PUNITIVE HOUSE DEMOLITIONS IN THE WEST BANK: THE HAGUE REGULATIONS, GENEVA CONVENTION IV, AND A *JUS COGENS* BYPASS

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I. INTRODUCTION

Israel has consistently refused to be bound by belligerent occupation law in administering the Occupied Territories of the West Bank and Gaza Strip to free itself from legal restraints and thereby safeguard its political and security interests. Israel systematically disregards belligerent occupation law entirely or interprets the law selectively, enforcing only provisions that do not endanger its goals. This conduct results in gross injustices and violations of international humanitarian law, as illustrated by the Israel Defense Forces' (IDF) practice of punitive house demolitions in the West Bank. This paper offers a new approach to analyzing these demolitions under international law.

II. HISTORICAL BACKGROUND

As a result of ongoing tension between the Jewish and Arab populations of Palestine, Great Britain relinquished its mandatory authority over the territory and transferred it to the United Nations (UN) in 1947.[1] The UN General Assembly recommended that Palestine be partitioned into three entities: a Jewish state, an Arab state, and a separate international entity of Jerusalem.[2] While the Jews agreed to the partition plan, the Palestinian Arabs and the Arab states rejected it.[3] On May 14, 1948, on the day of the formal termination of the British Mandate, the Jewish community in Palestine declared independence as the State of Israel.[4]

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1 *See* Nabil Elaraby, *Some Legal Implications of the 1947 Partition Resolution and the 1949 Armistice Agreements*, 33 LAW AND CONTEMPORARY PROBLEMS 97 (1969), http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3186&context=lcp.

2 G.A. Res. 181 (II), U.N. Doc. A/RES/181 (Nov. 29, 1947), *available at* http://unispal.un.org/unispal.nsf/0/7F0AF2BD897689B785256C330061D253.

3 *See* Robbie Sabel, *International Legal Issues of the Arab-Israeli Conflict, An Israeli Lawyer's Position*, 2 J. OF E. ASIAN & INT'L LAW 407, 412 (2010).

4 ISRAEL MINISTRY OF FOREIGN AFFAIRS, THE DECLARATION OF THE ESTABLISHMENT OF THE STATE OF ISRAEL (1948), *available at* http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/declaration%20of%20establishment%20of%20state%20of%20israel.aspx.

This declaration marked the beginning of the military conflict between Israel and the Arab states as well as the birth of the Palestinian refugee problem: about 700,000 people, more than half of the Palestinian Arab population, became refugees and resettled mostly in the West Bank, Gaza Strip, Transjordan, Syria, and Lebanon.[5]

The 1967 Arab-Israeli War had the most profound impact on the conflict from a territorial perspective. It resulted in Israel's conquest of the West Bank and Gaza Strip (the remainders of the British Mandate not controlled by Israel after the 1948 War), the Golan Heights in Syria, and the Sinai Peninsula (returned to Egypt following the 1979 Israel-Egypt peace treaty), significantly expanding the land under Israel's control and beginning the country's occupation of territories inhabited almost exclusively by Arabs.[6] In 1967, there were 598,637 Palestinians in the West Bank[7] and 356,261 Palestinians in the Gaza Strip.[8] As of 2014, there were 2,790,331 Palestinians in the West Bank and 1,760,037 Palestinians in the Gaza Strip.[9]

III. BELLIGERENT OCCUPATION LAW

A. THE HAGUE REGULATIONS AND GENEVA CONVENTION IV

Two documents prescribe the international law of belligerent occupation: the Regulations annexed to the Hague Convention (IV) Respecting the Laws and Customs of War on Land ("Hague Regulations");[10] and the Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War ("Geneva Convention IV").[11]

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[5] *See* BENNY MORRIS, RIGHTEOUS VICTIMS: A HISTORY OF THE ZIONIST-ARAB CONFLICT, 1881-2001, 252 (2001).

[6] *See* DAVID KRETZMER, THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES 5 (2002). Israel continues to occupy most of the lands it conquered in 1967.

[7] Levy Inst., *West Bank Population According to 1967 Census and Jordanian 1961 Census* (1967), http://www.levyinstitute.org/pubs/1967_census/vol_1_intro_tab_i.pdf.

[8] Levy Inst., *Gaza Strip Population According to 1967 Census and Egyptian Estimate for 1966* (1967), http://www.levyinstitute.org/pubs/1967_census/vol_1_intro_tab_j.pdf.

[9] PALESTINIAN CENT. BUREAU OF STATISTICS, http://www.pcbs.gov.ps/site/881/default.aspx.

[10] Hague Convention, Respecting the Laws and Customs of War on Land, Oct. 18, 1907, *available at* https://www.icrc.org/applic/ihl/ihl.nsf/INTRO/195?OpenDocument [hereinafter Hague Convention].

[11] Geneva Convention Relative to the Protection of Civilians in Time of War, Aug. 12, 1949, *available at* https://www.icrc.org/applic/ihl/ihl.nsf/INTRO/380 [hereinafter Geneva Convention IV].

Article 43 of the Hague Regulations can be viewed as the occupation law's guidebook for the administration of occupied territory. It includes key clauses dealing with the general powers of the occupant and outlines both the obligations and rights of the occupying power.[12]

> 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.[13, 14]

A reasonable reading of Article 43 supported by many scholars holds that the occupant should protect the interests of three broad groups:[15] first, the interest of the local population in a stable and orderly government; second, the interest of the temporarily displaced sovereign in the preservation of the preexisting legal status quo in the occupied area; and third, the security interests of the occupying power itself.[16]

Article 43's discussion of the general powers of the occupant is supplemented by Article 64 of Geneva Convention IV. According to the Red Cross, the latter "expresses, in a more precise and detailed form, the terms of Article 43 of the Hague Regulations, which lays down that the Occupying Power is to respect the laws in force in the country 'unless absolutely prevented.'"[17] Article 64 can thus be considered a supplement to Article 43 and states the following:[18]

> The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or

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12 EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION 108 (2004).

13 Hague Convention, *supra* note 10.

14 Some argue that the words "public order and safety" are an incorrect translation of the French wording of Article 43 and that the correct translation should have been "public order and *civil life*." *See* Edmund Schwenk, *Legislative Power of the Military Occupant under Article 43, Hague Regulations*, 54 YALE L.J. 393 (1945).

