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**International Legal Aspects of  
Punitive House Demolitions in the  
Occupied Palestinian Territories**

**Master thesis**  
20 points

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Field of study:  
**International Human Rights Law**

Semester:  
**Spring 2005**

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# Acknowledgments

I am immensely grateful to Professor Gudmundur Alfredsson, my supervisor and the Head of the Raoul Wallenberg Institute (RWI), Lund University, for his admirably diplomatic, patient and competent academic guidance of the occasionally excessively outspoken candidate, and for the useful advices, boosted with authoritative personal guarantees in the issues of practical importance, as raised in the times of need. The possibility to get to know and to learn from Professor Alfredsson, under the auspices of the respectable RWI, I consider my utmost personal honour.

I would further like to express my eternal gratitude to Mohamad Zakaria, Miroslava (Miki) Madzarevic and Paul Madzarevic (my family), for the exceptionally unbounded optimism, firm belief and fervent encouragement along the occasionally steep and tedious way of shaping the thesis.

The realization of the thesis would be virtually impossible without the provided successive scholarships of the Fund of the Royal House of Karadjordjevic (Serbia) and the Swedish Institute (especially Ms. Karin Dif), to whom I owe the highest appreciation.

Finally, I would want to thank the opponent, Serign Bamba Jabbie for accepting the duty and reserving his time for due consideration of the topical legal wrangles.

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The thesis is dedicated to The Families – those who went away and those who have stayed, with the perpetuate hope of getting together somewhere once again.

# Abbreviations

AI – Amnesty International  
*Am. J. Int'l L.* – American Journal of International Law  
*Ariz. J. Int'l & Comp. L.* – Arizona Journal of International and Comparative Law  
ASIL – The American Society of International Law  
*Brit. Y.B. Int'l L.* – The British Year Book of International Law  
*Brook. J. Int'l L.* – Brooklyn Journal of International Law  
*B.U. Int'l L.J.* – Boston University International Law Journal  
CAT – Convention against Torture  
CmAT – Committee against Torture  
CmERD – Committee on the Elimination of Racial Discrimination  
CEDAW – Convention on the Elimination of All Forms of Discrimination Against Women  
CERD – International Convention on the Elimination of All Forms of Racial Discrimination  
(The) Court – High Court of Justice/Supreme Court of Israel  
CRC – Convention on the Rights of the Child  
CSCE – Conference on Security and Co-Operation in Europe  
DER – Defence (Emergency) Regulations  
DoP – Declaration of Principles on Interim Self-Government Arrangements  
ECHR – European Convention for the Protection of Human Rights and Fundamental Freedoms  
ECtHR – European Court on Human Rights  
e.i.f. – entered into force  
*EJIL* – European Journal of International Law  
ESC – Economic and Social Council  
EU – European Union  
*Ga. J. Int'l & Comp. L.* – Georgia Journal of International and Comparative Law  
GC IV – Fourth Geneva Convention  
*Harv. Int'l L. J.* – Harvard International Law Journal  
*Hofstra L. Rev.* – Hofstra Law Review  
HPCR – Humanitarian Policy and Conflict Research (Harvard University)  
HRC – Human Rights Committee  
HRW – Human Rights Watch  
IA – The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip  
IACHR – Inter-American Commission on Human Rights  
ICC – International Criminal Court  
ICCPR – International Covenant on Civil and Political Rights  
ICESCR – International Covenant on Economic, Social and Cultural Rights  
ICJ – International Court of Justice  
ICJur – International Commission of Jurists  
ICRC – International Committee of the Red Cross  
ICRC Commentary – ICRC Commentary: Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1958)  
ICTR – International Criminal Tribunal for Rwanda  
ICTY – International Criminal Tribunal for the Former Yugoslavia  
IDF – Israeli Defence Forces  
ILC – International Law Commission  
*I.L.M* – International Legal Materials (provided by ASIL)  
*IRRC* – International Review of the Red Cross

*Isr. YB. Hum. R.* – Israeli Yearbook of Human Rights  
 LAW – The Palestinian Society for the Protection of Human Rights and the Environment  
*Law & Soc’y Rev.* – Law and Society Review  
*Leid. J. Int’l L.* – Leiden Journal of International Law  
 LSM – Law in the Service of Man, the West Bank Affiliate of the ICJur  
 Maastricht Guidelines – Maastricht guidelines on violations of economic, social and cultural rights  
*Mich. J. Int’l L.* – Michigan Journal of International Law  
*Official Journal* – Official Journal of the European Communities  
 OHCHR – Office of the High Commissioner for Human Rights  
 OMCT – The World Organisation Against Torture  
 OP ICCPR – Optional Protocol to the International Covenant on Civil and Political Rights  
 OPT – Occupied Palestinian Territories  
*Pal. YB. Int’l. L.* – The Palestine Yearbook of International Law  
 PCATI – The Public Committee against Torture in Israel  
 PCIJ – Permanent Court of International Justice  
 P.D. – Piskei Din (Judgments of the Supreme Court of Israel)  
*Penn. St. Int’l L. Rev.* – Pennsylvania State International Law Review  
 PNA – Palestinian National Authority  
 Rome Statute – Rome Statute of the International Criminal Court  
 UDHR – Universal Declaration of Human Rights  
 UNCEIRPP – United Nations Committee on the Exercise of the Inalienable Rights of the Palestinian People  
 UN CHR – United Nations Commission on Human Rights  
 UN GA – United Nations General Assembly  
 UN HCHR – The High Commissioner for Human Rights  
 UN SC – United Nations Security Council  
 UN Special Committee – The Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories  
 USA – The United States of America  
*Tex. L. Rev.* – Texas Law Review  
*Transnat’l & Contemp Probs.* – Transnational Law and Contemporary Problems  
*YB. Int’l Hum. L.* – Yearbook of International Humanitarian Law

# Summary

Throughout five chapters, the thesis deals with the issues of international humanitarian and human rights law arising out of the practice of punitive house demolition, that is repetitively utilized in the Occupied Palestinian Territories by the Israeli authorities, in response to the acts of insurgency/terrorism.

The **first chapter** (Introduction) enables the reader to get a glimpse of the precise objective(s) of the thesis, coupled with the reservations regarding the scope of the study, due to the practical necessities of the available space and time. It further presents a relatively detailed legal historical background of punitive house demolitions, ranging from the early years of the British rule in the OPT, throughout the subsequent political vicissitudes and changes in the sovereign powers, till the present moment. The chapter also covers the basic, related facts on prerogatives of the competent judicial system in the OPT, comprising military courts and the Israeli Supreme Court.

The **second chapter** (Contemporary Profile – Factual Analysis) provides a fairly detailed insight into the empirical data of punitive house demolitions, starting with the definition of the phenomenon and the introductory analysis of the regulations vesting the authority to the military commander of the area for ordering the demolitions. It further scratches the patina of the official justifications and a highly varying frequency over the course of time, ending with the brief analytical estimation of its disputed effectiveness, based on the available data.

The **third chapter** (Applicable Law – the Relevant Legal Analysis) is virtually the most important part of the thesis, which fully concentrates on the issue of direct application of the relevant law to the presented facts, aiming at a strictly legal identification of the violations of humanitarian and human rights law. The chapter offers a fairly extensive analysis of the most prominent allegations of the violations of international law, with due respect to the said limitations, condemning the practical omnipotence of the military commander and the uninterrupted pursuance of the punitive practice.

The **fourth chapter** (Monitoring) attempts to reanimate the relevant portions of international law, under the heavy burden of *realpolitik*. The reader can obtain a succinct picture of the missing and existing possibilities of constructive monitoring aiming to finally introduce the respect for human rights of the OPT population. In certain points, the section reminds of the reality of prevalence of inter-governmental political interest, in contravention of the precisely coined legal obligations of the international community to ensure the respect of international law. However, the hope of contra development persists.

The **fifth chapter** (Conclusion) streamlines the legal argumentation of the previous chapters, with the concrete pointers to the issues previously discussed.

# I Introduction

*Home is the first line of defence.*  
Szold

Whether one possessively names it *Filastin* or *Eretz Israel*, the Palestine has not been, throughout the course of modern history, a “promised land” of “milk and honey”. Instead, it has brimmed with violence, resulting in a staggering score of destruction of her peoples’ lives and property. In the clash of fervent nationalisms between Jews and Palestinians, the mutual resort to violence (be it “terrorism” or the “fight for freedom”/“the right to exist”) has created a rare interdependence between the offending excess and the response, in the perverted logic of a *circulus vitiosus*. Punitive house demolitions have reflected many aspects of such harsh reality. A Palestinian national commits an offence, causing or not causing death of Jewish national(s), and a military commander orders his or his family house destroyed in the immediate aftermath, rendering many uninvolved people homeless and further frustrated. As Ezer Weizmann, an erstwhile Israeli President, once observed, the “years of war and terrorist action have created a kind of fixed ‘exchange rate’ for vengeance and retribution – a balance of debits and credits in the blood bank... the compelling necessity to hit back, or feasibility of exercising restraint depend on the number of coffins on either side of the border.”<sup>1</sup> The prominent aura of punishment/retaliation is denied by Israel, who justifies the demolitions as an effective deterrent in contravention of the available statistics.

The punitive demolitions, constituting 15 per cent of the overall number of house demolitions, have left homeless thousands of people not guilty for the offences served as the demolitions’ official pretext. However, in comparison to the ferocious historical atrocities as *e.g.* genocides, the practice of punitive house demolitions represents a chronic, low-profile Israel’s response to broadly defined offences in the OPT, starting from the first years of occupation, maintained on a day-to-day basis and balancing on the thin line between the (questionable) formal legality and substantial illegality. As such, it may not instantly rivet the international public and urge the request of an immediate cessation and official atonement. But it leaves victims behind, scarred materially and psychologically, hence prompts the identification of the possible crime and the subsequent response.

## 1. Objectives and scope of the study, method and material

The title of the thesis may seem to carry a pre-qualification of the topical house demolitions as “punitive”. However, the qualification is only initially (*sic*) a matter of convenience, as the interested academic circles have generally accepted the use of the term, notwithstanding its status of an object of high controversies and the continual denial by Israel.

The objective of the work presented is to assess the legal nature, the viability of punitive house demolitions under the extant international legal corpus in terms of precise legal identification of (f)actual violations of humanitarian and human rights law. Furthermore, the author has made another humble attempt of pointing to the flaws and potential virtues of the “as is” international monitoring mechanism in respect of the identified human rights

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<sup>1</sup> Ezer Weizmann, *The Battle for Peace*, 1994 New York: Bantam Books, pp. 265–266 – as cited in Gerald Cromer, *A War of Words: Political Violence and Public Debate in Israel* (2004 London), p. 40.



violations. The issue is explored by means of interconnecting the facts of the case, a particular national law (1945 Defence (Emergency) Regulations) as the ground of the punitive measures, with primarily the Regulations respecting the Laws and Customs of War on Land annexed to the Convention (IV) respecting the Laws and Customs of War on Land (the Hague Regulations), Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (GC IV), Universal Declaration of Human Rights (UDHR), International Covenant of Civil and Political Rights (ICCPR), International Covenant of Economic, Social and Cultural Rights (ICESCR) and similar humanitarian and human right law provisions, available jurisprudence and developed theory.

Bearing in mind that the topic deeply intertwines with different areas of international law, practical considerations have necessitated certain limitations to its scope. Namely, the topic of punitive house demolitions may easily be brought into the legal context of: special protection of the child and women (them being the age/gender categories mostly affected by the punitive practice), torture (as the level of severity of the measure and the official negligent attitudes possibly amounting the intent may prove to be the required “critical mass” to trigger such label), ethnic cleansing (if having in mind the generally and particularly symptomatic official attitudes, programmes and acts throughout the modern history), terrorism and state-terrorism (if eliminating the political considerations and “the eye of a beholder” syndrome), etc. Therefore, the thesis does not purport to deal with the related specialized legal instruments, provisions and phenomena.

## ***2. Legal Historical Background***

### **A. British Mandated Palestine**

Before the World War I, the Ottoman Empire ruled the territory of Palestine, comprising nowadays Israel and the Occupied Territories. With the breakdown of the Empire, the British mandate over Palestine was officially established by the League of Nations on July 24th 1922.<sup>2</sup> The primary legislation was set in the hands of the local British High Commissioner, with the legal power of issuing “ordinances”. Pursuant to the 1922 Palestine Order in Council, the ordinances must respect the obligations imposed by the League of Nations and ensure the respect of civil rights to all inhabitants of the land.<sup>3</sup>

As a response to the ebbs and tides in the Jewish-Palestinian resort to violence for achieving the wanted political ends, British administration was introducing and revoking a

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<sup>2</sup> The British had entered Palestine in December 1917, formally obtained the Palestine Mandate in April 1920, but the League of Nations ratified it in July 1922 and officially approved it on September 29<sup>th</sup> 1923. *See generally* Charles D. Smith, *Palestine and The Arab-Israeli Conflict*, Fifth Edition (2004 Palgrave Macmillan). *See also* Anis F. Kassim, ‘Legal Systems and Developments in Palestine’, *I Pal. YB. Int’l L.* (1984), p. 23.

<sup>3</sup> Note that the Article 2 of the Mandate incorporated a responsibility assigned to the Great Britain by Balfour Declaration in 1917 of “placing the country under such political, administrative and economic conditions as will secure the establishment of *the* [a, as worded in the Balfour Dec.] Jewish national home”. But it also imposed an imperative of “safeguarding the civil and religious rights of all inhabitants of Palestine, irrespective of race and religion”. *See e.g.* Yoram Shachar, ‘History and Sources of Israeli Law’ in Amos Shapira and Keren C. DeWitt-Arar (Eds.), *Introduction to the Law of Israel* (1995 Kluwer Law International, The Hague), p. 8. *See generally e.g.* Sally V. Mallison and W. Thomas Mallison Jr., ‘The Juridical Bases for Palestinian Self-Determination’, *I Pal. YB. Int’l L.* (1984).

certain number of Orders in Council<sup>4</sup>. In 1931 Palestine (Defence) Order in Council conferred the High Commissioner the power to enact “[r]egulations for securing the public safety and the defence of Palestine” in case of “any public emergency touching the public safety and defence of His Majesty’s Empire”<sup>5</sup>. In 1933, the Order was enacted, and a year later, after diminishing intensity of the unrest, withdrawn.

Exacerbation of the situation in 1936 by surging Arab clash with the Jews and the British<sup>6</sup>, prompted the authorities to re-enact and implement the Order once again. An amendment to the 1931 Order<sup>7</sup> was passed, authorising enactment of regulation enabling “infliction of fines upon bodies of persons or upon corporations and the *forfeiture and destruction of property as punitive measures* [emphasis added] whether actual offenders can or cannot be identified”<sup>8</sup>. Such a policy of punishment raised a wide public opprobrium in Britain<sup>9</sup>, despite the repeated official justifications and ideological prepositions necessitating the use of punitive demolitions.<sup>10</sup> In 1937, a new Order revoked both the 1931 and 1936 Orders, but retained the Emergency regulations and enhanced the scope of the Commissioner’s power<sup>11</sup>, who was now in charge for amending the Defence Regulations.<sup>12</sup>

Imposition and often carefree implementation<sup>13</sup> of the normative frame at the time resulted not in peace but in even more violence.<sup>14</sup> In 1938, after an obvious aggravation of the mutual clashes between the parties involved, a very clear acknowledgement was made that “civil administration and control of the country was, to all practical purposes, non-existent”<sup>15</sup>.

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<sup>4</sup> Orders in Council were used to define the realm of power of the High Commissioner of Palestine in dealing with frequent unrests.

<sup>5</sup> *The Laws of Palestine* Volume III (1934 Waterlow, London), pp. 2619-2620, as cited in Martha Roadstrum Moffett, *Perpetual Emergency: A Legal Analysis of Israel’s Use of the British Defence (Emergency) Regulations, 1945, in the Occupied Territories* (1989 Al-Haq), p. 50.

<sup>6</sup> So called “Arab Revolt”. The collective actions against villages were coordinated by joint efforts of Jewish and British officials, who discussed together the imposition of penalties and sentences. “At several points the British army might almost have been acting under orders from the Jewish Agency, something like a mercenary force or security service.” Tom Segev, *One Palestine, Complete: Jews and Arabs Under the British Mandate* (2001 Henry Holt and Company, New York), pp. 426-427.

<sup>7</sup> *Palestine Gazette* No. 634, September 30<sup>th</sup> 1936, p. 1070, as cited in Moffett, *op.cit.*, p. 50.

<sup>8</sup> In the summer of 1936 the authorities destroyed several hundred houses in the Old City of Jaffa, under ambiguous reasons, displaying the willingness on the side of authorities to pursue an “iron-handed policy against terror”. Michael Joseph Cohen, ‘Sir Arthur Wauchope, the Army, and the Rebellion in Palestine 1936’, *Middle East Studies*, Vol. 9, No. 1 (Jan. 1973), p. 27, as cited in Tom Segev, *op.cit.*, p. 399.

<sup>9</sup> “The use of strong measures, such as ... destroying houses... even if only during the course of a confrontation, foments discontent among the British.” Sharett, *Political Diary*, vol. II, p. 419 as cited in Tom Segev, *op.cit.*, pp. 424-425.

<sup>10</sup> British Chief Secretary Battershill expressed a “doubt whether any Arab really has any ethical feeling against murder, and I am sure Arabs look upon murder as a justifiable and satisfactory weapon to use not only in private feuds but in political controversies. We shall never get them to change their fundamental belief on this point and so our only hope is to make murder and disturbances as unpleasant and expensive for them as possible or, in a word, make them see that it does not pay. Then they will stop”. Battershill to Shuckburgh, 21 Nov. 1937, RHL, Battershill Papers, 10:3, ff. 5-24, as cited in Tom Segev, *op.cit.*, p. 425.

<sup>11</sup> *Palestine Gazette* No. 675, Supp. No. 2, March 24<sup>th</sup> 1937, p. 267, as cited in Moffett, *op.cit.*, p. 50.

<sup>12</sup> See Moffett, *ibid.*, p. 50.

<sup>13</sup> Allegedly, between 1936 and 1940, the authorities destroyed 2000 houses as a part of the counter-terrorism campaign. See Bruce Hoffman, *The Failure of British Strategy Within Palestine, 1939-1947* (1983 Bar-Ilan University Press), p. 81.

<sup>14</sup> See Ann Mosely Lesch, *Arab politics in Palestine, 1917-1939: The frustration of a nationalist movement* (1979 Cornell University Press), p. 218. There had been a proposition of what was considered a more effective (“checkmate”) alternative to the punitive demolitions in combating the raising violence and terrorism – granting 1000 new immigration permits for every Jew killed in an Arab terror attack. Tom Segev, *op.cit.*, p. 425.

<sup>15</sup> Lesch, *ibid.*, p. 223.

At the onset of the Second World War, British representatives both home and in Palestine, having lost actual control over Palestine<sup>16</sup>, came to the sound conclusion that it had become a very heavy political/financial burden. In other words: “Britain was getting sick of Palestine”<sup>17</sup>, an observation being followed by later prompt decision for disengagement from the area.

### a) Defence (Emergency) Regulations

Under such circumstances of an imminent political/administrative breakdown, British administration was mainly focused on security and defence measures. A rather controversial set of norms was introduced into the legal system of the area in 1945, known as the Defence (Emergency) Regulations<sup>18</sup> (hereinafter: DER). DER was promulgated by the Mandatory Government in Palestine (The High Commissioner of Palestine) in 1945, pursuant to the Article VI of the 1937 Palestine Defence Order in Council<sup>19</sup>, “to assure public safety, defence of Palestine, the maintenance of public order, the suppression of mutiny, rebellion or riot.”<sup>20</sup> It allowed utilization of “an impressive array of legal tools for detention, deportation, confiscation, censorship, demolition of houses, restraint of movement, food control, press control, money control, rent control, and capital punishment.”<sup>21</sup> Aside to the mentioned abundant means of securing public safety, it was the concrete Regulation 119 of DER, that specifically referred to the use of house demolitions.

Being initially directed against Jewish underground movements<sup>22</sup>, DER promulgation sparked frenzied opposition by Jewish community and the Jewish Lawyer’s Association, which demanded full abrogation of the regulations. The requests were based on the argument, summarized in the words of then renowned lawyer, later Israeli Attorney General and Justice Minister, Ya’acov Shapira, that “[t]he established order in Palestine since the defence regulations is unparalleled in any civilized country. Even in Nazi Germany there were no such laws... Only in an occupied country do you find a system resembling ours... It is our duty to tell the whole world that the [DER] destroy the very foundations of justice in this land... No government has the right to pass such laws.”<sup>23</sup> However, despite various arguments against it, the authorities frequently resorted to the DER prescribed measures<sup>24</sup>, including house demolitions.

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<sup>16</sup> M. Cohen, *op.cit.*, p. 230.

<sup>17</sup> Tom Segev, *op.cit.*, p. 389.

<sup>18</sup> *Palestine Gazette* No. 1442, reg. 119, Supp. No. 2 (September 27<sup>th</sup> 1945), pp. 1055, 1089. DER were initially enacted for the purpose of quenching the riots of the Jewish underground movements. See Baruch Bracha, ‘Restrictions of Personal Freedom without Due Process of Law According to the Defence (Emergency) Regulations, 1945’, 8 *Isr. YB. Hum. R.* (1976), p. 296.

<sup>19</sup> *Palestine Gazette* No. 675, Supp. No. 2 (March 24<sup>th</sup> 1937), p. 267.

<sup>20</sup> Dov Shefi, ‘The Protection of Human Rights in Areas Administered by Israel: United Nations Findings and Reality’ in 3 *Isr. YB. Hum. R.* (1973), p. 342.

<sup>21</sup> Shachar, *op.cit.*, p. 5.

<sup>22</sup> Subsequently, their prime target, though, were Arab/Palestinian nationals. Moffett, *op.cit.*, p. 17.

<sup>23</sup> Sabri Jiryis, *The Arabs in Israel, 1948-66* (1968 Beirut), p. 4, as cited in David McDowall, *The Palestinians: The Road to Nationhood*, (1994 Minority Rights Group, London), p. 50; Nur Masalha, *A Land Without People: Israel, Transfer and the Palestinians 1949-96* (1997 London), p. 114. It was the argument to be completely shifted, in behalf of DER, once Shapira became the Attorney General when he asserted that “[i]t is one thing for the military to use someone else’s law. It is quite another for the Knesset [Israeli Parliament] to enact as its own a preventive detention law.” McDowall, *op.cit.*, p. 51.

<sup>24</sup> David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (2002 State University of New York Press), p. 121.

Shortly after GA Resolution 181 (November 29<sup>th</sup> 1947) and partitioning of Palestine, British forces and administration gradually withdrew from the area and officially finalized its Mandate on May 14<sup>th</sup> 1948. The official full disengagement was preceded by enactment of the Palestine (Revocations) Order in Council<sup>25</sup> on May 12<sup>th</sup>, which comprised a list of Orders-in-Council, as erstwhile grounds for the British administrative rule (*vide supra* text), and their full revocation together with the subsequent regulations enacted pursuant to them, as from the last day of the Mandate. The 1937 Palestine (Defence) Order in Council, that had served as a base for enactment of DER was the last order on the list, logically implying the revocation of DER. However, validity of the revocations has been one of the focal point of disputes in the course of assessing nowadays validity of DER. Namely, the very Revocations Order was not published in Palestine Gazette, as the official publication for the territory, but in Government Gazette in London, giving rise to later high controversies regarding the validity of “hidden law”<sup>26</sup> in the concrete case.

## **B. Jordanian-Egyptian Administration (1948 – 1967)**

With the British disengagement and an immediate proclamation of the State of Israel in May 1948, a war broke out, resulting in subsequent subordination of almost all the territory of the Mandated Palestine under Israeli authority – with the exception of the West Bank and Gaza.<sup>27</sup> The excluded territories (West Bank and Gaza) were immediately occupied and administered by Trans-Jordan (nowadays Hashemite Kingdom of Jordan, hereinafter: Jordan)<sup>28</sup> and Egypt respectively<sup>29</sup>, till the onset of Israeli occupation 1967. Israel promptly proclaimed a state of emergency (May 21<sup>st</sup>), introduced military government and, by virtue of the 1948 Law and Administration Ordinance<sup>30</sup>, immediately enacted a set of emergency regulations, whose initial 3-months validity of the emergency regulations was extended by legislation of the State Provisional Council. The “alien” sovereignty over the West Bank and Gaza at the time has never been recognized by Israel.

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<sup>25</sup> Palestine (Revocation) Order in Council, §2, para. 2, Statutory Instrument No. 1004 (1948), p. 1350.

<sup>26</sup> The phrase is actually used as “unpublished law” with reference to all normative acts that were legislated in the period of time between November 29<sup>th</sup> 1947 (the date of Partition) and May 15<sup>th</sup> 1948 (creation of the state of Israel), but that was not published in the official publication for such purposes, *i.e. Palestine Gazette*. See Law and Administration Ordinance (Amendment) Law (5709-1949), Article 11 A(b). See also Interpretation Order No. 160, in English, as appended (C) in Moffett, *op.cit.*, p. 82.

<sup>27</sup> The territory constituted 22 per cent of Palestine. Ardi Imseis, ‘On the Fourth Geneva convention and the Occupied Palestinian Territory’, 44 (1) *Harv. Int’l L. J.* (Winter 2003), p. 77. See Anis F. Kassim, ‘Legal Systems and Developments in Palestine’, I *Pal. YB. Int’l L.* (1984), p. 27.

<sup>28</sup> King Abdullah of Jordan formally annexed the West Bank in April 1950, but the annexation was only recognized by the United Kingdom and Pakistan, while the annexation of East Jerusalem was out of British recognition. See Esther Rosalind Cohen, *Human Rights in the Israeli-Occupied Territories: 1967 – 1982* (1985 Manchester University Press), p. 48.

<sup>29</sup> See Charles D. Smith, *op.cit.*, pp. 196-201. Gaza Strip was never annexed to Egypt. Raja Shehadeh, *From Occupation to Interim Accords: Israel and the Palestinian Territories* (1997 Kluwer Law International), p. 77.

<sup>30</sup> Law and Administration Ordinance No. 1 of 5708-1948, Article 11 incorporated the emergency regulations into the law of Israel: “The law which existed in Palestine on the 5th Iyar, 5708 (14th May, 1948) shall remain in force, insofar as there is nothing therein repugnant to this Ordinance or to the other laws which may be enacted by or on behalf of the Provisional Council of State, and subject to such modifications as may result from the establishment of the State and its authorities.” Pursuant to this section, Israel has considered DER applicable not only in the territory of the OPT, but in Israel herself. The article incorporated fully Article 46 of the 1922 Palestine Order-in-Council, imposing the principle of statutory supremacy – the (supreme) law is primarily to be sought in (primary – Knesset etc. born) legislation.

On May 8<sup>th</sup> 1948, the Jordanian Military Governor issued Proclamation No. 2, incorporating the existing law of the area, “except... [the laws] which are contrary to the Defence Law of Transjordan of 1935 or Regulations and Orders published under this law”.<sup>31</sup> On May 13<sup>th</sup> 1948, shortly prior to the full British disengagement, Jordan proclaimed an *Addendum* to then valid 1935 Trans-Jordan Defence Law, establishing validity of Jordanian Defence Law and all Regulations pursuant to it, for the territory under the responsibility of the Jordanian army.<sup>32</sup> In August 1939, the King of Jordan had already proclaimed the Defence Law to be in effect and enacted certain Defence Regulations<sup>33</sup> pursuant to it. Thus, now, the West Bank was under applicable and effective Jordanian Defence Law that was, among other punitive measures, explicitly allowing house demolitions<sup>34</sup>. The Regulations were similar to the British DER, with the differences in the fact that DER grants, in regard of punitive house demolitions, the right to appeal and special military courts and procedures. Obviously, Jordanian government considered DER repelled.<sup>35</sup>

However, even though the legal ground for punitive house demolitions was existent in the West Bank and Gaza, during the period of administration both Jordan and Egypt, respectively, never *explicitly* modified or repealed DER<sup>36</sup>, nor carried out house demolitions.<sup>37</sup>

### C. Israeli Occupation of Palestine

The 1967 June war<sup>38</sup> between Israel and Arabs gravely affected the political face of Palestine. The result was the onset of a long-term (pending) occupation of Palestine.<sup>39</sup> On June 7<sup>th</sup>, the day of entry into the West Bank (Judea and Samaria), Israeli Defence Forces (hereinafter: IDF) issued 3 authoritative Military Proclamations. The Proclamation No. 1 (Proclamation of Assumption of Government), served as the ground for the establishment of military rule in the West Bank and Gaza.<sup>40</sup>

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<sup>31</sup> See Meir Shamgar, ‘The Observance of International Law in the Administered Territories’, 1 *Isr. YB. Hum. R.* (1971), p. 264. See 9 *Isr. YB. Hum. R.* (1979), p. 343.

<sup>32</sup> *Addendum* No. 20 of 1948, *Jordanian Official Gazette* No. 945 (May 16<sup>th</sup> 1948), p. 183, as cited in Moffett, *op.cit.*, p. 52.

<sup>33</sup> General Defence Regulations, *Jordanian Official Gazette* No. 644 (August 29<sup>th</sup> 1939), p. 514, as cited *ibid.*

<sup>34</sup> Article 2 (4) of the 1939 General Defense Regulations (No. 2). Orders were to be issued by, *inter alia*, the King and the Prime Minister (Articles 5 and 6 respectively). Moffett, *ibid.*, pp. 8-9 and the accompanying notes.

<sup>35</sup> Arguably, even if DER had been still valid at the time, it would have been rendered unnecessary/redundant by the mentioned 1948 *Addendum*. Moffett, *ibid.*, p. 9. See *infra* text on the validity of DER.

<sup>36</sup> See Cohen, *op.cit.*, p. 94.

<sup>37</sup> See Emma Playfair, *Demolition and Sealing of Houses as a Punitive measure in the Israeli-occupied West Bank* (1987 Al-Haq), p. 10.

<sup>38</sup> The reasons for the so called “Six Days War” (June 5-10<sup>th</sup> 1967) allegedly were prior heavy threats to Israel’s “national existence”, depicted in Syrian based terrorism, Egyptian troop concentration in Sinai after the evacuation of UN personnel from the area and the blockade of the Strait of Tiran, which necessitated the pre-emptive attack by Israel. See a fairly interesting discussion on these and *contra* assertions in Norman G. Finkelstein, *Image and Reality of the Israel-Palestine Conflict* (2003, Verso), pp. 123-149.

<sup>39</sup> The act of assuming control over OPT has been recognized as “occupation” first by UN GA Res. 242 (1967) and a subsequent series of UN SC resolutions. The latter fact has made Israel the only country recognised by UN SC as the “occupying power”.

<sup>40</sup> The Proclamation No. 1 reads as follows: “The authority of the power of the State having passed de facto into the hands of the occupant, the latter shall do all in his power to restore, and ensure, as far as possible, public order and safety, respecting at the same time, unless absolutely prevented, the laws in force in the country.” See Shamgar, *op.cit.*, p. 267. See also Kassim, *op.cit.*

On the same and subsequent day, the Military Commanders of the West Bank and Gaza Strip/Northern Sinai respectively, issued Proclamation No. 2 (Law and Administration Proclamation)<sup>41</sup>, in respect of the governance of each area, by which the military government (military commanders of each area) has assumed all legislative, administrative and executive powers previously held by the Jordanian administration:

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

3. (a) Any power of government, legislation, appointment, or administration with respect to the Region or its residents shall henceforth be vested in me alone and shall be exercised only by me or by a person appointed by me to that end or acting on my behalf.

Since then the military government has introduced one more proclamation and numerous orders<sup>42</sup>, but the above mentioned one has served as the formal legal ground for claiming the preservation of the civil and penal law of the area, including DER and thus full legality of resort to house demolitions under international law. DER 119 has been deemed as the constituent part of “Jordanian legislation that has remained in force since the period of the British Mandate, and which is consequently still in force in the Judea and Samaria Region”.<sup>43</sup> Due to the instant imminence of conflicting arguments regarding the validity of the regulation, IDF subsequently issued 2 Interpretation Orders<sup>44</sup>, which gave the formal ground for the allegation of beyond doubt continuation of DER’s validity on the whole territory under Israeli control.

In November 1981, the Military Commander of the West Bank introduced the Order No. 947 Concerning the Establishment of Civilian Administration” for the area<sup>45</sup>, supplanting the military government by the civilian one, but the Article 3 of the Order provided the commander to retain certain powers, *inter alia*, Jordanian and British Defence (Emergency) Regulation from 1935 and 1945, respectively.<sup>46</sup>

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<sup>41</sup> ‘Territories Administered by Israel, Military Proclamations, Orders and Judicial Decisions: Extracts’, 1 *Isr. YB. Hum. R.* (1971), p. 419. Cf. Jonathan Kuttab and Raja Shehadeh, *Civilian Administration in the Occupied West Bank: Analysis of Israeli Military Government Order No. 947* (1982 Al-Haq), p. 2.

<sup>42</sup> As of 1999, 1457 military orders had been issued regarding the West Bank and 1316 concerning the Gaza Strip. Report of the UN CHR Special Rapporteur, Hannu Halinen, “Question of the violation of Human Rights in the Occupied Arab Territories, Including Palestine”, UN Doc. E/CN.4/1999/24 (55<sup>th</sup> Session, January 20<sup>th</sup> 1999), para. 30. See also Jerusalem Media and Communication Centre (JMCC), Special Reports from Palestine, *Israeli Military Orders in the Occupied Palestinian West Bank: 1967-1992*, Second Edition (1995). Despite the great number of orders, Israel has never published them in a comprehensive legal corpus – they are neither published in an official gazette/press, nor distributed within reasonable time and wider public, as is the requirement of the Article 65 GC IV (that the provisions be “brought to knowledge of the inhabitants in their own language”). See International Commission of Jurists (ICJ), *Inquiry into the Israeli Military Court System in the Occupied West Bank and Gaza*, Mission Report (1989), p. 13.

<sup>43</sup> *Sakhwill et al. v. The Commander of the Judea and Samaria Region*, HCJ 434/79, 34 (1) P.D. 464, summarized in English in 10 *Isr. YB. Hum. R.* (1980), p. 346.

<sup>44</sup> Interpretation Order No. 160 (1967) and Interpretation Order No. 224 (1968) in English translation, as appended (C and E respectively) in Moffett, *op.cit.*, p. 82.

<sup>45</sup> Similar order was issued in Gaza.

<sup>46</sup> Kuttab and Shehadeh, *op.cit.*, p. 9.

### ***3. Judicial System in the OPT***

#### **A. Military Courts**

The Israeli military court system was established in the OPT by the Proclamation No. 3 (Concerning Security Provisions) in the West Bank and an unnumbered order in Gaza, as one of the first acts of the new military administration.<sup>47</sup> The Proclamation outlines the areas of jurisdiction and provided procedural details for the functioning of the courts, while also specifying the scope of power and jurisdiction of the Military Commander. Due to the wording of the Proclamation, regional commanders have the power to change the structure of the court system.<sup>48</sup>

The military judicial system have had jurisdiction over cases involving military personnel for both military and civilian offences and serves both as the first instance and as an appellate military instance. Moreover, Military Courts<sup>49</sup> have concurrent jurisdiction with local Palestinian courts in criminal cases<sup>50</sup>, but they have the exclusive task of processing all cases connected to security.<sup>51</sup> The military courts may shift cases from the Palestinian local court to the military court, in certain cases and pursuant to unpublished internal guidelines directed by the Shin Beth (Israeli counter-intelligence, General Security Service). Those cases include existence of any criminal offence that may be considered a security issue (*e.g.* non-prevention of offences, threats etc.), which is often misused to the detriment of the Palestinian population.<sup>52</sup>

Judges and prosecutors are themselves military personnel - officers serving in the IDF actively or in its reserves, while their appointment is in the hands of IDF Regional Commander, on the basis of recommendation of the Military Advocate General. Practice has shown that some judges regard their positions as complementary to the role of prosecutors, putting the utmost emphasis of maintaining Israeli security and control over the OPT, while others seem to slant toward more impartial, liberal approach coupled with the high regard for the security issues.<sup>53</sup> A reminder stays that there is no security of tenure for the judges while

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<sup>47</sup> See Asher Maoz, 'The Institutional Organization of the Israeli Legal System' in Shapira and DeWitt-Arar (Eds.), *op.cit.*, pp. 31-32.

<sup>48</sup> It is worth noticing hereby that Article 35 of the Proclamation stipulated an interesting guidance, that "[t]he military courts and their directors should adhere to the terms of the Geneva convention of 12 August 1949 concerning the protection of civilians during war and regarding all matters relating to judicial procedure. If there is a contradiction between this Order and the above-mentioned convention then the regulations of the convention will take precedent. Israel Law Resource Center, *Database: Israeli Military Orders*, available at: <http://www.geocities.com/savepalestinenow/indexmilitaryorders/indexmo.htm>, accessed on 2005-02-21. The Proclamation was amended and the provision abolished on October 22<sup>nd</sup> 1967 by Military Order 144 (Concerning Security Provisions), as it was clashing with Israeli official doctrine of inapplicability of GC IV in the OPT. See *e.g.* JMCC, *op.cit.*

<sup>49</sup> Seated in Ramallah, Nablus and Gaza.

<sup>50</sup> See Arie Pach, 'Human Rights in West Bank Military Courts', 7 *Isr. YB. Hum. R.* (1977), p. 226.

