

***ISRAEL'S PUNITIVE HOUSE DEMOLITION POLICY***

***COLLECTIVE PUNISHMENT***

***IN VIOLATION OF INTERNATIONAL LAW***

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***Al-Haq, 2003***

***West Bank affiliate of the International  
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# ***AL-HAQ***

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## *Introduction*

4 The military occupation by Israel of the West Bank and the Gaza Strip is now in its fourth decade and the litany of human rights abuses that have been committed throughout this occupation are both widely known and well documented. One of the most noticeable and altogether inhumane practices that the occupying army has continuously employed since 1967 is that of demolishing Palestinian houses. Over nine thousand houses have been completely destroyed since the beginning of the occupation. Houses have been razed for the creation of “no-go areas” around illegal Israeli settlements, along settler roads and along the border with Egypt in the Gaza Strip. Buildings have been destroyed or damaged in the course of military operations; all too frequently such destruction has not been justified by military necessity. Thousands of houses have also been demolished on the basis that they had been built in violation of the Israeli authorities housing permit ‘policy’. It is estimated that presently there are several thousand houses in East Jerusalem alone that are threatened with demolition!

Most notoriously, Israel has throughout the occupation implemented a policy whereby the houses of suspected, detained or convicted Palestinians are demolished as a punitive measure for their actual or suspected crimes. This paper will examine the legality of this practice, whereby families are punished by house demolition for the unlawful actions of a single member of that family. These demolitions are ordered by Military Commanders, carried out by the soldiers of the occupying army and have been repeatedly validated by the Israeli judiciary. It will be specifically argued that these demolitions constitute acts of collective punishment, expressly prohibited under international law.

It is worth noting that frequently, the Israeli occupation forces have demolished houses in response to the commission of illegal acts, although it has claimed that such demolitions were not punitive but were for security or military purposes. For example, on 10 January 2002 sixty houses were completely demolished and four partially demolished by the army in the Rafah Refugee Camp in the Gaza Strip. Six hundred people were left homeless as a result of this action.

These demolitions were carried out the day after four Israeli soldiers were killed in that area by two gunmen.<sup>2</sup> Although it was claimed otherwise, the effect of this action was undoubtedly punitive in nature. Such demolitions are quite common. This report, however, will focus on those demolitions which the Israeli authorities openly admit to be punitive.

In this regard, the domestic legal basis for the demolitions relied upon by Israel will be examined and the various justifications which the authorities put forward for the use of this legislation will be critiqued. Following this, it is intended to examine the prohibition of collective punishment under international law. Focusing on this prohibition within the humanitarian law regime the customary nature of this legal norm will also be assessed. In the course of this discussion, recourse will be made to the jurisprudence of the Supreme Court of Israel and to case examples of demolitions the details of which have been gathered by Al-Haq fieldworkers. It will then be assessed whether these punitive house demolitions amount to war crimes or crimes against humanity.

## Some general aspects of demolitions

It is a common and recurring practice in the Occupied Palestinian Territories that the army of the Occupying Power, the Israeli army, demolish or seal the houses of persons who have committed offences or who are suspected of having committed such. In particular, the homes of persons who have carried out suicide bombings within Israel or against Israeli settlers or soldiers, are always demolished in the aftermath of such attacks. This punitive demolition policy also targets persons, and thereby their families, for less serious offences or for suspicion that offences have been committed. For example, over the course of two days at the end of November 2002 the army demolished eight homes in the Bethlehem

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<sup>2</sup>Report of the Special Rapporteur of the Commission on Human Rights, Mr. John Dugard, on the situation of human rights in the Palestinian territories occupied by Israel since 1967, U.N. Doc. E/CN.4/2002/32, 6 March 2002.

area; the house of a suicide bomber who had killed eleven people in Jerusalem the previous day, the house of an Islamic Jihad activist, the home of a member of Fatah, the house of Abdullah abu-Hadid, suspected of being involved in shooting attacks prior to Operation Defensive Shield, the home of an activist in Fatah's military wing who was detained in Israeli at the time, the homes of two "Tanzim" activists and the home of Ibrahim Abayat, a former Fatah leader who had been deported to Cyprus after the siege of the Church of the Nativity.<sup>3</sup> The army demolished houses of persons involved in recent offences, in addition to persons who had or were suspected of carrying out "old" attacks and of persons already detained or deported.

Where it is intended that a demolition will be carried out following the commission of illegal acts, a Military Commander will issue a military order directing that the house in question is to be demolished or sealed. The occupying army employs various methods for carrying out these demolitions. Bulldozers are most commonly used for demolishing houses although the army also frequently uses explosives for this purpose. To facilitate these demolitions, a curfew is usually imposed in the locality and tanks and armoured personnel carriers will accompany the unit carrying out the demolition. In a number of cases, very little notice is given to inhabitants that their home is about to be destroyed; often as little as fifteen minutes is allowed for the residents to remove all their belongings from the house that is about to be demolished. On other occasions, soldiers have informed families that their home may be demolished in the future and no further information is supplied. Under such circumstances, these persons are forced to live in uncertainty, not knowing when, or if, their home will be destroyed. For families whose houses have been completely demolished, the severe impact is made worse by the fact that they are prohibited from rebuilding on the site of their former home. On occasion, the site of their former home may be declared a "closed area" by the army, thus preventing the family having any access whatsoever to their property. The land is confiscated and declared as no longer belonging to the owners.

The less severe sanction of sealing a house or particular rooms is also imposed as a punitive measure. Using concrete blocks or metal sheeting rooms or entire houses are sealed off, preventing access to them by the former inhabitants. Although this measure is seen as reversible, there are few cases of sealed houses

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3 'IDF demolishes eight homes in Bethlehem', *Ha'aretz*, 24 November 2002.

being allowed to be re-opened and the overall effect is thus the same; families are denied access to their house and are rendered homeless. As the next section will demonstrate, the punitive measures of demolition and sealing have been employed by the Israeli authorities throughout their entire occupation of the West Bank and Gaza.

# Empirical data relating to punitive house demolitions and sealings

## The Early Years of the Occupation

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Exact figures for the number of punitive house demolitions which were carried out during the first half of Israel's occupation of the West Bank and Gaza are unavailable, although it is widely known that the Israeli authorities employed this sanction extensively. A variety of sources point to the widespread use of house demolitions as a means of punishment and it is clear that such use was particularly intense during the first years of the occupation. The former Israeli Defence Minister, Moshe Dayan, told the Knesset that 516 houses had been demolished, expropriated or sealed between June 1967 and 1st December 1969.<sup>4</sup> The ICRC reported in 1978 that 1,224 houses had been demolished since 1967, a thousand of which had taken place in the first five years of the occupation. Al-Haq estimates that during the first decade of the occupation at least one thousand homes were demolished punitively.<sup>5</sup> The number of demolitions dropped during the mid 1970's and approximately one hundred houses were demolished or sealed from this time until the early 1980's.<sup>6</sup> As the below table shows, demolitions and sealing became much more frequent in the period beginning in 1985. With the onset of the first intifada at the end of 1987, the Israeli authorities escalated the implementation of the punitive house demolition policy with considerable fervour.

Between 1987 and the end of the first intifada the Israeli authorities completely demolished nearly four hundred houses and either partially demolished, sealed or partially sealed another four hundred as punishment. The demolition policy employed by Israel during the first intifada led to the destruction or putting beyond use of over 3,500 individual rooms and caused the displacement of approximately eight thousand Palestinian people.<sup>7</sup>

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4 Cited in Esther Rosalind Cohen, *Human rights in the Israeli-occupied territories; 1967-1982*, Manchester University Press, 1985, p. 96.

5 Al-Haq, *Punishing a Nation; Human Rights Violations during the Palestinian Uprising, December 1987 - December 1988* Ramallah, 1989, p. 153.

6 *Id.*

7 Source: Al-Haq database.

Use of demolitions as a punitive measure waned with the falling levels of violent resistance during the mid 1990's, to the point where no demolitions or sealings were carried out between 1998 and 2000.

During 2001 and over the course of the past year the Israeli authorities have once again renewed their punitive house demolition policy in the face of the violence of this, the second intifada. From August 2002 to January 2003 the army carried out over one hundred punitive house demolitions in the West Bank and Gaza. This represents the highest number of demolitions in such a short period for over a decade.<sup>8</sup>

There is a worrying difference in Israel's punitive demolition policy between the two intifadas. Since the resumption of this policy during the second intifada, the Israeli authorities have almost constantly chosen the most severe sanction permitted by Regulation 119(1), that of total demolition. Taking the figures in the below table into account, it is clear that whereas during the first intifada 57% of those houses affected were demolished, either completely or partially, during the second intifada 98% of houses affected have been totally demolished. There have been few cases of houses being in the past two years. The number of demolitions has not yet reached the level witnessed during the first intifada, although this year in particular has shown a marked increase in the use of the demolition policy. Opting for complete demolition over the less harsh, and reversible, sanction of sealing displays a worrying trend in the Israeli authorities employment of this illegal policy.

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<sup>8</sup> See B'tselem, [http://www.btselem.org/english/House\\_Demolitions/Statistics.asp](http://www.btselem.org/english/House_Demolitions/Statistics.asp).

**Israel's Punitive Demolitions and Sealings according to  
Al-Haq's database  
January 1981 - January 2003**

Year	Demolished	Partially Demolished	Sealed	Partially sealed	Annual Total
1981	14	-	1	1	16
1982	6	3	3	4	16
1983	6	2	11	14	33
1984	3	-	1	3	7
1985	24	-	24	7	55
1986	12	1	10	25	48
1987	6	-	15	18	39
1988	118	23	38	22	201
1989	119	29	61	27	236
1990	103	27	79	23	232
1991	50	5	37	26	118
1992	3	-	23	10	36
1993	5	2	20	14	41
1994	1	-	-	-	1
1995	2	1	-	-	3
1996 <sup>9</sup>	11	-	-	-	11
1997	6	-	2	-	8
1998-2000	-	-	-	-	-
2001	8	1	-	-	9
2002	114	-	-	-	74
2003	19	-	2	-	22
Totals	630	94	328	194	1.246

<sup>9</sup> Figures from 1996 onwards are supplied by B'tselem, Israeli Information Center for Human Rights in the Occupied Territories, see [http://www.btselem.org/english/House\\_Demolitions/Statistics.asp](http://www.btselem.org/english/House_Demolitions/Statistics.asp); last visited February 2003.

