

# CONCOMITANT PROHIBITIONS: COLLECTIVE PUNISHMENT AS THE ORIGIN OF OTHER VIOLATIONS OF THE RIGHTS OF CIVILIANS UNDER BELLIGERENT OCCUPATION

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*International humanitarian law (IHL) categorically prohibits all types of collective punishment. However, neither treaty nor customary sources provide a clear definition of what should be deemed a collective punishment. Given this lack of clarity, it is no surprise that little attention has been paid to the way in which resorting to different forms of collective punishment during a belligerent occupation might lead to additional violations of international law, including IHL and international human rights law (IHRL). This article explores the notion of collective punishment under the law of occupation and connects it with other relevant rules of international law. Based on this analysis, and using the Occupied Palestinian Territory as a case study, the article argues that violating the prohibition of collective punishment in a situation of belligerent occupation in all likelihood will trigger the breach of other concomitant rules of IHL and IHRL, thus shedding light on the scope of the prohibition contained in Article 33 of the Fourth Geneva Convention.*

**Keywords:** law of occupation; belligerent occupation; international humanitarian law; collective punishment; complementarity; *lex specialis*; Fourth Geneva Convention; Gaza Blockade; humanitarian assistance; punitive house demolitions; freedom of movement; economic, social and cultural rights; due process; individual criminal responsibility; withholding of human remains

Every man must pay for his own crimes. In the words of the prophet:  
‘The soul that sins it shall die. The son shall not bear the iniquity of the father, neither the father bear the iniquity of the son; the righteousness of the righteous shall be upon him, and the wickedness of the wicked shall be upon him.’  
*Ezekiel 18:20*<sup>1</sup>

If we demolish the perpetrator’s apartment we will simultaneously demolish the home of this woman and her children. We will thereby punish this woman and her children although they have done no wrong. We do not do such things here ... We shall read into it and vest it with our values, the values of a free and democratic Jewish State.  
*Justice Mishael Cheshin*<sup>2</sup>

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<sup>1</sup> Similar admonitions can also be found elsewhere in the holy scriptures; see, eg, Deuteronomy 24:16: ‘Parents are not to be put to death for their children, nor children put to death for their parents; each will die for their own sin’.

<sup>2</sup> HCJ 2006/97, *Ghanimat v GOC Central Command* (30 March 1997, translation by HaMoked: Center for the Defence of the Individual).

## 1. INTRODUCTION: AN EXAMPLE OF MUTUAL INFLUENCE

For well over a century, international humanitarian law (IHL) has categorically outlawed collective punishment. Article 50 of the 1907 Hague Regulations provides that '[n]o general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible'.<sup>3</sup> This prohibition was later enshrined in the 1949 Geneva Conventions and its 1977 Additional Protocols.<sup>4</sup> It is also part of customary IHL<sup>5</sup> and of the statutes of several international criminal tribunals.<sup>6</sup> However, none of these sources provide a definition of what is to be deemed a collective punishment.

The first reference to collective punishments in the 1949 Geneva Conventions can be found in Article 87 of the Third Geneva Convention, which addresses the sanctioning of prisoners of war and forbids the imposition of certain types of penalty on this category of detainees. In its most recent authoritative comment on this clause, the International Committee of the Red Cross (ICRC) referred to the definition given by *Black's Law Dictionary*.<sup>7</sup> There, a collective punishment is characterised as '[a] penalty inflicted on a group of persons without regard to individual responsibility for the conduct giving rise to the penalty', a statement that is also pertinent in the case of belligerent occupation.<sup>8</sup> The ICRC added that, to violate this prohibition, the measure in question 'need not be unlawful' and that 'even lawful sanctions ... would become unlawful if they are imposed on persons or entire groups for acts they have not committed'.<sup>9</sup> This caveat is well founded in the case of prisoners of war, who are subjected not only to the effective control

<sup>3</sup> Hague Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulation concerning the Laws and Customs of War on Land, *Martens Nouveau Recueil* (ser 3) 461 (entered into force 26 January 1910) (Hague IV).

<sup>4</sup> Geneva Convention (III) relative to the Treatment of Prisoners of War (entered into force 21 October 1950) 75 UNTS 135 (GC III), art 87; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (entered into force 21 October 1950) 75 UNTS 287 (GC IV), art 33; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (entered into force 7 December 1978) 1125 UNTS 3, art 75(2)(d) (AP I); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (entered into force 7 December 1978) 1125 UNTS 609, art 4(2)(b) (AP II).

<sup>5</sup> Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Vol I: Rules* (International Committee of the Red Cross and Cambridge University Press 2005, revised 2009) (ICRC Study) 374–75.

<sup>6</sup> Collective punishments are part of the list of serious violations of IHL contained in art 3 of the Statute of the Special Court for Sierra Leone (entered into force 12 April 2002) 2178 UNTS 139 (SCSL Statute), and in art 4 of the Statute of the International Court for Rwanda, annexed to UNSC Res 955 (8 November 1994), UN Doc S/RES/955 (ICTR Statute). However, they are not part of the Rome Statute of the International Criminal Court (entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute).

<sup>7</sup> ICRC, *Commentary on the Third Geneva Convention* (ICRC and Cambridge University Press 2021) (Commentary GC III (2021)), para 3689.

<sup>8</sup> Bryan A Garner (ed), *Black's Law Dictionary* (11th edn, Thomson Reuters 2019) 331. Despite the fact that GC III and GC IV differ in their origin and the group of people they intend to protect, the 'ordinary meaning' of the notion of collective punishment remains the main source of interpretation to elucidate the scope of the prohibition in both treaties; see Vienna Convention on the Laws of Treaties (entered into force on 27 January 1980) 1155 UNTS 331 (VCLT), art 31.

<sup>9</sup> ICRC (n 7) para 3690.

but also to the disciplinary authority of the Detaining Power.<sup>10</sup> For instance, Article 89 of the Third Geneva Convention foresees as a possible disciplinary punishment the '[d]iscontinuance of privileges granted over and above the treatment provided for by the [Convention]'. It is easy to understand that suspending the prerogatives of a prisoner of war for disciplinary reasons will probably not be unlawful on its own, but would violate IHL if such prerogatives are withheld as part of a collective punishment. Hence, the prohibition of collective punishment contained in Article 87 of the Third Geneva Convention can be breached even if the measure is not illegal on its own.

The same caveat holds true in the case of Article 33 of the Fourth Geneva Convention. An Occupying Power shall not impose a collective punishment upon protected persons even if the sanction itself could be considered lawful. However, it is submitted that, in practice, every time an Occupying Power resorts to an act of collective punishment, in all likelihood it will breach other concomitant rules of international law. In other words, the fact of breaching the prohibition of collective punishment in an occupied territory is likely to transgress other applicable rules of international law. As is shown below, this assertion is intimately intertwined with the necessary complementarity between IHL and international human rights law (IHRL), including during situations of belligerent occupation. Israel constitutes a unique testing ground for this assertion.

Since the Six-Day War of 1967, Israel has occupied the West Bank, East Jerusalem and the Gaza Strip.<sup>11</sup> During the course of this over half-a-century-old belligerent occupation, Israel has often been accused of inflicting collective punishments on Palestinian civilians.<sup>12</sup> Allegations include the land and sea blockades of Gaza, the policy of demolishing the houses of relatives of Palestinians who attack Israeli civilians or the Israeli armed forces, withholding bodies of

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<sup>10</sup> See GC III (n 4) Part III, Chapter III: Penal and Disciplinary Sanctions. For a more detailed analysis of the status and protection of prisoners of war under IHL, see Sandra Kräehenmann, 'Protection of Prisoners in Armed Conflict' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (3rd edn, Oxford University Press 2013) 359.

<sup>11</sup> ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Rep 136, [101]; UNSC Res 2334 (23 December 2016), UN Doc S/RES/2334, paras 1–2. It should be noted that Israel questions part of this legal conclusion, especially since its disengagement from Gaza in 2005. However, the majority of scholars, international tribunals and international organisations, as well as most states, still consider that the Palestinian Territory, including Gaza and East Jerusalem, are placed under belligerent occupation. According to the ICRC, 'effective control [to apply the law of occupation] does not require the exercise of full authority over the territory; instead, the mere capacity to exercise such authority would suffice ... in some specific and exceptional cases – in particular when foreign forces withdraw from occupied territory (or parts thereof) while retaining key elements of authority or other important governmental functions that are typical of those usually taken on by an Occupying Power – the law of occupation might continue to apply within the territorial and functional limits of those competences': ICRC, *Updated Commentary on the First Geneva Convention* (2016) paras 305–13. See also Marten Zwanenburg, 'The Law of Occupation Revisited: The Beginning of an Occupation' (2007) 10 *Yearbook of International Humanitarian Law* 99; Shane Darcy and John Reynolds, 'Otherwise Occupied: The Status of the Gaza Strip from the Perspective of International Humanitarian Law' (2010) 15 *Journal of Conflict and Security Law* 211. This article subscribes to the most widely accepted view, whereby the West Bank, the Gaza Strip and East Jerusalem continue to be occupied under international law. For an opposing view on this issue, see Elizabeth Samson, 'Is Gaza Occupied? Redefining the Status of Gaza under International Law' (2010) 25 *American University International Law Review* 915.

<sup>12</sup> See UN Human Rights Council, Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967 (15 July 2020), UN Doc A/HRC/44/60, with further references.

Hamas-affiliated fighters or the restrictions on freedom of movement in the West Bank, among others. Although IHL is the only branch of international law that explicitly prohibits collective punishment, other bodies of law could (and should) be taken into consideration when analysing such measures. This is particularly true in the case of IHRL. Hence, the scope of the analysis undertaken in this article is circumscribed by two premises: (i) the existence of a belligerent occupation, and (ii) the ongoing application of IHRL in occupied territories.

Whereas IHL applies only in situations of armed conflict (international or non-international) and belligerent occupation,<sup>13</sup> IHRL applies at all times, including during military occupation.<sup>14</sup> This view is supported by considerable state practice and by the jurisprudence of the International Court of Justice (ICJ) and the UN human rights bodies.<sup>15</sup> In its seminal *Wall* advisory opinion, the ICJ stated the following:<sup>16</sup>

As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.

The ICJ added that IHL must be considered the *lex specialis*.<sup>17</sup> While the exact meaning of this assertion has been extensively debated, and even contested,<sup>18</sup> it seems fair to say that IHL and IHRL are ‘complementary legal regimes’, but that the notion of *lex specialis* remains an indispensable interpretative tool to try to resolve the ‘sometimes intricate legal questions of interplay that arise on the ground in concrete cases’.<sup>19</sup> This means that, in the majority of cases, IHL and

<sup>13</sup> GC III and IV (n 4) common art 2.

<sup>14</sup> Noam Lubell, ‘Human Rights Obligations in Military Occupation’ (2012) 94 *International Review of the Red Cross* 317. The jurisprudence of Israel’s High Court of Justice has tried to evade the question of IHRL de jure applicability in the Occupied Palestinian Territory, which has led to a range of inconsistent decisions; see David Kretzmer and Yaël Ronen, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (2nd edn, Oxford University Press 2021) 95–97.

<sup>15</sup> See also *Wall* Advisory Opinion (n 11) [106]; ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion [1996] ICJ Rep 226 (*Nuclear Weapons*), [25]; UN Human Rights Committee, General Comment 29: States of Emergency (Article 4) (31 August 2001), UN Doc CCPR/C/21/Rev.1/Add.11, para 3; Cordula Droegge, ‘Elective Affinities? Human Rights and Humanitarian Law’ (2008) 90 *International Review of the Red Cross* 501; Raúl Emilio Vinuesa, ‘Interface, Correspondence and Convergence of Human Rights and International Humanitarian Law’ (1998) 1 *Yearbook of International Humanitarian Law* 69; Orna Ben-Naftali and Yuval Shany, ‘Living in Denial: the Application of Human Rights in the Occupied Territories’ (2003–04) 37 *Israel Law Review* 17. To obtain a sense of the objections that have been raised against the applicability of IHRL during armed conflict, see Lubell (n 14) 318–24 (arguing that although ‘it must be acknowledged that there are certain circumstances in which extraterritorial applicability [of IHRL] is unclear and subject to debate ... military occupation is perhaps one of the least controversial circumstances, and there is a solid foundation for the assertion that the Occupying Power must abide by international human rights law’).

<sup>16</sup> *Wall* Advisory Opinion (n 11) [106].

<sup>17</sup> *ibid.* See also *Nuclear Weapons* Advisory Opinion (n 15) [25].

<sup>18</sup> William A Schabas, ‘*Lex specialis*? Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of *Jus ad Bellum*’ (2007) 40 *Israel Law Review* 592.

<sup>19</sup> ICRC, ‘International Humanitarian Law and the Challenges of Contemporary Armed Conflicts’, Report 31IC/11/5.1.2, 31 October 2011, 14–15.