15 *See* Guy Harpaz & Yuval Shany, *The Israeli Supreme Court and the Incremental Expansion of the Scope of Discretion Under Belligerent Occupation Law*, 43 ISRAEL L. REV 514 (2010).

16 *Id.*

17 Int'l Comm. of the Red Cross, *Commentary - Art. 64. Part III: Status and treatment of protected Persons*, (Aug. 12, 1949), *available at* https://www.icrc.org/applic/ihl/ihl.nsf/COM/380-600071?OpenDocument.

18 BENVENISTI, *supra* note 12, at 100.

> suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws. The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfill its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.

Geneva Convention IV imposes far greater responsibilities on the occupant than the Hague Regulations.[19] According to Geneva Convention IV, the occupant must ensure the humane treatment of protected persons without discriminating among them; safeguard the protected persons' honor, family rights, religious convictions and practices, and manners and customs;[20] facilitate the proper working of all institutions that are devoted to the care and education of children;[21] not promote unemployment or place restrictions on job opportunities for the purpose of inducing local workers to work for the occupying power;[22] ensure that food and medical supplies reach the local population;[23] and ensure and maintain medical and hospital establishments and services, and public health and hygiene.[24] However, the occupant may take such measures of control and security in regard to the local population as may be necessary as a result of war.[25]

Geneva Convention IV also deals with how penal provisions can be enacted by the occupying power: any new penal provision must be published in the population's language;[26] retroactive punishment is prohibited;[27] penal provisions should be in accordance with general principles of law, in particular

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19 *Id.* at 104.
20 Geneva Convention IV, *supra* note 11, art. 27.
21 Geneva Convention IV, *supra* note 11, art. 50.
22 Geneva Convention IV, *supra* note 11, art. 52.
23 Geneva Convention IV, *supra* note 11, art. 55.
24 Geneva Convention IV, *supra* note 11, art. 56.
25 Geneva Convention IV, *supra* note 11, art. 27.
26 Geneva Convention IV, *supra* note 11, art. 65.
27 *Id.*

the principle that the penalty must be proportionate to the offense;[28] and limitations apply to the criminal procedure and detention of the local population.[29]

Article 4 of Geneva Convention IV also prescribes whom the Convention is designed to protect:

> Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.[30]

Geneva Convention IV's contribution to belligerent occupation law is significant in two respects.[31] First, it prescribes a bill of rights for the occupied population through internationally approved guidelines for the lawful administration of occupied territories.[32] Second, it shifts the emphasis of the traditional law of occupation from the interests of the occupying power to the interests of the local population.[33]

B. APPLICABILITY OF THE HAGUE REGULATIONS AND GENEVA CONVENTION IV TO THE WEST BANK: A CHANGING POLITICAL LANDSCAPE

On June 9, 1967, the day the IDF captured the West Bank, Chaim Hertzog, the newly appointed military governor of East Jerusalem and the West Bank, issued the Security Provision Order announcing that he had assumed all governmental powers in the area and the pre-occupation law (Jordanian law) would remain in force.[34] The Order permitted the establishment of military courts by the IDF and gave IDF soldiers the power to search and arrest members of the local population, impose curfews, and define security offenses.[35] It also included the following provision:

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28 Geneva Convention IV, *supra* note 11, art. 67.

29 Geneva Convention IV, *supra* note 11, arts. 69-78.

30 Geneva Convention IV, *supra* note 11, art. 4.

31 BENVENISTI, *supra* note 12, at 105.

32 *Id.*

33 *Id.*

34 *See* MORRIS, *supra* note 5, at 336-37; *Proclamation Regarding the Taking of Power by the IDF (6.7.1967)*, 1 Proclamations, Orders and Appointments of the Judea and Samaria Command, at 3.

35 *Security Provisions Order (West Bank - 1967) Article 35*, 1 Proclamations, Orders and Appointments of the Judea and Samaria Command, at 5.

> [A] military tribunal and the administration of a military tribunal shall observe the provisions of the Geneva Convention of August 12, 1949 Relative to the Protection of Civilian Persons in Time of War with respect to legal proceedings, and in the case of conflict between this order and the said Convention, the provisions of the convention shall prevail.[36]

Israel's government prepared the Order long in advance so it would be ready when the IDF occupied enemy territory.[37] The preceding provision assumed that under international law, any territory outside existing state boundaries (pre-1967) seized in the course of war would be regarded as occupied territory to which Geneva Convention IV would apply.[38] A diary entry recorded on May 24, 1967 by Tzvi Inbar, the former IDF Attorney General who played a major role in designing the IDF's legal framework in the Occupied Territories, reveals that Israel had at first intended to apply Geneva Convention IV:

> [Today,] I and an additional officer went to inspect the emergency boxes in the storage of the IDF Attorney General Command Center . . . [E]ach regional advocate [of the Israeli Military Government] for the West Bank [and] the Gaza Strip . . . [had] his own box. These boxes included Hebrew booklets: Administrating Occupied Territories, The Laws of War, The Geneva Conventions, and The Hague Conventions.[39]

Though Inbar was initially instructed to apply Geneva Convention IV, Israel's shifting political landscape changed how the Occupied Territories were administered. Not long after the 1967 war ended, it became clear that many Israeli politicians believed the West Bank was rightfully part of Israel and had thus been "liberated" rather than occupied.[40] This conviction greatly influenced Israel's treatment of the local population in the West Bank and is the primary reason that the preceding provision prescribing the supremacy of Geneva Convention IV in

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36 *Id.*

37 KRETZMER, *supra* note 6, at 32.

38 *Id.*

39 Tzvi Inbar, *The IDF Legal Department and the Occupied Territories*, 16 LAW AND WAR 149, 155-56 (2002).

40 KRETZMER, *supra* note 6, at 32-33.

the Occupied Territories was revoked soon after the war.[41] An order enacted by the military commander of the West Bank in August 1967 simply replaced the provision with another that omitted any reference to Geneva Convention IV.[42]

