions could fall under the scope of DER 119. Nor is ownership of the subject structure relevant.<sup>102</sup> Finally, there is no judicial process or review; the decision lies solely within the discretion of the military commander.<sup>103</sup>

Upon occupation of the West Bank and Gaza, Israel adopted a policy to preserve existing pre-occupation law.<sup>104</sup> Among the

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99. Defense (Emergency) Regulations, *supra* note 18, Regulation 119 [hereinafter DER 119].

100. See Simon, *supra* note 46, at 18.

101. See COHEN, *supra* note 25, at 97.

102. *Id.* at 98–99.

103. *Id.* at 99.

104. See *supra* Part II.A.3 (explaining the maintenance of prior law in the occupied territories).

laws purportedly preserved were the Defense (Emergency) Regulations of 1945 and, more specifically, DER 119.<sup>105</sup> Thus, pre-occupation law has provided the justification for the use of housing demolitions. Demolition orders issued by military commanders clearly state that they are issued pursuant to Article 119 of the Defense (Emergency) Regulations of 1945.<sup>106</sup>

### *B. Practice of Demolition*

Demolitions have been utilized to varying degrees since the occupation of the West Bank and Gaza in 1967. The measure has been used more frequently in times of high tension.<sup>107</sup> In the years following the occupation, the first *Intifada* of the late 1980s and the *Al-Aqsa Intifada*, beginning in September 2000, there has been a marked increase in the use of the demolition practice.<sup>108</sup> This section will examine the mechanics and implementation of that practice.

Soon after the occupation began, Israel began to seal homes as an alternative to the demolition of houses in certain cases.<sup>109</sup> In this practice, doors and windows are cemented or bolted shut, sealing off a room or an entire building.<sup>110</sup> Although homes are not literally demolished, sealing is generally considered to be a form of demolition.<sup>111</sup> Israeli Attorney General Meir Shamgar confirmed in 1971 that in the government's view, "[d]emolitions are of two kinds: (a) actual demolition, or (b) eviction of a person from the building and closing of the building or flat, without destroying it."<sup>112</sup> While not expressly provided for by DER 119, it is accepted that sealing is implicitly permitted as a less severe sanction.<sup>113</sup>

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105. See PLAYFAIR, AL-HAQ, *supra* note 19, at 10.

106. See *id.* at 42–43 (providing examples of demolition orders issued by Israeli military commanders).

107. See COHEN, *supra* note 25, at 97–98.

108. See KRETZMER, *supra* note 6, at 145.

109. See Simon, *supra* note 46, at 7.

110. *Id.*

111. *Id.*

112. Meir Shamgar, *The Observance of International Law in the Administered Territories*, 1 ISR. Y.B. HUM. RTS. 262, 275 (1971). Shamgar later became a justice of the Israeli Supreme Court.

113. See Simon, *supra* note 43, at 7.

Sealing is employed in a variety of situations. According to Attorney General Shamgar, it is used “mainly when there are other inhabitants in the building who have no connection to the offense.”<sup>114</sup> Sealing is also used when demolition cannot be carried out because of the damage to neighboring structures, such as in the case of a single apartment in a larger complex.<sup>115</sup> Finally, this method may be utilized in response to less severe offenses since unlike actual demolition, sealing is potentially reversible.<sup>116</sup>

The Israeli Defense Forces carry out demolition and sealing orders that are issued by military commanders and reviewed by various officials, including the Minister of Defense.<sup>117</sup> Demolition orders are executed using explosives or an armored bulldozer,<sup>118</sup> while sealing is accomplished using brick or metal plates.<sup>119</sup> These operations usually take place under the cover of darkness or during a declared curfew to minimize interference.<sup>120</sup> In the past, no prior notice was provided, although families were sometimes given between a half-hour and two hours to evacuate the home and remove possessions before demolition.<sup>121</sup> Intervention by the Israeli Supreme Court altered this practice,<sup>122</sup> although recent demolitions have again taken place without prior notice.<sup>123</sup>

Following the demolition or sealing, families are prohibited from using the forfeited land in any manner.<sup>124</sup> A “closed area” is often declared, meaning that no one may enter the property for any reason.<sup>125</sup> Additionally, no government assistance is

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114. *Id.*

115. See Martin Carroll, *The Israeli Demolition of Palestinian Houses in the Occupied Territories: An Analysis of Its Legality in International Law*, 11 MICH. J. INT'L L. 1195, 1196 (1990).

116. *Id.*

117. COHEN, *supra* note 25, at 99.

118. See Simon, *supra* note 46, at 7.

119. *Id.*

120. PLAYFAIR, AL-HAQ, *supra* note 19, at 5.

121. *Id.* at 6.

122. See *infra* Part III.D (discussing the Israeli Supreme Court's treatment of the issue).

123. See John Kifner, *Israeli Court Upholds Blowing Up Houses*, N.Y. TIMES, Aug. 7, 2002, at A6.

124. Simon, *supra* note 46, at 7.

125. PLAYFAIR, AL-HAQ, *supra* note 19, at 7.

provided to displaced families, who must instead rely on relatives, neighbors, or international organizations, such as the International Committee of the Red Cross (“ICRC”).<sup>126</sup>

The regulations grant the authority to demolish homes in an area, town, village, quarter, or street that are inhabited by persons suspected of committing violent crimes,<sup>127</sup> thus allowing the demolition of the homes of uninvolved persons who happen to live in an area where unrest has occurred. The Israeli Defense Forces conducted these so-called “neighborhood punishment” demolitions in the early years of the occupation.<sup>128</sup> Israel has, however, limited its application of DER 119 in recent years and no longer demolishes the houses of uninvolved neighbors.<sup>129</sup> Instead, demolition has been reserved for cases in which an attack occurred from a home, or in which an inhabitant of the house was suspected of involvement in a violent offense.<sup>130</sup>

This latter category, however, is still particularly troubling, as the term “inhabitant” has been given a broad definition to include persons who rarely live in a particular house.<sup>131</sup> The house subject to demolition need not be the primary residence of the violent offender; often, it is a family home where an offender previously lived.<sup>132</sup> Prior to 1979, the Israeli Government stated that a nexus was required between the regular occupants of the house and the offense;<sup>133</sup> demolitions were only carried out when the regular occupants were aware of or in some way assisted in the offense.<sup>134</sup> Since that time, however, houses have been demolished in circumstances where the regular occupants were completely unaware of the offender’s actions.<sup>135</sup>

Authorities rarely wait until the individual has been convicted of a crime to carry out the demolition. Most demolitions take place after the inhabitant suspected of engaging in a violent offense has been arrested.<sup>136</sup> Usually, the suspect is simply

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126. *Id.*

127. See COHEN, *supra* note 25, at 96–97; KRETZMER, *supra* note 6, at 146.

128. COHEN, *supra* note 25, at 97.

129. See *id.* at 96; KRETZMER, *supra* note 6, at 162.

130. KRETZMER, *supra* note 6, at 146.

131. See COHEN, *supra* note 25, at 96.

132. *Id.* at 96–97.

133. *Id.*

134. See Simon, *supra* note 46, at 17.

135. *Id.*

136. PLAYFAIR, AL-HAQ, *supra* note 19, at 3.

in custody, sometimes facing charges but often times not.<sup>137</sup> In these cases, demolition takes place in addition to other punishment under the criminal system.<sup>138</sup>

In other cases, demolitions proceed despite the fact that the suspect cannot be found and has therefore not been arrested.<sup>139</sup> Demolitions may even occur following the death of the suspect.<sup>140</sup> In these circumstances, even the death of the alleged perpetrator does not prevent demolition of his family's home.

Additionally, ownership of the house is irrelevant. In some cases, rented houses have been demolished based on the actions of tenants without notice to the landlord.<sup>141</sup> Even buildings owned by UN agencies have been demolished pursuant to DER 119.<sup>142</sup>

The government asserts that the owners of homes that are demolished in error have been compensated upon discovery of the error.<sup>143</sup> A procedure also exists which allows property owners to claim damages for injury to property.<sup>144</sup> This claims process is administered by the military government and is not subject to review by Israeli courts.<sup>145</sup>

It is highly significant that no demolitions have been carried out against Jewish settlers in the West Bank and Gaza or against homes within Israel itself, despite the fact that DER 119 remains in force in Israel as well.<sup>146</sup> The measure has solely been used against Palestinian homes, and only in the West Bank and Gaza.

Furthermore, there has been a distinct lack of uniformity in the application of DER 119 by the military government. The practices referred to in this section are not necessarily followed, and a great deal of discretion remains in the hands of the military commander.<sup>147</sup> Although generalities appear to exist, no clear standards have emerged regarding the severity of the of-

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137. *Id.*

138. KRETZMER, *supra* note 6, at 147.

139. See PLAYFAIR, AL-HAQ, *supra* note 19, at 3.

140. *Id.*

141. See COHEN, *supra* note 25, at 98–99.

142. PLAYFAIR, AL-HAQ, *supra* note 19, at 5.

143. See COHEN, *supra* note 25, at 99.

144. *See id.*

145. *See id.*

146. See Stone, *supra* note 25, at 83.

147. See KRETZMER, *supra* note 6, at 146.

fense, the connection of the suspect to the house, ownership of the property, or the type of demolition carried out.<sup>148</sup>

### *C. Policy Considerations*

Israel justifies this policy of housing demolitions through DER 119, which it claims is a part of pre-occupation law.<sup>149</sup> Regardless of the validity of the Defense (Emergency) Regulations of 1945, this regulation at most *allows* demolitions; it does not *compel* them. Since the occupation began, the policy decision to carry out demolitions has been made by various Israeli governments, and has been subject to great debate.

Proponents of the policy cite its importance as an immediate and forceful form of punishment.<sup>150</sup> They argue that resort to the judicial process would detract from the immediate deterrent effect of the demolition.<sup>151</sup> Indeed most demolitions take place a very short time after the offense, and it cannot be denied that blowing up a house leaves a mark on the minds of neighbors. The demolition results in a “pillar of smoke that everyone sees, hears, and understands.”<sup>152</sup>

Specifically, military officials have cited the effectiveness of the demolition policy in deterring individuals from assisting saboteurs.<sup>153</sup> They argue that the potential punishment for those who indirectly support and assist terrorists is essential to the maintenance of order in the Occupied Territories.<sup>154</sup> Interestingly, this argument seems to advocate the use of collective punishment as an effective deterrent.

The demolition policy also serves the wider purpose of reaffirming Israeli control over the West Bank and Gaza.<sup>155</sup> House demolitions clearly display the power of the Israeli military and

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148. See PLAYFAIR, AL-HAQ, *supra* note 19, at 4–5.

149. See Simon, *supra* note 46, at 15.

150. See COHEN, *supra* note 25, at 100.

151. Simon, *supra* note 46, at 10.

152. *Id.* (quoting former Brigadier General Shlomo Gazit, *The Administered Territories — Policy and Actions*, 204 MA'ARAHOT 25, 37 (1970) (Hebrew)). As a Brigadier General, Gazit was involved in administration of the military government in the early years of the occupation. *Id.* at 10 n.40.

153. See COHEN, *supra* note 25, at 97 (quoting former Brigadier General Shlomo Gazit and former Minister of Defense Moshe Dayan's support of demolitions to maintain order).

154. *Id.*

155. See Simon, *supra* note 46, at 10–11.

demonstrate the response with which unrest will be met. Domestic political considerations also encourage this dramatic show of force.<sup>156</sup>

Defenders of demolition argue that it is a lesser evil than other forms of punishment, which might be required if it were not used. They assert that the use of demolitions is far preferable to death penalty, which is not used by Israel.<sup>157</sup> The demolition of a house is also claimed to be a simply a monetary punishment, and is therefore better than the detention or punishment of a person.<sup>158</sup>

These arguments are flatly rejected by critics who point out that demolition invariably occurs in conjunction with other forms of punishment. Offenders are still detained, convicted, and punished in the judicial system.<sup>159</sup> Demolition, then, represents an additional, extrajudicial punishment that is often not even borne by the offender, but rather by his family or neighbors.

Opponents of the policy also argue that demolitions damage the Palestinian identity.<sup>160</sup> Since Palestinians have historic ties to the land, the forfeiture and demolition of homes is a particularly severe and intrusive form of punishment.<sup>161</sup> This fact, along with the collective nature of the punishment, serves to alienate the Palestinian population and increase, rather than reduce, the level of tension and violence.<sup>162</sup>

Numerous Israeli leaders have, therefore, criticized the policy, including former military leaders.<sup>163</sup> Housing demolitions are a source of great political debate, and have generally been less enthusiastically supported by Israel's Labour governments.<sup>164</sup> Additionally, many leaders are keenly aware of the damage the policy causes to Israel's image in the world community.<sup>165</sup>

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156. *See id.* at 11–12.

