PROSECUTING COLLECTIVE PUNISHMENT: ISRAEL'S BREACH OF INTERNATIONAL LAW IN THE WEST BANK

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ABSTRACT

This Note examines Israel's use of collective punishment in the West Bank and investigates the best forum for prosecuting these violations. Collective punishment is prohibited under international humanitarian law, and is an act prosecutable as a war crime or crime against humanity by the International Criminal Court. However, to date, Israel's use of collective punishment has gone unchallenged in international courts. In addition, while domestic Israeli law provides for challenges in court based on customary international law, the High Court of Justice, Israel's Supreme Court, has been reluctant to grapple with these violations of international law. In this Note, I will detail the relevant international and domestic laws that prohibit Israel's use of collective punishment in the West Bank. This Note will then investigate the best forum to challenge these violations of international law, focusing on the International Criminal Court, ad hoc tribunals, and the High Court of Justice in Israel. Finally, this Note will conclude with benefits and drawbacks of each of these fora and outline the best forum in which to prosecute these violations.

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I. INTRODUCTION

Since the start of the occupation of Gaza and the West Bank, Israel has employed measures of collective punishment in Palestinian neighborhoods.[1] Collective punishment is defined as imposing a penalty on someone who is not individually responsible for a crime.[2] The methods used by Israel in response to terrorist attacks and perceived security threats include road closures and area closures, and home raids in Palestinian areas; however, most notable has been demolitions of homes of convicted or suspected Palestinian terrorists.[3] While it is understood as a violation of both

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[1] For a discussion on the Israeli punishment of Palestinians, *see* Orlando Crowcroft, *Jerusalem Violence: Why Does Israel Bulldoze the Homes of Terrorists?*, INT'L BUS. TIMES (Oct. 6, 2015), http://www.ibtimes.co.uk/jerusalem-violence-why-does-israel-bulldoze-homes-terrorists-1522716.

[2] Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land art. 50, Oct. 18, 1907, 36 Stat. 2277, T.S. 539.

[3] *Israel: Serious Violations in West Bank Operations*, HUM. RTS. WATCH (July 3, 2014), https://www.hrw.org/news/2014/07/03/israel-serious-violations-west-bank-operations. Since the Six Day War in 1967, Israel has occupied the West Bank, East Jerusalem, and Gaza Strip; at the time, this occupation also included areas in the Golan Heights and the Sinai Peninsula, but since 1967 other areas have either been given back to other governments or formally become part of Israel. *Israel, Palestine and the Occupied Territories*, GLOBAL POLICY FORUM, https://www.globalpolicy.org/security-council/index-of-countries-on-the-security-council-agenda/israel-palestine-and-the-occupied-territories.html. In addition, Israel disengaged from the Gaza Strip in 2005. GLOBAL POLICY FORUM, *supra* note 3. While many scholars debate whether the Gaza Strip is still occupied

international treaty law as well as customary international law,[4] Israel has maintained that actions by their officials do not constitute collective punishment and are instead legal measures used in self-defense.[5] This debate is not settled in the international domain. This Note assumes that these measures do in fact rise to the level of collective punishment as prohibited by the Fourth Geneva Convention and customary international law.[6] Many scholars have written on the nature of these measures, and this Note does not profess to add to that literature. Rather, this Note focuses on how best to prosecute individuals for the use of collective punishment, which requires assuming the truth of the premise that collective punishment, as a violation of international law, is indeed being employed.

Both international and domestic Israeli law prohibit the use of collective punishment.[7] However, the Israeli High Court of Justice ("HCJ") relies on a domestic test of proportionality and skirts the issue of the customary prohibition on the use of collective punishment.[8]

This Note discusses the collective punishment used by Israel in the West Bank. The first section investigates the Israeli and international laws pertaining to violations of the prohibition on collective punishment. The second section discusses the establishment of the International Criminal Court ("ICC") and the advantages and disadvantages of prosecuting individuals for violations of international law in this court. The third section discusses the establishment of ad hoc tribunals and the benefits as well as pitfalls of these courts. Given this background, this Note then considers the possibilities for holding individuals in the Israeli government accountable for its use of collective punishment in the West Bank and Gaza. The fourth section discusses the benefits and drawbacks to each of these courts in order to conclude which forum is best suited to address the issue of Israel's violations of international law with respect to collective punishment. This Note concludes by suggesting that the prosecution of individuals for the use of collective punishment should be left to the courts in Israel rather than

by Israel, that debate is beyond the scope of this Note.

[4] *Customary International Humanitarian Law: Rule 103*, *Collective Punishments*, INT'L COMM. RED CROSS, https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule103 (last visited Mar. 20, 2017) [hereinafter Rule 103].

[5] *See* Barak Ravid & Jonathan Lis, *Israel Responds to Gaza War Report: UNHRC Has 'Singular Obsession with Israel,'* HAARETZ (June 22, 2015), http://www.haaretz.com/israel-news/.premium-1.662434.

[6] Convention Relative to the Protection of Civilian Persons in Time of War, sec. I. art. 33, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC (IV)]; Rule 103, *supra* note 4.

[7] Rule 103, *supra* note 4; David Kretzmer, *The Law of Belligerent Occupation in the Supreme Court of Israel*, 94 INT'L REV. OF THE RED CROSS 207, 209 (2012).

[8] *See*, *e.g.*, HCJ 6298/07 Ressler v. Knesset (not yet reported) (2012) (Isr.).

other fora due to the ongoing nature of the conflict, the expediency of Israeli courts, and their capacity to hear many cases. However, ICC can encourage domestic prosecutions of collective punishment, leading to the eventual termination of the practice.

II. THE LAW OF COLLECTIVE PUNISHMENT

This section discusses both Israeli law and international law understandings of collective punishment and how individuals can be prosecuted for these violations. The benchmark of collective punishment in the international sphere is punishment for an action where the person penalized cannot be said to have individual responsibility.[9] While the Geneva Conventions do not define "collective punishment," the Hague Regulations of 1907 define it as a "general penalty, pecuniary or otherwise . . . inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible."[10] Therefore, in order for punishment to be lawful under international law, the individual or individuals being penalized must be individually responsible for the acts being punished.

A. International Law Related to Collective Punishment

International Humanitarian Law outlaws punishing individuals for offense they have not committed.[11] In addition, the Hague Regulations and the Fourth Geneva Convention treaties explicate prohibitions on these acts particular to the context of occupation. These regulations require that the occupying power not deprive the occupied people of the protections

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[9] Hague Convention (IV), *supra* note 2, at art. 50.

[10] *Id.*

[11] Additional Protocol II to the Geneva Convention reads: "without prejudice to the generality of the foregoing, the following acts against the persons [not taking part in direct hostilities] are and shall remain prohibited at any time and in any place whatsoever: . . . (b) collective punishments." Additional Protocol II refers to the laws relating to the victims in non-international armed conflicts while Additional Protocol I refers to the laws relating to the victims of international armed conflicts. Although some scholars argue that the conflict between Israelis and Palestinians is not international because Israel administers the West Bank, others argue that this conflict exists between two countries. Despite the classification, Additional Protocol I and Additional Protocol II contain the same prohibition on collective punishment, meaning that collective punishment is prohibited in the West Bank regardless. Protocol Additional to the Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, U.N. Doc. A/32/144, at art.4 (June 8, 1977) [hereinafter AP II]. In addition, the Fourth Geneva Convention states "no protected person may be punished for an offense he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited." GC (IV), *supra* note 6, at art. 47.

guaranteed by international law, which includes safety from collective punishment.[12] Similarly, the Fourth Geneva Convention prohibits an occupying power from destroying "real or personal property belonging individually or collectively to private persons . . . except where such destruction is rendered absolutely necessary by military operations."[13] Israel is bound by each of these treaties that prohibit the use of collective punishment.