<sup>51</sup> See Glen E. Robinson, *Building a Palestinian State: The Incomplete Revolution* (1997 Indiana University Press), pp. 110-111.

<sup>52</sup> It should be noticed that, despite the jurisdiction of the military courts for Israeli citizens residing in OPT, Israeli citizens have never been tried before military courts for offences committed in OPT, but have been regularly brought before ordinary criminal courts. See ICJur., *Attacks on Justice*, Eleventh Edition (2002), p. 209. See also ICJur., *Inquiry into the Israeli Military Court System in the Occupied West Bank and Gaza*, Mission Report (1989), p. 14.

<sup>53</sup> Lisa Hajjar, *Courting conflict: The Israeli Military court System in the West Bank and Gaza* (2005 University of California Press), pp. 98-99.

the Regional Commander is fully empowered to dismiss them at any time.<sup>54</sup> In respect of distribution of jurisdictions within the military judiciary, it should be especially noted that the Military Commander also possess a significant power of reducing the sentences or annulling convictions.<sup>55</sup>

## B. Israeli Supreme Court/High Court of Justice

### a) Jurisdiction

The Supreme Court of Israel<sup>56</sup> has two functions in the contemporary judicial system of the country.<sup>57</sup> The first function is that of the final court of appeals for decisions by lower district courts, while the second function is exercised from the position of a High Court of Justice, as a forum for petitions against administrative measures of the state.<sup>58</sup> With respect to the second function, the scope of jurisdiction has been somewhat disputable in case of the OPT, as the territory outside the original compulsive jurisdiction of the Court.

The peculiarity of the legal situation in the OPT and the position of the Court is that the Israeli military authorities, controlling the occupied territory, are (self)bound to respect humanitarian law (*see infra* text on applicability of the GV IV), but also need to act in accordance with the rules of Israeli administrative law, as the Israeli Defence Forces (IDF) act in behalf of the government.<sup>59</sup> Israel has maintained that there is no internationally recognized right for Palestinians of presenting a claim under a regime of military occupation law, as the territory of their residence is allegedly not under sovereignty of Israel, but the Court has restrained itself from calling upon the lack of the Palestinians' *locus standi*.<sup>60</sup> It somewhat uniquely and unprecedentedly exercises judicial review over decision and acts of the military commanders in OPT.<sup>61</sup> In *Rafiah Approach* case the Court held that:

[Israeli] courts derive their jurisdiction from the laws of the state and not from international law... [T]he court will judge the validity of an administrative act in the areas of military government according to public international law, when there is no Israeli statute that applies and there is therefore no possibility of a clash between international law and the national Israeli law".<sup>62</sup>

Even though the procedural rules for full judicial review are not provided by the international law of occupation, it is exercised in reliance to the Israeli administrative law.<sup>63</sup>

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<sup>54</sup> ICJur., *Attacks on Justice*, p. 210.

<sup>55</sup> B'Tselem (The Israeli Information Center for Human Rights in the Occupied Territories), *The Military Judicial System in the West Bank* (November 1989, Jerusalem), p. 9, available at: [www.btselem.org](http://www.btselem.org).

<sup>56</sup> Began to function on September 15th 1948, seated in Jerusalem.

<sup>57</sup> Cf. Yoav Dotan, *Judicial Rhetoric, 'Government Lawyers, and Human Rights: The Case of the Israeli High Court of Justice During the Intifada'*, 33 *Law & Soc'y Rev.* (1999), p. 323.

<sup>58</sup> See the official presentation of the Supreme Court of Israel (High Court of Justice, HCJ), available at: [www.court.gov.il](http://www.court.gov.il).

<sup>59</sup> Reiterated and elaborated by the Court in *Association for Civil Rights in Israel (ACRI) v. Central District Commander et al.*, HCJ 358/88, 43 (2) P.D. 529., available at: <http://www.court.gov.il>.

<sup>60</sup> Hajjar, *op.cit.*, p. 57. As frequently argued, the reasons for the roundabout recognition of the right to petition have been the implication of recognition of Israeli rule by the petitioners and/or Israeli rejection of the 1949 Green line separating Israel from the West Bank. Kretzmer, *op.cit.*, p. 20.

<sup>61</sup> Kretzmer, 'Constitutional Law' in Shapira and DeWitt-Arar (Eds.), *op.cit.*, p. 56.

<sup>62</sup> *Khelou v. Government of Israel* (1972), 27 (2) P.D. 169, 177, known as *Rafiah Approach* case, summarized in English in 5 *Isr. YB. Hum. R.* (1985), p. 384.

<sup>63</sup> See e.g. Kretzmer, *op.cit.*, pp. 27-28. See generally Zeev Segal, 'Administrative Law' in Shapira and DeWitt-Arar (Eds.), *op.cit.*, pp. 59-71. "[T]he right to present one's claim is a right rooted in Israeli law, available to



While stressing that “the Laws of War do not contain any firmly established rule – or even a developing rule – about the *right to be heard*”:

[T]he Court reviews the legality and validity of the action in accordance with the principles of Israeli administrative law, to ascertain *whether the official who carries out functions of the Military Government, acts lawfully and according to the norms binding on an Israeli public servant...* [A]n Israeli official in the Area brings with him to his functions the duty to act in accordance with those additional standards that are demanded by reason of his being an Israeli authority, wherever he may be. [emphasis in original]<sup>64</sup>

Notwithstanding the possibility for the judicial review *de facto* exists and the incremental willingness of the judiciary to exercise the self-ascribed duty, the Court has been “a relatively seldom used apex of the [judicial] system”.<sup>65</sup>

## **b) Law(s)**

The Supreme Court of Israel has been performing its functions despite the absence of a formal constitution and a bill of rights, as tools for strict delimitation of the state powers. The specific status of the OPT has broadened the scope of the Court’s duties in respect of the law applied. There are four legal systems applicable in the OPT: 1. international law of belligerent occupation, 2. local law in force after the onset of the occupation in 1967, 3. military orders issued by military commanders from 1967 and 4. Israeli law, by way of its indirect influence.<sup>66</sup>

In respect of the relation between the national and international law, the status of the later one is not regulated by statute.<sup>67</sup> The hierarchy of the legal systems follows the dualistic theory of international law and the British legal tradition, which strictly distinguishes customary from conventional law in respect of national implementation. Knesset has the power of transforming international law into domestic law by passing legislation<sup>68</sup> or by explicit recognition of it as a customary law.<sup>69</sup> Even without any legislative act by Knesset, the Court accepted that international custom automatically incorporates itself in the domestic law, as long as there is no conflicting statute and prevails over the existent complying domestic regulations.<sup>70</sup> When the clash between the national and international (humanitarian) law happens, different approach is assumed regarding the customary and conventional law, *i.e.* the first, as dominant, can be called upon before the courts, while the later, in the absence

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every person in judicial, quasi-judicial and even administrative proceedings... The principle accepted in Israel is that when legislation grants a government authority the power to take a decision that injures a citizen, the principles of natural justice apply without the need that they be enacted expressly.” Petitioner’s claim in *ACRI* case (1988), p. 9, para. 3.

<sup>64</sup> Reiterating *Abu Aita v. The Regional Commander of Judea and Samaria*, HCJ 69, 493/81, 37 (2) P.D. 197 in *ACRI* case (1988), pp. 16-18.

<sup>65</sup> ICJur, *Inquiry*, p. 13.

<sup>66</sup> Kretzmer, ‘Constitutional Law’ in Shapira and DeWitt-Arar (Eds.), *op.cit.*, p. 56.

<sup>67</sup> Yaffa Zilbershats, ‘The Adoption of International Law into Israeli Law: The Real is Ideal’, 25 *Isr. YB. Hum. R.* (1995), p. 243.

<sup>68</sup> There were proposals for incorporating the GC into Israeli law, *e.g.* in 1989 when such Bill was proposed by a Member of Knesset (MK) Amnon Rubinstein. See Natan Lerner, ‘International Law and the State of Israel’ in Shapira and DeWitt-Arar (Eds.), *op.cit.*, p. 389. See also Zilbershats, *op.cit.*, pp. 254-258.

<sup>69</sup> See Shamgar, *op.cit.*, pp. 262-277. See also *Khelou* case (1972), p. 384.

<sup>70</sup> In 1980 Foundations of Law act practically barred the adoption of customs derived from the rules of English common law, as it established that “[w]here the court, faced with a legal question requiring decision, finds no answer to it in statute law or case law or by analogy, it shall decide it in the light of the principles of freedom, justice, equity and peace of Israel’s heritage.” Zilbershats, *op.cit.*, p. 245. See also Shachar, *op.cit.*, p. 7.

of the a legislative recognition by Knesset, cannot be directly invoked and implemented. The distinction is reflected in the differential treatment of *e.g.* Hague Regulation, which is regarded as customary law and the GC IV, deemed as a conventional law.<sup>71</sup> In such absence of a clear statutory provision determining the status of, at least, certain portions of international law, the gap is filled by the judiciary, that has repeatedly held DER, as local law, the dominant legal source in respect to the GC IV.

The “statute” is created, in the first place, by Knesset and the acts passed are considered primary legislation. As military commanders are the authoritative highest representatives of the Israel in the OPT, their legislative functions, exercised through proclamations and orders, are characterized as primary legislation.<sup>72</sup> However, this issue of “whether legislative enactments by the military government” enjoy the status of “primary law, which are unchallengeable” or it simply belongs to the group of “secondary by-laws and administrative action, which are reviewable, has never been decided by the High Court of Justice and has only been the subject of obiter dicta”.<sup>73</sup>

### c) The Security Concern

It is a fact beyond any doubt that Israel has faced extensive threats of war from the adjacent states and resistance/terrorist attacks, primarily originating from the Palestinian population within the OPT. In the state of permanent emergency and under the assigned duties, the Court has confronted and dealt with “legal challenges to the validity of acts based on security concerns”<sup>74</sup>, prompting certain adjustments of its role. Initially, the Court was oriented exclusively toward judicial review of jurisdictional or procedural aspects, while mostly refraining from reviewing the substance of the argued security considerations<sup>75</sup>, unless such decisions had been brought manifestly *mala fide* or in an excess of jurisdiction. It has been observed that, since 1980 (Foundations of Law), the Court has shown much more flexibility, “judicial activism” and readiness to examine “the fairness and reasonableness of many administrative decisions”, with the focus “more on values” than on form and technicality.<sup>76</sup> Notwithstanding the development, the uncompromised judicial protection of the state security interests has been apparently prevailing, frequently to the detriment of the reachable justice.

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<sup>71</sup> The different treatment of the Hague Regulations and GC IV was not existent in the first years of occupation of the OPT. It appeared during 1970ies, only after the leading Israeli theoreticians (Shamgar, Dinstein etc.) assumed a firm attitude against the application of the GC IV. The change is reflected in the case law generated by the Court. *Cf. e.g. The Christian Society for the Holy Places v. Minister of Defense et al* (1972), HCJ 337/71, 26 (1) P.D. 574, summarized in English in 2 *Isr. YB. Hum. R.* (1972), pp. 354-356 and *Oyyeb v. The Minister of Defence et al* (1978), HCJ 606/78, known as *Beit-El* case (occasionally cited as *Ayyub*), translated in II *Pal. YB. Intl'l. L.* (1985). See Zilbershats, *op.cit.*, p. 250.

<sup>72</sup> See *e.g.* opinion of Judge Witkon in *Abu Hilu et al. v. Government of Israel*, HCJ 302/72, 27 (2) P.D. 169, excerpted and summarized in 5 *Isr. YB. Hum. R.* (1975), p. 386. See also Pach, *op.cit.*, p. 230.

<sup>73</sup> Raja Shehadeh, *Occupier's Law – Israel and the West Bank* (1985), p. 96 as cited in Joost R. Hiltermann, ‘Israel’s Deportation Policy in the Occupied West Bank and Gaza’, III *Pal. YB. Intl'l L.* (1986), p. 162.

<sup>74</sup> Shimon Shetreet, ‘The Scope of Judicial Review of National Security Considerations in Free Speech and Other Areas: the Israeli Perspective’, 18 *Isr. YB. Hum. R.* (1988), p. 35.

<sup>75</sup> See Hajjar, *op.cit.*, p. 57.

<sup>76</sup> Zilbershats, *op.cit.*, p. 251. See *e.g. Schnitzer v. The Chief Military Censor*, HCJ 680/88, pp. 41-48, paras. 25-27, available at: <http://www.court.gov.il>.

# Contemporary Profile – Factual Analysis

*The bulldozer has become as much a symbol of Israel's Occupation as the rifle and the tank.*

Jeff Halper<sup>77</sup>

## 1. Definition

The general term “house demolitions” refers to the “intentional physical destruction of a house or portion thereof by government actors”<sup>78</sup>. Addition of the word “punitive” with reference to the Occupied Palestinian Territories<sup>79</sup>, points out to a specific recurring practice, conducted by Israeli administration and relatively unobstructed by the competent judiciary, of demolitions and sealing of houses<sup>80</sup>, as formally administrative means of targeting their inhabitants and/or persons who have committed or have been suspected of committing offences (in the course of resistance activity/terrorism) against Israeli citizens, soldiers and Palestinians<sup>81</sup> collaborating with the Israeli authority.

## 2. Legal Ground

Since 1967, the onset of the Israeli occupation of Palestine, Israeli military authorities have recurrently conducted the practice of punitive house demolitions, on the legal ground of the Regulation 119 of the Defense (Emergency) Regulation of 1945<sup>82</sup>, imposed by the British administration over the Mandated Palestine. Israel has claimed its discontinued validity in the territory under its control, *i.e.* both the OPT and Israel itself<sup>83</sup>. In part entitled “Miscellaneous Penal Provisions”, DER 119 (1) reads as follows:

1. A military commander may by order direct the *forfeiture* to the Government of Palestine of any house, structure or land from which he has *reason to believe* than 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 or have 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 [or] 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. [emphasis added]

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<sup>77</sup> Coordinator of the Israeli Committee Against House Demolitions (ICAHD).

<sup>78</sup> HPCR, ‘The Legality of House Demolitions Under International Humanitarian Law’, Policy Brief (May 2004), available at: <http://www.ihlresearch.org/opt/pdfs/briefing3403.pdf>, accessed on 2004-12-11. *See also* Cohen, *op.cit.*, p. 94.

<sup>79</sup> House demolitions, as a means of curbing resistance, do not originate from British or Israel’s practice in the OPT, but from British commandoes who first authorised it during the Boer War (1899-1902) in South Africa. *See e.g.* Discussion extracts from the “Symposium on Human Rights” in Tel Aviv in July 1971 (hereinafter: Tel Aviv Symposium), 1 *Isr. YB. Hum. R. (1971)*, p. 383.

<sup>80</sup> The term “house”, for the purpose of this work, equals to one housing unit, not building or any construction of similar kind.

<sup>81</sup> *See e.g.* Robert I. Friedman, *Zealots for Zion: Inside Israel's West Bank Settlement Movement* (1994 Rutgers University Press), pp. 63-64.

<sup>82</sup> *Palestine Gazette* No. 1442 Supp. 2 (1945), p. 1055. *Vide supra* text and accompanying notes for details.

<sup>83</sup> *See e.g. Abbasi et al. v. GOC Home Front Command*, HCJ 8084/02, p. 5, para. 8.

2. Members of His Majesty's Forces or of the Police Force, acting under the authority of the Military Commander may seize and occupy, without compensation, any property in any such area, town, village, quarter or street as is referred to in subregulation (1), after eviction without compensation of the previous occupiers, if any.<sup>84</sup>

The above article is, procedurally, a product of an administrative decree allegedly intended to deter potential criminal offenders. It clearly confers to a military commander a wide-range (discretionary) power to forfeit and subsequently destroy, in whole or in part, any type of property, practically irrespective of the actual connection between the property and the person(s) who had committed the offence. As a hypothesis, the reference to "inhabitants" of *e.g.* a "land" situated in an "area, town, village, quarter or street", as the targeting object, may lead to forfeiture/destruction of property of a wider collective settlement, not only a house.<sup>85</sup> The very term "inhabitants"<sup>86</sup> has been defined in a very broad sense, enabling the demolitions of the houses belonging solely to the families of offenders, unrelated to the offence, *i.e.* in cases even when the inhabitants are not habitual residents, being away for period of time<sup>87</sup> or belonging to unrelated persons, irrespective of the actual ownership.<sup>88</sup>

Even though the only express reference in the article is made to *demolitions* as a legal punitive measure, *a fortiori*, the practice of *sealing* houses has been accepted as a less harming and reversible legal alternative.<sup>89</sup> Former Israeli Attorney-General, Meir Shamgar interpreted that "[d]emolitions are of two kinds: a) actual demolition, or b) eviction of a person from the building and closing of the building or flat, without destroying it. The latter occurs mainly when there are other inhabitants in the building who have no connection to the offence".<sup>90</sup> In practice, though, the criteria for ordering a house to be demolished or sealed have not been quite clear - whether demolition or sealing will be undertaken, mostly depends on the severity of the offence<sup>91</sup>, the possibility of affecting the neighbourhood property, ownership of the house (personal property or rented) and/or the age of the alleged offender.<sup>92</sup> Demolitions have been deemed by the Court as the measure to be used "only in special circumstances", as the "gravity of demolitions is threefold. First, it deprives the inhabitants of

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<sup>84</sup> *Palestine Gazette* No. 1442 Supp. 2 (1945), p. 1082.

<sup>85</sup> See *e.g. Hizran v. IDF Commander in Gaza Strip* (1992), HCJ 4772/91 IsrSC 46(2) p. 150, as quoted in *Alamarin v. IDF Commander in Gaza Strip* (1992), HCJ 2722/92, para. 6, available at: [http://62.90.71.124/files\\_eng/92/220/027/z03/92027220.z03.pdf](http://62.90.71.124/files_eng/92/220/027/z03/92027220.z03.pdf), accessed on 2005-02-22.

<sup>86</sup> There were assertions that the expressed (plural) form in "some of the inhabitants" refers to the possibility of applying DER 119 only in cases where more than one offenders had been involved, but the claim was explicitly rebuffed by the Court. "[T]here is no linguistic or substantive basis to interpret the expression... as referring to inhabitants whose number is necessarily more than one". *Hamri v. Commander of Judea and Samaria* (1982), HCJ 361/82, translated in English in *I Pal. YB. Intl'l. L.* (1984), pp. 129, 131.

<sup>87</sup> *Hamri* case (1982), p. 131. The offenders in the murder case were most of their time in the school located in another village, away from their parents' home. See also *Tamimi v. Military Commander of the West Bank*, 1986 (3) Takdin-Elyon 84, summarized in English in *18 Isr. YB. Hum. R.* (1988), p. 248.

<sup>88</sup> *E.g.* in cases of rented houses in which perpetrators lived, where the eventual victim of the demolition is the house owner. See *Al-Jamal v. IDF Commander in Judea and Samaria*, 1989 (2) Takdin-Elyon, p. 163, as cited in Kretzmer, *op.cit.*, p. 159. However, even if the perpetrator does not reside in the house, it may still be destroyed. See *e.g.* AI, 'Under the Rubble: House Demolition', p. 10.

<sup>89</sup> Even though sealing of doors and windows of a room or building is not demolition in verbatim meaning, it is still in effect a form of demolition.

<sup>90</sup> Shamgar, *op.cit.*, p. 275.

<sup>91</sup> See *e.g. Turkman v. Minister of Defence et al* (1991), 48 (1) P.D. 217, summarized in English in *25 Isr. YB. Hum. R.* (1995), p. 347, occasionally cited as *Turkmahn, Turkeman, Turqman*. See also *Dagalis v. IDF Commander in Judea and Samaria* (1985), 40 (2) P.D. 42, summarized in English in *17 Isr. YB. Hum. R.* (1987), p. 315, occasionally cited as *Daghlis* or *Dujlas*.

<sup>92</sup> Playfair, *op.cit.*, p. 4.

the house of a place of residence; second, it prevents the possibility of restoring the *status quo ante* [emphasis in original]; and third, it may sometimes harm neighbouring tenants.”<sup>93</sup>

There can be noticed a slight controversy that have occurred in practice on the issue of definitive legal ground for ordering punitive house demolitions. Namely, until the onset of the 2<sup>nd</sup> Intifada (September 2000), the sole ground for demolitions had been DER 119, but later Israeli authorities distanced from explicitly invoking this legal ground.<sup>94</sup> Instead, there has been ambiguity on the matter in the light of an alternative possible ground, *i.e.* that the demolitions are “based on clear military considerations”<sup>95</sup>. The Court also addressed this lack of clarity in 2003, stating that “[t]he notice [prior to the demolition] did not mention that the decision was made pursuant to Section 119...It states that the military commander decided to demolish the house pursuant to his authority, and also in accordance with the law and the defence legislation, and also mentions that the decision is made for the reasons of *imperative military needs*. [emphasis added]”<sup>96</sup>. Only on the Court’s request, was a clarification provided by the State that the demolition had been ordered on the ground of DER 119.<sup>97</sup>

### 3. Legal Procedure

The procedure of punitive house demolitions on the ground of DER 119 starts with the issuance of a demolition order by the military commander, implying confiscation of the offence-originating structure or land. The rationale for such a decision or the (*afirmati ocumbit probatio*) burden of proof, if compared to the end-effects of the given power, is staggeringly low and based on a mere suspicion (“he has reason to believe”) or satisfaction (“of which he is satisfied”) of the commander, while there is no prerequisite of previous criminal conviction, prior to execution of the demolition.<sup>98</sup> In this regard, as an administrative measure, it can be issued as a sole punitive measure, or it can serve as an addition to the punishment imposed by a military court.

As it is by nature a full discretionary power of a military commander to order or not the demolition by way of issuing a demolition order, there are no procedural rules providing for a judicial review. There is no formalized appeal procedure before the order is executed, except referring the matter back to the military commander for reconsideration.<sup>99</sup> That is a frequently evaded step on way of resorting to the Supreme Court of Israel, sitting as a High Court of Justice, as a *de facto* appellate instance.<sup>100</sup> Virtually the only way the Court can rule in favour of a Palestinian regarding a demolition order is if a *procedural* flaw in issuing or execution of the order is proven. The very *substance* of the order, being based on secret

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<sup>93</sup> *Hamri v. Commander of Judea and Samaria* (1982), p. 132.

<sup>94</sup> A rather direct denial has been made: “[T]he IDF does not base its decisions to demolish houses on Regulation 119, or on mere speculations that the owner of the property may perpetrate a terrorist attack”. “IDF Spokesperson’s response to the House Demolition Report”, appended to B’Tselem (Ronen) Shnayderman, *Through No Fault of Their Own: Punitive House Demolitions during the al-Aqsa Intifada*, Draft (November 2004 B’Tselem), p. 54.

<sup>95</sup> *Ibid.*, p. 54.

<sup>96</sup> *Abu Salim v. Commander of the IDF forces in the West Bank*, HCI 8262/03, as cited in Shnayderman, *op.cit.*, p. 33.

<sup>97</sup> Shnayderman, *op.cit.*, p. 33.

<sup>98</sup> See *Hamri* case (1982), pp. 131-132.

<sup>99</sup> However, it is said that every demolition must be approved by the Israeli Minister of Defence. Shlomo Gazit, *Israel’s Policy in the Administered Territories* (1969), p. 5 as cited in Playfair, *op.cit.*, p. 9.

<sup>100</sup> There is no military court of appeal in the OPT.

evidence and discretion, has been repeatedly presented by the Court as not contestable – only in very few cases it actually interfered with the decision on the merits.<sup>101</sup>

Petitioning the Court is not frequently utilized in practice, due to a very down-to-earth practical obstacle in the form of a very short notice to the occupants of a house before carrying out of the demolition.<sup>102</sup> Since the beginning of the 2<sup>nd</sup> Intifada, IDF reportedly gave prior warnings in only three per cent of cases, justifying that by IDF safety considerations while conducting house demolitions, as “[g]iving such warning of military actions in hostile territory is liable to endanger [IDF] forces.”<sup>103</sup> Only in 1989, the Court framed a rule for the military authorities carrying out house demolitions, to provide a hearing of the occupants prior to demolition and a 48 hours notice for the inhabitants of the house to be demolished.<sup>104</sup> The respect of such a time period was not necessary in cases of house demolitions on all the OPT<sup>105</sup>, nor in cases of so called “operational military needs”<sup>106</sup>, nor is such notice required prior to realization of a sealing order.<sup>107</sup> The applicant is entitled to receive notice of the commander’s order and has the right to be heard before the commander and a panel, with optional due legal assistance. If the demolition order of the hearing panel is challenged, the Court is in charge and may issue a temporary injunction and call for the military authorities to elaborate the necessity of the measure. Still, the Court sticks to the procedural issues without assessing whether the practice violates the substantive rights of the people victimized by it.<sup>108</sup>

Furthermore, as seen from the above Article (2), the former occupants are not provided with any compensation in case of the military seizure or occupation of any home forfeited under DER 119.<sup>109</sup>

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<sup>101</sup> *Turkman case* (1991), p. 347; *See Hodli v. IDF Commander in Judea and Samaria* (1991) 47 (1) PD 612, summarized in English in 25 *Isr. YB. Hum. R.* (1995), p. 327. *See also Jabrin v. Minister of Defense*, HC 443/86, 515/86 (11.1.87), unreported – as cited in Kretzmer, *op.cit.*, p. 157.

<sup>102</sup> Sometimes the notice is given only 15 minutes prior to the demolition or in extreme situation even less than 5 minutes. *See e.g.* AI, ‘Under the Rubble’, p. 11; Al-Haq (Shane Darcy), *Israeli’s Punitive House Demolition Policy: Collective Punishment in Violation of International Law* (2003, Al-Haq), p. 25.

<sup>103</sup> Shnayderman, *op.cit.*, pp. 15, 16; Playfair, *op.cit.*, p. 6;

<sup>104</sup> *ACRI case* (1988). This was the first time that a concession was done in respect of conferring to the Palestinians a reasonable period of time for petitioning the High Court.

<sup>105</sup> The Court order was initially limited only to Beita area. Four months after the agreement on the 48h prior notice, ACRI filed the second petition for effectuating the order on the whole OPT, arguing its need due to the severity of the (irrevocable) sanction and the high possibility of making an emotionally induced error in the aftermath of a terror attack. *See Moffett, op.cit.*, p. 33.

<sup>106</sup> The circumstances are of such nature that the judicial review is “incompatible with the conditions of place and time or the nature of the circumstances” – a construction arguably redundantly expressed in case of punitive house demolitions. *See Kretzmer, op.cit.*, p. 156. *See also Adal Sado Amar v. IDF Commander in the West Bank* (HCJ 6696/02), available at: <http://www.court.gov.il>.

<sup>107</sup> *ACRI case* (1988), p. 15.

<sup>108</sup> Decisions of the Court “reportedly did not contain any analysis of the legal provisions applied by Israeli authorities or explain its views regarding international law standards.” Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories (hereinafter: UN Special Committee), UN Doc. A/59/381 (59<sup>th</sup> session, September 23<sup>rd</sup> 2004), para. 73.

<sup>109</sup> UN High Commissioner for Human Rights (UN HCR), “Question of the Violation of Human Rights in the Occupied Arab Territories, Including Palestine”, UN Doc. E/CN.4/2001/114 (57<sup>th</sup> session, November 29<sup>th</sup> 2000), p. 10, para. 40.



#### 4. Official Justification

In other cases where (not punitive) house demolitions have taken place, the main justification given by the Israeli authorities for the destruction are “military needs” (60 per cent), and the lack of building permits (25 per cent).<sup>110</sup> From the point of theory, the three types of house demolitions can be fairly well distinguished, but the problem appears in the realm of practical assessment whether certain precisely defined conditions required for each of the types are met or not, which evokes different legal treatment ranging from full sanction till unequivocal prohibition. The issue of fulfillment of the conditions is susceptible to contradictory interpretations, dictated by conflicting and, not rarely, questionable motives. Namely, punitive demolitions often cannot be separated (not only in effect – being the same for all 3 types) from the military ones, while the justification of the lack of building permits can serve to cover deeply punitive character and the real motive of a particular demolition occurrence.<sup>111</sup> The factual common denominator of the practices of all 3 types is obvious – the destruction of property – a result carrying possible and actual grave consequences when conducted on a mass level, but the implication of a possible leading motive, as the ideal distinguishing criteria, has always been highly arguable, at least from the point of contemporary legal standards of proof among the “civilized nations”.

The official reasons behind the resort to DER 119, as presented by Israeli authorities at different time points, have displayed different goals and motives in the use of punitive demolitions. However, the prevailing reasoning gravitates around the argument of promoting public safety and order through *deterrence* effect that demolitions yield<sup>112</sup>, *i.e.* the aim is to dissuade other Palestinians from conducting further terrorist attacks against Israeli civilians and soldiers and not to punish families of the offenders.<sup>113</sup> *E.g.* in *Abbasi case*, the Court summarized the official Israel’s view:

Often, the criminal penalties which the terrorists are expected to face in the criminal proceeding are insufficient for deterring them. The Respondent [the state] has expressed his position that this move of demolishing houses in which terrorists reside has a deterrent effect on terror.<sup>114</sup>

Identically, the Israeli army continuously warns that “[t]he demolition of the houses of terrorists sends a message that anyone who participates in terrorist activity will pay a price for their actions. The IDF will continue to use all legal means in order to strike at terrorists, their dispatchers, and those who assist them.”<sup>115</sup> The Court mostly upheld the view that the

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<sup>110</sup> So called “military” and “administrative” house demolitions, respectively. *Cf. e.g.* Amnesty International (AI), ‘Under the Rubble’. *See* UN CHR Special Rapporteur, John Dugard, “Question of the violation of Human Rights in the Occupied Arab Territories, Including Palestine”, UN Doc. E/CN.4/2005/29 (61<sup>st</sup> session, December 7<sup>th</sup> 2004), para 21.

<sup>111</sup> *E.g.* the case of houses demolished on February 21<sup>st</sup> 2001 in Beit Umar and El Aroub (Route 60), as the site of murder of an Israeli citizen (Baruch Goldstein, *see* *infra* text on prohibition of discrimination) 3 weeks before. A representative of the “Judea and Samaria Civil Administration” said it was due to lack of building permits, while Israeli security officials justified the demolitions by security needs, *i.e.* travelling safety on the road. *See* UN Special Committee, UN Doc. A/56/438 (56<sup>th</sup> session, October 3<sup>rd</sup> 2001), paras. 10, 11.

<sup>112</sup> *See e.g.* *ACRI case* (1988).

<sup>113</sup> *Janimat v. OC Central Command*, H CJ 2006/97 in *Judgments of the Israel Supreme Court: Fighting Terrorism within the Law*, p. 63, available at: [http://www.hamoked.org/items/4980\\_eng.pdf](http://www.hamoked.org/items/4980_eng.pdf), accessed on 2005-03-03, 51 (2) P.D. 651, occasionally cited as *Ganimat, Ghaneimat*.

<sup>114</sup> Paragraph 48 of the State’s response of 16 October 2002 in *Abbasi case* (2002), p. 5, para. 7. *See also* *Dagalis case* (1985), p. 315; *Sakhwil case* (1979), p. 345.

<sup>115</sup> *See e.g.* the web site of Israel Defence Forces (IDF), news section, available at: <http://www1.idf.il/dover/site/mainpage.asp?clr=1&sl=EN&id=7&docid=22274>, accessed on 2005-01-08.

measure of house demolition “which is not a form of punishment but of prevention – is important to prevent the spread of [attacks]”<sup>116</sup>; with occasional excursions into assertions that it was “dealing... with a punitive provision”.<sup>117</sup>

In support of the alleged legal and just utilization of demolitions, Israeli authorities have called themselves upon the local law doctrine and international law<sup>118</sup>, implying that the demolitions have been a lesser evil in comparison to a possible heavier penalty for the scope of offences of the gravest significance for the Israeli state and population.

## 5. Frequency

The relatively exact statistical data on punitive house demolitions are available only for a period of time of Israeli administration over the Occupied Territories. It is virtually impossible to precisely estimate the number of punitive house demolitions carried out for the first few years of the administration, but there are certain (though slightly disparate) indices and/or indirect confirmations that the activities were conducted extensively during this period. A Red Cross report from 1978 that there were 1000 houses demolished in the first five years of the administration of the Occupied Territories, out of all 1224 demolitions carried out from 1967<sup>119</sup>, while the Israeli official sources<sup>120</sup> claim that 1125 house demolitions took place in the first fourteen years of the occupation.<sup>121</sup> B’Tselem statistical data show that from 1967 till December 1987 and the outbreak of the first Intifada, Israel demolished or sealed minimum 1387 houses<sup>122</sup>, “most in the first few years following occupation of the West Bank and Gaza Strip”.<sup>123</sup>

After the outbreak of the 1<sup>st</sup> Intifada, Israel responded by a heavy increase in house demolitions<sup>124</sup>, *i.e.* from 1988 till 1992, full demolition was conducted over 431 houses, partial demolition over 59 houses, while 271 houses were sealed completely and 100 houses partially.<sup>125</sup> Only in 1988, 108 Palestinian houses were punitively demolished because of the “involvement in security incidents”.<sup>126</sup>

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<sup>116</sup> See *Abu Kabita v. Minister of Defense*, 1991 (2) Takdin-Elyon, p. 378, as cited in Kretzmer, *op.cit.*, p. 152.

<sup>117</sup> *Hamamreh v. Minister of Defence*, HCJ 274/82, translated in English in *I Pal. YB. Int'l. L.* (1984), p. 128.

<sup>118</sup> Articles 43 of the 1907 Hague Regulations and Article 64 of the 1949 Fourth Geneva Convention (GC IV).

<sup>119</sup> Shane Darcy, ‘Punitive House Demolitions, the Prohibition of Collective Punishment, and the Supreme Court of Israel’, 21 *Penn St. Int'l L. Rev* (Spring 2003), p. 478.

<sup>120</sup> The Israeli Ministry of Defence reported a higher number of demolished homes, for the period between the onset of the occupation and the end of 1987, than the Palestinian ones. See B’Tselem Report, *Demolition and Sealing of Houses as a Punitive Measure in the West Bank and the Gaza Strip During the Intifada* (1989 B’Tselem).

<sup>121</sup> *Jerusalem Post*, 23 November 1981 as cited in Kretzmer, *op.cit.*, p. 145. Cf. the citation in Playfair, *op.cit.*, p. 1. The officially estimated figure is 1265 for the first 15 years of occupation. The number of house demolitions provided by the Israeli authorities in the source did not include houses in Jerusalem and the villages destroyed during and after the June war.

<sup>122</sup> Official data for house demolitions during 1980-ies were not published, although the data for West Bank (not including Gaza) were precisely provided by, among the rest, Al-Haq.

<sup>123</sup> See Shnayderman, *op.cit.*. See also B’Tselem, *Demolition and Sealing* (1989).

<sup>124</sup> Ilan Pappé, *A History of Modern Palestine: One Land, Two Peoples* (2003 Cambridge University Press), p. 237.

<sup>125</sup> Shnayderman, *op.cit.*, p. 5. Cf. B’Tselem, *Violations of Human Rights in the Territories, 1990/1991* (1991, Jerusalem, B’Tselem), pp. 32-33.

<sup>126</sup> *N.Y. times*, February 8<sup>th</sup> 1989 at A1, col. 2. (quoting U.S. Department of State’s Country Reports on Human Rights Practices for 1988), as cited in Allison M. Fahrenkopf, ‘A Legal Analysis of Israel’s Deportation of Palestinians from the Occupied Territories’, 8 *B.U. Int'l L.J.* (Spring 1990), p. 130.



Such heavy trend in the use of the punitive measure declined in the period from 1993 till 1997, due to the commencement and maintenance of the Oslo peace process at the time<sup>127</sup>, so 18 houses were fully and 3 partially demolished, while 26 houses were fully and 18 partially sealed.<sup>128</sup>

According to the B'Tselem report, the only exception to the continuous practice of punitive demolitions was the period from 1998 till 2001, which has been explained by the fact that Israeli army was not allowed to enter areas that had ceased to be their jurisdiction pursuant to the Oslo Agreements (Areas A), after the agreed transfer of governing powers from Israel to the Palestinian Authority.<sup>129</sup>

But, since the onset of the second (“Al-Aqsa”) intifada in September 2000, and a high surge in terror-attacks on Israeli civilians, Israel resumed the practice<sup>130</sup> and, till January 2005, undertook demolitions of a total of 675 housing units (homes to more than 4.000 persons)<sup>131</sup>. Demolitions have been extensively used as the most severe punitive measure, with notably rare resort to the less harmful option of sealing or partial demolition<sup>132</sup> or, if comparing the sheer statistical numerical data, it can be noticed that during the 1<sup>st</sup> Intifada 57 per cent of the houses affected by the policy, were completely or partially demolished, while 43 per cent were fully or partially sealed. The 2<sup>nd</sup> Intifada has unveiled a drastically changed picture: 98 per cent of the houses affected have been fully demolished.<sup>133</sup> The overall empirical data for this period rightly prove that the “destruction of... houses had reached unprecedented levels”.<sup>134</sup>

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<sup>127</sup> See UN CHR Special Rapporteur, Rene Felber, UN Doc. E/CN.4/1994/14 (50<sup>th</sup> session, January 28<sup>th</sup> 1994), para. 43. See also the subsequent report, where the Rapporteur points to the continued use of sealing of houses, instead of physical destruction, still with due emphasis on its devastating effects and humiliating execution, UN Doc. E/CN.4/1995/19 (December 13<sup>th</sup> 1994), paras. 46-48. 3 years later, another report is rather silent on punitive house demolitions, except for the resembling notion of “7 [houses]demolished for security reasons” in the West Bank. UN CHR Special Rapporteur, Hannu Halinen, UN Doc. E/CN.4/1998/17 (53<sup>rd</sup> Session, February 19<sup>th</sup> 1998), para. 60; UN Special Committee, UN Doc. A/49/172 (49<sup>th</sup> session, June 7<sup>th</sup> 1994), para. 37; UN Doc. A/50/463 (50<sup>th</sup> session, September 22<sup>nd</sup> 1995), para. 36.