IHRL apply simultaneously and mutually reinforce each other.<sup>20</sup> However, when the two branches of international law lead to conclusions that are incompatible, priority should be given to the more specific norm.<sup>21</sup>

It is undeniable that international law as a whole should not assume a conflict between two different legal obligations whenever reconciliation can be achieved.<sup>22</sup> Indeed, the Vienna Convention on the Law of Treaties provides that in the interpretation of a treaty, the parties must take into account ‘any [other] relevant rules of international law applicable’.<sup>23</sup> Against this backdrop, it has been argued that IHL and IHRL should be construed ‘in accordance with a sense of coherence and meaningfulness ... in a way that allows, as far as possible, to view norms pertaining to different regimes as a single set of compatible obligations’.<sup>24</sup> However, practice shows that this systemic integration does not always hold sway. When ‘complementarity and mutual influence’ between IHL and IHRL is not possible, the more specific norm (*lex specialis*) must take precedence.<sup>25</sup> There are powerful arguments for maintaining this approach. Firstly, it can help to elucidate normative clashes and bring about a certain degree of legal security. Secondly, neither state practice nor international jurisprudence has clearly endorsed the abandonment of the *lex specialis* principle in favour of a ‘mixed [IHL-IHRL] paradigm’.<sup>26</sup> Finally, the jumble of legal paradigms can sometimes lead to ‘counterproductive results’, the most important of which is ‘widening the gap between normative developments and military needs’ in a way that paints ‘international law in “utopian” colors’.<sup>27</sup>

In fact, the prohibition of collective punishment during belligerent occupation is a revealing example in this respect. It can shed some light on the complementarity of both legal regimes, as well as on the continuing importance of the notion of *lex specialis*. For instance, if one argued that the blockade of Gaza is a lawful military operation under the laws of war, it might not make sense to brandish the whole panoply of human rights allegedly trumped by Israel as a result of that very same act. This approach would not add ‘coherence and meaningfulness’ to international

<sup>20</sup> Victor Luis Gutiérrez Castillo, ‘Repenser les principes d’interprétation Régissant l’Interaction du Droit International Humanitaire et du Droit International des Droits de la Personne’ in Laurence Boisson de Chazournes (ed), *Enjeux et Perspectives: droit international, droit de la mer, droits de l’homme: mélanges en l’honneur de la professeure Haritini Dipla* (Editions A Pedone 2020) 333, 337–39, with further references. See also Vera Gowlland-Debbas and Gloria Gaggioli, ‘The Relationship between International Human Rights and Humanitarian Law: An Overview’, in Robert Kolb and Gloria Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law* (Edward Elgar 2014) 77, 87.

<sup>21</sup> Gutiérrez Castillo (n 20) 341–48 (acknowledging that there are very few analyses that apply the rule of *lex specialis* to a concrete situation). This article aims to do precisely that; it examines the prohibition of collective punishment by building upon both the notion of complementarity and that of *lex specialis*.

<sup>22</sup> Philippe Sands, ‘Treaty, Custom and the Cross-fertilization of International Law’ (1998) 1 *Yale Human Rights and Development Law Journal* 85, 105.

<sup>23</sup> VCLT (n 8) art 31(3)(c).

<sup>24</sup> Vito Todeschini, ‘The ICCPR in Armed Conflict: An Appraisal of the Human Rights Committee’s Engagement with International Humanitarian Law’ (2017) 35 *Nordic Journal of Human Rights* 203, 207 (citations omitted).

<sup>25</sup> Droege (n 15) 502 and 524.

<sup>26</sup> Yuval Shany, ‘Human Rights and Humanitarian Law as Competing Legal Paradigms for Fighting Terror’, November 2009, International Law Forum of the Hebrew University of Jerusalem Law Faculty, Research Paper No 23-09, 26–27.

<sup>27</sup> *ibid.*

law. Instead, a systemic integration of both paradigms in this scenario could generate legal insecurity and give rise to unrealistic expectations.<sup>28</sup> On the contrary, if the blockade of Gaza could be considered a collective punishment or a breach of other IHL provisions, then this potential violation of the laws of war (the *lex specialis*) would arguably coexist with other violations of IHRL. Breaching the prohibition of collective punishment in this particular case would, by its nature, prompt the infringement of concomitant rules of international law.<sup>29</sup> Under those circumstances, the need for coherence within the different branches of international law would support the ‘complementarity and mutual influence’ of IHL and IHRL. A violation of the laws of war would simultaneously constitute a violation of human rights law.<sup>30</sup> Furthermore, the fact that actions running counter to the prohibition of collective punishment can give rise to other infringements of international law is also germane to the way in which such conduct might be prosecuted in domestic, regional and international tribunals.

This article seeks to provide some guidance on the interplay between IHL and IHRL when it comes to the imposition of collective punishments in occupied territories. It starts by revisiting the meaning of the prohibition of collective punishment, with special emphasis on the notions of deterrence and punitive intent (Section 2). It then uses the situation of the Occupied Palestinian Territory to demonstrate that alleged breaches of the prohibition of collective punishment could invariably be approached from the perspective of concomitant rules of international law. To this end, it explores how this prohibition interacts with the blockade of Gaza (Section 3.1), the restrictions of movement in occupied territories (Section 3.2), the policy of house demolitions of relatives of Palestinians who attack Israeli civilians or Israeli armed forces (Section 3.3) and the return of bodies of Hamas-affiliated fighters (Section 3.4). Neither the list of case studies nor the IHL and IHRL rules invoked in each section is intended to be exhaustive. Nevertheless, they help to illustrate the complexity of the prohibition of collective punishments. Other types of collective punishment would undoubtedly interact with different IHL and IHRL obligations. For instance, the article briefly mentions the fact that collective punishments could infringe constitutive elements of due process, such as the presumption of innocence or the principle of *nulle poena sine culpa*. At any rate, it should be emphasised that establishing the existence of any particular breach of international law would require a detailed case-by-case analysis of the factual situation, something that goes beyond the scope of this contribution. However, Section 3 should shed some light on both the scope of the prohibition of collective punishments and the way that breaching this prohibition might give rise to concomitant violations of international law.

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<sup>28</sup> This is not to say that IHRL would not be applicable, but just that *certain* IHRL rules would be incompatible with the *lex specialis*.

<sup>29</sup> Also, as will be seen further below, IHRL would bring to the table ‘additional elements that IHL does not provide’: Lubell (n 14) 319.

<sup>30</sup> Droege (n 15) 546; Schabas (n 18) 596, 603. A more in-depth analysis of the notion of *lex specialis* would go well beyond the scope of this article. However, it should be noted that there is at least one domain in which the pre-eminence of IHL tends to be widely acknowledged: namely, the use of force during the conduct of hostilities. It is submitted that, in general, IHL should also be seen as the *lex specialis* when it comes to the rules on means and methods of warfare, as well as regarding the law of occupation.

Lastly, Section 4 concludes that the prohibition of collective punishment under the Fourth Geneva Convention (applicable in situations of belligerent occupation) shares with its counterpart in the Third Geneva Convention (applicable to prisoners of war) the fact that both can be breached even if the measure in question is not unlawful. Nevertheless, the article will also conclude that, at least in the case of the former, it is difficult to imagine a collective punishment that would not be simultaneously associated with additional IHL or IHRL violations. This, in turn, could have an impact on the way in which allegations of collective punishment are investigated and prosecuted.

## 2. TOWARDS A DEFINITION OF COLLECTIVE PUNISHMENT IN OCCUPIED TERRITORIES

As mentioned earlier, neither the Geneva Conventions nor customary IHL provide a definition of collective punishment. Article 33 of the Fourth Geneva Convention, applicable in occupied territories, simply states that '[c]ollective penalties and likewise all measures of intimidation or of terrorism are prohibited'. The sentence that immediately precedes this in Article 33 clarifies that '[n]o protected person may be punished for an offence he or she has not personally committed'. Furthermore, in its Commentary on Article 75(2)(d) of Additional Protocol I, which also prohibits collective punishments 'at any time and in any place whatsoever', the ICRC posited that the notion of collective punishment had to be understood 'in the broadest sense' and would cover 'harassment of any sort, administrative, by police action or otherwise'.<sup>31</sup>

Despite the lack of a definition of collective punishment in IHL treaties or customary law, there are various elements that can be taken into consideration to elucidate the scope of this prohibition, which include (i) its link to the principle of individual criminal responsibility; (ii) its absolute nature, which outlaws any type of collective punishment, regardless of the purported objective for which it is imposed; and (iii) the existence of punitive intent. These three elements are outlined in the following subsections.

### 2.1. COLLECTIVE PUNISHMENT AND INDIVIDUAL CRIMINAL RESPONSIBILITY

It is a long-established principle of criminal law that no one may be convicted for an offence except on the basis of individual responsibility.<sup>32</sup> Responsibility is always strictly individual and cannot become the burden of the entire population.<sup>33</sup> The prohibition of collective punishment is a corollary of this principle.<sup>34</sup> It can also be linked to the right to be presumed innocent

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<sup>31</sup> Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC and Martinus Nijhoff 1987) (Commentary Additional Protocols (1987)) para 874.

<sup>32</sup> Elies van Sliedregt, *Individual Criminal Responsibility in International Law* (Oxford University Press 2012) 17. As shown in the opening quotations to this article, the principle can be traced back to the holy scriptures.

<sup>33</sup> René Provost, *International Human Rights and Humanitarian Law* (Cambridge University Press 2002) 188.

<sup>34</sup> Commentary Additional Protocols (1987) (n 31) para 4535.



until proven guilty according to law.<sup>35</sup> However, it is much broader in scope than either of these two legal notions in that it applies not only to criminal sentences pronounced by a court after due process of law, but also to sanctions of any type, including those of an administrative nature.<sup>36</sup>

Needless to say, the prohibition of collective punishment does not apply to penalties that are imposed under due process of law and which respect the principles of fair trial, including an individualised finding of guilt.<sup>37</sup> In that sense the prohibition does not preclude the establishment of joint responsibility in the event of so-called ‘collective criminality’, for instance, when several individuals conspire to commit a crime.<sup>38</sup> Leaders, organisers, instigators and accomplices who participate in the planning or execution of an offence might all be found responsible therefor.<sup>39</sup> In such circumstances, the principle of individual criminal responsibility would not be violated and the punishment could not be considered arbitrary, provided that responsibility is determined separately for each person.

On the other hand, if an Occupying Power imposes a penalty on a group of protected persons without due regard to the principle of individual criminal responsibility, the penalty will also contradict the prohibition of collective punishment.

## 2.2. THE ABSOLUTE NATURE OF THE PROHIBITION

In its Commentary on Article 33 of the Fourth Geneva Convention, the ICRC considered that collective punishments are ‘in defiance of the most elementary principles of humanity’ and that ‘resorting to intimidatory measures’ is prohibited, even when the intention of the Occupying Power is to ‘forestall breaches of the law’ or ‘prevent hostile acts’.<sup>40</sup>

The prohibition of collective punishment is absolute.<sup>41</sup> Its peremptory nature is reinforced by the fact that it must be respected even during states of emergency or situations which threaten the life of the nation.<sup>42</sup> This is why deterrence cannot be put forward as a justification to impose a collective punishment. In fact, by its nature, one of the purposes of any sanction will be to deter future perpetrators. In one of its landmark decisions, the International Criminal Tribunal for the Former Yugoslavia (ICTY) argued that the first purpose of any sentence for alleged war crimes was precisely ‘individual and general deterrence concerning the accused and, in particular,

<sup>35</sup> eg, International Covenant on Civil and Political Rights (entered into force on 23 March 1976) 999 UNTS 171 (ICCPR), art 14(2).

<sup>36</sup> Orna Ben-Naftali and others, ‘The Lawfulness of Israel’s House Demolition Policy under International Law and Israeli Law’, Expert Opinion, November 2014, 27, [http://www.hamoked.org/files/2014/1159001\\_eng.pdf](http://www.hamoked.org/files/2014/1159001_eng.pdf).

<sup>37</sup> In general, the principle of fair trial does not apply to disciplinary punishment. However, as already mentioned, the prohibition of collective punishment as enshrined in IHL requires a broad interpretation of the notion of punishment.

<sup>38</sup> van Sliedregt (n 32) 18–37.

<sup>39</sup> *ibid* 23–26.

<sup>40</sup> Jean Pictet (ed), *Commentary: IV Geneva Convention relative to the Protection of Civilian Persons in Times of War* (ICRC 1958) (Commentary GC IV (1958)) 225–26.

<sup>41</sup> Ben-Naftali and others (n 36) 30; UN Human Rights Council (n 12) para 80.

<sup>42</sup> UN Human Rights Committee, General Comment 29 (n 15) para 11.



commanders in similar situations in the future'.<sup>43</sup> Therefore, the fact that a particular sanction 'primarily [intends to deter] does not negate the possibility that it also serves as a form of punishment'.<sup>44</sup>

The rationale of the prohibition of collective punishment is precisely to avoid the arbitrary punishment of entire groups for acts they have not committed, regardless of the underlying justifications. During the Second World War, Nazi Germany 'carried out many forms of collective punishments to suppress and *deter* any resistance'.<sup>45</sup> From the perspective of the Nazis, the primary goal of their actions might have been to discourage or avert certain types of behaviour among the population of the territories they had occupied. However, arbitrary and indiscriminate sanctions were unanimously considered a form of collective punishment. This is the reason why, during the 1949 Diplomatic Conference of Geneva, states decided to reaffirm categorically the prohibition despite the fact that it would place 'serious restrictions ... on the ability of an Occupying Power to protect itself against illegal combatants'.<sup>46</sup>

Such restrictions are the core of the laws of war, which are a carefully crafted balance between the principle of humanity and the principle of military necessity.<sup>47</sup> Indeed, the laws of war are 'a compromise between military and humanitarian requirements'.<sup>48</sup> Hence, neither the need to seek a military advantage nor military goals can justify a departure from IHL.<sup>49</sup> Since striking at the innocent through a collective punishment was deemed particularly inhumane, it was decided that IHL would adhere to an absolute prohibition, one that no military objective (including deterrence) could lawfully overcome.

A parallel could be drawn with the prohibition of torture. Its unreserved nature cannot be dodged by arguing that torturing a detainee could save many innocent lives. Some might think that this utilitarian argument has a certain appeal during an ongoing armed conflict but, under international law, resorting to the ill-treatment of someone deprived of liberty will remain illegal in all circumstances.<sup>50</sup>

<sup>43</sup> ICTY, *Prosecutor v Blaškić*, Judgment, IT-95-14-A, Appeals Chamber, 29 July 2004, para 678.

<sup>44</sup> Amichai Cohen and Yuval Shany, 'House Demolition at the Israeli Supreme Court: Recent Developments', *Lawfare Blog*, 14 January 2019, <https://www.lawfareblog.com/house-demolition-israeli-supreme-court-recent-developments>.

<sup>45</sup> Georgios Kosmopoulos, 'Collective Punishments under International Humanitarian Law: An Analysis of the 2006 War in Lebanon' (2008) 3 *Pace Diritti Umani – Peace Human Rights* 95, 98 (emphasis added). See also Amichai Cohen, 'Economic Sanctions in IHL: Suggested Principles' (2009) 42 *Israel Law Review* 117, 131 ('collective punishments [by the Nazi regime] were clear violations of IHL which included murder and total destruction and were intended to punish the civilian population and *deter* it from future cooperation with the [enemy] military' (emphasis added)).