## *Domestic Legal Basis relied upon by Israel for Demolitions*

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

The demolition of the houses of those persons who have, or are suspected to have, been involved in acts prejudicial to the security of the State of Israel is carried out pursuant to Regulation 119(1) of the Defence (Emergency) Regulations, 1945.<sup>10</sup> This legislation was enacted by the British government during the time of its mandate over Palestine and pursuant to Article 43 of the 1907 Hague Regulations<sup>11</sup> and Article 64 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War<sup>12</sup> the Israeli authorities contend that these laws remain “part and parcel” of the penal law in the Occupied Territories.<sup>13</sup> Falling within a section of the Regulations titled “Miscellaneous Penal Provisions“, Regulation 119(1) sets down inter alia that:

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

<sup>10</sup> *Defence (Emergency) Regulations, 1945, [1945] Palestine Gazette (No. 1442), Supp. No. 2, 1055.*

<sup>11</sup> *Regulations annexed to Convention IV Respecting the Laws and Customs of War on Land, signed at The Hague, 18 October 1907 [hereinafter the 1907 Hague Regulations].*

<sup>12</sup> *Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, adopted 12 August 1948, entered into force 21 October 1950, 75 U.N.T.S. 287 [hereinafter the Fourth Geneva Convention].*

<sup>13</sup> See Meir Shamgar, ‘The Observance of International Law in the Administered Territories’, 1 *Israel Yearbook on Human Rights* (1971) 262, p. 275.

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

Regarding the Defence (Emergency) Regulations themselves, it has been pointed out that these were repealed by the British immediately prior to the termination of their mandate by the Palestine (Revocations) Order-in-Council of 1948. Thus, the Israeli authorities cannot rely thereupon, as the Regulations were not the "laws in force in the country", pursuant to Article 43, at the time the State of Israel came into existence. The Israeli position is that the failure of the British Government to publish the revocation order in the official Palestine Gazette prevented the Regulations from being repealed.<sup>14</sup> Similarly, the Jordanian Constitution overturned these regulations in May 1948, but Israel has contended that the revocation was merely implicit and therefore they did not see it as effective. Both the British and Jordanian Governments have clearly and repeatedly stated that their view is that these laws were repealed by them in 1948.<sup>15</sup> It is Al-Haq's opinion that the Defence (Emergency) Regulations, 1945 are no longer valid in the Occupied Territories and that Israel is thus legally prevented from relying on these laws!<sup>16</sup>

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Furthermore, even if the said Regulation were in force in 1967, it can be argued that they could not be relied upon. Article 64 of the Fourth Geneva Convention specifies that local law may only remain in force provided that it is not "an obstacle to the application to the Present Convention". The official commentary elaborates that "when the penal legislation of the occupied territory conflicts with the provisions of the Convention, the Convention must "prevail".<sup>17</sup> It is necessary, therefore, to establish whether the provisions of the Defence (Emergency) Regulations, specifically Regulation 119(1), are compatible with the norms set down in the relevant treaties of international humanitarian law.

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14 See *Na'azal v. IDF Commander in Judea and Samaria*, 39(3) P.D. 645, 652 (1986), summarized in English in 16 *Israel Yearbook on Human Rights* 329 (1986).

15 See Lynn Welchman, *A Thousand and One Homes: Israel's Demolition and Sealing Of Houses in the Occupied Palestinian Territories* Al-Haq Occasional Paper No. 11, Ramallah: 1993, pp. 14-17.

16 See Martha Roadstrum Moffett, *Perpetual Emergency: A Legal Analysis of Israel's Use of the British Defence (Emergency) Regulations, 1945, in the Occupied Territories* Al-Haq Occasional Paper No. 6, Ramallah: 1989.

17 Jean Pictet, *Commentary on Geneva Convention IV of 1949, Relative to the Protection of Civilian Person in Times of War*, (Geneva: International Committee of the Red Cross, 1958), p. 336 [hereinafter *Commentary to the Fourth Geneva Convention*].

## Regulation 119(1) and International Humanitarian Law

To describe Regulation 119(1) as a piece of draconian legislation would not do justice to its severity. Regulation 119(1) allows for the seizure of any ‘house, structure, or land’ and for the subsequent destruction of “the house or the structure or anything in or on the house, the structure or the land” as a punitive measure for the commission of illegal acts. Such punishment can be imposed where any hostile activity has been carried out from within that building itself or by inhabitants of other houses “in any area, town, village, quarter or street”. Theoretically, a Military Commander may order the demolition of a house, or houses, on the suspicion that some inhabitants of a town have committed, or abetted the commission of, or been accessories to the commission of offences; the provision demands no link between the perpetrators and those to be punished other than mere geographical proximity. Article 53 of the Fourth Geneva Convention, to which Israel is a signatory and to which it is bound as an Occupying Power, prohibits the destruction of property “except where such destruction is rendered absolutely necessary by military operations”. A similar rule is laid down in Article 23 of the 1907 Hague Regulations, which stipulates that it is “especially forbidden” to “destroy or to seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war”. By the very fact that housing demolitions are carried out as a punitive measure would defeat any claim that such actions can be justified as being an absolute military necessity.

The then Attorney General for Israel, Meir Shamgar, addressed the issue of house demolitions as “personal punitive measures” in 1971<sup>18</sup>. He maintained that these demolitions could be based, “in appropriate circumstances”, on Article 53 of the Fourth Geneva Convention, citing military requirements of two kinds. Firstly, there is the necessity of destroying “the physical base for military action when persons in the commission of a hostile military act are discovered”.<sup>19</sup> Shamgar contends that “[t]he house from which the hand grenades are thrown is a military base, not different from a bunker in other parts of the world”.<sup>20</sup> Secondly, there is the need to deter future law-breaking, to “create effective military reaction”. While there may be limited scope for the demolition of a house during the course of military operations, demolitions that are carried out punitively with the stated goal of deterrence cannot be regarded as being imperative military necessities.

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<sup>18</sup> Shamgar, ‘The Observance of International Law in the Administered Territories’, *supra* note 13.

<sup>19</sup> *Id.*, p. 276.

<sup>20</sup> *Id.*

The fact that inhabitants are, on occasion, given advance warning that the demolition is about to take place, allowing for their evacuation and the retrieval of personal effects removes the immediacy that is demanded by the military necessity requirement. Draper has concluded that

[t]o appeal to the humanitarian element by stating, which is true, that the inhabitants are first removed before blowing up the house, destroys the very basis of the argument for the application of Article 53 under its exceptive clause<sup>21</sup>

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Pursuant to Regulation 119(1) a Military Commander has complete discretion in deciding to exercise this particular authority; there is no provision made for any judicial process prior to the imposition of the prescribed sanctions. Even more worrying is the fact that the suspicion of the Military Commander that an offence has been committed is all that is needed to trigger these extra-judicial sanctions. Under the laws of occupation an Occupying Power is not prevented from imposing punishment on persons who have been found to have committed an offence. However, international humanitarian law demands that a suspect be afforded a judicial hearing prior to the imposition of any penal sanction. The Fourth Geneva Convention establishes the due process rights which must be observed by an Occupying Power. These include the right to a regular trial,<sup>22</sup> to be promptly informed of the charges in writing,<sup>23</sup> the right to representation,<sup>24</sup> to present evidence and to call witnesses<sup>25</sup> and the right of appeal.<sup>26</sup> When the power to demolish a house rests solely with an official of the executive, with a limited right to have this decision reviewed (although not provided for in Regulation 119(1), there is a clear infringement of the international legal rule that punitive measures cannot be imposed extra-judicially. The right to judicial review of demolition orders, which had previously existed, was effectively removed by a recent decision of the Israeli Supreme Court.<sup>27</sup>

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21 G. Draper, 'Military Necessity and Humanitarian Imperatives', 12 *Revue de Droit Penal Militaire et de Droit de la Guerre* (1973), pp. 140-141.

22 *Id.*, Article 71.

23 *Id.*

24 *Id.*, Article 72.

25 *Id.*

26 *Id.*, Article 73.

27 See detailed discussion in Section VI, below.

In addition to being a violation of property rights and a blatant instance of extra-judicial punishment, the demolition of Palestinian homes can also be seen as a form of cruel, inhuman or degrading treatment or punishment. Such acts are prohibited by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which was ratified by Israel on 3 October 1991. Article 16 of that treaty specifies that States Parties to the convention “shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”.<sup>28</sup>

The hardship and suffering that is caused by punitive house demolitions is indeed palpable. A home is usually the repository of highly personal and individual mementos, articles of irreplaceable personal worth and interest, happy memories of childhood, friendships, personal relations, books, photos, letters, toys, clothes and other objects that obtain highly personal and individual subjective worth from lengthy use. The loss of one’s home and these belongings undoubtedly causes severe mental anguish for the former inhabitants, in addition to rendering them physically homeless. The act of demolition constitutes a direct invasion and obstructive violation of personal space. The Israeli authorities intentionally inflict this pain to punish people for the real or suspected acts of a third person and as means of terrorising and intimidation the Palestinian people, increasing their sense of vulnerability and helplessness. Rather than seeking to prevent this form of cruel and inhuman treatment, Israel has adopted the practice of punitive house demolitions as an official State policy. Recently, the United Nations Committee against Torture addressed Israel’s continued practice of house demolitions. This body found that these demolitions, in certain circumstances, may amount to instances of cruel, inhuman or degrading treatment or punishment in violation of Article 16 of the Convention.<sup>29</sup> The Committee called on Israel to desist from its policy of house demolition.<sup>30</sup>

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28 Article 1 defines torture as:

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

29 Concluding observations on Third Periodic Report submitted by Israel, CAT/C/XVIII/Concl.5 of 23 November 2001, paragraph 6 (j).

