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THE ISRAELI DEMOLITION OF PALESTINIAN HOUSES IN THE OCCUPIED TERRITORIES: AN ANALYSIS OF ITS LEGALITY IN INTERNATIONAL LAW

*Martin B. Carroll**

I. INTRODUCTION

The recent Palestinian uprising in the Israeli Occupied Territories, otherwise known as the Intifadah, has brought greater attention to Israel's security measures. Specifically, the Intifadah has raised questions of the efficacy and legality of Israel's attempts to control the local population by means criticized by many as overly heavy-handed. One such practice employed by the Israelis is the demolition or sealing of houses in which a resident is believed to have committed a political or violent act against the interests of the State of Israel. The intent of this paper is to examine the legality of the destruction of houses in the Occupied Territories under the relevant articles of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949 [Geneva Convention IV] (hereinafter the Fourth Geneva Convention).¹

The standard Israeli practice in the past has been to demolish or seal off a suspected terrorist's house immediately after the incident in question occurs.² The demolitions almost invariably have been carried out before the suspect has been tried or convicted.³ In a typical

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1. Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV]. The relevant Geneva provisions were adopted along with three other treaties regarding international standards in relation to acceptable conduct in times of war.

2. One example of the Israelis' quick response to acts of terrorism occurred when army personnel arrested a Palestinian suspected of stabbing an Israeli-appointed Arab mayor and immediately thereafter bulldozed his house in the Jelazoun refugee camp. Washington Post, July 11, 1988, at A13, A21. In 1984, the Israelis destroyed four houses in the Gaza Strip in reaction to the hijacking of a public bus. N.Y. Times, Apr. 13, 1984, at A1. There are numerous other examples of the Israelis demolishing houses immediately following the arrest of a suspected terrorist.

3. NATIONAL LAWYERS GUILD 1977 MIDDLE EAST DELEGATION, TREATMENT OF PALESTINIANS IN THE WEST BANK AND GAZA 68 (1978).

demolition, soldiers normally give the occupants a short time, perhaps as little as one hour, to remove their possessions from the house to be destroyed. The property on which the demolished building was standing is often forfeited and the former occupants are left to find accommodations with friends or relatives, or else live in Red Cross tents. Permission to rebuild or reopen a sealed house has rarely been given to the occupants; indeed, the family is seldom permitted to remain on the land in any capacity.⁴

However, the Israeli High Court, in July, 1989 restricted the army's ability to destroy houses arbitrarily, by holding that the residents have a right to appeal a decision to destroy a house in court before such an action may take place. The residents of a house scheduled for demolition have forty-eight hours to appeal to the local military commanders and, if such appeal is denied, have an additional forty-eight hours to appeal to the High Court. This ruling does not apply to the army's practice of sealing houses nor any houses destroyed in the case of military operations, such as combat. While this decision grants the right of appeal to the residents of the condemned houses, it clearly does not go so far as to prohibit demolitions by the army in all circumstances.⁵

The Israelis will generally seal off a portion of a house, rather than demolish it, if it is likely that the other occupants were unaware of their fellow occupant's activities. They will also seal off an entire house if the demolition would likely damage adjoining houses.⁶ Theoretically, actual demolition is reserved for those dwellings occupied by suspects accused of committing a serious security violation. Israel has claimed that it avoids demolishing houses of families who were unaware of the terrorist's activities.⁷

There has been much criticism of the demolitions from a humanitarian viewpoint. The loss of a home without compensation is obviously a devastating blow to the occupants of a demolished building.⁸

4. E. PLAYFAIR, *DEMOLITION AND SEALING OF HOUSES AS A PUNITIVE MEASURE IN THE ISRAELI-OCCUPIED WEST BANK* 7 (1987).

5. *Washington Post*, July 31, 1989, at A17.

6. Gazit, *The Administered Areas: Aspects of Israel's Policy*, in ISRAEL INFORMATION MINISTRY OF FOREIGN AFFAIRS INFORMATION BRIEFING 15-16 (1972).

7. Statement of Moshe Dayan in the *Jerusalem Post*, Oct. 30, 1968, as cited in J. STONE, *NO PEACE-NO WAR IN THE MIDDLE EAST* 15 (1968).

8. Raja Shehadeh relates the story of one person who had his house destroyed after his son had been arrested for throwing stones at an army patrol. The homeowner's account of the demolition is as follows:

On 14 November 1982, at 2:00 a.m., a number of Israeli soldiers rushed into our house and began to search. They did not find anything. They then said that they wanted my son Waleed who is a 16-year-old school student. They took him with them to the police station in Jerusalem [known as] the Russian compound. The following night we were surprised to

Emma Playfair described the situation many dispossessed families face:

No help is given to the family by the authorities to alleviate their hardship or to provide shelter, other than the minimal assistance available to all, according to means, from the Social Welfare Department. Unless neighbours or relatives can take them in, the family is dependent for shelter on the International Committee of the Red Cross which provides many such families with tents A family which in many cases has already had a breadwinner detained is also left homeless and often with inadequate clothing or food. Social and medical problems also arise if families are divided or have to live in unsuitable or primitive conditions, or move to an area where they have no local support.⁹

Playfair also challenges Israel's contention that demolitions are carried out only in the most extreme cases where an occupant has been directly linked to a violent act. She cites a case in which two houses were destroyed in Yatta in 1985 despite the fact that no one was alleged to have been injured as the result of the incident which triggered the demolitions.¹⁰ Fritz Kalshoven argues that the demolitions are not always in response to a suspect's terrorist activities: "Israeli authorities recently began demolishing homes of Arabs who had been uncooperative in investigations of terrorism or who had declined to come forward with information. Previously, demolition was limited to the homes of those actively engaged in terrorism."¹¹

In *Daghlas v. Military Commander of Judea und Samaria*,¹² the Israeli High Court approved an order by the Military Commander of the West Bank to demolish three homes of persons suspected of stabbing an Israeli settler. The High Court permitted the houses to be

see a large number of Israeli soldiers enter the house with an army officer. The officer told me to listen and began reading an order which stated that they wanted to demolish our house because our son, Waleed, had been accused of throwing stones at an Israel patrol. We were given 30 minutes to evacuate our house. We were surprised and could not do much in half an hour as most of the family were still asleep. The soldiers began throwing some of the furniture out of the house causing a lot if to break. The rest of the furniture remained in the house. The soldiers placed explosives and blew up the house. So, in a few minutes, my house . . . had been destroyed. This quick action did not give us the opportunity to ask for an injunction at the high Court of Justice . . . This house does not belong to my son but is my property, and now the whole family is in need of a home to live in.

R. SHEHADEH, *OCCUPIER'S LAW: ISRAEL AND THE WEST BANK 155-56* (1985). For other personal accounts relating to demolitions or sealing of houses see *IN THEIR OWN WORDS: HUMAN RIGHTS VIOLATIONS IN THE WEST BANK* (World Council of Churches ed. 1983).