<sup>46</sup> Swiss Federal Political Department, 'Final Record of the Diplomatic Conference of Geneva of 1949', 1949, Vol. III, 141.

<sup>47</sup> Antonio Cassese, 'Current Challenges to International Humanitarian Law' in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press 2014) 3, 6.

<sup>48</sup> Mary Ellen O'Connell, 'Historical Development and Legal Basis' in Fleck (n 10) 10, 36–37.

<sup>49</sup> *ibid*: 'Any exception to the prescribed behavior for reasons of military necessity shall be permissible only if a rule of international humanitarian law expressly provides for such a possibility'.

<sup>50</sup> Gary D Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (2nd edn, Cambridge University Press 2018) 615–72. Solis illustrates why armed forces must abide by absolute prohibitions, regardless of the alleged practical benefits of breaching the law; he adds that, at any rate, breaching the law of armed conflict

### 2.3. A COMPARATIVE LOOK AT THE NOTION OF PUNITIVE INTENT

Another widely accepted element in identifying a violation of the collective punishment prohibition is that the act in question must have a punitive intent.<sup>51</sup> However, as pointed out by the ICRC, '[a] punitive purpose can be said to exist not only when the punishment is motivated by the desire to sanction ... but also, more generally, when it seeks to harass, intimidate or exert pressure on the group as a whole'.<sup>52</sup>

It should be noted that, in line with what was mentioned earlier, the fact that the prohibition of collective punishment requires a punitive purpose does not mean that this must be the only objective of a given measure. The same measure can also be justified by a range of other reasons, such as security concerns or responding to the changing military needs of the armed conflict. However, if a punitive purpose underlies an indiscriminate punishment imposed upon a group of civilians in an occupied territory, then the measure in question is prohibited irrespective of the existence of other separate or ancillary purposes.<sup>53</sup> What is required is that one of the purposes of the measure is to collectively punish the individuals in question, including by way of sanctioning, harassing, intimidating or exerting pressure on them.

However, as with other IHL rules, the prohibition continues to be applicable even if, together with the punitive purpose, the Occupying Power aims to compel civilians to act in a particular way. Jurisprudence on the constitutive elements of the prohibition of collective punishment, including the notion of intent, remains scant. However, the Special Court for Sierra Leone (SCSL) provides an interesting example of the possible coexistence of intentions in a single act. In *Prosecutor v Issa Hassan Sesay and Others*, the Trial Chamber analysed (among other issues) the killing of 63 civilians in Kailahun Town at the hands of the Revolutionary United Front. According to the Court, the massacre was 'an act of violence committed with the specific intent to spread terror among the civilian population', and thus should be considered an act of terrorism under the laws of war.<sup>54</sup> At the same time, the SCSL found that the act was also committed with 'the aim of indiscriminately punishing civilians perceived to be ... collaborators' and, consequently, fell within the crime of collective punishment under the SCSL Statute.<sup>55</sup> Therefore, the Court accepted that the same measure could thus have multifaceted intentions.<sup>56</sup>

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often turns out to be a vector for further radicalisation. In addition, he rightly argues that, under these circumstances, the utilitarian argument is not only legally, but also morally flawed. Solis (a veteran of the US Marine Corps who served in the Vietnam War) rejects utilitarianism in favour of Kantianism.

<sup>51</sup> Shane Darcy, 'Prosecuting the War Crime of Collective Punishment: Is It Time to Amend the Rome Statute?' (2010) 8 *Journal of International Criminal Justice* 29, 42.

<sup>52</sup> Commentary GC III (2021) (n 7) para 3693.

<sup>53</sup> Vaios Koutrolis, 'Appréciation de l'application de certaines règles du droit international humanitaire dans les rapports portant sur l'interception de la flottille naviguant vers Gaza' (2012) 1 *Revue Belge de Droit International* 90, 119.

<sup>54</sup> SCSL, *Prosecutor v Issa Hassan Sesay and Others*, Judgment, SCSL-04-15-T, Trial Chamber I, 2 March 2009, paras 1130, 1491–92.

<sup>55</sup> *ibid.* See also SCSL Statute (n 6) art 3(b).

<sup>56</sup> For a more recent piece of jurisprudence making the link between due process and the prohibition of collective punishment, see Extraordinary Chambers in the Courts of Cambodia, *Prosecutors v Kaing Guek Eav alias Duch*, Judgment, 001/18-07-2007/ECCC/TC, Trial Chamber, 26 July 2010, paras 458–63.

Moreover, it is worth noting that the punitive intent can be inferred from certain acts and need not be explicitly acknowledged by the alleged perpetrator of an incident of collective punishment. For instance, it could be deduced from the actual consequences of the sanction for a group of people, or from the duration of the measure, or even from public statements of the authorities in charge of enforcing the punishment. A more restrictive approach to the notion of intent would lead to absurd results. It would suffice to claim that a collective punishment is imposed with the sole purpose of deterrence, or for security reasons, or simply to deny that it is a form of punishment, to effectively deprive civilians in occupied territories of their protection under the laws of war. Once more, an analogy with the prohibition of torture can contribute to illustrate this point. The pertinence of this comparison stems from the fact that, beyond the notion of *mens rea* or criminal intent common to any crime or offence, both the prohibition of torture and the prohibition of collective punishment require the existence of a specific purpose in order to be breached. Article 1 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides the following definition:<sup>57</sup>

[T]he term ‘torture’ means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind.

To violate the prohibition of torture, the perpetrator must intentionally inflict severe pain or suffering on the victim for a specific purpose. However, to establish the existence of a specific intent ‘does not require direct evidence of the accused’s mental state’ but can instead be inferred from the circumstances ruling at the time.<sup>58</sup> This has been the approach of the US judiciary, the Committee on Torture, and the international courts and tribunals.<sup>59</sup> For instance, in *Prosecutor v Akayesu*, the International Criminal Tribunal for Rwanda (ICTR) stated that ‘[o]n the issue of determining the offender’s specific intent, the Chamber considers that intent is a mental factor which is difficult, even impossible, to determine’ and ‘[t]his is the reason why, in the absence of a confession from the accused, his intent can be inferred from a certain number of presumptions of fact’.<sup>60</sup> When someone intentionally inflicts severe pain or suffering upon a victim with the aim of extracting a confession or punishing that person, this has been seen, as a rule, to violate the prohibition of torture.<sup>61</sup> In fact, there is a certain consensus on the fact that torture can take

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<sup>57</sup> Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (entered into force 26 June 1987) 1465 UNTS 85, art 1.

<sup>58</sup> Oona A Hathaway, Aileen Nowlan and Julia Spiegel, ‘Tortured Reasoning: The Intent to Torture under International and Domestic Law’ (2011) 52 *Virginia Journal of International Law* 791, 798.

<sup>59</sup> *ibid* 836.

<sup>60</sup> ICTR, *Prosecutor v Akayesu*, Judgment, ICTR-96-4-T, Chamber I, 2 September 1998, para 523.

<sup>61</sup> *ibid*. See also ICTY, *Prosecutor v Zejnir Delalic and Others*, Judgment, IT-96-21-T, Trial Chamber, 16 November 1998, paras 494–97; UN Committee Against Torture, *Dragan Dimitrijevic v Serbia and Montenegro*, 24 November 2004, UN Doc CAT/C/33/D/207/2002, para 5.3.

place even if causing such level of harm is not the accused's main objective or purpose, as long as the act itself was intentional.<sup>62</sup> The applicable intent standard would be that of acting 'knowingly';<sup>63</sup> that is, it is enough if the perpetrator is aware 'that a circumstance exists or a consequence will occur in the ordinary course of events'.<sup>64</sup> It is submitted that a similar standard must be applied when assessing whether an act violates the prohibition of collective punishment.<sup>65</sup>

Therefore, it cannot be argued that the prohibition of collective punishment is breached only when the act has the sole and unique intent (and, even less so, the self-avowed purpose) of sanctioning a group of people for acts that they have not committed. Instead, and in line with the yardstick contained in the Rome Statute, any act conducted in 'awareness ... that ... a consequence will occur in the ordinary course of events' might amount to a collective punishment,<sup>66</sup> provided that the said act is in effect punishing, intimidating or terrorising a group of individuals for acts they have not themselves committed or threatened to commit.

During the belligerent occupation of Kuwait during the First Gulf War, Iraqi armed forces reportedly conducted countless acts of retribution in several Kuwaiti cities. The main reason for these 'horrible punishments' was to deter entire neighbourhoods from their unwavering support for the Kuwaiti resistance movement.<sup>67</sup> Iraq never acknowledged that its intention was to impose a collective punishment on the population; rather, it saw its own actions as a way to subdue Kuwaiti resistance into submission.<sup>68</sup> However, these acts, by their own indiscriminate nature, were commonly considered a form of collective punishment, regardless of the self-declared intention of the Occupying Power.<sup>69</sup> The important aspect was that Iraqi armed forces were allegedly punishing, intimidating or terrorising Kuwaiti civilians for acts they had not themselves committed. The United States Department of Defense summarised it as follows:<sup>70</sup>

Iraqi policy provided for the collective punishment of the family of any individual who served in or was suspected of assisting the Kuwaiti resistance. This punishment routinely took the form of destruction of the family home and execution of all family members. Collective punishment is prohibited expressly by Article 33, GC.

In this particular case, the punitive intent could be indisputably inferred from the actions of the Iraqi armed forces, even if the Occupying Power had other goals in mind, such as deterring acts of resistance or suppressing all forms of popular support to it.

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<sup>62</sup> Hathaway, Nowlan and Spiegel (n 58) 801.

<sup>63</sup> *ibid* 802.

<sup>64</sup> Rome Statute (n 6) art 30.

<sup>65</sup> Koutrolis (n 53) 120.

<sup>66</sup> Rome Statute (n 6) art 30.

<sup>67</sup> US Department of Defense, 'Conduct of the Persian Gulf War: Final Report to Congress', April 1992, 32–33.

<sup>68</sup> Human Rights Watch, 'Human Rights Watch World Report 1992: Iraq and Occupied Kuwait', 1 January 1992, [https://www.hrw.org/reports/1992/WR92/MEW1-02.htm#P210\\_89593](https://www.hrw.org/reports/1992/WR92/MEW1-02.htm#P210_89593).

<sup>69</sup> *ibid*.

<sup>70</sup> US Department of Defense (n 67) Appendix O: 'The Role of the Law of War', 620.

All in all, it is clear that collective punishments are absolutely prohibited under international law. Although neither the Geneva Conventions nor customary IHL provide a definition of collective punishment, state practice, judicial decisions and scholars all tend to agree that the prohibition encompasses any sanction intentionally imposed upon groups or individuals for acts they have not themselves committed, in disregard of the principle of individual criminal responsibility. The punitive intent does not have to be acknowledged by the alleged perpetrator; nor does it need to be the sole purpose of the act. It suffices that this intent can be inferred from any type of sanction that aims to punish, intimidate or exert pressure upon particular individuals for acts they have not themselves committed or threatened to commit. In the same vein, and considering the ‘awareness’ standard enshrined in Article 30 of the Rome Statute, the intent can also be inferred when the authority imposing the collective punishment is cognisant of the fact that its actions in practice will punish, intimidate or exert pressure upon particular individuals for acts they have not themselves committed or threatened to commit.

In the next section we analyse how these elements could help in understanding the allegations of collective punishment in the Occupied Palestinian Territory, as well as the way in which this prohibition interacts with other rules of international law.

### 3. CONCOMITANT VIOLATIONS OF THE RIGHTS OF CIVILIANS UNDER ISRAELI BELLIGERENT OCCUPATION

International law bestows upon an Occupying Power the authority to maintain public order. However, the exercise of this authority must be balanced against the rights of the civilian population.<sup>71</sup> One of the many limitations on the discretion of the Occupying Power is precisely the need to respect the laws in force in the (occupied) country.<sup>72</sup> At the same time, Article 64 of the Fourth Geneva Convention recognises that domestic laws may be repealed or suspended if they constitute an obstacle to the application of the Convention itself. Against this backdrop, scholars have argued convincingly that an Occupying Power is, in fact, obliged to abolish legislation and institutions which contravene not only the law of occupation itself, but also international human rights standards.<sup>73</sup> This obligation is also a corollary of the duty to respect (as much as possible) IHRL in occupied territories, as discussed in the introduction to this article.

Israel contests the allegations of collective punishment that have been thrown its way. It has often claimed that the measures labelled as such by certain actors were justified by security needs, or by the need to prevent acts of terrorism, or that they were based on laws that were already in force in the Occupied Palestinian Territory before the occupation began in 1967. From the perspective of international law, and in line with the elements outlined above, none of these

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<sup>71</sup> See, eg. GC IV (n 4) art 27.

<sup>72</sup> Hague Regulations (n 3) art 43 (the Occupying Power ‘shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country’).

<sup>73</sup> Lubell (n 14) 329; Marco Sassòli, ‘Legislation and Maintenance of Public Order and Civil Life by Occupying Powers’ (2005) 16 *European Journal of International Law* 661, 675–77.

arguments would be crucial for establishing the existence of a collective punishment. Indeed, given that the prohibition of collective punishment is absolute, it cannot be breached under the auspices of deterrence or other military considerations. Moreover, legislation that contradicts IHL is always illegal, regardless of whether it was enacted before the application of the law of occupation. The same goes for legislation which glaringly violates IHRL.<sup>74</sup>

This section will focus on how possible infringements of the prohibition of collective punishment in an occupied territory would, by their nature, raise concomitant breaches of the rights of civilians. For that purpose it will focus on certain provisions of international law – with limited references to domestic law, in particular, the so-called ‘emergency powers’.<sup>75</sup> This methodological decision is based on the specific purpose of this article: namely, to illustrate how the fact of breaching the prohibition of collective punishment contained in Article 33 of the Fourth Geneva Convention in all likelihood will become the source of other violations of international law. The approach of focusing on international law is justified by the fact that, at any rate, a state shall not ‘invoke the provisions of its internal law as a justification for its failure to perform a treaty’.<sup>76</sup>

### 3.1. THE GAZA BLOCKADE

In June 2007, following the takeover of Gaza by Hamas, Israel imposed a land, air and sea blockade of the strip.<sup>77</sup> Among many other things, Israel drastically restricted access to ‘food, fuel, cooking gas canisters, spare parts for water and sanitation plants, and medical supplies’ for

<sup>74</sup> *ibid.*

<sup>75</sup> For a brief introduction to this complex issue, see Yoav Mehozay, ‘The Fluid Jurisprudence of Israel’s Emergency Powers: Legal Patchwork as a Governing Norm’ (2012) 46 *Law and Society Review* 137; see also Emanuel Gross, ‘Democracy’s Struggle Against Terrorism: The Powers of Military Commanders to Decide upon the Demolition of Houses, the Imposition of Curfews, Blockades, Encirclements and the Declaration of an Area as a Closed Military Area’ (2002) 30 *Georgia Journal of International and Comparative Law* 165.