157. COHEN, *supra* note 25, at 103.

158. *Id.* at 101 (quoting Professor Alan Dershowitz).

159. *See* PLAYFAIR, AL-HAQ, *supra* note 19, at 3.

160. *See* Simon, *supra* note 46, at 11–12.

161. *See* COHEN, *supra* note 25, at 96.

162. *See id.* at 13.

163. *See id.* at 13–14 (profiling former military leaders who later stated their opposition to the demolition policy).

164. *Id.* at 8.

165. *See id.* at 13 (quoting former Israeli Foreign Minister Abbas Eban).

*D. Israeli Supreme Court*

Prior to 1979, the Israeli Supreme Court was uninvolved in the demolition practice.<sup>166</sup> Demolitions were conducted immediately overnight, and no opportunity existed for the aggrieved party to seek judicial recourse.<sup>167</sup> Thus, the Court had no opportunity to pass judgment on the legality of the practice.

In 1979, sitting as the High Court of Justice, the Israeli Supreme Court received its first demolition case. The facts in *Sakhwill v. Military Commander of Judea and Samaria Region*<sup>168</sup> were favorable to the military government, arguably the reason Israel's Attorney General allowed the petition to reach the Court. The petitioner's son had been arrested for involvement in terrorist activities and had already been convicted by the time the High Court heard the case.<sup>169</sup> In addition, the sanction to be imposed was the sealing of one room in the house that had been directly used in commission of the offense.<sup>170</sup>

In a brief opinion, the Court upheld the demolition order.<sup>171</sup> Thus, the state achieved judicial endorsement of the demolition practice. In addition to confirming that DER 119 was valid law, the Court concluded that contradictory provisions in international humanitarian law did not prevent the military government from exercising its authority under existing local law.<sup>172</sup> This supremacy of local law over substantive international law would become a key aspect of the Court's subsequent rulings.<sup>173</sup>

The next cases heard by the Court represented a gradual broadening of the High Court's acceptance of the demolition practice. The Court's second demolition decision also involved a sealing of the rooms of two individuals who had confessed to

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166. See KRETZMER, *supra* note 6, at 146.

167. See PLAYFAIR, AL-HAQ, *supra* note 19, at 5–6.

168. *Sakhwill et al. v. Military Commander of Judea and Samaria Region*, 34(1) P.D. 464 (1979), *summarized in English in* 10 ISR. Y.B. HUM. RTS. 345 (1980).

169. *Id.* at 346.

170. KRETZMER, *supra* note 6, at 148.

171. See *id.*

172. *Sakhwill*, 34(1) P.D. at 464, *quoted in* Simon, *supra* note 46, at 28.

173. See KRETZMER, *supra* note 6, at 148. See also Simon, *supra* note 46, at 46.



serious offenses.<sup>174</sup> Again, the premises were connected to the offense.<sup>175</sup> A subsequent case also involved the sealing of a house, but without any connection between the offense and the premises.<sup>176</sup> This progression continued as the Court upheld the actual demolition of the houses of families who had confessed to murder<sup>177</sup> and the demolition of houses of persons who had confessed to terrorist acts.<sup>178</sup> The Court also rejected the argument that the house must be connected to the offense or that the other inhabitants must be aware of the terrorist activity.<sup>179</sup>

Additionally, the Israeli Supreme Court accepted the military's broad definition of the term "inhabitant" for purposes of DER 119.<sup>180</sup> It upheld the demolitions of parents' homes when the offenders, their sons, had lived away at school most of the year.<sup>181</sup> The Court later stated that residence "from time to time" was sufficient to establish residence for purposes of the regulation.<sup>182</sup>

Families with reason to believe that their homes would be demolished began filing early petitions challenging demolition orders and were able to seek legal intervention prior to the execution order by military authorities.<sup>183</sup> Often, families filed petitions after a family member had been arrested for a serious offense and they suspected that demolition would be forthcoming.<sup>184</sup> In 1987, military authorities stated their intention to grant administrative hearings prior to carrying out demolition

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174. *Khamed v. IDF Commander in Judea and Samaria* 35(3) P.D. 223 (1981), *discussed in* KRETZMER, *supra* note 6, at 148.

175. *Id.*

176. *Khamamara v. Minister of Defense*, 36(2) P.D. 755 (1982), *discussed in* KRETZMER, *supra* note 6, at 148.

177. *See* *Khamri v. Commander in Judea and Samaria*, 36(3) P.D. 439 (1982), *summarized in English in* 17 ISR. Y.B. HUM. RTS. 314 (1987).

178. *See* *Muzlakh v. Minister of Defense*, 36(4) P.D. 610 (1982).

179. *See* KRETZMER, *supra* note 6, at 154.

180. *See id.* at 154–55.

181. *See, e.g., Khamri*, 36(3) P.D. at 442, *summarized in English in* 17 ISR. Y.B. HUM. RTS. 314 (1987).

182. *Jabar v. Officer Commanding Central Command*, 41(2) P.D. 522, 525 (1987), *summarized in English in* 18 ISR. Y.B. HUM. RTS. 252, 252–253 (1988).

183. *See* KRETZMER, *supra* note 6, at 155 (discussing judicial intervention prior to 1989).

184. *See, e.g., Sakhawill*, 34(1) P.D. at 464, *quoted in* *Simon*, *supra* note 43, at 28; *Khamed*, 35(3) P.D. at 223, *discussed in* KRETZMER, *supra* note 6, at 155.

orders “except in severe and exceptional cases.”<sup>185</sup> This policy, however, was not followed in all cases.<sup>186</sup>

Finally, the Association for Civil Rights in Israel intervened, filing a general petition requesting hearings in all demolition cases.<sup>187</sup> The Association argued that Israeli administrative law required both a hearing and the opportunity to petition the High Court of Justice to appeal the hearing.<sup>188</sup> The Court agreed with this proposition, and in *Association for Civil Rights in Israel v. Commander-in-Chief of the Central Region*<sup>189</sup> ruled that both hearing and opportunity to petition were required. Furthermore, the Court rejected the military request to maintain an exception in severe cases, declaring instead that the military could temporarily seal houses in such cases, pending judicial review.<sup>190</sup>

Since this 1989 ruling, the Court has routinely reviewed petitions pursuant to this ruling.<sup>191</sup> This judicial oversight has reduced the overall number of demolition orders issued by military commanders.<sup>192</sup> Nonetheless, the Court has interfered with very few of the demolition orders that it has reviewed.<sup>193</sup> Generally the Court limited its review to the procedural legality of the decision to issue a demolition order, without addressing the merits of that decision.<sup>194</sup> Other issues have been dismissed. For example, the Court has rejected arguments challenging the

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185. See KRETZMER, *supra* note 6, at 155 (citing *Zaid v. IDF Commander in Judea & Sumaria*, 1987(2) Takdin-Elyon 53).

186. See *id.* at 156.

187. See *id.*

188. *Id.*

189. *Association for Civil Rights in Israel v. Commander-in-Chief of the Central Region*, 43(2) P.D. 529, summarized in *English* in 23 ISR. Y.B. HUM. RTS. 294, 296 (1993).

190. *Id.* One exception was allowed, although it is not applicable to punitive demolitions. The Court ruled that hearing could be bypassed in “operational military circumstances in which judicial review is incompatible with conditions of place and time or the nature of the circumstances.” *Id.* at 540–41. See generally *supra* text accompanying note 90-92 (discussing the three reasons housing demolitions are utilized.)

191. See Simon, *supra* note 46, at 32.

192. See *id.* at 36.

193. See KRETZMER, *supra* note 6, at 157.

194. *Id.* at 158.

effectiveness of demolition as a deterrent.<sup>195</sup> Thus, military commanders were left with considerable discretion despite the opportunity for judicial review.

One of the rare cases in which the Court did review the decision to issue a demolition order occurred in *Turkmahn v. Minister of Defense*.<sup>196</sup> In that case, the perpetrator was convicted of murder, and authorities issued an order to demolish the house where he lived with his mother, seven unmarried siblings, and a married sibling's family.<sup>197</sup> Although demolitions had been upheld in cases with similar factual backgrounds,<sup>198</sup> for the first time, the Court adopted a proportionality test.<sup>199</sup> It found that demolition of the entire house would be a disproportionate punishment, and ordered that only two of three rooms in the house could be sealed.<sup>200</sup>

Experts have been puzzled over the Court's sudden interventionist approach and its distinction between nuclear family and a sibling's separate family.<sup>201</sup> The decision, however, generally restricted demolitions to the home of an offender's nuclear family.<sup>202</sup> Moreover, authorities became more likely to seal individual rooms in multi-unit buildings than to destroy the entire building.<sup>203</sup>

The relative restraint created by judicial review has suffered greatly as the *Al-Aqsa Intifada* has progressed. Military authorities have begun to bypass the requirement of hearing and

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195. See generally *Aga v. IDF Commander in Gaza*, 44(1) P.D. 536 (1989), summarized in *English in 23 ISR. Y.B. HUM. RTS.* 330 (1993). Arguments based on substantive international law have likewise been rejected, as will be discussed in the following parts of this Article.

196. *Turkmahn v. Minister of Defense*, 48(1) P.D. 217 (1991).

197. See *id.*

198. See KRETZMER, *supra* note 6, at 160.

199. See Simon, *supra* note 46, at 35.

200. See *Turkmahn*, 48(1) P.D. at 220–21.

201. See Simon, *supra* note 46, at 36–37; KRETZMER, *supra* note 6, at 160–61.

202. See Simon, *supra* note 46, at 36.

203. See KRETZMER, *supra* note 6, at 161. The Israeli military is viewed as being conscious of its image and concerned about maintaining its legitimacy. Because of this concern, it seeks to avoid criticism from the High Court of Justice and generally avoids actions that it believes the Court would not condone. See Simon, *supra* note 46, at 37.

appeal, and instead resumed immediate demolitions.<sup>204</sup> A judicial challenge to this practice by 43 families proved unsuccessful.<sup>205</sup> In a 2002 decision the Israeli Supreme Court held that because Israel is “in the midst of combat activity” the notice and appeal requirement introduced in *Association for Civil Rights in Israel* may be suspended.<sup>206</sup> Suspension is warranted when “there is a serious fear that awarding the right of hearing will endanger the lives of soldiers and endanger the action itself.”<sup>207</sup> Days later, the Court issued a decision stating that in such circumstances, petitioners should make their case directly to the military commander rather than the Court.<sup>208</sup> It is uncertain whether the Court will resume judicial review of demolition cases in the future.

### *E. Statistics*

It is difficult to compile accurate statistics regarding punitive house demolitions by the Israeli Defense Forces for a number of reasons. First, government figures and those compiled by non-governmental organizations have historically differed, indicating that these groups are inconsistent in how or what they count.<sup>209</sup> Second, access to areas of the West Bank and Gaza is frequently restricted, making verification of demolitions difficult for relief workers, human rights advocates, and non-governmental personnel.<sup>210</sup> Third, substantial portions of vil-

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204. See PALESTINIAN CENTRE FOR HUMAN RIGHTS, FACT SHEET: CRIMES AGAINST HOUSING AND AGRICULTURE (2002); B’Tselem, *House Demolitions — Statistics*, at [http://www.btselem.org/English/House\\_Demolitions/Statistics.asp](http://www.btselem.org/English/House_Demolitions/Statistics.asp) (last visited Mar. 11, 2003).

205. Nahil Adal Saadu Amar et al. v. IDF Commander in the West Bank, HCJ 6696/02 (Aug. 5, 2002). See also Kifner, *supra* note 123, at A6; Dan Izenberg, *Court Approved Destruction of Terrorist’s Families Homes*, JERUSALEM POST, Aug. 7, 2002, at 1.

206. *Amar*, 6696/02, ¶ 2. See also Kifner, *supra* note 123, at A6.

207. *Amar*, 6696/02, ¶ 5.

208. Mahmud Aida Aadi Salah A Din v. IDF Commander of the West Bank, 6868/02 (Aug. 8, 2002).

209. See SHANE DARCY, AL HAQ, ISRAEL’S PUNITIVE HOUSE DEMOLITION POLICY: COLLECTIVE PUNISHMENT IN VIOLATION OF INTERNATIONAL LAW 8 (2003), available at <http://www.alhaq.org/publications/index.htm> (last visited May 31, 2003).

210. Jeff Halper, *The Key to Peace: Dismantling the Matrix of Control*, at <http://www.icahd.org> (last visited May 12, 2003).

lages or neighborhoods were demolished in the early years of the occupation, creating a situation where counting individual homes was not feasible.<sup>211</sup> Finally, the distinction between houses demolished for punitive reasons and those demolished in security operations or for building permit violations is sometimes difficult to survey and is often ignored by mass media sources or even non-governmental organizations. Thus, figures reported by these entities may include houses demolished for differing reasons.