In addition, collective punishment is generally viewed as prohibited by customary international law.[14] Though not a formal codification of customary international law principles,[15] the International Committee of the Red Cross lists the prohibition of collective punishment as a generally agreed upon rule of customary international law.[16]

In addition, the Geneva Conventions allow the occupying power to "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."[17] Some would argue that Israel's use of home demolitions would fall within the scope of this article of the Geneva Conventions, since they are used to ensure safety and security of both Palestinians and Israelis.[18] While Israel argues that it has used collective punishment only as a security measure throughout the occupation of the West Bank, the international community has questioned this argument.[19]

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[12] *Id.*

[13] *Id.* at art. 53.

[14] Rule 103, *supra* note 4.

[15] Customary international law is not codified, but the International Committee of the Red Cross has compiled rules it views as being part of Customary International Humanitarian Law. *See Customary IHL*, INT'L COMM. RED CROSS, https://ihl-databases.icrc.org/customary-ihl/eng/docs/home (last visited Mar. 20, 2017). This Note cites to this compilation.

[16] *Id.*

[17] GC (IV), *supra* note 6, at annex, art. 43.

[18] *Israel: Stop Punitive Home Demolitions: Policy Amounts to Collective Punishment, Potential War Crime,* HUM. RTS. WATCH (Nov. 21, 2014), [hereinafter *Israel: Stop Punitive Home Demolitions*] https://www.hrw.org/news/2014/11/21/israel-stop-punitive-home-demolitions.

[19] While many in Israel believe this does not rise to the level of collective punishment, much of the international community agrees that Israel's actions do constitute collective punishment. The IDF has successfully argued in court that home demolitions in particular are means of deterrence and therefore do not rise to the level of collective punishment because there is no punishment to speak of. HCJ 514/85 Nazal v. Commander of the Judea and Samaria region, 39(3) PD 645 (1986) (Isr.). In order to make a meaningful contribution to the plethora of academic writings on the topic of collective punishment, I will assume that, arguendo, Israel's actions rise to the level of collective punishment. The scope of this Note is narrowed to the prosecution of this violation of International Law.

No such exception for the employment of collective punishment in times of national security exists in treaty or customary international law.

B. Israeli Law on Collective Punishment

The type of collective punishment employed against Palestinians usually depends upon the security or political situation at hand in the West Bank and Gaza.[20] The types of collective punishment most often employed are home demolitions, road and area closures, and widespread arrests.[21]

1. Regulation 119

During the time of British Mandate Palestine, the United Kingdom promulgated Regulation 119 pursuant to the Emergency Powers (Defence) Act of 1945.[22] Israel holds that Jordan "who occupied the West Bank in 1948, inherited the Regulation from the British Mandate and applied it to its territory, including the West Bank, through its internal laws."[23] After the Six Day War in 1967, Israel began to occupy the West Bank and "made use of the Regulation in its Territories, as part of the law applicable prior to the occupation, in its capacity as a belligerent occupant."[24] Consequently, Israel continues to apply Regulation 119 in the West Bank.[25]

Israeli Regulation 119 allows a military commander in the Israeli Defense Forces ("IDF") to demolish a home as a punitive measure.[26] Israel has maintained that its policy is to demolish only the homes of Palestinians engaged in terrorist attacks against the State of Israel or its people, stating

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[20] Judah Ari Gross, *IDF Seals off Two Terrorists' West Bank Villages After Attacks,* TIMES OF ISR. (Mar. 8, 2016), http://www.timesofisrael.com/idf-seals-off-two-west-bank-villages-after-terror-attacks; Times of Israel Staff, *US 'Concerned' Over Israel's Demolition of Palestinian Homes,* TIMES OF ISR. (Apr. 2, 2016), http://www.timesofisrael.com/us-concerned-over-israels-demolition-of-palestinian-homes; Judah Ari Gross, *IDF Closes Off West Bank for Purim Holiday*, TIMES OF ISR. (Mar. 22, 2016), http://www.timesofisrael.com/idf-closes-off-west-bank-for-purim-holiday.

[21] *See* sources cited *supra* note 20.

[22] Yuval Shany et al., *Expert Opinion: The Lawfulness of Israel's House Demolition Policy under International Law*, HAMOKED 1, 4, (2014), http://www.hamoked.org/files/2014/1159001_eng.pdf.

[23] *Id.* at 5.

[24] *Id.*

[25] This regulation was used as the legal basis for demolishing homes of Palestinians both in the West Bank and Gaza since 1967. RAPHAEL COHEN-ALMAGOR, ISRAELI DEMOCRACY AT THE CROSSROADS 230 (2005). Israel continued to use this regulation to justify home demolitions in Gaza until Israel's disengagement in 2005. Shany et al, *supra* note 22, at 33.

[26] Regulation 119 of the Defence (Emergency) Regulations, 5705-1945, Part XII.

that the purpose of these home demolitions is deterrence.[27] The Regulation reads that the military commander may order the destruction 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 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 offense against these Regulations involving violence or intimidation or any Military Court offense.[28]

The Regulation allows home demolitions as an "administrative sanction," which "may be imposed in addition to the judicial-criminal sanction imposed on terror suspects" but is often the only punitive measure imposed.[29] Regulation 119 does not give the homeowner a right to a hearing or appeal before the home is demolished, [30] though the HCJ has since given Palestinians the right to appeal in these cases.[31]

However, in 2005, the Israeli parliament's (the "*Knesset*") Constitution Law and Justice Committee doubted the deterrent effect of these demolitions sought by Israel, and suggested that demolitions instead often lead to the radicalization of individuals and subsequently more terrorist attacks in their wake.[32] In 2005, the same year that Israel disengaged from Gaza, a military committee determined that the purpose of home demolitions was not being realized, and declared that Regulation 119 would no longer be used.[33] This declaration was cast aside in the wake of escalating violence in 2014 and a policy of home demolitions began again.

2. Basic Laws

Israel has twelve Basic Laws that have constitutional stature.[34] These Basic Laws include guarantees that all people living in Israel have freedom

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[27] *Background on the Demolition of Houses as Punishment*, B'TSELEM (Jan. 1, 2011), http://www.btselem.org/punitive_demolitions (last updated Nov. 26, 2014).

[28] Regulation 119, *supra* note 26.

[29] *Id.* at 6.

[30] *Id.*

[31] HCJ 358/88, Assoc. for Civil Rights in Israel v. Cert. Dist., Commander, 43(2) P.D. 529, *reprinted in* 9 SELECTED JUDGMENTS OF THE SUPREME COURT OF ISRAEL 1 (1989).

[32] B'TSELEM, *Background on the Demolition of Houses as Punishment*, *supra* note 27.

[33] *Id.* However, between 2005 and 2014, Regulation 119 was employed twice. *Id.*

[34] *See* Rivka Weill, *Hybrid Constitutionalism: The Israeli Case for Judicial Review and Why We Should Care,* 30 BERKELEY J. INT'L L. 349, 349 n.2 (2012).

of movement, property, and profession.[35] The rights contained in the Basic Laws stand as the fundamental rights that Israel guarantees to its inhabitants that ought not to be violated.[36] When a law or action of a government official violates a fundamental right guaranteed by the Basic Laws, the HCJ employs a proportionality test to determine if the law is constitutional.[37] If a law fails to pass the proportionality test, the HCJ deems the law unconstitutional and strikes it down.[38] The test requires that a governmental act or law "must be designed to fulfill an appropriate purpose . . . [and] must be applied to an appropriate degree and not beyond necessity."[39] A purpose is proper if "it is designed to achieve a society purpose or safeguard a public interest."[40] Because the crux of the test is the safety or societal function the government seeks in enacting a law or performing a certain action, the government must provide its objective in court.[41]

Due to many issues in the application of this test, the Court adopted a tripartite analysis to further elucidate the concept of proportionality.[42] First, there must be a "correlation between the purpose and measure taken by the authorities to achieve the purpose."[43] This signifies that the measure taken by the government must rationally lead to the stated objective. Second, the actions taken by the government must be the "least injurious" possible to achieve their objective.[44] If a less harmful means could achieve the same result, the law fails this prong of the test. Though the Court does not undergo an extensive inquiry into the alternative types of means possible, it does consider alternatives that the petitioner has proposed and those that she has not.[45] Third, the injury caused by the means employed by the government must be "proportional to the benefit reaped from it."[46] An action would fail to satisfy this third prong if the means employed caused a prolonged injury for a small or speculative benefit. Presumably an application of this test would render collective punishment a

[35] *See*, *e.g.*, *Israel Ministry of Foreign Affairs: Basic Law-Human Dignity and Liberty* (1992) (Isr.), http://www.mfa.gov.il/MFA/MFA-Archive/1992/Pages/Basic%20Law-%20Human%20Dignity%20and%20Liberty-.aspx.