In 1968, Professor Yehuda Blum provided the first major legal justification for the IDF's decision not to apply Geneva Convention IV in the Occupied Territories.[43] Blum argued that since Jordan's annexation of the West Bank in 1950 had not received international recognition, it was not the sovereign territory of a "High Contracting Party" (as described by Article 2 of Geneva Convention IV) when taken by Israel in 1967; thus, the Convention did not apply to the West Bank, and Israel should not be regarded as an occupying power.[44] Because the object of Geneva Convention IV is to protect the sovereign rights of the previous regime, Blum argued that Israel was only bound by the humanitarian aspects of belligerent occupation law.[45]

Three years after Blum published his argument, the Israeli government adopted it as policy when the Attorney General of Israel announced at the 1971 Human Rights Symposium at Tel Aviv University that Israel would only follow the humanitarian aspects of Geneva Convention IV.[46] The official, detailed legal argument made by the Israeli government against the applicability of Geneva Convention IV to the Occupied Territories is based on a particular interpretation of Article 2 of the Convention,[47] which provides the following:

> In addition to the provisions which shall be implemented in peace-time, 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.
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> The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting

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41 *See* Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967*, 84 AM. J. OF INT'L LAW 44, 62 (1990).

42 *See* Amnon Rubinstein, *The Changing Status of the 'Territories' (West Bank and Gaza): From Escrow to Legal Mongrel*, 8 TEL AVIV STUDIES IN LAW 59, 63 (1988).

43 *See* Yehuda Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 ISRAEL LAW REV. 279, 293 (1968).

44 *Id.*

45 *Id.*

46 *See* Eyunal Mishpat, *The Pithat Rafiah Decision*, 3 TEL AVIV LAW REV. 933, 938 (1974).

47 *See* MEIR SHAMGAR, THE OBSERVANCE OF INTERNATIONAL LAW IN THE ADMINISTERED TERRITORIES 262 (1971).

> Party, even if the said occupation meets with no armed resistance.
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> 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.[48]

In arguing against the applicability of Geneva Convention IV, Israel claims that the second paragraph, rather than extending the application of Geneva Convention IV to cases where there is no armed resistance, actually limits the scope of the entire treaty to occupations where the occupied territory is under the legal sovereignty of one of the parties.[49] However, this interpretation of Article 2 was rejected by the International Committee of the Red Cross, leading Israeli academics, and foreign experts in international law.[50]

C. THE ROLE OF THE SUPREME COURT OF ISRAEL

Israel does not have a statute that deals with the implementation or the validity of international law within the state.[51] The Supreme Court of Israel bases its adaptation of international law on the English model. English law differentiates between two sources of international law: customary international law and treaties.[52] Norms of customary international law, including norms of customary international law codified in treaties, automatically apply to domestic courts unless they are inconsistent with an act of Parliament.[53] However, norms of conventional law, which derive from international treaties, do not automatically become part of domestic law and courts do not enforce them unless they have been incorporated into domestic law by an act of Parliament.[54] In addition, the

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48 Geneva Convention IV, *supra* note 11, art. 2.

49 Amichai Cohen, *Administrating the Territories: An Inquiry into the Application of International Humanitarian Law by the IDF in the Occupied Territories*, 38 ISRAEL LAW REV. 24, 36 (2005).

50 KRETZMER, *supra* note 6, at 34. A detailed discussion of Israel's interpretation of Article 2 is provided later in this article.

51 Yaffa Zilbershats, *The Adoption of International Law into Israeli Law: The Real is Ideal*, 24 MISHPATIM 317, 318 (1994).

52 *Id*.

53 *Id*.

54 *Id*.

Supreme Court of Israel has held that domestic laws that address issues of customary international law are to be interpreted in a manner consistent with international law.[55]

To maintain the position that Geneva Convention IV does not apply to the Occupied Territories, the Israeli government has adopted a contrived interpretation of Article 2 of the Convention. For the most part, the Supreme Court has upheld the interpretation of Article 2 advanced by the Israeli government. In one case, the Supreme Court held that the Palestinians in the Occupied Territories fell under the category of "protected persons" as stated in Article 4 of Geneva Convention IV, thus acknowledging that they are entitled to all the rights prescribed by the convention.[56] However, the Court has also repeatedly held that although the Hague Regulations are considered customary international law and therefore apply automatically to the Occupied Territories, Geneva Convention IV is conventional international law and is not binding in Israeli courts absent its incorporation into domestic law by the Knesset (Israeli parliament).[57] Still, that position has not prevented the Supreme Court and government from relying on different provisions of Geneva Convention IV when doing so justified IDF actions in the Occupied Territories.[58]

IV. HOUSE DEMOLITIONS IN THE WEST BANK

House demolitions are among the most extreme measures the IDF uses against individuals in the Occupied Territories.[59] House demolitions can be divided into three categories, each with its own distinct legal basis: administrative demolitions, military-need demolitions, and punitive demolitions.[60]

A. ADMINISTRATIVE AND MILITARY-NEED DEMOLITIONS

The legal basis for administrative demolitions is found in two articles of the Hague Regulations: Articles 43 and 55. Article 43 grants the occupying army, in this case the IDF, the power to restore and maintain "public order and safety." Article 55 provides the following:

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55 C.A. 336/61 Eichmann v. Attorney General 16 PD 2033, 2040 [1962] (Isr.).

56 HCJ 606/78 Ayub v. Minister of Defense 32(2) PD 113, 119 [1979] (Isr.).

57 *Id*.

58 KRETZMER, *supra* note 6, at 149-53.

59 *Id*. at 145.

60 Dan Simon, *The Demolition of Homes in the Israeli Occupied Territories*, 19 YALE J. OF INT'L LAW 80, 87 (1994).

> The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct. [61]

Thus, Article 55 grants the IDF power to manage public land and zoning regulations in the Occupied Territories.[62] In the West Bank, the IDF typically conducts administrative demolitions of homes built without a permit.[63] In practice, it is almost impossible for Palestinians to obtain a building permit in the West Bank – more than 90 percent of Palestinian permit requests are rejected – thus forcing them to build illegally.[64] In contrast, the Israeli government grants Jewish settlers in the West Bank building permits on a very large scale.[65] Excluding the removal of a few temporary trailers set up without a permit in the West Bank by Israeli settlers, administrative demolitions are virtually always used against Palestinian homes.[66]

The legal basis for military-need demolitions is found in Article 53 of Geneva Convention 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.[67]

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61 Hague Convention, *supra* note 10, arts. 43, 55.