Accurate accounting for the early years of the occupation is the most difficult. For example, the Israeli Government reported that 1,265 houses were demolished between 1967 and 1981.<sup>212</sup> Meanwhile, the ICRC found that 1,224 houses were demolished between 1967 and 1978.<sup>213</sup>

In more recent years, figures show that a significant number of demolitions were carried out between 1988 and 1991 at the height of the first *Intifada*.<sup>214</sup> Demolitions were used sparingly after the Oslo accords and at the beginning of the *Al-Aqsa Intifada*.<sup>215</sup> Recent suicide bombings, however, have resulted in a substantial increase in punitive demolitions with twenty houses demolished between August 2 and August 9, 2002.<sup>216</sup> Figure 1 is one non-governmental organization's documentation of demolitions and sealings pursuant to DER 119 since the beginning of the first *Intifada* in 1987.

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211. See Darcy, *supra* note 209, at 8.

212. Kretzmer, *supra* note 6, at 145.

213. Darcy, *supra* note 209, at 8.

214. Kretzmer, *supra* note 6, at 145.

215. See *infra* Figure 1.

216. Jonathan Steele, *Israeli 'Restraint' Still Means Terror for the Palestinians*, GUARDIAN, Aug. 9, 2002, at 16. See also John Kifner, *Militants Reject Policy on Attacks in Israel*, N.Y. TIMES, Aug. 14, 2002.

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Figure 1: Demolitions and Sealings from 1987 until 2002<sup>217</sup>

Year	Complete Demolitions	Partial Demolitions	Complete Sealings	Partial Sealings
1987*	1	0	N/A	N/A
1988	125	24	39	26
1989	144	18	76	27
1990	107	11	97	11
1991	46	4	34	20
1992	8	2	25	16
1993	1	2	18	15
1994	0	1	4	3
1995	0	0	1	0
1996	11	0	0	0
1997	6	0	2	0
1998	0	0	0	0
1999	0	0	0	0
2000	0	0	0	0
2001	8	1	0	0
2002	187	1	0	0
2003†	89	0	3	0
<b>Totals</b>	<b>733</b>	<b>64</b>	<b>299</b>	<b>118</b>

\* Beginning December 9, 1987.

† Through April 29, 2003.

Additionally, another non-governmental organization found that only 8.4% of homes demolished between 1981 and 1991 were owned by the offender.<sup>218</sup> The remaining homes were owned by family members, third parties, or were rented.<sup>219</sup> Figure 2 shows the ownership of homes in cases before the Israeli Supreme Court through 1989.

217. B'Tselem, *supra* note 204.

218. LYNN WELCHMAN, A THOUSAND AND ONE HOMES: ISRAEL'S DEMOLITION AND SEALING OF HOUSES IN THE OCCUPIED PALESTINIAN TERRITORIES 6 (1993).

219. *Id.*

Figure 2: Ownership of 145 homes in adjudicated cases<sup>220</sup>

	Offender	Parents	Siblings	Relative	Rental	Unknown
Number	7	69	16	9	6	38
Percent	4.8	47.6	11.0	6.2	4.1	26.2

Finally, Israeli citizens make up approximately 10% of the population in the Occupied Territories.<sup>221</sup> Yet, only Palestinian homes have been demolished pursuant to DER 119.<sup>222</sup> The measure has not been used against Jews living in the West Bank and Gaza, nor has it been used inside of Israel, where DER 119 also remains in force.<sup>223</sup>

#### IV. HOUSE DEMOLITIONS AS A VIOLATION OF HUMAN RIGHTS LAW

This Part analyzes the legality of punitive demolitions under international human rights law. Human rights law is concerned with the relationship of the state to its own people.<sup>224</sup> Thus, it is often overlooked in favor of humanitarian law, which is the law of armed conflict, when discussing the West Bank and Gaza.<sup>225</sup> However, the implications of humanitarian law are still relevant and important to the dialogue. In fact, many scholars consider humanitarian law to be a branch of human rights law.<sup>226</sup>

Human rights law is sometimes assumed to be inapplicable in situations of armed conflict. This assumption is based on the fact that territorial or jurisdictional issues may limit the application of human rights law, and that derogations from interna-

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220. See Simon, *supra* note 46, at 17.

221. Online Newshour, *Israeli-Palestinian Conflict* (the website of the Newshour with Jim Lehrer), at [http://www.pbs.org/newshour/bb/middle\\_east/conflict/map.html](http://www.pbs.org/newshour/bb/middle_east/conflict/map.html) (last visited May 21, 2003).

222. See PLAYFAIR, AL-HAQ, *supra* note 19, at 10–11.

223. *Id.*

224. See, e.g., International Covenant on Civil and Political Rights, art. 2(1), Dec. 19, 1966, 999 UNT.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

225. See Fourth Geneva Convention, *supra* note 39.

226. See COHEN, *supra* note 25, at 1–3. But see JEAN PICTET, HUMANITARIAN LAW AND THE PROTECTION OF WAR VICTIMS 13 (1975) (stating that human rights is a branch of humanitarian law).

tional instruments may minimize their protection during periods of conflict.<sup>227</sup> Still, the prevailing view is that human rights law, when applicable, is available to supplement humanitarian law.<sup>228</sup> This argument is particularly persuasive during prolonged periods of occupation.<sup>229</sup> This Part will examine the application of human rights law, analyze DER 119 under it, and discuss the enforcement of human rights provisions.

### *A. Application*

The most significant instrument in international human rights law is the International Covenant on Civil and Political Rights (“ICCPR”).<sup>230</sup> This instrument was signed by Israel on December 19, 1966, and was ratified on October 3, 1991.<sup>231</sup> The instrument took effect with regard to Israel on the date it was ratified.

Some scholars dispute the application of the ICCPR to the conflict regions, arguing that this treaty only governs the relationship of a state to its own nationals and not those in occupied territories.<sup>232</sup> While true in some situations, this argument does not hold true in the West Bank and Gaza. Article 2(1) of the ICCPR states that “[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals in its territory and subject to its jurisdiction the rights recognized in the present Covenant.”<sup>233</sup> The nature of the prolonged occupation and Israel’s insistence that no other nation exercised sovereign power in the territories prior to the occupation lead to the conclusion that the territories should be considered Israeli territory for purposes of Article 2(1). In any event, Palestinians living in the West Bank and Gaza are clearly subject to the jurisdiction

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227. COHEN, *supra* note 25, at 4–5.

228. *Id.* at 3–4.

229. *Id.*

230. ICCPR, *supra* note 224.

231. *Id.* (Ratification Index).

232. See, e.g., H. Meyrowitz, *Le Droit de la Guerre et les Droits de l’Homme*, 88 REVUE DU DROIT PUBLIC ET DE LA SCIENCE POLITIQUE EN FRANCE ET A L’ETRANGER 1059, 1104 (1972) (suggesting that human rights law does not protect enemy nationals).

233. ICCPR, *supra* note 224, art. 2(1).



of the Israeli military government<sup>234</sup> and are thus entitled to protection of the rights enumerated in the ICCPR.

The ICCPR provides that a State Party may derogate from its obligations under the treaty in a "time of public emergency which threatens the life of the nation."<sup>235</sup> Derogation is only permissible "to the extent strictly required by the exigencies of the situation."<sup>236</sup> Furthermore, no derogation is permitted with regard to certain enumerated articles,<sup>237</sup> and notice of derogation must be given to all other States Parties.<sup>238</sup>

Israel submitted notice of derogation to the Secretary-General of the United Nations on October 3, 1991, the same day that it ratified the ICCPR.<sup>239</sup> The notice stated that a state of emergency had existed in Israel since its independence in 1948 due to "threats of war, of actual armed attacks, and campaigns of terrorism resulting in the murder of and injury to human beings."<sup>240</sup> In order to defend itself and protect life and property, Israel stated that powers of arrest and detention inconsistent with ICCPR Article 9 were required.<sup>241</sup> The notice asserted that Israel would derogate to the extent that measures it utilized were inconsistent with Article 9.<sup>242</sup> No further derogation was made.

With the exception of Article 9, the ICCPR applies to Israel. Thus, these same provisions apply in areas subject to its jurisdiction, including the West Bank and Gaza. The next section will examine whether punitive demolitions violate these provisions.

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234. *See supra* Part II (describing the legal regime in the West Bank and Gaza).

235. ICCPR, *supra* note 224, art. 4(1).

236. *Id.*

237. No derogation is permitted from articles 6, 7, 8(1), 8(2), 11, 15, 16 and 18. *Id.* art. 4(2).

238. *Id.* art. 4(3).

239. *Notice of Derogation submitted by Israel to the Secretary-General*, Oct. 3, 1991.

240. *Id.*

241. *Id.*

242. *Id.* Article 9 generally deals with powers of arrest and detention. ICCPR, *supra* note 224, art. 9.

*B. Analysis*

The ICCPR is considered to be a strong statement of individual rights.<sup>243</sup> Not surprisingly, though, it contains no express prohibition against housing demolitions.<sup>244</sup> However, it can be reasonably construed from the language of several articles of the ICCPR that the demolition practice is contrary to its terms.

The most obvious starting point is Article 17. It states that “[n]o one shall be subjected to arbitrary or unlawful interference with his . . . home . . . .”<sup>245</sup> This article also guarantees protection of the law from such interference.<sup>246</sup> Still, Article 17 fails to offer significant protection. So long as demolitions are pursuant to DER 119, they are not unlawful. The argument that demolitions are carried out arbitrarily would also likely fail as they are based on the reasonable suspicion of the military commander.<sup>247</sup>

A stronger argument against demolitions can be made under Article 7 of the ICCPR. This article states that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”<sup>248</sup> Article 7 is considered one of the core rights protected under the human rights scheme and cannot be derogated from in any circumstances.<sup>249</sup> It is entirely reasonable that the demolition of a person’s home can be considered a form of cruel, inhuman or degrading punishment or treatment.<sup>250</sup> This practice leaves families without shelter, and frequently personal possessions are destroyed in the process as well.<sup>251</sup> Additionally, in over 90% of cases, demolitions are imposed on a homeowner who is not the offender.<sup>252</sup>

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243. See INTERNATIONAL HUMAN RIGHTS IN CONTEXT (Henry Steiner & Philip Alson eds., 2d ed. 2000); Brian Farrell, *South Africa and Affirmative Action: The Legality of the Employment Equity Act Under the International Covenant on Civil and Political Rights*, 5 TRINITY COL. L. REV. 202, 212 (2002).

244. See generally ICCPR, *supra* note 224, art. 9.

245. *Id.* art. 17(1).

246. *Id.* art. 17(2).

247. KRETZMER, *supra* note 6, at 145–46.

248. ICCPR, *supra* note 224, art. 7.

249. See *id.* art. 4(2) (prohibiting derogation from Article 7).

250. KRETZMER, *supra* note 6, at 147.

251. See, e.g., Selçuk & Asker v. Turkey, 1998-II Eur. Ct. H.R. 477, ¶ 74.

252. See WELCHMAN, *supra* note 218, at 6.

A precedent exists for this conclusion. Article 3 of the European Convention, like Article 7 of the ICCPR, prohibits inhuman or degrading treatment or punishment.<sup>253</sup> As with its ICCPR counterpart, Article 3 is also nonderogable.<sup>254</sup> The European Court of Human Rights (“European Court”) has held that the punitive demolition of an individual’s house in certain circumstances constitutes inhuman punishment.<sup>255</sup> This determination depends on the circumstances of the case.<sup>256</sup>

The European Court has made clear that the prohibition against inhuman treatment is one of the most fundamental of rights.<sup>257</sup> States are absolutely compelled to respect this norm “[e]ven in the most difficult of circumstances, such as the fight against organised terrorism and crime.”<sup>258</sup> Presumably, this requirement would apply to situations of armed conflict as well.

### C. Enforcement

Israel follows the English common law rule regarding the relationship between domestic courts and international law.<sup>259</sup> While customary international law is enforceable in domestic courts, conventional international law is not unless incorporated into domestic law.<sup>260</sup> The ICCPR has not been incorporated into Israeli domestic law and cannot, therefore, be enforced in Israel’s courts. Likewise, no international tribunal has the competence to directly enforce the provisions of the covenant in Israel.<sup>261</sup> Article 2(3)(a) requires each State Party to ensure that a person whose rights are violated “shall have an effective remedy,”<sup>262</sup> this lack of a forum may in itself be a violation of the ICCPR.

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253. European Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 3, 1953, art. 3, 213 UNT.S. 221, 224.

254. *Id.* art. 15(2), 213 U.N.T.S. at 232.

255. *See, e.g.*, *Selçuk & Asker v. Turkey*, 1998-II Eur. Ct. H.R. 477, ¶ 74.