[36] Weill, *supra* note 34, at 349 n.2.

[37] *See generally* Ressler v. Knesset, *supra* note 8.

[38] *Id.*

[39] HCJ 6615/11 Salhab et al. v. Minister of Interior & Military Commander of the West Bank, ¶ 106 (2012) (Isr.).

[40] *Id.* at ¶ 107.

[41] *Id.*

[42] *Id.* at ¶ 1.

[43] *Id.* at ¶ 112.

[44] *Id.* at ¶ 114.

[45] Salhab v. Minister of Interior, *supra* note 39, at ¶ 114.

[46] *Id.* at ¶ 115.

disproportionate response.

III. COLLECTIVE PUNISHMENT IN USE AND IN COURTS IN ISRAEL

Israel has often employed forms of collective punishment in the West Bank.[47] This section details the use of collective punishment during escalations in the West Bank since 2014 and discusses how Israeli courts decide cases involving violations of the ban on collective punishment.

A. Escalation in the West Bank Since 2014

In the summer of 2014, tensions rose between Palestinians living in the West Bank and Gaza and Israelis.[48] The conflict began in mid-June when three Israeli teenagers were kidnapped while hitchhiking in the West Bank.[49] While Hamas fired rockets from Gaza, Palestinians in the West Bank rioted as the IDF searched for the three boys by employing various methods, such as road closures and unpermitted entry into homes, which many argued was a violation of the rights of Palestinians.[50] Within three weeks, the boys were found dead.[51] Israel announced in June 2014 that it intended to use Regulation 119 to demolish several houses in response to these abductions.[52] During this conflict, Israel demolished at least five family homes of Palestinians in the West Bank suspected of carrying out terrorist attacks.[53] These buildings were home to the suspects themselves as well as their families.[54] Mark Regev, a spokesperson of the Israeli government, explained that the demolitions were necessary to offset "a culture of support within Palestinian society" for terrorist attacks.[55] HaMoked, or the Center for Defense of the Individual, challenged the use of Regulation 119 and urged the Court to reexamine Regulation 119's

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[47] *See Israel: Stop Punitive Home Demolitions*, *supra* note 18.

[48] *Israel 'Ready for Escalation' of Gaza,* BBC (July 8, 2014), http://www.bbc.com/news/world-middle-east-28206556.

[49] Yaakov Lappin, *Bodies of Three Kidnapped Israeli Teens Found in West Bank,* THE JERUSALEM POST (June 30, 2014), http://www.jpost.com/Operation-Brothers-Keeper/Large-number-of-IDF-forces-gather-north-of-Hebron-in-search-for-kidnapped-teens-361048.

[50] Jodi Rudoren & Isabel Kershner, *Israel's Search for 3 Teenagers Ends in Grief,* N.Y. TIMES (June 20, 2014), http://www.nytimes.com/2014/07/01/world/middleeast/Israel-missing-teenagers.html?_r=0.

[51] Lappin, *supra* note 49.

[52] B'TSELEM, *Background on the Demolition of Houses as Punishment*, *supra* note 27.

[53] *Israel: Stop Punitive Home Demolitions*, *supra* note 18.

[54] *Id.*

[55] Jodi Rudoren, *Israeli Forces Demolish Home of Palestinian Who Used a Car to Kill 2*, N.Y. TIMES (Nov. 19, 2014), https://www.nytimes.com/2014/11/20/world/middleeast/israel-demolishes-family-home-of-palestinian-driver-who-killed-2-pedestrians.html.

compliance with international law.[56] However, Israel has continued to use home demolitions despite the lack of "explanation . . . as to why these recommendations [to abandon the practice because of its questionable legality] were disregarded."[57] Similarly, in response to the escalation of stabbing attacks in 2015, Israel commenced a policy of closing off access to the Palestinian villages where the perpetrators of these acts live, continuing to close roads even after the IDF located the suspected terrorists.[58]

B. How the HCJ Applies International Law

Israel follows the British approach to the application of international law, by which domestic courts may enforce customary international law norms "as long as they are not incompatible with primary legislation."[59] Courts "must interpret legislation according to the presumption of compatibility with international obligations," but if there is an irreconcilable clash, "the [domestic] legislation prevails."[60] However, international conventions to which Israel is a party are not enforceable by the Court unless they have become customary international law or have been made binding though legislation enacted by Israel's parliament.[61] More often than not, the HCJ reads Israeli domestic law to be compatible with or substantially similar to international law.[62] The HCJ held in previous rulings that provisions of the Fourth Geneva Convention are not part of customary international law, while it has admitted that the Hague Regulations are.[63] Despite this holding, the HCJ has grappled with and ruled on provisions of the Fourth Geneva Convention's applicability in the West Bank.[64] In cases where the

[56] *HaMoked Heads Group of Human Rights Organizations in HCJ Petition: Instruct the State to Cease the Illegal Practice of Punitive House Demolitions in the OPT, Including East Jerusalem*, HAMOKED (Nov. 27, 2014), http://www.hamoked.org/Document.aspx?dID=Updates1387.

[57] B'TSELEM, *Background on the Demolition of Houses as Punishment*, *supra* note 27.

[58] Amos Harel, *Magical New Steps to Curb Palestinian Terror?* HAARETZ (Nov. 29, 2015), http://www.haaretz.com/Israel-news/.premium-1.688895.

[59] Kretzmer, *supra* note 7, at 211-12.

[60] *Id.* at 212.

[61] HCJ 253/88 Sajedia v. Minister of Defense, 42(3) PD 801 (1988) (Isr.); Kretzmer, *supra* note 7, at 212.

[62] *See, e.g.*, Salhab v. Minister of Interior, *supra* note 39, at ¶ 106.

[63] Sajedia v. Minister of Defense, *supra* note 61; Kretzmer, *supra* note 7, at 212. The Hague Regulations prohibit the punishing of anyone who has not himself committed an action worthy of punishment, while the Geneva Conventions have a prohibition on collective punishment explicitly. *Compare* Hague Convention (IV), *supra* note 2, art. 50, *with* GC (IV), *supra* note 6.

[64] HCJ 2056/04 Beit Sourik Village Council v. The Government of Israel et al. 48(5) PD 807, 827 (2004) (Isr.); Kretzmer, *supra* note 7, at 212.

government has conceded applicability of the Convention, the HCJ declined to rule on the question of applicability and instead reasoned from the government's assumption.[65]

Therefore, the HCJ could rely on the Fourth Geneva Convention, Additional Protocol I or II, or the Hague Regulations in making a determination about the use of collective punishment in the West Bank. While the HCJ has not officially determined that the Fourth Geneva Convention applies, it has continued to engage with provisions of the Convention in various rulings.[66] Any of these conventions and principles is enforceable in Israeli courts "as long as they are not incompatible with primary legislation."[67]

As one scholar notes, where petitioners challenge the security measures used in the West Bank on international law grounds, the Court "in most instances adopts a consistent approach: (i) it accepts jurisdiction; (ii) procedurally, it imposes significant restrictions on the authorities; (iii) substantively, it invests judicial efforts in construing the measure as being compatible with the relevant provisions of international law."[68] Such superficial recognition of the international law principles at hand raises questions of the HCJ's ability to honestly evaluate Israel's compliance with international law.