30 *Id.*, paragraph 7 (g).

Israel's punitive house demolition policy is and always has been manifestly discriminatory. It is only the houses of Palestinians that have ever been sealed or demolished by the occupation forces. There has never been any instance of the demolition of houses as punishment for the crimes committed by citizens of Israel. Not even when twenty nine Palestinians were massacred by an Israeli settler in the Mosque in Hebron, nor when Israel's Prime Minister Yitzhak Rabin was assassinated by an Israeli citizen were house demolitions considered, let alone meted out, as appropriate punishment. House demolitions are a cruel and barbaric form of punishment that are employed on a discriminatory basis against Palestinians and Palestinians alone.

One of the most serious indictments that can be made of the Israeli authorities, and the primary focus of this report, is that its punitive house demolition policy pursued under Regulation 119(1) punishes innocent persons for the offences committed by others. When a house is demolished for the illegal activities of one of the inhabitants, all the other inhabitants also suffer the effects of the actions that have been taken. Punitive house demolitions bear all the hallmarks of acts of collective punishment. In this regard, the next section examines the prohibition of collective punishment under international law.

## ***The Prohibition of Collective Punishment under International Law***

It is a fundamental principle of law that individuals may only be punished for offences which they have personally committed. The corollary to this principle of individual responsibility is that persons or groups of persons may not be punished for acts which have been committed by others of their own family or village. Punishment must be personal and individual. In observance of this principle most domestic legal systems expressly prohibit the imposition of collective punishment. International law similarly proscribes punishing persons on a collective or non-individual basis. Within both international human rights law and international humanitarian law the individual nature of punishment has been constantly stressed.

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### **International Human Rights Law**

Under the international human rights law regime the prohibition of non-individual punishment is generally found within the sphere of due process guarantees. Article 5(3) of the American Convention on Human Rights sets out that “[p]unishment shall not be extended to any person other than the criminal”.<sup>31</sup> The African Charter on Human and Peoples’ Rights also affirms, in Article 7, that “[p]unishment is personal and can be imposed only on the offender”.<sup>32</sup> Subjecting persons not convicted of any offence to collective (or any) punishment also conflicts with the right to be given a fair trial<sup>33</sup> and is in direct contradiction of the presumption of innocence.<sup>34</sup>

31 American Convention on Human Rights, (1978), 1144 U.N.T.S. 123.

32 African Charter on Human and Peoples’ Rights, (1986), O.A.U. Doc. CAB/LEG/67/3 Rev. 5

33 Guaranteed by Article 10 of the Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 171 (1948); Article 14(1) of the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (1976); Article 8(1) of the American Convention; Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, (1953) 213 U.N.T.S. 221, E.T.S. 005; and Article 7(1) of the African Charter.

34 Guaranteed by Article 11 of the Universal Declaration; Article 14(2) of the International Covenant on Civil and Political Rights; Article 8(2) of the American Convention; Article 6(2) of the European Convention; and Article 7(1)(b) of the African Charter.

## International Humanitarian Law

International humanitarian law lays down a similar, but decidedly more comprehensive prohibition on the use of collective punishment. A number of this legal regime's principal instruments expressly proscribe any measures that would punish persons for offences which they did not personally commit. Article 87 of the Third Geneva Convention, which protects prisoners of war, prohibits "[c]ollective punishment for individual acts".<sup>35</sup> The Additional Protocols to the Geneva Conventions, adopted in 1977, contain a common provision which sets out that "no one shall be convicted of an offence except on the basis of individual penal responsibility"<sup>36</sup>. Both Additional Protocols also specifically prohibit the imposition of collective punishments 'at any time and in any place whatsoever'.<sup>37</sup> Article 4(b) of the Statute of the International Criminal Tribunal for Rwanda expressly enumerates collective punishment as a crime for which persons may be prosecuted by the tribunal.<sup>38</sup> However, it is in the two treaties which guarantee the protection of civilians, the 1907 Hague Convention and the Fourth Geneva Convention, that humanitarian law offers the most substantial and detailed prohibition on the imposition of collective punishment.

- Article 50 of the Hague Regulations, annexed to the 1907 Hague Convention, establishes that:

No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible.

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35 Geneva Convention III Relative to the Treatment of Prisoners of War, adopted 12 August 1949, entered into force 21 October 1950, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention].

36 Article 75(4)(b) of Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Victims of International Armed Conflict, adopted 8 June 1977, entered into force 7 December 1978, 1125 U.N.T.S. 3-608 [hereinafter Additional Protocol I] and Article 6(2)(b) of Protocol II Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, adopted 8 June 1977, entered into force 7 December 1978, U.N. Doc. A/32/144 Annex II, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

37 Article 75(2)(d) of Additional Protocol I and Article 4(2)(b) of Additional Protocol II.

38 Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda, (1994) U.N. Doc. S/Res/955.

- Article 33(1) of the Fourth Geneva Convention provides a more concrete and absolute prohibition of collective punishment by emphasising the principle of individual responsibility:

No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.

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

- Article 33(1) of the Fourth Geneva Convention is derived from Article 50 of the Hague Regulations and it provides a much more clear and unambiguous prohibition of collective punishment than its predecessor. It sets down that "no protected person may be punished for an offence he or she has not personally committed". This provision re-affirms the individual nature of punishment, that "[r]esponsibility is personal and [that] it will no longer be possible to inflict penalties on persons who have themselves not committed the acts complained of".<sup>39</sup> In the Commentary to the Fourth Geneva Convention Pictet points out that the prohibition of collective punishment in Article 33(1) "does not refer to punishments inflicted under penal law, i.e. sentences pronounced by a court after due process of law, but penalties of any kind inflicted on persons<sup>40</sup> or entire groups of persons. The scope of the prohibition is thus quite broad, encompassing "penalties of any kind" whether inflicted by a court or by any executive organ of government. The official Commentary to the Additional Protocols similarly advocates that "[t]he concept of collective punishment...should be understood in the widest sense, and concerns not only penalties imposed in the normal judicial process, but also any other kind of sanction".<sup>41</sup>

<sup>39</sup> Commentary to the Fourth Geneva Convention, p. 225.

<sup>40</sup> *Id.*

<sup>41</sup> Claude Pilloud et al., Commentary to the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (Geneva, 1987), p. 1374 [hereinafter Commentary to the Additional Protocols].

It is clear therefore that persons must be personally responsible for the commission of an offence before any punishment may be meted out upon them for that crime.

The second sentence of Article 33(1) sets out that “[c]ollective penalties and likewise all measures of intimidation or of terrorism are prohibited“. The prohibition on the use of collective penalties here is a simple restating of the rule set down in the preceding sentence. Laying a prohibition on measures of intimidation or terrorism of protected persons was deemed necessary because of the earlier practice by belligerents of “resorting to intimidatory measures to terrorise the population...[in order] to prevent hostile acts”,<sup>42</sup> Such collective measures “strike at innocent and guilty alike...[and] are opposed to all principles based on humanity and justice”.<sup>43</sup> Highlighting the propinquity of collective punishments and measures of intimidation or terrorism is quite apt because frequently a measure that is claimed to be legitimately punitive in nature is often imposed solely to oppress and alienate a particular group, in furtherance of the imposing power’s goals.

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<sup>42</sup> *Commentary to the Fourth Geneva Convention*, p. 226.

<sup>43</sup> *Id.*

## Customary Status of the Prohibition

The above section has set out the various conventional prohibitions against acts of collective punishment. It is to be borne in mind that as conventional law, the above provisions are only binding on the parties who have ratified those instruments in which these articles are found, except where those particular provisions are deemed to be declaratory of customary international law. It is necessary therefore to establish the customary status of those norms set down in treaty law. In the present context this is quite relevant as the Israeli authorities often contend the de jure applicability of the Fourth Geneva Convention to the Occupied Territories and argue that only those rules which reflect customary law are binding upon them.<sup>44</sup>

The Statute of the International Court of Justice in Article 38, paragraph 1(b) describes international custom “as evidence of a general practice accepted as law”. Thus, it is State practice and the accompanying *opinio juris* which are the necessary ingredients for the creation of custom. The International Criminal Tribunal for Yugoslavia has acknowledged in the infamous *Prosecutor v. Tadic* case the problematic nature of accurately assessing State practice during conflict situations:

When attempting to ascertain State practice with a view to establishing the existence of a customary rule or general principle, it is difficult, if not impossible, to pinpoint the actual behaviour of the troops in the field for the purpose of establishing whether they in fact comply with, or disregard certain standards of behaviour. This examination is rendered extremely difficult by the fact that not only is access to the theatre of military operations normally refused to independent observers (often even to the ICRC) but information on the actual conduct of hostilities is withheld by the parties to the conflict; what is worse, often recourse is had to misinformation with a view to misleading the enemy as well as public opinion and foreign Governments.<sup>45</sup>

<sup>44</sup> See generally David Kretzmer, *The Occupation of Justice* State University of New York Press, 2002, pp. 31 - 56.

<sup>45</sup> *Prosecutor v. Tadic*, Case No. IT-94-1-AR2, Appeals Chamber, 2 October 1995, para. 99.

In assessing the customary status of the prohibition of collective punishment therefore, it is permissible, and often also necessary to consider the level of ratification of the treaties containing those rules and also the approach that has been taken to the issue by international organisations and judicial bodies.

The 1907 Hague Convention and its annexed regulations are unanimously viewed as being declaratory of customary international law.<sup>46</sup> The International Military Tribunal at Nuremberg held that the rules laid down in this convention were, by 1939, declaratory of the laws and customs of war.<sup>47</sup> Therefore, it can be said that Article 50 of the Hague Regulations, outlawing the imposition of penalties on persons who cannot be regarded as “jointly and severally responsible” for the acts of complained of, is a binding rule of customary international law.