9. E. PLAYFAIR, *supra* note 4, at 7. The International Red Cross has stated: "[G]enerally Israel does not provide alternative housing or supplies to those affected by demolitions. To do so would diminish the 'deterrent' effect of the demolition." INTERNATIONAL COMMITTEE OF THE RED CROSS, *ANNUAL REPORT 1976* (1977).

10. E. PLAYFAIR, *supra* note 4, at 5.

11. N.Y. Times, Nov. 11, 1969 as cited in NATIONAL LAWYERS GUILD 1977 MIDDLE EAST DELEGATION, *supra* note 3, at 66 n.13.

12. H.C. 698/85 (1986).

destroyed despite the fact that none of the suspects had been convicted and one had not even been detained. This case points out the inherent difficulties in attempting to implement a program which depends upon immediate retaliation in order to create a deterrence against violence, yet also claims to reserve such measures for those who actually engage in violent acts. Given the normally short time between a violent incident and the retaliatory demolition, it is apparent that the Israelis can only act upon a suspicion of guilt rather than certainty. The desire for a quick retaliatory response also leaves little time for investigation, especially in regard to the knowledge the other occupants of a house had of the suspected terrorist's activities.

The actual number of houses demolished in the Occupied Territories cannot be stated with any degree of complete certainty, as there are many conflicting claims as to the correct figure. Israeli authorities estimated that 1,224 houses had been destroyed from 1967-81.¹³ The Red Cross stated that 1,265 buildings had been destroyed from 1967-78.¹⁴ Al-Haq/Law in the Service of Man has claimed that from 1981 to 1987, 163 houses were demolished, sealed, or partially sealed.¹⁵ It has been estimated that more than 200 houses have been demolished since the beginning of the Intifadah.¹⁶

II. APPLICABILITY OF THE GENEVA CONVENTION

Before embarking on a textual analysis of the Fourth Geneva Convention, it is necessary to determine whether the terms of the Convention are applicable to the events in the Occupied Territories. Although Israel ratified the treaties of the Geneva Convention on April 10, 1951, it has claimed that the Fourth Convention applies only to occupied territory which has been seized from a legitimate sovereign. The Israeli Government claims that Jordan and Egypt were not the legitimate sovereigns of the West Bank and Gaza Strip respectively since the armistice agreements following the 1948 War did not recognize political or territorial boundaries of the land seized during the conflict. Israeli Supreme Court Justice Meir Shamgar states:

In my opinion there is no existing rule of international law according to which the Fourth Convention applies in each and every armed conflict whatever the status of the parties. Territory conquered does not always

13. Jerusalem Post, Nov. 23, 1981, at 1. This figure does not include villages destroyed during or immediately following the 1967 War.

14. INTERNATIONAL COMMITTEE OF THE RED CROSS, ANNUAL REPORT 1978 (1979).

15. For a breakdown of the years 1981-84, see E. COHEN, HUMAN RIGHTS IN THE ISRAELI OCCUPIED TERRITORIES 1967-82 (1985).

16. Washington Post, *supra* note 5. Overall, while the use of demolitions decreased dramatically in the late 1970s and early 1980s, the trend has reversed since 1984.

become occupied territory to which the rules of the Fourth Convention apply The whole idea of the restriction of military government powers is based on the assumption that there had been a sovereign who was ousted and that he had been a legitimate sovereign.¹⁷

Shamgar argues that Jordan's legal standing in the West Bank was that of a belligerent occupier following an unlawful invasion and not that of a legitimate sovereign. He points to the fact that only Great Britain and Pakistan recognized Jordan's annexation of the West Bank in 1950 as proof of the illegitimacy of Jordan's claim to the West Bank.¹⁸ Shamgar maintains that the same conclusion applies to the Gaza Strip, which was regarded by the Egyptian Government as territory under military occupation. Thus having established that both Egypt and Jordan were belligerent occupiers of the territories in question, Shamgar concludes that the territorial position is *sui generis*. It is therefore claimed that the Fourth Geneva Convention does not apply as of right in the territories, but may be applied on a *de facto* basis.¹⁹

Unfortunately, Shamgar's argument begs the question concerning the identity of the rightful sovereign in the West Bank and Gaza Strip during the years of Jordanian and Egyptian control (1948-67). If a nation is to be categorized as a belligerent occupier, it must logically follow that another country has temporarily lost its sovereign control. Yet what nation possessed such sovereignty before 1948 is not identified. Shamgar ignores this omission in his thesis, arguing that the situation is *sui generis*, which then allows him to justify the inapplicability of the Fourth Geneva Convention.

Although Israel has agreed to abide by the terms of the Fourth Geneva Convention on a *de facto* basis, it is necessary to discover whether Israel is bound by the Convention under the terms of the

17. Shamgar, *The Observance of International Law in the Administered Territories*, 1971 ISR. Y.B. HUM. RTS. 262, 263. In a similar vein, Yehuda Zvi Blum has written:

[T]he traditional rules of international law governing belligerent occupation are based on a two-fold assumption, namely, (a) that it was the legitimate sovereign which was ousted from the territory under occupation; and (b) that the ousting side qualifies as a belligerent occupant with respect to the territory. According to Glahn, "[b]elligerent occupation . . . as regulated by customary and conventional international law, presupposes a state of affairs in which the sovereign, the legitimate government of the occupied territory, is at war with the government of the occupying forces." This assumption of the concurrent existence in respect of the same territory of both an ousted legitimate sovereign and a belligerent occupant lies at the root of all those rules of international law, which, while recognizing and sanctioning the occupant's rights to administer the occupied territory, aim at the same time to safeguard the reversionary rights of the ousted sovereign. It would seem to follow that, in a case like the present where the ousted State never was the legitimate sovereign, those rules of belligerent occupation directed to safeguarding the sovereign's reversionary rights have no application.

Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 ISR. L. REV. 279, 293 (1968).

18. Shamgar, *supra* note 17, at 264-65.

19. *Id.* at 266.

treaty, or if its implementation is discretionary. Article 2 of the Fourth Geneva Convention states in part, "The Convention shall also apply 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."²⁰ Egypt, Jordan and Israel acceded to the terms of the Fourth Geneva Convention prior to the outbreak of hostilities in 1967.²¹ Thus, it facially appears that the Fourth Geneva Convention would apply since all three interested parties have controlled either the West Bank or Gaza Strip, and have ratified the Convention.