C. Are Laws Different in the West Bank?

Many Israeli prosecutors argue that different laws apply to military occupation.[69] International law grants an occupying military authority power to maintain public order, but that authority has to be "balanced against the rights, needs, and interests of the local population."[70] The standard of reasonableness used is the same in Israel as it is in the West Bank for a violation of Constitutional rights.[71] As such, in home demolition cases, the HCJ finds it reasonable for the IDF to demolish homes of Palestinian attackers as long as "it is effective and realizes the purpose of deterrence, and moreover—if the injury caused as a result of the demolition of the houses does not disproportionately violate the right of the injured

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[65] Kretzmer, *supra* note 7, at 213.

[66] Beit Sourik Village Council v. Government, *supra* note 64; Sajedia v. Minister of Defense, *supra* note 61; HCJ 5591/02 Yassin et al. v. Commander of Ketziot Detention Facility et al. 57(1) PD 403, 413 (2002) (Isr.).

[67] Kretzmer, *supra* note 7, at 211-12.

[68] Harpaz, *supra* note 77, at 422; GC (IV), *supra* note 6, at arts. 27-34 & 47-78.

[69] HCJ 8091/14 HaMoked et al. v. Minister of Defense ¶ 22 (2014) (Isr.).

[70] Beit Sourik Village Council v. Government, *supra* note 64.

[71] HaMoked v. Minister of Defense, *supra* note 69, at ¶ 25.

individuals to their property, relative to the effectiveness of deterrence."[72] The HCJ further reasons that the collectivity of the effect is important, yet it contrasts a collective action such as demolishing "an entire neighborhood" with a non-collective demolition of the home of one family.[73]

D. How the HCJ Rules on Collective Punishment

In July 1989, the HCJ established a right for Palestinians to appeal home demolitions except in cases of "operational military needs."[74] This court ruling did not grapple with the violations of international law or the rights of those affected by the home demolitions, instead focusing on "procedural aspects" of home demolitions.[75] The HCJ noted that home demolitions increase public safety and deter future terrorist activities.[76]

In the past, the HCJ has ruled that home demolitions are legal. The HCJ has focused on the "alleged existence of an abstract, passive, communal support for terrorism by the community in which the petitioner lived" in order to approve home demolitions or road closures.[77] In doing so, the HCJ has reasoned that the action taken is not taken collectively against those who are not guilty of a crime, since the entire community passively supported the actions of the individual.[78] In addition, the HCJ has emphasized the government's stated purpose in employing the measures while ignoring the impact of these measures.[79]

A military commander cannot "exercise his authority to punish terrorists or as a means of collective punishment of uninvolved parties" unless it serves a "weighty deterring purpose."[80] To measure this, the HCJ explains that the military commander must "show that there is a substantial military need to deter, that the exercise of the authority will indeed create, in practice, the desired deterrence, and that the authority will be exercised in a proportionate manner."[81] When determining whether there is a weighty

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[72] *Id.*

[73] *Id.*

[74] Assoc. for Civil Rights in Israel v. Cert. Dist., Commander, *supra* note 31.

[75] Ralph Ruebner, *Democracy, Judicial Review and the Rule of Law in the Age of Terrorism: The Experience of Israel—A Comparative Perspective*, 31 GEORGIA J. OF INT'L & COMP. L. 493, 508 (2003)*; Id.*

[76] *Id.*

[77] Guy Harpaz, *Being Unfaithful to One's Own Principles: The Israeli Supreme Court and House Demolitions in the Occupied Palestinian Territories,* 47 ISR. L. REV. 401, 420 (2014).

[78] *Id.*

[79] *Id.* at 420.

[80] HCJ 5290/14 Qawasmeh et al. v. Military Commander of the West Bank Area ¶ 23 (2014) (Isr.).

[81] *Id.* at ¶ 24.

need for deterrence, the HCJ defers to the military commander for his expertise and notes that it is not the HCJ's policy to "interfere therewith other than in extraordinary cases."[82] Effectively, the military commander makes his own decision and the HCJ has previously granted him immense deference.

After the reemployment of home demolitions, the HCJ seems to be softening their stance on the legality of home demolitions. In *Sidar v. Commander in the West Bank*, Justice Fogelman of the HCJ raised the issue of the efficacy of home demolitions, questioning whether they truly accomplish the goal of deterrence.[83] In addition, the "significant delay in the exercise of the authority," meaning the delay between the terrorist action and the home demolition, led him to question whether the home demolition was carried out in response to the action of one of the family members, or whether it could in fact be an attempt to punish or deter others in a response to a series of knife attacks committed by other Palestinians.[84] In *Alewa v. Commander in the West Bank*, Justice Mazuz urged the HCJ to revisit the issue of home demolitions and collective punishment. He did so based both on the changes made to Israeli[85] and International law since the HCJ previously visited the issue in depth, and because he worried about the possibility of the use of collective punishment.[86] He noted that many argue that Regulation 119 violates international law, and suggested that this argument is "weighty and, in [his] opinion, worthy of thorough examination."[87] In *Halabi v. Commander in the West Bank*, Justice Rubinstein returned to the previous line of reasoning of the HCJ, rejecting the concerns above and framing the issue as a question of proportionality.[88] Under this line of reasoning, the home demolition is legal so long as the damage to that property may prevent the loss of many lives.[89]

While the HCJ in each of these three cases declined to explore the question of home demolitions fully, opinions of certain Justices left open the question of the future of these court cases; it seems the HCJ may be more amenable to a review of home demolitions in the future. Thus far, the HCJ's treatment of these thorny legal issues have been unsatisfying, but

[82] *Id.* at ¶ 25.

[83] HCJ 5839/15, Sidar v. Commander in the West Bank ¶ 8 (2015) (Isr.).

[84] *Id.* at ¶ 7.

[85] The changes he refers to are the solidifying of the Basic Laws as a type of Israeli Constitution. He notes that since those changes, a thorough review of the practice of home demolitions may need to be undertaken. HCJ 7220/15 Alewa v. Commander in the West Bank ¶ 3 (2015) (Isr.)

[86] *Id.*

[87] *Id.*

[88] HCJ 8567/15 Halabi v. Commander in the West Bank ¶ 23 (2015) (Isr.).

[89] *Id.*

recent cases leave open some hope that the court may rule against the practice in the future.

IV. THE INTERNATIONAL CRIMINAL COURT

The International Criminal Court ("ICC")[90] could prosecute individuals who commit crimes of international law in Israel and the West Bank. This means that when prosecuting an act taken by a state official, a decision must be made on whom to prosecute; the state itself cannot be the defendant. This section discusses the history of the ICC, its applicability in the case at hand, and whether it would address Israel's ongoing violations of international law in the West Bank.

The ICC may exercise jurisdiction where "the State on the territory of which the conduct in question occurred" or "the State of which the person accused of the crime is a national" have accepted jurisdiction of the ICC[91] Although Israel signed the Rome Statute in 2002, the State declined to ratify the treaty, noting its concern that the ICC may be used as a political tool.[92] Because Israel never ratified the Rome Statute, the State has no legal obligations under the Statute.[93] However, Palestine[94] filed an Article 12(3) declaration accepting the Court's jurisdiction since June 13, 2014, and subsequently acceded to the Rome Statute in 2015.[95] This grants the ICC's Office of the Prosecutor ("OTP") jurisdiction to prosecute cases regarding crimes committed within the territory of Palestine.[96]

A. The History of the ICC

The ICC was established in 2002 with the ratification of the Rome

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[90] Some scholars believe that the establishment of the ICC indicates a shift in the international community away from ad hoc tribunals toward a single, streamlined system of international prosecution. *See*, *e.g.*, ALTON FRYE, TOWARD AN INTERNATIONAL CRIMINAL COURT? (1999). However, other scholars argue that a space still exists for ad hoc tribunals to supplement the ICC in certain instances. *See*, *e.g.*, Milena Sterio, *The Future of Ad Hoc Tribunals: An Assessment of Their Utility Post-ICC,* 19 ILSA J. INT'L & COMP. L. 237, 246 (2013).