The Fourth Geneva Convention is a much more expansive treaty and as such, not all of its provisions may be customary norms of international law. However, many of the articles in this treaty are re-statements or developments of earlier treaty rules and as such may be customary rules; Article 33(1) of the Fourth Geneva Convention is based on Article 50 of the Hague regulations and thus its broader protection against collective punishment is, in part, based on established custom. Can it be said that this provision’s establishment of the individual nature of punishment in 1949 has, since then, been crystallized into a norm of customary international law? To determine so, it is necessary to look at a number of factors. *Abi-Saab* would maintain that “the larger the conventional community, the more the treaty approximates the status of general international law”.<sup>48</sup> In this regard it is worth noting that there has been almost near-universal ratification of the Fourth Geneva Convention and in fact, there are presently almost as many States parties to the Fourth Geneva Convention as there are to the Charter of the United Nations.<sup>49</sup>

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46 See *Adam Roberts and Richard Guelff, Documents on the Laws of War (Oxford/New York, 2000, 3rd ed.)*, p. 68.

47 *International Military Tribunal, Judgement 83, 1947, Nazi Conspiracy and Aggression: Opinion and Judgment, 1947*. This view was supported by the Israeli Supreme Court in *Ayyub v. Minister of Defence (1978) 33 (2) P.D. 113 [English summary: 9 Israel Yearbook of Human Rights (1979), 337]*.

48 *Georges Abi-Saab, ‘The 1977 Additional Protocols and general international law: some preliminary reflections’, in A. Delissen and G. Tanja, Humanitarian Law of Armed Conflict: Challenges Ahead: Essays in Honour of Frits Kalshoven (Dordrecht, 1991), 115, p. 117.*

49 At the time of writing there are 191 States parties to the Charter of the United Nations (see <http://www.un.org/Overview/growth.htm>) and 189 States parties to the Fourth Geneva Convention (see <http://www.icrc.org/ihl>).

No party to the Fourth Geneva Convention has entered any reservation or declaration toward Article 33(1) and it is extremely doubtful that any party would claim a right to impose punishment on persons who have not committed any offences. Protected persons, those who find themselves “in the hands of a Party to the conflict or Occupying Power of which they are not nationals”,<sup>50</sup> cannot be subjected to collective punishment as a matter of treaty law and, it would also seem, as a matter of customary law.

The customary status of the prohibition of collective punishment in the Fourth Geneva Convention is strengthened by the presence of like provisions in the 1977 Additional Protocols to the Geneva Conventions. At the time of writing Additional Protocol I has been ratified by 160 States parties, while there are 172 States parties to Additional Protocol II applicable in non-international armed conflicts. Theodor Meron has recommended that for any particular treaty these “ratifications should be evaluated from the perspective of the relevance and weight of the ratifying states”.<sup>51</sup> In this respect, it must be noted that four of the five permanent members of the United Nations Security Council have ratified or acceded to both Additional Protocols: China, the Russian Federation, the United Kingdom, and most recently, France. Seventeen of the nineteen members of NATO have also become parties to these protocols. While a number of major military powers, specifically the United States, Iran, Iraq, India, Pakistan, Israel and Turkey, have not ratified the protocols, it is doubtful that the refusal of these states is based on the inclusion therein of a prohibition against collective punishment.<sup>52</sup> Also, a perusal of the reservations made by States who have ratified the instrument will show no hostility on their parts to the outlawing of collective punishment by Additional Protocols I and II.

Having delineated the nature of the prohibition of collective punishment under international law it is necessary to set out a number of specific requirements which must be satisfied before a measure may be classified as one of collective punishment. Firstly, there must be a tangible connection between the offences which have been committed and the punishment imposed, that is, the punitive measures have been imposed in direct response to the commission of illegal acts.

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<sup>50</sup> Fourth Geneva Convention, Article 4.

<sup>51</sup> Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law*, Oxford, Clarendon Press, 1989, p. 74.

<sup>52</sup> For the United States position, see generally Abraham D. Sofaer 'The Rationale for the United States Decision', 82 *American Journal of International Law* 4 (Oct. 1988), 784.

Secondly, the hardship endured by innocent parties must be substantial and not merely incidental to the suffering of those persons guilty of the offence. For example, lawful imprisonment often causes hardship for an offender's relatives but such a sanction could never be considered to be one of collective punishment. By setting down these necessary elements it is not intended to adopt an overly strict interpretation of collective punishment, in defiance of the official view that the term be "understood in the broadest sense"<sup>53</sup>; instead it is done in order that incidents of collective punishment may be clearly differentiated from other, possibly unlawful, acts. Such clarity is of absolute necessity because the commission of any act of collective punishment would be considered as being "in defiance of the most elementary principles of humanity"<sup>54</sup>.

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<sup>53</sup> *Commentary to the Additional Protocols*, p. 874.

<sup>54</sup> *Commentary to the Fourth Geneva Convention*, p. 225.

## *Israel's Punitive Demolition Policy - Recent case examples*

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

Regulation 119(1) of the Defence (Emergency) Regulations, 1945 allows for the demolition of houses as a punitive measure. This legislation does not, however, compel a Military Commander to employ this sanction in response to the commission of illegal acts. Despite the fact that the Israeli authorities' use of these Regulations is illegal, they continue to take measures pursuant thereto. It is clear therefore that a Military Commander is not prevented from employing alternative means of punishment as prescribed for by these Regulations, such as imprisonment,<sup>55</sup> imposing a monetary fine<sup>56</sup> or detention pursuant to Regulation 111.

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<sup>55</sup> Regulation 53.

<sup>56</sup> Regulation 56(B).

Nevertheless, Commanders of the Israeli forces in the West Bank and Gaza have repeatedly resorted to the power granted to them by Regulation 119(1) to demolish or seal Palestinian houses as a punitive measure, often in addition to other punishment being handed down for the same acts. Case examples of house demolitions documented by Al-Haq serve to demonstrate the collective nature of punitive house demolitions.

## Case #1: Maha Hamed Mahmoud Alnatsheh

Maha Hamed Mahmoud Al-Natsheh, living near Hebron, gave the following account to Al-Haq of her home being demolished by the Israeli occupying army in September 2002:

I am married to Abdal Khaleq Hassan Shadhli who is 48 years old. On Wednesday 26th September 2002 I was at my parents house in Um-Aldalyeh, about two kilometres from my house. I received a telephone call from my neighbours telling me that Israeli soldiers were surrounding my house. I took my car and drove quickly to my house. The area was under curfew. I parked my car in a nearby area and walked to my house. My husband has been in detention since 28th August 2002.

When I reached my house the soldiers did not allow me to come closer. After a long discussion they allowed me to meet the officer. I introduced myself to him as the owner of this house. I asked him to identify himself to me but he refused and said that I had only 15 minutes to evacuate furniture from my house. I asked him to give me a written notification but he ignored me. I then asked for the help of my neighbours. Only five women and four men were allowed to help and to take some of the furniture out. I could only evacuate 15% of my furniture.

The soldiers then ordered us to leave the area. Then they put explosive material inside and blew up the house. It was 11:20am. At this point I became homeless and all my private belongings were lost. I could only take some clothes and I lost all of my books that I had collected together with my husband since 1991. Another thing that makes me feel bad is that my husband is in jail and I have not been able to visit him or know anything about him or any kind of torture that he might be experiencing. I am now living in a room with my relatives. I do not feel comfortable. I wish I died before that happened, as my husband and my house are the dearest things to me.<sup>57</sup>

At the time of the demolition, this woman's husband, a political leader of Hamas, had been detained by the Israeli authorities and was undergoing interrogation. He had not been charged or convicted of any offences and at this time was only under suspicion. The Military Commander, exercising his authority under Regulation 119(1), used this suspicion as a basis for demolishing the house. His wife was also forced to suffer this hardship of demolition for the suspected illegal activities of her husband. She was punished for suspected crimes that she did not personally commit, in violation of Article 33 of the Fourth Geneva Convention.

## Caes #2: Hanna Nimer Ahmed al-Bargouthi

Hanna Nimer Ahmed al-Bargouthi recounted to Al-Haq the demolition of her family home during an assault by the occupation army on Beit Rima, a village near Ramallah, in October 2001:

I am the wife of Yacoub Ahmed al-Bargouthi and have six sons. We have lived in Beit Rima near the Shatoula Meadow since 1981. We lived in a two story 350 square meter house. On Wednesday 24 October 2001 at 5:00 am I was praying when I heard knocking at the door. I saw from the window that there were two Israeli soldiers outside. When I opened the door they ordered my family and I to leave the house so that they could search it using dogs. Outside I saw approximately 300 soldiers surrounding the area. After we left the house 15 soldiers entered it, but without dogs, and searched through everything for about two hours. They broke many of our belongings. After that they put us in the stairwell and left several soldiers to watch over us. They forced us to sit without moving, even the small children. They didn't let the children walk around or leave the stairwell. A number of soldiers then entered the bedrooms and slept.

In the afternoon my son Wael, who is 26 years old, told me that he had heard the soldiers saying that they were going to demolish the house. Wael understands Hebrew. I then tried to go to get out some of my belongings, but the soldiers refused to let me inside. The commanding officer asked me about my son Bilal, who is being detained by the Palestinian Preventative Security. He told me that if he isn't handed over to them in one week they would kill him and then bring his body to us tied with chains made from pig skins, and that his fate would be like that of Abu al-Halawi from Nablus who had been assassinated a few days before. He added that Bilal had killed many people. He also told my son Wael the same thing.