256. *Id.* ¶ 76. The Court has taken into account such factors as the age of the occupants, the economic situation of the family, the motivation of government forces, and assistance available following demolition. *Id.* ¶ 77.

257. *Id.* ¶ 75.

258. *Id.*

259. KRETZMER, *supra* note 6, at 31.

260. *See supra* text accompanying notes 71-72.

261. *See* INTERNATIONAL HUMAN RIGHTS IN CONTEXT, *supra* note 243, at 987.

262. ICCPR, *supra* note 224, art. 2(3)(a).

An important point should be made regarding enforcement. The enforceability of a provision of international law is distinct from the applicability of the provision.<sup>263</sup> The inability to enforce Article 7 of the ICCPR does not alter the conclusion that it is applicable. A violation of Article 7 remains a violation of Article 7, despite the lack of enforcement. While true that on a personal level an individual has no available remedy,<sup>264</sup> on a higher level, the political and moral effect of recognition of the violation should not be dismissed.

#### V. HOUSE DEMOLITIONS AS A VIOLATION OF HUMANITARIAN LAW

The strongest arguments against housing demolitions are made under international humanitarian law. Generally, humanitarian law applies in situations of armed conflict. One subset of humanitarian law is the law of belligerent occupation.

The humanitarian law relevant to the discussion of housing demolitions can be found in two instruments, the Hague Regulations and the Fourth Geneva Convention.<sup>265</sup> Israel applies the Hague Regulations in domestic law but does not consider demolitions pursuant to DER 119 to violate this body of law.<sup>266</sup> The Fourth Geneva Convention provides the stronger legal basis against demolitions, but Israel denies its application.<sup>267</sup> This Part will first examine the application of the Hague Regulations and then consider applicability of the Fourth Geneva Convention.

##### A. Hague Regulations

The conventions signed at The Hague in 1907 represent one of the most significant events in the development of humanitarian law.<sup>268</sup> Of interest to this discussion are the regulations annexed to the fourth convention,<sup>269</sup> commonly known as the

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263. KRETZMER, *supra* note 6, at 34–35.

264. *See id.*

265. Simon, *supra* note 43, at 46–47.

266. *Id.* at 47.

267. *Id.* at 48.

268. WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 2 (2001).

269. *See* Hague Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, U.S.T.S. 539, 2 A.J.I.L. Supp. 90 (entered into force Jan. 26, 1910) [hereinafter Hague Convention (IV)]

Hague Regulations.<sup>270</sup> The Regulations contain rules pertaining to the authority of an army over the territory of a hostile state, the foundation of the law of belligerent occupation.<sup>271</sup>

### 1. Application of Regulations by the Israeli Supreme Court

Following the occupation, the Israeli Supreme Court initially avoided ruling on the applicability of the Hague Regulations to the West Bank and Gaza.<sup>272</sup> When the Court finally did address the issue, the Court ruled that the Hague Regulations and Geneva Conventions were both conventional law and as such were unenforceable in Israeli courts.<sup>273</sup> This ruling ignored the near-universal view that the Hague Regulations were considered customary law, a fact that was immediately pointed out by Israel's academic community.<sup>274</sup>

Eventually, the Court corrected its error. In *Ayyub v. Minister of Defense*,<sup>275</sup> the Court recognized the status of the Hague Regulations as customary international law. As customary, rather than conventional, international law, the Regulations would be applicable and enforceable in Israel's domestic courts.

This pronouncement forced the Court to address a second issue: the status of the West Bank and Gaza. According to Section III of the Hague Regulations, the regulation protections apply to territory *occupied* by a hostile army.<sup>276</sup> The Court answered this question directly, holding that Israeli military's re-

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270. Hague Regulations, *supra* note 39, at Annex.

271. *Id.*

272. See, e.g., *Christian Society for the Holy Places v. Minister of Defense*, 26(1) P.D. 574 (1971), summarized in *English* in 2 ISR. Y.B. HUM. RTS. 354–56 (1972); *Electricity Corporation for Jerusalem District, Ltd. v. Minister of Defense* 27(1) P.D. 124 (1972), summarized in *English* in 5 ISR. Y.B. HUM. RTS. 381–83 (1975).

273. *Hilu v. State of Israel*, 27(2) P.D. 169, 180 (1972), summarized in *English* in 5 ISR. Y.B. HUM. RTS. 384 (1975) (commonly referred to as the *Rafiah Approach Case*). See generally *supra* text accompanying notes 71–72 (explaining the distinction between customary and conventional international law in the Israeli system).

274. See generally Yoram Dinstein, *The Judgment in the Rafiah Approach Case*, 3 TEL AVIV U.L. REV. 934 (1974) (Hebrew). Dinstein's article is credited with almost single-handedly changing the Court's view on this issue. See KRETZMER, *supra* note 6, at 36.

275. *Ayyub v. Minister of Defense*, 33(2) P.D. 113 (1978), summarized in *English* in 9 ISR. Y.B. HUM. RTS. 337, 341 (1979).

276. See Hague Regulations, *supra* note 39, § III.

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lationship to the territories was that of an “occupying power.”<sup>277</sup> Thus, the Court concluded that the protections of the Hague Regulations applied in the territories and were domestically enforceable.<sup>278</sup>

The Court’s application of the Hague Regulations with regard to housing demolitions, however, has essentially been limited to invocation of Article 43.<sup>279</sup> This article states that:

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.<sup>280</sup>

This provision, along with a similar clause in the Fourth Geneva Convention, formed the basis of the Court’s “local law doctrine.”<sup>281</sup>

Following the occupation, the military government issued a proclamation concerning the continued validity of pre-existing law in the territories.<sup>282</sup> One effect of this proclamation was the validation of DER 119, the basis for housing demolitions.<sup>283</sup> When confronted with challenges to DER 119 based on substantive provisions of the Hague Regulations, the Court has simply declared the primacy of local law over such provisions, presumably pursuant to Article 43.<sup>284</sup>

As a result, the Israeli Supreme Court has not analyzed housing demolitions under the substantive provisions of the Hague Regulations. Rather, it has used Article 43 to justify the continued validity of DER 119.<sup>285</sup> The Court has made no attempt to explain the apparent inconsistency between application of

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277. *Ayyub*, 33(2) P.D. at 117, summarized in *English* in 9 ISR. Y.B. HUM. RTS. 337, 339.

278. *See id.* at 341.

279. *See Simon*, *supra* note 46, at 46–47.

280. Hague Regulations, *supra* note 39, art. 43.

281. *Simon*, *supra* note 46, at 46–47.

282. *See supra* Part II.A.3. (discussing the preservation of pre-occupation law).

283. *See supra* Part III.A. (explaining the legal justification for demolitions).

284. *Simon*, *supra* note 46, at 47.

285. *See Jabar v. Officer Commanding Central Command*, 41(2) P.D. 522, 525 (1987), summarized in *English* in 18 ISR. Y.B. HUM. RTS. 252–53 (1988).

one article and the disregard for other substantive articles.<sup>286</sup> It appears, then, that arguments made under other articles of the Hague Regulations will continue to be dismissed without being fully addressed.

## 2. Analysis of the Regulations

Generally, the Hague Regulations are not as protective as the provisions of the Fourth Geneva Convention. However, strong arguments can be made under the regulations, and their acceptance as customary international law is significant.<sup>287</sup> It is also of great importance that the Israeli Supreme Court has recognized the application and enforceability of the Hague Regulations, regardless of the use of the local law doctrine to limit application of the Regulations with regard to housing demolitions.<sup>288</sup>

In utilizing the local law doctrine, the Israeli Supreme Court has not addressed Article 43 directly.<sup>289</sup> Several academic writers, however, have suggested that the Article 43 requirement that existing law be respected preempts other substantive provisions of the regulations.<sup>290</sup> This argument runs contrary to the intent and purpose of the Hague Convention as a whole. The requirement that the occupier respect existing law is intended to *protect* the population of the occupied territory, not bestow the occupier with draconian powers it would otherwise lack.<sup>291</sup> It is significant that with respect to laws, the drafters of the regulations chose the term “respect” rather than to “maintain” or to “enforce” laws previously in force. Even if one were to concede that there is an absolute *obligation to respect* DER 119 as pre-existing law regardless of contrary provisions, Article 43 certainly does not compel the *use* of the law, which runs contrary to other substantive provisions of the regulations.

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286. However, several academics, particularly Professor Julius Stone, have attempted to explain the inconsistency. *See, e.g.*, Stone, *supra* note 25, at 97.

287. *See supra* text accompanying notes 273–74; *see also infra* text accompanying notes 396–398 (noting the near-universal view that the Hague Regulations represent customary international law).

288. *See* Simon, *supra* note 46, at 46–47.

289. *See supra* text accompanying notes 280, 282, & 285.

290. *See, e.g.*, Stone, *supra* note 25, at 96–97.

291. *See* Simon, *supra* note 46, at 52–53.

Additionally, Article 50 of the Hague Regulations prohibits collective punishment. It states that “[n]o 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.”<sup>292</sup> This article has been broadly characterized as a “principle of individual responsibility.”<sup>293</sup>

The protection of Article 50 applies to individuals who are not jointly and severally responsible for an offense. Clearly in many circumstances, individuals who have no knowledge of or connection to the illegal activity are punished along with the offender despite their innocence.<sup>294</sup> It cannot be denied that in some cases, parents, family members, or friends may be aware of the offender’s illegal activity and actively assist, tacitly support, or willingly ignore the conduct.<sup>295</sup> However, even if these individuals might be jointly and severally responsible, the protections of Article 50 are not denied to others who are innocent.<sup>296</sup> Moreover, military officials do not attempt to make a determination on the complicity of other residents of a house that is to be demolished.<sup>297</sup>

The use of the term “population” in Article 50 may lead to the conclusion that collective punishment is prohibited only in situations where a wide group of people is punished, such as when all residents of a village are made to suffer for the actions of one resident. However, such a reading is inconsistent with the purposes of the Hague Convention, which seek to preserve the “interests of humanity.”<sup>298</sup> Demolitions sometimes leave

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292. Hague Regulations, *supra* note 39, art. 50.

293. THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 47 (1991).

294. *See supra* Figure 2 (showing statistics regarding ownership of demolished houses).

295. *Id.*

296. *See* Simon, *supra* note 46, at 55–56.

297. *See id.* at 56.

298. Hague Convention (IV), *supra* note 269, at pmb1. Under international law, when a treaty’s terms are inconclusive, they should be interpreted in light of the treaty’s context and purpose. *See* Vienna Convention on the Law of Treaties, May 23, 1969, art. 31(1), 1155 UNT.S. 331, 340 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention].



dozens of people homeless;<sup>299</sup> surely a family relationship should not dilute these interests.

In response to the argument that housing demolitions might not be considered collective punishments, one must then turn to the Martens Clause, at the beginning of the Convention. The clause provides that:

Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.<sup>300</sup>

Thus, it cannot simply be argued that no prohibition against housing demolitions exists in the enumerated articles of the Regulations. Instead, this clause requires further recourse to state practice, the laws of humanity, and public conscience. Conceivably, these sources can be found in conventional international law, including the Geneva Conventions.<sup>301</sup>

The prohibition against collective punishment should be understood to include non-individual punishment that extends to the offender's family.<sup>302</sup> The case for protection of family is bolstered by Article 46 of the Regulations, which states that "[f]amily honour and rights, the lives of persons, and private property . . . must be respected."<sup>303</sup> Such values must be considered when attempting to discern the correct definition of the term "population."<sup>304</sup> This article goes on to declare that "[p]rivate property cannot be confiscated,"<sup>305</sup> another indication of the protection afforded by the regulations.

The sanctity of private property is most strongly stated in an unlikely place. Article 56 declares that the "property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property,

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299. See Simon, *supra* note 46, at 53.

300. Hague Convention (IV), *supra* note 269.

301. See Simon, *supra* note 46, at 53.

302. *Id.* at 55.

303. Hague Regulations, *supra* note 39, art. 46.

304. See Vienna Convention, *supra* note 298, art. 31(2)(b).

305. Hague Regulations, *supra* note 39, art. 46.

*shall be treated as private property.*<sup>306</sup> This treatment as private property means that “[a]ll seizure of, *destruction* or willful damage done to institutions of this character . . . *is forbidden*. . . .”<sup>307</sup> This language demonstrates that private property deserves the utmost protection. Places of worship, educational institutions, and museums are protected in the Regulations by elevating them to the same category as private property.

It is universally agreed that the Hague Regulations apply to the West Bank and Gaza, and this fact has been confirmed by the Israeli Supreme Court.<sup>308</sup> The Court has also declared that the Regulations are enforceable in domestic courts.<sup>309</sup> This recognition by the Court is of incredible significance as it eliminates any questions regarding application.