However, Israel concentrates on the status of the territory involved, i.e., that article 2 refers only to land taken from a *sovereign* High Contracting Party. The Israeli position, if accepted, would effectively negate the applicability of the Convention to any conflict involving territory whose sovereign status was in question. Adoption of the Israeli argument would violate the intended purpose of the Fourth Geneva Convention — the protection of civilians in time of war. As an example of the drafters' intent to allow for the liberal application of the Convention, article 2 states that the Fourth Geneva Convention applies even if a state of war is not recognized by one of the Contracting Parties. Similarly, during the drafting of the Fourth Convention, the Special Committee charged with formulating acceptable compromise language for article 2 concluded that, in regard to a war between a Contracting Party and an adverse state not a party to the Convention, the Contracting Party should still try to apply the articles of the Convention. Their report stated that "according to the spirit of the four Conventions, the Contracting States shall apply them, in so far as possible, as being the codification of rules which are generally recognized."²²

The applicability of the Fourth Convention to the Occupied Territories has been supported by the International Committee of the Red Cross,²³ the United Nations General Assembly,²⁴ the United Nations

20. Geneva Convention IV, *supra* note 1, at art. 2. Article 2 reads in full:

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any armed conflict which may arise between two or more high Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply 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.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provision thereof.

21. Jordan ratified the Convention on May 29, 1951 (91 U.N.T.S. 381); Israel on July 6, 1951 (96 U.N.T.S. 326); and Egypt on November 10, 1952 (150 U.N.T.S. 372).

22. 2B DIPLOMATIC CONFERENCE OF GENEVA OF 1949, FINAL RECORD 108 (1949).

23. The ICRC, on May 24, 1968, notified the Government of Israel that in its opinion the

Security Council,²⁵ and by the United States.²⁶ The Israeli position has also been criticized in some academic circles as well.²⁷ From a practical viewpoint, acceptance of the Israeli claim would seriously weaken the force of the Fourth Geneva Convention because it would allow nations to make fine legal arguments in order to evade and frustrate the purpose and spirit of the Convention. The humanitarian protections provided by the drafters of the Fourth Convention cannot be allowed to be negated by a legal dispute involving the sovereign

Fourth Convention applied to the Occupied Territories. In its reply on June 16, 1968, the Israeli Government stated that it wished to leave open the question of whether the Fourth Convention actually applied. 106 INT'L REV. OF THE RED CROSS 427 (1970). See also *id.*, at 487-88, in which the ICRC detailed its efforts to convince the Israeli Government that the destruction of houses in the Occupied Territories was a clear violation of articles 33 and 53. The ICRC stressed that the demolitions which had taken place constituted collective reprisals, in violation of article 33. The Red Cross recently reaffirmed its position in INTERNATIONAL COMMITTEE OF THE RED CROSS ANNUAL REPORT 1987 (1988), at 83-84, in which it stated that it considered "the conditions for application of the Fourth Geneva Convention are fulfilled in all of the occupied territories . . . whatever status the Israeli authorities ascribe to those territories."

24. See G.A. Res. 2443, 23 U.N. GAOR Supp. (No. 18) at 50, U.N. Doc. A/7218 (1968), which called upon "the Government of Israel to desist forthwith from acts of destroying homes of the Arab civilian population inhabiting areas occupied by Israel and to respect and implement the Universal Declaration of Human Rights and the Geneva Conventions of 12 August 1949 in occupied territories." See also G.A. Res. 2252, ES-V U.N. GAOR Supp. (No. 1) at 3-4, U.N. Doc. A/6798 (1967); and G.A. Res. 3092, 28 U.N. GAOR Supp. (No. 30) at 28-30, U.N. Doc. A/9030 (1974). There are numerous other General Assembly Resolutions which call for the mandatory implementation of the Fourth Geneva Convention to the Occupied Territories.

Similarly, the *Report of the Special Working Group of Experts Established under Resolution 6 (XXV) of the Commission on Human Rights*, 26 U.N. ESCOR, U.N. Doc. E/CN.4/1016/Add.1, at 5 (1970), stated:

Whereas the Government of Israel has stated that the applicability of the Convention should be left open, the Group wishes that the Occupying Power would now commence to apply the Convention The Occupying Power should refrain from demolishing houses for reasons which are not provided for in the Geneva Convention.

25. Four days after the 1967 War ended, the U.N. Security Council passed Resolution 237 which recommended "to the governments concerned the scrupulous respect of the humanitarian principles governing the treatment of prisoners of war and protection of civilian persons in time of war, contained in the Geneva Conventions of 12 August 1949." 22 U.N. SCOR (1361st mtg.) at 5 (1967).

26. On July 1, 1969, the United States Ambassador to the United Nations, Charles Yost, stated in the U.N. Security Council that the Government of Israel was required to apply the Fourth Geneva Convention. He added that the U.S. Government had "so informed the Government of Israel on numerous occasions since June, 1967." 61 U.S. DEP'T. OF STATE BULL. 76, 77 (1969). The United States also joined a United Nations Commission on Human Rights resolution which condemned the failure of Israel to acknowledge the applicability of the Fourth Geneva Convention (Feb. 4, 1978).

27. See e.g., *The Colonization of the West Bank Territories by Israel: Hearings before the Subcommittee on Immigration and Naturalization of the Senate Committee on the Judiciary*, 95th Cong., 1st Sess. 50-51 (1977) (testimony of Prof. W.T. Mallison). Mallison states:

Even if the claim that Jordan annexed the West Bank unlawfully should be accepted for purposes of legal argument, this does not mean that this territory is not "the territory of a high contracting party" within the meaning of Article 2. It is well established that the word 'territory' includes, in addition to de jure title, a mere de facto title to the territory. Otherwise, civilians in disputed territory would be denied the protection of law

Other relevant academic criticism includes F. KALSHOVEN, *BELLIGERENT REPRISALS* 316-17 (1971); NATIONAL LAWYERS GUILD 1977 MIDDLE EAST DELEGATION, *supra* note 3, at xiv-xvi.

status of the Occupied Territories. Arguments over the legal sovereignty of contested territory cannot eradicate the requirement that Contracting Parties have to follow the provisions of the Fourth Convention; otherwise, the Convention would become a meaningless shell of protection for civilians in time of war.

III. APPLICATION OF THE CONVENTION

The Palestinians living the Occupied Territories are covered by the Fourth Geneva Convention under article 47. Article 47 states:

Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories with the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.

When the Israel Defense Forces (IDF) gained control of the Occupied Territories in 1967, the Proclamation of the Assumption of Government by the Israel Defense Forces (Proclamation No. 2) was published. This provision directed in part:

2. The law in existence in the Region on 7 June 1967 shall remain in force insofar as it does not in any way conflict with the provisions of this Proclamation or any Proclamation or Order which may be issued by me, and subject to modifications resulting from the establishment of government by the Israel Defense Forces in the Region.²⁸

Thus, the law which existed in the Occupied Territories prior to the IDF's entrance was, with few exceptions, to be enforced by the Israelis. In the West Bank this meant that any residual law of the Ottoman, British and Jordanian entities was to be enforced, while in the Gaza Strip laws established by the Egyptian military were continued to be enforced in addition to the Ottoman and British acts which remained.