We stayed in the basement until 1:30 when the soldiers made us leave so they could blow up the house. The soldiers then proceeded to put explosives around the house and on the roof. The explosives were circular with holes in their middle and were attached to wires. We again tried to take some of furniture and the children's schoolbooks from the house, but were again stopped by the soldiers. After that we went next door to the neighbors, and at 5:00 pm the soldiers destroyed our home. The home was completely demolished, along with everything inside. We were not allowed to take anything out. The children did not understand why the soldiers destroyed our home. We now don't have anywhere to stay.<sup>58</sup>

This case perfectly illustrates the collective nature of the illegal sanction of house demolitions. Six other family members are punished for the alleged criminal actions of one family member, Bilal Ahmed al-Bargouthi. This person was already being detained by the Palestinian Preventive Security for his alleged crimes; he suffers both imprisonment and house demolition for his actions, while innocent family members are also rendered homeless. Furthermore, the soldiers prevented the family members from retrieving personal effects and belongings from their house prior to demolition. This demolition is also, *inter alia*, in clear violation of the prohibition on collective punishment.

## Case #3: Abd al-Rahman Ahmad Theeb Asmar

Several other houses were also destroyed in Israel's October 2001 attack on the village of Beit Rima.<sup>59</sup> Another punitive demolition was carried out on the home of Abd al-Rahman Ahmad Theeb Asmar, who gave the following statement to Al-Haq:

My house is located on the western side of Beit Rima. Early in the morning on Wednesday, 24 October 2001 I was awakened by the sound of heavy shooting. I immediately went outside in order to find out what was happening. Outside I saw an Israeli helicopter flying over the village and shooting at targets on the ground. As soon as I saw this I went back into my house and gathered my family together in a safe room. Soon thereafter a group of Israeli soldiers came to my home.

The soldiers arrested my three sons, tying their hands and covering their eyes. The shooting in the village was extremely heavy at this point, and with their painted faces the soldiers only added to our terror. After they had arrested my sons the rest of the family was all put together in one room and the door was locked. Before leaving the soldiers asked me about another of my sons, Basem, but I told them that I didn't know anything about where he is or what he is doing. The soldiers then left without searching the house.

In the morning I saw the soldiers placing sacks of sand on my neighbor Na'el Aziz's house. Later, around 4:00 pm, approximately 50 soldiers surrounded my house, and an officer ordered us to come out of the house and leave the area. I told him that I knew that they wanted to demolish the house and asked him to give me one hour to take out some of our possessions, but he refused saying that we could have only five minutes to collect our money.

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<sup>59</sup> See *Human Rights in Focus: Israel's Attack on Beit Rima, Al-Haq, Ramallah, 2001*.

I then asked him where he expected us to go, and he told me that we could go wherever we liked. Even though he had given us five minutes to take our money we were not allowed to take anything else from the house during this time. After the five minutes were over we left the house and went to an unfinished house that one of my sons is building. As we left the house I saw that it was surrounded by three tanks. A group of soldiers went inside carrying several boxes. After these soldiers left the house I heard an extremely loud explosion and watched my house collapse.

My house was two stories tall, and each floor had an area of 200 sq/meters. Ten people lived together on the first floor. There were many storage containers containing olive oil and several generators stored in the house.<sup>60</sup>

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This family home was completely demolished because several of the sons were suspected of committing crimes against Israel. This punishment was carried out extra-judicially and was blatantly collective in nature. It was a destruction of property that cannot be justified as a military necessity pursuant to Article 23(g) of the Hague Regulations or Article 53 of the Fourth Geneva Convention.

## Case #4: Hussien Ahmad Ayyoub Asedeh

Another incident documented by Al-Haq is the partial demolition of the home of Hussien Ahmad Ayyoub Asedeh in January 2002 in the village of Tel, near Nablus.<sup>61</sup> Hussien's brother, Yaser, had been accused of killing two Israelis settlers in 1998, was imprisoned by the Palestinian Authority for two years and had been assassinated by the Israeli army in October 2001. On the morning of the 4th January 2002, Israeli soldiers surrounded Hussein's house and an hour later a bulldozer, four armoured personnel carriers and about a dozen jeeps arrived in the area. Soldiers came to the door and asked Hussien if he was Yaser's brother, to which he replied he was. They told Hussien that they were looking for information on the whereabouts of his brothers and that they intended to demolish Yaser's house. Yaser had lived with Hussien's other brothers next door to Hussien, in their parent's home.

At the time the soldiers arrived, Hussien's brothers were not present at their home. The soldiers claimed that Hussien's house had in fact been owned by Yaser and they informed Hussien this was the house which they were going to demolish. An officer questioned Hussien again on his brothers' whereabouts and when he told him that he did not know, the officer directed the driver of the bulldozer to begin demolishing the house. The bulldozer demolished the entrance to the house and then stopped. The officer asked the same question again to which Hussien gave the same reply. The officer threatened that the entire house would be demolished but Hussien insisted that he knew nothing. The bulldozer then proceeded to demolish a pillar, the balcony and a window of the house. After this the soldiers searched the house, damaging all the furniture. The soldiers claim that a weapon and some ammunition was found in this house during the search, although Hussien did not accompany them on their search and did not see any weapon. The soldiers then left, telling Hussien that they would return to demolish the house fully.

Al-Haq and HaMoked, the Center for the Defense of the Individual, filed a petition with the Supreme Court of Israel two days later seeking to prevent the demolition of this house.<sup>62</sup> It was pointed out that this family had not been given any written notice of the army's intention to demolish the house and that the partial demolition had been used as a means of pressure on Hussien to obtain information. It was also argued that demolishing the house was a form of collective punishment as this house was not owned by Yaser, the person who had been accused of committing the original offences. The counsel for the Military Commander contended that the house was not a civilian house, rather it was a military base and used for terrorist activities. The alleged discovery of weapons was cited in support of this assertion. The Court rejected the petition and held that the Fourth Geneva Convention gives the Occupying Power the right to carry out such actions as a military necessity. Moreover, it was held that the army is entitled to decide on the existence of such a necessity. Although the Court gave the army the right to demolish the house in question, at the time of writing, no further demolition had taken place. The Asedeh family have been living for the past 10 months under constant fear that their home may be demolished at any moment at the whim of the Israeli occupation army.

## Case #5: the Abu Dis case

On 23 August 2002 Israeli soldiers came to the homes of the families of Usamah Muhammad Bahar and Nabil Mahmoud Halibyyeh and informed them in writing that they were going to demolish their houses in 48 hours. These two men had blown themselves up in December 2001 in Jerusalem, killing eleven Israelis. The families contacted Al-Haq the following day, in the hope that the organisation could petition the Supreme Court and prevent the demolition of these houses. A petition was filed by HaMoked, the Centre for the Defence of the Individual, with the Court that evening. The following day the Court issued a decision granting a temporary interim injunction preventing the army from harming the houses, until after the petition has been heard in the near future.<sup>63</sup> No date was set for this future hearing.

The Supreme Court dealt with the petition fully on 17 September 2002. It was argued on behalf of the families that they had not participated in the planning or carrying out of the attack and that in light of the fact that house demolitions are unlikely to deter potential attackers, their homes should not be demolished. The respondent, in turn, pointed out that demolitions under Regulation 119(1) had been specifically advocated by the decision of the Israeli Ministerial Committee for Matters of National Security on 31 July 2002:

{ [a]ccording to evaluation of the government and security forces, destruction of the homes of attackers is a deterrent to the initiatives of potential attackers, in a manner such that the use of this means is liable to limit the extent of attacks. }

Regarding the effectiveness of house demolitions as a deterrent the Court reiterated its long-held view that this ‘is a subject for the evaluation of the security forces and we [do] not find a basis to question this’. The Court accepted that the petitioners had not taken any part in the planning or execution of the attack but stated that “we are far from seeing the petitioners as people with innocent hearts”.

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<sup>63</sup> HCJ 7289/02, *Bahar et al v. IDF Commander of the West Bank*, 25th August 2002.

One of Halabia's brothers had stated under interrogation that he had noticed that his brother had become more religious prior to the attack. From this the Judge Matza concluded that:

The family of this attacker was aware of the change in the mental state of their relative; and if they didn't close their eyes to what they saw and close their ears to what they heard, they could have known ahead of time to what he was doing and prevent him from carrying out his plot.

He then surmised that because the other attacker lived with and was dependent on his family, "we must attribute to his parents the knowledge of the actions". The failure of the families to condemn the attacks in the petition is subjected to criticism by the Court. The Court concluded that:

According to the consistent ruling of this court, the question of the knowledge of family members of the evil intentions of a potential attacker and the character of dealing with this act, are not...an automatic condition for implementing the authority of the military commander to order the destruction of the house of an attacker. However, with the lack of a disassociation from this act and its condemnation in the case before us is added an ethical dimension and justification for the order; the verdict of the petitioners in this matter is that of the verdict of one who turns to the High Court of Justice when his hands are not clean.

The petitions were rejected by the Court.

In the early hours of the morning of 19 September the houses of both families were demolished by army bulldozers. The demolition of the Bahar family's two storey home left seventeen people homeless, including four children. The Court has asserted that none of these family members had 'innocent hearts' and thus could be punished for the offences committed by one of their family members. These demolitions amount to clear acts of collective punishment, the commission of which is in blatant violation of international law.

## *The Israeli Supreme Court and Collective Punishment*

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

While acknowledging that innocent persons are adversely affected by demolitions the Supreme Court has consistently failed to view demolitions as illegal acts of collective punishment. The issue was raised before the Court in *Daghlas et al v. Military Commander of the Judea and Samaria Region*.<sup>64</sup> Justice Ben-Dror delivered the Court's response to the petitioners' claim that house demolitions constituted acts of collective punishment:

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64 HCJ No. 698/85, 40(2) P.D. 42.

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

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

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

The Court recognises here that demolitions will cause 'great suffering' for innocent family members, that they are 'forced to suffer' for the offender's individual acts, yet they find it difficult to see where the claim of collective punishment originated.

To add insult to injury, the Court lays the illogical claim that house demolitions, as a form of punishment, are no different from imprisonment. Where a house is demolished all the inhabitants suffer the same fate, where as when a person is imprisoned, it is only that person that is punished; any negative effects felt by others are merely incidental to the offender's punishment. In the case in hand, the first petitioner's brother, who had committed one of the offence's in

question, has already been detained. Professor David Kretzmer, a prominent Israeli academic and member of the United Nations Human Rights Committee, would contend that in such a scenario ‘the immediate aim of demolishing the house is not to deny rights or freedoms of that person but to cause suffering to his family’<sup>65</sup>. Addressing the Court’s justification that demolitions serve a deterrent purpose, Kretzmer concludes that demolition of a house “could conceivably be effective as a general deterrent (though of course, it may also be counter-productive), but the objection to collective punishment is not that it is not an effective deterrent, but that it is cruel and inhuman”<sup>66</sup>.