The Court has, of course, used the local law doctrine to limit application with regard to housing demolitions.<sup>310</sup> This limitation, however, is not soundly based in the law of the Hague Regulations and only affects enforcement in Israeli courts. Again, while affecting individual petitions arising from the territories, this limitation does not affect the terms of the Regulations. Although the Israeli Supreme Court has a monopoly on enforcement of the Hague Regulations in the West Bank and Gaza, the Court does not have a monopoly on the definitive interpretation of the Regulations.<sup>311</sup>

#### *B. Fourth Geneva Convention*

The Geneva Conventions of 1949 offer the most extensive statement of the laws of armed conflict. The Conventions attempted to redress weaknesses in the humanitarian law regime that became apparent during World War II.<sup>312</sup> As a result, the provisions of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War<sup>313</sup> (“Fourth Geneva Conven-

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306. *Id.* at art. 56 (emphasis added).

307. *Id.* (emphasis added).

308. *See* Simon, *supra* note 46, at 19.

309. *Id.* at 20.

310. *Id.* at 47–48.

311. *Id.* at 52–53.

312. *See* JEAN PICTET, COMMENTARY — IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 3–4 (Major Ronald Griffin & Mr. C.W. Dumbleton trans., 1958).

313. Fourth Geneva Convention, *supra* note 39.

tion”) are more detailed and comprehensive than the civilian protections contained in the Hague Regulations.<sup>314</sup>

Unlike the Hague Regulations, the Fourth Geneva Convention is not a universally accepted statement of customary international law.<sup>315</sup> However, individual provisions of the Convention are considered by many to be expressive of international custom.<sup>316</sup> In any event, the Convention is widely accepted and has been ratified by more states than even the UN Charter.<sup>317</sup>

This section will examine the practice of housing demolitions against the framework of the Fourth Geneva Convention. The application of this Convention to the West Bank and Gaza will be explained from the perspectives of the Israeli Government and the Israeli Supreme Court before being independently analyzed. The provisions of individual articles of the Convention impacting housing demolition will be reviewed, taking into account the positions of the government, academics, non-governmental organizations and international institutions. Conclusions will then be drawn as to the applicability of these individual articles.

### 1. Application

Israel, Jordan, and Egypt are all parties to the Fourth Geneva Convention.<sup>318</sup> Each of these nations ratified the convention before 1967.<sup>319</sup> There is no doubt that they are “High Contracting Parties,” the term used to describe parties to the Convention.<sup>320</sup> The Convention is therefore binding on each of them.

Complex issues arise regarding application of the Convention to the West Bank and Gaza. Although the Convention is binding on each of the states involved, the provisions are only applicable in certain circumstances. Pursuant to Article 2, the protections of the Convention “shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war

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314. See PICTET, *supra* note 312, at 225.

315. See KRETZMER, *supra* note 6, at 36.

316. See MERON, *supra* note 293, at 5 n.5.

317. *Id.* at 4.

318. Fourth Geneva Convention, *supra* note 39, at 396, 387. See also KRETZMER, *supra* note 6, at 34.

319. *Id.*

320. *Id.*

is not recognized by one of them.”<sup>321</sup> In addition, the Convention applies “to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.”<sup>322</sup>

a. Position of Israeli Government

Upon entry of Israeli forces into the West Bank, the military commander for the region issued a proclamation regarding the assumption of power by the Israeli military.<sup>323</sup> Appended to the proclamation was an order regarding the establishment of the legal system for the region. This order included a statement that required military tribunals to:

[A]dhere to the terms of the Geneva Convention of 12 August 1949 concerning the protection of civilians during war and regarding all matters relating to judicial procedure. If there is a contradiction between this order and the above-mentioned Convention then the regulations of the Convention will take precedent.<sup>324</sup>

Thus, the provisions of the Convention were incorporated into the military law of the region.<sup>325</sup>

The military government soon repealed this order, presumably in response to political pressure to view the territories as “liberated” rather than “occupied.”<sup>326</sup> An influential academic work provided a legal basis for this change.<sup>327</sup> Authored by Professor Yehuda Blum, the article discussed the application of international law governing belligerent occupation. Blum understood the law of belligerent occupation to be based on the assumption that the ousted party had sovereignty over the territory in question.<sup>328</sup> Specifically, he questioned whether the

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321. *Id.* art. 2.

322. *Id.*

323. *See supra* Part II.A.2.

324. Military Proclamation 3, art. 35 (1967), *summarized in English and reprinted in* RABAH & FAIRWEATHER, *supra* note 31, at 1.

325. *See* KRETZMER, *supra* note 6, at 32.

326. *Id.*

327. *See generally* Yehuda Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 *ISR. L. REV.* 279 (1968).

328. *Id.* at 293–94.

West Bank had been the sovereign territory of Jordan prior to 1967.<sup>329</sup>

Blum argued that the 1950 annexation of the West Bank by Jordan was not legitimate under international law, and thus, the West Bank had not been the sovereign territory of another state in 1967.<sup>330</sup> As a result, the West Bank had not been the "territory of a High Contracting Party," despite its effective control by Jordan, and did not meet the Article 2 requirements for application of the Convention.<sup>331</sup> As one of the purposes of the Convention is to protect the reversionary rights of the previous sovereign, the article concluded that provisions aimed at preserving these rights were inapplicable.<sup>332</sup> Blum did, however, suggest that Israel was still bound by the humanitarian protections of the Convention.<sup>333</sup>

This argument is the foundation of the Israeli Government's position regarding application of the Convention to the West Bank and Gaza. Following the article's publication, the government adopted the stance that as a whole the Fourth Geneva Convention did not apply to the West Bank and Gaza.<sup>334</sup> This view was based on the legitimate premise that although occupied by Jordan and Egypt respectively, these regions had not been the sovereign territory of their respective states.<sup>335</sup> At the same time, Israel stated its intention to comply with the Con-

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329. *Id.* at 280–81.

330. *Id.* at 281–95.

331. See KRETZMER, *supra* note 6, at 32.

332. See COHEN, *supra* note 25, at 43.

333. See generally Blum, *supra* note 327.

334. See KRETZMER, *supra* note 6, at 33. A review of statements made by Israeli representatives before the United Nations suggests that Israel might have considered the issue unresolved until 1977, after which it clearly rejected application. See Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories 1967–1988*, in INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES 45 (Emma Playfair ed., 1992). Cohen states that Israel's Labour governments have generally considered the question of applicability unanswered, while Likud governments have viewed the Convention as inapplicable. See COHEN, *supra* note 25, at 44.

335. For a discussion of the status of the West Bank and Gaza between 1948 and 1967, see generally COHEN, *supra* note 25, at 44–51 (suggesting that these regions were not sovereign territory prior to 1967). Incidentally, no issues regarding sovereignty arise in application of the Hague Regulations.

vention's humanitarian provisions.<sup>336</sup> Generally speaking, Israel has done so.<sup>337</sup>

One exception to this compliance policy has been the provisions potentially prohibiting the continued use of DER 119 as a punitive measure.<sup>338</sup> Israel has maintained that Article 64 of the Convention concerning pre-existing law requires the state to apply DER 119 despite the fact that demolitions may run contrary to other substantive provisions of the Convention.<sup>339</sup> Although officials sometimes offer arguments as to why demolitions do not violate individual provisions of the Convention, the official position is that these other provisions are superceded by DER 119 pursuant to Article 64.<sup>340</sup>

#### b. Treatment by Israeli Supreme Court

It is often noted that the Israeli Supreme Court has not ruled that the Fourth Geneva Convention is applicable to the West Bank and Gaza.<sup>341</sup> It is less often mentioned that the Court has never ruled that the Convention is *not* applicable. The Court has, essentially, avoided the issue. Despite the fact that the Convention has been raised in numerous petitions, the Court has never directly ruled on its applicability.<sup>342</sup> For the most part, the vast body of academic literature on the topic has been ignored in the opinions of the Court.<sup>343</sup>

Since Israel has agreed to voluntarily abide by the Convention, the Court is somewhat limited in its ability to review individual articles.<sup>344</sup> The approval of the Attorney General must be secured before the Court examines an issue arising from a voluntary application.<sup>345</sup> Generally, this approval has been limited

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336. See Roberts, *supra* note 334, at 44–45.

337. See COHEN, *supra* note 25, at 44.

338. Simon, *supra* note 46, at 46.

339. *Id.* at 47.

340. *Id.* at 48.

341. KRETZMER, *supra* note 6, at 54.

342. See KRETZMER, *supra* note 6, at 54. It should be remembered, though, that the Court *has* held that Israel's status in the West Bank and Gaza is that of a belligerent occupant. See *Ayyub v. Minister of Defense*, 33(2) P.D. 113, 117 (1978), summarized in *English* in 9 ISR. Y.B. HUM. RTS. 337 (1979).

343. See KRETZMER, *supra* note 6, at 206 n.9.

344. See *id.* at 41.

345. See Qupty, *supra* note 25, at 103–04.

to circumstances in which the state will prevail without a doubt.<sup>346</sup>

Individual justices, however, have expressed their own opinions on the subject. Prior to serving on the Court, Meir Shamgar championed the government's interpretation of Article 2 as Attorney General of Israel.<sup>347</sup> On the other hand, various justices have indicated their openness to the application of the Convention, most notably Justice Alfred Witkon. In *dicta*, he wrote, "It is a mistake to think that the Geneva Convention does not apply to Judea and Samaria. It applies even though it is not justiciable in this court."<sup>348</sup>

Although the Court has not made an authoritative decision on the applicability of the Convention to the territories, it has explicitly ruled that the Convention is not enforceable in Israel's domestic courts.<sup>349</sup> In *Ayyub v. Minister of Defense*,<sup>350</sup> the Court distinguished between customary international law and conventional international law, confirming that the latter is not enforceable without enabling legislation.<sup>351</sup> The Court has offered this ruling as a partial justification for its reluctance to rule on applicability.<sup>352</sup> Unlike the Hague Regulations, the Court holds the view that the Fourth Geneva Convention, even if applicable, does not create a cause of action for an individual in domestic courts.<sup>353</sup>

While the Court has not considered whether the Fourth Geneva Convention as a whole might constitute customary international law, it has examined this question regarding a particu-

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346. *See id.* at 108.

347. *See* KRETZMER, *supra* note 6, at 54. In an article published after his election to the Supreme Court, Shamgar stated that there is "no existing rule of international law according to which the Fourth Convention applies in each and every armed conflict . . ." Shamgar, *supra* note 112, at 262. He went on to write that application was based on the premise that "there had been a sovereign who was ousted and that he had been a legitimate sovereign." *Id.*

348. *Dweikat v. Government of Israel*, 34(1) P.D. 1, 29 (1979), *summarized in English in* 9 ISR. Y.B. HUM. RTS. 345 (1979).

349. KRETZMER, *supra* note 6, at 43.

350. *Ayub v. Minister of Defense*, 33(2) P.D. 113 (1978), *summarized in English in* 9 ISR. Y.B. HUM. RTS. 337 (1979).

351. *Id.*

352. *See* KRETZMER, *supra* note 6, at 43–44.

353. *Id.*

lar provision of the Convention.<sup>354</sup> In a minority opinion, Justice Haim Cohn found “the seeds of customary international law” present in an individual article of the Convention.<sup>355</sup>

With respect to the objections to housing demolitions made under the Convention, the Court has primarily relied on the local law doctrine to dodge the issue.<sup>356</sup> On the rare occasions that it has addressed international law, the Court has simply stated that DER 119, as local law in force prior to 1967, remains in force.<sup>357</sup> It is somewhat ironic, given its ambivalent stand on the applicability of the Convention, that the Court has even cited Article 64 of the Convention as support for the rather amorphous local law doctrine.<sup>358</sup>

### c. Analysis

Numerous issues converge when analyzing the application of the Fourth Geneva Convention to the West Bank and Gaza. Among these issues are the sovereignty of Egypt and Jordan in these territories prior to the occupation, the correct reading of Article 2 of the Convention, the possible categorization of the Convention as customary international law, and the effects of Israel’s voluntary acceptance of the Convention. An examination of these issues is necessary for a proper understanding of the applicability of the Convention.

The question of whether the West Bank and Gaza were the sovereign territory of Jordan and Egypt, respectively, prior to 1967 has generated a great deal of discussion. The issue is an interesting one academically, and persuasive arguments can be made to support both the affirmative and negative conclusion. According to the Israeli Government, this question is the key to the application of the Convention under Article 2.<sup>359</sup>

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354. *Id.* at 43.

355. *Qawassmeh v. Minister of Defense*, 35(1) P.D. 617, 636 (1980). The issue was raised regarding Article 49 of the Convention, which concerns deportations and mass transfers.

356. *Simon*, *supra* note 46, at 46–48.

357. *See COHEN*, *supra* note 25, at 94.

