

Israel, House Demolitions in the Occupied Palestinian Territory

A. Sakhwil et al. Commander of the Judea and Samaria Region

N.B. As per the **disclaimer**, neither the ICRC nor the authors can be identified with the opinions expressed in the **Cases and Documents**. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven**; nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

[Source: *Israeli Yearbook on Human Rights*, vol. 10, 1980, p. 345; footnotes omitted.]

H.C. 434/79, SAKHWIL *ET AL.*v.

COMMANDER OF THE JUDEA AND SAMARIA REGION

[...]

[...]

This petition was filed with the High Court of Justice by two Arab women from [...] the West Bank Region. The women asked the Court to issue an injunction preventing the respondent from sealing off or demolishing or expropriating the houses in which they and their families resided.

[...]

In respect to the house of the second petitioner, the respondent had indeed ordered the sealing off of one of its rooms – that which belonged to her son. The woman's counsel [...] argued before the High Court that the order to seal off a room was invalid because it was discriminatory, arbitrary and in violation of the 1949 (Fourth) Geneva Convention relative to the Protection of Civilian Persons in Time of War. The Court considered the fact that the son was convicted by the Military Court of Ramallah of membership in an

unlawful organisation, of providing shelter to a person who had committed an offence in violation of security legislation, and of possessing explosives. It was proven to the Court that the son had knowingly used his room which the respondent had ordered sealed as a shelter for a member of the Al-Fatah organisation (one who had actually engaged in sabotage activity in Jerusalem) and as a hiding place for a sack of explosives.

Taking cognisance of the purpose for which the room had served, the Court found the argument on the illegality of the respondent's order to be groundless. The Court stated that the room could be lawfully sealed pursuant to Regulation 119(1) of the Defence (Emergency) Regulations, 1945, which "constitute 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". As to the content of Regulation 119 permitting destruction of private property in certain circumstances, the Court observed that "Regulation 119 applies to an unusual punitive action, whose main purpose is to deter the performance of similar acts".

Finally, the Court also rejected the counsel's allegation relating to the observance of the Geneva Convention. It found it unnecessary to look into the question of whether the respondent was bound to comply with the provisions of the Geneva Convention, for "even if it were so, there is no contradiction between the provisions of that Convention... and the use of the authority vested in the respondent by legislation which was in force at the time when the Judea and Samaria Region was under Jordanian rule and which has remained in force in Judea and Samaria to this day". Consequently this petition was rejected by the High Court, and the sealing off of a room by the respondent was upheld.

B. The Israeli Information Centre for Human Rights in the Occupied Territories, "Demolition for Alleged Military Purposes"

[Source: The Israeli Information Centre for Human Rights in the Occupied Territories, "Demolition for Alleged Military Purposes", online: <http://www.btselem.org/>]

International humanitarian law

Even following the transfer of parts of the West Bank and the Gaza Strip to the Palestinian Authority as part of the Oslo Accords, Israel remains the occupier of the Occupied Territories. As the occupier, it must comply with the duties of an occupying state, and act in accordance with the laws of occupation.

Hostilities are taking place in the Occupied Territories, but these events do not justify Israel's avoidance of its duties as the occupier, as if the occupation had ended. [...]

The occupying state must also protect the civilian population's property. Article 46 of the Hague Regulations provides that private property must be respected and that it cannot be confiscated. Article 53 of the Fourth Geneva Convention provides that the destruction of property by the occupying state is forbidden, "except where such destruction is rendered absolutely necessary by military operations." Because the occupier has special obligations toward the civilian population, it bears an extremely heavy burden of proof that the injury

was necessary. Article 147 of the Convention provides that, “extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly” is a grave breach of the Convention.

Israeli officials use article 23(g) of the Hague Regulations, of 1907, to justify the demolition of houses and destruction of agricultural land. This article states that it is forbidden “to destroy or seize the enemy’s property unless such destruction or seizure be imperatively demanded by the necessities of war.” Israeli officials argue that protecting security forces and settlers from Palestinian gunfire, and combating the digging of tunnels intended for smuggling weapons, are pressing military necessities that justify the demolition of property pursuant to article 23(g).