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

Although counsel for the petitioners did not specifically raise the argument of collective punishment in a subsequent case, *Nasman et al v. Commander of the IDF Forces in Gaza Strip*,<sup>67</sup> Justice Or acknowledged the suffering of innocent parties:

“One must remember that we are talking about the }  
destruction and sealing up of a structure in which other }  
people live, an act as result of which innocent people }  
shall also be hurt”<sup>68</sup>.

The Court refused, however, to find demolitions illegal on such grounds and affirmed that they “shall not intervene in the decision of a military commander under Regulation 119 of the Defence Regulations (emergency), 1945, when this decision stands the test of reasonableness”<sup>69</sup>. This assessment, of whether “the

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<sup>65</sup> David Kretzmer, *The Occupation of Justice State University of New York Press, 2002, p. 150.*

<sup>66</sup> *Id.*

<sup>67</sup> HCJ 802/89.

<sup>68</sup> Paragraph 4.

<sup>69</sup> *Id.*

respondent, in considering and making his decision, acted properly and reasonably, taking into account the genuine facts of the case”<sup>70</sup>, does not take account whatsoever of the collective nature of the penal sanction prescribed by Regulation 119(1). This approach has been adopted by the Supreme Court in all its dealings with the issue of punitive house demolitions.

In *Hizran et al v. The Commander of the IDF in Judea and Samaria*,<sup>71</sup> the hardship imposed on innocent parties was again acknowledged by the Court and it was once again justified as a necessity for achieving effective deterrence. Judge Netanyahu spoke of the ‘extensive’ authority that is given to a military commander by Regulation 119(1). This authority, he stated,

...is not restricted to the living unit of the perpetrator himself. It extends beyond this, to the entire structure (and even the land) the residents of which, or some of the residents of which have committed an offence...

I am not overlooking the fact that destroying the structures in their entirety shall hurt not only the petitioners themselves but also their families. However this is a result of the necessity of deterring the public so that they may see and learn that by their criminal acts, they not only harm individuals, endanger public safety and incur severe punishment on themselves, but also bring hardship to the members of their households.<sup>72</sup>

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Justice Bach, in *Alamarin v. Commander of the IDF Forces in the Gaza Strip*,<sup>73</sup> recognised both the extra-judicial nature of the punishment and the fact that is undeniably collective in nature and in effect:

...it clearly follows that the commander’s authority also applies to those parts of an apartment or house which are owned or used by the family of the suspect or others, who have not been proved to have taken part in, encouraged or even been aware of the criminal act of the suspect.<sup>74</sup>

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

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<sup>70</sup> Paragraph 3.

<sup>71</sup> HCJ 4772/5359/91

<sup>72</sup> Paragraph 5.

<sup>73</sup> HCJ 2722/92.

<sup>74</sup> Paragraph 6.

Judge Cheshin began his discussion of this issue in the Hizran case by establishing that ‘the guiding principle’ is that “one must not impose collective punishment or collective sanctions”,<sup>75</sup> that “each of the petitioners, and himself alone, should be punished for his crime”.<sup>76</sup> However, in his final analysis he interpreted the prohibition on collective punishment as preventing the punishment of persons residing in separate living units of the building to be demolished; he refused to accept that the hardship imposed on persons who shared such a living unit with the offender is clearly also an act of collective punishment. In a later decision, however, he held that only the room in which the person who committed the offences lived, should be affected by the order.<sup>77</sup> While his assertions are a step in the right direction, his opinions have failed to persuade other members of the Court to realise the collective nature of the sanction which they continuously legitimise.

In recent years the Israeli authorities have adopted a policy of demolishing the houses of families of suicide bombers. Horrendous as these crimes are, demolishing the houses of the families of the perpetrators is an act of collective punishment in violation of international law. The Supreme Court of Israel has allowed for several house demolitions of the families of suicide bombers. *In Sabeach v. IDF Commander in Judea and Samaria*<sup>78</sup> the family argued that only the room in which the offender had stayed should be sealed. The court disagreed, reasoning that “for a terrorist who is planning to blow himself up and commit suicide the fear that the army could afterwards only seal his private room, or even demolish it, would serve no deterrent purpose. In such a situation the respondents [house demolition] order would lose all its meaning”.<sup>79</sup> *In Nazaal v. IDF Commander* the argument that demolition amounted collective punishment was again raised but the Court opined that:

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<sup>75</sup> Paragraph 13.

<sup>76</sup> Paragraph 14.

<sup>77</sup> *Nazaal v. IDF Commander in Judea and Samaria*, (1994) 48 (5) P.D., p. 338.

<sup>78</sup> (1996), 50 (1) P.D. p. 353.

<sup>79</sup> *Id.*, p. 363.

The object of using the powers granted to the military commander, according to Regulation 119(1)...is to deter potential terrorists from carrying out their murderous acts, as an essential measure for maintaining security. ...Imposition of the said sanction does indeed have a severe punitive effect, which harms not only the terrorist, but also others, generally members of his family who live with him, but this is not its aim and this is not what is intended to do.<sup>80</sup>

Once again the Court recognises the direct hardship imposed on innocent family members. It justifies this as a deterrent and excuses it because such an effect was not the aim of the measure, despite the inescapable fact that this is the exact effect of punitive house demolitions.

From the above it can be seen that the Israeli Supreme Court has consistently refused to recognise punitive house demolitions as illegal acts of collective punishment. It has just sought to justify the extreme nature of the sanction as a necessity for deterrence. In effect, the Court views house demolitions as a deterrent-based public order measure rather than a form of punishment. This approach fails to take account of the fact that all punitive measures are implicitly deterrent in nature. David Kretzmer has recently assessed the Court's approach to this issue and drew this harsh, yet wholly justified, conclusion.

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It would seem that the Court's decisions on house demolitions typify its jurisprudence on the Occupied Territories. The Court has not seen itself as a body that should question the legality under international law of policies or actions of the authorities, or should interpret the law in a rights-minded fashion. On the contrary it has accepted and legitimised policies and actions the legality of which is highly dubious and has interpreted the law in favour of the authorities.<sup>81</sup>

This is a serious indictment of the highest judicial authority in the State of Israel. Its persistent legitimisation of the authorities' punitive house demolition policy and the associated failure to recognise and condemn the actions taken thereunder as illegal acts of collective punishment cast serious doubt on the fairness and independence of the Israeli Supreme Court.

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<sup>80</sup> *Nazaal v. IDF Commander in Judea and Samaria*, (1994) 48 (5) P.D. 338, p. 346.

<sup>81</sup> Kretzmer, *The Occupation of Justice State*, p. 163.

## *Recent Jurisprudence of the Israeli Supreme Court*

### Removal of the right to be heard before demolition

In August 2002 the Supreme Court of Israel delivered a judgement relating to Israel's punitive house demolition policy which was a further assault on the already battered rule of law in the Occupied Territories. The decision in the case of *Amar et al v. IDF Commander in the West Bank*<sup>82</sup> effectively removed the right to judicial review of house demolition orders issued by the occupying army. This case involved ten petitions which were taken by family members of persons who had committed attacks against Israelis and who feared that their houses were going to be demolished by the respondent. The petitioners sought a guarantee from the Court that the respondent would give sufficient time prior to demolition to allow them to petition the Court and seek a decision as to whether the Military Commander had the competence in the particular circumstances to issue a demolition order. The Court made it clear that a Military Commander has the right to demolish houses pursuant to Regulation 119(1) of the Defence (Emergency) Regulations, 1945 and that this was not being contested by the petitioners, whose sole concern was obtaining a guarantee of the right to be heard.

Up to this point the right to be heard had been enforced quite rigorously by the Court. In 1989, the Court held that occupants must be given a hearing prior to demolition and sufficient time to petition the Court if the outcome of the hearing is unfavourable.<sup>83</sup> The argument put forward by the respondent in *Association for Civil Rights in Israel v. Officer Commanding Central Command*, that in certain "severe and exceptional circumstances" a hearing could be denied, was rejected

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<sup>82</sup> HCJ 6696/02, 6th August 2002.

<sup>83</sup> 43 (2) *Piskei Din* 529 [English summary: 23 *Israel Yearbook of Human Rights* (1993) 294].

by the Court. In such instances, the Court held, the house could be sealed instead of demolished outright and a hearing could then be held to establish if actual demolition may be carried out.<sup>84</sup> Although the Supreme Court has failed to recognise the illegality of house demolitions, it had allowed for sufficient time prior to demolition for families to challenge a Military Commander's decision to demolish.

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

The giving of a warning such as this, on an operational action expected in enemy territory, is liable to endanger in a very real way the lives of our forces, and even endanger the success of the action, as notice will enable the enemy to booby trap the aforementioned houses, to set an ambush for the forces which are to arrive there, and so on. Phenomena such as these have occurred in the past months in various places throughout the territories. For these reasons, as a rule, no military force, employing military-war actions in enemy territory, gives prior warning for operational activity it intends to implement, warning which could put in very real danger the lives of its soldiers and endanger the success of the operation.<sup>85</sup>

President Barak's analysis began from a similar "state of war" premise; "Israel is in the midst of combat activity" and that its "army is conducting various combat actions, the goal of which is to return security to the region and the State".<sup>86</sup> He affirmed that the need to undertake "deterrent activities", such as house demolitions, is at the discretion of the army as part of "overall combat activity".