<sup>76</sup> VCLT (n 8) art 27.

<sup>77</sup> Blockades are usually defined as ‘belligerent measures taken by one side of an armed conflict to prevent vessels or aircraft from entering the ports of the other party to the armed conflict, in order to prevent it receiving armaments or material assistance from abroad’, whereas a siege is generally considered ‘an operational strategy aimed at capturing a locality or area, by surrounding it, severing its supply and communication lines, and carrying out attacks against it’; see Katharine Fortin, ‘Blockade’ in Dražan Djukić and Niccolò Pons (eds), *The Companion to International Humanitarian Law* (Brill Nijhoff 2018) 216; Kinga Tibori-Szabó, ‘Siege’ in Djukić and Pons, *ibid* 645. However, both methods of warfare share many common elements and, in fact, early ‘rules on blockade were taken from the law of siege’; see Wolff Heintschel von Heinegg, ‘The Law of Armed Conflict at Sea’ in Fleck (n 10) 475, 536–37. In view of its shared characteristics, as well as to facilitate the reading of this section, both notions are sometimes used interchangeably throughout the text. It should be noted that the ICRC has referred to the situation in Gaza as a ‘closure’, a notion that seems to encompass both the naval blockade and the land restrictions imposed by Israel: ICRC, ‘Gaza Closure: Not Another Year!’, 14 June 2010, News Release 10/103, <https://www.icrc.org/en/doc/resources/documents/update/palestine-update-140610.htm>. Despite the above-mentioned definition of blockades under IHL, this article uses the term in a broader sense, encompassing all measures taken by Israel at sea, in the air and on land, and which ultimately led to the closure of Gaza from the outside world.

the 1.8 million Palestinians living there.<sup>78</sup> Despite the loosening of certain restrictions in recent years, the Gaza blockade has continued to undermine the living conditions of its inhabitants and fragmented its economic and social fabric.<sup>79</sup>

Outside Israel there seems to be wide consensus regarding the unlawfulness of the blockade under international law. For instance, the ICRC has repeatedly stressed the daunting humanitarian consequences of the closure and has considered that '[t]he whole of Gaza's civilian population is being punished for acts for which they bear no responsibility'; therefore the situation 'constitutes a collective punishment imposed in clear violation of Israel's obligations under [IHL]'.<sup>80</sup> Similar legal readings have been put forward by the UN Secretary General, the UN Special Rapporteur on the situation of human rights in the Palestinian territory, and a myriad of states.<sup>81</sup> These assertions have been commonplace since the 1970s, when Israel's belligerent occupation of the Palestinian territory was in its early stages.<sup>82</sup>

One of the domestic legal underpinnings for the blockade are the Defence (Emergency) Regulations, promulgated during the British Mandate in 1945. Regulation 125 foresees the establishment of 'closed areas'. According to this norm:<sup>83</sup>

A Military Commander may by order declare any area or place to be a closed area for the purposes of these Regulations. Any person who, during any period in which any such order is in force in relation to any area or place, enters or leaves that area or place without a permit in writing issued by or on behalf of the Military Commander shall be guilty of an offence.

Even fervent proponents of the Defence (Emergency) Regulations have highlighted that the discretion of military commanders 'must be reasonable', rooted in clear military needs, and take into due consideration the human rights of all those affected.<sup>84</sup>

<sup>78</sup> Avi Shlaim, 'The Siege of Gaza', *Al Jazeera*, 19 July 2014, <https://www.aljazeera.com/opinions/2014/7/19/the-siege-of-gaza>.

<sup>79</sup> United Nations Office for the Coordination of Humanitarian Affairs, 'Gaza Blockade: Restrictions Eased but Most People Still "Locked In"', 12 February 2020, <https://www.ochaopt.org/content/gaza-blockade-restrictions-eased-most-people-still-locked>.

<sup>80</sup> ICRC (n 77).

<sup>81</sup> UN Human Rights Council (n 12) paras 36, 59. For a non-exhaustive list of states that have considered the blockade to be a form of collective punishment, see Koutrolis (n 53) 106. For an opposite view, see Sir Geoffrey Palmer and others, Report of the UN Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident (2 September 2011), para 77, [https://reliefweb.int/sites/reliefweb.int/files/resources/Full\\_Report\\_2235.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/Full_Report_2235.pdf).

<sup>82</sup> UNGA, Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories (26 October 1970), UN Doc A/8089, paras 71–74. It should be reminded that, as noted in the introduction, the analysis of the blockade set out below accepts the most widely accepted view, whereby the Gaza strip is still occupied by Israel. Nevertheless, the content of this section would arguably remain valid even if one were to consider that Israel was not the Occupying Power of this territory. Indeed, the prohibition of collective punishment would still apply as a matter of customary IHL to the non-international armed conflict between Israel and Hamas, and most of the assertions herein would remain valid.

<sup>83</sup> Defence (Emergency) Regulations (1945), British High Commissioner in Palestine, reg 125, [https://www.imo-lin.org/doc/amlid/Israel/The\\_Defence\\_Emergency\\_Regulations\\_1945.pdf](https://www.imo-lin.org/doc/amlid/Israel/The_Defence_Emergency_Regulations_1945.pdf).

<sup>84</sup> Gross (n 75) 227–28.



It should be noted that blockades per se are not prohibited by the laws of war. However, as with sieges, they are lawful only ‘when directed exclusively against an enemy’s armed forces’.<sup>85</sup> One of the consequences of this is that, during active hostilities, civilians should be allowed, whenever feasible, to leave the besieged area, in line with the IHL principle of precaution.<sup>86</sup> They should also be allowed to receive rapid humanitarian relief, but the Occupying Power retains a right to control and oversee the content of the relief consignments.<sup>87</sup>

In order to determine whether the Gaza blockade constitutes a collective penalty, one would need to decide whether it is intentionally punishing Palestinian civilians for acts they have not themselves committed. In this particular case, certain Israeli officials have reportedly stated that the blockade aims at delegitimising Hamas vis-à-vis the population, ‘set[ting] a price for every Qassam [rocket], in terms of cutting off infrastructure and water’ and ‘putting the Palestinians on a diet’.<sup>88</sup> However, the official position of Israel remains that the blockade is justified in view of the security situation in the Gaza strip and does not seek to punish the civilian population.<sup>89</sup>

Be that as it may, and as the criteria to assess punitive intent are not set in stone, any legal analysis must consider all the factual elements at stake. In the absence of an explicit acknowledgement, which will rarely occur during any ongoing armed conflict, it is important to reflect on whether the siege of Gaza is de facto punishing, intimidating or exerting pressure upon certain individuals for acts they have not committed.

At any rate, a blockade must take into account the humanitarian consequences for the population affected by it.<sup>90</sup> In fact, it has even been argued that a blockade would be unlawful if the intended military advantage is outweighed by the heavy toll imposed upon civilians.<sup>91</sup> However, and although entering into such discussions would be well beyond the scope of this article, it

<sup>85</sup> von Heinegg (n 77) 532–38, and ICRC, ‘International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Recommitting to Protection in Armed Conflict on the 70th Anniversary of the Geneva Conventions’, Report submitted to the 33rd International Conference of the Red Cross and Red Crescent, December 2019, 15–16.

<sup>86</sup> ICRC *ibid.* See also GC IV (n 4) arts 17 and 35. The latter states that ‘[a]ll protected persons who may desire to leave the territory at the outset of, or during a conflict, shall be entitled to do so, unless their departure is contrary to the national interests of the State’.

<sup>87</sup> ICRC (n 85); see also ICRC Study (n 5) 193–200.

<sup>88</sup> Koutrolis (n 53) 114; Turkish National Commission of Inquiry, ‘Report on the Israeli Attack on the Humanitarian Aid Convoy to Gaza on 31 May 2010’, February 2011, 79–83. The last of those remarks was attributed to Dov Weisglass, adviser to Ehud Olmert, former Israeli Prime Minister, who in 2006 reportedly said that ‘[t]he idea is to put the Palestinians on a diet, but not to make them die of hunger’: Conal Urquhart, ‘Gaza on Brink of Implosion as Aid Cut-Off Starts to Bite’, *The Guardian*, 16 April 2006, <https://www.theguardian.com/world/2006/apr/16/israel>.

<sup>89</sup> Palmer and others (n 81) 42–43; Israel Ministry of Foreign Affairs, ‘Behind the Headlines: Turkel Commission Publishes First Part of Report’, 23 January 2011, [https://mfa.gov.il/mfa/foreignpolicy/issues/pages/flotilla\\_operation\\_israel\\_policies\\_gaza\\_23-jan-2011.aspx](https://mfa.gov.il/mfa/foreignpolicy/issues/pages/flotilla_operation_israel_policies_gaza_23-jan-2011.aspx).

<sup>90</sup> von Heinegg (n 77) 532–36.

<sup>91</sup> Kosmopoulos (n 45) 109–10; Koutrolis (n 53) 111–12; Human Rights Council, Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council Resolution S-2/1 (23 November 2006), UN Doc A/HRC/3/2, para 275; Amnesty International, ‘Israel/Lebanon: Out of All Proportion – Civilians Bear the Brunt of the War’, 21 November 2006, 24–27.

must be reiterated that if a particular act amounts to a collective punishment, it will be forbidden by the laws of war, regardless of any anticipated military advantage or proportionality assessment. In addition, it is submitted that the foreseeable consequences of a blockade upon the population at large might arguably constitute an indicative criterion to determine the existence of a punitive intent.

The blockade of an occupied territory (or parts thereof) could give rise to other IHL violations. For instance, apart from collective punishments, Article 33 of the Fourth Geneva Convention also outlaws 'all measures of intimidation' against protected persons, as well as reprisals against civilians and their property. Although the notion of reprisals is not defined in IHL treaties, it is understood to include acts that aim to induce a party to an armed conflict to discontinue its own violations of the laws of war.<sup>92</sup> Whereas the purpose of collective punishment is to make a group of persons 'pay the price for the behavior of one or more individuals or groups', reprisals are not punitive in nature.<sup>93</sup> Instead, they seek to compel an adversary to respect the laws of war.<sup>94</sup>

Nevertheless, reprisals are subject to very stringent conditions. They must be exceptional, used only as a last resort, and proportionate to the initial IHL violation of the opposite party which they aim to stop.<sup>95</sup> Furthermore, reprisals are always prohibited when they are directed against persons protected by the Geneva Conventions.<sup>96</sup> If the purpose of besieging Gaza is to force Hamas and other militant groups to comply with the laws of war and stop their indiscriminate attacks against Israeli civilians, then the blockade might well constitute an act of reprisal. However, as Palestinian civilians and civilian objects are directly affected by it, such reprisals would arguably be unlawful under IHL.

To a certain extent, a blockade imposed by a party to an armed conflict upon its enemy can also be examined from the prism of economic sanctions. Neither IHL, in general, nor the prohibition of collective punishments, in particular, bar the use of economic sanctions.<sup>97</sup> However, the laws of war do not allow the attack, destruction, removal or rendering useless of objects indispensable for the survival of the civilian population.<sup>98</sup> This norm protects civilians not only from starvation, but also from deprivation or insufficient supply of certain essential commodities, including agricultural areas for the production of food, crops, livestock, drinking water installations and irrigation works, to name but a few examples.<sup>99</sup> A blockade that breaches this

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<sup>92</sup> Ania Salinas, 'Reprisals against Civilians' in Djukić and Pons (n 77) 621.

<sup>93</sup> Jérôme de Hemptinne, 'Prohibition of Reprisals' in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (Oxford University Press 2015) 575, 580.

<sup>94</sup> *ibid.*

<sup>95</sup> ICRC Study (n 5) 513–23. See also ICTY, *Prosecutor v Milan Martić*, Judgment, IT-95-11-T, Trial Chamber, 12 June 2007, paras 465–67.

<sup>96</sup> ICRC Study, *ibid.*

<sup>97</sup> Cohen (n 45) 132.

<sup>98</sup> AP I (n 4) art 54(2); ICRC Study (n 5) 189–93.

<sup>99</sup> *ibid.* Of course, and in addition to this rule, the use of starvation of the civilian population as a method of warfare remains prohibited at all times: AP I (n 4) art 54(1); Rome Statute (n 6) art 8(2)(b)(xxv).

obligation is unlawful under IHL, regardless of whether or not it (also) constitutes a collective punishment.

More importantly, a violation of the prohibition of collective punishment through a military blockade could infringe a range of IHRL duties. As argued in the introduction, IHL and IHRL are complementary legal regimes. It is submitted that, in the case of means and methods of warfare, IHL constitutes the *lex specialis*.<sup>100</sup> This implies that if a blockade is perfectly lawful under the laws of war, it might not make sense to invoke certain human rights obligations vis-à-vis the party imposing it – by its own nature, placing an area under siege will lead to hardship for its population and hamper the full enjoyment of some rights. For instance, it might restrict the right to freedom of movement of the civilians living inside the besieged area. In such a scenario – namely, if the blockade is lawful according to IHL – some of the constraints it creates would probably not constitute violations of international law. On the other hand, if a blockade amounts to an act of collective punishment – and, hence, transgresses IHL, the *lex specialis* – then it is only logical to ponder even more closely the way in which that same act might contravene other concomitant IHL rules, as well as other branches of international law.