There is no significant difference between article 23(g) of the Hague Regulations, on which Israel relies, and Article 53 of the Fourth Geneva Convention, and the articles complement each other. The reason that Israel referred to the Hague Regulations is twofold: it seeks to emphasize that an armed conflict is currently being waged in the Occupied Territories, and that the Fourth Geneva Convention does not apply in the Occupied Territories, an argument it has made continuously since 1967, contrary to the position of the international community.

Even in the case of military necessity, which can provide an exception to the sweeping prohibition on destruction of property, the occupier must comply with the other provisions of international humanitarian law. Indeed, jurists and international tribunals have firmly rejected the argument that military necessity prevails over every other consideration and nullifies application of these other provisions. Every act must comply with international humanitarian law, and the parties are not free to choose the ways and means to wage combat.

To ensure that the exception set forth in article 23(g) of the Hague Regulations and Article 53 of the Fourth Geneva Convention is not broadly construed, international humanitarian law provides, *inter alia*, that it is forbidden to damage property as a preventive means where the danger has not yet been realized. It further provides that destruction of property is forbidden unless alternative, less injurious, means are not available to achieve the objective. In addition, it is expressly forbidden to destroy property with the intent to deter, terrify, or take revenge against the civilian population. Injury to property intended to cause permanent or prolonged damage is also forbidden.

Even though the claim that some cases of destruction entailed military necessity cannot be outright rejected, there is strong reason to believe that many cases involved considerations that were extraneous to the narrow definition of military necessity. However, we shall not examine the question of whether military necessity indeed existed in the Gaza Strip to justify the exception to the prohibition on damaging private property. For even if military necessity exists, Israel’s policy flagrantly violates other rules of international humanitarian law, the violation of which are sufficient to make the policy illegal.

In the past, too, Israel relied extensively on a broad construction of the “military necessity” exception. Israel claimed “pressing military necessity” to justify the house demolitions committed pursuant to Regulation 119 of the Emergency Defense Regulations. Israel made its claim even though it had declared that the demolitions were intended to punish persons suspected of attacks against Israel and to deter other Palestinians from performing similar acts. The prohibition on destruction of property set forth in international humanitarian law is intended precisely to prevent using such reasons to justify damage to property.

Principle of proportionality

[...] [The] principle [of proportionality] also applies to Israel's policy discussed in this document. According to the commentary published by the ICRC on article 53 of the Fourth Geneva Convention, destruction of property is illegal if the occupier does not “try to keep a sense of proportion in comparing the military advantages to be gained with the damage done.” This prohibition applies even in a situation of military necessity.

Examination of the circumstances in which Israel implemented its policy – the extreme magnitude of the house demolitions, the uprooting of trees, the destruction of agricultural fields, and the manner in which Israel chose to implement its policy – clearly and unequivocally indicate that these contentions are baseless. The injury to the civilian population was excessive in proportion to the military advantage that Israel ostensibly sought to achieve by implementing this policy.

One of the primary requirements of proportionality states that actions that will injure civilians may be taken only after alternative acts, whose resultant injury would be less, are considered and then rejected because they will not achieve the necessary military advantage. Israel ignores this rule and uses means whose injury to civilians is extremely severe. Furthermore, Israel declares that destruction of the agricultural land and demolition of houses constitute a future policy. Declaring these acts a policy indicates the lack of an intention to consider alternatives before carrying out the acts of destruction.

The IDF forces destroyed entire residential neighborhoods, claiming that, under some of the houses, tunnels had been dug through which weapons were being smuggled. In other cases, the army destroyed dozens of houses on the grounds that Palestinians were firing from the area at IDF soldiers. The demolition of houses based on this claim cannot be deemed to meet the conditions required by the principle of proportionality.

Israel destroyed crops and agricultural land, and uprooted fruit trees on the grounds that from these fields Palestinians fired at soldiers and settlers. In some of the cases, the IDF forces destroyed tomato and squash fields, in which people could not hide. The army's actions caused long-term, and in some instances irreversible, damage to the land, and affected the income of thousands of people for many years to come. Destruction of this kind certainly cannot be considered to be in accordance with the principle of proportionality. [...]