The Court recognised the existence of a fundamental right to be heard, a right which is "applicable in the matter of the destruction of structures in which terrorists live, both in periods of calm and periods of combat activities".<sup>87</sup> Such a right is not, however, an absolute right. It is not applicable in "special or exceptional circumstances", one of which is where there is a risk of injury to body or property

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<sup>84</sup> The Court did allow for dispensation of the hearing requirement in the case of "operational-military circumstances in which judicial review is incompatible with conditions of place and time or the nature of the circumstances", pp. 540-541. Rather than referring to punitive demolitions, the exception mentioned is that already enshrined in Article 53 of the Fourth Geneva Convention which allows for property destruction as an absolute military necessity [emphasis added].

<sup>85</sup> *Supra* note 82, paragraph 2.

<sup>86</sup> *Id.*, paragraph 3.

<sup>87</sup> *Id.*, paragraph 4.

“during an operational-military action within the framework of combat activity of the army’. President Barak then referred to *Association for Civil Rights in Israel v. Officer Commanding Central Command* where it was held that the right to be heard could be dispensed with during ‘military-operational circumstances’ in which the army” might need, for example, “be rid of a barrier or overcome resistance or respond to attacks on the army forces”. He cited another case in which a similar rule was upheld in instances of ‘destruction of structures as part of military-operational activities’.<sup>88</sup> He then drew the conclusion that:

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

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

President Barak continued:

The right to the right of hearing in the case of a military-operational action is derived from a balance between the right of the individual to be heard in the face of damage to his person or property and the necessary public need in fulfilling the military action - a need behind which stands, amongst other things, the concern for the security of the soldiers and their lives. ...if there is a serious fear that awarding the right of hearing will endanger the lives of soldiers and endanger the action itself, the right of hearing is cancelled in the face of essential combat needs.<sup>89</sup>

Where such a danger doesn’t exist, the right to a hearing must be upheld. Barak asserted that even in circumstances where the right will not be upheld “in its entirety”, it must be upheld “partially”, such as allowing a hearing before the military commander “on the spot before the property is damaged”<sup>90</sup>. He found that it could never be determined in advance whether circumstances would allow for

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88 HCJ 4112/90, *Association for Civil Rights in Israel v. Southern Commander*, 640.

89 Paragraph 5.

90 *Id.*

the granting of a hearing, that “[e]verything is dependent on the circumstances of the matter, and on the correct balance between the right of hearing and the danger (to soldiers) and the chance (of fulfilling the action)”<sup>91</sup>. Finding this petition too general, the Court decided that it could not grant a right to judicial review in all circumstances. The Court concluded that the responsibility for determining whether to grant a hearing prior to demolition rests with the IDF Commander and that the petitions are thus rejected.

46 The decision reached by the Supreme Court in this case continues in their well-established approach of giving a *carte blanche* to the IDF for their actions in the Occupied Territories. At the outset, punitive house demolitions, those which do not take place during combat activity but rather in the aftermath of the commission of illegal activities, are described by the Court as actions of a military character. The Court then asserts that during such operations it is the military commander who is best placed to decide on whether to delay a demolition and to allow a hearing. In effect, the Court absolves itself of having to deal with decisions taken by the army in the Occupied Territories. Military commanders are thus given complete discretion in deciding, not only as to whether to demolish a house punitively, but also as to whether they should allow their order of demolition to be challenged before a judicial body. The Court again upholds the extra-judicial nature of the punishment and has removed the one semblance of adherence to the rule of law that had previously been present, the right to judicial review of house demolition<sup>92</sup> orders.

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

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<sup>91</sup> Paragraph 6.

<sup>92</sup> HCJ 6868/02, 8th August 2002

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

Once again the Court relinquishes full discretion for carrying out demolitions to the military commander. He is under no obligation to reply to the petitioners and it is highly unlikely that a mere letter will alter his decision to demolish. The “principle practical problem” is far from solved by this decision.

## *Serious violations of International Law*

### *Grave Breaches of the Fourth Geneva Convention*

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

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

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

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

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

Israel's house demolition policy throughout the occupation would seem to fit the grave breach of "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly" set out in Article 147. The demolition of houses has undoubtedly been carried out extensively and, as it has been shown above, any measure that is expressly punitive in nature cannot be justified as an absolute military necessity. That punitive house demolitions are unlawful under international law has also been clearly established. Destruction that is carried out wantonly refers to destruction that is "extensive, unnecessary and wilful".<sup>93</sup> Thousands of Palestinian homes have deliberately been demolished or sealed as a punitive measure. Ostensibly these demolitions have been carried out as a deterrent against future illegal activities. They have clearly failed in this regard, because despite their widespread use Palestinians have continued to mount armed attacks against Israeli citizens and members of the occupying army. Israel's pursuit of its punitive house demolition policy has led to extensive destruction of property, not justified by military necessity and which has been carried out unlawfully and wantonly.

It has been, and continues to be, Al-Haq's stated position that Israel's punitive house demolition policy clearly amounts to a grave breach of the Fourth Geneva Convention, to which Israel is a signatory and bound to as an occupying power.<sup>94</sup> The international community, of which the majority of States are High Contracting Parties to the Fourth Geneva Convention have a clear duty to investigate, prosecute and punish those Israelis who have committed or ordered the commission of punitive house demolitions. The commission of these most serious violations has been going on for far too long and Al-Haq calls on the international community to fulfil its legal obligations under international law and put a stop to Israel's continued employment of this illegal practice.

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<sup>93</sup> Jeremy Bowen, 'Wanton Destruction', p. 372 in Roy Gutman and David Rieff (eds.), *Crimes of War: What the Public Should Know* (New York, 1999).

<sup>94</sup> See Lynn Welchman, *A Thousand and One Homes: Israel's Demolition and Sealing Of Houses in the Occupied Palestinian Territories* Al-Haq Occasional Paper No. 11, Ramallah, 1993, p. 45; John Quigley, *The Legal Consequences of the Demolition of Houses by Israel in the West Bank and Gaza Strip - A Study Prepared for Al-Haq, Al-Haq, West Bank Affiliate of the International Commission of Jurists, Ramallah, 1994.*

## Extensive Property Destruction as a War Crime

It has been established that the extensive destruction of property resulting from Israel's punitive house demolition policy is a grave breach of the Fourth Geneva Convention. Can it be concluded that under international criminal law these actions also amount to the war crime of extensive property destruction not justified by military necessity?

Article 6(c) of the Charter of the International Military Tribunal at Nuremberg enumerated the "wanton destruction of cities, towns or villages, or devastation not justified by military necessity" as a war crime.<sup>95</sup> The recently entered into force Rome Statute of the International Criminal Court expressly holds grave breaches of the Geneva Conventions to be war crimes within the jurisdiction of the Court.<sup>96</sup> Article 8(2)(a)(iv) stipulates that the grave breach of "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly" is a war crime. The Statute of the International Tribunal for the Former Yugoslavia has also enumerated the grave breach of extensive property destruction as a war crime.<sup>97</sup> It is worth noting that at the time of writing, there were 139 signatories and 84 States Parties to the Rome Statute, a treaty that was the result of intense negotiations involving between delegations from over 150 countries and dozens of non-governmental organisations. Also, since 1 July 2002 many States parties to the Statute have taken concrete measures to incorporate this treaty into their own domestic legislation. These developments, reflecting the overall success this major achievement in international criminal law, affirm the authoritative character of the Statute of the International Criminal Court.

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<sup>95</sup> Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of International Military Tribunal, Annex, (1951) 82 U.N.T.S. 279. *The extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly has also been specified as a grave breach in Article 50 of the First Geneva Convention supra note 5 and Article 51 of the Second Geneva Convention, supra note 5.*

<sup>96</sup> Rome Statute of the International Criminal Court, (1998) U.N. Doc. A/CONF.183/9, entered into force 1 July 2002, Article 8 (2) (a).

<sup>97</sup> Article 2 (d).

***The elements of the war crime of extensive property destruction in the Rome Statute have been set out as follows:***

1. The perpetrator destroyed or appropriated certain property
2. The destruction or appropriation was not justified by military necessity.
3. The destruction or appropriation was extensive and carried out wantonly
4. Such property was protected under one or more of the Geneva Conventions of 1949.
5. The perpetrator was aware of the factual circumstances that established that protected status.
6. The conduct took place in the context of and was associated with an international armed conflict.
7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.<sup>98</sup>

The first three elements have clearly been met by Israel's house demolition policy as the previous section showed: property was destroyed, the destruction was extensive, it cannot be justified by military necessity and it was carried out wantonly.<sup>99</sup>

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

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<sup>98</sup> Article 8(2)(a)(iv), *Elements of Crimes Preparatory Commission for the International Criminal Court, PCNICC/2000/1/Add. 2*, 2 November 2000.

<sup>99</sup> See previous section discussing grave breaches of the Fourth Geneva Convention.

Element 6 demands that the acts took place during an international armed conflict. The Rome Statute of the International Criminal Court has made it clear that the term “international armed conflict” includes military occupation.<sup>100</sup> The West Bank and Gaza have been occupied by Israel since 1967. It hardly needs stating that, in satisfaction of element 7, the Israeli authorities are aware that they are occupying the lands where the punitive house demolitions are carried out.

Israel’s punitive house demolition policy constitutes one of the most egregious of war crimes. The actions taken under this policy meet all the elements of the war crime of extensive destruction of property, not justified by military necessity and carried out unlawfully and wantonly. The International Criminal Court has jurisdiction over this and other war crimes “in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes”.<sup>101</sup> Although this court will only be able to prosecute crimes committed since the coming into force of the Statute, it is abundantly clear that Israel’s punitive house demolition policy is an ongoing course of action. In fact, since 1 July 2002, over seventy houses have been demolished as punishment by the Israeli military forces.<sup>102</sup>

52 Under international criminal law, the Israeli authorities have committed and continue to commit serious war crimes on an almost daily basis.

## House Demolitions: Collective Punishment as a War Crime

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

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<sup>100</sup> Rome Statute of the International Criminal Court, (1998) U.N. Doc. A/CONF.183/9, Elements of Crimes, footnote 34 to Article 8(2)(a).

<sup>101</sup> Article 8 (1).