62 ReliefWeb, *The Legality of House Demolitions Under International Humanitarian Law* (2011), at 2, http://web.stanford.edu/group/scai/images/housedemolitions.pdf.

63 *Id*.

64 *See* B'TSELEM - THE ISRAELI INFO. CTR. FOR HUMAN RIGHTS IN THE OCCUPIED TERRITORIES, Planning and Building in Area C (Jan. 1, 2011), *available at* http://www.btselem.org/planning_and_building.

65 *See* ISRAELI COMM. AGAINST HOUSE DEMOLITIONS, Israel's Policy of Demolishing Palestinian Homes Must End: A Submission to the UN Human Rights Council by the Israeli Committee Against House Demolitions (ICAHD), *available at* http://www.icahd.org/node/458.

66 *Id.*

67 Geneva Convention IV, *supra* note 11, art. 53.

Under Article 53, houses can be demolished only if the occupying power is engaged in an operation that requires the use of military force.[68] The occupying power must demonstrate that the use of military force is warranted by the circumstances at the time and that it was facing systematic and organized lethal violence equivalent to the violence characteristic of an armed conflict.[69] The IDF uses military-need demolitions extensively.[70]

The proper classification of house demolitions under one of the three categories is highly controversial. For example, in January 2009, during Operation Cast Lead, the IDF destroyed the entire residential neighborhood of ʻIzbat ʻAbd Rabo *after* the army gained full military control over the area.[71] Some argue that demolition of the neighborhood was punitive, the result of Palestinians allowing Hamas fighters to carry out attacks against the IDF from certain homes in the neighborhood; the IDF, on the other hand, argues that it was a military-need demolition, to secure the area.[72] This paper, however, addresses the legality of only the third category, punitive demolitions. Despite the manipulative manner in which the first two categories of demolitions are used and classified by Israel, only punitive demolitions are clear violations of international law.

B. PUNITIVE DEMOLITIONS

The use and legal basis of punitive demolitions in Israel date to the period of the British Mandate. The British Army in Palestine began using punitive demolitions in the 1936-39 Arab Rebellion during which it demolished more than 5,000 Palestinian homes.[73] The legal basis for these demolitions was Regulation 119 of the Defense (Emergency) Regulations, 1945:

> (1) A Military Commander may by order direct the forfeiture by the Government of Palestine of any house, structure, or land from which he has reason to suspect that any firearm has been illegally discharged, or any bomb, grenade or explosive or incendiary article illegally thrown, or of any house, structure or land situated in any

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68 ReliefWeb, *supra* note 64, at 2.

69 *Id*.

70 B'TSELEM - THE ISRAELI INFO. CTR. FOR HUMAN RIGHTS IN THE OCCUPIED TERRITORIES, Demolition for Alleged Military Purposes (Jan. 1, 2011), *available at* http://www.btselem.org/razing.

71 *Id.*

72 *Id.*

73 MIFTAH, House Demolitions Fact Sheet (Mar. 29, 2011), *available at* http://www.miftah.org/Display.cfm?DocId=14882&CategoryId=4.

> area, town, village, quarter or street the inhabitants or some of the inhabitants of which he is satisfied have committed, or attempted to commit, or abetted the commission of, or been accessories after the fact to the commission of, any offence against these Regulations involving violence or intimidation or any Military Court offence; and when any house, structure or land is forfeited as aforesaid, the Military Commander may destroy the house or the structure or anything growing on the land.
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> (2) Members of His Majesty's forces or 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.[74]

But the British Army only demolished the houses of Palestinian Arabs and never those of Jews, despite major attacks by Jewish underground organizations such as the hangings of British sergeants or the bombing of the British headquarters at the King David Hotel in Jerusalem.[75]

Subsequently, early Israeli demolition practices emulated the British example.[76] Moshe Dayan, the Israeli Minister of Defense during the formative years of the Israeli occupation and the architect of Israel's demolition policies, applied to the West Bank the practices he had learned firsthand during his service in the British army thirty years earlier.[77] Upon the entry of the IDF into the West Bank (and Gaza) in 1967, the IDF assumed full legislative and administrative authority over those territories, subject to the discretion of the military commander. [78] Neither the military commander nor the Knesset revoked Regulation 119, allowing the IDF to continue the practice of punitive demolitions

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74 HAMOKED: CTR. FOR THE DEF. OF THE INDIVIDUAL, Defense (Emergency) Regulations, 1945 Regulation 119, *available at* http://www.hamoked.org/Document.aspx?dID=2204.

75 AMOS PERLMUTTER, THE LIFE AND TIMES OF MENACHEM BEGIN 176 (1987).

76 *Id*.

77 *Id*.

78 *Proclamation Regarding the Taking of Power by the IDF (6.7.1967)*, 1 Proclamations, Orders and Appointments of the Judea and Samaria Command, at 3; Brian Farrell, *Israeli Demolitions of Palestinian Houses as Punitive Measure: Application of International Law to Regulation 119*, 28 BROOK. J. OF INT'L L. 871, 876-77 (2003).

both in the Occupied Territories and Israel (Regulation 119 applied to the whole of Palestine).[79]

C. PUNITIVE DEMOLITIONS IN PRACTICE

As previously noted, house demolitions are regarded as one of the most extreme measures used by the IDF against Palestinians in the Occupied Territories.[80] In fact, in a February 11, 1990 interview with the Israeli newspaper, *Kol Ha'Ir*, the former Chief Justice of the Supreme Court of Israel, Shimon Agranat, described house demolitions as "inhumane," indirectly criticizing the Court for permitting the practice.[81]

The term "house demolition" encompasses four different acts, though each is designed to achieve the same result: the displacement of Palestinians from their homes.[82] These include complete demolition, partial demolition, complete sealing, and partial sealing.[83] Both complete demolition and partial demolition involve the use of bulldozers or explosives, the only difference being whether complete or partial destruction of the house is effected.[84] Sealing, on the other hand, makes the house uninhabitable by filling it with concrete, entirely or partially, thereby sealing some rooms in the house.[85]

Each punitive demolition is initiated by either the IDF or the Israel Security Agency (better known as Shabak) that submits a recommendation for demolition to, and requests the approval of, the IDF's Legal Counsel for the Occupied Territories (LCOT).[86] At this stage of the process, the inhabitants of the house recommended for demolition are unaware a recommendation has been submitted.[87] The LCOT can issue two kinds of approvals: approval to seal and approval to demolish.[88] If the LCOT issues an approval to seal, the IDF can seal the house immediately, partially or entirely, without providing prior notice to the inhabitants of the house.[89] If the LCOT issues an approval to demolish, the

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79 KRETZMER, *supra* note 6, at 125.