[91] Rome Statute of the International Criminal Court art. 11, July 17, 1998, 3187 U.N.T.S. 90 *entered into force* July 1, 2002 [hereinafter Rome Statute]; *see Understanding the International Criminal Court*, INT'L CRIM. CT. 1, 4 (2012), https://www.icc-cpi.int/iccdocs/pids/publications/uicceng.pdf.

[92] Rome Statute, *supra* note 91.

[93] *See id.*

[94] *Id.* Palestine includes the occupied Palestinian territory (including East Jerusalem), as defined by the ICC and Palestine's ratification. Preliminary Examination, Palestine, https://www.icc-cpi.int/palestine.

[95] Preliminary Examination, Palestine, *supra* note 94.

[96] *Understanding the International Criminal Court*, *supra* note 91.

Statute by sixty states.[97] The Rome Statute notes that the jurisdiction of the ICC is limited to relevant crimes committed after the Rome Statute entered into force in 2002.[98] The ICC was established to supplement both ad hoc tribunals and domestic courts in order to try the "most serious crimes of concern to the international community."[99] The ICC is "complementary" to national jurisdictions.[100] This limits the prosecutorial reach of the ICC by rendering inadmissible any case of a war crime, crime against humanity, or genocide that is being investigated or prosecuted by a state that has jurisdiction over the case.[101] Because of this intended relationship, the Rome Statute purposely limits the scope of prosecutable crimes under the ICC to only those not being prosecuted or investigated by the state in question.[102]

1. Jurisdiction

The ICC has jurisdiction to prosecute genocide, crimes against humanity, and war crimes.[103] Crimes against humanity are defined as "persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender . . . , or other grounds that are universally recognized as impermissible under international law,"[104] "deportation or forcible transfer of population,"[105] as well as "other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or to mental or physical health."[106] War crimes are defined as "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly"[107] as well as "willfully causing great suffering, or serious injury to body or health."[108] The focus on these serious crimes reinforces the idea that the ICC is a

[97] *About*, INT'L CRIM. CT., https://www.icc-cpi.int/en_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx (last visited Mar. 20, 2017).

[98] Rome Statute, *supra* note 91, at art. 12.

[99] *About*, *supra* note 97.

[100] Rome Statute, *supra* note 91, at art. 1.

[101] *Id.* at art. 17.

[102] *Id.* at art. 1.

[103] *Id.* at art. 1.

[104] *Id.* at art. 7(1)(h).

[105] *Id.* at art. 7(1)(d). This concept is further defined as "forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present without grounds permitted under international law." *Id.* at art. 7(2)(d).

[106] Rome Statute, *supra* note 91, at art. 7(1)(k). The Rome Statute defines crimes against humanity as inclusive of eight other categories, but this Note focuses on the two discussed above. *Id.* art. 7.

[107] *Id.* at art. 8, 2(a)(iv).

[108] *Id.* at art. 8, 2(a)(iii).

"supranational institution working within a system of sovereign states" that respects the jurisdiction of those states as paramount.[109]

2. Admissibility of Cases

Cases[110] are inadmissible in the ICC where they are being investigated or prosecuted by a state that has jurisdiction over the case, unless the state is unable or unwilling to carry out an investigation or prosecution.[111] Similarly, a case that has been genuinely investigated by a state where the state declined to prosecute the person is deemed inadmissible, unless that decision was based on the state's inability or unwillingness to genuinely prosecute.[112] The admissibility principle embodies the idea that the ICC is meant to be complementary to domestic jurisdictions.[113]

Complementarity means that states have primary jurisdiction over the prosecution of cases and the ICC is secondary to that jurisdiction, stepping in to try cases where the state is either unable or unwilling to prosecute.[114] This principle "serves to allocate power between the ICC and domestic forums over cases that could properly be prosecuted either in the ICC or in one or more domestic forums."[115] This principle "empowers domestic jurisdictions throughout the world and encourages them to build up their domestic judicial systems" in order to avoid international imposition.[116] Some scholars believe that the complementarity principle allows the "international criminal justice community to allocate its collective resources in ways that most efficiently and effectively achieve the Rome Statute's fundamental goals," namely, ridding the world of violations of international law.[117]

In determining whether a state is unable or unwilling to prosecute a

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[109] Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 MIL. L. REV. 20, 39 (2001).

[110] Cases where a relevant crime has been committed can be brought before the ICC in one of three ways: (1) a state party may refer the case to the Court, (2) the U.N. Security Council may refer the case, or (3) the prosecutor may initiate an investigation. Rome Statute, *supra* note 91, at art. 13. By using this process for deciding which cases are inadmissible, the ICC indicates its purpose as an international organization that is driven by concerns for International Law rather than by political considerations. Leanos, *supra* note 114, at 2283.

[111] Rome Statute, *supra* note 91, at art. 17(a).

[112] *Id.* at art. 17(b).

[113] Brendan Leanos, *Cooperative Justice: Understanding the Future of the International Criminal Court Through Its Involvement in Libya,* 80 FORDHAM L. REV. 2267, 2280 (2012)

[114] Leanos, *supra* note 113, at 2283.

[115] Newton, *supra* note 109, at 39.

[116] Leanos, *supra* note 113, at 2281.

[117] *Id.* at 2280.

crime, the Rome Statute establishes criteria.[118] A state is deemed unwilling to prosecute a crime if one of the following conditions are met:

> (a) The Proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes with in [sic] the jurisdiction of the Court referred to in article 5;
>
> (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned for justice; [or]
>
> (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person to justice.[119]

This often requires prosecutors to rely on circumstantial evidence and their conclusions on whether a state is unwilling "often implicate 'politically sensitive' issues."[120]

In order for a state to be deemed unable to investigate or prosecute, the ICC considers "whether, due to a total or substantial collapse or unavailability of its national judicial system, the State in unable to obtain the accused or the necessary evidence and testimony otherwise unable to carry out its proceedings."[121] In considering inability, the prosecutor has stated that it weighs several factors and considerations, including: "lack of necessary personnel, judges, investors, prosecutor; lack of judicial infrastructure; lack of substantive or procedural penal legislation, rendering system 'unavailable'; lack of access rendering system 'unavailable'; obstruction by uncontrolled elements rendering system unavailable; amnesties, immunities rendering system 'unavailable.'"[122]

B. Applicability in the Israeli-Palestinian Context

After an unsuccessful attempt in 2008,[123] Palestine accepted the

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[118] *Id.*

[119] Rome Statute, *supra* note 91, at art. 17(2).

[120] Leanos, *supra* note113, at 2283; *Informal Expert Paper: The Principle of Complementarity in Practice*, Off. of the Prosecutor, INT'L CRIM. CT. 1, 15 (2003), https://www.icc-cpi.int/NR/rdonlyres/20BB4494-70F9-4698-8E30-907F631453ED/281984/complementarity.pdf [hereinafter *Informal Expert Paper*].

[121] Rome Statute, *supra* note 91, at art. 17(3).

[122] *Informal Expert Paper*, *supra* note 120, at 15; Leanos, *supra* note 113, at 2283.