<sup>128</sup> Shnayderman, *op.cit.*, p. 5. See UN CHR Special Rapporteur, Hannu Halinen (February 19<sup>th</sup> 1998), para. 29.

<sup>129</sup> Shnayderman, *op.cit.*, pp. 4-5. Cf. UN CHR Special Rapporteur, Giorgio Giacomelli, UN Doc. E/CN.4/2000/25 (56<sup>th</sup> Session, March 15<sup>th</sup> 2000), para. 63.

<sup>130</sup> After the onset of the Al-Aqsa Intifada, the practical return to the policy was effectuated in the last two weeks of October 2001, while official renewal was confirmed at the meeting of Political-Security Cabinet on 31 July 2002, following the Palestinian attack at the Hebrew University in Jerusalem. See Section 9 of the state's response in *Bachar v. Commander of IDF Forces in the West Bank*, HCJ 7473/02; Aluf Benn, ‘Actions against Families of Suicides: Expulsion and Confiscation of Property’, *Ha'aretz*, 1 August 2002, as cited in Shnayderman, *op.cit.*, p. 3, 6.

<sup>131</sup> See B'Tselem's statistics *per annum* 2001-2004, available at:

[http://www.btselem.org/english/Punitive\\_Demolitions/Statistics.asp](http://www.btselem.org/english/Punitive_Demolitions/Statistics.asp), accessed on 2005-04-25. Only from August 2002 till March 2003, IDF carried out over 200 punitive house demolitions, which displays the highest number of demolitions for such a short period for over a decade. Darcy, *op.cit.*, p. 479. More precisely, from July till November 2002, IDF destroyed 61 houses, with the immediate consequence of rendering more than 500 people homeless (majority children). UN CHR Special Rapporteur, John Dugard, UN Doc. E/CN.4/2003/30, (59<sup>th</sup> Session, December 17<sup>th</sup> 2002), para. 32. Cf. AI, ‘Under the Rubble’, p. 9. See also UN Special Committee, UN Doc. A/56/428 (56<sup>th</sup> session, October 3<sup>rd</sup> 2001), paras. 7-11; UN Special Committee, UN Doc. A/56/428/Add.1 (56<sup>th</sup> session, October 26<sup>th</sup> 2001), para. 6.

<sup>132</sup> Shnayderman, *op.cit.*, pp. 3, 6. Cf. AI, ‘Under the Rubble’, p. 9; Darcy, *op.cit.*, p. 479.

<sup>133</sup> Al-Haq (Darcy), *op.cit.*, p. 8.

<sup>134</sup> UN Special Committee, UN Doc. A/59/381 (59<sup>th</sup> session) , pp. 8, 9.

## 6. Other Empirical Data

A very important factual point for further analysis of the nature of the demolitions is the fact that in the majority of cases the *identified* perpetrator of the offence has been detained and/or about to serve a long prison (or death) sentence for the act (32 per cent), or has escaped the apprehension (21 per cent), or has already been dead (suicide bomber or killed, 47 per cent).<sup>135</sup> However, in the majority of overall cases of punitive demolitions, there has been a lack of precise identification of the offenders.<sup>136</sup> Once any identification is concluded, there is no specific accusation of the persons whose houses are to be demolished – the IDF has never made an attempt to arrest or prosecute them.<sup>137</sup> Although punitive house demolitions are officially intended to harm the “terrorists”,<sup>138</sup> the overwhelming majority of the actually harmed persons/victims are members of their families<sup>139</sup> and other persons brought to *any* connection to the offender but objectively detached from the very offense.<sup>140</sup>

Also rather frequently happens that not only the primordially and directly targeted houses are destroyed, but the neighbouring ones too<sup>141</sup>. This practice of “neighbourhood punishment”, granted by DER 119, was seriously intentionally used in the beginning of the occupation rule, but was later significantly limited in scope and nowadays it is not the practice to destroy houses of persons totally uninvolved in an offence<sup>142</sup>. If such destruction happens in error, the property owners may subsequently claim indemnities for the loss, but such procedure is fully administered by the military government, without the possibility of review by Israeli courts.<sup>143</sup>

The demolitions are usually carried out at night<sup>144</sup> or, if carried out during the day, it is under the imposed curfew/closure of the military area – in both cases the purpose is

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<sup>135</sup> See Shnayderman, *ibid.*, pp. 8-9. See also Kretzmer, *op.cit.*, p. 147 and the accompanying notes. In majority of cases, houses were demolished prior to the conviction of an offender by the court. B’Tselem Report (1989), p. 17; UN Special Committee, UN Doc. A/50/170 (50<sup>th</sup> session, May 2<sup>nd</sup> 1995), para. 61.

<sup>136</sup> The IDF acknowledges the difficulty of identifying the origin of an attack and the offender, which results in often fatal mistakes. AI, ‘Under the Rubble’, pp. 22-23 and the accompanying footnotes. *But see* IDF claims in Shnayderman, *ibid.*, p. 55.

<sup>137</sup> AI, ‘Under the Rubble’, p. 22.

<sup>138</sup> Approximately 18 per cent of the destroyed homes were the ownership of the person suspected of having committed an offence. See B’Tselem Report (1989), p. 16.

<sup>139</sup> See e.g. *Hamamreh* case (1982), pp. 127-128.

<sup>140</sup> See e.g. a case of Hussein Ahmad Ayyoub Asedeh, whose house was destroyed as a consequence of failed attempt by IDF to extort evidence on whereabouts of his brothers, while the official reason for the IDF to be there was demolishing a dead brother’s house, separate from Hussein’s. Al-Haq (Darcy), *op.cit.* (2003), p. 26.

<sup>141</sup> The destruction of the adjacent/neighbouring buildings and apartments has been explained as inadvertent, due to the intensity of explosions or vibrations while bulldozing. See e.g. IDF punitive operation in Al-Bureij refugee camp (Gaza) on March 3<sup>rd</sup> 2003, that caused the collapse of a neighbouring house belonging to Noha Maqadameh, 9months pregnant mother of 10 children, causing her subsequent death, while 6 other houses were also demolished, leaving 90 people homeless. See AI, ‘Under the Rubble’. However, various NGOs have documented cases where such an error could not have been avoided only due to not paying enough rational attention to prevent the damage, *i.e.* where grave negligence practically amounts to intent. See e.g. Shnayderman, *op.cit.*, pp. 12, 48, 55.

<sup>142</sup> See Kretzmer, *op.cit.*, p. 146. See also Cohen, *op.cit.*, pp. 96-97. *But see e.g.* B’Tselem Testimony of Randa Kababji from Nablus (January 2005). It is not uncommon that the indirectly destroyed property belongs to international organizations, e.g. UNRWA. Playfair, *op.cit.*, p. 5.

<sup>143</sup> See Cohen, *op.cit.*, p. 99.

<sup>144</sup> UN CHR Special Rapporteur, John Dugard, UN Doc. E/CN.4/2002/32, (58th Session, March 6<sup>th</sup> 2002), para 30. See UN HCR, UN Doc. E/CN.4/2001/114 (57<sup>th</sup> session, November 29<sup>th</sup> 2000), pp. 9, 10, paras. 39, 40.

minimizing the possible resistance/disturbance. In the immediate aftermath of destruction<sup>145</sup>, having happened in front of the inhabitants' eyes, they are usually provided with basic assistance by the International Committee of Red Cross (ICRC), but are compelled to seek another place for living, due to impossibility of maintaining their lives at the demolition area.<sup>146</sup> Rebuilding/accessing the demolished/sealed houses is prohibited, since the Israeli authorities have, by virtue of DER (2), seized full control over the house and the ground on which the house was built.

An interesting detail to be noted in this regard is that the punitive actions have been utilized exclusively against Palestinian population<sup>147</sup> and not once against Israeli civilians who committed identical or similar offences.<sup>148</sup> Also, Palestinian houses have been demolished if the persons were suspected of *any* kind of violent activity against Israelis regardless of its consequences, from throwing rocks to murder<sup>149</sup> or “from suicide-bombings that left many casualties to failed attempts to harm soldiers”.<sup>150</sup> It is estimated that in 40 per cent of the cases of punitive destruction of houses, no Israelis had been killed in the offences giving rise to such demolitions.<sup>151</sup>

### A. “Clearing Operations” – Border Line

A relatively new trend has emerged, most evidently in Gaza<sup>152</sup> since the onset of the 2<sup>nd</sup> Intifada, descriptively referred to as “clearing operations”. It can be argued that they balance on a thin line between demolitions based on “military needs” and punitive demolitions. Namely, a multitude of houses have been demolished<sup>153</sup>, mostly along the

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<sup>145</sup> The very destructions have often been categorized as “wanton” or carried out “in a purely purposeless manner”. See UN CHR Special Rapporteur, John Dugard, UN Doc. E/CN.4/2005/29, (61<sup>st</sup> session, December 7<sup>th</sup> 2004), para. 11.

<sup>146</sup> By means of ICRC 2001 “House Destruction Relief” programme, the families are initially provided some basic humanitarian aid, tents as an instant shelter and household equipment for the first four days after the destruction. See e.g. ICRC Report, *Israel, The Occupied Territories and the Autonomous Territories*, pp. 269-271; ICRC News, January 11st 2002, available at [www.icrc.org](http://www.icrc.org), accessed on 2005-03-21. Even when setting up a tent on the ruins of the demolished houses, IDF have interfered, harassed and compelled the families to fully abandon the area. See UNRWA Case Study: Reports on the West Bank Barrier, *Demolitions in Ramadin Village, Hebron* (July 2004).

<sup>147</sup> The demolitions affect mostly the refugee population from the 1948 war. The number of all (fully or partially) demolished houses in refugee camps is at least twice the number of those outside. UN CHR Special Rapporteur, John Dugard, UN Doc. E/CN.4/2002/32, (58th Session, March 6<sup>th</sup> 2002), paras. 30, 39.

<sup>148</sup> See *infra* text on prohibition of discrimination. See Shnayderman, *op.cit.*, p. 5. See also Darcy, *op.cit.*, p. 14; AI, ‘Under the Rubble’, p. 10; Playfair, *op.cit.*, p. 11.

<sup>149</sup> A breakthrough in the sense of establishing a proportionality test, was the *Turkman* case (1991) establishing that the severity of the offence and the deterrence need should be adjusted to the suffering of those whose houses were to be destroyed – only when human life had been lost was it permissible to destroy the houses where the offenders lived.

<sup>150</sup> If taking into account IDF terminology, the criteria for estimating the “attack’s” nature, is rather ambiguous. Some of the offenders can be considered terrorists about to undertake an attack, while some were actually not terrorists but “the soldiers sincerely considered them to be ones” – a belief that was reflected in the case of a 16 year-old boy who threw stones at an IDF patrol and therefore “endangered the soldiers”. Rabbi Michael Lerner, ‘When Will They Ever Learn’, *Tikkun* (March 2<sup>nd</sup> 2005), available at: [www.tikkun.org](http://www.tikkun.org), accessed on 2005-03-23.

<sup>151</sup> 66 per cent of the suspects whose houses were demolished had carried out attacks by themselves, 34% were involved in “initiating, planning or assisting the attacks”. Shnayderman, *op.cit.*, p. 14. UN CHR Special Rapporteur, John Dugard, UN Doc. E/CN.4/2005/29, (61<sup>st</sup> session, December 7<sup>th</sup> 2004), para. 22.

<sup>152</sup> Areas of e.g. Rafah (the largest amount of destruction suffered), Beit Hanoun, Beit Lahiya, Jabaliya, Khan Yunis. It should be noticed that the Gaza Strip is one of the most densely populated areas in the world – in an covered area of 360 km<sup>2</sup>, 1.3 million Palestinians have their homes.

<sup>153</sup> The enormous severity of the particular situation can be the best presented in the words of Peter Hansen, now former UNRWA Commissioner-General: “You have a very striking picture of people fleeing. But fleeing to

Egyptian-Israeli border (Gaza, Rafah), without prior warning and for the alleged reasons of: 1. dealing with the problem of weapons smuggling from Egypt via underground tunnels for which the houses serve as base and 2. protecting the IDF soldiers and Jewish settlers from terrorist attacks.<sup>154</sup> Israel has maintained that incursions and house demolitions of the area is needed for the purpose of cutting down an extensive net of smuggling tunnels, by which weapons from Egypt goes into hands of Palestinian fighters who use it in attacks against Israel. That is the prime reason why IDF argues that a “typical tunnel-hunting operation” necessitates destruction of a house covering the tunnels, as well as the houses from which an attack was directed.<sup>155</sup> B’Tselem asserts that there have been no practical possibilities to determine the exact number of the houses demolished and the only obtained data for the year 2004 (from the beginning till October 31<sup>st</sup>) discloses the figure 1.152 houses raised<sup>156</sup>, but other authoritative sources emphasize that from September 2000, there have been 2.540 houses (60 per cent of all) destroyed<sup>157</sup>, leaving ca 23.900 Palestinians homeless – just in the period from May till August 2004, there were 72 houses totally destroyed and 27 partially<sup>158</sup>. It should be noted that this category of destruction is mostly grounded on invocation of international legal rules on the scope of military needs and security, thus belonging primarily to the group of military house demolitions, but even the mentioned official reasoning behind certain military activities have implied a clearly punitive character of a (practically non-assessable at the moment) number of such demolitions.<sup>159</sup>

## 7. Effectiveness

*I and the public know, what all schoolchildren learn  
Those to whom evil is done, do evil in return.*

W. H. Auden<sup>160</sup>

As mentioned, Israeli officials and a certain number of theoreticians tend to describe “the measure under discussion... [as being] of utmost deterrent importance, especially in a country where capital punishment is not used against terrorists killing women and children.”<sup>161</sup> The strong expectation of the deterrent effect has been based on the old idea that

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where? If you’re in Farah, you can’t go South because there is a border, you can’t go West because there is an ocean, and you can’t go North and you can’t go East because there is nowhere to go. You can’t get out of Gaza. So, if you’ve been a refugee many times over there is no longer anywhere you can flee.” UNRWA, selected articles from the press, available at: [http://www.un.org/unrwa/news/articles/pr\\_jt\\_oct03.html](http://www.un.org/unrwa/news/articles/pr_jt_oct03.html), accessed on 2005-02-06.

<sup>154</sup> Human Rights Watch (HRW) report “Razing Rafah: Mass Home Demolitions in the Gaza Strip, available at: [www.hrw.org/reports/2004/rafah1004/](http://www.hrw.org/reports/2004/rafah1004/), accessed on 2004-10-18.

<sup>155</sup> HRW, *op.cit.* As the justification for the notorious IDF offensive in Gaza I October 2004, it was asserted that the army “only destroyed homes from which militants attacked them”. ‘Dozens of Homes Demolished by Israeli Troops in Gaza Offensive’, *Al-Hayat* (October 16<sup>th</sup> 2004), available at: [www.daralhayat.com](http://www.daralhayat.com), accessed on 2005-03-01.

<sup>156</sup> Shnayderman, *op.cit.*, p. 18.

<sup>157</sup> UN CHR Special Rapporteur, John Dugard, UN Doc. E/CN.4/2005/29, (61<sup>st</sup> session, December 7<sup>th</sup> 2004), para 22.

<sup>158</sup> UN Special Committee, UN Doc. A/59/381 (59<sup>th</sup> session, September 23<sup>rd</sup> 2004), p. 14. *See also* UN CHR Special Rapporteur, John Dugard, UN Doc. E/CN.4/2004/6 (60<sup>th</sup> session, September 8<sup>th</sup> 2003), para. 34.

<sup>159</sup> In particular case of Beit Hanoun, but within the general picture, “[i]t appears that this large-scale devastation was in part a *punitive* measure [emphasis added]”. UN CHR Special Rapporteur, John Dugard, UN Doc. E/CN.4/2004/6 (60<sup>th</sup> session, September 8<sup>th</sup> 2003), para. 34.

<sup>160</sup> “September 1, 1939”, as cited in Benny Morris, *Righteous Victims: A History of the Zionist-Arab Conflict, 1881-2001* (2001 Vintage), preface.

<sup>161</sup> Shamgar, *op.cit.*, p. 276.

“unlike Westerners the Arabs placed greater value on the collective than on the individual; the obligation to avenge the blood of a murder victim lay on the family, not on any one of its members.”<sup>162</sup> However, in the contemporary set of circumstances, there has been no clear empirical evidence boosting the argument that the deterrent feature dominates.

The precise causal interdependence between the demolitions and the chronic terrorism in the Occupied Territories cannot be clearly estimated, as a certain time gap naturally exists between discovery/apprehension of a person on terrorism charges and the actual demolition.<sup>163</sup> If analyzing *e.g.* the suicide terrorism trend, as followed by house demolitions without an exception, it can be noted that the number of the attacks (here irrelevant whether successful or only attempted) over the time period taken into consideration, has certainly not diminished but significantly raised<sup>164</sup>. According to the data on thwarted (*sic*) suicide attacks, indeed the antiterrorism measures of the security services have proven effective. But, the highly growing overall number of suicide attacks, including also the planned/attempted ones, is what counts when discussing the actual “deterrence” effect of the subsequently executed punitive house demolitions.

If following the line of topical events after the onset of the 2<sup>nd</sup> Intifada, *i.e.* the *supra* stated surged trends of house demolitions and terrorism, it can be argued that: 1. the recourse to punitive house demolitions has failed to deter further offences and/or 2. it has directly incited further offences. According to regional reporting NGOs, the number of terrorist attacks does not diminish in the area of demolition, where the deterrence should be the strongest, if following the *sui generis* logic of the demolition measure.<sup>165</sup> The effect has been absent even among the very family members of the persons who had the house punitively demolished, as it is reported that they themselves have been convicted of the similar offences.<sup>166</sup> As reported, “house demolitions were considered by Palestinians as sources of

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<sup>162</sup> In prior British understanding (derived from previous Turkish experience) such collective addressing presents a “peculiar blend of discipline and pedagogy... like Scout leaders improving their flock”, hence suggestions were made from the part of the Jews that “when it was difficult to identify where the village terrorists had come from, all the villages in the area should be penalized and held responsible.” Segev, *op.cit.*, pp. 422, 423.

<sup>163</sup> *E.g.* house of Baha Sayid, a member of Popular Resistance Committee who was responsible for the November 18<sup>th</sup> 2000 infiltration of an IDF outpost near the Israeli community of Kfar Darom in the Gaza Strip (two IDF soldiers murdered), was destroyed 2,5 years after the actual terrorist attack committed by him. Most of the cases of punitive demolitions happen closely after the offence.

<sup>164</sup> If comparing the sources available from the Israel Defence Forces (IDF) and Israeli Ministry of Foreign Affairs, a conclusion can be brought *contra* to the official military/government’s claims about diminishing of suicide attacks. In the course of validation of its antiterrorism policy, Israeli Security Agency has claimed in a report, “*Summary of Terrorist Activity 2004*” (January 5<sup>th</sup> 2005) a significantly lesser number of suicide attacks in 2004 committed by the most active terrorist organizations (Tanzim, Al-Aqsa, Hamas and Islamic Jihad) in comparison to 2003 (a drop from 137 to 72 – suicides and suicide shooting categories together). But it had also asserted that 367 suicide attacks were foiled in 2004, making the overall number of attempted (here not relevant whether successful) suicide attacks 439. However, from the official IDF document “*Suicide Bomber Attacks Carried Out vs. Attacks Prevented (01.12.2004)*” it is possible to calculate that in 2003 there were actually 209 suicide attacks in all, transcending the 171 attempted and committed in 2002, but certainly lesser than in 2004. See the Israel Security Agency Report, available at the web-page of Israeli Ministry of Foreign Affairs at [www.mfa.gov.il](http://www.mfa.gov.il), accessed on 2005-02-21 and the IDF (Israel Defence Forces) statistics of attempted and successful (suicide) terrorist attacks, available at the IDF official web-site: <http://www1.idf.il/dover/site/mainpage.asp?sl=EN&id=22&docid=16703>, accessed on 2005-01-07. *But cf.* slightly incorrect/permutated data from the official reports in the Graph 2 regarding the years 2002 and 2003 at: <http://www.jewishvirtuallibrary.org/jsourc/Peace/aksagraph.html>, accessed on 2005-02-21.

<sup>165</sup> Playfair, *op.cit.*, p. 21.

<sup>166</sup> *Ibid.*, p. 21.

extreme provocation and incitement”<sup>167</sup> and such form of “economic violence...deprivations and assaults on property and livelihood, intended to suppress the uprising, were largely the cause of the uprising”.<sup>168</sup> Hence, an argument on the effectiveness of the demolitions does not prove to stand the test of facts.

Interesting enough is the fact that Israeli judiciary has repeatedly denied the idea of ineffectiveness of demolitions as a deterrent to terrorism, while it had been at the same time rejecting even the possibility of assessing the available statistical data regarding the interrelation terrorism – punitive house demolitions. In the *Aga* case, the Court asserted that:

[w]e are talking about a complex set of facts and factors that influence considerations of punishment and deterrence, and the statistical data requested will not clarify those matters. In particular, one cannot assess the effect of the above factors of punishment on the attacks... without the possibility of examining the rate of attacks in a situation in which such punitive measures are not taken.<sup>169</sup>

In the new development of the events an indicative breakpoint has been made. A Committee appointed by IDF Chief of Staff, Moshe Ya’alon, on December 31<sup>st</sup> 2004, had invested an effort to examine and internally clarify the mentioned “complex set of facts and factors” and found that the demolitions have been generally counterproductive, with reportedly only 20 cases in which it demonstrated deterrent effect. Hence, it has been recommended that the utilization of the measure be discontinued.<sup>170</sup> However, the official claim of legality of such measure still remains intact.

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Bearing in mind the basic data on punitive house demolitions phenomenon, the next step is application of the international law to the facts.

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<sup>167</sup> UN CHR Special Rapporteur, Hannu Halinen, UN Doc. E/CN.4/1999/24 (55<sup>th</sup> Session, January 20<sup>th</sup> 1999), para. 24.

<sup>168</sup> Avram S. Bornstein, *Crossing the Green Line Between Palestine and Israel* (2001 University of Pennsylvania Press), pp. 9-10.

<sup>169</sup> *Aga v. IDF Commander in Gaza*, HCJ 1005/89, 44 (1) P.D. 536, summarized in English in 23 *Isr. YB. Hum. R.* (1993), p. 329.

<sup>170</sup> B’Tselem Press Release, February 17<sup>th</sup> 2005, available at: [http://www.btselem.org/English/Press\\_Releases/20050217.asp](http://www.btselem.org/English/Press_Releases/20050217.asp), accessed on 2005-02-18. Karin Laub, ‘Israel to Halt Demolition of Palestinian Homes’, *Washington Post* (February 17<sup>th</sup> 2005), available at: <http://www.washingtonpost.com/wp-dyn/articles/A32646-2005Feb17.html>, accessed on 2005-02-18.



### III Applicable Law – the Relevant Legal Analysis

The applicable local law on OPT has comprised the law existing in the area at the moment of occupation, with the subsequent changes introduced by Military Orders. Relic of the British past, the controversial Regulation 119 (1) of DER, as the Bible of security powers, provides the notorious rule which empowers a military commander to order the punitive demolition or sealing of a house.

As the Israeli official legal reasoning relies on the local law doctrine, the core of assessing the (il)legality of punitive house demolitions rests primarily on the question of validity of DER 119, as arguable part of the local law existent before the occupation. Second, irrespective of the possible outcome in defining the status of DER 119, it needs to endure the test of compatibility with international humanitarian and human rights *lege lata*. Thus, further attention will be paid on the question of concrete applicability and the legal impact of the Hague Regulation, Fourth Geneva Convention, ICCPR, ICESCR and other applicable norms of international law.

#### 1. Humanitarian Law

The humanitarian law related to the topic of punitive house demolitions is comprised in Regulations respecting the Laws and Customs of War on Land annexed to the Convention (IV) respecting the Laws and Customs of War on Land of October 18<sup>th</sup> 1907 (the Hague Regulations) and Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of August 12<sup>th</sup> 1949 (GC IV). No derogation is possible from application of humanitarian law, even in the times of emergencies.<sup>171</sup>

#### A. Applicability in the OPT

*The great enemy of clear language is insincerity.*  
Orwell

Although not a party to the Hague Convention<sup>172</sup>, Israel is bound by the Convention and the annexed Hague Regulations, as they have evolved into international customary law.<sup>173</sup> In the *Beit-El* case, the Court has recognized that the “Hague Convention is indeed customary law, and that one can claim under it in the municipal courts”<sup>174</sup>.

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<sup>171</sup> See Article 4 ICCPR, expressly denying the possibility of derogating from other international legal instruments, like those of humanitarian law.

<sup>172</sup> See Pach, *op.cit.*, p. 229.

<sup>173</sup> See *e.g.* *Legality of the Threat or Use of Nuclear Weapons*, ICJ Advisory Opinion (July 8<sup>th</sup> 1996), Eric Heinze and Malgosia Fitzmaurice (Eds.), *Landmark Cases in International Law* (1998 Kluwer Law International), pp. 1306, 1307, paras. 75, 79; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Advisory Opinion (July 9<sup>th</sup> 2004), para. 89, available at: [www.icj-cij.org](http://www.icj-cij.org); *Prosecutor v. Naletilic and Martinovic*, Judgment (Trial Chamber I, March 31<sup>st</sup> 2003), ICTY Case No.IT-98-34-T, para. 215.

<sup>174</sup> *Beit-El* case (1978), p. 141. It should be noted, though, that Israeli governmental officials have not taken a clear stance on this issue. See Kretzmer, *op.cit.*, p. 35.

Israel is a party to the Geneva Conventions<sup>175</sup>, but does not recognize the 1977 Additional Protocols to the GC and maintains a specific view on the matter of applicability of the GC IV in the OPT. The applicability criteria are set in the common Article 2 GC IV:

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

*The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.*

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

Back in 1971, Meir Shamgar as Israeli attorney general, established the foundation of the official Israeli position regarding the effect of the Fourth Geneva Convention (hereinafter: GC IV) in the OPT. According to the basic postulates of the doctrine, Israel is not an occupying power, but is only “administering” the “disputed” territory with *sui generis* legal status.<sup>176</sup> For decades, Israel has claimed lack of any legal obligation for Israel to implement the provisions of the GC IV regarding the occupation of a territory, due to alleged lack of satisfaction of the stipulated basic conditions, under the circumstances of the situation. It has been decided to “*leave the question open because no convincing legal reasons* [emphasis added] supporting the argument in favour of the application of the Convention have so far been put forward.”<sup>177</sup> Aside to practical legal imperfections of the GC IV, full rejection of *de jure* applicability was elaborated through “the political implications for [Israel] if the GC IV were to be applied”, determining the impossibility of accepting the application with reservations or ‘under protest’.<sup>178</sup> The alleged lack of “convincing legal reasons” in concrete was derived from the wording of the Article 2 (2) common to the GC, envisaging applicability to the situation of “occupation of the territory of a *High Contracting Party*” [emphasis added]. As Israel did not recognize that the West Bank and Gaza had ever been territories of Jordan and Egypt, respectively, it could not possibly formally accept Geneva Conventions, as the “political implication” would mean recognition of previous administrations’ sovereignty.

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<sup>175</sup> Israel ratified GC on July 6<sup>th</sup> 1951.

<sup>176</sup> Shamgar, *op.cit.*, pp. 262-277. Israel has been persistently avoiding the qualification of the “belligerent occupant”, but preferred the term “administration” for its neutrality in terms of relating it to the GC IV. See e.g. Imseis, *op.cit.*, p. 93 and the accompanying notes.

<sup>177</sup> Dr Shamgar pertinently reminded that “not every rifle shot brings about the immediate application of the Fourth Convention”. Tel Aviv Symposium, p. 368.

<sup>178</sup> *Ibid.*, p. 369.



Furthermore, Israel argues that under the signed Oslo Agreements<sup>179</sup>, in the areas under control of the Palestinian National Authority (PNA), any legal obligation that may have arisen regarding the respect of humanitarian law, is precluded due to the transfer of power, *i.e.* lack of effective control on the portions of the OPT. In other words, the humanitarian law is not at all applicable and the area is a jurisdictional matter and the sole responsibility of the PNA. However, the reports have shown that Israel has been gravely interfering with the practical ability of the PNA to perform its duties, by continuously bombing and raiding the main control institutions of the PNA and routine incursions into the territory (towns, villages, refugee camps) which are formally under the PNA control.<sup>180</sup>

Over the time, the UN decisive mechanisms and theoreticians have negatively responded to such views<sup>181</sup>, as a logical concern arises that “[i]f the application of international humanitarian law depended solely on the discretionary judgment of the parties to the conflict, in the most cases there would be a tendency for the conflict to be minimized by the parties thereto”.<sup>182</sup>

Regarding the argued full transfer of power to PNA, the ICJ confirmed Israeli (rejected) status of belligerent occupier of the West Bank, on the grounds of the Article 42 of the Hague Convention.<sup>183</sup> The ICJ acknowledged that the transfers of power, pursuant to the Oslo agreements, had taken place, but, in the light of the non-conforming events following the agreement<sup>184</sup>, it concluded that the transfers “remained partial and limited”.<sup>185</sup> In ICJ words:

The [OPT] were occupied by Israel in 1967 during the armed conflict between Israel and Jordan. Under customary international law, these were therefore occupied territories in which Israel had the status of occupying Power. Subsequent events in these territories... have done nothing to alter this situation. All these territories (including East Jerusalem) remain occupied territories and Israel has continued to have the status of occupying Power.<sup>186</sup>

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<sup>179</sup> Declaration of Principles on Interim Self-Government Arrangements (DoP) signed on September 13<sup>th</sup> 1993 and The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip (IA) signed on September 28<sup>th</sup> 1995 by Israel and the Palestine Liberation Organization (PLO). The subject issue was mutual recognition between Israel and the PLO and a five-year transitional period for Israeli gradual removal of control/army from areas with majority of Palestinian population. West Bank was divided into three areas, with varying degrees of Palestinian autonomy. Area A (circa ten per cent of the West Bank), consisted of the seven major Palestinian towns (Jenin, Qalqilya, Tulkarm, Nablus, Ramallah, Bethlehem, Jericho and Hebron), in which Palestinians would have complete responsibility for civilian security. In area B, which comprised all other Palestinian population centres (except for some refugee camps), Israel would retain “overriding security responsibility”. In area C, which includes all settlements, military bases and areas, and State lands, Israel would retain sole security responsibility. At the end of the transitional period, an agreement was supposed to be reached based on UN SC resolutions 242 and 338, calling for the complete withdrawal of Israeli forces from the OPT. PLO promised to stop terrorist attacks by Palestinian ultra-militant formations. The Agreement was not eventually fulfilled in its purpose of leading to a definite peace in Palestine and the further aggravated tension resulted in the onset of the 2<sup>nd</sup> Intifada in September 2000.

<sup>180</sup> AI, ‘Under the Rubble: House Demolition’, p. 3.

<sup>181</sup> See generally UN Committee on the Exercise of the Inalienable Rights of the Palestinian People (UNCEIRPP), *The Question of the Observance of the Fourth Geneva Convention of 1949 in Gaza and the West Bank Including Jerusalem Occupied by Israel in June 1967* (1979 New York).

<sup>182</sup> *The Prosecutor v. Akayesu*, Judgment (September 2<sup>nd</sup> 1998), Trial Chamber I, ICTR Case No. ICTR-96-4-T, para. 603.

<sup>183</sup> Article 42 of the Hague Regulations: “Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.”

<sup>184</sup> After the failed Oslo, the access of IDF to the areas (A) under PNA control is virtually unrestricted and a “matter of routine”. See Shnayderman, *op.cit.*, p. 42.

<sup>185</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, , para. 77.

<sup>186</sup> *Ibid.*, para. 78.

The same view, in the particular matter, had been adopted by the Israeli High Court of Justice, as the Court (repeatedly) recognized that “[t]he situation is one of belligerency and the status of [Israel] vis-à-vis occupied territory is the status of an occupying power”<sup>187</sup>. As argued, the laws of occupation do not necessarily apply only when the occupying Power exercises effective control over the territory, but when it has the ability to exercise such power.<sup>188</sup> International Criminal Tribunal for the Former Yugoslavia (ICTY) has established that “[t]here is no requirement that an entire territory be occupied, provided that the isolated areas in which the authority of the occupied power is still functioning ‘are effectively cut off from the rest of the occupied territory’”<sup>189</sup>, which fully mirrors the actual situation in the OPT. In sum, “[t]he overall *status quo ante* has not been changed by [Oslo] agreements” and the “Israeli Military Government continues to be the source of Israeli authority in the occupied areas”.<sup>190</sup>

Regarding the alleged inapplicability of the GC IV, the UN SC and UN GA have repeatedly expressed concern over Israel’s view on the issue and reiterated that the GC IV is applicable to Palestinian and other Arab territories, occupied by Israel since 1967.<sup>191</sup> ICRC has established that the GC IV “is applicable *in toto* in the [OPT] and cannot accept that a duly ratified international treaty may be suspended at the wish of one of the parties”.<sup>192</sup> The same conclusion was adopted/reiterated at the Conference of High Contracting Parties to the GC IV<sup>193</sup> and again confirmed by the ICRC<sup>194</sup>.

As the issue at stake is a matter of interpretation of the multilateral treaty, a reference is necessarily made to the Vienna Convention. Theoreticians have displayed almost equally strong arguments in respect of both applicability<sup>195</sup> and non-applicability of the GC IV, concentrating mostly on the matter of the level of control exercised by Jordan and Egypt over the West Bank and Gaza, respectively, prior to the 1967 occupation. In 2004, International Court of Justice (ICJ), relying on the articles 31 and 32 of Vienna Convention, the explicit requirement of *bona fide* interpretation of the GC IV and the appropriate supplementary means of interpretation reserved for the cases of obscurity or unreasonableness, came to conclusion that there is “no need for any enquiry into the precise prior status of [OPT]” and finally ruled that the “[GC IV] is applicable in the Palestinian territories”.<sup>196</sup>

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<sup>187</sup> *Beit-El* case (1978), p. 138. See also *Beit Sourik Village Council v. The Government of Israel Judgment* (2004), HCJ 2056/04, para. 1, available at <http://www.court.gov.il>, accessed on 2005-02-23.

<sup>188</sup> UN CHR Special Rapporteur, John Dugard, UN Doc. E/CN.4/2005/29, 61<sup>st</sup> session (December 7<sup>th</sup> 2004), p. 34, para. 19.

<sup>189</sup> *The Prosecutor v. Naletilic and Martinovic*, para. 218.

<sup>190</sup> Mala Tabory, ‘The Legal Personality of the Palestinian Autonomy’ in Amos Shapira and Mala Tabory (Eds.), *New Political Entities in Public and Private International Law: With Special Reference to the Palestinian Authority* (1999 Kluwer Law International), p. 148.

<sup>191</sup> E.g. UN Security Council (UN SC) Resolutions No. 237 (June 14<sup>th</sup> 1967), 446 (March 22<sup>nd</sup> 1979), 465 (March 1<sup>st</sup> 1980), 471 (June 5<sup>th</sup> 1980), 607 (January 5<sup>th</sup> 1988), 672 (October 12<sup>th</sup> 1990), 681 (December 20<sup>th</sup> 1990) etc.; UN General Assembly (UN GA) Resolutions 2252 (ES-V) (July 4<sup>th</sup> 1967), 43/58 (September 6<sup>th</sup> 1988), 53/65 (December 10<sup>th</sup> 1997), 55/131 (December 8<sup>th</sup> 2000), 56/60 (December 10<sup>th</sup> 2001), ES-10/9 (December 20<sup>th</sup> 2001) etc.

<sup>192</sup> ICRC Annual Report 1975, p. 22. See also e.g. Annual Report 1976, p. 11.

<sup>193</sup> Conference of High Contracting Parties to the GC IV (December 5<sup>th</sup> 2002, Geneva), para. 1.

<sup>194</sup> ICRC Statement, December 5<sup>th</sup> 2002.

<sup>195</sup> See e.g. Richard A. Falk and Burns H. Weston, ‘The Relevance of International Law to Palestinian Rights in the West Bank and Gaza: In Legal Defence of the Intifada’, 32 *Harv. Int’l L. J.* (Winter 1991), pp. 138-144.

<sup>196</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, para. 101.