A. *Defence (Emergency) Regulation 119*

A British regulation, enacted in 1945, has been relied upon by the Israelis as a legal justification for the practice of demolishing or sealing houses in the Occupied Territories. The Palestine Defence (Emergency) Regulation 119 (hereinafter DER 119) passed pursuant to the Emergency Powers (Defence) Act, 1945 (British Imperial Statute)²⁹ states:

28. *Territories Administered by Israel Military Proclamations, Orders and Judicial Decisions: Extracts* (Shapiro-Libai ed.), 1971 ISR. Y.B. HUM. RTS. 419.

29. Emergency Powers (Defence) Act, 1945, 8 & 9 Geo. 6, ch. 31.

119.(1) A Military Commander may by order direct the forfeiture to the Government of Palestine of any house, structure or land from which he has reason to suspect that any firearm has been illegally discharged, or any bomb, grenade or explosive or incendiary article illegally thrown, 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 offence against these Regulations involving violence or intimidation or any Military Court offence; and when any house, structure or land is forfeited as aforesaid, the Military Commander may destroy the house or the structure of anything growing on the land.

DER 119 is of utmost importance since it provides the legal underpinning for the demolitions. It is also important to note that DER 119 gives the Military Commander wide latitude in employing this measure. The regulation allows the Military Commander to order the forfeiture of a house or land whenever he "has reason to *suspect*" that a house has been used as a base from which an attack originated or if a suspect lived in the dwelling. The regulation does not require that a formal legal hearing take place before such action may occur.

The Israelis contend that despite the occupation of the West Bank by the Jordanians, and the Gaza Strip by the Egyptians subsequent to the 1948 War, DER 119 was never explicitly repealed by either country and thus the regulation was still in effect in 1967. However, this position has been challenged by both the Jordanians and the Palestinians.

The Jordanians and the Palestinians claim that the British regulation was abolished by the Jordanian Government when the Jordanian Defence Regulations of 1935 came into effect in the West Bank on May 14, 1948.³⁰ The Jordanian Government had stipulated that the regulations would apply in any country or territory in which the Jordanian Army was stationed. On May 24, 1948, General Hashem, the Military Commander of the West Bank, issued Proclamation No. 2 which stated that all of the laws and regulations in effect in Palestine at the end of the Mandate would remain in force save where they conflicted with the Jordanian Defence Regulations of 1935.³¹

The Israelis counter that the Jordanian Law of Modification of Administrative Procedures in Palestine, which came into effect on December 1, 1949, stated that "all laws, Regulations and Orders in force

30. For a more complete discussion of the Jordanian and Israeli positions on the applicability of the British regulations, see Shefi, *The Protection of Human Rights in Areas Administered by Israel: United Nations Findings and Reality*, 1973 ISR. Y.B. HUM. RTS. 337, 342-45; E. COHEN, *supra* note 15 at 94-95.

31. Shefi, *supra* note 30, at 344.

at the end of the Mandate over Palestine shall remain in effect until abolished or modified." In addition, the Law Concerning the Laws and Regulations Prevailing in Both Banks of the Hashemite Kingdom of Jordan (Sept. 16, 1950) provided that the laws and regulations prevailing in each of the two Banks would remain in place until such time as the National Council and His Royal Highness issued a united code for both Banks. Thus, it is argued that the language of these two Jordanian acts makes clear that the British regulations were never formally repealed by Jordan and were therefore still enforceable during Jordan's occupancy of the West Bank.³²

It has also been argued that the Jordanian Arms and Ammunition Law and the Explosives Law, which declared that they abolished "any other Jordanian or Palestinian legislation which was in effect before this law, insofar as that legislation contradicts the provisions of this law," effectively repealed the British Regulations in question.³³ The Israelis contend that the language of DER 119 did not explicitly conflict with the two acts and thus was not abolished when those laws went into effect.

Finally, it has recently been contended that the British Government revoked the Regulations before the end of their Mandatory control over Palestine. In 1987 the British Minister of State for Foreign and Commonwealth Affairs wrote, "I confirm that, in view of the Palestine (Revocation) Order in Council 1948, the Palestine (Defence) Order in Council 1937 and the Defence Regulations 1945 made under it are, as a matter of English law, no longer in force."³⁴

Despite the recent British disclaimer as to the continuing validity of the Regulations, the Regulations were in fact employed by the Jordanians from 1948-1967.³⁵ Jordan used the Regulations against the populace in the West Bank which had rebelled against the monarchy.³⁶ Since Jordan never explicitly abolished the Regulations, and indeed used them to counter uprisings on the West Bank, it is appar-

32. Israel's High Court in H.C. 97/79, *Abu Awad v. Commander of the Judea and Samaria Region*, 33 (3) Piskei Din 309, ruled that the regulations had never been implicitly or explicitly abolished and therefore remain in force as enacted in 1945.

33. See Shefi, *supra* note 30, at 345.

34. E. PLAYFAIR, *supra* note 4, at 33 n.9.

35. Julius Stone contends that DER 119 was continued in the State of Israel and in the West Bank by Jordan concurrently by the Law for the General Administration of Palestine, No. 17 of 1949, Section 2, Off. Gaz. No. 1002, at 380, and by the Royal Law No. 28 of 1950, along with the General Defence Regulations No. 2 of 1939, under the Transjordan Defence Ordinance of 1935. Stone, *Behind the Cease-Fire Lines: Israel's Administration in Gaza and the West Bank*, in *OF LAW AND MAN: ESSAYS IN HONOUR OF HAIM H. COHN* 79, 107 n.35 (S. Shoham ed. 1971).

36. See Kuttner, *Israel and the West Bank: Aspects of the Law of Belligerent Occupation*, 1977 *ISR. Y.B. HUM. RTS.* 166, 224-25; E. COHEN, *supra* note 15, at 96.

ent that DER 119 was still valid on the West Bank when the Israelis began their occupation in 1967. The British Mandatory law was also enforced by the Egyptians in the Gaza Strip.³⁷

B. Article 64: Continuation of the Local Law

Article 64 of the Fourth Geneva Convention 21 provides the legal mechanism through which DER 119 is implemented. The article states:

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. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect to all offences covered by the said laws.³⁸

Israel recognized the principle behind article 64 when it issued Proclamation No. 2, which formally announced that any law which had existed prior to June 7, 1967, would continue to be enforced with few exceptions. Supporters of Israel's use of DER 119 argue that under article 64 all such laws must be enforced unless they pose a threat to the Occupying Power's military security or in some way contradict the provisions of the Convention. Julius Stone has written:

[T]he demolitions in question have taken place under provisions of local penal law in force when Israel entered into occupation. Article 64 thus seems even to *require* continuance of this law. Moreover the same paragraph permits repeal of such a law in force which is a threat to the occupant's security. It would thus be very strange indeed to hold that the occupant was forbidden to *maintain* the existing law when *this* was necessary for his security. The paragraph also authorizes him to repeal a law which obstructs the application of the Convention; but it does not *oblige* him to do so.³⁹

Critics of Israel's enforcement of DER 119 argue that the regulation violates the provision of article 64 which requires an Occupying Power to repeal existing laws which represent "an obstacle to the application of the present Convention."⁴⁰ It is argued that enforcement

37. Holtzman, *Security Legislation in the Occupied Areas*, in 4 ARAB AND AFRO-ASIAN MONOGRAPH SERIES 78 (1968).

38. Geneva Convention IV, *supra* note 1, at art. 64. Article 64 originally derived from Article 43 of the Hague Regulations. Article 43 provides that the occupant "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 of the country." The Hague Regulations are officially known as the Annex to the International Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539.