358. *See generally* *Jabar v. Officer Commanding Central Command*, 41(2) P.D. 522 (1987), *summarized in English in* 18 *ISR. Y.B. HUM. RTS.* 252 (1988). This, of course, suggests that despite an unwillingness to authoritatively rule on the issue, the Court does, in fact, believe the Convention is applicable.

359. *See infra* text accompanying notes 475–77.



Professor Blum argued that Jordan never gained sovereignty over the territory of the West Bank during its occupation between 1948 and 1967.<sup>360</sup> This argument is based on the fact that Jordan and Egypt occupied the West Bank and Gaza, respectively, as a result of aggression.<sup>361</sup> Since, sovereignty cannot be established through aggressive occupation, neither Jordan nor Egypt could claim sovereign rights.<sup>362</sup>

Arab governments and certain scholars have denied this theory and argued that sovereignty was, in fact, established.<sup>363</sup> However, such arguments are largely unpersuasive. Even proponents of the application of the Convention to the territories have concluded that sovereignty was never achieved.<sup>364</sup> Thus, this determination appears to be correct.

Emphasis has been placed on the sovereignty question for two reasons. First, the issue is one of great political significance to Jordan and, to a lesser extent, Egypt.<sup>365</sup> Showing that Jordan exercised sovereign control over the West Bank strengthens its claim to the region and legitimizes its position vis-à-vis Israel.<sup>366</sup> This posturing, however, has nothing to do with the application of the Fourth Geneva Convention.

Second, the question of sovereignty is at the center of the Israeli interpretation of Article 2, as expressed by Meir Shamgar. This argument relies on an incorrect reading of the second paragraph of the article, which states that the "Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party."<sup>367</sup> As discussed above, Shamgar read "the territory of a High Contracting Party" to mean the sovereign territory of a state.<sup>368</sup> As will be demonstrated, sovereignty is not essential to the application of the Convention through Article 2.

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360. See *infra* text accompanying notes 473–74.

361. See COHEN, *supra* note 25, at 45–46.

362. See *id.*

363. See *id.* at 45–47.

364. See *id.*; Alain Pellet, *The Destruction of Troy Will Not Take Place*, in INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES 169, 174–76 (Emma Playfair ed., 1992). For a thorough discussion of the sovereignty issue, see COHEN, *supra* note 25, at 44–51.

365. See COHEN, *supra* note 25, at 46–48.

366. *Id.*

367. Fourth Geneva Convention, *supra* note 39, art. 2.

368. See *supra* text accompanying note 347.

According to the first paragraph of Article 2, the Convention applies “to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.”<sup>369</sup> Correctly read, the Convention applies at the outbreak of hostilities and continues to apply to the territory occupied in the course of the conflict for an indefinite period of time. The armed conflict between Israel and Jordan and Egypt in 1967 gave rise to application of the Convention. Once applicable, the Convention applied to territories occupied by Israel and continues to apply to this day.<sup>370</sup>

This interpretation becomes clear when the drafting history of the Convention is examined. The first paragraph of Article 2 was meant to trigger the application of the Convention when any armed conflict erupted between High Contracting Parties.<sup>371</sup> This definition included all stages of the conflict, including belligerent occupation.<sup>372</sup>

The second paragraph was specifically aimed at situations where occupation does not result from armed conflict.<sup>373</sup> This provision was a direct result of the Nazi occupation of Denmark during the Second World War, which did not initially meet with armed resistance.<sup>374</sup> Thus, the second paragraph is wholly ir-

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369. Fourth Geneva Convention, *supra* note 39, art. 2.

370. See COHEN, *supra* note 25, at 44.

371. See INTERNATIONAL COMMITTEE OF THE RED CROSS, REPORT ON THE WORK OF THE CONFERENCE OF GOVERNMENT EXPERTS FOR THE STUDY OF THE CONVENTIONS FOR THE PROTECTION OF WAR VICTIMS 8 (1947) [hereinafter REPORT OF GOVERNMENT EXPERTS].

372. See *id.*; REPORT ON THE WORK OF THE PRELIMINARY CONFERENCE OF NATIONAL RED CROSS SOCIETIES FOR THE STUDY OF THE CONVENTIONS FOR THE PROTECTION OF WAR VICTIMS 15 (1957).

373. See REPORT OF GOVERNMENT EXPERTS, *supra* note 371, at 8. Proponents of the government’s interpretation have stated that this reading renders the word “even” in the second paragraph meaningless, and that this reading is therefore incorrect, “whatever the meaning intended to be conferred on it by its draftsmen”; Meir Shamgar, *Legal Concepts and Problems of the Israeli Military Government — The Initial Stage*, in 1 MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL 1967–1980, THE LEGAL ASPECTS 39 (Meir Shamgar ed., 1982). Professor Kretzmer counters by arguing that even if application is contingent on the second paragraph, its terms refer to any territory controlled by a High Contracting Party. The requirement that this territory be the *sovereign* territory of a party has no basis in the Convention or international law. See KRETZMER, *supra* note 6, at 34.

374. KRETZMER, *supra* note 6, at 34.

relevant to situations where armed conflict has already taken place.

This interpretation is supported by the official commentary to the Fourth Geneva Convention, published by the ICRC. It states:

In case of war being declared or of armed conflict, the Convention enters into force; the fact that the territory of one or other of the belligerents is later occupied in the course of hostilities does not in any way affect this; the inhabitants of the occupied territory simply become protected persons as they fall into the hands of the Occupying Power.

The sense in which the [second] paragraph . . . should be understood is thus quite clear. It does not refer to cases in which territory is occupied during hostilities; in such cases the Convention will have been in force since the outbreak of hostilities . . . . The paragraph only refers to cases where the occupation has taken place . . . without hostilities, and makes provision for the entry into force of the Convention in those particular circumstances.<sup>375</sup>

The second paragraph was simply intended to “fill the gap” left by paragraph one regarding occupation meeting no armed resistance.<sup>376</sup> This understanding of Article 2 comports with the underlying purposes of the Convention, to “first and foremost protect individuals, and not to serve State interests.”<sup>377</sup> This interpretation is consistent with the requirements of the Vienna Convention.<sup>378</sup> A wealth of scholarly material supports this conclusion as well.<sup>379</sup>

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375. PICTET, *supra* note 312, at 21.

376. *Id.* at 22.

377. *Id.* at 21.

378. “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” See Vienna Convention, *supra* note 298, art. 31(1). If the meaning is still ambiguous, further recourse is made to supplemental means, including preparatory work. *Id.* art. 32.

379. See, e.g., COHEN, *supra* note 25, at 51–54; Richard Falk & Burns Weston, *The Relevance of International Law to Israeli and Palestinian Rights in the West Bank and Gaza: In Legal Defense of the Intifada*, 32 HARV. INT'L L.J. 129, 138–41 (1991); Christopher Greenwood, *The Administration of Occupied Territory in International Law*, in INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES 244 (Emma Playfair ed., 1992); KRETZMER, *supra* note 6, at 34, Roberts, *supra* note 334, at 47; Simon, *supra*

As an alternate argument, several academics have focused on the fact that customary international law is a part of Israeli domestic law.<sup>380</sup> They submit that the Fourth Geneva Convention may represent customary international law.<sup>381</sup> This argument is not redundant in light of the above conclusion regarding the interpretation of Article 2. Finding the Convention to be customary law would not only confirm its applicability, but would also provide the added benefit of making it enforceable in Israel's domestic courts.

The international community has clearly subscribed to the theory that the Fourth Geneva Convention is applicable to the West Bank and Gaza. The ICRC, the UN General Assembly, and the UN Security Council have each stated that the Convention applies to the territories.<sup>382</sup> Even the United States has publicly expressed the view that Israel is required to apply the Convention.<sup>383</sup>

Careful legal analysis reveals that Israel's interpretation of Article 2 is incorrect. Clearly, the first paragraph of Article 2 compels application, triggered by Israel's armed conflict with

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note 46, at 1199. Even Julius Stone appears to concede that the Convention is generally applicable to the territories. *See* Stone, *supra* note 25, at 95.

380. KRETZMER, *supra* note 6, at 31.

381. *See, e.g.,* Quity, *supra* note 25, at 112; Pellet, *supra* note 364, at 189; PICTET, *supra* note 312, at 9; R. Yingling & R. Ginnane, *The Geneva Conventions of 1949*, 46 AM. J. INT'L L. 393, 411 (1952). Others suggest that at least some of the articles of the Convention represent customary law. *See* Theodor Meron, *West Bank and Gaza: Human Rights and Humanitarian Law in the Period of Transition*, 9 INT'L Y.B. HUM. RTS. 106, 111–12 (1979). An additional argument is made under English common law that laws of war (i.e., humanitarian law) is not subject to the conventional/customary law distinction. Rather, humanitarian law is enforceable in domestic courts regardless of whether it represents customary international law or not. *See* Quity, *supra* note 25, at 114 (quoting Benjamin Rubin, *The Adoption of International Conventions by Israel in Israeli Courts*, 13 MESPATTEM 210, 211 (1983)). Another alternate argument has been raised based on Israel's voluntary compliance with the humanitarian provisions of the Convention. However, Professor Kretzmer sees this argument as less significant, because it would not necessarily allow for enforcement in domestic courts. *See* KRETZMER, *supra* note 6, at 41–42.

382. *See* Hussein Hassouna, *The Enforcement of the Fourth Geneva Convention in the Occupied Palestinian Territories, Including Jerusalem*, 7 J. INT'L & COMP. L. 461, 466 (2001).

383. *See* Carroll, *supra* note 115, at 1201 (citing 61 U.S. DEP'T OF STATE BULL. 76, 77 (1969)).

Jordan and Egypt in 1967. Despite issues of domestic enforceability, application of the Convention places significant restrictions on Israel's continued use of DER 119.

## 2. Individual Articles Regarding House Demolitions

Having concluded that the Fourth Geneva Convention applies to the West Bank and Gaza, the protections afforded by individual articles of the Convention become relevant. Clearly, residents of the West Bank and Gaza are "protected persons" entitled to full protection of the Fourth Geneva Convention.<sup>384</sup> These protections became effective in 1967 and remain in force today.<sup>385</sup>

Several articles of the Convention are particularly relevant to the issue of housing demolitions. This subsection will review Articles 64, 53, 33, and 71–74 and examine arguments for and against their application to this issue. Analysis of each will reveal the effects of its application.

### a. Article 64: Pre-Occupation Law

As discussed above, Article 64 deals with the preservation of existing law in an occupied territory. It states, in part, that the "penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention."<sup>386</sup> Article 64 is significant in analyzing DER 119, as the regulation falls into the category of existing law.

Of course, the Israeli Government denies the applicability of the Convention and therefore has no occasion to invoke Article 64 in support.<sup>387</sup> Likewise, the Israeli Supreme Court has relied

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384. Fourth Geneva Convention, *supra* note 39, art. 4. Possible rare exceptions include, for example, an argument that persons who entered the territory after the occupation did not "find themselves" in the hands of the occupying power as contemplated by Article 4.

385. All of the articles examined in this section remain in force after the "one year" provision that limits application of specific other articles to one year in certain occupation situations. *Id.* art. 6. For a thorough discussion of this provision, see Roberts, *supra* note 334, at 36–39.

386. Fourth Geneva Convention, *supra* note 39, art. 64.

387. See *infra* text accompanying notes 476–477.

primarily on the “local law doctrine,” although it has cited Article 64 in support of the doctrine.<sup>388</sup>

Other proponents of the continued use of DER 119, however, have relied on Article 64 to prevent application of other articles of the Convention that would prohibit the practice. The argument, as expressed by Professor Julius Stone, is centered on the concept that Article 64 preempts other provisions.<sup>389</sup> The statement that existing penal laws should remain in force thus “seems even to *require* continuance of this law.”<sup>390</sup> Stone argues that Israel has no choice but to maintain DER 119 as valid law.<sup>391</sup>

Stone also addresses the authorization to repeal the laws contained in Article 64. First, he emphasizes that the language used is permissive; while an occupying power *may* repeal laws contrary to the Convention, but the article “does not *oblige* him to do so.”<sup>392</sup> Second, Stone points out that the occupying power may repeal laws that threaten its security and finds that “it would be very strange indeed to hold that the occupant was forbidden to *maintain* the existing law when *this* was necessary for his security.”<sup>393</sup> Finally, he concludes that “the entire practice of demolitions . . . under the unaltered local law in force is legally justifiable under Article 64 . . . .”<sup>394</sup>

Stone’s argument is rejected by a number of experts who argue that existing law that runs contrary to provisions of the Convention cannot be maintained pursuant to Article 64.<sup>395</sup> This is plainly stated in the official commentary to the Convention, written years before the occupation.<sup>396</sup> According to this expert interpretation, “when the penal legislation of the occupied territory conflicts with the provisions of this Convention, the Convention must prevail.”<sup>397</sup>

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388. See *supra* text accompanying notes 280, 282, & 285–86.