[123] The Minister of Justice of the Palestinian Authority indicated his intent to be bound by the Rome Statute in January 2009. William Thomas Worster, *The Exercise of Jurisdiction by the International Criminal Court Over Palestine,* 26 AM. U. INT'L L. REV. 1153, 1153

jurisdiction of the ICC in January 2015 by lodging a declaration according to Article 12(3) of the Rome Statute.[124] In doing so, it accepted the jurisdiction of the ICC from June 13, 2014.[125] In January 2015, the OTP of the ICC opened a preliminary examination into the situation in Palestine, which has allowed the OTP to gather evidence, review reports, and interview individuals.[126] Currently, the OTP is "continuing to engage in a thorough factual and legal assessment of the information available, in order to establish whether there is a reasonable basis to proceed with an investigation."[127]

In line with its policy, the OTP opened a preliminary examination into the situation in Palestine in order to determine whether there "is a reasonable basis to proceed with an investigation."[128] In its initial report, the OTP noted that in 2014, Israeli officials destroyed 590 "Palestinian-owned structures in the West Bank, including East Jerusalem," which displaced 1,177 individuals.[129] In January 2015, forty-two Palestinian-owned buildings were demolished in Ramallah, Jerusalem, Jericho, and Hebron, all in the West Bank, which left seventy-seven Palestinians displaced.[130] In addition, between January 1 and July 31, 2016 Israeli authorities destroyed 684 Palestinian-owned structures.[131]

In response to this investigation, Israel "open[ed] a dialogue with the Office" and published its own report on the legal aspects of the 2014 war

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(2011). In accepting the jurisdiction of the ICC, the Palestinian Authority requested an immediate investigation into the escalation in Gaza of 2008 and 2009, which would require retroactive jurisdiction. *Id*. at 1154. However, this ascension to the Rome Statute was not accepted by the ICC. *ICC Prosecutor Rejects Palestinian Recognition*, BBC (Apr. 4, 2012), http://www.bbc.com/news/world-middle-east-17602425. The ICC Prosecutor reasoned that other U.N. bodies must determine that Palestine is a State, because the Rome Statute only allows states to accept the jurisdiction of the ICC. *Id.* Because the U.N. General Assembly granted Palestine the status of non-member State in 2012, Palestine could not accept the jurisdiction of the ICC before this time. *Report on Preliminary Examination Activities: 2015*, Off. of the Prosecutor, Int'l Crim. Ct. 11 (2015), https://www.icc-cpi.int/iccdocs/otp/OTP-PE-rep-2015-Eng.pdf [hereinafter *Report on Preliminary Examination 2015*].

[124] *Preliminary Examination*, *supra* note 94.

[125] *Report on Preliminary Examination: 2015*, *supra* note 123, at ¶ 49.

[126] International Criminal Court, *Report on Preliminary Examination Activities: 2016* (Nov. 14, 2016) ¶¶ 140-44, [hereinafter *Report on Preliminary Examination: 2016*] https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-pe_eng.pdf.

[127] *Id.* at ¶ 145.

[128] *Id.* at ¶ 2; Office of the Prosecutor, *The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine*, INT'L CRIM. CT. (Jan. 16, 2015), https://www.icc-cpi.int/Pages/item.aspx?name=pr1083.

[129] *Report on Preliminary Examination: 2015*, *supra* note 123, at ¶ 69.

[130] *Id.*

[131] *Report on Preliminary Examination: 2016, supra* note 126, at ¶ 132.

with Gaza, or Operation Protective Edge.[132] The OTP noted in its 2015 and 2016 reports that it is continuing the initial examination into potential crimes committed both by Israelis and Palestinians in Palestine.[133] After the preliminary examination is complete, the OTP will decide whether to open an investigation into the possible crimes committed and thereafter file criminal charges.[134]

The question arises as to whether collective punishment qualifies as a relevant violation of international criminal law that would allow the ICC to prosecute the case. At least one court has prosecuted a violation of the prohibition on collective punishment as a war crime[135] and many states view collective punishment as a war crime.[136] Collective punishment as employed by Israel fits the meaning of war crimes, defined as intentionally directing attacks against the civilian population.[137] It could also satisfy the definition of crimes against humanity if categorized as a forcible transfer of population or an inhumane act intended to cause great suffering.[138] Home demolitions and area closures result in the forcible transfer of Palestinians.[139] In addition, home demolitions qualify as an "extensive destruction . . . of property" that, as demonstrated by IDF reports, is not justified by military necessity.[140] Therefore, this Note treats collective punishment as a crime that is justiciable in the ICC to proceed with this analysis. This position is supported by the OTP's inclusion of destruction of "Palestinian-owned structures" in the alleged crimes section of its Report on Preliminary Examination Activities.[141] In order to move forward with a case, the ICC's OTP would need to begin an investigation or prosecution into the crimes committed by Israeli officials.

However, even if technically available, the concept of the ICC as an enforcement body raises several issues in the Israel-Palestine context. First, in order to find a case against an Israeli official admissible, the ICC would have to deem Israel unable or unwilling to investigate or prosecute an

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132 *Report on Preliminary Examination: 2016*, *supra* note 126, at ¶ 75.

133 *Id.* at ¶ 76; *Report on Preliminary Examination: 2015*, *supra* note 123, at ¶ 145.

134 *Id.*

135 Shane Darcy, *Prosecuting the War Crime of Collective Punishment,* 29 J. INT'L CRIM. JUSTICE 1, 2 (2010).

136 Rule 103, *supra* note 7.

137 *Understanding the International Criminal Court*, *supra* note 91, at 14.

138 *Id.* at 13.

139 In its preliminary examination, the ICC's Office of the Prosecutor noted that since 2012, thousands of Palestinians have been displaced after their homes were destroyed. *Report on Preliminary Examination: 2015, supra* note 123, at ¶ 69.

140 Rome Statute, *supra* note 91, at art. 8, 2(a)(iv).

141 *Report on Preliminary Examination: 2015*, *supra* note 123, at ¶ 69; *Report on Preliminary Examination Activities: 2016, supra* note 126, at ¶ 132.

individual for a violation of the prohibition on crimes against humanity, genocide, or war crimes. Second, only those crimes committed after 2002 can be prosecuted in the ICC in general, and only those crimes committed after June 13, 2014 can be prosecuted in this case, since Palestine accepted jurisdiction of the ICC beginning on this date.[142] This reality results in impunity for every use of collective punishment and violation of international law in the West Bank before this date. Third, because the ICC has limited capacity and has prosecuted few cases, the Court may lack the ability to prosecute individuals for the use of collective punishment.

The ICC mandate has restricted its effectiveness,[143] particularly in this context. As noted, the jurisdiction in this particular case will only extend from June of 2014. Between 2001 and 2005, 650 Palestinian homes were sealed or destroyed with no regard for the individuals who resided in these homes.[144] While the ICC could prosecute the use of collective punishment since 2014, the reach would be extremely restricted considering that Israel has used collective punishment since the founding of the State.[145] This leaves hundreds of Palestinians without redress for the crimes committed against them, and many perpetrators free from prosecution.

Moreover, the ICC has limited capacity to prosecute crimes. Since its inception in 2002, the ICC has prosecuted few cases.[146] International organizations have raised concerns that the ICC lacks the capability and funds to increase its capacity, which results in a lack of enforcement of international law.[147] In response, the ICC has proposed to increase its capacity to respond to the demands of the international community.[148] Regardless, the ICC in current form remains ill prepared to confront the issue of Israel's use of collective punishment. Given the number of home demolitions in the West Bank, the ICC would be unable to prosecute the volume of implicated perpetrators. Moreover, any ICC investigation and

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[142] *Id.* at art. 11.

[143] Lisa J. Laplante, *The Domestication of International Criminal Law: A Proposal for Expanding the International Criminal Court's Sphere of Influence,* 43 J. MARSHALL L. REV. 635, 636 (2010).

[144] Adam Chandler, *Can Israel Really Deter Attackers By Demolishing Their Homes?,* THE ATLANTIC (Nov. 19, 2014), http://www.theatlantic.com/international/archive/2014/11/can-israel-deter-attackers-by-demolishing-their-homes/382945/ (noting that home demolitions existed since British Mandate Palestine in 1945 and have been employed since).

[145] *Id.*

[146] *Situations under Investigation*, INT'L CRIM. CT., https://www.icc-cpi.int/pages/situations.aspx (last visited Apr. 1, 2017).

[147] Elizabeth Evenson & Jonathan O'Donohue, *Still Falling Short—The ICC's Capacity Crisis,* HUM. RTS. WATCH (Nov. 3, 2015), https://www.hrw.org/news/2015/11/03/still-falling-short-iccs-capacity-crisis.