39. Stone, *supra* note 35, at 97 (emphasis in original).

40. Geneva Convention IV, *supra* note 1, at art. 64.

of DER 119 violates the spirit of the Fourth Geneva Convention which was intended to provide protection for civilians in time of war. Stone counters by noting that while article 64 permits the abolition of local penal law which is contrary to the Convention's principles, it does not oblige the Occupying Power to do so.⁴¹

Stone's argument runs counter to the *Commentary, IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* ("*Commentary: Geneva Convention IV*"), which declares that the provision which states that local laws may be rescinded if they are contrary to the principles of the Convention:

[I]s in the interests of the population and makes it possible to abrogate any discriminatory measures incompatible with humane requirements. It refers, in particular, to provisions which adversely affect racial or religious minorities, such provisions being contrary to the spirit of the Convention (Article 27), which forbids all adverse distinction based, in particular, on race, religion or political opinion.

*This means that when the penal legislation of the occupied territory conflicts with the provisions of the Convention, the Convention must prevail.*⁴²

In addition, looking to the drafters' intent during the formulation of the Convention, one may find further evidence of the principle that local law is not to be enforced if it contravenes the spirit of the Convention. The U.S. representative during the drafting of the Geneva Convention, Mr. Ginnane, asserted that the Occupying Power should in no way use the criminal law of the Occupied Power as an instrument of oppression. He referred to the fact that the Americans, after World War II, found it necessary as an Occupying Power to abrogate the laws established by the Nazis in Germany.⁴³ The Drafting Committee later adopted an amendment offered by the United Kingdom which included a provision which allowed the Occupying Power to disregard the penal laws of the occupied territory if they contravened the principles of the Convention. The Soviet Union's amendment, which did not include such a provision, was defeated.⁴⁴

C. DER 119's Conflict with the Convention

It thus becomes apparent that the efficacy of Israel's justification for the demolitions based on DER 119's incorporation through article

41. J. STONE, *supra* note 7, at 15 (1969).

42. J. PICTET, COMMENTARY, IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 335-36 (R. Griffin & C.W. Dumbleton trans. 1958) (emphasis added).

43. 2A DIPLOMATIC CONFERENCE OF GENEVA OF 1949, FINAL RECORD 670 (1949).

44. *Id.* at 771.

64 depends on whether the regulation conflicts with the Convention as a whole. It is therefore necessary to examine the various articles of the Convention to determine whether any of them preclude the demolition of houses as a deterrent measure.

D. *Article 53: Destruction of Property*

Article 53 pertains to the destruction of property by an Occupying Power. The article declares:

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 social or co-operative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.

The legality of the demolitions quite obviously depends upon how article 53 is construed. The primary definitional problem which arises in article 53 analysis rests with how the phrase "absolutely necessary by military operations"⁴⁵ is interpreted. The Israelis demolish houses in order to deter the population from engaging in hostile activities, contending that deterring terrorism constitutes an action of utmost military necessity. General Shlomo Gazit, Military Administrator of the Occupied Territories, stated:

The effectiveness of the blowing-up of houses lies in the fact that it is an immediate punishment and if we want to deter somebody, we cannot stop and wait for the normal legal machinery If we want to deter terrorists the effects must be seen immediately by the population.⁴⁶

Gazit maintains that "[s]trict adherence to the principle of demolishing or sealing off every house or apartment from which a terrorist act has been launched has proved to be effectively deterrent."⁴⁷ Gazit does admit that the Israelis at times improperly destroy property due to the exigent nature of the demolition policy. He explains that the demolition process is an "arbitrary act without the possibilities of investigating thoroughly. . . [W]e are not angels. Here and there a mistake is possible."⁴⁸

Meir Shamgar explained what he believed constituted an absolute military necessity:

Military requirement can be of two kinds: on the one hand, there is the

45. Geneva Convention IV, *supra* note 1, at art. 53.

46. NATIONAL LAWYER'S GUILD 1977 MIDDLE EAST DELEGATION, *supra* note 3, at 64 n.8.

47. Gazit, *supra* note 6, at 16.

48. *Israel's Occupation Policies*, NEW OUTLOOK, July-Aug. 1968, at 47, 49. Gazit went on to say, "The act of blowing up houses is essentially also a deterrent action, a punishment which is supposed to deter others. I am not sure that expropriation would achieve the same deterrent effect." *Id.* at 49-50.

necessity to destroy the physical base for military action when persons in the commission of a hostile military act are discovered. The house from which hand grenades are thrown is a military base, not different from a bunker in other parts of the world. On the other hand, there is the necessity to create effective military reaction. The measure under discussion is of utmost deterrent importance, especially in a country where capital punishment is not used.⁴⁹

An Israeli Ministry of Defence publication pointed to the deterrence effect of demolishing houses of terrorists:

The blowing up of houses owned or used by terrorists, in accordance with the law obtaining in Judea, Samaria and Gaza — as well as in Israel — has . . . proved an effective deterrent and a humane method . . . There is no doubt that by blowing up a few dozen houses of proven terrorists, bent on indiscriminate murder . . . thousands of innocent lives . . . have been saved.⁵⁰

An Israeli military officer identified the main reason for a quick response to terrorist activity when he said, "We do not want someone who is thinking of putting a bomb in a supermarket to wait six or nine months until he sees what happens to someone else."⁵¹ In an article appearing in *Cardozo Law Review* which supported the practice of demolitions on deterrence grounds, Reicin stated:

[D]estruction of homes may deter those persons actually contemplating terrorist acts as well as those who might otherwise harbor terrorists or encourage such acts. The act of destroying houses serves as a dramatic warning to those contemplating similar actions. Even individuals who may be willing to undertake suicide missions and would not be deterred by most other types of punishment, might reconsider in light of the visual reality of destruction as well as the awareness that financial disaster could befall their families or landlord. Moreover, the destruction may cause family members to make concerted efforts to discourage their children or siblings from committing acts of violence; landlords may also interfere by evicting those suspected of terrorist involvement. Finally, internal policing by the community may also become more active.⁵²

Professor Alan Dershowitz takes a different tact in justifying the demolitions. Dershowitz argues that the destruction of property is a far less onerous punishment for a suspected terrorist than imprisoning or executing him. Dershowitz states:

Let us assume that such destruction would be a technical violation of

49. Shamgar, *The Observance of International Law in the Administered Territories*, 1971 ISR. Y.B. HUM. RTS. 262, 275.

50. ISRAEL MINISTRY OF DEFENSE, *THE ISRAELI ADMINISTRATION IN JUDEA, SAMARIA, AND GAZA — A RECORD OF PROGRESS* 7 (1968).

