

AS IMPUNITY REIGNS

Israel Escalates Collective Punishment Against Palestinians



Legal Paper

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Introduction

As Israel braces itself for formal annexation, perpetuating through law a state of affairs it has entrenched on the ground for decades and completing in the occupied West Bank, a process already implemented in occupied Jerusalem and the Syrian Golan, everyday violence and repression against the Palestinian population may lurk unnoticed. But it is precisely this violence, understated, gradual and normalized though it might be, which paves the way for major shifts such as the impending move towards official annexation. It also grinds down the protected population, diminishing its material resources and stifling its resilience, subsistence and capacity to resist. To this end, Israeli occupying authorities employ a plethora of tactics, one of the most systematic and overarching of which is collective punishment. Collective punishment is defined as the imposition of sanctions - criminal, administrative or otherwise, or any form of harassment, against persons or a group of persons, in response to an act committed by other members of this group (i).

About JLAC

The Jerusalem Legal Aid and Human Rights Center (JLAC) is mandated with providing pro-bono legal aid and consultation in the defense of human rights, both in East Jerusalem and the remainder of the West Bank. JLAC has coupled its legal aid with public interest cases, legal reform, community awareness, and advocacy.

Acts that meet the definition of collective punishment are prohibited under Article 50 of the Hague Regulations, Article 87 of the Third Geneva Convention and Article 33 of the Fourth. Further, the imposition of collective punishment was recognized as a war crime under Article 4(2) of the Statute of the International Criminal Tribunal for Rwanda and Article 3(2) of the Statute of the Special Court for Sierra Leone. Entering its fourteenth years this month, Israel's closure of the occupied Gaza Strip represents the most sustained and all-encompassing application of collective punishment in the Occupied Palestinian Territory. Due to its limited scope, however, this paper will focus on other, more specific measures, offering a glimpse into their application during the first half of 2020.

The measures examined in this paper are punitive house demolitions, military order 1827 and the withholding of Palestinian victims' bodies. Far from conclusive, this paper aims at providing a contribution to the examination of Israel's exercise of collective punishment in recent years, particularly the research undertaken by Professor Michael Lynk, the United Nations special rapporteur on the situation of human rights in the Palestinian Territory occupied since 1967, whose report on collective punishments is forthcoming. Apart from amounting to collective punishment, each of the three measures listed in this paper violates a number of principles and rights protected by international humanitarian law and international human rights law. Punitive demolitions, for instance, violate Article 53 of the Fourth Geneva Convention, which prohibits any destruction of property unless absolutely necessary for military purposes. Like other forms of home demolitions, punitive demolitions result in forcible transfer, strictly prohibited under Article 49 of the Fourth Geneva Convention, and in a violation of the right to adequate housing, protected by Article 11(1) of the Covenant on Economic, Social, and Cultural Rights, ratified by Israel. The withholding of Palestinian war dead's bodies, meanwhile, contravenes the customary IHL rules on the disposal of the war dead as well as the human rights to dignity, family life, religious freedom, and the prohibition against degrading or inhuman treatment. The amendment to military order 1827, which penalizes Palestinian banks providing Palestinian prisoners' families with the stipends they are entitled to under Palestinian law, violates Article 43 of the Hague Regulation. Under this Article, the occupying power must, unless absolutely prevented, respect the laws in force in the country.

Punitive Home Demolitions

Israel's long-standing practice of demolishing or sealing off Palestinian-owned homes to punish entire families for acts allegedly perpetrated by one of the family's members is based on Regulation 119 of the Defence (Emergency) Regulations enacted by the British Mandate Government in September 1945. The emergency regulations were incorporated into Israeli law through Section three of the Laws and Administrative arrangement Ordinance of May 1948. Their validity was extended to the OPT in the immediate wake of the occupation in 1967 to constitute a major pillar of Israel's military regime therein. In an attempt at refuting claims that punitive home demolitions constitute collective punishment, Israel has time and again sought to legitimize the policy by arguing that it is aimed at deterrence rather than punishment. This legal fiction has been repeatedly giving credence by the Israeli High Court of Justice (HCJ), which has adopted Israel's groundless arguments about the effectiveness of house demolitions in deterring potential future attacks. The Israeli High Court has approved the overwhelming majority of punitive home demolition orders issued by the Israeli military or police against homes in the West Bank and Jerusalem. Since 2016, Israeli occupying authorities have implemented 63 punitive house demolition orders in the West Bank, including East Jerusalem, displacing 287 Palestinians, 117 of whom were minors (ii). In 2020 alone, Israel carried out four punitive demolition orders, two of which were carried out following the outbreak of the covid-19 pandemic in Palestine.