Another way to look at this is by determining the scope of human rights obligations of an Occupying Power. Although the applicability of IHRL to situations of belligerent occupation is widely accepted, scholars have posited that ‘the substantive elements of the obligations and the assessment of whether a violation has occurred, must be determined in the light of the context, including both the situation on the ground and legal restraints’.<sup>101</sup> Whereas a lawful military blockade, no doubt, is a context in which certain IHRL norms are difficult to implement, a blockade that amounts to a collective punishment could not possibly contribute to mitigate the human rights obligations of an Occupying Power – although other unrelated contextual elements might.<sup>102</sup>

IHL already imposes certain duties upon the Occupying Power in respect of the right to education, public health, food, work or freedom of religion.<sup>103</sup> However, IHRL regulates all these matters in far greater detail. If a blockade breaches the prohibition of collective punishment, it will inevitably hinder the application of other concomitant rules of international law, most notably IHRL.

Article 55 of the Fourth Geneva Convention, for instance, simply provides that the Occupying Power has the duty to ensure ‘[t]o the fullest extent of the means available to it ... the food and medical supplies of the population’. The 1966 International Covenant on Economic, Social and Cultural Rights goes one step further. It recognises ‘the right of everyone to an adequate standard

<sup>100</sup> For an analysis of how the application of the rules on means and methods of warfare, as well as the IHL rules on the conduct of hostilities, could in practice curb the enjoyment of human rights, see Elizabeth Salmón, ‘Entre la *lex specialis* y la metodología *pick-and-choose*: aproximaciones al derecho internacional Humanitario en la jurisprudencia de la Corte Interamericana de Derechos Humanos’ (2020) 1 *Anuario Iberoamericano sobre Derecho Internacional Humanitario* 181.

<sup>101</sup> Lubell (n 14) 324.

<sup>102</sup> The opposite would be tautological, as it would lead to the conclusion that violating a norm of international law gives a state a blank cheque to infringe other aspects of international law.

<sup>103</sup> GC IV (n 4) arts 50–58.

of living for himself and his family, including adequate food, clothing and housing, and to the *continuous improvement of living conditions*'.<sup>104</sup> In addition, it obligates state parties to 'recognize the fundamental right of everyone to be free from hunger' and:<sup>105</sup>

[t]o improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources.

The Committee on Economic, Social and Cultural Rights has added that, as a consequence of the above, states must not only ensure 'the availability of ... food in quantity ... and quality sufficient to satisfy the dietary needs of individuals', but also 'the accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights'.<sup>106</sup> An Occupying Power would breach its obligations under the right to food if its behaviour affects the means of production, including 'by displacing farming or fishing communities' or by 'paralyzing the transport network that allows supplies to be distributed'.<sup>107</sup> As can be seen, IHRL proceeds well beyond, and enhances, the provisions of the laws of war. It creates an additional set of responsibilities regarding access to resources and means of production.<sup>108</sup>

Needless to say, many of these obligations cannot be fulfilled during a siege, especially if it is protracted. Indeed, the least that can be said about the blockade of Gaza is that it has not led to the 'continuous improvement of living conditions' for the Palestinians affected by it. Therefore, if the blockade were to be considered a form of collective punishment, or even an act of reprisal or a measure of intimidation, then the necessary complementarity between IHL and IHRL would be even more robust. The violation of the laws of war, the *lex specialis*, in all likelihood would trigger concomitant breaches of IHRL.

With regard to health, the laws of war stipulate that an Occupying Power must:<sup>109</sup>

ensur[e] and maintai[n], with the cooperation of national and local authorities, the medical and hospital establishments and services, public health and hygiene in the occupied territory, with particular reference to the adoption and application of the prophylactic and preventive measures necessary to combat the spread of contagious diseases and epidemics.

<sup>104</sup> International Covenant on Economic, Social and Cultural Rights (entered into force 3 January 1976) 993 UNTS 3 (ICESCR), art 11(1) (emphasis added). It should be remembered that Israel contests the application of the ICESCR to the Occupied Palestinian Territory; see, eg, *Wall Advisory Opinion* (n 11) [112].

<sup>105</sup> ICESCR, *ibid* art 11(2)(a).

<sup>106</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 12: The Right to Adequate Food (12 May 1999), UN Doc E/C.12/1999/5, para 8. See also Rolf Künneemann, 'The Right to Adequate Food: Violations related to its Minimum Core Content' in Audrey Chapman and Sage Russell (eds), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Intersentia 2002) 161.

<sup>107</sup> Sylvain Vité, 'The Interrelationship between the Law of Occupation and Economic, Social and Cultural Rights: The Examples of Food and Health' in ICRC, 'Expert Meeting: Occupation and Other Forms of Administration of Foreign Territory', March 2012, 88, 93.

<sup>108</sup> *ibid*.

<sup>109</sup> GC IV (n 4) art 56; see also AP I (n 4) art 14(1).

Once more, IHRL is far more precise and complete, thanks partly to the work and mandate of the Committee on Economic, Social and Cultural Rights, as well as of regional human rights bodies. The ICESCR enshrines the right of every person to ‘the enjoyment of the highest attainable standard of physical and mental health’.<sup>110</sup> This is considered to include a myriad of entitlements regarding the functioning of public health and healthcare facilities, goods and services; accessibility of health facilities; the scientific and medical quality of the services; the training and skills of medical personnel; and the right to maternal, child and reproductive health, among others.<sup>111</sup>

Any collective punishment in the form of a blockade is bound to infringe certain aspects of the multifaceted nature of the right to health. Furthermore, IHRL considers that states must not take retrogressive measures in relation to the right to health.<sup>112</sup> It also limits the permissibility of instruments of political and economic pressure that might have an impact on the right to health, and establishes that states ‘should refrain at all times from imposing embargoes or similar measures restricting the supply of ... adequate medicines and medical equipment’.<sup>113</sup> If the blockade of Gaza were to be considered a collective punishment, its full impact on the fulfilment of the right to health under IHRL would also need to be assessed. For instance, it has been reported that fuel cuts made by Israel in response to security threats have obstructed medical services, water infrastructure and sewage treatment.<sup>114</sup> In addition, they are said to have severely affected the functioning of the healthcare system.<sup>115</sup>

Similar remarks could be made about the right to work,<sup>116</sup> children rights, the right to self-determination,<sup>117</sup> and even the right to development.<sup>118</sup> It is important to reiterate that IHL typically assumes that an occupation will be short-lived. If a belligerent occupation extends over several decades, the Occupying Power acquires additional obligations with regard to the fulfilment of the human rights of the population placed under its effective control.<sup>119</sup>

All in all, it is undeniable that a siege will interfere with many IHRL obligations. Although the above-mentioned examples are non-exhaustive, they illustrate that a breach of the prohibition of collective punishment in the form of a blockade will inevitably give rise to concomitant violations of international law, including human rights law. As will be seen in the next subsection, the same can be said about less stringent policies on movement and residency.

<sup>110</sup> ICESCR (n 104) art 12.

<sup>111</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (11 August 2000), UN Doc E/C.12/2000/4.

<sup>112</sup> *ibid* paras 32 and 48.

<sup>113</sup> *ibid* para 41.

<sup>114</sup> UN Human Rights Council (n 12) para 67.

<sup>115</sup> *ibid* paras 69–70.

<sup>116</sup> *Wall Advisory Opinion* (n 11) [130], [133], [134].

<sup>117</sup> UN Human Rights Council (n 12) paras 56–57.

<sup>118</sup> *ibid* para 65. A renowned Israeli scholar has gone as far as considering the blockade of Gaza a ‘uniquely cruel case of deliberate de-development’: Avi Shlaim, ‘How Israel Brought Gaza to the Brink of Humanitarian Catastrophe’, *The Guardian*, 7 January 2009, <https://www.theguardian.com/world/2009/jan/07/gaza-israel-palestine>.

<sup>119</sup> Lubell (n 14) 333; ICRC (n 107) 63–67.

### 3.2. RESIDENCE PERMITS AND RESTRICTIONS OF MOVEMENT

The laws of war are somewhat permissive in allowing an Occupying Power to impose collective movement restrictions short of a blockade, such as curfews or temporary travel bans, and they confer a broad discretion upon military commanders.<sup>120</sup> Article 78 of the Fourth Geneva Convention even foresees the possibility of subjecting protected persons to assigned residence or internment, if this is justified by imperative reasons of security. In a similar vein, Regulation 124 of the above-mentioned Defence (Emergency) Regulations provide that:

[a] Military Commander may by order require every person within any area specified in the order to remain within doors between such hours as may be specified in the order and, in such case, if any person is or remains out of doors within that area between such hours without a permit in writing issued by or on behalf of the Military Commander or some person duly authorized by the Military Commander to issue such permits, he shall be guilty of an offence against these Regulations.

However, as in the case of blockades, this discretion is never unlimited and should not be exercised in an arbitrary manner.<sup>121</sup> The commander must consider the measure to be essential for public order or for the security of the area in question, and ensure that there are no less harsh alternatives.<sup>122</sup>

Israel has often faced criticism for the way in which it has controlled and restricted population movements throughout the Occupied Palestinian Territory. The system of short-term and long-term curfews, together with the existence of physical barriers, checkpoints and administrative permits has seriously constrained the mobility of civilians and has often separated them from their communities, farmlands and private property.<sup>123</sup> It has also imposed a heavy toll on Palestinians seeking medical assistance outside their places of residence.<sup>124</sup> In some cases, these restrictions were put in place as a direct response to indiscriminate attacks against Israeli citizens, but reportedly remained in place long after the alleged perpetrators had been arrested.<sup>125</sup>

Once again, if such measures are fully in line with the laws of war (the *lex specialis*), it might be overstretched, and legally unsound, to link Israeli actions to a panoply of IHRL norms. On the other hand, in the event that any of those restrictions amounts to collective punishment, it is only logical to scrutinise its impact on the human rights of Palestinians living in occupied territory.

<sup>120</sup> Shany (n 26) 22.

<sup>121</sup> Gross (n 75) 214–15.

<sup>122</sup> *ibid.*

<sup>123</sup> UN Human Rights Council (n 12) paras 77–79; *Wall Advisory Opinion* (n 11) [133]–[134]; Andrew Ross, *Stone Men* (Verso 2019) 20, 45, 52, 75, 145, 172, 246–47; B'Tselem, 'Restrictions on Movement', 11 November 2017, [https://www.btselem.org/freedom\\_of\\_movement](https://www.btselem.org/freedom_of_movement). For an early report of this practice, see Raja Shehadeh, *The West Bank and the Rule of Law: A Study* (International Commission of Jurists 1980) 103.

<sup>124</sup> Hagar Shezaf, 'Israel Tightens Demands on Gazan Breast Cancer Patients in Need of Urgent Care', *Haaretz*, 23 September 2020, <https://www.haaretz.com/middle-east-news/palestinians/.premium-israel-tightens-demands-on-gazan-breast-cancer-patients-in-need-of-urgent-care-1.9174721>.

<sup>125</sup> Ryan Corbett, 'Prosecuting Collective Punishment: Israel's Breach of International Law in the West Bank' (2017) 35 *Boston University International Law Journal* 369, 378.

The key element in making this determination would be whether the restriction of movement in question is knowingly imposed with a view to punish, intimidate or exert pressure upon protected persons for acts they have not themselves committed.<sup>126</sup> As mentioned earlier, an actor that flouts the prohibition of collective punishment will not necessarily acknowledge such violation. However, a punitive intent can sometimes be inferred from the factual elements of the case.

Although a case-by-case analysis would remain necessary to determine whether a specific collective punishment might lead to concomitant breaches of international law, it seems that some specific violations are indeed likely to occur. To start with, imposing movement restrictions that amount to collective punishment could violate the right to freedom of movement of citizens of the Occupied Palestinian Territory. Article 12 of the International Covenant on Civil and Political Rights (ICCPR) states that ‘everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence’. The ICCPR itself and the United Nations Human Rights Committee recognise that this right may be restricted on national security grounds, which would certainly include the vicissitudes of an armed conflict.<sup>127</sup> However, any measure amounting to a collective punishment would be unlawful under international law, and could not possibly be justified on security grounds. As mentioned earlier, IHL is a balance between the principles of military necessity and humanity. Hence, security considerations cannot be put forward as a valid reason to violate the laws of war.

In *Rashed Morar v IDF Commander in Judaea and Samaria*, the Supreme Court of Israel discussed the legality of an order issued by a military commander, which prohibited Palestinian private owners of fields from entering their land to cultivate it. The commander justified his decision on military grounds and security.

In her analysis of the case, Justice Beinisch considered that freedom of movement had been recognised ‘both as an independent basic right and also as a right derived from the right to liberty’, as well as ‘a basic right in international law’.<sup>128</sup> She added that as the plaintiffs were requesting access to land on their own property, ‘especially great weight should be afforded to the right to the freedom of movement and the restrictions imposed on it should be reduced to a minimum’. Interestingly, Justice Beinisch also made the link between those limitations and the right to property, in the following manner:<sup>129</sup>

Therefore, the residents in the territories held under belligerent occupation have a protected right to their property. In our case, there is no dispute that we are speaking of agricultural land and agricultural

<sup>126</sup> Cheryl V Reicin, ‘Preventive Detention, Curfews, Demolition of Houses, and Deportations: An Analysis of Measures Employed by Israel in the Administered Territories’ (1987) 8 *Cardozo Law Review* 515, 525–26. See also Section 2 of this article.

<sup>127</sup> ICCPR (n 35) art 12(3). See also UN Human Rights Committee, General Comment 27: Article 12 (Freedom of Movement) (2 November 1999), UN Doc CCPR/C/21/Rev.1/Add.9, para 16. The Committee has also pointed out that restrictions must be consistent with other rights protected under IHRL, including the fundamental principles of equality and non-discrimination: *ibid* para 18.

<sup>128</sup> HCJ 9593/04, *Rashed Morar and Others v IDF Commander in Judaea and Samaria*, ILDC 452 (IL 2006) (26 June 2006), opinion of Justice Beinisch, para 14.