51. N.Y. Times, March 30, 1969.

52. Reicin, *Preventive Detention, Curfews, Demolition of House, and Deportations: An Analysis of Measures Employed by Israel in the Administered Territories*, 8 *CARDOZO L. REV.* 515, 547 (1987).

some Convention. On the other hand, looked at realistically, what is it? It is a monetary punishment. Surely everybody would agree that, in terms of human values, it is better to destroy somebody's house than to destroy somebody's person, it is better to destroy his house than to detain him Any objective person, looking at the two situations, would have to conclude that detention is a much more serious violation than economic punishment — specifically, the destroying of houses

So in one sense one could argue, and I thus argue, that what Israel did in destroying the houses, is, at worst, foolish because it conjures up the image of collective responsibility and because it feeds on the kind of middle-class values which put property over human conditions. But surely it is very difficult to find any moral basis for making a comparative condemnation of Israel's destruction of houses . . . vis-à-vis another government's detention of the same people under the same circumstances.⁵³

Dershowitz's argument attempts to place the demolitions into the broader context of possible deterrent measures the Israelis could conceivably implement. By comparing the demolitions with detentions or capital punishment, Dershowitz emphasizes the relative leniency, in human terms, of the Israeli policy of destroying houses. His analysis, however logical it may appear, misses the crux of the issue. Dershowitz's fundamental assumption that the Israeli practice of demolition is preferable to detention ignores the fact that, in reality, the Israelis usually detain Palestinians suspected of terrorist activities in addition to demolishing their place of residence. Thus, any justification for the practice of demolition as a deterrence measure cannot be based on an argument which alleges that the demolitions are a lesser evil than detention since the Israelis often do both. Dershowitz's position also lacks sound legal reasoning. Following his approach, legal analysis would turn on a subjective determination of what is least intrusive rather than on textual analysis of the applicable international law.

The Israelis point to Pictet's *Commentary: Geneva Convention IV* for support for their position that the deterrence effect of the demolitions meets the requisite criteria for being "absolutely necessary" in military terms. The *Commentary: Geneva Convention IV* declares that "[i]t will be for the Occupying Power to judge the importance of such military operations."⁵⁴ Israel maintains that its eradication of terrorist bases is well within the permissible scope envisioned by the drafters of article 53. It is argued that the destruction of terrorist bases is a fundamental tenet of counter-guerrilla strategy and therefore such action should be classified as being of imperative military neces-

53. *Symposium on Human Rights*, 1971 ISR. Y.B. HUM. RTS. 361, 376-77.

54. J. PICTET, *supra* note 42, at 302.

sity under article 53.⁵⁵

The Israeli High Court of Justice has consistently upheld the legality of demolishing suspected terrorists' homes.⁵⁶ In *Hamri v. Regional Commander of Judea and Samaria*, the Court held that under DER 119 it was permissible to (1) expropriate the house, (2) seal part of the house, (3) seal off the entire house or (4) demolish the entire house.⁵⁷ Since the homeowner's son had allegedly killed an Israeli, it was held that the destruction of the house was warranted. The Court also noted that the demolition of the house would have a strong deterrent effect upon others contemplating such actions.⁵⁸ The Court did, however, state that demolitions should be used sparingly due to the devastating effects such an action has upon other residents of the house who may not have been involved in the terrorist activity.⁵⁹

In *Motzlah v. Minister of Defense*,⁶⁰ the Court upheld a demolition order which was issued in retaliation for a bombing that had occurred two years earlier. The Court held that despite the passage of time between the incident in question and the demolition order, there had been no abuse of discretion.

There is a strong legal argument against the Israeli interpretation of article 53. The disagreement centers on when a demolition can truly be rendered "absolutely necessary by military operations."⁶¹ The question arises whether deterrence alone satisfies the standard articulated in article 53. The International Committee of the Red Cross believes it does not. The Director of the Department of Principles and Law at the ICRC defined what constituted an absolute military operation:

In the opinion of the ICRC, the expression 'military operations' must be construed to mean the movements, manoeuvres, and other action taken by the armed forces *with a view to fighting*. Destruction of property as mentioned in article 53 cannot be justified under the terms of that

55. Reicin, *supra* note 52, at 546.

56. See e.g., *Sakhwil v. Regional Commander of Judea and Samaria*, H.C. 434/79, 34(1) P.D. 464 (1980) (Court ruled DER 119 was valid under Geneva Convention IV and permitted sealing off of suspected terrorist's room); *Khamed v. Regional Commander of Judea and Samaria*, H.C. 22/81, 35(3) P.D. 223 (1981) (property may be seized for punitive measures if occupant has committed a major security offense); *Hamamra v. Minister of Defense*, H.C. 274/82, 36(2) P.D. 755 (1982) (Court allowed complete sealing of house despite fact that the entire family would be homeless due to sixteen-year-old son's planting of bomb); *Abu Allan v. Minister of Defense*, H.C. 126/81, 37(2) P.D. 169 (1983) (sealing of room permissible reaction to occupant's stone throwing).

57. H.C. 361/82, 36(3) P.D. 439, 441, 442 (1982).

58. *Id.* at 442.

59. *Id.*

60. H.C. 572/82, 36(4) P.D. 610 (1982).

61. Geneva Convention IV, *supra* note 1, at art. 53.

article unless such destruction is absolutely necessary — i.e., materially indispensable — for the armed forces to engage in action, such as making way for them.

This exception to the prohibition cannot justify destruction as a punishment or deterrent, since to preclude this type of destruction is an essential aim of the article.

The authors of the Commentary on the Fourth Convention were in full agreement with the ICRC on this, as confirmed by Mr. Jean Pictet, under whose direction the Commentary was published.⁶²

Since the Israelis justify the demolitions for deterrence reasons, it cannot be claimed that the demolitions have taken place in the midst of conflict or are of *immediate* military necessity. Esther Cohen agrees that the Israelis have not always acted in accordance with the literal language of article 53 as she notes: "The necessity was not, however, imperative, the demolition was not done in the heat of the battle but mostly after the saboteur or armaments were found in the apartment or house."⁶³ Draper also believes that the demolitions cannot be justified as a military necessity:

It would appear that after the guerrilla has used the house from which he committed hostile acts, the blowing up takes place in circumstances wholly unrelated to military operations which may not even be in progress at the time To appeal to the humanitarian element by stating, which is true, that the inhabitants are first removed before blowing up the house, destroys the very basis of his argument for the application of article 53 under its exceptive clause.⁶⁴

Yoran Dinstein has also argued that the demolitions violate article 53: "[I]n view of the provision of article 53, it is forbidden . . . to demolish an [sic] house belonging to a protected person in an occupied territory merely because the owner or tenant is suspected of rendering assistance to saboteurs."⁶⁵ Kalshoven states that the demolitions are prohibited by the Fourth Geneva Convention. He writes: "[I]t needs no argument that in the instances discussed here, i.e., in regard to the occupied territories there was no question of military operations, let alone that these could have made the demolitions absolutely necessary."⁶⁶

The United Nations' Special Committee to Investigate Israeli Practices Affecting Human Rights of the Population of the Occupied Territories cited numerous examples of houses and entire villages de-

62. From a letter by Jacques Moreillon (Nov. 25, 1961) (emphasis in original).

63. E. COHEN, *supra* note 15, at 101.

64. Draper, *Military Necessity and Humanitarian Imperatives*, 12 REVUE DE DROIT PENAL MILITAIRE ET DE DROIT DE LA GUERRE, 140-41 (1973).