80 *Id*. at 145.

81 B'TSELEM - THE ISRAELI INFO. CTR. FOR HUMAN RIGHTS IN THE OCCUPIED TERRITORIES, *Demolitions and Seals of Houses in the West Bank and Gaza Strip* (1990), at 2, http://www.btselem.org/sites/default/files2/hrysvt_ntymvt_btym_kmtsy_nyshh.pdf.

82 *See id*. at 3.

83 *See id.*

84 *See id.*

85 *See id.*

86 *Id*.

87 *Id.*

88 *Id*.

89 *Id*.

inhabitants of the house receive a notice from the military commander that their house will be demolished and they have 48 hours to appeal the demolition decision to the military commander.[90] If the military commander denies the appeal, the inhabitants are then given 48 hours to submit another appeal to the Supreme Court of Israel.[91] Since the beginning of the Israeli occupation, the Court has virtually never stopped a demolition from proceeding.[92]

In the vast majority of punitive house demolition cases, the person whose house is demolished is never tried or convicted of a crime.[93] Ordinarily, the IDF will seek to demolish the house that is the last known residence of a person suspected of committing a crime that warrants punitive demolition.[94] Once an address is located and a recommendation for demolition is approved, it is almost certain that the house will be demolished.[95] A review of cases issued by the Supreme Court of Israel reveals that the Court allowed punitive house demolitions even in circumstances when the suspect only rented the house;[96] when the house was owned by the suspect's father, who was not aware and did not approve of the suspect's actions;[97] and when dozens of the suspect's extended family members, including young children, resided in the house and had no other home.[98] The Court held, repeatedly, that the purpose of punitive house demolitions is not to punish the suspect for his alleged acts, but to deter other Palestinians from committing similar crimes.[99] In other words, punitive demolition is a punishment that the IDF may impose independently of and in addition to other criminal sanctions on the suspect if convicted.[100]

The case of the Krabsa family illustrates the execution of punitive house demolitions.[101] On February 27, 1990, the IDF arrested Muhamad Hasham Abed Krabsa for acts he allegedly committed while part of a terrorist group that targeted Palestinians collaborating with the IDF.[102] In his interrogation, the suspect confessed, *inter alia*, that he took part in the killing of three Palestinians who

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90 *Id*.
91 *Id*.
92 *Id*. at 5.
93 *Id*. at 3.
94 KRETZMER, *supra* note 6, at 146.
95 B'TSELEM, *supra* note 83, at 5.
96 KRETZMER, *supra* note 6, at 159-60.
97 HCJ 9353/08 Dheim v. General of the Home Front Command 3-5 (Isr.).
98 HCJ 2665/90 Krasba v. Minister of Defence 1-2 (Isr.).
99 HCJ 9353/08 Hisham Abu Dahim et al. v. The General of the Home Front Command 5-6 (Isr.).
100 KRETZMER, *supra* note 6, at 146.
101 HCJ 2665/90 Krasba v. Minister of Defence 1 (Isr.).
102 *Id*.

allegedly collaborated with the IDF.[103] Charges were brought against the suspect on May 14, 1990; on June 3, the suspect's father, Hasham Abed Diab Krabsa ("Hasham"), received a notice from the military commander that his house would be demolished by the IDF in two days.[104]

On June 5, 1990, Hasham appealed the demolition decision to the military commander,[105] but his appeal was denied six days later.[106] He then appealed the military commander's decision to the Supreme Court of Israel.[107] Hasham based his appeal on two arguments: (1) There were twenty-seven family members of five families residing in the house in five different units, but the suspect only used one unit when he resided in the house and, therefore, there was no justification for demolishing the other four units; (2) The suspect had not been tried or convicted of any crime.[108]

On September 13, the Court issued its two-page decision denying Hasham's appeal.[109] The Court held that it would not question the military commander's judgment, that the suspect's confession was sufficient for allowing the demolition, and that the entire house could be demolished as long as the suspect previously used one of the units of the house.[110]

On October 30, 1990, at 12:00 p.m., the IDF imposed a curfew in the West Bank town of Ein 'Arik where Hasham's house was located.[111] At 4:40 p.m. of the same day, forty IDF soldiers arrived at the house and ordered Hasham to empty the house of its contents.[112] One hour after Hasham and his neighbors finished emptying the house, the IDF attempted to begin demolishing the house with a bulldozer.[113] However, due to the location of the house and the surface on which it was located, the IDF's demolition attempt did not succeed.[114] The IDF then successfully used explosives to demolish the house.[115] As a result, Hasham's house was destroyed and his neighbors' houses were severely damaged.[116] Hasham and twenty-seven of his family members became homeless.[117]

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103 *Id*.
104 *Id*.
105 *Id*.
106 *Id*.
107 *See id*. at 2.
108 *Id*. at 2; B'TSELEM, *supra* note 83, at 8.
109 HCJ 2665/90 Krasba v. Minister of Defence (Isr.).
110 *Id*. at 2.
111 B'TSELEM, *supra* note 83, at 9.
112 *Id*.
113 *Id*.
114 *Id*.
115 *Id*.
116 *Id*.
117 *See id*.