The Israeli High Court of Justice, having supported the official Israel's view that the GC IV is not applicable<sup>197</sup>, yielded rare exceptions expressed in individual rationale in favour of the Convention's applicability but still to the detriment of its *justiciability*.<sup>198</sup> In case even that the GC IV somehow applies in the OPT, it has been argued that the GC feature of a *conventional* law does not allow its enforcement/justiciability. As the GC IV has allegedly not qualified as a *customary* law, it does not have a stance higher than the extant local laws, DER being one of them and the petition of the affected persons cannot be filed against the state.<sup>199</sup> Hence, from the official stand-point of Israel, one can only speak of theoretical applicability of the GC IV<sup>200</sup>, but not the possibility of actually enforcing its norms before Israeli fora. This reasoning seems to by-pass the authoritative estimation of the customary character of *some* GC IV provision as presented in ICRC Commentary, namely that “[a]n examination of those provisions of the Hague Regulations which relate to the protection of civilian persons shows that the Fourth Convention repeats *most of them*. [emphasis added]”<sup>201</sup> However, Israel has made an official pledge in the course of willingness to *de facto* apply the “humanitarian provisions”, as opposed to the political ones<sup>202</sup>, without any further specifications.<sup>203</sup>

Irrespective of the actual strength of the GC IV in the OPT, the common Article 3 of the GC<sup>204</sup>, has acquired the status of customary law<sup>205</sup> and, as such, should be enforceable within the Israeli judicial system. Above all the arguments, an acknowledgement should be kept in mind of the fact that being a part of the international legal system and respecting its rules is not solely a legal, but also a solemn obligation. In case of persistent denial of such a specific character of the obligations, “there is no need to engage in the laborious business of

<sup>197</sup> See e.g. *Beit-El* case (1978). *But see* an implication of the applicability of the GC IV in *Tsemel v. Minister of Defence*, H CJ 593/82, 37 (3) P.D. 365, translated and summarized in I *Pal. YB. Int'l L.* (1984), p. 164.

<sup>198</sup> See e.g. *Residents of the village of Rujeib v. The Government of Israel*, H CJ 390/79, 34 (1) P.D. 1-31, known as *Elon Moreh* case (occasionally cited as *Dweikat*), translated in I *Pal. YB. Int'l L.* (1984), p. 153.

<sup>199</sup> See e.g. *Affu v. Commander of the IDF Forces in the West Bank et al.* (1987), H CJ 785/87, 845/87, 27/88, 42 (1) P.D. 4, summarized in English in 23 *Isr. YB. Hum. R.* (1993), p. 277.

<sup>200</sup> See Eyal Benvenisti, *International Law of Occupation* (2004 Princeton University Press), p. 109.

<sup>201</sup> Jean S. Pictet (Ed.), *ICRC Commentary: Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (1958 ICRC, Geneva), p. 620. “[T]hese fundamental rules [of humanitarian law] are to be observed by all states whether or not they have ratified the [Hague and GC IV] *conventions that contain them*, because they constitute intransgressible principles of international customary law. [emphasis added]” *Legality of the Threat or Use of Nuclear Weapons*, ICJ Advisory Opinion (July 8<sup>th</sup> 1996), Heinze and Fitzmaurice (Eds.), *op.cit.*, p. 1307, paras. 79. See also M. Cherif Bassiouni, ‘The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities’, 8 *Transnat'l & Contemp Probs.* (Fall 1998), p. 216.

<sup>202</sup> This type of declaration may be considered a legally binding one. See Thomas Giegerich, ‘The Palestinian Autonomy and International Human rights Law: Perspectives on an Ongoing Process of Nation-Building’ in Shapira and Tabory (Eds.), *op.cit.*, pp. 224-225 and the accompanying notes.

<sup>203</sup> See Shamgar, *op.cit.*, p. 262. See also Theodor Meron, ‘West Bank and Gaza: Human Rights and Humanitarian Law in the Period of Transition’, 9 *Isr. YB. Hum. R.* (1979), p. 108; Yoram Dinstein, ‘The Israel Supreme Court and the Law of Belligerent Occupation: Reunification of Families’, 18 *Isr. YB. Hum. R.* (1988), p. 177; Michael Curtis, ‘International law and the Territories’, 32 *Harv. Int'l L. J.* (Spring 1991), pp. 480, 488; *Abu Aita v. The Regional Commander of Judea and Samaria*, H CJ 69, 493/81, 37 (2) P.D. 197, para. 232, as cited in *ACRI* case (1988), para. 5, occasionally cited as *Abu Itta*, summarized in 13 *Isr. YB. Hum. R.* (1983), p. 348; Amira Hass, ‘Property: Civilian Destruction of’ in Roy Gutman (Ed.), *Crimes of War: What the Public Should Know* (1999 W.W. Norton & Company), p. 290.

<sup>204</sup> So called Martens Clause, relating to the “[p]ersons taking no active part in hostilities” in whose benefit it contains the prohibition of, *inter alia*: “a) violence to life and person, in particular murder, cruel treatment and torture... c) outrages upon human dignity, in particular humiliating and degrading treatment...”

<sup>205</sup> Common Article 3 reflects the “elementary considerations of humanity”, therefore is a part of customary law. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, ICJ Judgment (June 27<sup>th</sup> 1986), pp. 14, 114. See *Prosecutor v. Dusko Tadic*, Judgment (May 7<sup>th</sup> 1997), Trial Chamber II, ICTY Case No. IT-94-1-T, para. 616.

seeking to prove that any or every commitment passes an artificial test of ‘applicability’ in a given situation”, but the burden of proof lies on the very obligated state.<sup>206</sup>

## B. Contemporary Status of DER 119 – Local Law Doctrine

Israel claims legal continuation of DER, pursuant to Article 43 of the Hague Regulations and Article 64 of the Fourth Geneva Convention, on the grounds of a Proclamation of a Jordanian military commander (May 24<sup>th</sup> 1948), 1950 Jordanian annexation law and by the Jordanian Constitution from 1952.<sup>207</sup> The relevant provisions of humanitarian law read as follows:

(Article 43 of the Hague Regulations)

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

(Article 64 of the GC IV)

*The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention...*

In other words, after the occupation in 1967, Israel allegedly simply maintained the provisions that had already been in force and furthermore, the state has been considered *obliged* to preserve them. The Proclamation was the formal gravity point of the arguments supporting the legal continuation of DER. One should notice the undisputable procedurally valid *incorporation* into the law of Israel, but the issue of the validity of DER *itself* (its status as “the law which existed” prior to the incorporation) stays intact – the core object of the incorporation act is disputable, not the act itself.

Regarding the substance, in 1951, The First Knesset indeed gave a fairly clear qualification of DER as “incompatible with the principles of a democratic state”<sup>208</sup>. With the expressed grave concern regarding Government’s positive treatment of DER, Knesset called upon the Government to invalidate them<sup>209</sup> – a request which has never come into implementation<sup>210</sup>, due to prompting existential and political interests of the state at the moment. But it was only a possibility of repelling DER on subsequent grounds of more political conformity – it did not mean that the legal “validity” of the Regulations was not practically taken for granted, as the very Knesset was in the same sentence referring to the “[DER] 1945, which *have been effective* [emphasis added] since the time of the British mandate”. That brings us back for a moment to the important question to be scrutinized – validity of the British revocation and contemporary status of DER 119.

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<sup>206</sup> Adam Roberts, ‘Prolonged Military Occupation: The Israeli-Occupied Territories since 1967’, 84 *Am. J. Int’l L.* (January 1990), p. 44.

<sup>207</sup> See e.g. Shamgar, *op.cit.*, p. 274.

<sup>208</sup> Knesset Debates (May 22<sup>nd</sup> 1951), Vol. 9, p. 1828, as cited in Moffett, *op.cit.*, p. 19.

<sup>209</sup> The initiative came from Menachem Begin, then representative in the Knesset, later Israeli Prime Minister: “If these laws, the laws of terrorism of an oppressive regime, remain in the State of Israel – some day, the time will come that no group will not be harmed by them... The existence of these emergency statutes is a disgrace, their implementation a crime.” *Knesset Records* (May 9<sup>th</sup> 1951), Vol. 12, p. 1807. *Vide seq.* note.

<sup>210</sup> McDowall, *op.cit.*, p. 51.

### a) Validity of the Revocation(s)

The question of legal treatment of prior revocation as the ground of potential DER invalidity was most clearly raised and resolved before the Court in *Nazal* case<sup>211</sup>. The Court rejected the idea of a valid revocation, as the it was not published in the official publication, the Palestine Gazette. Namely, DER “was not abolished during the previous rule or during the present military rule, and no legal grounds were presented to us, by reason of which they are now to be considered null.”<sup>212</sup>

Kretzmer rightly pointed out the authorities manifest pursue of solely pure *forma* by a simple comparison of the “principle against hidden laws”, intended to protect individuals from being punished without prior acknowledgement of the basic principle on crime and punishment, and the case in which “the authorities *divest themselves* [emphasis in original] of far reaching powers” to impose restrictions on individuals.<sup>213</sup> Namely, the question raised is what principle, “besides requirements of form” requests the law directed toward Israeli authorities alone (*sic*), which does not in any way interfere negatively with human rights of an individual, must be published “outside the halls of government”.<sup>214</sup>

If recalling the requirements for considering an emergency regulation null, they can be summed in that DER should be revoked “explicitly and by name” and/or that it contradicts the provisions of the 1935 Trans-Jordan Defence Law.<sup>215</sup> Israeli officials have alleged that DER has never been revoked in the exact requested manner and that it is in full harmony with the Jordanian law.<sup>216</sup> In *Abu Awad* case, the Court ruled that “the [DER] remained in force in the West Bank as part of the Jordanian law”, justifying the decision with the lack of explicit repelling by the 1952 Jordanian constitution and the lack of contra evidence proving the contradiction between the laws (DER, Jordanian and Israeli legislation).<sup>217</sup> But, in *Qawasmi* case<sup>218</sup>, after being presented the proof that the Jordanian constitution had in specific provisions cancelled the equivalent provision (and, as implied, the whole) of DER<sup>219</sup>, the Court did not base the decision on the Jordanian law at all, but instead on the very 1968 Order of the military commander that had incorporated DER 119 into the OPT legal system.

However, certain procedural differences of the Jordanian regulations in comparison to the British DER, cannot be considered naive, especially in respect of punitive demolitions, for which the Jordanian rules provide for the right to appeal, special military courts and procedures.<sup>220</sup> In respect of the explicit/by name repelling, a rather rhetorical question ensues

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<sup>211</sup> *Nazal et al. v. IDF Commander of the Judea and Samaria* (1985), HCJ 513/85, 514/85, 39 (3) P.D. 645; summarized in English in 16 *Isr. YB. Hum. R.* (1986), p. 329.

<sup>212</sup> *Ibid.*, p. 329.

<sup>213</sup> Furthermore, the Israeli officials were “undoubtedly aware” of the British revocation at the end of the Mandate. Rosenthal, *The 1945 Defence Regulations: Valid Law in West Bank?* (unpublished paper) as cited in Hiltermann, *op.cit.*, p. 160.

<sup>214</sup> Kretzmer, *op.cit.*, p. 122.

<sup>215</sup> See *supra* text on Jordanian administration. The arguments can similarly be applied to the Gaza Strip.

<sup>216</sup> See “Attorney General’s Directive Re: Application of British Defence (Emergency) Regulations, 1945, to Judea and Samaria” (unpublished document in Hebrew, 1969), as cited in Hiltermann, *op.cit.*, p. 159.

<sup>217</sup> *Abu Awad v. Commander of the Judea and Samaria Region*, HCJ 97/79, 33 (3) P.D. 309, summarized and excerpted in English in 9 *Isr. YB. Hum. R.* (1985), pp. 343-344.

<sup>218</sup> *Qawasmi v. Minister of Defence*, HCJ 320/80, 35 (2) P.D. 113, translated in III *Pal. YB. Int’l L.* (1986), p. 90.

<sup>219</sup> Unlike DER, Article 9 of the 1952 Jordanian Constitution prohibits deportation of Jordanian citizens.

<sup>220</sup> Arguably, even if DER had been still valid at the time, it would have been rendered unnecessary/redundant by the mentioned 1948 *Addendum*. Moffett, *op.cit.*, p. 9. See *supra* text on the legal background.

in that regard, namely, if the Jordanian administration indeed wanted to preserve the British DER, why would it at all allow the maintenance of such duplication of the legislative provisions. Additionally, a direct counter-argument can be made that the Constitution also did not make explicit/by name *reference* to DER.<sup>221</sup> Also, more generally, if Israel has persistently rejected the idea of the erstwhile sovereignty of Jordan/Egypt over the West Bank/Gaza, how can she call upon the power of the very insignia of their sovereignty (the laws, the Constitution)?

Furthermore, aside to the implicit revocation of DER by Jordanian Constitution (by guaranteeing inviolability of homes and protection of property), and irrespective of the official Israel's manifest formal approach, DER has been subsequently definitely and *explicitly* officially repealed by the high representatives of both Great Britain and Jordan in the subsequent development of events.<sup>222</sup>

### **b) GC IV as the Ground**

Despite the serious particular factual and legal challenges, Israeli officials still maintain the view that the DER, including the provision on punitive house demolitions, have been in force in West Bank pursuant to the mentioned Article 64 GC IV. The incorporation of DER has not been understood only as a right of the occupant, but also as an obligation.<sup>223</sup> A point for challenging the view is that Israel claims the incorporation by virtue of an article in a Convention she does not recognize as applicable and/or justiciable. First, despite the general reference in Article 43 of the Hague Regulations to an occupant's respect of the "laws in force", the Article 64 GC IV, as a complementary one<sup>224</sup>, is referring to *penal* laws, which is contradictory to the formal and officially advocated nature of DER as an administrative instrument. Second, irrespective of that "slight" remark, within the same Article 64, it is provided that the incorporation of the law is valid unless it constitutes an "obstacle to the application of the [GC IV]". Therefore, a clear implication is constructed referring to the priority of other, substantive norms of the GC IV. Whether DER 119 is theoretically accepted as a criminal legislation in its core or as an administrative one, the ICRC Commentary was quite clear in the down-to-earth, succinct phrasing that if the law "conflicts with the provisions of the Convention, the Convention must prevail"<sup>225</sup>. Third, regarding the view of DER's maintenance as an *obligation* of the occupant, if having in mind the undisputable protective nature of the GC IV and humanitarian law toward, primarily, a population (not a state)<sup>226</sup>, such conclusion is not reachable. Under any circumstances, the GC IV must be recognized as a premeditatedly purposeful system<sup>227</sup>, not as a pure enumeration of separate articles liable to unilateral amputation and transplantation to a/the case in need. If DER 119,

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<sup>221</sup> In the fashion of negative categorization, an argument has been made that the reason for this lack of direct reference was the practical invalidation of DER, since the practice of punitive demolitions, as authorised by DER, was not at all exercised in the OPT under Jordanian rule. See Hiltermann, *op.cit.*, p. 159.

<sup>222</sup> See Statement of the Minister of State in the British Foreign and Commonwealth Office, Mr. Timothy Renton, in a letter to LSM/Al-Haq, dated April 22<sup>nd</sup> 1987. Hiltermann, *ibid.*, p. 162. See Moffett, *op.cit.*, pp. 14, 15-16.

<sup>223</sup> Julius Stone, *No Peace, No War in the Middle East* (1969), p. 15, as cited in Shefi, *op.cit.*, p. 346.

<sup>224</sup> Pictet (Ed.), *op.cit.*, p. 335.

<sup>225</sup> *Ibid.*, p. 336.

<sup>226</sup> See e.g. Yoram Dinstein, *Legislation Under Article 43 of the Hague Regulations: Belligerent Occupation and Peacebuilding* (Fall 2004 HPCR Harvard University), p. 9.

<sup>227</sup> *But see e.g. Military Prosecutor v. El-Khoury et al.*, R/82/69, summarized in 7 *Isr. YB. Hum. R.* (1977), p. 258. The military court, being aware of the interpretation by Pictet, ran counter to it when excluding the penal procedures from "penal laws", thus assuming particularistic approach to Article 64 of the GC IV.

by any chance, substantially contradict the main principles of the GC IV, its termination would be legal, political and, above all, a moral imperative.

Israeli government and judiciary, in pursuing a “love me, love me not” approach not only toward the GC IV and general humanitarian law, but also toward the particular parts (*sic*) of the beneficial provisions, have not adopted a firm stance on this issue in a manner of a truly argumentative and *deeply* (good-faith) analytical response to the critics. The phenomenon is relatively understandable in case of the political representatives, but unforgivable in respect to the judiciary, displaying a desperate pursue of political “correctness” by way of intrinsically selective adjudication.<sup>228</sup>

Therefore, even if the argument of the formal validity of DER 119 would somehow still persist, the further step is proving non-viability of DER under international legal corpus.

## C. Violations of Relevant Humanitarian Law Provisions

### a) Destruction of Property

Article 23 (g) of the Hague Regulations reads as follows:

... [I]t is especially forbidden

g) To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war;

Article 53 of the GC IV:

*Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.*

The articles prohibit destruction of all property, irrespective of the nature (real or personal) or the ownership (private, public etc.), and are mutually complementary.<sup>229</sup> Irrespective of the arguably correct *prima facie* perception of the status of punitive house demolitions as outlawed by the stated article<sup>230</sup>, Israel has claimed right the opposite, relying

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<sup>228</sup> There has been a slightly apologetic observation that “[j]udges, ... as state functionaries, cannot neglect considerations of state interests and these may, on occasions, demand that doctrinal niceties be given short shrift in order to meet particular governmental emergencies [emphasis in original]”. Roger Cotterrell, *The Sociology of Law*, Second Edition (1992), p. 235, as cited in Eyal Benvenisti, *Inter Armas Silent Leges? National Courts and the “War on Terrorism”*, available at: <http://www.rg-law.ac.il/about/lectures/benve.htm>, accessed on 2005-03-28. But if a judicial majority fails in addressing the “[d]raconian legislative solutions to short-term problems...[as] an exaggerated response to public agitation for immediate results” that “must be integrated with settled legal doctrine which expresses more enduring principles of justice”, it would mean that “every dictatorship whose authority is acknowledged by the courts would be a *Rechtstaat*”. Conor Gearty, *Principles of Human Rights Adjudication* (2004 Oxford University Press), pp. 66-67.

<sup>229</sup> While Article 23 (g) of the Hague Regulations covers the situation of property destruction under broader concept of “hostilities”, the Article 53 GC IV does not offer that general protection and is specialized for the property protection within an occupied territory. Pictet (Ed.), *op.cit.*, p. 301.

<sup>230</sup> See e.g. Meron, *op.cit.*, p. 119.

on the Article 23 (g) of the Hague Regulations.<sup>231</sup> The emphasis is placed on the “[imperative] necessities” as the only prohibition-evading ground, which, as argued, promotes house demolitions into expressly permitted under the international law. In *Sakhwil* case, while rejecting the argument that the military commander had been bound by the GC IV, the Court stated that “even if it were so, there is *no contradiction* [emphasis added] between the provisions of that Convention... and the use of the authority vested in the respondent by [DER 119].”<sup>232</sup> The legally and politically correct wording of the governmental justifications points, at the first sight, to a number of cases where DER 119 indeed can be used without necessarily coming into clash with the relevant provisions of international law. The main problem is correctly identifying those specific situations when punitive demolitions may be brought into direct connection with the concept of military necessity, rendering such demolitions valid under international humanitarian law.

As it is a matter of discretion of the Occupying Power to estimate the necessity of the recourse to destruction of property, and under the danger of the abuse of the reservation to the mentioned article, Israel, being an

Occupying power [,] must therefore try to interpret the clause in a reasonable manner: whenever it is felt essential to resort to destruction, the occupying authorities must try to keep a sense of proportion in comparing the military advantages to be gained with the damage done.<sup>233</sup>

Although it has been argued in the recent years in favour of a new role of proportionality – namely, that it should not be measured by its equivalence to the breach, but “on the basis of its appropriateness and reasonableness to the aim pursued by the reacting state”, such a reasoning is more a matter of a political/legal speculation on *de lege ferenda* and not a well-established practice.<sup>234</sup> Therefore, Israel cannot avail itself of the advanced interpretation of proportionality in its invocation of military necessity for exercising punitive demolitions. The nowadays general legal reality is fixed around the moderate understanding of proportionality when establishing a relation between a violation (*e.g.* an act of Palestinian terrorism/resistance) and the military response. In that course, it has been argued that that it is “not a relation of equivalence, but rather a relation of appropriateness between the wrongful conduct and the need to restore the pre-existing legal balance”<sup>235</sup>. However, the concrete practice in the OPT (of offences and the subsequent punitive demolitions of a family house) display a rather distorted understanding of proportionality, even in those cases where it could have initially been considered theoretically justified.

*Al Bureij* case<sup>236</sup> has been a good example of a not that subtle blend of punishment of offenders in the circumstances of the alleged urgent military necessity, depicting a thin line between punitive and military house demolitions, as easily erasable by controversial official justifications and motives. The action of demolishing several residential structures and shops that happened in the immediate vicinity of a murder spot, few days after the violence, had not

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<sup>231</sup> Note Shamgar’s safe-side reference to the GC IV: “Even if Article 53 has priority over Article 64, demolitions that is necessary because of military requirements is permitted.” Shamgar, *op.cit.*, p. 276.

<sup>232</sup> *Sakhwil* case (1979), p. 345.

<sup>233</sup> Pictet (Ed.), *op.cit.*, p. 302.

<sup>234</sup> Enzo Cannizzaro, ‘The Role of Proportionality in the Law of International Countermeasures’, *EJIL* Vol. 12, No. 5. (2001), pp. 891-892.

<sup>235</sup> *Ibid.*, p. 909. See Christopher Greenwood, ‘Historical Developments and Legal Basis’ in Dieter Fleck (Ed.), *The Handbook of Humanitarian Law in Armed Conflicts* (2000 Oxford University Press), p. 31.

<sup>236</sup> *Association for Civil Rights in Israel v. Officer Commanding Southern Command*, HCJ 4112/90, 44 (4) P.D. 626, known as *Al Boureij* case (occasionally cited as *Al Boureigh*), summarized in English in 23 *Isr. YB. Hum. R.* (1993), p. 333.



been preceded by suspicion (as required by DER 119) that the inhabitants had carried out the violent act nor it, so application of DER 119 was practically precluded. Under the public urging for the severe punitive response in the absence of any connection of the affected inhabitants and the crime, the case displayed a purely retaliating approach to the matter. The action was, however, subsequently justified by the Court in terms of urgent and immediate military necessity in the aim of “preserving human life” from “substantial danger”.<sup>237</sup>

One of the official justifications, employed regarding the case of destruction of two buildings housing 39 families, after stone-throwing protests, was that a Palestinian gunman had used the premises to attack during the demonstrations. The official description of the destruction was that military had “carried out engineering works to remove the continual threat in Netzarim junction. Among these activities – the destruction of the buildings... Netzarim junction is a key position, controlling the main entry route into the Jewish settlement of Netzarim. The violence which occurred at the junction this last week, disrupted the daily life in the settlement”.<sup>238</sup> The IDF continuously justify the measures as fully proportional and in conformity with the threats posed by Palestinian offenders, while mixing the non-equivalent concepts of security and military necessity.

The *inflated* concepts of security, intertwined with military needs cannot serve as a just cause for punitive demolitions. One exemplary situation possibly justifying the demolitions is if the combat would still be pending at the moment when *e.g.* a fire would be discharged or a grenade hurled – there would be room for the conclusion that the *immediate* military action leading to the destruction of the house would comprise the demolition as a punitive measure.<sup>239</sup> But a military action that comes once the combat situation has ceased, cannot be considered as a legally sound response. ICRC has given its view that the “military operations” are supposed to mean “the movements, manoeuvres and other action taken by the armed forces *with a view to fighting* [emphasis added]”.<sup>240</sup> When deliberating on the issue of due notice prior to the demolitions, the Court touched upon the “operational military circumstances” and defined them in terms of engagement of a military unit “in an operational action, in which it must *clear away an obstacle or overcome resistance or respond on the spot to an attack* on army forces or on civilians which occurred *at the time*, or similar circumstances [emphasis added]”.<sup>241</sup> But if the offence is complete, *i.e.* the violence does not stretch into time, therefore creating a time gap between the offence and the subsequent military response, is there a “danger to human life” as an “absolute necessity” exception required by the humanitarian law? For obvious reasons, the “conditions of place and time” of the military response are clearly irrelevant in respect of the basic description of punitive house demolitions. The widest discretion of the military commander to establish the link between the two fully divergent phenomena does fit the instant political prerogatives, but cannot stand the test of the law.

As independently observed, “[e]ven if a low-intensity armed conflict exists in the West Bank and Gaza, it seems evident to us that such measures are disproportionate, in the sense that the damage to civilian property outweighs military gain.”<sup>242</sup> The Court had

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<sup>237</sup> B’Tselem, ‘Judicial Review’, VI *Pal. YB. Int’l L.* (1990/91), p. 209.

<sup>238</sup> AI, ‘Under the Rubble’, p. 21.

<sup>239</sup> See Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (2004 Cambridge University Press), pp. 218-219.

<sup>240</sup> ICRC statement, Playfair, *op.cit.*, p. 11.

<sup>241</sup> *ACRI* case (1988), para. 8.

<sup>242</sup> Human Rights Inquiry Commission, Question of the Violation of Human Rights in the Occupied Arab Territories, Including Palestine, UN Doc. E/CN.4/2001/121 (57<sup>th</sup> Session, March 16<sup>th</sup> 2001), para. 50.

established that the Military Commander “cannot rely on norms of the Israeli administrative law to refrain from fulfilling a duty or honoring a prohibition that applies to him as is customary under the Laws of War.”<sup>243</sup> Bearing in mind the legal obligations and the empirical facts, the implication is that the resort to punitive house demolitions is contrary to the particular requirements of the Article 23 (g) of the Hague Regulations and the mirroring Article 53 of the GC IV.

## **b) Collective Punishment**

“In the Middle East, it is difficult to be seen as an individual... When a suicide bomber attacks Israeli children, the Jews consider the entire Palestinian population guilty, directly or indirectly... The two nations – Jews and Palestinians – are reduced metaphorically to single agents struggling against each other.”<sup>244</sup>

Both Hague Regulations and GC IV expressly prohibit collective punishment.

Article 50 of the Hague Regulations:

*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.*

Article 33 of the GC IV:

*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.*

*Pillage is prohibited.*

*Reprisals against protected persons and their property are prohibited.*

The 1977 Additional Protocols I and II to the GC announce that “no one shall be convicted of an offence except on the basis of individual penal responsibility”<sup>245</sup>, while prohibiting collective punishment “at any time and in any place”<sup>246</sup>. ICRC Commentary construes the prohibition in a sense that the collective punishment comprises “penalties of any kind on persons or entire groups of persons, in defiance of the most elementary principles of humanity, for acts that these persons have not committed”.<sup>247</sup>

As the GC IV is applicable to the OPT, the population of the area is considered “protected persons”. While it is widely acknowledged that collective punishment, reprisals against civilians and their property are prohibited by international law, Israel acknowledges the fact, but argues that the policy of punitive house demolitions, as authorised by DER 119, does not fit the humanitarian legal prohibition.<sup>248</sup> As deliberated in *Shukri* case:

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<sup>243</sup> *ACRI* case (1988), p. 17.

<sup>244</sup> George P. Fletcher, ‘Collective Guilt and Collective Punishment’, *5 Theoretical Inquiries L.*, pp. 163-164.

<sup>245</sup> Protocol I Article 75 (4) (b) and Protocol II Article 6 (2) (b).

<sup>246</sup> Protocol I Article 75 (2) (d) and Protocol II Article 4 (a) (b).

<sup>247</sup> Pictet (Ed.), *op.cit.*, p. 225.

<sup>248</sup> See e.g. Curtis, *op.cit.*, pp. 491-492.

The authority conferred upon the Military Commander pursuant to Regulation 119 is not authority for collective punishment. The exercise thereof is not designed to punish the Petitioner's family. The authority is administrative, and its exercise is designed to deter, thus maintaining public order.<sup>249</sup>

The UN monitoring bodies have claimed the opposite. UN SC expressed a concern because "the Israeli Government continued the practice of demolishing the homes of the families of persons connected to suicide-bombing attacks" and estimated that such "punitive demolitions affecting persons not charged with a crime are a form of collective punishment."<sup>250</sup> Others concurred under the findings that "[t]he renewed policy of demolishing houses... was perceived as persistent collective punishment and humiliation imposed on the Palestinian population..."<sup>251</sup> Also, as reported, "there has often been a disciplined, retributive approach" regarding the punitive house demolitions, "in a clinical display of collective punishment".<sup>252</sup>

Hypothetically speaking, if the case would be that an offender whose house is to be punitively demolished does not have a family or dependents whose material and emotional interests are inextricably tied with the house, such destruction may probably satisfy the basic criminal legal tenet of individual responsibility. Israel indeed initially contended that the demolitions were undertaken against individuals only.<sup>253</sup> But the problem is the majority of cases where the immediate negative impact of the demolitions hits an offender's family members, rendering them homeless. The reports have shown that "each demolition or total sealing of a house since May 1985 has left between 2 and 25 people, in addition to the suspect, homeless".<sup>254</sup> The issue of family connection between the directly targeted person and the inhabitants of the very property to be destroyed had been allegedly acknowledged as relevant until 1979.<sup>255</sup> In *Jabri* case, the Supreme Court, sitting as the High Court of Justice, established that the connection between the occupants of the house and the *offence* [not offender; Kretzmer's emphasis] was not required, hence the elimination of the need for the inhabitants' prior knowledge of the acts of the perpetrator.<sup>256</sup> Later, in *Hizrahn* case<sup>257</sup>, the Court seemed to have recognized the inner injustice of subjecting the whole family to the effect of the demolitions and narrowed the working definition of a family to the nuclear one, which again did not touch upon the matter of actual *guilt* of the persons, as the ground for the legal responsibility. A rare voice explicitly emphasising the lack of the guilt was that of Justice Cheshin:

The woman and her children reside in that same apartment where the murderer lived, but *nobody claims that they were accomplices* in his plot to murder innocent souls. Likewise *nobody claims that they knew about the intended attack*. If we demolish the bomber's apartment we will simultaneously destroy the

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<sup>249</sup> *Shukri v. The Minister of Defense*, H.CJ 798/89 (not published); in Paragraph 3 of the Judgment, as cited in *Abbasi* case (2002), pp. 4-5, para. 7.

<sup>250</sup> UN SC meeting record S/PV.5019, to be printed in the *Official Records of the Security Council*, 59<sup>th</sup> year (2004), p. 4.

<sup>251</sup> UN Special Committee, UN Doc. A/59/381 (59<sup>th</sup> session, September 23<sup>rd</sup> 2004), p. 18, para. 73; UN Doc. A/49/511 (49<sup>th</sup> session, October 18<sup>th</sup> 1994), para. 25.

<sup>252</sup> 'Question of the Violation of Human Rights in the Occupied Arab Territories, including Palestine', UN Doc. A/57/366 (57<sup>th</sup> Session, August 29<sup>th</sup> 2002), para. 14. See Statement of UN HCHR Mary Robinson to the Conference of High Contracting Parties of the Fourth Geneva Convention, December 5<sup>th</sup> 2001.

<sup>253</sup> See e.g. Shefi, *op.cit.*, p. 346.

<sup>254</sup> Playfair, *op.cit.*, p. 14.

<sup>255</sup> Kretzmer, *op.cit.*, p. 146.

<sup>256</sup> *Jabri v. Minister of Defense*, H.C. 1786/90 (5.7.90) as cited and briefed in Kretzmer, *op.cit.*, p. 146.

<sup>257</sup> *Hizrahn v. IDF Commander in Judea and Samaria* (1991), 46 (2) P.D. 150, summarized in English in 23 *Isr. YB. Hum. R.* (1993), p. 349.

home of this woman and her children. We will thereby punish this woman and her children even though *they have done no wrong* [emphasis added].<sup>258</sup>

Therefore, the Court's majority directly institutionalised the principle of objective responsibility *contra* to the modern criminal legal standard of (subjective) responsibility for the individually committed and imputable offences.<sup>259</sup>

The Court has persistently legitimized the view in *Dagalis* case that “there is no ground to the petitioners’ complaint that house demolition amounts to collective punishment” and that accepting the view would mean that the “[DER 119] regulations and its provision would be emptied of content leaving only the possibility of punishing a terrorist who lives alone by himself in the house”.<sup>260</sup> In *Sabeach* case, while brooding over the question whether to demolish or seal only the room in which the suicide bomber lived, the Court confidently reiterated the view.<sup>261</sup>

It can be noticed that the Court is more concerned for the possible dangerous lack of the alleged end-effect of DER 119 which it dubiously tries to preserve at any price, but leaves the topic open without actually proving the (responsible) individual targeting of the offender, as *contra* to collective punishment. Even if the offender does not reside in the house and has no ownership on the house, if his family lives there, the house is still doomed to be destroyed. If following the wording of DER 119, the only explanation for such an event, that can be derived, is that the family members “committed or attempted to commit or abetted the commission or have been accessories” to the offence, otherwise the authorisation from the DER 119 would be lacking. As argued by Dershowitz, “so long as it is limited to houses that are owned by *accessories* to terrorism”, the demolitions cannot be considered as collective punishment but as “economic penalty for *complicity* with murder [emphasis added]”.<sup>262</sup> However, the Court has not mentioned/implied the existence of the guilt of a family member – on the contrary and establishing who can be considered an “accessory” or “accomplice” to terrorism/murder should presume a *proper* investigation of individual criminal responsibility in each particular case, *i.e.* the syntagma “accessories to terrorism” should not be susceptible to *a priori* unilateral broad interpretations, as done under the authority of the ambiguous DER 119. The general presumption of guilt/contemplation of the harmful act on the side of a family

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<sup>258</sup> *Janimat v. OC Central Command*, H CJ 2006/97, *Judgments of the Israel Supreme Court: Fighting Terrorism within the Law*, p. 64, available at: [http://www.hamoked.org/items/4980\\_eng.pdf](http://www.hamoked.org/items/4980_eng.pdf), accessed on 2005-03-03. 51 (2) P.D. 651, known also as *Ganimat, Ghaneimat*. Similarly the Court established that severely affected are the “persons who did not themselves commit any crime”. *Alamarin* case (1992), para. 8.

<sup>259</sup> See *e.g.* Dershowitz, who regards imputable to Palestinian families all the offences caused by their members, for which the only cure are punitive house demolitions, not only toward families, but the whole villages. See generally Alan Dershowitz, *Why Terrorism Works* (2002 Yale University Press). In that direction, there have been ideas that the international law is “obsessed with individual responsibility for communal acts” and that the “application of the [GC IV] serves to reinforce the power of the community to nurture a fundamental culturally constitutive element – demonification and hatred of some constructed ‘other’”. Larry Cata Backer, ‘The Fuhrer Principle of International Law: Individual Responsibility and Collective Punishment’, 21 *Penn. St. Int’l L. Rev.* (Spring 2003), p. 512. Such arguments, however, unavoidably turn into a double-bladed sword, especially in case of Israel and the OPT, legitimizing armed responses (“terrorism” and “counter-terrorism”) of both sides over presumably guilty, by way of kinship involved, civilian population.

<sup>260</sup> *Dagalis* case (1985), p. 315, excerpted in B’Tselem, ‘Judicial Review’, VI *Pal. YB. Int’l L.* (1990/91), p. 206. See also *Sanuar v. Commander of the IDF Forces in the Gaza* (1989), H CJ 658/89, 43 (2) P.D. 821, summarised in English in 25 *Isr YHR* (1995), p. 324.

<sup>261</sup> *Sabeach v. IDF Commander in Judea and Samaria* (1996) 50 (1) P.D., p. 353, as cited in Kretzmer, *op.cit.*, p. 151.

<sup>262</sup> Alan Dershowitz, *The Case for Israel* (2003 John Wiley & Sons), pp. 166-167.

member, reveals only the advocacy of reviving the “mind-delict”<sup>263</sup>, as a relict of the past, and as such contradicts above all the conscientiousness. While the *passive support* of a family member (which presumes not necessarily the exact knowledge of, but anticipation of the future offence) for the offence to be committed<sup>264</sup> indeed, in certain cases may be existent, such passive (without taking part in the offence in terms of abetting, helping, executing etc.), even though *generally wishful* (complying with the end-effect) attitude is ruled out as the ground of responsibility under modern principles of the extant national and international criminal laws.

The alleged green light for the demolition practice can, at the first glance, be found in the rather relaxed wording of the Article 50 of the Hague Regulations, when referring to those that can “be regarded as jointly and severally responsible”.<sup>265</sup> However, the provisions of the Hague Regulations and GC IV are widely acknowledged as complementary<sup>266</sup> and GC IV explicitly prohibits the punishment of those who have not “personally committed” the punishable offence. As UN General Secretary, Kofi Annan, warned:

[J]ustice does not mean only punishment of the guilty. It must also mean fair treatment of the innocent. Let us, therefore, be careful not to place whole communities under suspicion, and subject them to harassment, because of the acts committed by some of their members.<sup>267</sup>

Bearing in mind the facts of the (punitive demolitions) case, the simultaneous generalized punishment-in-effect of those that presumably have not taken a role in the offence, logically invokes the issue of collective punishment.<sup>268</sup> A parallel hypothetical question that latently rises here is what if DER 119 were authorising heavy torture (not to mention physical elimination) of the families of an offender<sup>269</sup>, as arguably the most effective deterrent. Can such and similar *deterrence* argument, as implemented in the practice, rational and devoid of humane delicacy, prevail over the main tenet of humanitarian law – the protected status of civilians and over their individual basic human rights?

The Old Testament/Torah/Pentateuch, as the virtual ground zero of the Israeli legal argumentation, provides the rule that “[f]athers shall not be put to death because of their children, nor shall children be put to death because of their fathers. Each one shall be put to death for his own sin.”<sup>270</sup> So far, the only one within the Court to repetitively emphasise this reasoning has been justice Cheshin<sup>271</sup>, but without real influence over the majority’s opinion.

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<sup>263</sup> Or, is applying a nice phrase of Justice Tirkel, the task is to “determine what [the family member] thought... about the thoughts of a certain person [the offender]. Ostensibly, revealing hidden thoughts about hidden thoughts...” See *Margalit Har-Shefi v. State of Israel*, 3417/99, Takdin Elyon 2001 (1) 904, as cited in Shnayderman, *op.cit.*, p. 35.