65. Dinstein, *The International Law of Belligerent Occupation and Human Rights*, 8 1978 ISR. Y.B. HUM. RTS. 104, 128.

66. F. KALSHOVEN, *supra* note 27, at 320.

destroyed by Israeli authorities in the Occupied Territories.⁶⁷ It declared that the Government of Israel's policy to destroy the houses of persons suspected of helping members of the resistance was in violation of articles 33 and 53 of the Fourth Geneva Convention.⁶⁸

U.N. General Assembly Resolution 2851 (XXXVI) (1971), commended the Special Committee's report and "[s]trongly call[ed] upon Israel to rescind forthwith all measures and to desist from all policies and practices as . . . [t]he destruction and demolition of villages, quarters and houses."

In the face of much criticism of its demolition policy, Israel has maintained that such action is permissible as a deterrent to terrorist activity. In part, the Israelis rely on the *Commentary: Geneva Convention IV* which states that it is up to the Occupying Power to judge the importance of the military operation used to justify the destruction of property. However, this provision is not without a limiting qualification. The *Commentary: Geneva Convention IV* also stated that the Occupying Power's discretion in this area is not absolute:

It is therefore to be feared that bad faith in the application of the reservation may render the proposed safeguard valueless; for unscrupulous recourse to the clause concerning military necessity would allow the Occupying Power to circumvent the prohibition set forth in the Convention. The Occupying Power must therefore try to interpret the clause in a reasonable manner. Whenever it is felt essential to resort to destruction, the occupying authorities must try to keep a sense of proportion in comparing military advantages to be gained with the damage done.⁶⁹

The language contained in the *Commentary: Geneva Convention IV* states that without some limitation on the permissible scope of destruction of property that can be carried out by an Occupying Power, the exception would swallow the rule. The use of demolitions as a deterrence measure is problematic, because deterrence as a logical construct is not the equivalent to destroying a building in the heat of battle. Allowing an Occupying Power to justify demolition of houses on the basis that such action is needed to control the population would greatly expand the scope of the exception beyond what is acceptable if article 53 is to retain its vitality. There is a vast difference between destroying a house which contains a sniper and demolishing a building

67. Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories, U.N. Doc. A/8389 (1971), at 44-46.

68. *Id.* at 54. It should be noted that the Special Committee was made up of three persons from nations which did not have diplomatic relations with Israel (Ceylon, Somalia, and Yugoslavia). The spokesman of the Permanent Mission of Israel to the United Nations called the Special Committee "a willing tool of the Arab propaganda machine." 3 THE ARAB ISRAELI CONFLICT 929 (J.N. Moore ed. 1974).

69. J. PICTET, *supra* note 42, at 302.

because a suspected terrorist lived in the house. The major difficulty with the adoption of the Israeli position is that it would blur what is permissible under the clause 'absolute military operations' to the extent that the provision is robbed of its literal meaning and becomes a subjective determination left to the unfettered discretion of the Occupying Power.

Article 53 would become a hollow shell of protection for the civilian population of occupied territories if the Occupying Power is given complete discretion in interpreting the exception clause. Destruction under the provision 'absolute military operations' must be limited to situations in which an Occupying Power is confronted with an armed attack from a building. Such an interpretation would prevent the Occupying Power from abusing the exception clause and thereby negating the spirit of article 53. Allowing deterrence to be used as a justification for demolishing houses would rob article 53 of its vitality since the standard used to determine the legality of such action would be ambiguous due to the lack of a bright-line rule.

E. Article 33: Prohibition of Collective Punishment

Another troublesome accusation which has been levelled at the practice of demolitions in the Occupied Territories is that the act often destroys or impairs the dwellings of many people who were not actually involved in terrorist activities. Quite often, when a house is destroyed, entire families lose their homes due to the suspected actions of one member of the family or a tenant. Article 33 of the Fourth Geneva Convention provides a clear prohibition against any form of collective punishment:

No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation of terrorism are prohibited. Pillage is prohibited. Reprisals against protected persons and their property are prohibited.⁷⁰

If persons who are not involved in terrorist activities are deprived of their homes as the result of a demolition, such an action would be classified as an illegal form of collective punishment under article 33.

The Israelis contend that houses are demolished only if all of the members of the residence are in some way implicated or were aware of the violent act committed by another resident. Shefi states that "[d]emolition is never carried out as a collective punishment, but only

70. Article 33 is derived from article 50 of the Hague Regulations which states, "[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 or severally responsible." Annex to the International Convention Respecting the Laws and Customs of War on Land, *supra* note 38, art. 50.

and solely as a punishment of the individual involved."⁷¹ Shefi also argues that "[n]o such action is taken unless . . . there [is] a direct connection between the building and terrorist and other violent activities."⁷² Moshe Dayan stated in the Knesset that Israel's policy is not to destroy houses unless the family or resident were aware of the terrorist's activities.⁷³ These contentions do not square with Israel's stated policy of using the demolitions as a deterrence measure. There is generally not a thorough investigation of the complicity or involvement of the suspected terrorist's fellow residents before the house is demolished or sealed. The reality of the situation in the Occupied Territories is that the demolitions take place soon after a violent act occurs.

The procedural nature of the demolitions before the recent Supreme Court decision confirms this fact. The occupants of the house to be demolished were given no right of appeal.⁷⁴ Moshe Dayan admitted this fact in the Knesset on February 13, 1968, when he stated that although the owners and tenants are informed about the impending demolition, they are not given an opportunity to appeal the demolition order.⁷⁵ As Gazit said, "[I]f we want to deter somebody, we cannot stop and wait for the normal, legal machinery."⁷⁶ The immediate retaliatory nature of the demolitions in effect negated the argument that all of the members of a house must be implicated in terrorist activities before their house was destroyed. It is practically impossible in most cases to ascertain the complicity of each of the residents in the short time between the occurrence of the violent act and the demolition order. It remains to be seen whether the residents' new right of appeal will prevent the army from demolishing the houses of persons who are not implicated in the act giving rise to the demolition order.