The process of punitive demolition does not end with the destruction of the house.[118] Once the house is destroyed, the IDF confiscates the land on which the house was built, and the family who lived in the house is prohibited from rebuilding it.[119] The newly homeless family often receives a tent from the United Nations Relief and Works Agency for Palestine Refugees in the Near East and erects the tent on the ruins of their home, taking the risk that the IDF will demolish the tent as well.[120]

Since 1967, 25,878 Palestinian homes have been demolished in East Jerusalem, the West Bank, and Gaza Strip; 1,523 of them were punitive demolitions.[121] However, this number may be misleading, as 6,130 demolitions fall under the "undefined" category, meaning they can be administrative, military-need, or punitive demolitions. Only 5 percent of all demolitions are executed for Israeli security reasons.[122]

D. ARGUMENTS AGAINST THE USE OF PUNITIVE DEMOLITIONS

Over the years, many arguments were brought against Regulation 119. The most prominent of these, and their reception by the government and Supreme Court of Israel, are reviewed below.[123]

1. The Shani Military Commission for the Assessment of the IDF's House Demolitions Policy in the Occupied Territories

In its 2005 report, the Shani Military Commission, headed by General Ehud Shani, stated that punitive demolitions were an illegitimate measure under international law.[124] In response to the report, Shaul Mofaz, the Israeli Minister of

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118 *See id.* at 3.

119 *Id.*

120 *See id.*

121 ISRAELI COMM. AGAINST HOUSE DEMOLITIONS, Get the Facts, *available at* http://www.icahd.org/the-facts.

122 JEFF HALPER, AN ISRAELI IN PALESTINE 53 (2010).

123 While some arguments directly targeted Regulation 119, others were directed at the validity of the Defense (Emergency) Regulations, 1945 in its entirety, various regulations that were promulgated under it, or the legal analysis used by the Israeli Supreme Court in cases involving human rights in the Occupied Territories. Some of these arguments can be brought against Regulation 119 as well and therefore will be presented as such.

124 HAMOKED: CTR. FOR THE DEF. OF THE INDIVIDUAL, *Shani Report*, http://www.hamoked.org.il/items/110467.pdf.

Defense, announced on February 17, 2005 that the IDF would no longer carry out punitive demolitions.[125]

Despite Mofaz's announcement, in 2009 the IDF implemented the punitive demolition of a house in East Jerusalem and sealed another two houses in the same area.[126] The inhabitants of the demolished house brought their case to the Supreme Court of Israel prior to the demolition of their house. They petitioned the Court for an injunction and argued, *inter alia*, that the use of Regulation 119 contradicted international law and therefore could not be used to justify the punitive demolition of their home.[127] However, the Court rejected their argument, holding that Regulation 119 and punitive demolitions were measures that the IDF could still use.[128]

2. Revocation of the Defense (Emergency) Regulations of 1945: Punitive Demolitions Lack Legal Basis Because the Regulations Were Revoked by the British Parliament.

Three days prior to the termination of the British Mandate over Palestine, the Palestine Order-in-Council of 1948 ("Revocation Order") was signed in London.[129] The Revocation Order was enacted to repeal the Palestine (Defense) Order-in-Council of 1937 and the regulations promulgated pursuant to it, including the Defense (Emergency) Regulations, 1945 and Regulation 119.[130] The Revocation Order was published in the Government Gazette in London but not in the official Palestine Gazette.[131] The Supreme Court of Israel, using the legal principle that no "hidden law" is a valid law (drawing from the legality principle of *nullum poena sine lege* – no penalty without a law), held that because the Revocation Order was never published in the official Palestine Gazette, it was invalid and therefore Regulation 119 remained in force.[132]

The hidden law principle is not applicable to the Revocation Order because the principle is intended to prevent individuals from being punished for deviating from norms that they could not have been aware of in advance of their

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125 B'TSELEM, House Demolitions as Punishment (Jan. 1, 2011), *available at* http://www.btselem.org/punitive_demolitions.

126 B'TSELEM, Statistics on Punitive House Demolitions (Jan. 1, 2011), *available at* http://www.btselem.org/punitive_demolitions/statistics.

127 HCJ 5696/09 Mugrabi v. General of the Home Front Command (Isr.).

128 *Id*. at 6-7.

129 *See* KRETZMER, *supra* note 6, at 121.

130 *See* Farrell, *supra* note 76, at 875.

131 *See* KRETZMER, *supra* note 6, at 121.

132 HCJ 513/85 Na'azal v. IDF Commander in Judea and Samaria (1985) (Isr.), 39(3) PD 645, 652.

actions.[133] In contrast, the Revocation Order was directed only towards authorities and was intended to revoke their right to use excessive force against individuals. It is therefore illogical to use the hidden law principle in a way that harms the individuals it was designed to protect.[134]

3. The Promissory Estoppel Argument: Israel's Promise to Follow the Humanitarian Aspects of Geneva Convention IV is Binding and Punitive Demolitions are Prohibited Under Articles 33, 53, and 71 of the Convention.

As previously stated, the Attorney General of Israel announced in 1971 that Israel had decided to follow the humanitarian aspects of Geneva IV.[135] Some argue that the government must honor this promise and IDF conduct must accord with the humanitarian provisions of Geneva Convention IV, such as the prohibition of collective punishment (Article 33);[136] the prohibition of the destruction of property, excluding military-need demolitions (Article 53); and the prohibition of punishment without a trial (Article 71).[137, 138] Under this argument, punitive demolitions cannot be carried out by the IDF because they contradict those provisions.[139] The Supreme Court of Israel is still divided as to the implications of the promise and has not set a strict rule.[140] Although the Court has sometimes held that the promise is unenforceable in domestic courts,[141] the Court has at other times found that the promise is binding on governmental conduct.[142]

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133 *See* KRETZMER, *supra* note 6, at 122.

134 *Id*.

135 Mishpat, *supra* note 46, at 938.

136 In virtually all cases, most of the inhabitants of the soon-to-be demolished house are not accused of being responsible for the wrongful conduct that led to the punitive demolition.

137 In many cases, punitive demolitions are used prior to a suspect's trial while he is still in IDF custody.

138 *See* David KRETZMER, *Enforceability and Interpretation of Geneva Convention IV – The Way of the Supreme Court*, 26 MISHPATIM 49, 63-65 (1995).

139 *Id*. at 63.

140 *See* HCJ 27/88 Afo v. IDF Commander (Isr.), 42(2) PD 4, 7.