<sup>264</sup> See e.g. *Bahar et al. v. IDF Commander of the West Bank*, H CJ 7289/02 (August 25<sup>th</sup> 2002), as cited in Al-Haq (Darcy), *op.cit.*, p. 28.

<sup>265</sup> See e.g. Pictet (Ed.), *op.cit.*, p. 225.

<sup>266</sup> GC IV “reproduces, with only slight changes, the original draft of the [ICRC]”. Pictet (Ed.), *op.cit.*, p. 225.

<sup>267</sup> Quotation from UN Press Release, “Secretary-General to Commission on Human Rights: Human Rights Must not be Sacrificed to Counter-Terrorism”, April 4<sup>th</sup> 2002.

<sup>268</sup> As Feinberg wrote, “group liability is inevitably distributive: what harms the group as a whole necessarily harms its members.” Burleigh Taylor Wilkins, *Terrorism and Collective Responsibility* (1992 Routledge), p. 127.

<sup>269</sup> Abhorrent as it sounds, such a proposition for death penalty for the suicide bombers families’ was made by a Washington lawyer and the president of the International Association of Jewish Lawyers and Jurists, Lewin, who invoked the Biblical (Exodus) Amalek precedent of collective punishment. Nathan Lewin, *Deterring Suicide Killers, Sh’ma: A Journal of Jewish Responsibility*, May 2002, at 11-12, as cited in Fletcher, *op.cit.*, p. 164.

<sup>270</sup> *Deuteronomy*, 24:16.

<sup>271</sup> See e.g. *Janimat* case (1997).

Israeli erstwhile Prime Minister, Shimon Peres, rather indicatively disagrees with such an obvious analogy to the scriptures when stating that “[w]e have no choice but to make the father responsible for the son and to tell the father that if someone from your house goes out to commit a suicide attack, don’t think just he will go to paradise. Your house is in danger. It will be sealed; it will be damaged.”<sup>272</sup> The overwhelming “no choice” type of argument<sup>273</sup>, as giving up from addressing any connection of the family with the offence, seems as neither a legally persuasive justification for exploding the scope of collective responsibility nor a true want for a solution beyond the superficial and anachronistic principle of talion<sup>274</sup>.

The Government’s and the Court’s persistent interpretation of DER 119 nature as a deterrent may be perceived as an attempt of eliminating the qualification of the measure as “punitive” in respect to the particular kind of house demolitions, so to avoid the possible legal and political consequences of the attribute. There are few major obstacles for affirmation of such amputation. At first, the obstacle is in the simple fact that the Regulation 119 finds its place in the Part XII of DER, entitled clearly as “Miscellaneous *Penal* Provisions [emphasis added]”. Second, the very Court has, on certain occasions, expressed inconsistency in the interpretation by qualifying DER 119 as a “punitive provision”<sup>275</sup>. Also, in support of the local law doctrine regarding the validity of DER 119, the Court called upon the Article 64 GC IV, which speaks of maintenance of *penal* laws. Also, relevant international for a, e.g. the Human Rights Committee (HRC), in referring to the “demolition of property and houses of families some of whose members were or are suspected of involvement in terrorist activities or suicide bombings” have deplored the “*partly punitive nature*” of such acts.<sup>276</sup>

Even if, despite the contra empirical data, punitive demolitions have the alleged deterrent effect, that does not exclude the effect of a punishment.<sup>277</sup> As Fleck argued in respect of, *inter alia*, “destruction of the house belonging to the family of an alleged offender”, “[c]ollective penalties and all measures of intimidation and terrorism carried out by the occupying power have only one purpose: to make the population of the occupied territory submissive.”<sup>278</sup> The first expected impact of the measure may indeed be achieving the submissiveness through comprehensive deterrence. In that direction, the Court has pointed in *Dagalís* case that:

[Deterrent effect] by its very nature must apply not only to the terrorist himself but also to those surrounding him, certainly the family members living with him. He must know that *his criminal acts will harm not only himself but might also cause great suffering to his family*. In this respect the sanction of demolition is *no different from imprisonment* imposed on the head of a family, a father of young children, who are left without a supporter and provider. Here too, the family members are affected. However... a petitioner is obliged to take this into account before committing his crimes, and he must

<sup>272</sup> *Jerusalem Post*, March 12<sup>th</sup> 1996.

<sup>273</sup> In similar respect Lewin (*see supra* note 268) believes that “[i]f executing some suicide-bomber families saves the lives of even an equal number of potential civilian victims, the exchange is, I believe, ethically permissible... It is a *policy born of necessity* [emphasis added] - the need to find a true deterrent when capital punishment is demonstrably ineffective.” Omar Barghouti, ‘Relative Humanity: The Fundamental Obstacle to a One State Solution’, *Znet*, December 16<sup>th</sup> 2003, available at: <http://fromoccupiedpalestine.org/node.php?id=1030>, accessed on 2005-03-01.

<sup>274</sup> *Genesis*, 9:6: “Whoever sheds the blood of man, by man shall his blood be shed...”

<sup>275</sup> *Hamamreh* case (1982). *Sakhwil* case (1979).

<sup>276</sup> Human Rights Committee (HRC), *Concluding Observations of the Human Rights committee: Israel*, UN Doc. CCPR/CO/78/ISR (August 21<sup>st</sup> 2003), para. 16.

<sup>277</sup> *Welch v. United Kingdom*, Judgment (February 9<sup>th</sup> 1995), ECtHR App. No. 17440/90, para. 30. *See infra* text.

<sup>278</sup> Hans-Peter Gasser, ‘Protection of the Civilian Population’ in Fleck (Ed.), *op.cit.*, p. 249. *See* Tomis Kapitan, ‘The Terrorism of “Terrorism”’ in James P. Sterba (Ed.), *Terrorism and International Justice* (2003 Oxford University Press), p. 50.

know that his family will also perforce suffer the consequences of his acts... Needless to add that the concept of collective punishment bears no relation at all to the sanction of house demolition: in the case before us it is clear that the terrorist departed from certain houses, and these houses – and no other – are to be demolished. It follows that *the punishment is not imposed on other houses of uninvolved persons*, and it is difficult to see where the argument that this concerns collective punishment arises in this case. [emphasis added]<sup>279</sup>

The mentioned part of the judgment reflected a high level of inner inconsistency. Namely, in the first part of the judgment, the Court seems to passively presuppose the lack of guilt on the side of the family when referring to solely offenders (“his”) criminal acts. The family members are not mentioned as accessories to the crime, but it can be inferred that they are “legally” qualified only as “involved” (as contra to the other “uninvolved houses”), as stems from the last sentence. That yields a conclusion that the only ground for “the punishment” which “cause[s] great suffering” is a quasi-legal phantasm of the guilt-by-family-relation/residence. The more absurd is the positive comparison of the effects of house demolition and imprisonment, as in the former case, the affected family is not suffering only emotionally, but fully existentially.<sup>280</sup> As the rationale sticks to justifications on the level of suffering inflicted, the deterrence-argument serves no purpose here anymore. As to that particular argument, from the point of such family facing demolition of their house, the moment of deterrence (induced by some prior case of punished terrorism) is elapsed once the offence is committed by their member. As pointed out, the “deterrence relies on a rational calculus – a cost-benefit analysis – by *those contemplating the harmful act* [emphasis added]”<sup>281</sup> and the calculus is therefore already conceived and implemented as the one who had contemplated it is either dead or imprisoned. Any measure undertaken on the interests of the remaining, objectively (criminally) uninvolved, family members after that, without the resort to due criminal procedural rules of establishing the connection with the offence (the guilt) in each case, is not (solely, for that particular family) a deterrent anymore, but only an illegal punishment.

In any case, if wanting to avoid the qualification of punishment, the only way to disentangle from the possible logical fallacy of formalistic legal argumentation is to claim the demolitions as a type of reprisals.<sup>282</sup> As Kretzmer notices, the problem is that the authorities fervently reject such a label, while the Court’s explicit denial of the demolitions’ punishment feature undermines such official contra-reprisal argument.<sup>283</sup> Therefore, in the light of possible legal paradoxes, the determination of the demolitions’ nature closest to the practical, healthy logic gravitates around the issue of punishment.

Furthermore, the direct impact of the punitive demolitions is on the very owner of the house and the owner does not have to be neither the offender (18 per cent of all cases)<sup>284</sup>, nor

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<sup>279</sup> *Dagalis* case (1985), p. 315.

<sup>280</sup> Later, the Court also acknowledged that the suffering constitutes an inevitable aftermath of every punishment, which, irrespective of being imposed on the offender, injures his dependents, “not less but even more”. *Sanuar* case (1989), p. 325.

<sup>281</sup> Dershowitz, *Why Terrorism Works*, p. 19.

<sup>282</sup> Reprisals are defined as illegal measures, but which, when taken with the aim of ensuring the cessation of certain acts are “considered as lawful in the particular conditions under which they are carried out”. Their prohibition is, nonetheless, “absolute and mandatory in character and thus cannot be interpreted as containing tacit reservations with regard to military necessity”. Pictet (Ed.), *op.cit.*, pp. 227-228.

<sup>283</sup> Kretzmer, *op.cit.*, p. 153.

<sup>284</sup> See B’Tselem Report (1989), *ibid.*, p. 16. Cf. Lynn Welchman, *A Thousand and One Homes: Israel’s Demolition and Sealing of Houses in the Occupied Palestinian Territories* (1993), p. 6, as cited in Brian Farrell, ‘Israeli Demolitions of Palestinian Houses as a Punitive Measure: Application of International Law to Regulation 119’, 28 *Brook. J. Int’l L.* (2003), p. 903.

family but a third person, fully unaware of the contemplation of the offensive act and unable to prevent it. Namely, as the movement of Palestinians around their properties is fully restricted by the IDF, there are no possibilities to prevent a potential offender from using their houses for an attack.<sup>285</sup> The Court has totally disregarded this fact and assumed a highly dubious stance that the IDF does not have to possess evidence of involvement of the inhabitants in the offence, “as the existence of such knowledge or participation does not flow from the text of the regulation”.<sup>286</sup> Therefore, this deterrence-lead reasoning of justified suffering of the family, in this case simply does not “hold the water”.

If assuming the plain dictionary approach to the items recurring in the judgments and the Article 33 of GC IV, the verb “deter”, means “to make someone decide not to do something”, “discourage from doing something through fear of the consequences”; the verb “intimidate” means “to deliberately make someone feel frightened especially so that they will do what you want”, “frighten or overawe, especially so as to coerce into doing something”; the verb “punish” means “to make someone suffer because they have done something against the law or against the rules”, “impose a penalty on (someone) for an offence... treat harshly or unfairly”.<sup>287</sup> Regarding the reference to “collective”, the European Commission on Human Rights established in *Becker v. Denmark* that the “‘collective expulsion of aliens’ means any measure of the competent authority compelling aliens as a group to leave the country, except where such a measure is taken after and on the basis of a reasonable and objective examination of the particular cases of *each individual* alien of the group [emphasis added]”.<sup>288</sup> If applying analogy to the punitive demolitions, if a defined (presupposed) group of people are evicted from their houses without their “case” having received due individual consideration, it indeed constitutes a collective punitive/forced eviction.

Having in mind all the facts of the case, the level of deterrence appears as critical enough to rightly warrant such a treatment as intimidation<sup>289</sup> or punishment. If the demolitions cause “suffering and misery ... to persons who did not themselves commit any crime”<sup>290</sup>, which borders with the qualified meaning of “to punish”<sup>291</sup>, even if it was not directly premeditated but only an unfortunate side-effect, the grave negligence of maintaining it amounts to the *intent* of inflicting the suffering<sup>292</sup> of an offender’s family. Therefore, it can be concluded with certainty that the punitive house demolitions do constitute the violation of the prohibition of collective punishment under the Article 33 of GC IV.

### c) Fair Trial

If it is undoubted that the punitive demolitions constitute a certain type of (collective) punishment, the connection must necessarily be drawn between the nominally administrative

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<sup>285</sup> AI, ‘Under the Rubble’, p. 22.

<sup>286</sup> *Alzak v. Military Commander of West Bank*, 1987 (1) Takdin-Elyon 1, as cited in Kretzmer, *op.cit.*, p. 154.

<sup>287</sup> *Macmillan English Dictionary* (2002) and Catherine Soanes (Ed.), *Compact Oxford English Dictionary*, Second Edition (2003), respectively.

<sup>288</sup> *Becker v. Denmark*, Decision on Admissibility (October 30th 1975), ECtHR App. No. 7011/75.

<sup>289</sup> For general relation between collective punishment and measures of intimidation (and/or terrorism) as particularly by-facts and in-effect applicable in case of punitive demolitions, see Pictet (Ed.), pp. 225-256.

<sup>290</sup> *Alamarin* case (1992), para. 8. See in particular the dissenting opinion of Justice Chesnin, p. 9-16.

<sup>291</sup> “[T]reat harshly”, even without reference to any prior offence, *i.e.* “unfair”. *Compact Oxford English Dictionary*.

<sup>292</sup> This speculation may be the ground for claiming violation of prohibition of torture. See *infra* text on inhuman treatment.



activity, undertaken by virtue of DER 119, with the humanitarian legal guarantees of fair trial under the GC IV. Articles 71, 72, 73 and 74 of the GC IV stipulate the rules of a fair penal procedure, the right of defence, the right to appeal and the participation right of the Protective Power, respectively. The only conclusion possible, in the aftermath of facing the facts and the law, as precisely elaborated in *infra* text (on fair trial guarantees under human rights law), boils down to the apparent denial of the guaranteed rights to the affected persons in violation of the aforementioned articles.

#### **d) Serious Breaches of International Law**

*In claris non fit interpretatio.*

Article 147 of the GC IV provides the exclusive list of the most serious violations of humanitarian law, as codified in the GC IV:

*Grave breaches [of the GC IV] shall be those involving any of the following acts, if committed against persons or property protected by the [GC IV]: ... torture or inhuman treatment... wilfully depriving a protected person of the rights of fair and regular trial prescribed in the [GC IV]... and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.*

The scope of causes and consequences arising out of the exercise of punitive house demolition, as described in the thesis, can, without further theoretical interpretations, be understood in terms of grave breaches of international law, as provided by the GC IV.

A tempting and immensely important issue, from the point of broad range of possible consequences, is whether punitive demolitions exercised in the OPT can be considered a war crime. Article 6 (b) of the 1945 Charter of the International Military Tribunal at Nuremberg defines war crimes as “violations of the laws or customs of war” in specific terms of, *inter alia*, ill-treatment and wanton destruction of cities, towns or villages, or devastation not justified by military necessity”<sup>293</sup>. The Statute of the International Criminal Tribunal for Former Yugoslavia (ICTY) also provides the label of war crimes in Article 3, referring to wanton destruction of property. In a similar manner, Article 8 of the Rome Statute of the International Criminal Court (ICC) deals with war crimes and explicitly incorporates into the category the Grave Breaches of the GC IV with special reference to torture and inhuman treatment (para. 2 (a) (ii)), extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly (para. 2 (a) (iv)) and wilful deprivation of a protected person of the right of fair and regular trial (para. 2 (a) (vi)).

The Elements of Crimes contained in the ICC Statute provide guidelines for identification of war crimes in the factual frame of a particular situation. With reference to wanton destruction of property as a war crime, the requirements to be met comprise: 1. destruction of certain property, 2. absence of military necessity, 3. extensive and wanton destruction, 4. property protected by the GC IV, 5. the perpetrator’s awareness of the protected status, 6. war/international armed conflict circumstances and 7. perpetrator’s awareness of the war’s factual circumstances.<sup>294</sup> *Mutatis mutandis*, regarding inhuman treatment and the denial of a fair trial as war crimes, the requirements range from the actual infringement of the guaranteed rights (infliction of *e.g.* mental pain and denial of the fair trial)

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<sup>293</sup> Article 6 (b) Charter of the International Military Tribunal, Nuremberg Trial Proceedings Vol. 1, available at: <http://www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm>, accessed on 2005-01-25.

<sup>294</sup> See Article 8 (2) (a) (iv), Elements of Crimes, ICC, UN Doc. PCNICC/2000/1/Add.2 (2000).

upon one or more protected persons in the war time, to the perpetrator's awareness of their protected status and the war circumstances.<sup>295</sup>

The common requirement of the breaches happening in the circumstances of war, *i.e.* international armed conflict, is certainly met, as the particular article (8 (2) (a)) also covers situations of a military occupation.<sup>296</sup> In the case of punitive demolition as the alleged wanton destruction, Israel feebly justifies the punitive acts by resort to the powerful concept of "military necessity", which plays no role under the particular circumstances of punitive demolitions, as shown above. The denial of the fact of inflicted inhuman treatment in the present case is virtually impossible, while the argument of demolitions as solely administrative, deterrent acts not necessitating fair trial guarantees, does not stand under the proof of substantively criminal law nature of the demolitions (*see infra* text on inhuman treatment and fair trial).

It can be noticed that collective punishment, as provided in Article 33 of the GC IV, is not explicitly enumerated among the war crimes in some of the mentioned legal instruments, most notably in the definite list of crimes of the ICC Statute. The issue is, however, duly included into the list of war crimes constituting crimes against the peace and security of mankind, next to the previously mentioned ones, by virtue of Article 20 (f) (ii) of the 1996 Draft Code of Crimes against the Peace and Security of Mankind, as introduced by the International Law Commission (ILC).<sup>297</sup> The severity of the enumerated war crimes, which have been a mere reflection of the rules implemented in the Hague Convention and the GC IV<sup>298</sup>, requires that the crimes must be committed in a systematic manner or on a large scale to be understood as an illegal encroachment to the peace and security of mankind. The facts of the case clearly disclose the systematic nature of punitive demolitions.

Therefore, all of the officially provided justifications and interpretations of the punitive practice lack very important substantive grounds to successfully wipe away the allegation of a gravely serious breach of law, under the notorious charge of war crimes. Israel has remained in full responsibility, from the collective and individual aspects, for the practice of punitive house demolitions in the OPT.

## ***2. Human rights law***

Unlike humanitarian law, functional in times of war for the purpose of protecting citizens of an adversary, human rights legal corpus defines the relation between a state and its own citizens. The mutually excluding questions of complementarity or subordination between the two branches has been a focal point of discontent in theory and practice.<sup>299</sup> Pursuance of

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<sup>295</sup> See Article 8 (2) (a) (ii), *ibid.*

<sup>296</sup> *Ibid.*, note 34.

<sup>297</sup> The drafters of the Nuremberg Charter did not provide restrictive list, therefore collective punishment may beyond doubt be attributed to the category of war crimes. Commentary on Article 20 1996 ILC Draft, available at: <http://www.un.org/law/ilc/texts/dcodefra.htm>, accessed at 2004-12-11.

<sup>298</sup> *Ibid.*

<sup>299</sup> See *e.g.* Hans-Joachim Heintze, 'On the Relationship between Human Rights Law Protection and International Humanitarian Law', *IRRC* Vol. 86, No. 856 (December 2004), pp. 789- 813. See also Rene Provost, 'Reciprocity in Human rights and Humanitarian Law', 65 *Brit. Y.B. Int'l L.* (1994), p. 427.

the prevailing argument of complementing feature of human rights law toward humanitarian law<sup>300</sup> is especially important in the cases of long-term occupations.<sup>301</sup>

## A. Applicability in the OPT

Israel has ratified all (here relevant) major multilateral human right treaties, *i.e.* ICCPR, ICESCR<sup>302</sup>, CERD<sup>303</sup> and CAT<sup>304</sup>. The only reservation to ICCPR is made in respect of the Article 23, regarding the matters of personal status, as traditionally governed by religious laws.<sup>305</sup> Other reservations, which have been lodged to CERD (Article 22) and CAT (Articles 20, 30) announce that the state is not obliged by the dispute settlement provisions in the particular conventions, while CEDAW refers to certain religious matters. The mentioned reservations certainly do not substantially affect the scope of obligation of the state under the international legal instruments to respect human rights of Palestinians in the OPT. However, “although some rights provided for in the [ICCPR] are legally protected and promoted through the Basic Laws, municipal laws, and the jurisprudence of the courts, the Covenant has not been incorporated in Israeli law and cannot be directly invoked in the courts”.<sup>306</sup> Also, “economic, social and cultural rights have not been granted constitutional recognition in Israel’s legal system, as the Draft Basic Law: Social Rights does not meet the requirements of Israel’s obligations under the [ICESCR].”<sup>307</sup> Procedural obstacles, in respect of other conventions, preclude the direct enforcement of their provisions at the time pending.

The state of emergency was announced in Israel, practically at the first days of creation of the state, on May 21<sup>st</sup> 1948 and has been applied in continuum since 1950 till the present moment.<sup>308</sup> The only derogation made upon ratification of ICCPR, as provided by the derogation clause in Article 4 (3) of the ICCPR, was from the Article 9 – the right to liberty and security of the person and freedom from arbitrary arrest or detention<sup>309</sup> and such was duly

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<sup>300</sup> “[E]ssential and inalienable human rights should be respected even during the vicissitudes of war”. UN SC Resolution No. 237 (June 14<sup>th</sup> 1967) or, as Justice William Brennan Jr. emphasized the issue of balancing the human rights and war needs: “A jurisprudence that is capable of sustaining the supremacy of civil liberties over exaggerated claims of national security only in times of peace is, of course, useless at the moment that civil liberties are most in danger.” William J. Brennan, Jr., ‘The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises’, 18 *Isr. YB. Hum. R.* (1988), p. 14.

<sup>301</sup> “Situations combining institutional stability and applicability of humanitarian law are somewhat unusual, consisting mostly of long-term belligerent occupations such as that of the Gaza Strip by Israel.” Rene Provost, *International Human Rights and Humanitarian Law* (2002 Cambridge University Press), p. 56.

<sup>302</sup> ICCPR and ICESCR, December 19<sup>th</sup> 1966 (entry into force on March 23<sup>rd</sup> 1967), *Human Rights in International Law: Collected Texts*, Second Edition (2000 Council of Europe Publishing). Israel ratified both Covenants on October 3<sup>rd</sup> 1991 and they entered into force on January 3<sup>rd</sup> 1992.

<sup>303</sup> CERD (December 21<sup>st</sup> 1965). Ratified by Israel on January 3<sup>rd</sup> 1979, e.i.f. on February 2<sup>nd</sup> 1979.

<sup>304</sup> CAT (December 10<sup>th</sup> 1984), Ratified by Israel on October 3<sup>rd</sup> 1991, e.i.f. on November 2<sup>nd</sup> 1991.

<sup>305</sup> Reservation to Article 23 ICCPR available at: [http://www.ohchr.org/english/countries/ratification/4\\_1.htm](http://www.ohchr.org/english/countries/ratification/4_1.htm), accessed on 2005-02-01.

<sup>306</sup> HRC, *Consideration of reports Submitted by States Parties under Article 40 of the Covenant*, UN Doc. CCPR/C/79/Add.93 (August 18<sup>th</sup> 1998), para. 9.

<sup>307</sup> ESC, *Concluding observations of the Committee on Economic, Social and Cultural Rights: Israel*, UN Doc. E/C.12/1/Add.27 (December 4<sup>th</sup> 1998), para 9.

<sup>308</sup> Despite the procedural request of annual security needs re-examination, with such long duration and full continuity, the state of emergency does not fit the requirement of the Article 4 ICCPR and the HRC interpretation of it. See HRC, *General Comment No. 29, Article 4: Derogations During a State of Emergency*, UN Doc. CCPR/C/21/Rev.1/Add.11 (August 31<sup>st</sup> 2001), para. 2.

<sup>309</sup> ICCPR Article 9: “1. Everybody has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law... 2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons... 3.... Shall be brought promptly before a judge... 4... shall be entitled to take proceedings before a court...”

notified to the UN Secretary General<sup>310</sup>. There have been no explicit notifications of derogations from other articles of the human rights instruments. In respect of the specific issue at stake, one should have in mind that the application of DER 119, in particular, as maintained local law, has *not* been dependant on the proclamation of the state of emergency in Israel.<sup>311</sup>

Despite undisputable prolonged military/administrative presence and control over the OPT, Israel's view has assumed a highly eliminative approach in the matter of any legal responsibility toward the OPT. First, as officially maintained, the application/effectuation of the human rights regime is precluded by the application of international humanitarian law. Furthermore, a highly restrictive approach has been assumed regarding the very jurisdictional provisions, expressed in the claim that Israel is responsible only for the human rights state-of-the-art inside its national borders, but not for guaranteeing human rights in the OPT. Finally, Israel's gradual ceding of power the PNA pursuant to the Oslo Accords, is interpreted as the lack of Israeli effective control over the portions of the OPT making the PNA solely responsible for the human rights situation of the area. The claims have been, directly or by implication, evaluated and rebuffed by various competent international human rights bodies and organizations.

As to the question on conditions for the application of certain human rights provisions, Article 2 (1) of the ICCPR, as the most important human rights legal instrument, establishes the rule that a state party should respect and ensure "to all individuals *within its territory and subject to its jurisdiction* [emphasis added] the right recognized in the present Covenant, without distinction of any kind". Although the wording of the article seem to *prima facie* expressly exclude liability of Israel for the acts outside its territory, HRC had already established the precedent for full extraterritorial application of the ICCPR in a set of *Uruguay cases*<sup>312</sup>. In recent comments on Israel, while expressing deep concern about the state's initial jurisdictional distancing from OPT, despite the "long-standing presence" and the "exercise of effective jurisdiction by Israeli security forces therein"<sup>313</sup>, HRC reiterated/stated the view that:

[T]he applicability of the regime of international humanitarian law during an armed conflict *does not preclude the application of the Covenant*, including article 4 [derogation clause]... [n]or does the applicability of international humanitarian law preclude accountability of States parties under [Article 2

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<sup>310</sup> The Notification of the derogation from Article 9 stated that the state of emergency was introduced in Israel due to "continuous threats and attacks" that "have taken the form of threats of war, of actual armed attacks, and campaigns of terrorism resulting in the murder of and injury to human beings.", available on the web-site of OHCHR at: [http://www.ohchr.org/english/countries/ratification/4\\_3.htm](http://www.ohchr.org/english/countries/ratification/4_3.htm), accessed on 2005-02-10.

<sup>311</sup> See Shimon Shetreet, 'A Contemporary Model of Emergency Detention Law: an Assessment of the Israeli Law', 14 *Isr. YB. Hum. R.* (1984), pp. 184, 188.

<sup>312</sup> E.g. *Lopez Burgos v. Uruguay* (52/79), concerning arrest, detention and mistreatment by Uruguayan state agents. Note especially concurring opinion of Justice Tomuschat, with the delivered precise reasoning and contemplation on the logical connection of ICCPR Articles 2(1) and 5 (purposes of ICCPR), UN Doc. CCPR/C/13/D/52/1979 (July 29<sup>th</sup> 1981); *Celiberti de Casariego v. Uruguay* (56/79), with the similar thematic, UN Doc. CCPR/C/13/D/56/1979 (July 29<sup>th</sup> 1981); *Montero v. Uruguay* (106/81), concerning the case of confiscation of a passport by Uruguayan consulate in Germany, UN Doc. CCPR/C/18/D/106/1981 (March 30<sup>th</sup> 1983). See Sarah Joseph, Jenny Schultz *et al.*, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, Second Edition (2004 Oxford University Press), pp. 89-90. The most extensive approach in this matter has been assumed by the IACHR, which has interpreted the extraterritorial jurisdiction to the point of comprising violations of human rights occurring wholly outside the territorial scope of the American human rights instruments. See Provost, *International Human Rights and Humanitarian Law*, pp. 20-22.

<sup>313</sup> HRC, UN Doc. CCPR/C/79/Add.93 (August 18<sup>th</sup> 1998), para. 10. See HRC, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13 (May 26<sup>th</sup> 2004), para. 11.

(1)] for the actions of their authorities outside their own territories, including in Occupied Territories. The Committee therefore reiterates that, in the current circumstances, *the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by [Israeli] authorities or agents* in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of state responsibility of Israel under the principles of public international law. [emphasis added]<sup>314</sup>

The Economic and Social Council (ESC), regretting Israeli denial of the obligation to guarantee the rights under the ICESCR, was of the view that “the State’s obligations under the Covenant apply to all territories and populations under its effective control”<sup>315</sup>. The Committee on the Elimination of Racial Discrimination (CmERD) came to/reiterated identical conclusion.<sup>316</sup>

The ICJ rendered its opinions on the matters of both general and concrete applicability of certain human rights instruments under war circumstances. Namely, in 1996, it stated that “the protection of [ICCPR] does not cease in times of war, except by operation of Article 4 of the Covenant”, while providing an answer to a possible relation between human rights law and humanitarian law, as *lex specialis* to the former.<sup>317</sup> The view was duly accepted by the Israeli Supreme Court.<sup>318</sup> As there are no notified derogations, except for the mentioned Article 9 ICCPR, there are no obstacles to the implementation of the Covenant in time of war. In a much more focused/concrete manner, the particular matter of Israeli jurisdiction over OPT and the applicability of ICCPR and ICESCR was strongly resolved by ICJ in 2004 Advisory Opinion, when the Court ruled that the ICCPR was “applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory” and that “Israel is bound by the provisions of the International Covenant on Economic, Social and Cultural Rights”.<sup>319</sup>

European Court of Human Rights (hereinafter: ECtHR) has also encountered the issue of applicability of certain human rights norms under the crucial question of identifying the sovereign in *Loizidou* case<sup>320</sup> where it authoritatively asserted that “the State which is recognised as accountable in respect of a particular territory remained accountable even if the territory is administered by a local administration... as in the case of a protected State or other dependency”. Hence, bearing in mind that Turkey was keeping “large number of troops engaged in active duties” in the Northern Cyprus, exercising *de facto* control, there was an “overwhelming evidence that Turkey ha[d] effective overall control over events in the occupied area” as a factual ground for the ECtHR to conclude that the country actually had

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<sup>314</sup> HRC, *Concluding Observations of the Human Rights Committee: Israel* (August 21<sup>st</sup> 2003), para. 11.

<sup>315</sup> ESC, *Concluding observations of the Committee on Economic, Social and Cultural Rights: Israel*, UN Doc. E/C.12/1/Add.27 (December 4<sup>th</sup> 1998), para 9.

<sup>316</sup> CERD, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Israel*, UN Doc. CERD/C/304/Add.45 (52<sup>nd</sup> session, March 30<sup>th</sup> 1998), para. 12. See CERD Report, UN Doc. A/46/18 (46<sup>th</sup> session, September 25<sup>th</sup> 1991), para. 368.

<sup>317</sup> “The test of what is an arbitrary deprivation of life... then falls to be determined by the applicable *lex specialis*, namely the law applicable in armed conflict which is designed to regulate the conduct of hostilities.” *Legality of the Threat or Use of Nuclear Weapons* (1996), para. 25. Similar view was reiterated in Inter-American Commission on Human Rights (IACHR), *Third Report on the Situation of Human Rights in Colombia*, OEA/Ser.L/V/II.102 doc. 9 rev. 1, (February 26<sup>th</sup> 1999), para. 11.

<sup>318</sup> *The Public Committee Against Torture in Israel (PCATI) et al. v. Government of Israel et al.*, HCJ 769/02, p. 14, para. 132, available at <http://www.stoptorture.org.il/eng/images/uploaded/publications/73.pdf>, accessed on 2005-03-05.

<sup>319</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, paras. 111, 112.

<sup>320</sup> *Loizidou v. Turkey*, Judgement (December 18<sup>th</sup> 1996), ECtHR App. No. 15318/89.



jurisdiction which “created a strong presumption of... responsibility for violations occurring in the occupied area.”<sup>321</sup>

Israel remains in charge of the OPT, *inter alia*, in the course of responsibility for human rights violations, as long as it exercises effective control over the *territory*. The satisfaction of the requirement of “effective control” has been addressed in the argumentation on the applicability of humanitarian law. If the recurring phrase “effective control” can be further understood in terms of “contextual assessment of the state’s factual control in respect of facts and events that allegedly constitute a violation of a human right”, it therefore implies parallel assessment of the very right and its extraterritorial effect.<sup>322</sup> By the fact that Israel calls upon DER 119, as the legal ground for ordering punitive demolitions and holds the factual power to effectuate the practice, thus holding the possibilities of preventing the possible violations at any time, Israel cannot possibly skip the judgment on the acts.<sup>323</sup> Even if, in clearly hypothetical case, the qualification of effective or overall control of the Israeli administration over the OPT could not be invoked, the argument of control by the state agents over an individual, as the independent ground for invoking the state’s responsibility, is duly pertinent.<sup>324</sup> Still, the identical practical problem of actual enforceability of the human rights provisions persists as in the case of humanitarian legal instruments. However, that does not preclude identification of a violation in the particular case – a violation identified under the internationally recognized bill of rights, stays a violation, irrespective of the temporary enforceability.

Finally, the Universal Declaration of Human Rights (hereinafter: UDHR), whose provisions are mirrored in the subsequently introduced human rights instruments, has been perceived by a significant number of theoreticians as legally binding, having acquired the character of either “general principles of law” or customary international law.<sup>325</sup>

## **B. Violations of the Relevant Human Rights Norms**

International Human Rights Law does not specifically prohibit punitive house demolitions. However, it is possible to establish a substantial connection between the facts of punitive demolitions and certain codified rules as expressed through extant human rights instruments.

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<sup>321</sup> *Loizidou v. Turkey* (1996), paras. 49, 56.

<sup>322</sup> Martin Scheinin, ‘Extraterritorial Effect of the International Covenant on Civil and Political Rights’ in Fons Coomans and Menno T. Kamminga (Eds.), *Extraterritorial Application of Human Rights Treaties* (2004 Intersentia, Antwerp-Oxford), p. 76.

<sup>323</sup> See e.g. Israel’s High Court of Justice reasoning in *Tsemel* case (1982), pp. 169-170: “The obligations and the legal powers of the military force, deriving from effective occupation of territory..., have been created and hold good by virtue of military control of the territory, and this is so even if the military force exercises its control *solely by means of its regular combat units*, without setting up a special military framework for the needs of the administration [emphasis added]”.

<sup>324</sup> ECtHR concluded that “a State may also be held accountable for violation of the [ECHR] rights and freedoms of persons who are in the territory of another State but who are found to be under the former State’s authority and control through its agents operating – whether lawfully or unlawfully – in the latter State”. *Issa et al. v. Turkey*, Judgment (November 16<sup>th</sup> 2004), ECtHR App. No. 31821/96, para. 71.

<sup>325</sup> See e.g. Clare Ovey and Robin C.A. White, *Jacobs & White, European Convention on Human Rights* (2002 Oxford University Press), p. 3; Sohn, ‘The Human Rights Law of the Charter’, 12 *Tex. Int’l L. J.* (1977), p. 133 – as cited in Eric Lane, ‘Human Rights Within the World Legal Order: A Reply to Sohn and McDougal’, 10 *Hofstra L. Rev.* (Spring 1982), p. 751. Cf. Henry J. Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals*, Second Edition (2000 Oxford University Press), pp. 228-229.

## a) Interference with Home

### Article 12 UDHR:

*No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.*

### Article 17 ICCPR:

*1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*

*2. Everyone has the right to the protection of the law against such interference or attacks.*

The first issue arising out of the practice of punitive house demolitions is the reference to the interference with a person's home.<sup>326</sup> At the first glance, the prerequisite of "unlawful" for determining the violation does not seem to be fulfilled, as the demolitions have been grounded on a national law, thus eliminating unlawfulness.<sup>327</sup> However, the mere identification of the existing national law does not represent the sufficient criteria for ruling out the mentioned ground for invoking the violation of the guarantee contained in the article. The inclusion of the "arbitrary [...] interference" points to inclusion of unreasonableness<sup>328</sup> and has the aim of guaranteeing "that even interference provided for by law should be in accordance with the provisions, aims and objectives of the [ICCPR] and... reasonable in the particular circumstances."<sup>329</sup> ECtHR has dealt with similar issues within the scope of Article 8 ECHR, as virtually identical to Article 17 ICCPR, and has on several occasions pointed out that:

[T]he phrase 'in accordance with the law' does not merely refer back to domestic law but also relates to the quality of the law, requiring it to be compatible with the rule of law.<sup>330</sup>

In this respect, the attention should be paid to § 2 of Article 17 ICCPR, granting the right to privacy in a positive manner, unlike para. 1. If analysing the wording of DER 119, probably the first question mark rises in respect to an extremely broad discretion of the military commander to order punitive demolitions (see *infra* on the principle of legality). In *Pinkney v. Canada*, HRC found a violation of privacy in a topically similar issue of regulations allowing a prison Warden and a deputed officer to read personal written communications of the inmates with others, with (quoting the Regulations) "the discretion of the Warden to stop or censor any letter, or any part of a letter, on the ground that its contents are objectionable or that the letter is of excessive length" who exercised the power

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<sup>326</sup> "The term 'home' ... is to be understood to indicate the place where a person resides or carries out his usual occupation." HRC, *General Comment 16 (Article 17)*, UN Doc. HRI/GEN/1/Rev.1 (23<sup>rd</sup> session, 1988), p. 21, para. 5.

<sup>327</sup> See HRC, *General Comment 16 (Article 17)*, p. 21, para. 3.

<sup>328</sup> See *Van Alphen v. The Netherlands* (305/88), UN Doc. CCPR/C/39/D/305/1988 (August 15<sup>th</sup> 1990), para. 5.8.