The argument that Israel breached the principle of proportionality when it implemented its policy in the Gaza Strip is supported by the comments made by Brigadier General Dov Zadka, head of the Civil Administration. In his response to a question from a reporter from B'Mahaneh [the IDF magazine] whether Israel did not overdo the demolitions that it carried out in the Occupied Territories, Zadka stated:

In Gaza – very much so. I think they did several things that were excessive. After the events in Aley Sinai and Dugit, they executed an extremely massive clearance in what they called “the northern sector.” They uprooted hundreds of dunam of strawberries and orchards and greenhouses, and I think that wasn’t right... In Judea and Samaria, too, there are places that we haven’t acted properly. Sometimes I approve a specific scope of clearing, but when I go to the field I find a degree of hyper-activity by the troops... Did we overdo it in certain places? To tell the truth – yes. For sure. You approve the removal of thirty trees, and the next day you see that they removed sixty trees. The soldier or the company commander on the site got carried away. There have been such cases, and we must not ignore them.

C. Israel Ministry of Foreign Affairs, “The Demolition of Palestinian Structures Used for Terrorism – Legal Background”

[Source: Israel Ministry of Foreign Affairs, “The Demolition of Palestinian Structures Used for Terrorism – Legal Background”, 18 May 2004, online:
<http://www.mfa.gov.il/MFA/PressRoom/2004/Pages/Initial%20Israeli%20Response%20to%20Amnesty%20Report%20on%20Demolitions%2018-May-2004.aspx>]

For nearly four years, Israelis have been the victims of a relentless and ongoing campaign by Palestinian terrorists to spread death and destruction, condemning our region to ongoing turmoil, killing more than 900 Israelis and injuring more than 6000.

In light of this unprecedented lethal threat, Israeli security forces have sought to find new effective and lawful counter-measures that would minimize the occurrence of such terrorist attacks in general, and suicide terrorism in particular, and to discourage potential suicide bombers.

Palestinian terrorists employ the most abhorrent and inhuman methods, including suicide terrorism in order to target Israeli civilians and soldiers, contrary to any notion of morality, and in grave breach of the international laws of armed conflict. Palestinian terrorists operate from within densely populated areas, abusing the protection granted by international law to the civilian population.

Faced with the failure of the Palestinian leadership to comply with its obligations to fight terrorism, stop incitement and prevent the smuggling of weapons, Israel has been compelled to combat the threat to the lives of Israelis, exercising its right to self defense while upholding its obligations under international law. One such security measure is the demolition of structures that pose a real security risk to Israeli forces.

Terrorists often operate from within homes and civilian structures. When terrorists fire from within these buildings or activate roadside charges from orchards and fields, military necessity dictates the demolition of these locations. Under International Law, these locations are considered legitimate targets. Therefore, in the midst of combat, when dictated by operational necessity, Israeli security forces may lawfully destroy structures used by terrorists.

A further instance necessitating the demolition of buildings is the use made by terrorist groups of civilian buildings in order to conceal openings of tunnels used to smuggle arms, explosives and terrorists from Egypt into the Gaza Strip. Similarly, buildings in the West Bank and Gaza Strip are used for the manufacturing and concealment of rockets, mortars, weapons and explosive devices to be used against Israel. The demolition of these structures is often the only way to combat this threat.

Another means employed by Israel against terrorists is the demolition of homes of those who have carried out suicide attacks or other grave attacks, or those who are responsible for sending suicide bombers on their deadly missions. Israel has few available and effective means in its war against terrorism. This measure is employed to provide effective deterrence of the perpetrators and their dispatchers, not as a punitive measure. This practice has been reviewed and upheld by the High Court of Justice.

Israel's security forces adhere to the rules of International Humanitarian Law and are subject to the scrutiny of Israel's High Court of Justice in hundreds of petitions made annually by Palestinians and human rights organizations.

Israeli measures are not a form of "collective punishment" as some have claimed, as if the intention were to cause deliberate hardship to the population at large. While the security measures taken in self-defense and necessitated by terrorist threats do unfortunately cause hardships to sectors of the Palestinian population, this is categorically not their intent. Wherever possible, even in the midst of military operations, Israel's security forces go to great lengths to minimize the effects of security measures on the civilian population not involved in terrorism.

In this context, Israel adopts measures in order to ensure that only terrorists and the structures they use are targeted. Furthermore, though permissible under the laws of armed conflict, Israel refrains whenever possible from attacking terrorist targets from the air or with artillery, in order to minimize collateral damage, a policy which entails risking the lives of Israeli soldiers. The death of 13 soldiers in ground operations in the Gaza Strip in early May 2004 is an example of the heavy price Israel pays for its commitment to minimize Palestinian civilian casualties.