[148] *Id.*

prosecution of an individual would likely take years to complete. Such time lapse would do nothing in the interim to deter Israeli officials from demolishing homes in the West Bank. In addition, the ICC would not have sufficient resources to prosecute the violators quickly and efficiently, consequently leaving many Palestinians vulnerable to further abuse.

The ICC likely will not prosecute Israelis for the war crime or crime against humanity of collective punishment. The ICC's extremely restricted capacity to prosecute cases suggests that the ICC will not prosecute Israel's home demolitions as war crimes or crimes against humanity.

However, once the OTP opens an investigation, its prosecutorial strategy dictates that "it is required to further proactive policies of cooperation with national authorities in order to promote the opening of proceedings at the domestic level," a conception known as positive complementarity.[149] The OTP would prefer for a domestic court to prosecute the case if it is willing or able. As the investigative burden may be too heavy to proceed, the OTP lightens this burden by assisting the domestic prosecutors in their own investigation and prosecution of individuals. As noted above, this has already begun to happen in the case of the preliminary examination in Palestine. Israeli officials have begun to collaborate with the OTP and have assisted in the investigation into crimes committed in Palestine.

Moreover, research that demonstrates that positive complementarity works. States that are under investigation by the ICC often begin their own prosecutions in order to avoid international intrusion and international discussions of their crimes.[150] In addition, these investigations and subsequent domestic prosecutions can spark a shift that results in the states ceasing the behavior at issue.[151] This would mean that positive complementarity could have the effect of sparking domestic prosecutions of individuals for the use of collective punishment while simultaneously reducing the use of collective punishment in Palestine.

[149] Patricia Pinto Soares, *Positive Complementarity and the Law Enforcement Network: Drawing Lessons from the Ad Hoc Tribunals' Completion Strategy,* 46 ISRAEL L.R. 319, 320 (2013). This notion arose from the ICC Prosecutorial Strategy 2009-2012, distinguishing positive complementarity from negative complementarity. This can be contrasted with negative complementarity, which is the idea that "unless a state is unwilling or unable, the Court can have no jurisdiction regardless of whether this issue is raised in litigation." Silvana Arbia & Giovani Bassy, *Proactive Complementarity: A Registrar's Perspective and Plans in* THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE (Carten Stahn et al. eds., 2011).

[150] *See generally* Hyeran Jo & Beth A. Simmons, *Can the International Criminal Court Deter Atrocity?*, PENN LAW: LEGAL SCHOLARSHIP REPOSITORY (2016).

[151] *Id.*

V. AD HOC TRIBUNALS

In addition to domestic courts and the ICC, ad hoc tribunals are a possible forum for the prosecution of perpetrators of war crimes, crimes against humanity, and acts of genocide. Though infrequently established, these courts serve an important purpose in international law and are therefore relevant in the discussion of Israeli officials' use of collective punishment.

A. The History of Ad Hoc Tribunals

In light of certain atrocities, the U.N. Security Council ("Security Council") established two ad hoc tribunals with limited jurisdiction to prosecute those who commit the most serious international crimes.[152] The Security Council established both the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR") in 1993 and 1994, respectively.[153] In addition, the Security Council has established hybrid tribunals in Kosovo, Bosnia and Herzegovina, East Timor, Sierra Leone, Cambodia, and Lebanon to "prosecute domestic and international crimes."[154] Each of these courts was established because of "the need to deter the commission of further crimes, the need for justice for the victim and the community, and the need to establish the truth of what happened as part of a future process of peaceful co-existence."[155]

B. The Process of Establishing an Ad Hoc Tribunal

The U.N. Charter vests in the Security Council the power to maintain international peace and security.[156] In exercising this power, the Security Council is bound to act "in accordance with the Purposes and Principles of the United Nations."[157] Before the Security Council created the ICTY and the ICTR, the Security Council was not perceived to possess the power to create criminal tribunals.[158] However, "by virtue of the absolute authority of the Security Council with respect to maintaining international peace and security" the international community welcomed and legitimized the

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[152] Newton, *supra* note 109, at 40.

[153] *Id.*

[154] *Ad hoc Tribunals*, INT'L COMM. RED CROSS (Oct. 29, 2010), https://www.icrc.org/eng/war-and-law/international-criminal-jurisdiction/ad-hoc-tribunals/overview-ad-hoc-tribunals.htm.

[155] *Id.*

[156] U.N. Charter art. 24(1); Newton, *supra* note 109, at 41.

[157] U.N. Charter art. 24.

[158] Newton, *supra* note 109, at 41.

establishment of these ad hoc tribunals.[159] The Security Council may also "establish such subsidiary organs as it deems necessary for the performance of its functions."[160] U.N. Member States "agree to accept and carry out the decision of the Security Council."[161]

The tribunals in both the former Yugoslavia and Rwanda are "grounded on a finding that judicial accountability for crimes facilitates the restoration of international peace and security" and therefore fall within the purview of the Security Council.[162] Despite emerging from the Security Council, the tribunals' jurisdiction is not subject to the control of the Security Council and these tribunals are intended not to be political bodies.[163]

C. The Jurisdiction and Purpose of Ad Hoc Tribunals

In establishing the two ad hoc tribunals, the Security Council restricted the parameters of the tribunals' jurisdiction in terms of both crimes and location.[164] These tribunals have jurisdiction that is concurrent with the national courts, but each of these ad hoc tribunals has jurisdictional "primacy over national courts."[165] Therefore, the ad hoc tribunal may, at any point, order a domestic court to defer to the tribunal and turn over a case.[166] Similar to the ICC, the jurisdictional primacy of these courts is founded on the principle of complementarity.[167]

Many believe that these tribunals "heralded a major step in the implementation of [International Humanitarian Law]."[168] The tribunals have aided in "affirming the customary nature of certain principles, reducing the gap in the rules applicable to international and non-international armed conflicts and by adapting more traditional provisions of [International Humanitarian Law] to modern realities through a more

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[159] *Id.* at 42.

[160] *Id.* at art. 29.

[161] *Id.* at art. 25.

[162] Newton, *supra* note 109, at 42; Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808, ¶ 26, U.N. SCOR, 48th Sess., U.N. Doc. S/2507 (Feb. 22, 1993).

[163] Newton, *supra* note 109, at 41; Report of the Secretary General, *supra* note 162.

[164] S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993); S.C. Res. 955, U.N. Doc. S/Res/955 (Nov. 8, 1994).

[165] S.C. Res. 827, *supra* note 164; S.C. Res. 955, *supra* note 164; Newton, *supra* note 109, at 42.

[166] Newton, *supra* note 109, at 42.

[167] William W. Burke-White, *The Domestic Influence of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia and the Creation of the State Court of Bosnia & Herzegovina,* 46 COLUM. J. TRANSNAT'L L. 279, 297 (2008).

[168] *Ad hoc Tribunals*, *supra* note 154, at 298.

flexible interpretation."[169]

In order to understand the functionality of tribunals, this Note examines the Security Council resolutions that created both the ICTY and ICTR. The resolutions by which each of these was created also dictated the jurisdictional limits of the tribunals.[170]

i. International Criminal Tribunal for the Former Yugoslavia

The Security Council adopted Resolution 827 on May 25, 1993, which established the ICTY.[171] The Security Council expressed its dedication to bringing persons responsible for the atrocities in Yugoslavia to justice, as well as to restoring and maintaining peace in the region.[172] The Resolution granted the Tribunal the power to prosecute individuals who committed "serious violations of international humanitarian law" in the region from 1991.[173]

The ICTY prosecuted cases of genocide, war crimes, and crimes against humanity and has tried over 160 individuals since its establishment.[174] In 2003, the ICTY established a strategy to ensure that the Tribunal "concludes its mission successfully, in a timely way and in coordination with the domestic legal systems in the former Yugoslavia."[175] While some states struggle to meet the demands of prosecuting war criminals, the ICTY has been working with the states of the former Yugoslavia to improve their judicial systems and has been transferring cases to competent systems in the region.[176] By enacting this completion strategy, the ICTY has, together with the Security Council and the international community, worked to establish "specialized mechanisms for war crimes prosecutions" to bolster the judicial systems of these states.[177]