141 *See* HCJ 698/80 Kwasama v. Minister of Defense (Isr.), 35(1) PD 617, 627-628.

142 *See* HCJ 253/88 Sajdia v. Minister of Defense (Isr.), 42(3) PD 801, 832 (finding that the Israeli government must comply with the humanitarian aspects of Article 85 of Geneva Convention IV and improve the conditions that detainees are held in).

4. Rejection of Israel's Interpretation of Article 2 of Geneva Convention IV: Geneva Convention IV Applies in its Entirety to the Occupied Territories; Therefore, Punitive Demolitions are Prohibited.

Israel's main argument against the applicability of Geneva Convention IV to the Occupied Territories rests on a controversial interpretation of the second paragraph of Article 2.[143] Israel interprets the words "occupation of the territory of a High Contracting Party" as limiting the applicability of Geneva Convention IV to occupied territories that were recognized by the international community as the territory of a sovereign state that is a High Contracting Party.[144] Because the Occupied Territories were never recognized by the international community, Geneva Convention IV does not apply to them.[145]

This interpretation of Article 2 has been rejected by prominent legal experts inside and outside Israel.[146] Since both Israel and Jordan are parties to Geneva Convention IV, and since the convention applies to "all cases of declared war or of any other armed conflict" – including the 1967 war – between parties to the convention, it applies to the West Bank whether or not the territory was recognized as Jordan's territory by the international community.[147] Therefore, Geneva Convention IV applies in its entirety to the West Bank and punitive demolitions are prohibited under Articles 33, 53, and 71.[148] Still, the Supreme Court of Israel has maintained the position that Geneva Convention IV is conventional international law and as such does not apply in domestic courts absent an act of the Knesset.[149]

V. JUS COGENS AND ARTICLE 3 OF GENEVA CONVENTION IV: THEIR IMPACT ON PUNITIVE DEMOLITIONS IN THE OCCUPIED TERRITORIES

Under international law, a *jus cogens* norm preempts all other norms and states must follow it irrespective of their specific circumstances.[150] A *jus cogens*

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143 The second paragraph of Article 2 of Geneva Convention IV states that, "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."

144 *See* Cohen, *supra* note 49, at 36.

145 *See* KRETZMER, *supra* note 6, at 33-34.

146 *Id*. at 34.

147 *See* Cohen, *supra* note 49, at 38.

148 *Id*.

149 *See* Zilbershats, *supra* note 51, at 329-30.

150 *See* Sevrine Knuchel, *State Immunity and the Promise of Jus Cogens*, 9 NW. UNIV. J. OF INT'L HUMAN RIGHTS 13, 149 (2011).

norm does not require that every state recognize its preemptory status and is applicable even to those that have not accepted it.[151] Both a state's legislative and executive branches must comply with *jus cogens* norms at all times.[152] This notion was codified in Article 53 of the Vienna Convention on the Law of Treaties ("Vienna Convention"), which defines a peremptory norm of international law in the following way:

> A norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[153]

The Vienna Convention's drafters did not spell out which norms of international law were peremptory, leaving the full content of the rule to be worked out in state practice and the jurisprudence of international tribunals.[154] Although there is disagreement as to which norms fall within the category of *jus cogens*, the consensus is that the UN Charter's prohibition of the use of force, slavery, genocide, and piracy represent the core of *jus cogens* norms.[155]

The International Court of Justice ("ICJ") has repeatedly held that Article 3 of Geneva Convention IV contains *jus cogens* norms of international humanitarian law.[156] The ICJ has further held that Article 3 "constitute[s] a minimum yardstick" and contains "elementary considerations of humanity" that are "applicable to international and non-international conflicts."[157] However, some argue that although the norms specified in Article 3 have an indisputably humanitarian character, they attained neither customary law nor *jus cogens* status,

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[151] *See* Eva M. Kornicker Uhlmann, *State Community Interests, Jus Cogens and Protection of the Global Environment: Developing Criteria for Peremptory Norms*, 11 GEORGETOWN INT'L ENVTL. L. REV. 101 (1998).

[152] *See* Theodor Meron, *On a Hierarchy of International Human Rights*, 80 AM. JOURNAL OF INT'L LAW 1, 19-20 (1986).

[153] Vienna Convention on the Law of Treaties, May 23, 1969, *available at* https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf.

[154] *See* Pamela J. Stephens, *A Categorical Approach to Human Rights Claims: Jus Cogens as a Limitation on Enforcement?*, 22 WIS. INT'L LAW J. 245, 252-53 (2004).

[155] *Id*. at 253-54.

[156] *See* Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 392, 114, ¶ 20, 129, ¶ 255 (Jun. 27). Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain), 1970 ICJ, 4, 32, (Feb. 5).

[157] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Jurisdiction and Admissibility, 1984 I.C.J. 392, 114, ¶ 218-19 (Jun. 27) .

which can readily be seen in states' poor record of compliance with the norms it contains.[158]

Article 3, Section (1), Subsections (c) and (d) provide the following:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> > (c) outrages upon personal dignity, in particular humiliating and degrading treatment.
> >
> > (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.[159]

The International Criminal Court ("ICC") in the Elements of Crimes defines "outrages upon personal dignity, in particular humiliating and degrading treatment" as acts that humiliate, degrade, or otherwise violate the dignity of a person to such a degree "as to be generally recognized as an outrage upon

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158 *See* Theodor Meron, *The Geneva Conventions as Customary Law*, 81 AM. JOURNAL OF INT'L LAW 348, 357-58 (1987).