Kalshoven rejects the Israeli contention that the demolitions are intended as a punitive measure against those actually involved in subversive activities: "Any attempt to justify the destructions as a punitive measure inflicted on individual suspects is bound to fail, in view of the conspicuous absence of anything like a fair and regular trial pre-

71. Shefi, *supra* note 30, at 346.

72. Shefi, *The Reports of the U.N. Special Committees on Israeli Practices in the Territories, in MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL 1967-80: THE LEGAL ASPECTS* 285, 301 (M. Shamgar ed. 1982).

73. Jerusalem Post, Oct. 30, 1968, as cited in J. STONE, *supra* note 7, at 15.

74. While there is no general right to appeal the demolition order, the owner may file an appeal to the Claims Appeals Board for compensation. However, this tactic rarely succeeds as the Board recognizes the military commander's order as primary legislation and does not rely on international law as its primary source of law. E. COHEN, *supra* note 15, at 102.

75. 51 *Divrei Haknesset* 1026.

76. Gazit, *supra* note 6, at 5.

ceding the execution of the measures and establish the liability to punishment of the persons in question."⁷⁷ In *Daghlas v. The Military Commander of the Judea and Samaria Region*, the Israeli High Court conceded that the demolitions are primarily designed to make a potential terrorist think twice about committing a violent act due to the repercussions it would have upon his family. The Court stated that a suspect "should know that his criminal acts will not only hurt him, but are apt to cause great suffering to his family."⁷⁸ This statement is an indication of the intended effect of Israel's demolition policy — it is designed to inhibit violent activities by punishing both the suspect and his family. The effectiveness of such a policy cannot be denied; it is safe to assume that this approach has acted as a powerful deterrent to those wishing to act against the Israelis.

Article 33 clearly prohibits the punishment of innocent people for the acts of others. During the drafting of article 33, the Italian representative stated that the new article was an improvement from article 50 of the Hague Regulations, which did not exclude the possibility of collective sanctions for individual acts which might be attributed to the population as a whole.⁷⁹ The *Commentary: Geneva Convention IV* notes that it is no longer feasible to justify collective punishment on the grounds that "the community might bear at least a passive responsibility" for an act committed against an Occupying Power.⁸⁰ It summarized the legal principle which was established by article 33 as follows:

This provision is very clear Responsibility is personal and it will no longer be possible to inflict penalties on persons who have not committed the acts complained of

The prohibition of reprisals is a safeguard for all protected persons, whether in the territory of a Party to the conflict or in occupied territory. It is absolute and mandatory in character and thus cannot be interpreted as containing a tacit reservations with regard to military necessity.

The solemn and unconditional character of the undertaking entered into by the State Parties to the Convention must be emphasized. To infringe this provision with the idea of restoring law and order would only add one more violation to those with which the enemy is reproaching.⁸¹

It is clear that the Israeli practice of demolishing the houses of suspected terrorists immediately after a violent act occurs is a viola-

77. F. KALSHOVEN, *supra* note 27, at 321.

78. H.C.J. 698/85.

79. 2B DIPLOMATIC CONFERENCE OF GENEVA OF 1949, FINAL RECORD 648 (1949).

80. J. PICTET, *supra* note 42, at 225.

81. *Id.* at 225, 228.

tion of article 33 if the other residents of the home have no proven knowledge or involvement with the suspect's activities. Since collective punishment is prohibited by article 33, the Israelis may justify a demolition only if they can prove individual complicity by each of the persons living in the condemned building. This requirement would however defeat the Israelis' objective of striking back immediately after a violent act has occurred, for the determination of individual responsibility by the residents would necessitate a thorough investigation and trial.

Despite the fact that DER 119 does not specifically require knowledge by the inhabitants of the terrorist's activities, it is impermissible to rely on local law to implement a policy of collective punishment. Gerhard von Glahn states: "[I]nvoication of domestic law or of domestic custom on the part of the belligerent occupant could not affect the essential illegality of the alleged reprisal: such law and such custom could not take effect in territory under belligerent occupation in view of the Fourth Geneva Convention and provisions."⁸² The right of appeal granted to the residents of the Occupied Territories may serve to eliminate the violations of article 33 previously committed by the Israeli army by restricting the demolitions to the homes of people actually proven to have engaged in violent activities. It remains to be seen whether the appeal process will necessitate a thorough investigation and trial or will simply be a rubber stamp for the army's request for demolitions.

IV. CONCLUSION

Demolitions and the sealing of houses in the Occupied Territories often run afoul of article 53's restriction of such destruction to instances involving an imperative military operation, as well as article 33's prohibition of collective punishment. Although there may be occurrences in which such action may satisfy the requirements of both articles, there can be little doubt that in the majority of cases the demolitions are in violation of international law. The Israeli argument that article 64 permits the implementation of DER 119 despite articles 53 and 33 is without merit. Such an argument ignores the express provision contained in article 64 which states that the local law should not be implemented if it represents an "obstacle to the application of the present Convention."⁸³ It can scarcely be argued that an Occupyp-

82. von Glahn, *The Protection of Human Rights in Time of Armed Conflicts*, 1971 *ISR. Y.B. HUM. RTS.* 208, 227.

83. Geneva Convention IV, *supra* note 1, at art. 64.

ing Power may invoke article 64 in order to implement a local law which violates the standards of articles 53 and 33. Another textual argument which may be made against the Israeli position is that articles 53 and 33 contain specific prohibitions against certain practices by an Occupying Power whereas article 64 contains only a generalized provision regarding enforcement of the local law subject to the principles of the Fourth Geneva Convention.

Israel should punish only those who are convicted of performing or conspiring to perform terrorist activities. Buildings should only be destroyed if it is imperative to do so in order to counter military attacks emanating from the structure. By following such a policy, Israel would eliminate the legal approbation currently levelled at its implementation of DER 119. Although its attempts to discourage terrorist activity are understandable, Israel must implement counter-terrorist measures which are not in violation of international law. The effectiveness of a policy does not justify its use; otherwise, many draconian measures undertaken by an Occupying Power to control the local population would be permissible. Israel's demolitions in the Occupied Territories ignore the plain meaning of the language contained in articles 53 and 33.

Israel should strive to honor the spirit of the Fourth Geneva Convention and thereby remove the shadow which has been cast upon it as the result of its policy of using demolitions as a deterrence measure. Following the strictures of international law is not always an easy path for nations torn by internal conflict or war. The legal guidelines established by the Geneva Convention often seem detrimental to the security of a nation faced with controlling a hostile population. Yet they represent the best hope mankind has in guaranteeing the humane treatment of civilians and safeguarding personal property in times of strife and conflict. To ignore such provisions sets the progress of man back a step, back to the disavowed practices of total war. The principles of the Fourth Geneva Convention are undoubtedly imperfect, but they represent the best efforts of men who strove to eliminate the excesses of the last world war. Israel, a nation whose birth was significantly influenced by those who had witnessed the abominations of unprincipled warfare, should surely understand the importance of upholding the principles embodied in the Fourth Geneva Convention.