<sup>329</sup> HRC, *General Comment 16 (Article 17)*, p. 21, para. 4.

<sup>330</sup> *Malone v. The United Kingdom*, Judgment (August 2<sup>nd</sup> 1984), ECtHR App. No. 8691/79, para. 67. See also *James et al. v. The United Kingdom*, Judgment (February 21<sup>st</sup> 1986), ECtHR App. No. 8793/79, para. 67.

selectively.<sup>331</sup> HRC set a standard on the imperative of sufficient precision of the concept of lawful interference with privacy under a national law, as *contra* to the great latitude of discretionary power, when it stated that “[a] legislative provision in the very general terms... did not, in the opinion of the Committee, in itself provide satisfactory legal safeguards against arbitrary application”.<sup>332</sup> The objectively broad discretion for ordering punitive demolition, conferred on the military commander under DER 119, and as applied in practice in a prevailing number of cases, can be understood in the same terms, *i.e.* DER 119 does not display the satisfactory quality of a law understood in terms of protection from interference with privacy/home.

In a mirroring set of circumstances to those in the OPT, ECtHR has encountered the matter of punitive demolitions, their effects in a series of cases against Turkey and provided clear precedents. In *e.g. Bilgin* case, ECtHR estimated the effects of a house demolition carried out by the security service under the identical circumstances and official reasoning to that of the Israel’s practice of house demolitions in the OPT.<sup>333</sup> Having found that “the applicant’s home and possessions were destroyed by the security forces, thus depriving the applicant of his livelihood and forcing him and his family to leave” the place of residence, ECtHR established that “these acts constituted grave and unjustified interferences with the applicant’s rights to respect for his private and family life and home, and to the peaceful enjoyment of his possessions.”<sup>334</sup> Hence, it a clear violation of the identical Article 17 ICCPR.

## **b) Torture, Inhuman and Degrading Treatment**

Article 5 UDHR and Article 7 ICCPR (in the relevant part):

*No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.*

The prohibition contained in this article is absolute – no derogation is allowed under the circumstances of the state of emergency. “Even in the most difficult of circumstances, such as the fight against organized terrorism and crime”, presumably comprising armed conflicts, the torture or inhumane or degrading treatment or punishment is “prohibited in absolute terms”.<sup>335</sup> The prohibition also stands “irrespective of the victim’s conduct”.<sup>336</sup>

The prohibition comprises not only inflicting a physical pain, but also mental suffering.<sup>337</sup> The Committee against Torture (hereinafter: CmAT), in concluding observations on Israel, states that “Israeli policies on house demolitions may, in certain instances, amount

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<sup>331</sup> *Pinkney v. Canada* (27/77), UN Doc. CCPR/C/14/D/27/1977 (October 29<sup>th</sup> 1981), paras. 31, 32. See *Estrella v. Uruguay* (74/80), UN Doc. CCPR/C/18/D/74/1980 (March 23<sup>rd</sup> 1983), para. 9.2.

<sup>332</sup> *Pinkney v. Canada* (27/77), para. 34.

<sup>333</sup> See *Bilgin v. Turkey*, Judgment (November 16<sup>th</sup> 2000), ECtHR App. No. 23819/94, *e.g.* p. 24, para. 102. See also *infra* on Article 7 ICCPR.

<sup>334</sup> *Bilgin v. Turkey* (2000), p. 25, para. 108. See *Selcuk and Asker v. Turkey*, Judgment (April 24<sup>th</sup> 1998), ECtHR App. No. 12/1997/796/998-999, pp. 19, 20, para. 77, 86; *Akdivar v. Turkey*, Judgment (September 16<sup>th</sup> 1996), ECtHR Reports 1996-IV, para. 88; *Yöyler v. Turkey*, Judgment (July 24<sup>th</sup> 2003), ECtHR App. No. 26973/95, para. 79; *Ayder and Others v. Turkey*, Judgment (January 8<sup>th</sup> 2004), ECtHR App. No. 23656/94, para. 119.

<sup>335</sup> *Selcuk and Asker v. Turkey* (1998), p. 18, para. 75. See *Dulas v. Turkey*, Judgment (January 30<sup>th</sup> 2001), ECtHR App. No. 25801/94, p. 11, para. 52.

<sup>336</sup> *Chahal v. United Kingdom*, Judgment (November 15<sup>th</sup> 1996), 22414/93, ECtHR, para. 79.

<sup>337</sup> See HRC, *General Comment No. 20: Article 7* (44<sup>th</sup> session, April 3<sup>rd</sup> 1999) in *General Comments or Recommendations Adopted by United Nations Human Rights Treaty Bodies*, Fourth Edition (2003 RWI), p. 58, para. 5.



to cruel, inhuman or degrading treatment or punishment” in violation of the state obligations under Article 16 CAT.<sup>338</sup> Left on a side is a reported equation of “[o]ther methods of torture...” with “threats of destruction of homes”.<sup>339</sup>

The task to be done is to establish what those “certain instances” may be in general terms, under which the measure may be understood as falling under the scope of the mentioned article(s). ECtHR has repeatedly pointed out that for an act to be considered as falling under the scope of the Article 3 ECHR, as practically identical to the Article 7 ICCPR, the ill-treatment must attain a minimum level of severity, which depends on the circumstances of the situation and is assessed on the grounds of “duration of the treatment, its physical and/or mental effects and, in some cases, the sex, age and state of health of the victim”,<sup>340</sup> with addition of the criteria of the material status, safety concerns in performing and assistance to the families in the aftermath of the demolitions.<sup>341</sup> At this point of a strong and immensely important legal link is established between clearly economic rights to property/housing and the prohibition of inhuman treatment, as a typically civil right.

It has been reported by relevant monitoring instances that “[t]he demolition of houses... has caused untold human suffering to persons unconnected with the present violence”.<sup>342</sup> The emphasis has been placed on details of a highly severe and enduring “psychological effects of house demolitions for both victims and witnesses”, manifested as “dread of the occupation army, diminished concentration, constant weeping and reexperiencing the traumatic event”, especially in respect of women and children, who suffer the phenomenon disproportionately.<sup>343</sup> The psychological shelter clearly seems to be destroyed along with the physical shelter, as parents are reduced to helpless victims along with their children.<sup>344</sup> As emphatically summarized and justly recognized:

The human suffering entailed in the process of destroying a family’s home is incalculable. One’s home is much more than simply a physical structure. It is one’s symbolic center, the site of one’s most intimate personal life and an expression of one’s status. It is a refuge, it is the physical representation of the family, it is home.<sup>345</sup>

In respect of (dis)regard of the duty to ensure safety and welfare of the affected persons<sup>346</sup>, the reporting organizations have amply documented the lack of due care in performing the measure. The disregard for the safety starts with the fact of an extremely short notice for the family to “prepare” itself for the execution of the demolitions and provide itself

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<sup>338</sup> CAT, *Conclusions and Recommendations of the committee against torture: Israel* (unedited version), UN Doc. CAT/C/XXVII/Concl.5, para. 6 (j). See also CAT, *Conclusions and recommendations: Israel*, UN Doc. A/57/44 (September 25<sup>th</sup> 2002), para. 6 (j).

<sup>339</sup> UN Special Committee, UN Doc. A/59/381 (59<sup>th</sup> session, September 23<sup>rd</sup> 2004), p. 10.

<sup>340</sup> *Selcuk and Asker v. Turkey* (1998), p. 19, para. 76; *Bilgin v. Turkey* (2000), p. 24, para. 101; *Dulas v. Turkey* (2001), p. 11, para. 53.

<sup>341</sup> *Selcuk and Asker v. Turkey* (1998), p. 19, paras. 74, 77; *Bilgin v. Turkey* (2000), para. 99.

<sup>342</sup> Human Rights Inquiry Commission, UN Doc. E/CN.4/2001/121 (57<sup>th</sup> Session, March 16<sup>th</sup> 2001), para. 50.

<sup>343</sup> Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, Miloon Kothari, *Addendum*, UN Doc. E/CN.4/2003/5/Add.1 (59<sup>th</sup> Session, June 10<sup>th</sup> 2002), para. 29. See Sandra Jordan, ‘Indifferent to Death: Tragedy of Traumatized Children of the Intifada’, *The Observer*, April 3<sup>rd</sup> 2005.

<sup>344</sup> See e.g. Samir Quota, R.L. Punamäki and E. El Sarraj, ‘House Demolition and Mental Health: Victims and Witnesses’, 6 (3) *Journal of Social Distress and the Homeless* (1997), pp. 203-211, abstracted at:

<http://www.hdip.org/HealthArchives/Psycho-Social-Health/bib10.html#Heading9>, accessed on: 2005-2-15.

<sup>345</sup> Jeff Halper, *Obstacles to Peace – A Re-Fraing of the Palestinian-Israeli Conflict*, Second Edition (2004) as cited in UN CHR Special Rapporteur, John Dugard, UN Doc. E/CN.4/2005/29, (61<sup>st</sup> session, December 7<sup>th</sup> 2004), para 20.

<sup>346</sup> See e.g. *Janimat* case (1997), p. 62.

a proper physical and psychological shelter. It further manifests itself in the inappropriate way of handling the execution of the measure and finally in the (mis)treatment of the families in the aftermath. The *post facto* assistance to the families is provided only by the ICRC (*see supra* text) and never by the state, as any assistance to the affected families by Israel would logically contradict the alleged purpose of the punitive measure.

The obvious ruinous impact of (punitive) house demolitions on personal integrity has been duly acknowledged by both national and international judicial instances. In *e.g.* *Alamarin* case, Israeli High Court of Justice also expressed its acknowledgement that “the use of a destruction order under the said r. 119 *undoubtedly constitutes a severe sanction*, and we must be aware that as a result of using this method of deterrent, suffering and misery may be caused to persons who did not themselves commit any crime [emphasis added]”<sup>347</sup>, though it has persistently restrained itself from precisely legally categorising the end-effect of the sanction. In that respect, ECtHR has authoritatively and explicitly stated the illegality of such an act:

[E]ven if it were the case that the acts in question were carried out without any intention of punishing the applicants, but instead to prevent their homes being used by terrorists or as a discouragement to the others, this would not provide a justification for the ill-treatment... The Court considers that [the demolitions] must have caused the applicant suffering of sufficient severity for the acts of the security forces to be categorised as inhuman treatment...<sup>348</sup>

While degrading treatment can be almost presumed to have been occurring under the said circumstances of punitive demolitions<sup>349</sup>, a far more tempting question arises on the possible link with torture. ECtHR has not specifically identified the punitive demolitions as torture, but the claim of “deliberate inhuman treatment causing very serious and cruel suffering”<sup>350</sup> might not be excluded. HRC’s possibly ambiguously inconsistent (with its general practice) wording of titles of Articles 12 and 7 ICCPR, in a sense of *not excluding* torture<sup>351</sup> might mean an “open door” for proving the necessary link.

### **c) Choice of One’s Residence**

Article 13 UDHR:

*1. Everyone has the right to freedom of movement and residence within the borders of each state.*

Article 12 ICCPR:

*1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.*

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<sup>347</sup> *Alamarin* case (1992), para. 8. *See* in particular the dissenting opinion of Justice Chesnin, p. 9-16. *See also Hamri* case (1982), p. 132.

<sup>348</sup> *Selcuk and Asker v. Turkey* (1998), p. 19, para. 79; *Bilgin v. Turkey* (2000), p. 24, para. 102; *Yöyler v. Turkey* (2003), para. 75.

<sup>349</sup> *See e.g. Labita v. Italy*, Judgment (April 6<sup>th</sup> 2000), ECtHR App. No. 26772/95, para. 120. Degrading treatment is described as the one arising in victims “feeling of fear, anguish and inferiority capable of humiliating and debasing them”. *See also Selcuk and Asker v. Turkey* (1998), p. 19, para. The effects are aggravated in relation with children of the victims. *See e.g.* ‘A Case of Illegal Eviction: An Interview with Salim Shawamreh and Jeff Halper’, 35 (3) *Canadian Dimension*, 00083402 (May/June 2001).

<sup>350</sup> *Aksoy v. Turkey*, Judgment (December 18<sup>th</sup> 1996), ECtHR App. No. 21987/93, para. 63.

<sup>351</sup> *See HRC, Concluding Observations of the Human Rights Committee: Israel* (August 21<sup>st</sup> 2003), para. 16.

...

3. *The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.*

...

Punitive house demolitions, in majority of cases, have the effect of closing forever the possibility for a person/family to continue living in the particular place of residence, as the very site of demolition is closed and confiscated by the IDF acting in the name of Israeli government.

HRC elaborated that the guarantee of free choice of residence as provided in the article contains protection against “all forms of forced internal displacement” and “precludes preventing the entry or *stay* of persons in a defined part of the territory [emphasis added]”.<sup>352</sup> The restrictions of the right may be justified under the argument of being “provided by law”. However, if having in mind the previously asserted critics of the quality of such a law (see *supra* text on Articles 15 and 17 ICCPR), it can be said the criterion has not been met.

Further criterion in §3 of (endangered) national security and public order are equally ruled out, as the terms cannot be equated with the already mentioned background justification of imperative military necessity – national security does not include and cannot be protected by a particular resort to punitive house demolitions. Judge Barak tried to clarify the meaning of the term “reasons of State security” and held that the term was “sufficiently broad to embrace the situations where the danger to the security of Israel or public *did not* ensue from the particular person himself [emphasis added].”<sup>353</sup> The opinion reflects ECtHR understanding of public emergencies.<sup>354</sup> Furthermore, if having in mind the circumstances of particular deprivation of the choice of residence, in terms of the so far established violations of human rights, most notably Article 17 ICCPR, it cannot be inferred that the criteria of “consisten[cy] with other rights” guaranteed by human rights norms is met. Therefore, all relevant requirements of the Article 12 ICCPR that may justify the measure, are not satisfied under the circumstances of punitive house demolitions.

#### **d) Fair Trial guarantees**

Article 11 UDHR:

*1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.*

Article 14 ICCPR:

*1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law...*

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<sup>352</sup> HRC, *General Comment No. 27: Freedom of movement (Art. 12)*, UN Doc. CCPR/C/21/Rev.1/Add.9 (November 2<sup>nd</sup> 1999), para. 7.

<sup>353</sup> *Anon v. Minister of Defence*, HCJ 7048/97, as cited in Emanuel Gross, ‘Human Rights, Terrorism and the Problem of Administrative Detention in Israel: Does a Democracy Have the Right to Hold Terrorists as Bargaining Chips?’, 18 *Ariz. J. Int’l & Comp. L.* (Fall 2001), p. 726.

<sup>354</sup> *See e.g. Lawless v. Ireland*, No. 3, Judgment (July 1<sup>st</sup> 1961), ECtHR App. No. 332/57, *The Law*, para. 28.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: [in summary: to be informed promptly of the nature and cause of the charge against him, to prepare legal defence... to be tried in presence, to examine witnesses]

...

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

...

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

An argument made here purports to establish that the decision-making procedure preceding the execution of the punitive house demolitions violate the guaranteed rights of an alleged offender. The article provides strict *procedural* guarantees to be respected in the process of determination of any criminal charge. Therefore, *conditio sine qua non* for invoking the article in the particular case is whether the concept of “criminal charge” is applicable to the alleged “administrative” nature of the procedure and sanction.

### ***A Prerequisite: Administrative v. Criminal Charge***

It has been acknowledged that the term “criminal charge” is determined by reference to ECtHR’s “*Engel* criteria”, namely by taking into consideration the *domestic classification*, *nature of the offence* charged, the *severity* of the sanction at stake and the *group* to whom the legislation applied.<sup>355</sup> In *Welch* case, ECtHR has established a set of criteria similar to *Engel*, for determining the nature of the penalty following an offence by announcing that:

[T]he starting-point in any assessment of the existence of a penalty is whether the measure in question is imposed following conviction for a “criminal offence”. Other factors that may be taken into account as relevant in this connection are the nature and purpose of the measure in question; its characterisation under national law; the procedures involved in the making and implementation of the measure; and its severity.<sup>356</sup>

The punitive demolitions are *domestically* deemed an *administrative* deterrent measure, thus formally not imposing a criminal charge. However, the domestic determination of the nature of the law and the punishment cannot be left under the interpretative domain of domestic legal system, as it may be abused in the attempt of evading the procedural guarantees otherwise applicable.<sup>357</sup> In the particular case, and having in mind “the autonomy of the concept of ‘criminal’”<sup>358</sup>, it is of greater importance to look into the substantive reality of the DER 119.

The *nature of offences* charged under DER 119 is criminal. If bearing in mind the general categorisation of the Palestinian offences giving rise to punitive demolitions as “terrorist activity”<sup>359</sup>, they are beyond doubt criminal in the core.<sup>360</sup> This label “provides no

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<sup>355</sup> *Engel and others v. Netherlands*, Judgment (June 8<sup>th</sup> 1976), ECtHR App. No. 5100/71, para. 82.

<sup>356</sup> *Welch v. United Kingdom*, Judgment (February 9<sup>th</sup> 1995), ECtHR App. No. 17440/90, para. 28.

<sup>357</sup> *Ovey and White*, *op.cit.*, p. 140.

<sup>358</sup> *Engel and others v. Netherlands* (1976), para. 81.

<sup>359</sup> “The demolition of the houses of *terrorists* sends a message that anyone who participates in *terrorist activity* will pay a price for their actions. The IDF will continue to use all legal means in order to strike at *terrorists*, their dispatchers, and those who assist them. [emphasis added]”. See *supra* text (IDF justification of the demolitions).

more than a starting point”<sup>361</sup>, and the next test is that of the nature of the very measure ensuing the offence.

The characterization of the *nature of the measure*, as “weightier criterion”<sup>362</sup>, in terms of being deterrent or punishment, can be rather controversial. There has certainly not been sufficient jurisprudence by HRC to illuminate the issue of the meaning the term penalty<sup>363</sup>. The ECtHR, by introducing the independent classification of terms or the “autonomous meaning” of the articles on human rights, has reached the same conclusion.<sup>364</sup> The controversy can be especially encountered in the decisions of Israeli High Court of Justice itself, ranging from the officially-supportive, majority assurance that the demolitions are deterrent not punishment, till the opposite, minority view. In that respect, while rejecting argument of the United Kingdom that the order used against Mr. Welch was preventive, rather than punitive, ECtHR assumed the view that “the aims of prevention and reparation are consistent with a punitive purpose and may be seen as constituent elements of the very notion of punishment.”<sup>365</sup> In connection to the previous criterion, if drawing a (bit roundabout) conclusive analogy from *Özlu* case, it can be said that “the general character of the rule and the purpose of the penalty, being both deterrent and punitive, suffice to show that the offence in question was... criminal in nature”<sup>366</sup>, therefore constituting a criminal charge already.<sup>367</sup>

The very degree of *severity* of the punitive demolitions, as the most important criterion, recognized as high by the national and international judicial instances<sup>368</sup>, can be differently marked in concrete situations, based on different circumstances of an offence. The deprivation of a personal living place naturally carries very serious existential consequences for the victim. The financial loss<sup>369</sup>, coupled with the undoubted grave suffering and the psychological crisis it causes in both adults and children, certainly renders the measure highly severe. The Court has even qualified the demolitions as “no different from imprisonment”<sup>370</sup>, which speaks clearly of its criminal character. In this direction, if having in mind empirical data that in 40 per cent of the cases of punitive destruction of houses, no Israelis had been

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<sup>360</sup> The Regulations refer to “any firearm [that] has been illegally discharged, or any bomb... illegally thrown [emphasis added]”, without some further elucidating references, leaving the estimation on the exact nature of the illegal act to the discretion of the commander. Such estimation, under the imprecise wording of DER 119, may encompass indeed non-criminal offences, still the measure undertaken in response is the same. See *infra* text on the principle of legality.

<sup>361</sup> *Engel and others v. Netherlands* (1976), para. 82.

<sup>362</sup> *Weber v. Switzerland*, Judgment (May 22<sup>nd</sup> 1990), ECtHR App. No. 11034/84, para. 32.

<sup>363</sup> Except for the notion that “although the terms of the [ICCPR] are derived from long traditions within many nations, the Committee must now regard them as having an autonomous meaning.” *Van Duzen v. Canada* (50/79), UN Doc. CCPR/C/15/D/50/1979 (April 7th 1982), para. 10.2. In the case, HRC encountered partially the issue through submissions of the parties involved, but did not address them, considering it redundant for the purpose of the particular case. See Joseph, Schultz *et al*, *op.cit.*, pp. 342-344.

<sup>364</sup> Ovey and White, *op.cit.*, pp. 31, 140-141.

<sup>365</sup> *Welch v. United Kingdom* (1995), para. 30.

<sup>366</sup> *Özturk v. Germany*, Judgment (February 21<sup>st</sup> 1984), ECtHR App. No. 8544/79 (1984), para. 53.

<sup>367</sup> For the purpose of determining the criminal character of the procedure it is sufficient to prove *either* that the nature of the offence is criminal, which is undisputable in case of ensuing sanctions under DER 119, or (not “and”) that the penalty has such character. See *e.g.* *Özturk v. Germany* (1984), para. 54; *Engel and others v. Netherlands* (1976), paras. 82-85.

<sup>368</sup> See *e.g.* *Turkman* case (1991); *ACRI* case (1988), para. 7, and the mentioned ECtHR cases against Turkey (see *supra* text on inhuman treatment).

<sup>369</sup> ECtHR has ruled as severe measures administratively imposed fines, that were incomparably lesser in amount, but could have been exchanged for prison. See generally *e.g.* *Schmautzer v. Austria*, Judgment (October 23<sup>rd</sup> 1995), ECtHR App. No. 15523/89. But see *e.g.* *Dagalis* case (1985), excerpted *supra* (text on collective punishment), *i.e.* the positive comparison between the punitive demolitions and imprisonment.

<sup>370</sup> See *Dagalis* case (1985).

killed in the offences giving rise to them, while 32 per cent of the offenders have been already sentenced to long prison sentences, it can be argued that the demolitions appear as a draconian (also duplicated) response in respect to the convicted offenders and their families. If bearing in mind that 47 per cent of the offenders are already dead, the measure administered over presumably *innocent* members cannot be justified under any circumstances.

The *group* to whom legislation is applied is yet another criterion for estimating the nature of an individual's charge. ECtHR came to the conclusion that as an article of certain national regulations under the court's scrutiny, providing for only nominally disciplinary sanction<sup>371</sup>, "*potentially affects the whole population*, the offence it defines, and to which it attaches a punitive sanction, is a 'criminal'"<sup>372</sup>. DER 119 is formulated in a manner to apply to virtually all inhabitants of not just a house, but those of much bigger collectives, *i.e.* "any house, structure or land", therefore definitely comes under the label of providing a criminal sanction. The fact that an administrative organ decides upon the measure should not determine the nature of the sanction, but *vice versa*.<sup>373</sup> Hence, treating punitive house demolitions different than a criminal punishment either clearly defies logic or is motivated by ulterior interests outside the scope of the official justifications and subsequent purely legal analysis.

### ***The Substance of Unfair Trial***

The sanction of house demolitions, as provided by DER 119, is prescribed by an administrative decree/order, after a closed/non-public contemplation of a military commander. HRC notes that the existence of the decisive bodies other than the required category of tribunals is not prohibited, but should be very exceptional, as they "do not afford the strict guarantees of the proper administration of justice in accordance with the requirements of article 14 which are essential for the effective protection of human rights".<sup>374</sup> The prime observation, in compliance with the Proclamation No. 2 (Article 3, see *supra* historical background) is that the *Military* Commander is the principal legislator and the principal administrator on the OPT, while apparently devoid of the (objective) quality of a court of a "competent, independent and impartial" tribunal<sup>375</sup>, as requested by § 1.<sup>376</sup> For this reason, it is rather useless to argue the related infringement of equal treatment in front of such "tribunal", as included in the paragraph, in a sense of a *de facto* prevention of access to it by way of non existence of a proper notice.

The presumption of innocence, stemming from §2 requests the guilt to be "proved according to law". The expected (for this kind of criminal sanction) stringer proof-standard is, in DER 119, virtually overridden by the feeble requirement of mere suspicion ("he has reason

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<sup>371</sup> The critical article reads that "[t]he parties, their counsel, employees of their counsel and experts and witnesses shall be bound to maintain the confidentiality of an investigation, on pain of a fine of up to five hundred francs..." *Weber v. Switzerland* (1990), para. 20.

<sup>372</sup> *Weber v. Switzerland* (1990), para. 33.

<sup>373</sup> Kretzmer, *op.cit.*, pp. 152-153.

<sup>374</sup> HRC, *General Comment No. 13: Equality Before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law* (Art. 14) (21<sup>st</sup> session, April 13<sup>th</sup> 1984), para. 4.

<sup>375</sup> This right to be "tried by an independent and impartial tribunal" is described as "an absolute right that may suffer no exception". *Gonzalez del Rio v. Peru* (263/87), UN Doc. CCPR/C/46/D/263/1987 (October 10<sup>th</sup> 1992), para. 5.2.

<sup>376</sup> Even a mere inclusion of a military legal officer on a tribunal, in the light of (similar or less serious than DER 119 based charges) has been identified by ECtHR as a violation of fair trial in a sense of absence of an independent and impartial tribunal. *See e.g. Incal v. Turkey*, Judgement (June 9<sup>th</sup> 1998), ECtHR App. No. 22678/93.

to believe”) or satisfaction (“of which he is satisfied”) of the military commander. Suspicion is not a proof, but only an *indication*, an introduction to collection of proofs and the subsequent procedural determination of the innocence/guilt. There is absolutely no requirement of a previous criminal conviction by a competent court before the military commanders actually pursue their power of authorizing demolition, which is confirmed by the Court in the *Hamri* case:

As is known, a military commander does not require the conviction of a judge and he himself does not constitute a court. From his point of view, the question is whether a reasonable person would regard the material before him as being of sufficient demonstrative value.<sup>377</sup>

The argument can indeed be made that the commanders do respect the burden of proof *according to law* (i.e. DER 119), but the essence of the discussed Article 14, as “fundamental to the protection of human rights”, is fixating the burden of proof, on the side of the prosecution, to the level of “beyond reasonable doubt”, with the guaranteed *in dubio pro reo* option.<sup>378</sup> As IDF asserts, the punitive demolition “sends a message that anyone who participates in terrorist activity will pay a price for their actions”. Leaving the perception of such participation in the “terrorist activity” to the mere suspicion of a military commander, without the due process of challenging the suspicion, surely violates the principle of presumption of innocence.

As there is a logical “domino effect” when determining the incompatibilities with the initial paragraphs of this article under the general circumstances of the topical case, criteria set in §3 have equally not been satisfied and do not require extensive elaboration. It would be rather cynical to notice that the right to be “promptly informed”<sup>379</sup> is perhaps the only subparagraph that may have been in majority (*sic*) of cases respected, *if* (and only if) taken out of the context of the whole §3, Article 14 and, primarily, humanity. The irony is in the unfortunate fact that the information on the reasons behind the measure is given immediately prior to the demolition, but closely after the commander’s *final* decision. Furthermore, the exercise of the rights to adequate time and facilities for the proper, optionally professional, preparation of defence and for examining the possible witnesses are, therefore, equally precluded.

Regarding the requirement of the §5, the only glimpse of an appeal is the possibility of returning the matter back to reconsideration to the military commander. Although the phrase “according to law” would presume an (formally and substantially defective) appeal as provided by the Israeli domestic law (DER), the proper reading of the phrase must be different. In *Montejo v. Columbia*, HRC elucidated that the offences considered “serious enough”, as those followed by imprisonment, imperatively require availability of a review by a higher tribunal.<sup>380</sup> The military commander, with the power of inflicting a highly severe punishment, is neither “higher” nor a “tribunal”, therefore appeal, as requested by §5, does

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<sup>377</sup> *Hamri* case (1982), pp. 131-132.

<sup>378</sup> HRC, *General Comment No. 13* (1984), para. 7. The principle of offering a proof beyond reasonable doubt is one of the central features of Israeli criminal proceedings. See e.g. Kenneth Mann, ‘Criminal Procedure’ in Shapira and DeWitt-Arar (Eds.), *op.cit.*, p. 284.

<sup>379</sup> Note that HRC prescribed that “the right to be informed of the charge ‘promptly’ requires that information is given in the manner described *as soon as the charge is first made by a competent authority* [emphasis added]”. HRC, *General Comment No. 13* (1984), para. 8.

<sup>380</sup> *Salgar de Montejo v. Colombia* (64/79), UN Doc. CCPR/C/15/D/64/1979 (March 24<sup>th</sup> 1982), para. 10.4. But, “the guarantee is not confined only to the most serious offences”. HRC, *General Comment No. 13* (1984), para. 17.

not exist, *i.e.* the “law” did not provide for any other competent authority for exercising the review over the commander’s orders. The only *de facto* possibility of review lies on the Israeli Supreme Court, sitting as a High Court of Justice. However, the resort to the Court has been impeded by the mentioned short (5 minutes on) notice, which practically precludes a person to use the “privilege” provided by the Israeli judiciary. Aside to the lack of precise normative incorporation of the possibility, once being petitioned, the Court has never engaged itself into the “full evaluation of the evidence”<sup>381</sup>, while enthroneing indisputableness of military assertions<sup>382</sup>, thus fully “falls short of the requirements of the article 14, paragraph 5”<sup>383</sup>.

In respect to §7, as already mentioned, 32 per cent of all identified offenders have been convicted or waiting for the trial, with lengthy prison sentences ahead. As the ensuing demolitions of their houses carry the qualification of a serious, criminal *punishment* by a state authority, the practice violates the *ne bis in idem* rule, *i.e.* the prohibition of double adjudication in the same matter as described in the paragraph.

Practically all the principles of fair trial have been gravely infringed throughout the procedure of particular authorization of punitive house demolitions. Identification of the infringement has not been a matter of theoretical constructions and roundabout analogies over subtle constitutive sub-issues of fair trial, but rather a plain recognition of manifest and legally unjustified inconsistencies of the practice with the extant rules of Article 14 ICCPR.

### e) Principle of Legality

Article 11 (2) UDHR and Article 15 ICCPR:

*No one shall be held guilty of any penal [ICCPR: “criminal”] offence on account of any act or omission which did not constitute a penal [criminal] offence, under national or international law, at the time when it was committed....*

The articles implement Feuerbach’s prime, non-derogable tenet of criminal law and justice, *i.e.* prohibition of punishment for an offence without a pre-existing rule of law regulating both the offence and the punishment<sup>384</sup>. DER 119, as an existing national law, enables the resort to a rather draconic measure of punitive house demolitions under the title of an *administrative* act and in, intrinsically, a highly ambiguous manner. The apparent existence of the law providing for the measure satisfies *forma*, but raises the objection of satisfaction of *materia*, in respect of the principle of legality.

In the *supra* discussion on Article 14 ICCPR, it has been established that the offence and the punishment, as provided by DER 119, substantively belong to the sphere of criminal law. The fact that the offences and the severe punitive practice are formally authorised by an administrative rather than criminal act and effectuated in administrative instead of criminal proceedings, points to the conclusion that the scope of the existent law is extended over the allowable limits, in clear violation of the principle of legality, as enshrined in Article 15 ICCPR.

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<sup>381</sup> *Domukovsky et al. v. Georgia* (627/95), UN Doc. CCPR/C/62/D/627/1995 (May 29<sup>th</sup> 1998), para. 18.11. *See infra* text on judicial review/effective remedy.

<sup>382</sup> *See Hamamreh case* (1982), p. 128.

<sup>383</sup> *Domukovsky case* (1998), para. 18.11. *See also Reid v. Jamaica* (355/89), UN Doc. CCPR/C/51/D/355/1989 (July 20<sup>th</sup> 1994), para. 14.3.

<sup>384</sup> *Nullum crimen, nulla poena sine lege.*



Furthermore, even if one would, by all means of, conceivably, *mala fide* interpretation, still persist on the idea of DER 119 as a proper base frame for the punitive practice, another substantial argument can be raised, regarding the inner ambiguity of DER 119. The implied objective element of the offence punishable under DER 119 comprises: illegal discharge of a firearm, illegal throwing, detonating, exploding or otherwise discharging a bomb, grenade or explosive or incendiary article. The required subjective element of the offence comprises the classical arsenal of the criminal intent: commission, attempt to commit, abetting the commission or complicity. The criteria of estimating the existence of subjective element is the Commander's "reason to believe" or personal satisfaction under mere suspicion that an offence is caused by a person. This particular constituent/representative part of the DER 119 is virtually the main issue of concern insofar as, under strikingly low burden of proof on the side of the Military Commander, that virtually amounts to the reversed one – to the detriment of an alleged offender, the scopes of both the offences and the discretion are overbroad/indefinite. DER 119, itself, does not give more insight into the meaning/importance of the very activity of *e.g.* illegal discharge of a firearm, illegal throwing of a bomb etc. The question of what the "illegal" action stands for can be answered only if connected to a commander's personal understanding of it<sup>385</sup>, as DER 119 puts an emphasis on a commander's acknowledgment/understanding of a possibility for such an event to have happened. Such a wide discretion allows punishment for the exercise of objectively non-offensive acts and/or enables punishment of totally innocent/uninvolved persons, as the category of the people covered by the regulation is also neither definite nor foreseeable.

It has been established by ECtHR in *Silver* case that "a law which confers a discretion must indicate the scope of that discretion" otherwise "a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct", as a person must be able "to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail".<sup>386</sup> Similarly, HRC provided the rule that arbitrariness must be broadly interpreted to "include the elements of inappropriateness, injustice, and lack of predictability".<sup>387</sup> In the respect of the requirement of sufficient precision, HRC has expressed concern in concrete language about:

[T]he vagueness of definitions in Israeli counter-terrorism legislation and regulations which, although their application is subject to judicial review, appear to run counter to the principle of legality in several aspects owing to the ambiguous wording of the provisions and the use of several evidentiary presumptions to the detriment of the defendant. This has adverse consequences on the rights protected under article 15 of the Covenant, which is non-derogable under article 4, paragraph 2, of the Covenant.<sup>388</sup>

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<sup>385</sup> Suppose a military commander learns that a person discharged a firearm on a wedding celebration. The act can be deemed illegal, but "illegal" according to what law? If referring to Part III of DER, under "Military Court Offences", the objective requirement for being sentenced for the breach of law is fairly precisely defined, while the subjective requirement includes "*intention* to cause death or injury to any person or damage to any property [emphasis added]", which is determined by the Court under the provided procedure. Notwithstanding the 1970 Military Order No. 378, comprising, *inter alia*, stone throwing as a security (!) offence, the determination of intention lacks in DER 119 and the estimation of the particularly "illegal" nature of the offence, from the subjective aspect, lies solely on the military commander.

<sup>386</sup> *Silver and others v. The United Kingdom*, Judgment (March 25<sup>th</sup> 1983), ECtHR App. No. 5947/72, para. 88. It is generally accepted that "[n]o one will be charged with, tried for or convicted of any criminal offence unless the offence is provided for by a law which defines the elements of the offence with clarity and precision." Conference on Security and Co-Operation in Europe (CSCE): "Document of the Copenhagen Meeting of the Conference on the Human Dimension", June 29<sup>th</sup> 1990, para. 10, 29 *I.L.M.*, p. 1309, para. 5.18.

<sup>387</sup> *Van Alphen v. The Netherlands* (305/88), para. 5.8.

<sup>388</sup> HRC, *Concluding Observations of the Human Rights Committee: Israel* (August 21<sup>st</sup> 2003), para. 14.

Due to the widest possible discretionary power in hands of a military commander and the low burden of proof, a very wide range of behaviours can trigger the response of punitive demolitions, which, as amply proved by practice may easily include relatively (in comparison to e.g. murder) benign offensive acts or in the worst case, an uninvolved person on the basis of family connection and a feeble “reason to believe” in the connection with the “offence”. Hence, the *Silver* case criteria of “sufficient precision” as required for a “law” to be the Law cannot be considered fulfilled.

In sum, the absence of criminal legislation covering precisely the offences and subsequent proportional punishment, with additionally a virtually infinite discretion power conferred for a military commander, DER being “contrary to the rule of law in its substantive meaning”<sup>389</sup>, cannot be said to satisfy the criteria of a (quality) law in existence prior to the commission of a crime. Therefore, a violation of the Article 15 ICCPR has been presently argued.

## **f) Rights to Property and Housing**

Article 17 UDHR:

1. *Everyone has the right to own property alone as well as in association with others.*
2. *No one shall be arbitrarily deprived of his property.*

Article 25 UDHR:

*Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing...*

Article 11 (1) ICESCR:

*The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.*

If speaking in terms of human rights, the right to property certainly may be the first association to punitive house demolitions. This right, being one of the most controversial rights granted under international human rights system, is omitted from ICCPR and ICESCR. However, this principal economic right, irrespective of the inner, self-crippling political charge<sup>390</sup>, carries a significant weight in other, regional human rights instruments.<sup>391</sup> Within the ECHR system, it has been provided in the Protocol No. 1, granting “peaceful enjoyment

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<sup>389</sup> Tel Aviv Symposium, p. 385.

<sup>390</sup> The relative disregard toward the right (in terms of the lack of explicit inclusion) resulted mostly from the clash of ideological/political/economic interest between the West and the East at the time of drafting the Covenants. See Catarina Krause and Gudmundur Alfredsson, ‘Article 17’ in Gudmundur Alfredsson and Asbjorn Eide (Eds.), *The Universal Declaration of Human Rights* (1999 Kluwer Law International, The Hague), p. 361-365.