159 Geneva Convention IV, *supra* note 11, art. 27.

personal dignity."[160] The ICC noted that the cultural background of the individual must be taken into account when evaluating those acts.[161]

In light of the nature of jus cogens norms outlined above and the legal and factual realities in which punitive demolitions exist as set out in previous sections, the author argues that punitive demolitions are prohibited under international law as they contradict the jus cogens norms stated in Article 3(1)(c) and (d).[162] Punitive demolitions are often carried out by the IDF in the middle of the night, with little or no notice given to the inhabitants, and prior to any court conviction.[163] These demolitions clearly constitute a violation of the jus cogens norm of refraining from "humiliating and degrading treatment" under Article 3(1)(c). Furthermore, punitive demolitions harm "people taking no active part in the hostilities" (Article 3(1)) such as children and other family members who reside in the house and took no part in the suspect's alleged crime.[164] These uninvolved people lose their home in clear violation of Article 3(1)(4), a jus cogens norm that prescribes "affording all the judicial guarantees which are recognized as indispensable by civilized people." As previously noted, the Supreme Court of Israel is reluctant to apply Geneva Convention IV and offer protection from punitive demolitions because of the Convention's lack of customary international law classification.[165] However, under the jus cogens analysis, no such classification is necessary and Article 3 must therefore be treated as one that preempts Regulation 119 as well as any contradicting Supreme Court decisions and governmental or military directives.[166]

Beyond the language of Article 3, support for this argument can be found in Eva Kornicker Uhlmann's four-pronged test for identifying jus cogens norms.[167] According to the test, a jus cogens classification consists of four elements: first, the object and purpose of the norm must be the protection of state

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[160] ICC, *Elements of Crimes* (2011), at 27, 33, http://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf.

[161] *Id.* at 27.

[162] *See* Geneva Convention, *supra* note 11, art. 3(1)(c)-(d); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. REP. 392, 114, ¶ 220, 129, ¶ 255 (June 27). Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain), 1970 I.C.J. REP. 4, 32 (1970); Meron, *supra* note 157, at 15; Uhlmann, *supra* note 156, at 101-4.

[163] Usama R. Halabi, *Demolition and Sealing of Houses in the Israeli Occupied Territories: A Critical Legal Analysis*, 5 TEMPLE INT'L AND COMPARATIVE LAW J. 251, 254-55 (1992).

[164] *See* HCJ 5696/09 Mugrabi v. General of the Home Front Command (Isr.).

[165] *See* C.A. 336/61 Aichman v. Attorney General of the Government of Israel, 16 PD 2033, 2040.

[166] *See* CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY: HISTORICAL EVOLUTION AND CONTEMPORARY APPLICATION 267 (2011).

[167] *See* Uhlmann, *supra* note 156, at 101-14.

community interests, among them the protection of humanitarian norms in armed conflict; second, the norm must have a foundation in morality, as prescribed under Kantian principles, to ensure that only the most fundamentally moral norms are jus cogens; third, the norm must be of an absolute nature, that is, a norm that is not contradicted by a treaty and that draws persistent protest when it is not complied with; and fourth, the vast majority of states must agree to the preemptory nature of the international norm.[168]

Prohibiting punitive demolitions under Article 3(1)(c) and (d) satisfies all four prongs. First, prohibiting punitive demolitions promotes the state interest of protecting humanitarian norms in armed conflict. Again, punitive house demolitions harm uninvolved persons who committed no crime, a clear violation of international humanitarian law under Article (3)(1)(4).[169] Thus, preventing punitive house demolitions directly contributes to the protection of humanitarian norms.

Second, as to Kantian principles of morality, employing punitive demolitions, especially when they target a suspect's family, as an instrument for deterring actions that threaten Israel's security interests is patently immoral under Kant's formulation of morality.[170] Using a person as a means to an end is immoral and such behavior disregards the dignity and worth of an individual.[171] Israel explicitly attempts to justify the use of punitive demolition by arguing that demolishing the suspect's home deters others in the community from committing crimes against Israel; making the suspect's family homeless is the means to that end of deterrence.[172]

Third, the use of punitive demolitions has been contested for decades, both in Israel and abroad, and no treaty allowing punitive demolitions has been signed.[173] Finally, there is extensive evidence proving that the vast majority of states acknowledge the norm's preemptory status:[174] Article 6(b) of the Charter of the International Military Tribunal, Article 3(b) of the International Criminal Tribunal for the Former Yugoslavia, Article 8(2)(a)(iv) of the Rome Statute of the

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168 *Id*.

169 *See* HCJ 5696/09 Mugrabi v. General of the Home Front Command (Isr.).

170 *See* Immanuel Kant, *Critique of Pure Reason* (1787), at 221-22, http://www2.hn.psu.edu/faculty/jmanis/kant/critique-pure-reason6x9.pdf; *see also* KANT'S MORAL PHILOSOPHY, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2014), http://plato.stanford.edu/entries/kant-moral/#HumFor. For punitive demolitions as a form of deterrence, *see* KRETZMER, *supra* note 6, at 151-52.

171 *See* Immanuel Kant, *Critique of Pure Reason* (1787), at 221-22, http://www2.hn.psu.edu/faculty/jmanis/kant/critique-pure-reason6x9.pdf.

172 *Id.*

173 *See* Simon, *supra* note 62, at 10-15.

174 *See* Uhlmann, *supra* note 156, at 112-14.

International Criminal Court, and, of course, Article 53 of Geneva Convention IV all condemn "wanton destruction of cities, towns or villages, or devastation not justified by military necessity." [175] Thus, the prohibition against punitive demolitions satisfies all four prongs of Uhlmann's test, thereby acquiring jus cogens status.[176]

VI. CONCLUSION

The prohibition of punitive demolitions must not be treated as a mere provision of conventional international law that Israel may or may not choose to respect. Punitive demolitions are in direct conflict with the jus cogens norms of Article 3(1)(c) and (d), and therefore the prohibition of these acts must enjoy the same level of protection under international law. The legality of punitive demolitions should not be analyzed only in terms of Regulation 119 or the Supreme Court of Israel's conventional/customary international law classification, because both are preempted under jus cogens analysis. Anything short of the complete abolishment of the IDF's use of punitive demolitions must be deemed illegal under international law.

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[175] Charter of the International Military Tribunal, art. 6(b), (Aug. 8, 1945), *available at* http://avalon.law.yale.edu/imt/imtconst.asp#art6; Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, (May 25, 1993), U.N Doc. S/Res/827, available at http://www1.umn.edu/humanrts/icty/statute.html; Article 8(2)(a)(iv) of the Rome Statute of the International Criminal Court, *available at* http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf; Geneva Convention IV, *supra* note 11.

[176] *See* Uhlmann, *supra* note 156, at 101-14.