The ICTY was established to fill a void in the international criminal justice system in the region and was always meant to expire.[178] However, the establishment of the ICTY enabled the advancement of the judicial systems of many states in the region with the help of the Security Council

[169] *Id.*
[170] S.C. Res. 827, *supra* note 164; S.C. Res. 955, *supra* note 164.
[171] S.C. Res. 827, *supra* note 164.
[172] *Id.*
[173] *Id.*
[174] *About the ICTY*, INT'L CRIM. TRIB. FOR THE FORMER YUGO., http://www.icty.org/en /about.
[175] *Completion Strategy*, INT'L CRIM. TRIB. FOR THE FORMER YUGO., http://www.icty.org /en/about/tribunal/completion-strategy.
[176] *Id.*
[177] *Id.*
[178] S.C. Res. 827, *supra* note 164.

and international community.[179]

ii. International Criminal Tribunal for Rwanda

On November 8, 1994, the Security Council adopted Resolution 955, thereby establishing the ICTR.[180] The Security Council noted its concern for the "flagrant violations of international humanitarian law" as well as its interest in maintaining peace and security.[181]

The Security Council granted the ICTR jurisdiction to prosecute genocide and "other serious violations" of International Humanitarian Law in Rwanda and neighboring states that occurred between January 1, 1994 and December 31, 1994.[182] The Resolution grants the ICTR jurisdiction that is concurrent with the domestic courts of Rwanda.[183] However, the Security Council granted the ICTR jurisdiction that has primacy over national courts of all states.[184] This means that at any point in the investigation or prosecution, the ICTR may request that the domestic courts transfer the case to the Tribunal.[185]

The Security Council Resolution outlines the definitions of genocide, crimes against humanity, and additional prosecutable violations.[186] The Resolution explicitly allows for the ICTR to prosecute collective punishment, though no definition of this crime is expounded.[187] The last trial took place in December 2012, leaving only appeals,[188] and the Tribunal formally closed in 2015.[189]

D. Relevance in the Israeli Context

One forum in which the use of collective punishment could be prosecuted is in a new ad hoc tribunal established to prosecute crimes in the Israeli-Palestinian conflict. Because ad hoc tribunals have a limited scope, they are able to, and intended to, focus their resources geographically, temporally, and jurisdictionally. In the context of Israel and Palestine, this would be both beneficial and disadvantageous. On the one hand, this would allow a

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[179] *Completion Strategy*, *supra* note 175.
[180] S.C. Res. 955, *supra* note 164.
[181] *Id.*
[182] *Id.* at 1.
[183] *Id.* at art. 8.
[184] *Id.*
[185] *Id.*
[186] *Id.* at art. 2-4.
[187] *Id.* at art. 4.
[188] *Id.*
[189] Alastair Leithead, *Rwanda Genocide: International Criminal Tribunal Closes*, BBC (Dec. 14, 2015), http://www.bbc.com/news/world-africa-35070220.

court to focus on both Israel and Palestine's war crimes and crimes against humanity. Likely, a court of this sort would have a larger capacity than the ICC and have the ability to undertake the investigation and prosecution of many cases. Moreover, the establishment of an ad hoc tribunal may allow the prosecution of crimes that occurred before June of 2014, which stands in stark contrast to the temporal limitations of the ICC in this case.

However, given the reality that the conflict between Israel and the West Bank has been ongoing for more than fifty years[190] it is unlikely that the conflict will conclude soon, which would complicate the jurisdiction of an ad hoc tribunal. Ad hoc tribunals are established with a strategy to conclude their prosecutions, which would be extraordinarily difficult given the situation in Palestine. This may not be any more effective than the domestic court.

Additionally, an ad hoc tribunal in this context has the potential to become extremely politicized. This conflict is intractable and every stage of the establishment of an ad hoc tribunal may pander to one side, or appear biased due to the cases it chooses to prosecute. This appearance of bias would compromise the legitimacy of the rulings of the eyes of Israelis, consequently threatening the efficacy of a tribunal.

The Security Council would have to establish jurisdiction, including prosecutable crimes, relevant timeframes, and pertinent territory. At each of these stages, political posturing could create an unfair system for such a tribunal. In addition, as other ad hoc tribunals are intended to close after a certain period of time, the Security Council will again be charged with determining whether to establish an ongoing tribunal with no set conclusion or a tribunal with a specified end. This also may be heavily influenced by politics.

VII. CONCLUSIONS

The calculation of the most effective forum for prosecution of Israel's use of collective punishment depends on the goal of these prosecutions. Collective punishment in the form of home demolitions is a reality Palestinians have lived with for decades. Prosecutions ought to not only hold the perpetrators accountable, but also seek to stop the system that allows home demolitions to continue. In order to do this, the prosecutions must be seen as legitimate and have a mechanism for enforcement in Israel and the West Bank. All of these considerations point to the necessity of a domestic prosecution.

[190] Israel began to occupy the West Bank in 1967 at the conclusion of the Six-Day War. The conflict between Jews and Palestinians living in the region began far earlier. However, for the purposes of this Note, I am primarily concerned with Israel's use of collective punishment, arising out of its application of Regulation 119.

For the reasons discussed above, the OTP and Security Council are unlikely to seek prosecutions of crimes in the West Bank. Neither the ICC nor an ad hoc tribunal remedies all deficiencies the cases before HCJ, and neither offer ideal solutions.

The ICC is ill-equipped to prosecute cases quickly and efficiently. The ICC moves too slowly and does not have the capacity to try all those who use collective punishment. Furthermore, the ICC may decide to try only those who commit the most heinous violations of this prohibition on collective punishment, which would allow many others to commit lesser violations and remain untouched. This does not improve the situation on the ground and does little to change Israeli officials' behavior.

Alternatively, because the situation is ongoing, an ad hoc tribunal would have little hope for concluding investigations and prosecutions within a concise time frame. The establishment of an ad hoc tribunal is likely to be politicized in some respect, hindering its ability to uniformly address violations of international law on both sides of this conflict. While this Note focuses on the violations of the prohibition on collective punishment by Israeli officials, both Hamas and the Palestinian Authority officials have likewise committed prosecutable violations of international law.

Domestic courts, though inadequate, have a larger capacity and move far more quickly than ad hoc tribunals and the ICC. Moreover, domestic prosecutions are seen as more legitimate than international opinions on Israel's actions. With Israelis judging Israelis, there is little room for the often-stated concern of the international community's disproportionate focus on Israel's actions.[191] Therefore, domestic courts may be best equipped to prosecute violations of International Humanitarian Law as well as respond quickly enough to stop acts of collective punishment, such as home demolitions, before they are carried out.

Though the HCJ is the best forum for prosecution of perpetrators of collective punishment to accomplish the goals of accountability for perpetrators and deterring future violations, leaving the prosecutions to domestic courts will not accomplish the goals on their own. The OTP has the potential to place pressure on Israel to comply with International Humanitarian Law and prosecute violations, a prosecution strategy that has proved effective in the past. In addition, the OTP likely will encourage domestic prosecutions, assisting in the investigation and prosecution preparation stages.

Moreover, it is naïve to think we can hold Israeli officials to a higher standard than their counterparts in other Western nations. In order to encourage Israel to prosecute individuals through positive complementarity,

[191] *See*, *e.g.*, Samantha Power, former U.S. Ambassador to the U.N., Speech to the U.N. Security Council (Dec. 23, 2016).

the OTP should also open preliminary examinations and investigations against other Western nations, such as the United States and United Kingdom, whose officials commit war crimes and crimes against humanity. We must hold all nations to the same standard, while simultaneously seeking to encourage the prosecutions of perpetrators of war crimes and crimes against humanity. The OTP has the ability to encourage these prosecutions, but must do so in many states in order to maintain legitimacy and achieve the goal of ridding the world of atrocities and holding perpetrators accountable.