389. Stone, *supra* note 25, at 96–97.

390. *Id.* at 97.

391. *Id.* at 97.

392. *Id.*

393. *Id.*

394. *Id.*

395. See, e.g., Carroll, *supra* note 115, at 1206; Simon, *supra* note 46, at 48.

396. PICTET, *supra* note 312, at 336.

397. *Id.*

The official commentary's position is the correct one. The purpose of Article 64 is to preserve the laws best suited to the occupied population and most familiar to them.<sup>398</sup> Moreover, this article protects the population from the imposition of oppressive criminal laws by the occupying power.<sup>399</sup> According to delegates to the Geneva Conference, an occupying power "should in no circumstances use the criminal law of the Occupied Power as an instrument of oppression."<sup>400</sup> Such an interpretation is in conformity with the object and purpose of the Convention.<sup>401</sup>

Perhaps a further argument should be added to those levied against Stone's reading of Article 64. A clear distinction exists between the maintenance of a law and the exercise of government authority pursuant to that law. To the extent that Article 64 can be read as requiring Israel to leave DER 119 in force, *it does not allow Israel to take actions contrary to other substantive provisions of the Convention in order to enforce that law.*<sup>402</sup> The language of DER 119 is permissive: "A Military Commander may" order forfeiture and demolition of a house; he is not required to make this order.<sup>403</sup> DER 119, thus, creates *no enforcement obligation on the part of Israeli officials*. If Stone's argument is correct, it simply means that Israel has the option to leave DER 119 on the books or to repeal it pursuant to Article 64; DER 119 cannot be used as a justification to take action that conflicts with other articles of the Convention.

#### b. Article 53: Destruction of Property

The Fourth Geneva Convention prohibits the destruction of property by the occupying power in most circumstances. Article 53 states: "Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to

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398. See GERHARD VON GLAHN, *THE OCCUPATION OF ENEMY TERRITORY* 95 (1957).

399. See *id.*

400. 2 FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, at 670 (1949).

401. See *supra* note 378 (explaining interpretation pursuant to the Vienna Convention).

402. Fourth Geneva Convention, *supra* note 39, art. 64.

403. DER 119, *supra* note 99.

social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.”<sup>404</sup> While the prohibition on destruction of property is clear, the exception has proved difficult.

As Attorney General of Israel, Meir Shamgar argued that demolitions pursuant to DER 119 are necessary military operations.<sup>405</sup> He reasoned that houses from which the attacks take place are, in effect, military bases and military action is thus required.<sup>406</sup>

Shamgar’s argument is strengthened by the fact that Israel has the prerogative to determine what constitutes military necessity. According to the official commentary, “it will be for the Occupying Power to judge the importance of such military requirements.”<sup>407</sup> Although the exception must be used in a “reasonable manner,” authorities are asked to do so by keeping the damage proportionate to the advantage gained.<sup>408</sup>

Great discretion is therefore placed in the hands of the occupying power. Israel is empowered to state that demolitions are necessary and proportionate. The government argues that the demolition of “a few dozen homes of proven terrorists” is proportionate to the benefit of the “thousands of innocent lives” that have been preserved.<sup>409</sup>

Opponents of the policy claim that this argument is flawed. They assert that military necessity cannot be claimed days or weeks after an offense has occurred.<sup>410</sup> They also rely on the ICRC interpretation that the exception is limited to measures “taken . . . *with a view to fighting*.”<sup>411</sup> Finally, opponents argue that the tension between the prohibition and the exception should be resolved in favor of the former.<sup>412</sup>

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404. Fourth Geneva Convention, *supra* note 39, art. 53.

405. See KRETZMER, *supra* note 6, at 147.

406. See Shamgar, *supra* note 112, at 176.

407. PICTET, *supra* note 312, at 302.

408. *Id.*

409. Carroll, *supra* note 115, at 1208 (quoting ISRAELI MINISTRY OF DEFENSE, THE ISRAELI ADMINISTRATION IN JUDEA, SAMARIA, AND GAZA — A RECORD OF PROGRESS 7 (1968)).

410. See Simon, *supra* note 46, at 69.

411. RAJA SHEHADEH, OCCUPIER’S LAW: ISRAEL AND THE WEST BANK 155 (1985) (quoting an interpretation by Jacques Moreillon, Director of the ICRC Department of Principles and Law, dated Nov. 25, 1981).

412. See Simon, *supra* note 46, at 66.



The discretion placed in the hands of the occupying power by Article 53 is problematic. Certainly, many people would agree that demolitions are not a military necessity. Unfortunately, so long as the occupying power is authorized to make that determination, the legal argument that demolitions violate Article 53 will be difficult to make. Although Article 53 offers limited restrictions on Israel's actions, this article is not the strongest provision from which to challenge demolitions.

c. Article 33: Individual Responsibility

The provision of the Fourth Geneva Convention that most strongly prohibits the use of housing demolitions as a punitive measure is Article 33. It states that "[n]o protected person may be punished for an offense he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited."<sup>413</sup> This article also prohibits reprisals.<sup>414</sup>

In the early stages of the occupation, supporters of DER 119 denied that it imposed non-individual punishment.<sup>415</sup> They contended that demolitions were "never carried out as a collective punishment, but only and solely as a punishment of the individual involved."<sup>416</sup> The assertion was that procedures existed to determine guilt before demolition.<sup>417</sup>

Proponents subsequently focused on the involvement of other occupants. They claimed that demolitions only occurred when other occupants of the house were implicated in the offense.<sup>418</sup> This theory was based on the widely held assumption that it was "highly unlikely that premises would be in use for terrorist activities without the owner being in fact implicated."<sup>419</sup>

The Israeli Supreme Court has contributed to this discourse as well. Although not addressing Article 33 in particular, the

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413. Fourth Geneva Convention, *supra* note 39, art. 33.

414. *Id.*

415. Colonel Dov Shefi, *The Protection of Human Rights in Areas Administered by Israel — United Nations Findings and Reality*, 3 ISR. Y.B. HUM. RTS. 337, 346 (1973).

416. *Id.*

417. *See* Stone, *supra* note 25, at 96.

418. *See* Simon, *supra* note 46, at 58–59.

419. Stone, *supra* note 25, at 96. This view was also subscribed to by Professor Dershowitz. *See* Simon, *supra* note 46, at 58.

Court has considered challenges to collective punishment under Israeli administrative law.<sup>420</sup> The Court has consistently denied that DER 119 imposes collective punishment, suggesting that the effects of demolition on family members are no more serious than if the head of household, who supports the family, was arrested.<sup>421</sup>

The Court also reasoned that demolitions pursuant to DER 119 are not punitive.<sup>422</sup> Rather, the Court has held that the purpose of demolitions is deterrence.<sup>423</sup> For example, in *Nazal v. Commander of the Judea and Samaria Region*,<sup>424</sup> the Court stated that the purpose of applying DER 119 was “to deter potential terrorists from carrying out their murderous acts . . . .”<sup>425</sup> Thus, there is no punishment.

Essentially, these arguments can be summarized into three groups. The first, now essentially abandoned, is that housing demolitions were only carried out against individual perpetrators of violent crimes and never against other occupants, or that the effects on others are incidental. The second argument is that the demolitions punishment is only used when family members of offenders were aware of, and involved in the offense. Finally, the Israeli Supreme Court asserts that demolitions are not punishment, but are solely a deterrent measure.<sup>426</sup>

Beginning with the Israeli Supreme Court’s deterrence theory, if demolitions are not punishment, then they truly do not fall within the purview of Article 33.<sup>427</sup> While logically appealing to suggest that the purpose of demolitions is deterrence this argument is based on the assumption that measures be designed to have either punitive *or* deterrent effects.<sup>428</sup> This incorrect assumption has no foundation in basic theories of criminal

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420. See KRETZMER, *supra* note 6, at 149.

421. See *generally* Dagalis et al. v. Military Commander of the Judea and Samaria Region, 40(2) P.D. 42 (1985), *summarized in English in* 17 ISR. Y.B. HUM. RTS. 315 (1987).

422. See KRETZMER, *supra* note 6, at 151–52.

423. See *id.*

424. *Nazal v. Commander of the Judea and Samaria region*, 42(3) P.D. 641, (1994), *summarized in English in* 19 ISR. Y.B. HUM. RTS. 376 (1989).

425. See KRETZMER, *supra* note 6, at 152 (quoting the *Nazaal* opinion).

426. *Id.*

427. See Fourth Geneva Convention, *supra* note 39, art. 33 (Article 33 only prohibits punishment of protected persons).

428. See KRETZMER, *supra* note 6, at 152.

justice. Quite simply, deterrence and punishment are inseparable. One of the primary goals of punishment is to deter criminal behavior in the future.<sup>429</sup> This is achieved through two means: general deterrence, which is aimed at the population as a whole; and, individual deterrence, which is intended to prevent the offender from repeating his or her behavior.<sup>430</sup> Both of these methods are achieved by imposing punishment.

Pursuant to DER 119, housing demolitions have all of the elements required for classification of an act as punishment.<sup>431</sup> Demolitions are a form of punishment historically employed by the British Empire in South Africa and Ireland.<sup>432</sup> House demolitions pursuant to DER 119 are clearly punitive and, as a result, are a method of punishment as contemplated by Article 33.

The argument that demolitions were carried out only against individuals has been abandoned with good reason. While persuasive in the early days of the occupation, this argument is clearly refuted by the facts. Between May 1985 and early 1987 alone, every demolition carried out by Israeli forces left between 2 and 25 people homeless *in addition to the offenders*.<sup>433</sup>

The effects of demolition on families are certainly not incidental to the punishment of the individual. Comparisons of the effects of demolitions on suspects' families with those effects suffered when the families' breadwinner is imprisoned are flawed. As Professor David Kretzmer notes, the aim of imprisonment is not frustrated if the prisoner's family is not adversely affected, as the main goal is incapacitation and reform of the prisoner.<sup>434</sup> The purpose of demolitions, on the other hand, cannot be accomplished without adversely affecting all other occupants of the house. Imposing suffering and hardship on these other occupants is a direct, not incidental, part of the punish-

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429. See Kent Greenwalt, *Punishment*, in 4 ENCYCLOPEDIA OF CRIME AND JUSTICE 1340 (Sanford Kadish ed., 1983).

430. *Id.* at 1340–41.

431. See KRETZMER, *supra* note 6, at 152. In its early demolition opinions, the Israeli Supreme Court routinely referred to the measure as punitive. *Id.* at 151.

432. See *id.* at 237 n.56.

433. See PLAYFAIR, AL-HAQ, *supra* note 19, at 14.

434. See KRETZMER, *supra* note 6, at 150–51. See also PLAYFAIR, AL-HAQ, *supra* note 19, at 14–15.

ment. The fact that demolitions have been carried out after the offender has been killed proves this fact.<sup>435</sup>

The argument that the suffering of family members is an unfortunate side effect is further weakened by the fact that few demolished homes are owned by offenders.<sup>436</sup> Rather, family members or third parties own the houses. Therefore, others are not incidentally affected by destruction of the offender's house. Realistically the party penalized, most directly is the owner of the building.

The remaining argument is that demolitions are only used when the other occupants were aware of or participated in the offense. This argument is likewise refuted by the facts. There is no basis in the suggestion that each resident of the demolished houses were somehow implicated in the offense, since Israeli forces routinely carried out demolitions without first contacting other occupants.<sup>437</sup> Israeli authorities have not examined the participation of other occupants prior to demolition, nor does it even accuse them of involvement.<sup>438</sup> Even the Israeli Supreme Court admitted that authorities need not have evidence that other occupants had knowledge of the offense as this "does not flow from the text of the regulation."<sup>439</sup>

Each of these arguments denying that demolitions violate Article 33 fails on its own terms. On the other hand, arguments in favor of the position are soundly founded and have far reaching support in the international community and legal circles. These arguments will now be explored.

The official commentary to the Fourth Geneva Convention clearly describes the nature of Article 33. It begins by stating that "penal liability is personal in character."<sup>440</sup> This assertion refers not just to formal punishments under penal law, but also to "penalties of any kind inflicted on persons or entire groups of persons, in defiance of the most elementary principles of humanity, for acts that these persons have not committed."<sup>441</sup>

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435. PLAYFAIR, AL-HAQ, *supra* note 19, at 3.

436. KRETZMER, *supra* note 6, at 150–51.

437. *See* Simon, *supra* note 46, at 59.

438. *See id.* at 59.

439. *See* KRETZMER, *supra* note 6, at 154 (quoting Alzak v. Military Commander of West Bank, 1987(1) Takdin-Elyon 1).