<sup>129</sup> *ibid*.



produce in which the petitioners have property rights. Therefore, when the petitioners are denied access to land that is their property and they are denied the possibility of cultivating the agricultural produce that belongs to them, their property rights and their ability to enjoy them are thereby seriously violated.

A similar link between the right to freedom of movement and the right to use and enjoy property was also made by the European Court of Human Rights in *Loizidou v Turkey*.<sup>130</sup> Although neither this case nor the *Rashed Morar* case addressed the issue of collective punishment, they both provide a glimpse of how restriction of movement amounting to collective punishment under IHL could interact with the right to freedom of movement and the right to property under IHRL.<sup>131</sup>

In a more recent case, the Jerusalem District Court was asked to review the decision of the Israeli Ministry of Interior to deny a permanent residence permit to a Palestinian woman whose son had reportedly stabbed an Israeli Border Police officer.<sup>132</sup> In a riveting piece of advocacy for the principle of individual criminal responsibility, the Court considered that the son's act could not account for the punishment imposed upon his mother and that, consequently, there were 'no arguments ... pointing to any sort of personal liability on the part of the petitioner'.<sup>133</sup> The legal rationale of the ruling was closely linked to the constitutive elements of the prohibition of collective punishment.

Justice Shaham considered that, apart from tampering with the principle of individual criminal responsibility, the decision of the Ministry of Interior to deny a residence permit to the petitioner would also infringe her right to family life, as it would separate her from her husband and the rest of her children, who lived in Jerusalem. In addition, Justice Shaham considered that endorsing such policies would be discriminatory, as the petitioner fulfilled all the legal and administrative requirements to be granted a residence permit. He added that 'given the importance of a person's legal status', as well as the fact that denying the petitioner's request would leave her in a 'legal limbo', the decision of the Ministry of Interior would violate her right to 'equality and dignity'.<sup>134</sup>

The prohibition of collective punishment was also upheld by the Israeli High Court of Justice in a case of assigned residency. Israeli security regulations allow military commanders to instruct a person under special supervision 'to live within the confines of a certain place in the Area to be detailed by the military commander in the order'.<sup>135</sup> This provision, in turn, is based on Article 78 of the Fourth Geneva Convention, which authorises an Occupying Power to subject a protected

<sup>130</sup> ECtHR, *Loizidou v Turkey*, App no 15318/89, 18 December 1996, paras 60–64.

<sup>131</sup> Art 17 of the 1949 Universal Declaration of Human Rights (UNGA Res 217A(III), 10 December 1948, UN Doc A/810 (1948)) provides that '[e]veryone has the right to own property alone as well as in association with others' and that '[n]o one shall be arbitrarily deprived of his property'.

<sup>132</sup> Nir Hasson, 'Court Rules Israel Can't Deny Residency of Palestinian Whose Son Stabbed a Policeman', *Haaretz*, 14 July 2020, <https://www.haaretz.com/israel-news/premium-court-rules-israel-can-t-deny-residency-of-palestinian-whose-son-stabbed-a-policeman-1.8993183>.

<sup>133</sup> AP (Jerusalem) 13708-03-20 *Khatib and Others v Israel* (8 July 2020), para 8, [https://hamoked.org/files/2020/1160978\\_eng.pdf](https://hamoked.org/files/2020/1160978_eng.pdf).

<sup>134</sup> *ibid.*

<sup>135</sup> Order regarding Security Provisions for Judea and Samaria (No 1651), 5770-2009, art 297(B)(1).

person to assigned residence or internment ‘for imperative reasons of security’.<sup>136</sup> In *Ajuri and Others v IDF Commander in Judaea and Samaria*, the High Court of Justice analysed the situation of three Palestinians from the West Bank who had been ordered to move to Gaza under such security regulations. One of the individuals affected by the decision was the brother of a Palestinian searched by the Israeli security forces for allegedly participating in several terrorist attacks against civilians.

In its decision, the High Court of Justice argued that assigned residence under IHL was a lawful measure only when taken against individuals who themselves represented a security threat, as the contrary would amount to arbitrary detention.<sup>137</sup> The Court added that the measure could not be used against innocent civilians for the purposes of ‘deter[ing] other terrorists from carrying out acts of terror’.<sup>138</sup> Although the prohibition of collective punishment was only implicitly invoked, the sentence was clearly inspired by, and in line with, this aspect of the laws of war. Moreover, a contrary decision arguably might have violated the prohibition of forced displacement, as prohibited acts of forced displacement include those stemming from actions that are themselves illegal under the laws of war.<sup>139</sup>

All in all, it is clear that if a restriction of movement or denial of a residence permit is knowingly imposed with a view to punish, intimidate or exert pressure upon protected persons for acts they have not themselves committed, it would violate the prohibition of collective punishment enshrined in the Fourth Geneva Convention. This would open the door to an array of concomitant IHL and IHRL violations, including those of the rights to freedom of movement, to property, to family life, to equality, and to dignity, as well as the prohibition of forced displacement and the prohibition of arbitrary deprivation of liberty.

### 3.3. PUNITIVE HOUSE DEMOLITIONS

The policy of punitive house demolitions in the Occupied Palestinian Territory has been thoroughly explored in the academic literature.<sup>140</sup> The policy allows military commanders to destroy the homes of relatives of Palestinians who have harmed (or attempted to harm) Israeli security personnel or Israeli civilians. House demolitions have been taking place since 1967 and have

<sup>136</sup> On the other hand, it should be recalled that art 49 GC IV (n 4) generally prohibits ‘[i]ndividual or mass forcible transfers, as well as deportations of protected persons’.

<sup>137</sup> HCJ 7019/02 *Kipah Mahmad Ahmed Ajuri and Others v IDF Commander in West Bank*, ILDC 14 (IL 2002) (3 September 2002), para 24 (The decision relied, among other things, on the ICRC 1958 Commentary on the Fourth Geneva Convention (n 40)).

<sup>138</sup> *Ajuri and Others*, *ibid*.

<sup>139</sup> ICRC (n 85) 16. See also ICTY, *Prosecutor v Milomir Stakić*, Judgment, Appeals Chamber, IT-97-24-A, 22 March 2006, paras 284–87; ICTY, *Prosecutor v Blagojević and Jokić*, Trial Judgment, IT-02-60-T, 17 January 2005, paras 596 and 600–01.

<sup>140</sup> See, eg, Ben-Naftali and others (n 36) which includes a wealth of additional references. See also Guy Harpaz, ‘Being Unfaithful to One’s Own Principles: The Israeli Supreme Court and House Demolitions in the Occupied Palestinian Territories’ (2014) 47 *Israel Law Review* 401; Yoram Dinstein, ‘The Israeli Supreme Court and the Law of Belligerent Occupation: Demolitions and Sealing off of Houses’ (1999) 29 *Israel Yearbook on Human Rights* 285.

been widely denounced as a form of collective punishment, including by some of the most prominent Israeli scholars and by international organisations such as the United Nations and the ICRC.<sup>141</sup> Even judges of Israel's Supreme Court have adopted the same view in certain dissenting opinions.<sup>142</sup> This criticism, together with doubts about its effectiveness, led the military authorities to place a moratorium on the use of the policy in 2005.<sup>143</sup> Nevertheless, the policy was reintroduced in 2014, following an increase in terrorist attacks.<sup>144</sup>

According to Israel, the legal underpinning of this practice is Regulation 119(1) of the Defence (Emergency) Regulations, enacted during the British Mandate, which states:

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

House demolitions are routinely ordered by military commanders, through an administrative proceeding. Although the Israeli Supreme Court has reviewed many of these administrative orders, its judicial review has been mostly circumscribed to procedural aspects and issues of proportionality, as opposed to a detailed assessment of the legality of the policy under domestic and international law.<sup>145</sup>

<sup>141</sup> Ben-Naftali and others (n 36). See also Shane Darcy, 'Punitive House Demolitions, The Prohibition of Collective Punishment, and the Supreme Court of Israel' (2002) 21 *Penn State International Law Review* 477, 478–80; Human Rights Watch, 'Israel: Stop Punitive Home Demolitions – Policy Amounts to Collective Punishment, Potential War Crime', 21 November 2014, <https://www.hrw.org/news/2014/11/21/israel-stop-punitive-home-demolitions>. In 1974, the ICRC spoke out against the practice of house demolitions and considered it a form of collective punishment: 'The situation of the victims whose homes were destroyed by the Israeli army in the occupied territories ... continued to be a source of concern for the ICRC, which holds that such destructions are contrary to the provisions of articles 33 and 53 of the Fourth Convention' (ICRC, *Annual Report*, 1974, cited in UN General Assembly, 'Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories' (27 October 1975), UN Doc A/10272, 33). During the 1980s, the ICRC went as far as issuing expert opinions to support the efforts of innocent Palestinian citizens to litigate their cases before the Israeli High Court of Justice: Dan Simon, 'The Demolition of Homes in the Israeli Occupied Territories' (1994) 19 *Yale Journal of International Law* 1, 3–4, 69.

<sup>142</sup> HCJ 2722/92 *Alamarin v IDF Commander* (14 June 1992), paras 4–5, [https://supremedections.court.gov.il/Home/Download?path=EnglishVerdicts/92/220/027/Z03&fileName=92027220\\_Z03.txt&type=4](https://supremedections.court.gov.il/Home/Download?path=EnglishVerdicts/92/220/027/Z03&fileName=92027220_Z03.txt&type=4) (Justice Cheshin arguing that 'the army commander does not have the authority to inflict collective punishment ... Where someone is suspected of an act as a result of which a destruction order is made with regard to his home, I did not agree then, nor do I agree now, that someone else's home may be destroyed merely because he lives next to that person').

<sup>143</sup> For a complete overview of the history and jurisprudence of this policy, see Kretzmer and Ronen (n 14) 375–417.

<sup>144</sup> *ibid* 376.

<sup>145</sup> Ben-Naftali and others (n 36) 6, 42.

The Israeli Supreme Court has generally endorsed the self-avowed purpose of the policy: namely, to deter future terrorist attacks.<sup>146</sup> However, scholars have questioned the deterrence effects of house demolitions and even argued that the practice is ‘likely to create an atmosphere of hate that would breed the next generation of terrorists’.<sup>147</sup> It should be noted that the policy has been implemented even when the alleged terrorist is already dead, and that, at any rate, those who bear the repercussions of the demolition are ‘owners of the house to be demolished [and] family members who reside in the house, even if they are not at fault and they pose no security threat’.<sup>148</sup>

Be that as it may, any house demolition that affects the relatives of a terrorist would amount to a collective punishment under international law if its effect were to punish, intimidate or terrorise individuals, in this case the family or community, for acts that they have not themselves committed. As mentioned earlier, the IHL prohibition of collective punishment is absolute, and cannot be justified for the purposes of deterrence.<sup>149</sup>

In a recent (and very welcome) piece of jurisprudence, Israel’s High Court of Justice rejected the demolition of a house on the basis that the Palestinian wife of the alleged terrorist and her eight children were ‘not accused ... of any involvement whatsoever in the criminal deeds of the father’.<sup>150</sup> The majority of judges considered that the demolition would constitute a severe violation of a series of ‘fundamental rights, including harm to property, human dignity and a succession of rights deriving from human dignity’.<sup>151</sup> Furthermore, Justice Karra considered that ‘[t]he continued use of this measure inflicting severe harm on innocent people constitutes collective punishment imposed contrary to ... fundamental rule[s]’.<sup>152</sup>

There is no doubt that if the destruction of the home of a protected person amounts to collective punishment, it will give rise to a myriad of other international law violations. Firstly, it would trigger additional violations of the laws of war. For instance, as with the case of the blockade of Gaza, a punitive house demolition amounting to collective punishment could also violate the prohibition on reprisals against protected persons.<sup>153</sup> Moreover, it could also infringe IHL provisions upholding the right to property. Article 46 of the Hague Regulations states that

<sup>146</sup> *ibid* 10–11. For a detailed explanation of the alleged deterrence effect of this practice, see HCJ 8091/14 *HaMoked and Others v Minister of Defence and Commander of Military Forces in the West Bank* (3 December 2014) paras 7–14.

<sup>147</sup> Cohen and Shany (n 44).

<sup>148</sup> Ben-Naftali and others (n 36) 24. For a recent example in which the owner of a house lost his property because of an attack committed by his tenant (to which he was not related), see UN Human Rights Council (n 12) paras 46–48.

<sup>149</sup> For an opposite view, see Gross (n 75) 205 (‘In my opinion, there is nothing inhumane in demolishing a terrorist’s house as a deterrent measure, if such an act can potentially prevent the murder and suffering of citizens who committed no crime and did no wrong to the terrorist’). Needless to say, Gross’s reasoning opens the door to a legal (and moral) slippery slope which would allow parties to an armed conflict to justify any type of behaviour.

<sup>150</sup> HCJ 4853/20 *Abu Baher and Others v Military Commander of the West Bank Area* (10 August 2020), opinion of Justice Mazuz, para 5, <https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts/20/530/048/r02&fileName=20048530.R02&type=4>.

<sup>151</sup> *ibid*, opinion of Justice Mazuz, para 3.

<sup>152</sup> *ibid*, opinion of Justice Karra, para 2.

<sup>153</sup> Ben-Naftali and others (n 36) 30.

‘[f]amily honour and rights, the lives of persons, and private property ... must be respected’.<sup>154</sup> An analogous international legal obligation can be found in Article 53 of the Fourth Geneva Convention, which prohibits the destruction of private property ‘except where such destruction is rendered absolutely necessary by military operations’.<sup>155</sup>

Indeed, Israel’s policy of punitive house demolitions could violate the protection afforded to private property under the law of occupation. The purpose of deterring future terrorist attacks seems to fall well below the threshold of being ‘absolutely necessary by military operations’.<sup>156</sup> Most notably, the policy is not at all related to ongoing combats or fighting of any sort, but rather to sporadic acts of violence that have already taken place, and is always implemented outside the conduct of hostilities. Therefore, it cannot be justified as a lawful act underpinning a military operation in progress, which is the only exception contemplated by Article 53 of the Fourth Geneva Convention.<sup>157</sup>

The right to property is also enshrined in IHRL. As mentioned earlier, private property is protected by the Universal Declaration of Human Rights and some consider it as part of customary international law.<sup>158</sup>

In view of the complementarity between IHL and IHRL, and taking into consideration the fact that punitive house demolitions amounting to collective punishment will always be illegal under the law of occupation, it is legitimate to consider whether this policy also violates other human rights. The answer seems to be in the affirmative, at least in relation to the rights to housing and to family life, the right of children and, most importantly, the right to non-discrimination.