<sup>102</sup> See B'tselem, [http://www.btselem.org/english/House\\_Demolitions/Statistics.asp](http://www.btselem.org/english/House_Demolitions/Statistics.asp)

It has been shown that Israel's punitive house demolition policy violates both Article 50 of the 1907 Hague Regulations and Article 33(1) of the Fourth Geneva Convention because it punishes persons for crimes they have not personally committed. Furthermore, the widespread imposition of measures of collective punishment against protected persons in occupied territories is a violation of an established norm of customary international law. Section 3 has shown the customary status of this prohibition, in particular as evidenced by the inclusion of a prohibition of collective punishment in both Additional Protocols I and II and in the Statute of the International Criminal Tribunal for Rwanda. Reinforcing the gravity of violating this norm Jean Pictet has stated that "other grave breaches of the same character as those listed in Article 147 can easily be imagined"<sup>103</sup>, following which he makes direct reference to the Yugoslav Penal Code which had added collective punishment to its list of grave breaches.

Since the adoption of the punitive house demolition policy in 1967, the Israeli authorities have punished thousands of innocent persons for crimes committed by others. The overwhelming majority of demolitions and sealings have been blatant acts of collective punishment. The acts carried out under this policy are in violation of a rule of customary international law and they are committed "as part of a plan or policy or as part of a large-scale commission of such crimes". Punitive house demolitions which punish persons on a collective basis must also, therefore, be regarded as war crimes.

## The House Demolition Policy as the Crime Against Humanity of Persecution

The concept of crimes against humanity first emerged in the Nuremberg charter and was later elaborated upon by the Israeli Supreme Court in the case of *Attorney General of Israel v. Adolf Eichmann*.<sup>104</sup> The Rome Statute of the International Criminal Court, to which Israel is a signatory, established that the Court has jurisdiction over crimes against humanity. Article 7 of the Statute includes, as a crime against humanity, "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack",

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<sup>103</sup>Commentary to the Fourth Geneva Convention, p. 594

<sup>104</sup> Israeli Law Reports 5, (1968).

Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.<sup>105</sup>

Paragraph 2 (g) of that article defines persecution as “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity”. The Statutes of the International Criminal Tribunal for Yugoslavia and for Rwanda also enumerate persecution as a crime against humanity.<sup>106</sup>

***The Elements of Crimes sets out the elements of the crime against humanity of persecution as follows***<sup>107</sup>

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1. The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights
  2. The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such.
  3. Such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognised as impermissible under international law.
  4. The conduct was committed in connection with any act referred to in Article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court.
  5. The conduct was committed as part of a widespread or systematic attack against a civilian population.
  6. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

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<sup>105</sup> Paragraph 1(h).

<sup>106</sup> Article 5 of the ICTY Statute and Article 3 of the ICTR Statute.

<sup>107</sup> Article 7 (1)(h) *Elements of Crimes*, supra note 98.

Israel's punitive house demolition policy would meet all of the prescribed elements of the crime against humanity of persecution. Firstly, the perpetrator must have deprived one or more persons of fundamental rights, contrary to international law. In *Prosecutor v. Kupreskic* the Trial Chamber of the ICTY established that "not every denial of a human right may constitute a crime against humanity" and that only "gross or blatant denials of fundamental human rights can constitute crimes against humanity"<sup>108</sup>. In the course of the judgment the Chamber addressed the question of whether 'certain property or economic rights can be considered so fundamental that their denial is capable of constituting persecution'<sup>109</sup>. The Trial Chamber found that "the comprehensive destruction of homes and property...constitutes a destruction of the livelihood of a certain population. This may have the same inhumane consequences as a forced transfer or deportation"<sup>110</sup>. The Chamber concluded that such property destruction "may constitute a gross or blatant denial of fundamental human rights, and, if committed on discriminatory grounds, it may constitute persecution"<sup>111</sup>. It has been shown that Israel's punitive house demolition policy has deprived tens of thousands of persons of their property rights and of the right not to be punished for crimes they did not personally commit, in violation of international law.

Element 2 requires that the perpetrator targeted the affected persons "by reason of the identity of a group or collectivity or targeted the group or collectivity as such" and, pursuant to Element 3, that "[s]uch targeting was based on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognised as impermissible under international law". Israel's punitive house demolition policy is directed solely against Palestinians, despite the fact that crimes of a similar degree have also been carried out by Israelis. The occupying power employs house demolitions against Palestinians because they are Palestinians. This policy is blatantly discriminatory as persons are targeted on national and ethnic grounds, in contravention of international law.

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<sup>108</sup> *Prosecutor v. Zoran Kupreskic et al*, Case No. IT-95-16-T, Judgement, 14 January 2000, paragraphs 618-620. See also *Prosecutor v. Kordic and Cerkez*, IT-95-14/2, Trial Chamber III, 26 February 2001, paragraph 205.

<sup>109</sup> Paragraph 630.

<sup>110</sup> Paragraph 631.

<sup>111</sup> *Id.*

The fourth requirement demands that the conduct in question was committed in connection with any of the acts in Article 7, paragraph 1, of the Statute or in connection with any other crime in the Court's jurisdiction. As already shown, the International Criminal Court also has jurisdiction over war crimes, including grave breaches of the Geneva Conventions. Article 8(a)(iv) established that the extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly is a war crime within the jurisdiction of the court. The preceding section has already established that actions taken under Israel's punitive house demolition policy amount to a grave breach of the Fourth Geneva Convention and to war crimes in view of the extensive destruction of property caused and in view of the blatant imposition of measure of collective punishment.

56 The conduct must also be part of a widespread or systematic attack against a civilian population in order to be considered a crime against humanity. Undoubtedly, it is almost always civilians that have been targeted by Israel's demolition policy. This is confirmed by the Israeli authorities own assertions that demolitions strike at innocent persons in order to achieve a deterrent effect. Regarding widespread or systematic attack, the Appeals Chamber of the ICTY has established that "[t]he attack in the context of a crime against humanity is not limited to the use of armed force; it encompasses any mistreatment of the civilian population".<sup>112</sup> The sheer number of demolitions that have been carried out and their continued use throughout the occupation show that the housing demolition policy is without question a widespread attack on the Palestinian civilian population.

Finally, the perpetrator must have known that the conduct was part of such an attack or that it was intended that it be part of such. As has been consistently stated, Israel demolishes and seals houses punitively as a policy. A Military Commander issues military orders pursuant to which soldiers of the occupying army carry out the demolitions. That such a policy exists is widely known throughout the military and the government of Israel and therefore, there is clear knowledge that the conduct is part of a widespread or systematic attack against the civilian population in the Occupied Territories.

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112 *Prosecutor v. Kunarac, Kovac and Vukovic, IT-96-23, Appeals Chamber, 12 June 2002, paragraph 86.*

Israel's actions directed at the Palestinian population through its punitive house demolition policy have been shown to amount to persecution. This policy involves the intentional and severe deprivation of fundamental Palestinian rights. This denial of rights is directed against Palestinians by reason of their identity. The punitive house demolition policy is utterly discriminatory and the Israeli authorities know this. It can be concluded that punitive housing demolitions are punishable as the crime against humanity of persecution. Israel's continued persecution of the Palestinian people has taken many forms, of which house demolitions are just one, albeit especially inhumane form. A harsh, systematic policy of closure of Palestinian cities, towns and villages, the imposition of strict curfews throughout the West Bank, the denial of building permits for Palestinians in annexed East Jerusalem, daily disruption of life by military checkpoints, mass destruction and confiscation of Palestinian lands and unlawful extra-judicial killings are just some of the other denials of fundamental rights which point to a clear persecutory policy of the Palestinian people by Israel.

## *Conclusions*

Israeli's punitive house demolition policy is as old as the military occupation of the West Bank and Gaza itself. Since 1967 thousands of homes have been adversely affected; over five hundred homes have been completely demolished as punishment for the crimes committed by one of the residents. This demolition policy has involved collective punishment on a massive scale. Thousands of innocent Palestinians have been made homeless by the actions of the Israeli occupation army. The Supreme Court, sitting as the High Court of Justice has consistently validated those actions and pointedly refused to put a stop to these unlawful acts of collective punishment. Furthermore, it has been demonstrated that punitive house demolitions, as part of an overall policy, are a grave breach of the Fourth Geneva Convention, amount to the war crimes of extensive property destruction and the imposition of collective punishment and comprise the crime against humanity of persecution.

The importance and centrality of the home in any society hardly needs emphasising. In the words of the President of the Israeli Supreme Court:

A person's home is not merely a roof over his head, but it is also a }  
 { means for the physical and social location of a person, his private }  
 { life and his social relationships.<sup>113</sup>

The demolishing or sealing of a house, therefore, not only destroys one's place of residence, but also eradicates a focal-point of family and social life. Moreover, and of critical importance in Palestinian society, house demolitions are a means by which the Israeli authorities have destroyed the people's links to their land. When this effect of punitive demolitions is considered in conjunction with the similar effect of administrative house demolitions and the wanton destruction associated with military operations, one sees a concerted effort by the Israeli authorities to sever the Palestinian people's ties to their land.

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113 HCJ 7015/02, *Ajuri v. IDF Commander in West Bank*, 3 September 2002, paragraph 14.

Israel's illegal punitive house demolition policy must end. The High Contracting Parties to the Fourth Geneva Convention have a duty to "respect and to ensure respect for the Convention in all circumstances"<sup>114</sup>. These parties also have a legal obligation under Article 146 to act in the face of the commission of grave breaches of Fourth Geneva Convention. Al-Haq calls on all States parties to this convention to fulfil their obligations and to prosecute the perpetrators of these serious crimes before their domestic courts. Israel has been acting with impunity throughout the occupation and despite heavy censure from the international community continues to do so. This weakens the effectiveness and respect for international law and dilutes its efficacy in other contexts as well. If Israel is allowed to continue in its implementation of this punitive demolition policy, countless more innocent Palestinian people will be made homeless. The collective punishment must be stopped.