While there is no question that the Palestinian population is suffering from the ongoing conflict, that suffering is a direct result of Palestinian terrorism aimed at innocent Israelis, and the need for Israel to protect its citizens from these abhorrent attacks.

[...]

D. Amnesty International, “House Demolition: Palestinian Civilians in Rafah Refugee Camp”

[Source: Amnesty International, “House Demolition: Palestinian civilians in Rafah refugee camp”, 18 May 2004,online: <http://www.amnesty.org/en/library>]

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ISRAEL/OCCUPIED TERRITORIES

Palestinian civilians in Rafah refugee camp

The Israeli army has accelerated its demolition of houses in the Rafah refugee camp in the past few days, making over 1,000 people homeless. The army intends to demolish more houses in the camp. [...]

United Nations Relief and Works Agency (UNRWA) officials estimate that the Israeli army has destroyed more than 80 buildings in the Rafah refugee camp during the past few days, leaving some 1,100 Palestinians homeless. Israeli army officials have announced their intention to demolish more homes, and on 16 May the Israeli Supreme Court rejected a petition, filed by human rights organizations on behalf of Palestinian families living in the refugee camp, to stop the demolitions.

The army say this latest wave of destruction of Palestinian homes is intended to expand the no-go area (referred to as the Philadelphi Route) along the Egyptian border in the southern Gaza Strip. The Israeli authorities contend that the massive scale of house demolition is necessary to uncover tunnels used by Palestinians to smuggle weapons into the Gaza Strip from Egypt. The demolition plan was reportedly approved on 13 May by Prime Minister Ariel Sharon, Defense Minister Shaul Mofaz and other top officials.

The Rafah refugee camp, in existence since 1948, is very densely populated, with rows of houses separated by narrow alleyways. In late 2000 the Israeli army began the massive destruction of houses in the camp. Until then, houses had stood only a few meters from the border with Egypt: now houses are reduced to rubble for up to 300 meters from the border. The destruction has targeted row after row of houses, contrary to claims by the Israeli authorities that they only destroy houses used by Palestinians to attack Israeli soldiers patrolling the border, and houses used as cover for tunnels.

On 14 May, Israeli army Chief of Staff Moshe Yaalon reportedly said that “There’s a process whereby the first row of houses is abandoned and used for digging tunnels for smuggling weapons and cover for shooting. We’ve been forced to destroy houses here in the past and apparently we’ll have to destroy more houses in the future.” [...]

Amnesty International believes that the massive destruction in Rafah refugee camp and elsewhere in the

Gaza Strip cannot be justified on the grounds of “absolute military necessity,” as the Israeli authorities claim, and constitutes a form of collective punishment against the tens of thousands of Palestinians who have been affected. Such measures are a violation of international humanitarian law, notably Article 33 of the Fourth Geneva Convention, which states: “No protected person [i.e. those living under foreign occupation] may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation...are prohibited...Reprisals against protected persons and their property are prohibited”. [...]

E. Ha’aretz, “High Court allows Gaza demolitions: Army’s ‘operational necessity’ takes precedence

[Source: *Ha’aretz*, Tel Aviv, 17 May 2004, Yuval Yoaz and Gideon Alon, “High Court allows Gaza demolitions: Army’s ‘operational necessity’ takes precedence”, online: www.haaretz.com]

The High Court of Justice ruled yesterday that Israel has the right to demolish Palestinian homes without granting the residents a right to a court of appeal in the event of “immediate operational necessity” or when it endangers the lives of Israeli soldiers or jeopardizes military operations.

Justices Eliahu Mazza, Dorit Beinisch and Eliezer Rivlin rejected a petition by 13 residents of Rafah, whose homes are targeted for demolition by the Israel Defense Forces. The ruling cancels a temporary order issued by Mazza on Friday night that stopped the IDF from proceeding with plans to raze homes adjacent to the Philadelphi route on the southern border of the Gaza Strip.

The justices accepted the state’s position that it is impossible to promise that no additional homes will be demolished. The state is committed to granting legal recourse to Palestinians whose homes are slated for demolition – except when this entails an immediate military risk. But attorney Enar Helman, representing the state, admitted that the situation on the ground makes this distinction largely irrelevant.