Several IHRL provisions protect the right to housing. For instance, Article 17 of the ICCPR states that ‘[n]o one shall be subject to arbitrary or unlawful interference with his ... home’, whereas Article 11(1) of the ICESCR safeguards the ‘right of everyone to an adequate standard of living for himself and his family, including adequate ... housing’. The UN Committee in charge of monitoring compliance with the ICESCR has considered that the right to housing, which stems from the right to an adequate standard of living, ‘is of central importance for the enjoyment of all economic, social and cultural rights’ and is intimately intertwined with the right to live in peace and dignity.<sup>159</sup> Needless to say, security of tenure constitutes a key element of this right.<sup>160</sup> A punitive house demolition amounting to a collective punishment under the laws of war is bound also to violate this IHRL norm.<sup>161</sup>

<sup>154</sup> Hague Regulations (n 3) art 46.

<sup>155</sup> See also ICTY, *Prosecutor v Tihomir Blaškić*, Judgment, IT-95-14-T, Trial Chamber, 3 March 2000, para 157.

<sup>156</sup> A similar protection is found in customary IHL: ICRC Study (n 5) 178–82.

<sup>157</sup> Ben-Naftali and others (n 36) 10 (‘Administrative house demolitions are not carried out in the framework of combat, and therefore they cannot be considered as a “military operation”’).

<sup>158</sup> *ibid* 31–32.

<sup>159</sup> Committee on Economic, Social and Cultural Rights, General Comment No. 4: The Right to Adequate Housing (Art. 11(1) of the Covenant) (13 December 1991), UN Doc E/1992/23, paras 1, 7.

<sup>160</sup> Office of the High Commissioner for Human Rights, ‘The Right to Adequate Housing’ (November 2009), Factsheet No. 21, 3–4.

<sup>161</sup> Association of International Development Agencies (AIDA), ‘OPT: International Humanitarian Organisations Call for an Immediate Halt to House Demolitions’, 18 May 2004, <https://reliefweb.int/report/israel/opt-international-humanitarian-organisations-call-immediate-halt-house-demolitions>.

The same goes for the right to family life. Article 23 of the ICCPR recognises that the family is the natural and fundamental group unit of society and is entitled to protection by society and the state. A punitive house demolition could trump many of the substantive elements of this right, such as choice of residence.<sup>162</sup> Moreover, it could also violate a state's negative obligation to abstain from interference with the family life of individuals under its jurisdiction.<sup>163</sup>

In the case of *Akdivar v Turkey*, the European Court of Human Rights (ECtHR) argued that the destruction of houses by Turkish armed forces amounted to a 'serious interference with the right to respect for their family lives and homes and with the peaceful enjoyment of their possessions'.<sup>164</sup> In *Yordanova and Others v Bulgaria*, the same tribunal condemned the forced eviction of Roma families from their residences, contending that it would violate their right to family life. The Court further argued that the eviction was unlawful on the basis that it was not motivated by the 'individual conduct' of those being expelled and, as such, the act 'would be nothing less than a collective punishment on the basis of ethnic origin'.<sup>165</sup> As forced evictions are a prerequisite of punitive house demolitions, the fact that the ECtHR linked the former to a prohibited collective punishment is also particularly telling.

Scholars and international organisations have raised similar concerns regarding Israel's policy of punitive house demolitions.<sup>166</sup> It has also been argued that the policy could violate the state obligation to abide by the best interest of the child, as well as the prohibition against subjecting children to 'arbitrary or unlawful interference with [their] family [and their] home'.<sup>167</sup>

In addition, and depending on the specific circumstances of the case, the current implementation of the policy of house demolitions could violate one of the cornerstones of IHRL: namely, the principle of equality and non-discrimination, which is widely accepted as part of customary international law.<sup>168</sup> Among many other provisions, this principle is enshrined in Article 7 of the Universal Declaration of Human Rights and Article 26 of the ICCPR. The latter states that '[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law'. Equality and non-discrimination are considered essential in promoting and fulfilling the whole panoply of human rights that protect individuals.<sup>169</sup> Interestingly, the policy of house demolitions has never been applied to Israeli settlers and their families who have harmed or attempted to harm others.<sup>170</sup> Despite sporadic surges in violence spurred by Jewish settlers

<sup>162</sup> UN Human Rights Committee, General Comment No. 19: Article 23 (The Family) – Protection of the Family, the Right to Marriage and Equality of the Spouses (27 July 1990), para 8.

<sup>163</sup> For an example of jurisprudence thereon by a regional human rights body, see ECtHR, *Marckx v Belgium*, App no 6833/74, 13 June 1979, para 31.

<sup>164</sup> ECtHR, *Akdivar v Turkey*, App no 21893/93, 16 September 1996, paras 83–88.

<sup>165</sup> ECtHR, *Yordanva and Others v Bulgaria*, App no 25446/06, 5 June 2012, paras 87, 166–67.

<sup>166</sup> Ben-Naftali and others (n 36) 32; UN Human Rights Council (n 12) paras 38–41.

<sup>167</sup> ICCPR (n 35) art 17; see also Ben-Naftali and others (n 36) 34; Convention on the Rights of the Child (entered into force 2 September 1990) 1577 UNTS 3, arts 3, 16.

<sup>168</sup> Michael O'Boyle and Michael Lafferty, 'General Principles and Constitutions as Sources of Human Rights Law' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013) 194, 207–10.

<sup>169</sup> Jarlath Clifford, 'Equality' in Shelton, *ibid* 420, 434.

<sup>170</sup> See *HaMoked* (n 146) opinion of Justice Rubinstein, para 11.



against Palestinian civilians – a situation that the Shin Bet, Israel’s security agency, has labelled ‘Jewish terror’<sup>171</sup> – military commanders have never ordered the demolition of the homes of Jewish citizens who have committed indiscriminate acts of violence against Palestinians, even after the perpetrators had been criminally convicted in a court of law for some of these acts.<sup>172</sup> This might indicate somehow that Israel’s efforts to deter acts of terrorism are not applied equally among the different communities living in East Jerusalem, Judea and Samaria.<sup>173</sup>

### 3.4. RETURN OF HUMAN REMAINS

Israel has also been accused of inflicting collective punishment upon persons protected by the Fourth Geneva Convention by withholding the bodies of deceased Palestinian militants,<sup>174</sup> a policy that is practised equally by Hamas in the Gaza strip regarding the mortal remains of Israelis.<sup>175</sup> Once again, the logic of deterrence seems to underlie this decision. According to Israeli government officials, preventing the return of the bodies of the deceased could ‘deter potential attackers’, whereas sending them back, on the other hand, could ‘send the wrong message’.<sup>176</sup>

<sup>171</sup> Loveday Morris and Rught Eglash, ‘Attacks by Israeli Settlers Surge as West Bank Tensions Boil’, *The Washington Post*, 6 March 2019, [https://www.washingtonpost.com/world/middle\\_east/attacks-by-israeli-settlers-surge-as-west-bank-tensions-boil/2019/02/17/5c69f176-2a30-11e9-906e-9d55b6451eb4\\_story.html](https://www.washingtonpost.com/world/middle_east/attacks-by-israeli-settlers-surge-as-west-bank-tensions-boil/2019/02/17/5c69f176-2a30-11e9-906e-9d55b6451eb4_story.html).

<sup>172</sup> ‘Israeli Convicted of West Bank Arson Attack that Killed Three Palestinians’, *BBC News*, 18 May 2020, <https://www.bbc.co.uk/news/world-middle-east-52705466>; Dov Lieber, ‘Defense Ministry: No Need to Demolish Homes of Abu Khdeir Killers’, *The Times of Israel*, 17 June 2016, <https://www.timesofisrael.com/defense-ministry-no-need-to-demolish-homes-of-abu-khdeir-killers>. As mentioned earlier, punitive house demolitions are generally triggered by administrative as opposed to judicial decisions.

<sup>173</sup> However, Israel’s judiciary has dismissed the idea that the policy is enforced in a discriminatory manner; see, eg, *HaMoked* (n 146) decision of Justice Rubinstein, para 25.

<sup>174</sup> UN Human Rights Council (n 12) paras 72–76; UN General Assembly, Report of the Secretary-General: Israeli Practices Affecting the Human Rights of the Palestinian People in the Occupied Palestinian Territory, including East Jerusalem (30 August 2016), UN Doc A/71/364, para 25.

<sup>175</sup> Toi Staff, ‘Netanyahu Meets with Parents of Slain Soldiers Whose Bodies Are Held by Hamas’, *The Times of Israel*, 17 November 2019, <https://www.timesofisrael.com/netanyahu-meets-with-parents-of-slain-soldiers-whose-bodies-are-held-by-hamas>. It should be noted that, under IHL, the obligation to respect and ensure respect for the laws of war does not depend on reciprocity; see ICRC Study (n 5) 498–99. In other words, the alleged violation of IHL by one party to an armed conflict does not entitle its enemy to follow suit.

<sup>176</sup> ‘Following Tel Aviv Attack, Lieberman Orders Holding of Terrorists’ Bodies’, *Haaretz*, 9 June 2016, <https://www.haaretz.com/israel-news/lieberman-seeks-to-fast-track-demolition-of-terrorists-homes-1.5393808>;

Anna Ahronheim, ‘Cabinet Approves Israel Holding onto All Bodies of Palestinian Attackers’, *The Jerusalem Post*, 2 September 2020, <https://www.jpost.com/israel-news/gantz-demands-israel-hold-onto-bodies-of-all-palestinian-attackers-640835>. It has been argued that the Defence (Emergency) Regulations ((n 83) reg 133) authorise military commanders to retain the bodies of dead combatants and to decide on their place of burial. However, as mentioned in the introduction, any piece of legislation that contradicts IHL would, by default, violate international law. Moreover, in 2017 the Supreme Court of Israel rejected this claim and argued that Israeli security forces had no legal authority, and thus were not authorised to retain the mortal remains of Palestinians; see H CJ 5887/17, *Ahmed Musa Jabareen and Others v The Israel Police and The Police Investigations Division* (25 July 2017), paras 9–12, [https://www.nevo.co.il/psika\\_html/elyon/17058870-a05.html](https://www.nevo.co.il/psika_html/elyon/17058870-a05.html). That said, the decision was overturned two years later by the same court: H CJ 10190/17, *I.D.F Military Commander in the Judea and Samaria Area v Muhammad Alian* (9 September 2019), <https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts/17/900/101/v12&fileName=17101900.V12&type=2>.



Nevertheless, as mentioned in other examples analysed in this article, the withholding of human remains would violate the prohibition of collective punishment if it knowingly sanctions, harasses, intimidates or exerts pressure upon protected persons who have committed no crime or pose no security threat. Once again, and depending on the circumstances of the case, such punishment could trigger a range of IHL and IHRL concomitant violations.

Under the laws of war, parties to an armed conflict must do everything they can to ‘facilitate the return of the remains of the deceased upon the request of the party to which they belong or upon the request of their next of kin’.<sup>177</sup> IHL also obliges parties to an armed conflict to dispose of the deceased in a respectful manner, which includes the need to comply with the burial rites prescribed by the religion of the deceased.<sup>178</sup> Since IHL is already a well-crafted balance between military necessity and the principle of humanity, states are bound by it at all times, even if the alleged rationale for not respecting its provisions is to obtain mortal remains held by an enemy. In the words of Theodor Meron, prominent scholar and former Principal Legal Adviser to the Israeli Ministry of Foreign Affairs: ‘Often, return of the bodies for an honorable burial is treated as a bargaining chip, as shameful leverage for what is in effect ransom’.<sup>179</sup>

The withholding of bodies might also infringe rules that outlaw humiliating and degrading treatment, as well as the prohibition of cruel and inhuman treatment, under both IHL and IHRL.<sup>180</sup>

Human rights law has no specific provisions dealing with the fate of mortal remains.<sup>181</sup> However, some of its general rules protect not only the human dignity of the deceased, but also the rights and suffering of their relatives.<sup>182</sup> In particular, the withholding of mortal remains either as a ‘bargaining chip’ or for the purposes of deterrence would run counter to the right to family life and the right to freedom of religion.

The jurisprudence of the European Court of Human Rights has been particularly fruitful in this respect. In *Pannullo and Forte v France*, the Court held that once a body was no longer needed for investigative purposes, it had to be returned to the relatives, who could then proceed to bury it in a dignified manner. It argued that the conduct of the French authorities constituted an interference that could not be deemed ‘necessary in a democratic society’ and, as such, violated the right to private and family life of the applicants.<sup>183</sup> In *Kushtova and Others v Russia*, the ECtHR posited that such practices were ‘particularly severe’ when they precluded the family from participating in the relevant funeral ceremony or denied them the right to be informed of

<sup>177</sup> ICRC Study (n 5) 411–14.

<sup>178</sup> *ibid* 414–17.

<sup>179</sup> Theodor Meron, *Bloody Constraint: War and Chivalry in Shakespeare* (Oxford University Press, 1998) 75.

<sup>180</sup> Anna Petrig, ‘The War Dead and Their Gravesites’ (2009) 91 *International Committee of the Red Cross* 341, 343.

<sup>181</sup> Frédéric Mégret and Chloe Swinden, ‘Returning the “Fallen Terrorist” for Burial in Non-international Armed Conflicts: The Rights of the Deceased, the Obligations of the State, and the Problem of Collective Punishment’ (2019) 10 *Journal of International Humanitarian Legal Studies* 337, 353–54.

<sup>182</sup> *ibid*; see also Petrig (n 180) 369.