440. PICTET, *supra* note 312, at 225.

441. *Id.*

Additionally, the commentary refers to the companion provision of the Hague Regulations, Article 50.<sup>442</sup> It is noted that the terms of Article 50 might arguably allow for some community responsibility.<sup>443</sup> However, this is clearly not the case with Article 33 where “[r]esponsibility is personal and it will no longer be possible to inflict penalties on persons who have themselves not committed the acts complained of.”<sup>444</sup>

Demolitions pursuant to DER 119 clearly run contrary to the commentary’s position, which was adopted years before the occupation.<sup>445</sup> There is no doubt that the ICRC agrees with this theory. In 1968, the ICRC reported that it had repeatedly contacted Israel to ask the government “to cease these practices which are contrary to article[] 33 . . . of the IVth Geneva Convention and to ask for the reconstruction of damaged houses or for financial compensation to be paid.”<sup>446</sup>

The position of the commentary is well-founded. Under Article 33, authorities cannot impose penalties on individuals not responsible for an offense.<sup>447</sup> This position comports with the object and purpose of the Fourth Geneva Convention.

Demolitions almost always violate Article 33 of the Convention because they are collective by nature. The outcome would only be different if the offender was the owner of the house and was also the only occupant. As soon as another individual is not wholly culpable for the offense is affected, Article 33 becomes applicable.

Statistical data and individual case studies support the conclusion that Article 33 has been repeatedly violated by Israel. Data collected by the non-governmental organization al-Haq reveals that over a ten-year period, only 8.4% of homes demolished pursuant to DER 119 belonged to the offenders.<sup>448</sup> Therefore, in well over 93% of cases the brunt of the punishment fell on the non-offending owner.

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442. *Id.*

443. See Hague Regulations, *supra* note 39, art. 50.

444. PICTET, *supra* note 312, at 225.

445. The Commentary was published in 1958.

446. SHEHADEH, *supra* note 411, at 154 (citing a 1968 report of the International Committee of the Red Cross).

447. See Fourth Geneva Convention, *supra* note 39, arts. 71–74.

448. See text accompanying note 159.

Individual cases reveal similar trends. Houses are demolished without notice and without any inquiry into the involvement or knowledge of other occupants.<sup>449</sup> Ownership of the house is not established by authorities.<sup>450</sup> Demolitions are carried out despite the fact that the alleged offender has died.<sup>451</sup> All of these cases demonstrate that the Israeli government practices collective punishment with little regard for other occupants of the houses.

Most convincing is the empirical evidence compiled from findings of fact made by Israeli Supreme Court. Out of 145 houses demolished, only 7 (4.8% of the total), were confirmed to have been owned by the offender.<sup>452</sup> At least 100 of these houses (69% of the total) belonged to someone other than the offender.<sup>453</sup> Thus in at least 69% of these cases, demolitions have penalized the owner of the house. In an even higher percentage, other occupants of the house are also penalized. These demolitions have been carried out in direct violation of Article 33 of the Fourth Geneva Convention.

#### d. Articles 71–74: Fair Trial

Clearly housing demolitions are a form of punishment.<sup>454</sup> Demolitions are imposed pursuant to DER 119 when an accused has illegally discharged a weapon or explosive device or committed an offense against the Defense (Emergency) Regulations of 1945.<sup>455</sup> It follows that DER 119, although termed an administrative procedure, has the characteristics of a penal law. Thus, the argument can be made that persons subjected to DER 119 should receive the protections afforded to a criminal defendant.

The right to a fair trial is “a fundamental notion of justice as it is understood in all civilized countries.”<sup>456</sup> These protections

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449. See SHEHADEH, *supra* note 282, at 154–56.

450. See Simon, *supra* note 46, at 59 n.315.

451. See PLAYFAIR, AL-HAQ, *supra* note 19, at 15.

452. See Figure 2 accompanying note 220.

453. See *id.* Ownership of thirty-eight houses was not determined. *Id.*

454. See *infra* text accompanying notes 429–33.

455. See *supra* Part III.A.

456. Simon, *supra* note 46, at 74. See also Fourth Geneva Convention, *supra* note 39, arts. 71–74.

are widely considered to be general principles of law,<sup>457</sup> and their application should not be sacrificed to issues of terminology.

Fair trials are governed by Articles 71 through 74 of the Fourth Geneva Convention.<sup>458</sup> Most importantly the first sentence of Article 71 states: "No sentence shall be pronounced by the competent courts of the Occupying Power except after a regular trial."<sup>459</sup> This provision contains two important safeguards. First, persons accused of crimes are entitled to a trial. Second, the trial must be conducted by a court of the occupying power. According to the commentary, this "safeguard is absolutely general."<sup>460</sup>

The basic requirements for fair trials are set forth in Article 72. Among these are the right to counsel, the right to present evidence and witnesses, and the right to an interpreter.<sup>461</sup> Additionally, Article 73 guarantees the right to appeal.<sup>462</sup>

### C. Enforcement

The Fourth Geneva Convention is not enforceable in Israeli courts, despite its applicability to the West Bank and Gaza.<sup>463</sup> Furthermore, it is uncertain whether the Israeli Supreme Court would accept the view that Articles 71–74 represent general principles of law.<sup>464</sup> Even if these articles were enforceable, the Court could quite possibly deny that DER 119 is a penal law.<sup>465</sup> In any event, the climate in Israel's domestic system has generally been a conservative one and that the Court would embrace such a novel concept is unlikely.

However, the establishment of the International Criminal Court ("ICC") on July 1, 2002, marks a new era in the enforce-

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457. See MERON, *supra* note 293, at 49-50; Simon, *supra* note 43, at 73–74; Stone, *supra* note 23, at 96. See generally M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT'L L. 235 (1993).

458. See Fourth Geneva Convention, *supra* note 39, arts. 71–74.

459. *Id.* art. 71.

460. PICTET, *supra* note 312, at 354.

461. See Fourth Geneva Convention, *supra* note 39, art 72.

462. See *id.* art. 73.

463. See *supra* Part V.B.1.c.

464. See *supra* text accompanying note 457 (discussing acceptance of Articles 71–74 as general principles of international law).

465. See *supra* Part II.C.

ment of international humanitarian law.<sup>466</sup> The ICC does not provide a forum for individuals to challenge measures that they believe violate humanitarian law, in the style of Israel's High Court of Justice. Rather, the ICC prosecutes persons responsible for violations of the law.<sup>467</sup>

The jurisdiction of the ICC is narrowly focused on four crimes: genocide, crimes against humanity, war crimes, and the crime of aggression.<sup>468</sup> The category entitled war crimes includes grave breaches of the Fourth Geneva Convention. Among these breaches are the "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly,"<sup>469</sup> which corresponds to Article 53,<sup>470</sup> and "depriving a . . . protected person of the rights of a fair and regular trial,"<sup>471</sup> which corresponds to Articles 71–74.<sup>472</sup> The list of violations is exclusive; thus non-individual punishment as prohibited by Article 33 is not included.

As discussed above, violations of Article 53 are somewhat difficult to prove, since the determination of what constitutes military necessity is left to the occupying power. Violations of the fair trial provision, on the other hand, are much easier to prove as falling under the ICC statute. The only significant obstacle is demonstrating that demolitions are form of punishment and that as such DER 119 is a criminal or quasi-criminal law requiring fair trial protections. Although difficult, this obstacle can be overcome.

Jurisdiction is the real challenge in using the ICC to prosecute violations of Articles 71–74 in the West Bank and Gaza. The Court is competent to exercise jurisdiction only "with the consent of those who will themselves be subject to its jurisdiction."<sup>473</sup> Jurisdiction can be exercised over crimes taking place

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466. Ewen MacAskill & Oliver Burkeman, *New Court Makes Global Justice a Reality*, GUARDIAN, April 11, 2002, at 17.

467. See Rome Statute of the International Criminal Court, July 17, 1998, art. 5, UN Doc. A/CONF. 183/9, 137 I.L.M. 999 (entered into force July 1, 2002) [hereinafter Rome Statute].

468. See *id.*

469. *Id.* at art. 8(2)(a)(iv).

470. See Fourth Geneva Convention, *supra* note 39, art. 53.

471. *Id.* at art. 8(2)(a)(vi).

472. *Id.* at arts. 71–74.

473. WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 54 (2001).



in the territory of a state party to the ICC or crimes committed by a national of a state party.<sup>474</sup>

Israel has not ratified the Rome Statute of the International Criminal Court ("Statute"). Although it signed the Statute on December 31, 2000, indicating its intention to ratify, Israel followed the example of the United States and, on August 28, 2002, informed the Secretary-General of the UN that it was "unsigned" the Statute.<sup>475</sup> Nor has Egypt ratified the Statute.<sup>476</sup>

Interestingly, Jordan is a state party to the ICC, having ratified the Rome Statute on April 11, 2002.<sup>477</sup> It follows that Jordanian claims to the territory of the West Bank arguably gives rise to the jurisdiction of the ICC. Jordan's claim is certainly tenuous as many scholars contend that Jordan never achieved sovereignty over the territory between 1948 and 1967.<sup>478</sup> Nevertheless, the basis for this territorial claim exists.

An even more intriguing possibility exists. As an accepted principle of international law, belligerent communities "may enter into legal relations and conclude agreements valid on the international plane . . ." <sup>479</sup> The Palestinian Authority certainly has a unique status in the international community. What would be the effect of ratification of the Rome Statute by an elected representative of the Palestinian people?

These two possibilities are, of course, speculative. Legal experts will no doubt express their opinions on the subject, as will the various parties. Still, this jurisdictional question would not be decided by the Israeli Supreme Court or left to the halls of

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474. See Rome Statute, *supra* note 467, art. 12(2).

475. The text of the communication read as follows:

[I]n connection with the Rome Statute of the International Criminal Court adopted on 17 July 1998. . . . Israel does not intend to become a party to the treaty. Accordingly, Israel has no legal obligations arising from its signature on 31 December 2000. Israel requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary's status lists relating to this treaty.

*Rome Statute of the International Criminal Court — Participants, Notes, ¶3, available at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/PartI/chapter XVIII/treaty10.asp> (last visited May 21, 2003).*

476. *Id.*

477. *Id.*

478. See *supra* text accompanying notes 327–35, 360–364.

479. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 64 (4th ed. 1990).

universities. Instead, this question it would be raised in, argued before, and ruled on by a new independent international court.

## VI. CONCLUSION

Israel has used house demolitions as a punitive measure in the West Bank and Gaza since 1967. This measure, ostensibly rooted in the law of the Mandate period, is increasingly used in response to security concerns in Israel. Clearly, the Israeli Government views house demolitions as an effective measure.

Demolitions invariably affect all occupants of a house, not just the alleged offender. Only in rare cases does the house belong to the offender, and in most cases, a number of people share the subject house. These other occupants are usually not accused of participation in the offense, and no attempt is made to determine their culpability before demolition occurs. Furthermore demolitions have occurred in a number of cases after the death of the offender.

This demolition practice runs contrary to standards of international law. It has been demonstrated that international human rights law is applicable to the West Bank and Gaza.<sup>480</sup> Punitive demolitions violate human rights protection against inhuman punishment, a proposition supported by the case law of the European Court of Human Rights.<sup>481</sup>

The “local law doctrine” by which Israel has sheltered DER 119 from substantive humanitarian law is unsustainable. The doctrine is based on a mistaken reliance on the primacy of pre-existing law over substantive international law.<sup>482</sup> Thus, punitive demolitions must be subjected to the full scrutiny of the Hague Regulations and Fourth Geneva Convention.

Additionally, the applicability of the Fourth Geneva Convention to the West Bank and Gaza is undeniable. An analysis of Article 2 reveals that the Convention is applicable in its entirety to the territories. The oft-used “sovereignty” argument is irrelevant to application, which properly turns on the fact that Israel occupied the West Bank and Gaza in the course of an armed conflict. The mistaken view that Article 64 obliges Israel

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480. *See supra* Part IV (discussing international human rights law).

481. *See, e.g.*, Selçuk & Asker v. Turkey, 1998-II Eur. Ct. H.R. 477.

482. *See supra* Part V.B.2.a.

to enforce DER 119 in violation of substantive international law has also been dismissed.

Despite the denial that demolitions violate Article 33 of the Convention, this fact has been well demonstrated. Demolitions are unmistakably collective and penal by nature. The manner in which Israel has enforced DER 119 since 1967 clearly establishes its non-individual character. The language of Article 33 and the official commentary on this article confirm the conclusion that Israel's use of housing demolitions is illegal. Likewise, the process laid out by DER 119 is offensive to the fair trial provisions of the Convention. Punitive demolitions are imposed outside the judicial system without hearing. Procedural safeguards are completely absent.

Israel's use of demolitions pursuant to DER 119 must end. It clearly violates provisions of the Fourth Geneva Convention and other principles of international law. The Israeli Government, Israel's courts, and the international community must all resolve to abolish a practice that has blemished Israel's standing among democratic nations.