“In 99 percent of the cases in the Rafah area, which is different from the West Bank or elsewhere in the Gaza Strip, the moment we announce our intention of razing a home, the Palestinians immediately set booby-traps there,” Helman explains.

“The state declared to us that the demolition of homes by the IDF during the fighting on Friday on the Philadelphi route was not conducted as a means of deterrence but as an urgent military action required to defend the lives of soldiers operating in the field,” the justices ruled.

Despite the rejection of the petition, the attorney for the petitioners, Yunis Tamim, voiced hope that the court’s decision could ultimately limit the scope of destruction. “We are sure that the army will think very carefully about destroying houses in the future. This is a clear decision that there are certain conditions in which houses can be demolished,” he told reporters.

Knesset reaction

Zehava Gal-On, chairwoman of the Meretz faction, said she regretted the High Court's decision. The MK said the court was abandoning thousands of innocent people for what the army defines as security needs. "It was again demonstrated that in Israel, human rights stop at the Green Line border and are not extended to the residents of the occupied territories," Gal-On said.

MK Mohammed Barakeh (Hadash) also attacked the court's decision, claiming that it provided "a stamp of approval for war crimes."

In response to this criticism, Likud MK and coalition chairman Gideon Sa'ar said that he "regrets that the security of the state and IDF soldiers are not valued as highly as the property rights of Rafah residents in the eyes of the critics from the left." He called it a "pathetic attempt to terrorize the court for obvious political reasons."

Discussion

1. Why should an Israeli court apply Jordanian law? (GC IV, Art. 64) By applying Jordanian legislation (Regulation 119(1) of the Defence (Emergency) Regulations, 1945) does the Court admit the status of Judea and Samaria as occupied territory requiring application of the Geneva Conventions? (HR, Arts 23(h) and 43; GC I-IV, common Art. 2(2); GC IV, Art. 6; P I, Arts 1(3) and 3(b))
2.
 - a. "Regulation 119(1)" permits destruction of private property; is this consistent with the Geneva Conventions? Was such action justified by military necessity? (HR, Art. 53; GC IV, Arts 53 and 147; CIHL, Rules 50 and 51)
 - b. In the Sakhwil case, did the woman or her son own the house? Was the son the only resident in the house? Was the woman convicted of any crime? Are these relevant considerations? (HR, Art. 50; GC IV, Art. 33; CIHL, Rule 103) Do the Conventions not provide for the right to a fair trial? Was the woman being tried for any crime that carried a penalty permitting the destruction of her house? (GC IV, Art. 147; P I, Art. 85(4)(e))
 - c. If application of "Regulation 119(1)" contradicts the above-mentioned articles of the Conventions, must the Regulation, if constituting Jordanian law in force prior to occupation, be applied? May it be applied? (HR, Art. 43; GC IV, Art. 64)
3. Was the Gaza Strip an occupied territory in October 2003? Does the prohibition on destroying houses also apply outside occupied territories? (HR, Art. 42; GC IV, Arts 2, 4 and 53; P I, Art. 52; CIHL, Rules 50 and 51)
4. Does Art. 23(g) of the Hague Regulations apply only to the conduct of hostilities or also to occupied territories? Is B'Tselem correct in writing in Document B. that there is no significant difference between Art. 23(g) of the Hague Regulations and Art. 53 of Convention IV? Is Art. 23(g) of the Hague Regulations today replaced by Art. 52 of Protocol I and the corresponding customary international law?
5. Are the destructions described in documents B., C. and D. covered by the law of military occupation, by the law on the conduct of hostilities, or both? In each case, when is the demolition of a house justified? When can a civilian dwelling be a military objective? May a military objective only be destroyed if military operations make it absolutely necessary to do so? (GC IV, Art. 53; P I, Art. 52; CIHL, Rules 7-10)

6. Do the circumstances described by the Ministry of Foreign Affairs in stating when the military can demolish homes for reasons of military necessity conform to the rules of IHL? When are the homes “legitimate targets”? Discuss each of the categories. (GC IV, Art. 53; P I, 52; CIHL, Rules 7-10)
7. Do the measures the Israeli forces take to ensure only “terrorists” and their structures are targeted comply with their obligations under IHL? Is it permitted under IHL to attack civilian homes from the air? Even within an occupied territory? If those homes are being used by insurgents?
8. Is protecting Israeli soldiers a legitimate factor for determining what constitutes military necessity?

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