<sup>183</sup> ECtHR, *Pannullo and Forte v France*, App no 37794/97, 30 October 2001, paras 35–40.

the whereabouts of the grave.<sup>184</sup> In fact, similar decisions have emphasised that the right to family life includes an entitlement to attend the burial of close relatives and that preventing a relative from doing so is not justified, even in the absence of bad faith.<sup>185</sup>

The focus on the right to family life indicates that emphasis is placed on the relatives' right to 'go through their grieving process in ways that are not disrupted by the State'.<sup>186</sup> That said, this same question has also been linked to the inherent dignity of the deceased in the afterlife.<sup>187</sup> Furthermore, some ECtHR cases have also been linked to the prohibition of collective punishment, despite the absence of a specific norm to this effect in the European Convention on Human Rights, or indeed in other IHRL treaties.<sup>188</sup>

In the same vein, the withholding of mortal remains of a Palestinian militant could breach the right to freedom of religion of the relatives of the deceased. Article 18(1) of the ICCPR provides that '[e]veryone shall have the right to freedom of ... religion',<sup>189</sup> which includes the freedom, 'either individually or in community with others and in public or private ... to manifest [his] religion or belief in worship, observance, practice and teaching'.<sup>190</sup> According to the Human Rights Committee, this right encompasses ritual and ceremonial acts that give direct expression to a person's belief, as well as various practices integral to such acts.<sup>191</sup>

Needless to say, a family that is unable to bury the mortal remains of a loved one cannot carry out ritual services or memorials in accordance with their beliefs and, hence, cannot enjoy its right to freedom of religion. In *Johannische Kirche and Peters v Germany*, the ECtHR held that preventing religious individuals from burying a family member in line with their beliefs could violate their freedom of religion, as burial ceremonies are such an essential part of religious life.<sup>192</sup>

All in all, it would seem that if the withholding of mortal remains is performed in a manner that knowingly sanctions, harasses, intimidates or exerts pressure upon protected persons who have committed no crime or pose no security threat, the act will not only violate the prohibition of collective punishment, but might also interfere with numerous other international law obligations, including IHL duties to facilitate the return of the deceased at the request of the next of kin and to dispose of the remains in a respectful manner, as well as the rights to family life and to freedom of religion under IHRL.

<sup>184</sup> ECtHR, *Kushtova and Others v Russia*, App no 21885/07, 16 January 2014, paras 44–45.

<sup>185</sup> ECtHR, *Hadri-Vionnet v Switzerland*, App no 55525/00, 14 February 2008, paras 52–56.

<sup>186</sup> Mégret and Swinden (n 181) 357.

<sup>187</sup> *ibid* 355.

<sup>188</sup> Comelia Klocker, *Collective Punishment and Human Rights Law: Addressing Gaps in International Law* (Routledge 2020) 88.

<sup>189</sup> ICCPR (n 35) art 18.

<sup>190</sup> UN Human Rights Committee, General Comment No. 22: Article 18 (The Right to Freedom of Thought, Conscience and Religion) (30 July 1993), UN Doc CCPR/C/21/Rev.1/Add.4, para 4.

<sup>191</sup> *ibid*.

<sup>192</sup> ECtHR, *Johannische Kirche and Peters v Germany*, App no 41754/98, 10 July 2001; Mégret and Swinden (n 181) 358.

#### 4. CONCLUDING OBSERVATIONS

Whether a particular sanction or measure can be considered a collective punishment and, therefore, a violation of IHL will depend on the extent to which it knowingly punishes, intimidates or exerts pressure upon protected persons for acts they have not themselves committed or threatened to commit. Parties to a conflict that impose collective punishments are unlikely to acknowledge their punitive intent. Furthermore, this punitive intent may coexist with other purposes, such as considerations of security and deterrence. However, it is submitted that as with the prohibition of torture, a punitive intent can sometimes be inferred from the factual elements of the case, which would also require a case-by-case analysis.

By definition, collective punishments contradict the principle of individual responsibility. As mentioned above, it is generally acknowledged that this principle must be upheld by an Occupying Power not only in relation to criminal sanctions, but also to administrative measures. Moreover, it should be remembered that the prohibition of collective punishment is absolute; therefore, it cannot be justified on the ground of deterrence.

It seems incontrovertible that breaching the prohibition of collective punishment in an occupied territory is likely to give rise to a myriad of concomitant violations of international law. This is intimately intertwined with the complementarity between IHL and IHRL, including during belligerent occupation, as well as with the need to ensure coherence among the various branches of international law. Using the examples of the Gaza blockade, the restrictions of movement in the Occupied Palestinian Territory, Israel's policies of house demolitions and the retention of human remains, this article has outlined the way in which such measures – which have often been regarded as prohibited collective punishments by scholars, international organisations and civil society – are bound to breach additional IHL and IHRL provisions.

Therefore, the subsections above illustrate some of the reasons why imposing a collective punishment upon protected persons is incompatible with other duties incumbent upon the State of Israel. Indeed, collective punishments might contravene existing international legal obligations in respect of constraints on the use of reprisals; the rules regulating access to healthcare; the prohibition against attack, destruction, removal or rendering useless objects indispensable for the survival of the civilian population; the right to work; children's rights; the rights to self-determination, to development, to freedom of movement, to property, to family life, to an adequate standard of living (which includes the right to housing); the prohibition of forced displacement and of arbitrary deprivation of liberty; the duty to bury the dead in a dignified manner; and the principles of equality and non-discrimination, to name some examples.

However, this list does not purport to be exhaustive. The prohibition of collective punishments is so fundamental, and its underlying rationale is so inextricably intertwined with the notion of human dignity, that the imposition of collective punishment on a protected person might tamper with additional rules of international law. It has repeatedly been pointed out, for instance, that collective punishment transgresses several due process requirements: it is not only incompatible with the principle of individual responsibility, but it may also infringe

ancillary judicial guarantees, including the presumption of innocence, the right of appeal or the principle of *nulle poena sine culpa*.<sup>193</sup>

Additionally, scholars, international organisations, civil society and even members of Israel's judiciary have gone as far as identifying a link between certain forms of collective punishment and the prohibition of torture and cruel, inhuman and degrading treatment. For instance, Professor Mordechai Kremnitzer of the Hebrew University of Jerusalem considers Israel's policy of punitive house demolitions to be 'unjust and inhuman',<sup>194</sup> whereas the United Nations deems it incompatible with Israel's obligations under Article 7 of the ICCPR, which outlaws all forms of cruel, inhuman or degrading treatment or punishment.<sup>195</sup> Justice Karra of the Israeli Supreme Court has held that the policy 'inflict[s] severe harm on innocent people'.<sup>196</sup> Similar admonitions have been advanced with regard to the other illustrative cases mentioned above, apart from the policy of punitive house demolitions itself. For instance, Justice Shaham of the Jerusalem District Court posits that violations of the prohibition of collective punishment in the form of refusing residence permits to innocent Palestinians is incompatible with the need to respect human dignity.<sup>197</sup> The same goes for the unjustified retention of human remains<sup>198</sup> and for certain consequences of the Gaza blockade, such as the physical and mental suffering caused to terminally ill Palestinian civilians who are unable to receive adequate medical treatment as a result of movement restrictions imposed upon them.<sup>199</sup>

The ECtHR has repeatedly made the link between the notion of collective punishment (which is not explicitly mentioned in IHRL treaties) and the prohibition of torture and inhuman or degrading treatment or punishment.<sup>200</sup> Although the threshold for the latter needs to be analysed on a case-by-case basis, it is very telling that collective punishments have so often been associated with different forms of ill-treatment. It is submitted that this constitutes a clear indication of the seriousness of this prohibition and reinforces the idea that collective punishments are, as pointed out earlier, 'in defiance of the most elementary

<sup>193</sup> Corbett (n 125) 375–80; Cohen and Shany (n 44) ('This approach also suffers from serious flaws, given ... the lack of due process in applying the sanction through administrative law rather than criminal law'); Mégret and Swinden (n 181) 360–61; UN Human Rights Council (n 12) para 25; Ronen Shnayderman, 'Through No Fault of Their Own: Punitive House Demolitions during the al-Aqsa Intifada', Israeli Information Center for Human Rights in the Occupied Territories, Information Sheet, November 2004, 11.

<sup>194</sup> Ben-Naftali and others (n 36) 14; see also Cohen and Shany (n 44) ('The house-demolition policy may also constitute a form of cruel, inhuman and degrading punishment'); Shnayderman (n 193) 9.

<sup>195</sup> UN Human Rights Committee, Concluding Observations on the Second Periodic Report of Israel (5 August 2003), UN Doc CCPR/CO/78/ISR, para 16; UN Human Rights Council (n 12) para 37; UN Committee against Torture, Concluding Observations on the Fifth Periodic Report of Israel (3 June 2016), UN Doc CAT/C/ISR/CO/5, para 41.

<sup>196</sup> *Abu Baher* (n 150) opinion of Justice Karra, para 2.

<sup>197</sup> *Khatib* (n 133) paras 18–19.

<sup>198</sup> Mégret and Swinden (n 181) 351; UN General Assembly (n 174) para 25 ('In addition to amounting to collective punishment, the withholding of bodies is inconsistent with Israel's obligations as an occupying Power ... and violates the prohibition of torture and ill-treatment').

<sup>199</sup> Hagar Shezaf, 'Israel Tightens Demands on Gazan Breast Cancer Patients in Need of Urgent Care', *Haaretz*, 23 September 2020, <https://www.haaretz.com/middle-east-news/palestinians/.premium-israel-tightens-demands-on-gazan-breast-cancer-patients-in-need-of-urgent-care-1.9174721>.

<sup>200</sup> Klocker (n 188) 73–79, 89–90.

principles of humanity'.<sup>201</sup> However, the differences and similarities between the prohibition of collective punishment and the prohibition of torture deserve to be further explored.

The above considerations might also have a significant impact on issues of international jurisdiction. The prohibition of collective punishments is listed as a grave IHL violation in the statutes of several international and hybrid tribunals,<sup>202</sup> but it is not explicitly mentioned in the Rome Statute of the International Criminal Court, nor by any of the treaties that have created an IHRL regional body or monitoring mechanism.<sup>203</sup> That said, the fact that infringing the prohibition of collective punishment gives rise to a broad range of concomitant violations of international law indicates that such acts may be, and at times have been, prosecuted under different legal categories in international and regional tribunals.<sup>204</sup>

According to scholars, the use of collective punishment in the Occupied Palestinian Territory could come within a variety of war crimes, including that of extensive destruction and appropriation of property not justified by military necessity; direct attacks against the civilian population; destruction or seizure of enemy property not justified by imperative military necessity; and inhuman treatment.<sup>205</sup>

As mentioned in the introduction, even lawful sanctions become unlawful if they amount to collective punishment. However, persons protected under the Fourth Geneva Convention are entitled not only to the safeguards of IHL, but also, in so far as possible, to those of human rights law, especially when the occupation is protracted.<sup>206</sup> It is hard to imagine an example in which a collective punishment imposed upon protected persons in occupied territory would not simultaneously breach additional IHL and/or IHRL norms, and possibly other branches of international law, such as international criminal law.<sup>207</sup> Therefore, it appears that any collective punishment in the Occupied Palestinian Territory is bound to transgress other international obligations incumbent upon the State of Israel.

Recent jurisprudence of the District Court of Jerusalem and the Supreme Court of Israel seems to offer an opportunity for better compliance with the country's domestic law and international legal obligations. As shown in the previous sections, Israeli judges have questioned the lawfulness of practices that seem to contravene the prohibition of collective punishment, including the policies of punitive house demolition and denial of residence permits for relatives

<sup>201</sup> Commentary GC IV (1958) (n 40) 225.

<sup>202</sup> See ICTR Statute (n 6) art 4(b), and SCSL Statute (n 6) art 3(b).

<sup>203</sup> Klocker (n 188) 74–75; Ezequiel Heffes, 'Collective Punishment' in Djukić and Pons (n 77) 241, 242.

<sup>204</sup> Darcy (n 51) 47; see also Djamchid Momtaz, 'War Crimes in Non-international Armed Conflicts under the Statute of the International Criminal Court' (1999) 2 *Yearbook of International Humanitarian Law* 177, 183 ('[a collective punishment] incontestably violates the provisions of common article 3 [to the 1949 Geneva Conventions], violations otherwise qualified as war crimes by the Statute [of the International Criminal Court]').

<sup>205</sup> Corbett (n 125) 387–88; Ben-Naftali and others (n 36) 26, 36–38; Elvina Pothelet, 'The ICC and Israel: Prosecuting the Punitive Demolition of Palestinian Homes', *Opinio Juris*, 22 March 2018, <http://opiniojuris.org/2018/03/22/the-icc-and-israel-prosecuting-the-punitive-demolition-of-palestinian-homes-part-1>.

<sup>206</sup> Lubell (n 14) 333; ICRC (n 107) 63–67.

<sup>207</sup> For a non-exhaustive list of international criminal law provisions linked to the prohibition of collective punishment, see Pothelet (n 205).

of alleged Palestinian terrorists.<sup>208</sup> Until now, most of these views have constituted dissenting opinions. However, as the recently deceased Justice Ruth Bader Ginsburg, of the US Supreme Court, wisely commented: ‘Dissents speak to a future age ... But the greatest dissents do become court opinions and gradually, over time, their views become the dominant view’.<sup>209</sup> It remains to be seen whether future Israeli jurisprudence on the issue of collective punishment subscribes to this dissenter’s hope.

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<sup>208</sup> Corbett (n 125) 381–82; H CJ 7220/15, *Aliwa v Commander of IDF Forces in the West Bank* (4 November 2015), paras 6–12, [https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts/15/200/072/i02&fileName=15072200\\_i02.txt&type=4](https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts/15/200/072/i02&fileName=15072200_i02.txt&type=4); *Abu Baher* (n 150); *Khatib* (n 133).

<sup>209</sup> ‘Ruth Bader Ginsburg in Pictures and Her Own Words’, *BBC News*, 19 September 2020, <https://www.bbc.com/news/world-us-canada-54218139>.