<sup>391</sup> See Krause and Alfredsson, *ibid.*, p. 359.

of ... possessions”, including substantially the right of property<sup>392</sup> and the prohibition of property deprivation, with exception of compelling interests dictating the legitimate and lawful deprivation.<sup>393</sup> Throughout the needed deprivation of property based on an imperative public interest, a principle to be respected, among the rest, is the proportionality, otherwise, “if the person has... to bear ‘an individual and excessive burden’”, “the requisite balance will not be found”.<sup>394</sup> Amply documented and elaborated arbitrary and disproportional deprivation of property in the OPT, in the form of punitive house demolition, clearly violate the said prohibition. The most blatant violation is displayed in respect of the affected uninvolved family members, who may naturally own the property “alone as well in association with others”, *i.e.* with the offender and who also carry individual rights to inherit. With its undoubted importance of a universal human right<sup>395</sup>, the right to property serves as a logical supplement for exercising a range of social rights, the right to housing, as described in Article 11 ICESCR, being one of them.

ESC has broadly identified the existence of violation of the right to housing when a State fails to address her “minimum core obligation” in respect to the guaranteed right, *i.e.* when “a State party in which any significant number of individuals is deprived of... basic shelter and housing... is, *prima facie*, failing to discharge its obligations under the Covenant.”<sup>396</sup> The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (hereinafter: Maastricht Guidelines), which carry “considerable weight” irrespective of not being formally binding<sup>397</sup>, also confirm this view.<sup>398</sup> In this respect, UN CHR Rapporteur (Dugard) and the Commission of Inquiry pointed out that the “demolition of houses and destruction of properties... constitute a violation of the right to an adequate standard of living, including the right to adequate housing, under article 11, paragraph 1, of [ICCPR]”<sup>399</sup>. If momentarily focusing on the available particular statistics on frequency of punitive house demolitions, including the average number of people per one house<sup>400</sup>, the number of deprived individuals cannot certainly be considered insignificant.

A constituent substantive legal element of the right to housing in question are, *inter alia*, the security of tenure, as the protection from forced eviction from dwellings, and anti-discrimination principle.<sup>401</sup> The very term “forced evictions” is used to describe the “permanent or temporary removal against their will of individuals, families and/or communities from the home and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection”. The prerequisite is that the evictions are *not* “carried out by force in accordance with the law and in conformity with the provisions

<sup>392</sup> *Marckx v. Belgium*, Judgment (June 13<sup>th</sup> 1979), ECtHR App. No. 6833/74, para. 63.

<sup>393</sup> Article 1 (1) of the ECHR Protocol No. 1: “... [E]xcept in the public interest and subject to conditions provided for by law and by general principles of international law”.

<sup>394</sup> *James et al. v. The United Kingdom* (1986), para. 50.

<sup>395</sup> See Krause and Alfredsson, *op.cit.*, p. 365.

<sup>396</sup> ESC, *General Comment 3: The Nature of States Parties Obligations (Art. 2, par. 1)* (5<sup>th</sup> session, December 14<sup>th</sup> 1990), para. 10.

<sup>397</sup> The guidelines were adopted on January 26<sup>th</sup> 1997 by a group of 30 legal experts, under the auspice of ICJur. Available at: <http://www1.umn.edu/humanrts/instreet/Maastrichtguidelines.html>, accessed on 2005-04-01. See Asbjorn Eide and Wenche Barth Eide, ‘Article 25’ in Alfredsson and Eide (Eds.), *op.cit.*, p. 537.

<sup>398</sup> Maastricht Guidelines, para. 9.

<sup>399</sup> See UN CHR Special Rapporteur, John Dugard, UN doc. E/CN.4/2002/32, (58<sup>th</sup> Session, March 6<sup>th</sup> 2002) and Human Rights Inquiry Commission, UN doc. E/CN.4/2001/121 (57<sup>th</sup> Session, March 16<sup>th</sup> 2001), para. 94.

<sup>400</sup> See Playfair, *op.cit.*, p. 14.

<sup>401</sup> ESC, *General Comment 4: The Right to Adequate Housing (Art. 11 (1))* (6<sup>th</sup> session, December 13<sup>th</sup> 1991), para. 8 (a). See Scott Leckie, ‘The Human Right to Adequate Housing’ in Asbjorn Eide *et al.* (Eds.), *Economic, Social and Cultural Rights: A Textbook*, Second Edition (2001 Kluwer Law International, The Hague), p. 150.

of the International Human Rights Covenants”.<sup>402</sup> While the punitive measure has been undertaken pursuant to DER 119, as the (questionably) existing law, its incompatibility with, primarily, ICCPR has been manifest. ESC has established a strong causal connection between forced evictions and Article 17 ICCPR, when noticing that the practice “may also result in violations of civil and political rights, such as... the right to non-interference with privacy, family and home and the right to the peaceful enjoyment of possessions.”<sup>403</sup> ESC also brought into connection “[f]orced evictions and house demolitions as a punitive measure” and concluded that they “are also inconsistent with the norms of the Covenant”, while taking note of the “obligations enshrined within the [GC IV and the Protocols] which relate to prohibitions on the displacement of the civilian population and the destruction of private property as these relate to the practice of forced evictions.”<sup>404</sup>

The Maastricht Guidelines further construe the category of “violations through acts of commission” as to include “[t]he active denial of such rights to particular individuals or groups, whether through legislated or *enforced* discrimination [emphasis added]”<sup>405</sup>, while including into the “violations through acts of omissions”, “[t]he failure to reform or repeal legislation which is manifestly inconsistent with an obligation of the Covenant”<sup>406</sup>. As established *infra*, punitive house demolitions do constitute a violation of the general prohibition of discrimination. Additionally, the state legislator (the Knesset) has not carried out the due obligation of repelling DER 119<sup>407</sup>, notwithstanding the two failed attempts in 50-ies and 60-ies, thus preserving a highly discriminatory practice of forced eviction.

Furthermore, “[w]henver an inhabited dwelling is either demolished or its inhabitants evicted, the government is under an obligation to ensure that adequate alternative housing is provided. In this context, ‘adequacy’ requires relocation within a reasonable distance from the original site, and in a setting which has access to essential services such as water, electricity...” while those persons who live in conditions that threaten their lives and health should, to the maximum of available resources, be adequately rehoused.<sup>408</sup> Such alternative housing in the aftermath of punitive demolitions in the OPT is boiled down to ICRC-provided tents, as the provisory “solution” till the families find any better solutions by/for themselves. The distorted logic of the official justifications and legal ground of the practice, clearly conflict with the pre-imposed obligations of the state to provide for alternative housing.<sup>409</sup> If the deterrence effect is the highest priority, while bearing in mind the rest of the *e.g. Dagalís* judgment rationale, there would be no point in demolishing a house after an offence

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<sup>402</sup> ESC, *General Comment 7: Forced evictions, and the right to adequate housing*, UN Doc. E/1998/22 (16<sup>th</sup> session, 1997), HRI/GEN/1Rev.7, p. 47, para. 3.

<sup>403</sup> *Ibid.*, p. 47, para. 4.

<sup>404</sup> *Ibid.*, p. 48, para. 13.

<sup>405</sup> Maastricht Guidelines, para. 14 (b).

<sup>406</sup> *Ibid.*, para. 15 (b).

<sup>407</sup> There have been claims that certain other parts of DER (regarding *e.g.* capital punishment) have been reformed, but the changes do not concern any aspect of punitive demolitions authorization. *See* Tel Aviv Symposium, p. 384.

<sup>408</sup> ESC, *Concluding Observations: Dominican Republic*, UN doc. E/C.12/1994/20 (December 19<sup>th</sup> 1994), para. 11.

<sup>409</sup> Having in mind that the housing right may be, under certain circumstances, inextricably connected to other social-economic rights, *e.g.* the right to employment, a reference can be made to the possible parallel violation of Israel’s obligation under Article 39 GC IV. Namely, “where a Party to the conflict applies to a protected person *methods of control which result in his being unable to support himself*, and especially if such a person is *prevented for reasons of security* from finding paid employment on reasonable conditions, the said party shall ensure his support and that of his dependents. [emphasis added]”.

committed, if an alternative and adequate (*sic*) housing would be provided for the families of the offenders.

In that direction, “the practice of forced evictions, without consultation, compensation, or adequate resettlement, is inconsistent with the obligation to respect and ensure the rights to adequate housing.”<sup>410</sup> If punitive house demolition in its description and consequences beyond doubt fit the defining frame of forced eviction and if “forced evictions are *prima facie* incompatible with the requirements of the Covenant”<sup>411</sup>, the demolitions are to be regarded as a clear violation of Article 11 ICESCR.

## **g) Prohibition of Discrimination**

Article 26 ICCPR:

*All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

Article 2 (1) ICCPR:

*Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

The fact that the punitive demolitions have been applied only in the case of a Palestinian offender<sup>412</sup>, naturally triggers the question of a possible violation of the prohibition of discrimination, as probably the most fundamental of all human rights guarantees. Such prohibition, for the purpose presented here, is contained in the cited general Article 2 (1) and the autonomous Article 26.<sup>413</sup> According to HRC, “article 26 does not merely duplicate the guarantee already provided for in article 2, but provides in itself an autonomous right” as, unlike Article 2, it is “not limited to those rights which are provided for in the Covenant”, but “prohibits discrimination in law or in fact in any field regulated and protected by public authorities”.<sup>414</sup> This provides for anti-discrimination protection of all the aforementioned rights in connection to punitive demolitions, including also the socio-economic rights to property and housing, irrespective of the lack of its explicit inclusion in ICCPR.<sup>415</sup>

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<sup>410</sup> ESC, *Concluding Observations: Kenya*, UN Doc. E/C.12/1993/19, p. 27. See Nihal Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence* (2002 Cambridge University Press), p. 878.

<sup>411</sup> ESC, *General Comment 4*, para. 18.

<sup>412</sup> Note that DER 119 is applicable to both the OPT and Israel.

<sup>413</sup> The right to property and the right to housing in connection to prohibition of discrimination are further included in Article 5 (d) (vi) and (e) (iii) CERD, respectively, and Articles 15 (2) and 16 (1) (h) CEDAW. See Krause and Alfredsson, *op.cit.*, p. 372.

<sup>414</sup> HRC, *General Comment No. 18: Non-discrimination* (37<sup>th</sup> session, November 10<sup>th</sup> 1989), para. 12. For insight into cases confirming overall protection of socio-economic rights by Article 26 ICCPR, see e.g. Joseph, Schultz *et al*, *op.cit.*, p. 525.

<sup>415</sup> A clear-cut case in respect of protection of property in connection to prohibition of discrimination is *Avellanal v. Peru* (202/86), UN Doc. CCPR/C/34/D/202/1986 (October 31<sup>st</sup> 1988).

ICJ has concluded that race-based distinctions “which constitute a denial of fundamental human rights” are a “flagrant violation of the purposes and principles of the [UN] Charter”<sup>416</sup> and that “the norm of non-discrimination or non-separation on the basis of race has become a rule of customary international law.”<sup>417</sup> Equality has been deemed by the High Court of Justice as the<sup>418</sup>, “the beginning of beginnings”<sup>419</sup> of the state of Israel. It has been asserted that “the rule whereby no discrimination may be practiced on grounds of... nationality... is a constitutional basic principle, which is integrated and interwoven into our basic legal concepts and constitutes an inseparable part thereof”<sup>420</sup>.

However, the practice has shown an unfortunate high propensity of the Israeli official apparatus for differentiating between the Palestinian and Jewish offenders who are facing the measure of punitive house demolition. Not once has the measure been applied against a Jewish offender. Exemplary cases of abstention from punitive demolition of (Jewish) homes of Baruch Goldstein (killed 29 Palestinian worshipers at the Cave of Patriarch/Ibrahimi Mosque in Hebron, 1994), Shahar Dvir Zeliger (member of Bat Ayin terror cell that killed 8 Palestinians in shooting attacks) or Yigal Amir (killed Israeli Prime Minister, Yitzak Rabin, 1995) *versus* the mentioned statistics on punished Palestinian offenders and their families, have sufficiently dug the pitch of unnatural (relative) disproportion, as the evidentiary ground for calling upon discrimination defined in the topical articles.

While duly taking into account the general estimation of ECtHR that it did *not* “consider that statistics can in *themselves* disclose a [discriminatory practice] [emphasis added]”<sup>421</sup>, rather specific circumstances of the practice and Israeli official stand-points on the related issues have clearly supported the conclusion of extant and pending discrimination. The Court accepted that “[w]here a general policy or measure has disproportionately prejudicial effects on a particular group [emphasis added]”, this may be discriminatory even though the rule is not specifically aimed/directed at that group.<sup>422</sup> DER 119 certainly does not explicitly, by words, target only Palestinian population, thus ruling out direct discrimination. But,

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<sup>416</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970-1971)*, ICJ Advisory Opinion (June 21<sup>st</sup> 1971), para. 132, Heinze and Fitzmaurice (Eds.), *op.cit.*, p. 401, para. 132.

<sup>417</sup> *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)* (1960-1966), Judgment (July 18<sup>th</sup> 1966), Second Phase, 1966 ICJ 6, 293 (dissenting opinion of Justice Tanaka).

<sup>418</sup> Proclamation of Independence provides the guarantee of “complete equality of social and political rights” to all citizens.

<sup>419</sup> Justice Cheshin in *The Union of Local Authorities v. The Knesset*, H CJ 7111/95, 50 (3) P.D. 485, 501, as cited in *Kaadan v. State of Israel* (2000), H CJ 6698/95, known as *The Katzir Case*, translated in XII *Pal. YB. Int'l L.* (2002/2003), p. 299, para. 21.

<sup>420</sup> *Burkan v. The Minister of Finance*, H CJ 114/78, 32 (2) P.D. 800, 806, as cited in *Kaadan* case, p. 301, para. 24. See the Proclamation of Independence providing for insurance of “complete equality of social and political rights” to all citizens. However, one should have in mind the official self-definition of Israel as a “Jewish state”, which *a priori* places a general question mark over the argument of *de jure* and *de facto* equality. Amendment No. 9 to the Article 7A of the *Basic Law: The Knesset* prohibits *e.g.* the participation in elections of political parties that in their “aims or actions, expressly or by implication” point to, *inter alia*, “negation of the existence of the State of Israel as the *State of the Jewish people* [emphasis added]”. Available at the official web-page of the Parliament of Israel at: [http://www.knesset.gov.il/laws/special/eng/basic2\\_eng.htm](http://www.knesset.gov.il/laws/special/eng/basic2_eng.htm), accessed on 2005-03-24.

<sup>421</sup> In *McShane* case, the applicant alleged “disproportionately low number of prosecutions and convictions” in comparison to the “large numbers of killings of [*inter alia*] Catholics” which indicated “that the security forces use lethal force against civilians... in a highly discriminatory fashion”. See generally *McShane v. United Kingdom*, Judgment (May 28<sup>th</sup> 2002), ECtHR App. No. 43290/98, para. 135. However, the overall circumstances of the particular case do not correspond the circumstances in the OPT, hence the additional emphasis here on the inadequacy of sole statistics’ self-sufficiency.

<sup>422</sup> *McShane v. United Kingdom* (2002), para. 135.

indirect discrimination, authorized by the law (DER 119) is equally treated.<sup>423</sup> Similarly to ECtHR, HRC asserts that:

‘[D]iscrimination’... should be understood to imply any distinction... on any ground... which has the *purpose or effect* of nullifying and impairing the recognition enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.<sup>424</sup>

Punitive demolitions do display the effect and the (real) purpose of negation of the guaranteed rights of Palestinians. The alternative ground of “purpose” of the distinction may seem to involve requirement of determination on the discriminatory intent, but such qualification is redundant.<sup>425</sup> If applying the ECtHR criteria of similarity of the situations of an affected victim (Palestinian nationality) and privileged persons (Jewish nationality)<sup>426</sup>, the violation is certain. The High Court of Justice has palpably nurtured significant inconsistencies in its decisions over punitive demolitions of Palestinian and Jewish houses, to the detriment of the former.<sup>427</sup> In this direction, with regard to the positive obligation to “ensure” equal treatment, one should, however, keep in mind an apparent Israeli official selective understanding of a threat for the national security and public order, insofar as the Jewish Terrorist groups (Gush Emunim Underground, Terror against Terror etc.) have not been considered a threat for the IDF as of 1988.<sup>428</sup> More probable than not, the groups are presumed not to be a threat to the *Jewish* population of Israel and the OPT. The official distinctive treatment of the Jewish terrorism can be observed from the cases of conscious choice of favourable laws than the DER 119 by the state prosecution system, in trying members of the Jewish terrorist organizations, conspicuously *contra* to the treatment of Palestinian offenders in identical situations.<sup>429</sup> On the other hand, *any* connection, direct (by personal participation)<sup>430</sup> or indirect (by a family member’s participation), in the Palestinian terrorist groups (Al-Aqsa, Hamas, Islamic Jihad, Tanzim etc.), (not only) under the circumstances provided by DER 119, causes highly severe repercussions. It has been authoritatively reported that the “violence against and harassment of Palestinian residents” (hence including/not excluding the offences punishable under DER 119) often happens “with the tacit consent of the IDF”<sup>431</sup>.

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<sup>423</sup> ECtHR has encountered the issue of discrimination in relation to punitively demolished houses in a series of mentioned cases against Turkey (*see supra* text on interference with home, inhuman treatment), but it did not establish the violation of the Article 14 ECHR (as equivalent to Article 26 ICCPR) on the ground that the particular claims were “unsubstantiated”.

<sup>424</sup> HRC, *General Comment No. 18* (1989), para. 18.

<sup>425</sup> The proof of the intent, for the purpose of determining the violation, is not requested, as “an act which is not politically motivated may still contravene article 26 if its effects are discriminatory”. *Simunek et al. v. Czech Republic* (516/92), UN Doc. CCPR/C/54/D/516/1992 (July 31<sup>st</sup> 1995), para. 11.7.

<sup>426</sup> *Fredin v. Sweden*, Judgment (February 18<sup>th</sup> 1991), ECtHR App. No. 12033/86, A192, para. 60.

<sup>427</sup> *See* UN Special Committee, UN Doc. A/50/170 (50<sup>th</sup> session, May 2<sup>nd</sup> 1995), para. 61.

<sup>428</sup> Federal Research Division, Library of Congress, *A Country Study: Israel* (1988), available at: <http://lcweb2.loc.gov/frd/cs/iltoc.html>, accessed on 2005-02-14.

<sup>429</sup> In the aftermath of a series of incidents against Palestinians, in 1984, a group of Israeli Jews, members of the Jewish Underground, was arrested and were subjected to trials by the Israeli judiciary. The trial reflected a highly favourable treatment of the defendants by both the prosecution, in terms of the prosecutor’s conscious choice of *e.g.* leniently punitive 1948 Prevention of Terrorism Ordinance, not the draconian 1945 DER, and the court, in terms of subsequent derisory low sentences with accompanying laudatory reasoning. On the other hand, Palestinians have received far detrimental treatment, proving the existence of a “dual system of justice” within Israel. *See* Lea Tsemel, ‘Double Standard of Justice in Israel: The Case of the Jewish Terror Organization’, II *Pal. YB. Int’l L.* (1985), pp. 37-68.

<sup>430</sup> *See* the Court’s opinion in *Bullut v. the Chief Military Prosecutor*, as cited in Pach, *op.cit.*, p. 235.

<sup>431</sup> UN HCHR, UN Doc. E/CN.4/2001/114 (November 29<sup>th</sup> 2000), para. 47; UN Special Committee, UN Doc. A/49/172 (49<sup>th</sup> session, June 7<sup>th</sup> 1994), para. 37.



With implied reference to punitive house demolitions, it has been acknowledged that “[w]hereas a Palestinian who kills an Israeli is punished to the full extent of the law, and sometimes his family as well, it is extremely likely that an Israeli who kills a Palestinian will not be punished or will receive only a light sentence.”<sup>432</sup> Once the case reaches the Court, the practice shows that the legal treatment of the Jewish nationals, who had the prior knowledge of the offences equally punishable under DER 119, has been distinctive in terms of a very high burden of proof on the side of the state and the so far absolute lack of demolitions of their houses as the independent outcome.<sup>433</sup> The presented facts already manifestly invoke responsibility of the state for the unchallenged practice of (qualified) discrimination on the basis of race/nationality, under Article 26 ICCPR. In respect of the failed protection and Article 2 (1), HRC, within the scope of own mandate, explicitly framed that:

[T]he demolition of property and houses of families some of whose members were or are suspected of involvement in terrorist activities or suicide bombings contravenes the obligation of the State party to *ensure without discrimination* the right not to be subjected to arbitrary interference with one's home (art. 17), freedom to choose one's residence (art. 12), equality of all persons before the law and equal protection of the law (art. 26), and not to be subject to torture or cruel and inhuman treatment (art. 7). [emphasis added]<sup>434</sup>

## **h) Right to an Effective Remedy**

Article 2 (3) ICCPR:

*Each State Party to the present Covenant undertakes:*

*a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; to ensure that any person claiming such a remedy shall have his rights thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;*

*b) To ensure that the competent authorities shall enforce such remedies when granted.*

There has not yet been a normative legal act passed by Knesset availing the victims of punitive demolitions the right to full judicial review in cases of the violations of their rights. The only available *de facto* judicial review has been conducted by the Supreme Court of Israel, sitting as the High Court of Justice. HRC has held that “the right to lodge complaints against maltreatment prohibited by article 7 must be recognized in the domestic *law* [emphasis added]”<sup>435</sup>, thus the *de facto* “favour” in the form of the Court’s review, done to the population of the OPT, does not satisfy the set criteria. If taking for granted the practical stability of such a grant, the problem to be further analysed is that of access to the provided remedy and the effectiveness of the remedy itself.

In a number of cases, victims are precluded from filing a petition, due to a lack of the timely notice. As mentioned, in 1989, the Court has imposed an obligation for the IDF to

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<sup>432</sup> Ron Dudai, *Tacit Consent: Israeli Law Enforcement on Settlers in the Occupied Territories* (2001), p. 37 – as cited in Imseis, *op.cit.*, p. 121.

<sup>433</sup> The state must prove “positive, concrete, immediate and significant information that a felony was about to be committed”, unlike the mere suspicion for Palestinians. Shnayderman, *op.cit.*, p. 35.

<sup>434</sup> HRC, *Concluding Observations of the Human Rights Committee: Israel* (August 21<sup>st</sup> 2003), para. 16.

<sup>435</sup> HRC, *General Comment No. 20: Article 7* (44<sup>th</sup> session, April 3<sup>rd</sup> 1999) in *General Comments* (2003 RWI), para. 14. See *Rodriguez v. Uruguay* (322/98), UN Doc. CCPR/C/51/D/322/1988 (August 9<sup>th</sup> 1994), para. 12.3.



serve a notice 48 hours prior to the demolitions. However, it also introduced significant exceptions from the rule in, *inter alia*, the matters involving “military-operational circumstances”.<sup>436</sup> The qualification of a particular situation in the mentioned terms, that would enable cancellation of the right to hearing, rests solely on the military commander’s “fear that awarding the right of hearing will endanger the lives of soldiers and endanger the action itself”.<sup>437</sup> In *Amar* case<sup>438</sup> the Court further fully eliminated the possibilities of a hearing in the situations when the military commander demands so. As observed by a petitioner, “a person’s right to voice his claims before he is injured, even when he appears to be unable to shake the authority’s considerations, derives from the recognition of his human dignity.”<sup>439</sup> The wide(st) discretionary power, as conferred by DER 119 and sanctioned by the Court’s rulings, used in a manner to prevent a person from the *access* to the Court, does not itself satisfy the purpose of obligation under the mentioned ICCPR article.

Even if a petition against the demolition order reaches the Court, there are rather low chances that the Court’s decision will bring a relief, as it has repeatedly refrained from considering the substance of security issues that lay in the base of a military commander’s order and quite frequently rejects the petitions. In *Hamamreh* case, the Court expressed the view that:

The scrutiny exercised by this Court over the judgment of the military commander – like any other scrutiny over the acts of the administration, has to do with judicial supervision over the lawfulness of that judgment, and not with factual scrutiny over the effectiveness or wisdom of the exercise of that judgment.<sup>440</sup>

In respect of the principle of not putting “itself in the shoes of the military authority”, the Court, proclaims its focus on the consideration of reasonableness of the measure, “taking into account the acts of those involved in the activity that harms the security of the area whose case is being considered by the court”.<sup>441</sup> Persistence of such a superficial scrutiny in the case of a *de facto* criminal charge with more than severe consequences, cannot be justified. Notwithstanding the acknowledgment of due discretion on the side of authorities in certain issues, in *Chahal* case ECtHR came to a conclusion that where an irreversible harm may occur, the notion of effective remedy requires it to be qualitatively more than “a remedy that is effective as can be”.<sup>442</sup> ECtHR elaborated that the English courts had satisfied themselves that the discretion of the Home secretary was exercised according to the law, but had not gone further into *substantive* analysis, *i.e.* “they had to confine themselves to examining whether the evidence showed that the Secretary of State had carried out the balancing exercise required by the domestic law”.<sup>443</sup> Such an evasion of substantive scrutiny has been considered by ECtHR as a violation of the Article 13 ECHR, identical to the Article 2 (3) ICCPR.

The Israeli Court has held that punitive house demolitions are justified by the necessities of the state security and satisfies itself with purely formalistic approach. As

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<sup>436</sup> *ACRI* case (1988), para. 8.

<sup>437</sup> *See e.g. Al Boureij* case (1990), para. 5.

<sup>438</sup> *Amar (Amer) et al. v. IDF Commander in the West Bank*, HCJ 6696/02.

<sup>439</sup> Petitioner’s claim in *Shuweiqi et al. v. Commander of the IDF forces in the West Bank*, HCJ 4715/03, para. 13, available at [http://www.hamoked.org/items/5040\\_eng.pdf](http://www.hamoked.org/items/5040_eng.pdf), accessed 2005-02-24.

<sup>440</sup> *Hamamreh v. Minister of Defence* (1982), para. 30.

<sup>441</sup> *Aga v. IDF Commander in Gaza*, HCJ 1005/89, 44 (1) P.D. 536, p. 539, summarized in English in 23 *Isr. YB. Hum. R.* (1993), p. 329. *But see* a somewhat positive approach in *Schnitzer v. The Chief Military Censor*, HCJ 680/88, available at: <http://www.court.gov.il>.

<sup>442</sup> *Chahal v. United Kingdom*, Judgment (November 15<sup>th</sup> 1996), ECtHR App. No. 22414/93, paras. 152, 141.

<sup>443</sup> *Ibid.*, paras. 153, 143.

Kretzmer noticed, “[t]he Court’s main role has been bolstering procedural requirements and interfering on the margins so as to prevent ‘excesses’”<sup>444</sup>. The Court simply invokes DER 119 as the ground for the commander’s discretion and abruptly puts an undue stop on any further substantive review of both the concrete situation and the legality of DER 119 itself. In respect of particular situations, it holds that in professional military questions... we take for granted that the witness on behalf of the respondent, who speaks in the name of [IDF]... does so for sincere professional reasons.”<sup>445</sup> The Court had already given the rationale for such a holding few years before, in *Abu Hilu* case, when it was concluded that:

The court is not the proper place to decide whether a military-security operation... – if grounded in law and undertaken for reasons of security – was indeed warranted by the security situation or whether the security problem could have been resolved by different means... [I]ssues related to the army and defense, similar to issues of foreign affairs, are not among the subjects fit for judicial review.<sup>446</sup>

As once picturesquely noticed, “with the coyness of a schoolgirl, the members of the court further reasoned that they, as learned justices, were not experts on security”<sup>447</sup>, thus explicitly closing the possibility for substantive review.

It has been widely acknowledged that legislative decisions, left unchecked against an external standard of rights, “imperil rights by promoting other (non-rights) goals or by utilizing legislative means that infringe upon rights.”<sup>448</sup> Therefore, in respect of the question of general legality of DER 119 under international law, the Court has failed to address one of the most important characteristics of an “effective remedy” in relation to legislative mechanisms, *i.e.* the duty of the state to abolishing or amend the laws manifestly incompatible with international law (*see* Maastricht Guidelines, “acts of omission”), with the special emphasis to the right to compensation<sup>449</sup>, that is naturally connected to issues of destruction of property, but that is totally excluded from DER 119. However, the Court has rather “accepted and legitimized policies and actions the legality of which is highly dubious” while “interpret[ing] the law in favour of the authorities.”<sup>450</sup> For the stated reasons, there has been a violation of the right to an effective remedy, as guaranteed in Article 2 (3) ICCPR.

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<sup>444</sup> Kretzmer, *op.cit.*, pp. 27-28. *See* Ralph Ruebner, ‘Democracy, Judicial Review and the Rule of Law in the Age of Terrorism: The Experience of Israel – A Comparative Perspective’, 31 *Ga. J. Int’l & Comp. L.* (Spring 2003), p. 505.

<sup>445</sup> *Elon Moreh* case (1978), p. 153.

<sup>446</sup> *Abu Hilu* case (1972), as quoted in Hajjar, *op.cit.*, p. 57.

<sup>447</sup> Richard Ben Cramer, *How Israel Lost: The Four Questions* (2004 Simon & Schuster), p. 52.

<sup>448</sup> Tom Campbell, *Protecting Human Rights: Instruments and Institutions* (2003 Oxford University Press), p. 232.

<sup>449</sup> *See e.g. Case of Trujillo-Oroza*, Judgment (January 26<sup>th</sup> 2000), IACtHR, Series C No. 64, para. 173. *See also Case of Velasquez-Rodriguez v. Honduras*, Judgment (July 29<sup>th</sup> 1988), IACtHR, Series C No. 4, para. 166.

<sup>450</sup> Kretzmer, *op.cit.*, pp. 27-28.

## IV Monitoring

The problem of monitoring that appears in the OPT, can be viewed from basically two main perspectives: in the realm of information collection/passive observation/reporting and the active enforcement of the decisions brought on the basis of the gathered and assessed information.

### 1. Observing

Israel has persistently rejected most of the inter-governmental monitoring bodies from performing their regular tasks in the OPT. The state asserts that the disproportional number of investigative committees, special representatives and rapporteurs have been scrutinizing implementation of international law in Israel – more than any other state in the UN system, which displays an alleged apparently intentional discrimination against Israel in the investigative core of the international community. The inimical attitude toward UN investigators has been the most palpable in respect of UN GA bodies established immediately after the occupation of the OPT such as the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories (UN Special Committee)<sup>451</sup>, the Committee on the Exercise of the Inalienable Rights of the Palestinian People and the Division on Palestinian Rights (UNCEIRPP), through more general UN Commission of Human Rights (UN CHR) and the assigned rapporteurs, till the UN High Commissioner for Human Rights (UN HCHR) and the increasingly involved (in the process of UN scrutiny over the OPT related issues) NGOs. The alleged bias of the whole UN system and the concrete reporting mechanism has served as a pretext of non-cooperation.<sup>452</sup> Therefore, the very process of initial monitoring of human rights in the OPT has been decked with rather specific obstacles, manifested in the lack of relevant first-hand sources of information. Instead, the evidence of human rights violations have been found within various UN agencies and bodies (*e.g.* UNHCR, UNRWA etc.), governments, inter-

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<sup>451</sup> GA Resolution No. 2443 (XXIII), Respect for and Implementation of Human Rights in Occupied Territories, A/RES/2443 (XXIII) (December 19th 1968). The results of the UN Special Committee's findings are further estimated by the Special Political and Decolonization Committee of the UN GA (the Fourth Committee). Israel officially contends, *inter alia*, that the wording of the mandate "predetermines... *ab initio* that Israel is in violation of international law"; that the mandate, being "open ended", contravenes the practice of annual appointments of Special Rapporteurs and as such is "never subject to scrutiny, critique or modification" but only "biased and unbalanced"; that the mandate is "anachronistic" as it fails to acknowledge the transfer of power to the Palestinians, according to the relevant peace agreements. *See e.g.* the Letter addressed to the Special Rapporteur by the Israeli Permanent Representative in UN, Ambassador Mr. David Peleg, as reproduced in the UN CHR Special Rapporteur, Hannu Halinen, "Question of the violation of Human Rights in the Occupied Arab Territories, Including Palestine", UN Doc. E/CN.4/1999/24 (55<sup>th</sup> Session, January 20<sup>th</sup> 1999), para. 57. For further details *see also Note verbale* from the Israeli UN Mission, UN Doc. E/CN.4/2002/129 (58<sup>th</sup> Session, December 27<sup>th</sup> 2001).

<sup>452</sup> "UN bodies... seek only to promote the interests of the Palestinian side, and to de-legitimize Israel", Statement by Israeli Deputy Permanent Representative Ambassador Arye Mekel, 58<sup>th</sup> Session of the UN GA (November 6<sup>th</sup> 2003), available at: [http://www.israel-un.org/committees/fourth/mekel\\_scip\\_6nov03.htm](http://www.israel-un.org/committees/fourth/mekel_scip_6nov03.htm), accessed on 2005-02-16. A glimpse of the attitude toward particular investigative bodies can be taken from *e.g.* the official Israeli UN-based representation: "The 'Special Committees' and 'Palestinian Units' of the UN ([UNCEIRPP], as well as the [UN Special Committee]) spend more than five million dollars a year, essentially to spread viciously anti-Israel propaganda. These bodies are the focus of the worst anti-Israel activity under the aegis of the UN..." Full statement available at the web-page of the Permanent Mission of Israel to the United Nations at: [http://www.israel-un.org/israel\\_un/uneasyrelation.htm](http://www.israel-un.org/israel_un/uneasyrelation.htm); accessed on 2005-02-16.

governmental and non-governmental agencies<sup>453</sup>, (Israeli and Palestinian) media and individuals directly connected to or affected by the violations of rights and freedoms in OPT.

There has been a slightly attention-distracting insistence on the increased presence of the authoritative monitoring bodies for the purpose of collecting the relevant information on possible/actual human rights violations. If perceiving punitive demolitions in the OPT in the light of low-profile violations, in the sense of not being temporally concentrated, publicly striking and numerically extensive practice, with the available mechanism of local (both Israeli and Palestinian) and international NGO's and the means of modern technology, such increased presence solely for the purpose of non-interfering observing is not necessary, though it is nevertheless still important and preferred. The main focus is not on the ability of the monitors and the international community to collect the data, but to implement the conclusions derived from it.

## ***2. Substantive Assessment and Enforcement***

The task ahead comprises identification of the international instances/fora that could realistically assume the power of *authoritatively* addressing the violations of international law and the enforcement of their decisions, making the guaranteed humanitarian and human rights practically “justiciable” in the everyday reality of punitive demolitions in Palestine. Hypothetically speaking, the identification of violations and implementation of the law in respect to punitive house demolitions can be generated on 3 levels, *i.e.* by: 1. the relevant multilateral UN treaty-based bodies, 2. the UN Charter-based system of human right monitoring bodies and 2. any objectively uninvolved (in the situation in the OPT) state/High Contracting Party (to GC IV).

### **A. UN Treaty Bodies**

The inimical relation of Israel toward the investigative processes over its own actions stretches further to the treaty based human rights bodies. Israel has ratified a set of multilateral human rights and humanitarian law instruments, but with significant procedural reservations, that preclude the physical presence of investigative bodies in the OPT and/or passing the decisions that might authoritatively qualify the behaviour of Israel as being in breach of substantive provision of the legal instruments, *inter alia*, those related to punitive house demolitions.

The overall criticism of the ability of the treaty committees to address pending human rights violations in the OPT, and in particular respect to the phenomenon of punitive house demolitions, may be concentrated on the issue of inability to initiate an investigation of reported violations on their own. Furthermore, they cannot actually resolve the problem, as they do not possess the power of (immediate) action in order to cease the practice, but are simply ordained with the task to address the claims presented in the state reports. Such a “soft” status is easily observed from the fact that the committees’ members serve in personal

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<sup>453</sup> If taking into consideration the exigencies of non-Israeli information collection in the OPT, it is more than true that “[w]ithout the information provided by NGOs, effective oversight by UN and regional human rights treaty bodies would sink into terminal torpor.” Claude E. Welch Jr., *NGOs and Human Rights: Promise and Performance* (2000 University of Pennsylvania Press), p. 10.

capacity, not as representatives of states, which may, at least in the realm of effectuation of decisions, if not in the very making of the decisions, constitute an advantage. However, it remains the fact that the relevant findings of the treaty bodies do pave the way to authoritative decisions of Charter-based organs of UN.

#### **a) Human Rights Committee**

The Human Rights Committee (HRC), established according to Article 28 ICCPR, has carried two important functions: 1. consideration of state reports received in pursuance of Article 40 ICCPR, 2. consideration, under Optional Protocol<sup>454</sup>, of communications submitted by individuals claiming to be victims of violations of ICCPR- guaranteed human rights. The relationship between HRC and Israel can be grasped from the low frequency of state reports submissions. Namely, from the membership day in 1991, Israel has dispatched only two state reports, the second one being submitted only in 2001.<sup>455</sup> In two subsequent Concluding Observations related to Israel, HRC has emphasised the applicability of humanitarian/human rights law<sup>456</sup> and has given a salient explicit hint of the possible violations in relation to punitive house demolitions.<sup>457</sup> However, in respect of the second function of HRC, there has been a significant procedural obstacle. Namely, Israel has not signed the ICCPR Optional Protocol (OP ICCPR), hence HRC is precluded from assessing, under the Article 1 OP ICCPR, the individual claims of the affected persons in respect of alleged violations of Articles 2, 7, 12, 14, 15, 17 and 26 ICCPR, as currently identified in relation to punitive demolitions.

Furthermore, Article 41 ICCPR contains the possibility of complaint submitted not by individuals, but by states regarding the violations done by another state. As the application of this article is dependent on previous declaration by the states concerned, while recalling that Israel has not made such a declaration, this option for addressing the violations related to punitive demolitions is also excluded.

#### **b) Committee on the Elimination of Racial Discrimination**

If a claim is sought to be made under CERD, for *e.g.* the violations of Articles 5 (d) (v)/(vi) and 5 (e) (iii), relating to the equal protection of civil rights (the right to property and inheritance) and economic/social rights (the right to housing), respectively, one can face a procedural obstacle constituted in the lack of Declaration in pursuance of Article 14 CERD. Therefore the competence of the Committee to receive, analyse communications from individuals and report the findings on the alleged violations, as provided in the mentioned article, cannot be established.

#### **c) Committee against Torture**

CAT monitoring mechanism, suffers from identically inflicted “illness” in the particular case. Israel has made reservations to Articles 20, precluding the Committee to

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<sup>454</sup> Adopted and opened for signature, ratification and accession by UN GA resolution 2200 A (XXI) of December 16<sup>th</sup> 1966 and entered into force on March 23<sup>rd</sup> 1976.

<sup>455</sup> UN Doc. CCPR/C/ISR/2001/2 (November 20<sup>th</sup> 2001). The first report (UN Doc. CCPR/C/81/Add.13) had been due on January 2<sup>nd</sup> 1993, but was submitted with extensive delay only on April 9<sup>th</sup> 1998.

<sup>456</sup> See *e.g.* HRC, *Concluding Observations of the Human Rights Committee: Israel* (August 21<sup>st</sup> 2003), para. 11.

<sup>457</sup> HRC has explicitly brought into connection issue of punitive house demolitions with Articles 7, 12, 17, 26 ICCPR. HRC, *ibid.*, para. 16.

receive information on systematic practise of torture, and to request cooperation in examination of the information. Thus the alleged violation of Article 16 CAT in connection to punitive house demolitions<sup>458</sup>, relating to the “acts of cruel, inhuman or degrading treatment... which do not amount to torture” and that are “committed by or at the instigation of or with the consent or acquiescence of [the state]”, cannot be assessed within the supervisory framework of the Convention.

#### **d) International Criminal Court**

Another possible instance among the treaty bodies for addressing the violations can be recognized in the International Criminal Court (ICC). The ICC holds the mandate for investigation and prosecution of the individuals accused of crimes war crimes. At the very mention of the connection between the ICC and Israel, two difficulties appear. The first obstacle is in the fact that, having only signed the Rome Statute of the ICC<sup>459</sup> then explicitly rejected it<sup>460</sup>, Israel is not a State Party to the Rome Statute.

Article 8 of the Rome Statute contains a fairly detailed view of war crimes under the jurisdiction of the ICC. Upon signature, Israel expressed her “acknowledgment of the importance, and indeed indispensability” of the ICC, but also expressed her “deep disappointment and regret at the insertion into the Statute of formulations tailored to meet the political agenda of certain states”.<sup>461</sup> It is hardly conceivable that the prosecution of *e.g.* war crimes cannot be seen as a proper “political agenda” of *all* states. Irrespective of the possible and indicative indirect self-recognition of Israel in the defined scope of international crimes potentially and actually addressable by the ICC, and aside to the statutory material possibilities to try war crimes, ICC does not have jurisdiction in the case of Israel. However, an argument has been developed that Jordan, having (disputable) territorial claim over the OPT and being a state party to the Rome Statute, may present a theoretical possibility of subjecting the West Bank alone to the ICC regime.<sup>462</sup> A more acceptable argument can be advanced in an interesting feature of the Rome Statute, as envisaged in Article 13 of the Rome Statute. The article provides for the possibility of establishing ICC jurisdiction in “[a] situation in which one or more of [*inter alia*, war crimes] appears to have been committed” when the case “is referred to the Prosecutor by the [SC] acting under Chapter VII of the [UN Charter]”.<sup>463</sup> Having in mind the loathing of the United States, as a UN SC permanent member, toward the ICC and the special relationship with Israel, this possibility is only theoretically, but not practically realistic.

In this direction, and irrespective of the mentioned political obstacle, here lies also the second (legal) obstacle for an effective assessment of the violations – the temporal limitation

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<sup>458</sup> CAT, *Conclusions and Recommendations of the committee against torture: Israel* (unedited version), UN Doc. CAT/C/XXVII/Concl.5 (November 23<sup>rd</sup> 2001), para. 6 (j). *See also* CAT, *Conclusions and recommendations: Israel*, UN Doc. A/57/44 (September 25<sup>th</sup> 2002), para. 6 (j).

<sup>459</sup> The Rome Statute was adopted and opened for signature on July 17<sup>th</sup> 1998 by the UN Diplomatic conference of Plenipotentiaries on the Establishment of an International Criminal Court. Israel signed the Rome Statute on December 31<sup>st</sup> 2000.

<sup>460</sup> On August 28<sup>th</sup> 2002, Israel announced that she “does not intend to become a party to the treaty. Accordingly, Israel has no legal obligations arising from its signature...”. Full text of the communication available at: <http://www.un.org/law/statute/romefra.htm>, accessed on 2005-04-11.

<sup>461</sup> Declaration of Israel upon signing the Rome Statute of the International Criminal Court, available at: <http://www.un.org/law/icc/statute/status.htm>, accessed on 2005-04-11.

<sup>462</sup> *See* Farrell, *op.cit.*, p. 934.

<sup>463</sup> Article 13 (b) of the Rome Statute.

on the ICC jurisdiction. Article 11 of the Rome Statute, especially if read together with Article 24 of the Statute<sup>464</sup>, prescribes jurisdiction *temporis ratione*, excluding the possibility of the ICC to adjudicate the crimes committed before the day of entry into force of the Rome Statute, *i.e.* July 1<sup>st</sup> 2002.

If one would want to develop the theoretical possibilities as obviously purely *l'art-pur-l'art*, a possible argument for avoiding the said time limitation may be establishing the claim of punitive house demolitions as “continuing violation”. The term refers to a set of acts “which extend over a period of time coinciding with both the period during which the international obligation concerned is breached and the period the continuing violation is in existence.”<sup>465</sup>

If the practice of punitive demolitions has been extending into time before as well as after the entry into force of the Rome Statute, by way of repetitive invocation<sup>466</sup> of DER 119, with the consequences of permanent deprivation of the property demolished, it can be concluded that the practice constitutes a “continuous violation”. A reminder, however, should be kept in mind that even in the hypothetical case of ICC jurisdiction over Israel on the grounds of Article 13 (b) of the Rome Statute, the idea of continuing crimes as allegedly nurtured under the said Article 11 “remains undecided and it will be for the Court to determine how it should be handled”.<sup>467</sup>

## B. UN Charter Bodies

It has been argued that the UN Charter based human rights bodies are more effective than the treaty based ones, being “agents of a *political* body of the community of states”, therefore they constitute “external policy environment of factors” that states take into consideration when framing own domestic and foreign policy.<sup>468</sup> In the case presented, this general “advantage” may easily turn into a double-bladed sword, in terms of preventing the effective assessment and enforcement of alleged human rights violations due to prevailing *contra* interests.

### a) UN Commission on Human Rights

If considering the present issues from the perspective of UN Charter bodies, one cannot skip the principal human rights organ within the UN system for monitoring, examining and publicly reporting on matters of human rights, the UN Commission on Human Rights (UN CHR).<sup>469</sup> Even though it reflects the representation of states<sup>470</sup> and operates under the

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<sup>464</sup> On non-retroactivity *ratione personae*.

<sup>465</sup> Joost Pauwelyn, ‘The concept of a ‘Continuing Violation’ of an International Obligation: Selected Problems’, 66 *Brit. Y.B. Int’l L.* (1995), p. 416.

<sup>466</sup> Cf. e.g. *Phosphates in Morocco case (Italy v. France)*, Judgment (June 14<sup>th</sup> 1938), PCIJ, Series A/B, Vol. 4, No. 74 (Kraus Reprint).

<sup>467</sup> William A. Schabas, *An Introduction to the International Criminal Court* (2001 Cambridge University Press), p. 59.

<sup>468</sup> Patrick James Flood, *The Effectiveness of UN Human Rights Institutions* (1998 Praeger Publishers, Westport), pp. 116-117.

<sup>469</sup> UN CHR was established in 1946 by ECOSOC.

<sup>470</sup> The members of UN CHR are not sitting in their private capacity.



authority of the UN GA, it preserves a relatively independent status<sup>471</sup>, but does not hold the power of enforcing the decisions. One of many issues addressed by CHR is the question of “violations of human rights in the occupied Arab territories, including Palestine”<sup>472</sup>, so called “Agenda 8”.

Despite Israel’s rejection of admittance of the UN investigative bodies to the OPT, the Rapporteurs, being consecutively appointed from 1993<sup>473</sup> pursuant to 1235 procedure<sup>474</sup>, have submitted annual reports on human rights violations in OPT and have covered relevant factual data of (punitive) house demolitions. The reports have expressed a deep concern over the “serious issue of penalties or steps taken against Palestinians being commensurate with the offence committed [and] of sealing houses or rooms” that were exercised in a “totally arbitrary” manner and “very often by way of collective punishment”<sup>475</sup>, and have consistently called for halting the practice.

Israel has been expressly denying credibility to the Commission<sup>476</sup>, arguing that the Commission “routinely adopts totally disproportionate resolutions concerning Israel”<sup>477</sup> while the Special Rapporteur was given an exceptionally and manifestly discriminatory mandate<sup>478</sup>, and advises it to “lower the decibel level of the ‘item eight’ debate”<sup>479</sup>. As the Commission is lacking the power of enforcement of the decisions reached, while being recently under heavy criticism of the wider international community for inner susceptibility to political fluctuations, in most of the cases the reversible relation Israel – UN CHR may be characterised simply as the relationship of polarized entities only passing the ball of mutual critics.

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<sup>471</sup> CHR reports to ECOSOC and any resolution or decision with financial consequences it brings requires the approval of ECOSOC. Irrespective of the hierarchical lower position than ECOSOC and GA, CHR maintains the status of higher significance than the later two in respect of human rights. See Henry J. Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals*, Second Edition (2000 Oxford University Press), pp. 598, 600.

<sup>472</sup> Office of the United Nations High Commissioner for Human Rights (HCHR), available at: <http://www.ohchr.org/english/bodies/chr/background.htm>, accessed on 2005-02-18.

<sup>473</sup> Pursuant to UN CHR Resolution 1993/2, the post of Special Rapporteur was given to: Mr. Rene Felber (Switzerland) 1993-1995, Mr. Hannu Halinen (Finland) 1995-1999, Mr. Giorgio Giacomelli (Italy) 1999-2001 and Mr. John Dugard (South Africa) 2001-present.

<sup>474</sup> “1235 petition” is a procedural tool of public character, at disposal of UN CHR, established by ECOSOC Resolution 1235 (XLII) (June 6<sup>th</sup> 1967), authorising examination of gross violations of human rights and fundamental freedoms.

<sup>475</sup> Report of the UN CHR Special Rapporteur, Rene Felber, UN Doc. E/CN.4/1994/14 (50<sup>th</sup> session, January 28<sup>th</sup> 1994), paras. 26, 43.

<sup>476</sup> Cf. Philip Alston and James Crawford (eds.), *The Future of UN Human Rights Treaty Monitoring* (2000 Cambridge University Press), p. 48. UN CHR authority has been heavily criticised in recent development of events, up to the point of suggesting the commission’s cessation of existence.

<sup>477</sup> The Permanent Mission of Israel to the United Nations, available at: [http://www.israel-un.org/gen\\_assembly/me/fourth/work2.htm](http://www.israel-un.org/gen_assembly/me/fourth/work2.htm), accessed on 2005-02-16.

<sup>478</sup> Israel officially contends, *inter alia*, that the wording of the mandate “predetermines... *ab initio* that Israel is in violation of international law”; that the mandate, being “open ended”, contravenes the practice of annual appointments of Special Rapporteurs and as such is “never subject to scrutiny, critique or modification” but only “biased and unbalanced”; that the mandate is “anachronistic” as it fails to acknowledge the transfer of power to the Palestinians, according to the relevant peace agreements. See *e.g.* the Letter addressed to the Special Rapporteur by the Israeli Permanent Representative in UN, Ambassador Mr. David Peleg, as reproduced in the Report of the UN CHR Special Rapporteur, Hannu Halinen, UN Doc. E/CN.4/1999/24 (55<sup>th</sup> Session, January 20<sup>th</sup> 1999), para. 57. For further details see also Note verbale from the Israeli UN Mission, E/CN.4/2002/129 (58<sup>th</sup> Session, December 27<sup>th</sup> 2001).

<sup>479</sup> Press Release, available at the official web page of Embassy of the United States in Japan <http://tokyo.usembassy.gov/e/p/tp-20050324-04.html>, accessed on 2005-04-10.



## **b) International Court of Justice**

The first association when mentioning a serious breach of international law is adjudication before, presumably, the most authoritative of the courts, the International Court of Justice (ICJ). In exercise of its judicial function, the ICJ has two procedures at disposal for addressing questions of international law: for contentious cases and advisory opinions.

### ***Jurisdiction in Contentious Cases***

By virtue of Article 34 (1) “[o]nly states may be parties in cases before [ICJ]”. Addressing the particular violations elicited by punitive demolitions, within a contentious case, cannot be directly and individually invoked, as PNA cannot at the present moment qualify with certainty as a state in traditional meaning of the term<sup>480</sup>. Furthermore, even if another state, party to the same multilateral human rights treaties as Israel, would bring the case of related human rights violations under the conventions before the ICJ for the purpose of settling the dispute “on interpretation or application” of the treaties’ provisions, the explicit reservations preclude the ICJ jurisdiction.<sup>481</sup> Even if Palestine would be granted a full-pledged statehood, Israel has already officially severely limited compulsory jurisdiction of the ICJ<sup>482</sup>, rendering the whole case purely hypothetical.<sup>483</sup> For that reasons a rather a roundabout way of addressing the violations that invoke state responsibility can be constructed<sup>484</sup> under the rules governing advisory opinions.

### ***Advisory Jurisdiction***

The recourse to advisory opinion option is probably the most realistic prospect of authoritative assessment of the alleged violations of human rights in connection to punitive house demolitions in the OPT. Under Article 96 (1) of the UN Charter and Article 65 (1) of the Statute of the Court, UN GA and UN SC have the right to ask the ICJ for an advisory opinion about “any legal question”. The question of punitive demolitions can be, substantially, easily referred to the ICJ, as it constitutes a clearly legal question and thus is, unlike *e.g.* the *Separation Wall* case, unburdened by political considerations. The only political aspect in the whole issue is which organ exactly would request it.

As mentioned, so far, UN GA and UN SC have issued a number of resolutions calling upon Israel to “to abide scrupulously by its legal obligations and responsibilities under the [GC IV], which is applicable to all the territories occupied by Israel since 1967”<sup>485</sup> and to cease the practice of human rights violations. The enforcement mechanism has been often failing in the expected next step toward implementing Israel’s compliance with international law. It should be kept in mind that the very acceptance of Israel in the membership of UN was

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<sup>480</sup> See generally Shapira and Tabory (Eds.), *op.cit.*

<sup>481</sup> See *e.g.* Article 22 CERD, Article 30 CAT.

<sup>482</sup> Israel’s Declaration of recognition of the ICJ compulsory jurisdiction (October 17<sup>th</sup> 1956), ICJ Yearbook 1971-1972, No. 26, Chapter IV, pp. 63-64.

<sup>483</sup> It is highly rational to expect that the positive outcome of the future peace with the Palestinians will be conditional on the Palestinian renouncement of the major legal claims toward Israel, arising out of the past human rights violations.

<sup>484</sup> If the ICJ scrutiny of human rights violations cannot be initiated by states, an interesting argument has been made in terms of the possibility of the UN-related organizations in charge for protection of refugees (UN HCR) to raise *e.g.* the compensation claim, in exercise of its official guardian functions. Luke T. Lee, ‘The Right to Compensation: Refugees and Countries of Asylum’, 80 *Am. J. Int’l L.* (July 1986), p. 549.

<sup>485</sup> S/RES/672 (October 12<sup>th</sup> 1990).

carried out under the notion of Israel's declaration that it "unreservedly accepts the obligations of the United Nations Charter and undertakes to honour them from the day when it becomes a Member of [UN]".<sup>486</sup> However, such compliance has been chronically lacking. Any expectable constructive action in terms of implementation of the obligation on the grounds of Chapter VII of the UN Charter has been precluded by the palpable lack of political will within the UN SC (most notably on the side of the United States). It has been asserted that the United States had used the veto power 29 times against UN SC resolutions "aimed at ending the extermination of the Palestinian nation".<sup>487</sup> Such a grave obstacle to actively address the legal crisis pending in the OPT, being well identified under the broad range of legal norms and yet being virtually untouchable, has pointed to domination of self-interest, resulting in the "notorious selectiveness" in dealing with the topic.<sup>488</sup> Nevertheless, the UN GA has an independent right of seeking an advisory opinion, "in the light of its own needs".<sup>489</sup>

Parallel to the process of directing the request for the advisory opinion to the ICJ, the UN SC political selectiveness appears as the problem *a fortiori* in the realm of the very future enforcement of the advisory opinion that will have been rendered. Namely, the advisory opinion would naturally be lacking binding legal effects. However, as an authoritative legal statement of the UN principal judicial organ on an issue of international law, it certainly does not lack authority, as the ICJ follows the same rules of procedure and substantive assessment of the facts as in contentious cases. Having in mind the enforcement stalemate within the UN SC, it would be reasonable to undertake an alternative action on the ground of UN GA Resolution 377 ("Uniting for Peace"), with reliance on the UN GA, as "[UN SC] failure does not deprive the [UN GA] of its rights or relieve it of its responsibilities under the Charter in regard to the maintenance of international peace and security".<sup>490</sup> Utilized for the first time in 1950 Korean crisis and later on in a number of similar situations, it has represented a *de facto* amendment of the UN Charter, thus it has paved the way out of the crippling decision-making dead-ends within UN SC throughout the last half a century. In that case, by votes of either seven UN SC members or the UN GA majority, the decisive functions of the UN SC under UN Charter would be taken over and exercised by UN GA, with the purpose of "making appropriate recommendations to Members for collective measures".<sup>491</sup> This possibility would open a wide range of direct legal tools provided by Chapter VII of the UN Charter, for influencing the behaviour of Israel in respect of punitive house demolitions, with the particular focus on economic means of pressure, as contained in the Article 41 of the UN Charter. Namely, if having in mind that the mentioned low-profile of the demolitions, it would be highly unrealistic to expect an immediate UN military action against Israel, pursuant to Article 42, for improving the situation caused *solely* by the punitive practice, as such an action would most certainly reflect a broader mandate.

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<sup>486</sup> UN GA resolution 273, UN Doc. A/RES/273 (May 11<sup>th</sup> 1949).

<sup>487</sup> Statement of Carolina Amador Perez, a representative of the Federation of Cuban Women on the CHR *General Debate on the Question of the Violation of Human Rights in the Occupied Arab territories, Including Palestine*, Press Release, March 25<sup>th</sup> 2005.

<sup>488</sup> Martti Koskenniemi rightly raised voice: "Why Libya, but not Israel?... The choice of targets, as well as the manner of reacting, has certainly not been automatic. The argument is made that the Council has not reflected the collective interests of United Nations members as a whole, but only the special interests and factual predominance of the United States and its Western allies within the Council." Martti Koskenniemi, 'The Place of Law in Collective Security', 17 *Mich. J. Int'l L.* (Winter 1996), p. 460.

<sup>489</sup> *Legality of the Threat or Use of Nuclear Weapons*, ICJ Advisory Opinion (July 8<sup>th</sup> 1996), para. 16.

<sup>490</sup> UN GA resolution 377 (1950), UN Doc. A/RES/377 (V) A (November 3<sup>rd</sup> 1950).

<sup>491</sup> *Ibid.*

### **c) A New Forum**

In the same manner to the one mentioned *supra*, the recourse can be made to the establishment of a whole new tribunal, which would have jurisdiction over the crimes committed in the OPT. Throughout the recent years, UN SC has exercised its powers in an arguably authoritative fashion of creating judicial bodies for adjudicating grave violations of international law in respect of particular conflict zones.<sup>492</sup> Even though the comparably critical situation in the OPT may easily be understood in the required terms of “constitute[ing] a threat to international peace and security”, mere practical considerations of proliferation of similar tribunals do prompt the search for more sustainable ways of delivering justice.

## **C. State-to-State Level**

### **a) Protecting Power**

The possibility of establishing a Protecting Power represents a classical monitoring mechanism of the humanitarian law implementation, envisaged in Article 9 GC IV. The Protecting Power is appointed among the neutral states and has the duty to “safeguard the interests of the Parties to the conflict”, *i.e.* protection of the “diplomatic, commercial and financial interests of the Power of Origin”<sup>493</sup>, in pursuance of the various humanitarian provisions stipulated in the GC. However this possibility is not a compulsory, but a purely facultative one, as the functioning of the Protective Power depends on initial conjunction of consents from all (three) parties involved.<sup>494</sup> As in the particular case, the lack of Israel’s consent levels full certainty, thus practically ruling out a convenient supervision solution, Article 11 GC IV somewhat innovatively provides an adequate substitute, in case of still pending risks for the protected population. The substitute refers to the appointment an international organization to assume the mentioned task, but without specifying which kind of organization is eligible.<sup>495</sup> ICRC has so far proven competent in safeguarding the humanitarian interests around the world and therefore presents a fertile ground for further development of humanitarian law monitoring in respect to the violations undertaken in the OPT<sup>496</sup>.

### **b) Universal Jurisdiction**

Notwithstanding the importance of the somewhat robust UN enforcement procedure, or in case of its failure, there has been another monitoring mechanism readily available on the inter-state level. As a member state of UN, Israel is bound by the UN Charter general provisions of respect for international law. As the signatory of the GC IV, by way of Article 1 GC IV, a High Contracting Party under obligation “to respect and to ensure respect for the present Convention in all circumstances”. Article 146 GC IV further stipulates an important

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<sup>492</sup> UN SC established *e.g.* International Criminal Tribunal for the Former Yugoslavia (ICTY) – Resolution 827 (May 25<sup>th</sup> 1993), International Criminal Tribunal for Rwanda (ICTR) – Resolution 955 (November 8<sup>th</sup> 1994), Special Court for Sierra Leone - Resolution 1315 (August 14<sup>th</sup> 2000).

<sup>493</sup> Pictet, *op.cit.*, p. 105.

<sup>494</sup> Parties to the conflict and the invited neutral state. Fania Domb, ‘Supervision of the Observance of International Humanitarian Law’ in 8 *Isr. YB. Hum. R.* (1978), p. 197.

<sup>495</sup> *Ibid.*, p. 203.

<sup>496</sup> *See* Imseis, *op.cit.*, p. 129.

obligation for the state to “enact any legislation necessary to provide effective penal sanctions for persons committing” war crimes. Punitive house demolitions have been proven to correspond the description of war crimes in form of “torture or inhuman treatment”, wilful deprivation of a protected person of “the rights of fair and regular trial” and “extensive destruction and appropriation of property, not justified by military necessity and carried out... wantonly”.<sup>497</sup> As the subjective attitude of Israel toward the GC IV renders the prospect of wilful just enforcement only a matter of hypothesis<sup>498</sup>, a possible sphere of enforcement is another High Contracting party.

Namely, mentioned articles of the GC IV can easily be understood in terms of allowing the possibility for exercise of universal jurisdiction, without geographical limitations. Such principle of universality allows a state to assume jurisdiction over all grave breaches of the GC IV, regardless of the nationality of the offender and the *locus delicti*<sup>499</sup>. Even if the “classical” implementation of the GC IV principles would seem individually impossible from the political and/or procedural perspective (*i.e.* case of unilaterally maintained argument of inapplicability of the GC IV to the OPT while there is the preclusion of prosecution by other states under principles of traditional international criminal law), still other countries would be able to invoke the principle of universal jurisdiction<sup>500</sup> as the base for adjudication of the requests arising from punitive house demolitions. A successful precedent for adjudication on such basis can certainly be the *Eichmann* case<sup>501</sup> or *Pinochet* case<sup>502</sup>, but a series of less successful attempts of prosecution by countries that have enacted legislation enabling exercise of universal jurisdiction (*e.g.* Belgium from 1993) should not be taken aback as insignificant possibility solely on the basis of temporary background diplomatic obstacles. Domestic courts of the uninvolved states have generally been reluctant to invoke universal jurisdiction for trying war crimes “without a clear connection between the State and the crime”.<sup>503</sup> The issue of connection between punitive demolitions and the state of Israel is undoubted, hence no legal obstacles are precluding the adjudication. Therefore, the evasion of the duty to implement the substance of the GC IV, as contained in Article 1 GC IV,

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<sup>497</sup> See Article 147 GC IV on grave breaches of humanitarian law.

<sup>498</sup> On July 30<sup>th</sup> 1997, the Knesset debated the proposed Draft Law Concerning Suits Arising from Activities of Security Forces in Judea, Samaria and the Gaza Strip, 5757-1997. The law concerns liability for injuries and deaths inflicted by Israeli security forces in the OPT in a manner that it retroactively erases most of the Israel’s liability for the injuries inflicted upon the Palestinian population in the OPT, including the obligation under humanitarian law to pay damages to Palestinians for, *inter alia*, house demolitions and torture. The law has been rejected by the Constitution and Law Committee of the Knesset on July 20<sup>th</sup> 1998, however, still Israeli law permits reconsideration of the draft law at any time, being transferred for consideration at committee level. Mustafa Mari, ‘Correspondents’ Reports: Occupied Palestinian Territories’, 2 *YB. Int’l Hum. L.* (1999), pp. 394-395. See LAW, PCATI and OMCT, *Implementation of the Convention Against Torture by Israel* (November 2001), p. 25, available at: [http://www.omct.org/pdf/procedures/ISR\\_CAT\\_impl.pdf](http://www.omct.org/pdf/procedures/ISR_CAT_impl.pdf), accessed on 2005-04-17.

<sup>499</sup> See Geof Gilbert, *Aspects of Extradition Law* (1991 Dordrecht, The Netherlands), p. 158

<sup>500</sup> The concept is not a legal peculiarity of the GC IV, but the reality codified in *e.g.* 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Article 1), 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 1979 International Convention against the Taking of Hostages (Article 8), 1984 CAT (Article 6), 1997 International Convention for the Suppression of Terrorist Bombings (Article 8), 1998 Rome Statute of the ICC (Article 12). See Gennady M. Danilenko, ‘ICC Statute and Third States’ in Antonio Cassese, Paola Gaeta *et al.* (Eds.), *The Rome Statute of the International Criminal Court: A Commentary, Volume II* (2002 Oxford University Press), pp. 1879-1880. See also Philippe Sands, ‘International Law Transformed? From Pinochet to Congo...?’, 16 *Leid. J. Int’l L.* (2003), pp. 42-44.

<sup>501</sup> See *e.g.* Gary J. Bass, ‘The Adolf Eichmann Case: Universal and National Jurisdiction’ in Stephen Macedo *op.cit.*, p. 77.

<sup>502</sup> See *e.g.* Richard Falk, ‘Assessing the Pinochet Litigation: Whither Universal Jurisdiction?’ in Stephen Macedo (Ed.), *op.cit.*, p. 97. See also Sands, *op.cit.*, p. 38.

<sup>503</sup> Lyal S. Sunga, *The Emerging System of International Criminal Law: Developments in Codification and Implementation* (1997 Kluwer Law International), p. 254.

would render other High Contracting Parties in breach of their own obligations stemming from the mentioned article.

Even if the Article 146 of the GC IV would be excluded as a clear legal ground for invoking universal jurisdiction, the universality principle “may eventually develop into a binding legal obligation” in itself<sup>504</sup>, as its incremental legal crystallization under the human rights law rendered the notion of substantive relief of the war crimes victims customarily prevailing over the notion of any particular procedure. It should be noticed that the utilization of universal jurisdiction could open the possibility for eventual ICC adjudication over the issue of punitive demolitions as war crimes, even if Israel persists in not ratifying the Rome Statute. In the case when the state exercising the universal jurisdiction would be a member to the Rome Statute, there would be a pre-existing transfer of national jurisdictions over grave crimes of international concern. As “all States have a sovereign right to determine how to exercise their jurisdiction over crimes... of universal concern”, Israel would not have a legal ground to object “the legitimate transfer of existing national powers”.<sup>505</sup>

Till then, if the issue of submissive diplomacy would be taken aside, exercise of the universal jurisdiction, at least by virtue of Article 146 GC IV, could constitute a serious sphere of voluntary adjudication for the war crimes committed in the pursuit of punitive house demolition policy.

### **c) Diplomatic/Economic Pressure**

As comprehensively observed, “only States, through bilateral or multilateral relations, are in a position to influence the Israeli Government or even the negotiators in the peace process.”<sup>506</sup> An apparently less obtrusive way of addressing the continuing violations of human rights by means of punitive house demolitions can be recognized in particular states’ conditioning of the vital flow of economic transactions (finances, goods) by Israel’s fulfilment of her international legal obligations and timely cessation/remedying the actual violations of human rights. Such a relatively indirect approaches to the solution of the problem by means of democratic and diplomatic processes in the realm of bilateral economic agreements with individual or regional state systems, *e.g.* the United States (USA) or the European Union (EU), can be presumed as more effective on the long-run in comparison to the UN induced compliance on the grounds of utilized Article 42 of the UN Charter.

The USA have been declaratively highly critical of Israel because of the practice of punitive house demolitions<sup>507</sup>. The Department of State initially considered such a practice a violation of the GC IV<sup>508</sup>, but has subsequently modified the view on the illegality in terms of considering the practice solely a “judicial punishment”, avoiding the qualification of the practice as illegal.<sup>509</sup> Furthermore, Israel has received the most extensive economic aid from the United States. It was reported in 1991 that the governmental aid to Israel “since 1967 has

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<sup>504</sup> Sunga, *op.cit.*, p. 254. See Kenneth C. Randall, ‘Universal Jurisdiction Under International Law’, 66 *Tex. L. Rev.* (March 1988), pp. 812-813.

<sup>505</sup> Danilenko, *op.cit.*, p. 1874.

<sup>506</sup> UN CHR Special Rapporteur, Rene Felber, UN Doc. E/CN.4/1995/19 (December 13<sup>th</sup> 1994), para. 77.

<sup>507</sup> U.S. Department of State, Daily Press Briefings, September 5<sup>th</sup> 2003, May 19<sup>th</sup> 2004, February 18<sup>th</sup> 2005.

<sup>508</sup> Department of State Report for 1980, p. 1005, as cited in John Quigley, ‘United States Complicity in Israel’s Violations of Palestinian Rights’, I *Pal. YB. Int’l L.* (1984), p. 111.

<sup>509</sup> U.S. Department of State, Daily Press Briefings, October 18<sup>th</sup> 2004.

totalled at least \$77 billion - \$16,000 for each Israeli citizen – when adjusted for inflation”.<sup>510</sup> Due to existing national legislation, US are bound by their “principal goal of the foreign policy of the United States... to promote the increased observance of internationally recognized human rights by all countries.”<sup>511</sup> In that direction, “no security assistance may be provided to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights.”<sup>512</sup> Similarly, EU is self-pledged “to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms”<sup>513</sup>. More specifically, as stipulated in Article 2 of the EU-Israel Agreement<sup>514</sup>, “[r]elations between the Parties, as well as all the provisions of the Agreement itself, shall be based on respect of human rights and democratic principles”, which constitutes the pivotal guidance of “their internal and international policy and constitutes an essential element of this Agreement”.

The political manifestoes like the Roadmap to Peace, as devised by the “Quartet” consisting of US, EU, Russia and the UN, had envisaged the cessation of, among the rest, the punitive demolition practice till May 2003<sup>515</sup>, but subsequently failed in the aim, as the conflicting parties did not comply with the far-fetched provisions. Irrespective of the established clear legal promptings, having in mind the generally close ties and the preferential treatment of Israel by the United States, it cannot be reasonably expected that the economic aid and the acquiescence/*practical* turning the “blind eye” to the ongoing practice of human rights violations<sup>516</sup>, including punitive demolitions, will cease. For that reason, perhaps the most significant onus in respect of economic influence is to be born by the European Union, with the yet not significantly tarnished political morality. If maintaining the substantial passivity status, the overall situation regarding the respect for human rights in the OPT may easily be boiled down to Kafka’s view on hope – “there is hope... infinite hope – but not for us.”

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<sup>510</sup> Less officially, the “at least” amount turns even bigger as Israel is receiving the aid at the beginning of each fiscal year, getting the opportunity to invest into the USA Treasury securities and collect interest before spending it. New York Times, September 23<sup>rd</sup> 1991.

<sup>511</sup> Amended Section 502 (B) of the 1961 Foreign Assistance Act – Human Rights, para. (a) (1).

<sup>512</sup> *Ibid*, para. (a) (2).

<sup>513</sup> Article 11 (1) (ex article J.1) of the Treaty on European Union, *Official Journal C 325 (24 December 2002)*, available at: <http://europa.eu.int/eur-lex/lex/en/treaties/index.htm>.

<sup>514</sup> Euro-Mediterranean Agreement – Israel, *Official Journal L 147/3 (21.6.2000)*, available at: [http://europa.eu.int/eur-lex/pri/en/oj/dat/2000/l\\_147/l\\_14720000621en00030156.pdf](http://europa.eu.int/eur-lex/pri/en/oj/dat/2000/l_147/l_14720000621en00030156.pdf)

<sup>515</sup> “A Performance-Based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict”, Security Issues, U.S. Department of State (April 30<sup>th</sup> 2003), available at: <http://www.state.gov/r/pa/prs/ps/2003/20062.htm>, accessed on 2005-04-17.

<sup>516</sup> See e.g. John Quigley, *op.cit.*, pp. 95-120. See generally Paul Findley, *They Dare to Speak Out: People and Institutions Confront Israel's Lobby*, Third Edition (2003 Lawrence Hill Books).

## V Conclusion

Decades of Israeli occupation of the OPT have displayed a pattern of systematic deployment of DER 119-stipulated means of punitive house demolitions contrary to international humanitarian law, human rights law and, above all, human conscientiousness. There are no *lacunae* or ambiguities in the international law regarding punitive house demolitions in the OPT and one may argumentatively claim that the situation, with all the prerequisites of positive applicability of the international legal standards, does not belong to the grey/white-zone of international law, as often implied and equivocally interpreted by Israeli politicians and scholars on the grounds of the alleged *sui generis* circumstances of the Palestine violent reality. Despite the attempt of “propagandistic appropriation of law”<sup>517</sup>, not only the Hague Convention, but also the GC IV, ICCPR, ICESCR etc. are fully applicable to the OPT and represent the firm standard for close examination of the facts.

An array of violations of humanitarian and human rights legal provisions have been identified in relation to punitive house demolitions. The most prominent among them refer to the: 1. prohibition of destruction of property (Articles 23 (g) of the Hague Convention and 53 GC IV), 2. prohibition of collective punishment (Articles 50 of the Hague Convention and 33 GC IV), 3. prohibition of interference with home (Articles 12 UDHR and 17 ICCPR), 4. torture, inhuman and degrading treatment (Articles 5 UDHR and 7 ICCPR), 5. choice of one’s residence (Articles 13 UDHR and 12 ICCPR), 6. fair trial guarantees (Articles 71-74 GC IV, Articles 11 UDHR and 14 ICCPR), 7. principle of legality (Articles 11 (2) UDHR and 15 ICCPR), 8. rights to property and housing (Articles 17, 25 UDHR and 11 (1) ICESCR), 9. prohibition of discrimination (Articles 26 and 2 (1) ICCPR), 10. right to effective remedy (Article 2 (3) ICCPR) and 11. grave breaches of GC IV (Article 147 GC IV) and war crimes.

As the identification of the violations, solely for the sake of knowing about them, would preserve the relevant legal provisions as dead letters, the next level of identification is on the monitoring mechanism capable of addressing the violations in the manner of both authoritative (*sic*) substantive analysis and enforcement. In that respect, Israeli reservations international treaties preclude the majority of available treaty body mechanisms to exercise their duties, with only theoretical possibility for the scrutiny on the side of ICC. Therefore, the focus, among available charter bodies and under nowadays circumstances, stands on the authority of the ICJ to render an advisory opinion on the legal question of punitive demolitions. In respect of the end-enforcement, the exercise of the universal jurisdiction should be advanced, having in mind the historical precedents and the growing acknowledgment of its positive features. Also, diplomatic/political and legally grounded economic mechanisms arising out of Israel’s bilateral relations with states and/or regional entities, *e.g.* European Union, pose a significant potential in enforcing the responsibility of Israel on both collective (state-responsibility) and individual level.

Recalling Rousseau’s view that “frequent punishments are always a sign of weakness or laziness on the part of a government”, for her own sake, Israel should indeed “have the courage to look beyond the mandate, to cooperate fully with the international human rights mechanisms and to participate actively in the substantive debate in this respect.”<sup>518</sup>

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<sup>517</sup> Richard Falk, *Revolutionaries and Functionaries: The Dual Face of Terrorism* (1988 E.P. Dutton), p. 140.

<sup>518</sup> UN CHR Special Rapporteur, Hannu Halinen, UN Doc. E/CN.4/1998/17 (53<sup>rd</sup> Session, February 19<sup>th</sup> 1998), para. 77.

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