In an extremely rare occurrence, Israel's High Court nullified a punitive house demolition order against the Atawneh family on 25 May 2020 (iii). While this specific decision saved a mother and her three children from displacement, the rationale for the judgement serves to reinforce the deceptive portrayal of such demolitions as a deterrent rather than a sanction. The majority decision to cancel the demolition order was based on the fact that the demolition order against Atawneh's family home was issued three months after Mahmoud Atawneh's indictment in the killing of an Israeli settler. It is the excessive delay in the issuance of the demolition order, a procedural reasoning, that led to the Court's conclusion that the demolition, if carried out, would amount to punishment. Thus, this decision should be viewed as an aberration rather than any change in attitude and approach. The Court is likely to continue approving punitive demolition orders virtually automatically with the exception of few cases such as the issuance of orders after an excessive delay, the lack of residency ties between the family and the person who allegedly carried out the attack, or cases where the apartment is rented by the alleged attacker. The insistence of the Court to legitimize punitive demolitions by denying their inherently punitive nature casts serious doubts whether Israeli courts provide Palestinians with substantive access to justice.

Withholding Bodies

The Israeli practice of withholding the bodies of deceased Palestinians accused of carrying out attacks or of involvement in combat has endured for decades. But it is not until the last five years that Israeli occupying authorities moved towards institutionalizing and systematizing it. The practice of withholding Palestinian martyrs' bodies as leverage in future prisoner swap negotiations is also based on a British emergency regulation, Regulation 133(3), which was amended in January 1948. In January 2017, the cabinet stated that, notwithstanding the general rule to release deceased Palestinian remains pending security assurances, the military is authorized, under Regulation 133(3), to withhold bodies of those affiliated with Hamas and thus can be used as a negotiation tactic or if the attack they carried out is deemed to be exceptionally severe.

Based on this cabinet's decision, Israel continues to withhold the bodies of 62 Palestinians as of the end of May 2020. Ten of these bodies have been withheld since the start of 2020.(iv). Moreover, the cabinet's decision received a stamp of legitimacy from the Israeli High Court, which, in September 2019, held in a majority of 4-to-three judges that regulation 133(3) grants the army the power to withhold bodies as bargaining chips. While such purpose is not explicitly mentioned in the regulation, the Court concluded that such power could be inferred through a purposive interpretation of the regulation. In addition to the 62 bodies withheld under the cabinet's decision, Israel continues to seize the bodies of at least 253 Palestinians in the cemeteries for enemy combatants, closed military zones where those buried are identified by numbers and where the conditions of burying, identifying and handling the dead have failed to meet basic standards. A list of the names of 123 of those was recently made public by the army with the prospective place of burial and identity of most of them, but while the step of locating them had been exhausted, Israel continues to delay the process of identification by refusing to establish a genetic database. Even if identification goes through, Israel is likely to keep withholding the bodies and argue that they can be used as bargaining chips. Israel's refusal to hand over the bodies of Palestinians inflicts massive psychological pain on their families as exemplified by countless testimonies provided by those whose loved ones are held in Israeli military morgues or in cemeteries for enemy combatants for prolonged periods.

It should be noted that Israeli Counterterrorism law, enacted in 2016, and its amendments has supplied Israeli occupying authorities with a wide range of powers to repress and persecute the Palestinian population in the guise of fighting terrorism. The framework introduced by the Counterterrorism Law has effectively substituted the British emergency regulations as the central pillar in Israel's counterinsurgency regime, reproducing most of its provisions. Yet, two measures that have remained the exclusive property of the emergency regulations and that were not included in the counterterrorism law are punitive demolitions and the withholding of bodies. Israel's explicit choice to use British-era emergency regulation as the basis for implementing these two measures and their exclusion from the new law reflects the severity of the violations they inflict and the controversy that introducing such measures in modern legislation may spark.

Military Order 1827

An extraterritorial application of the Counterterrorism Law can be found in amendment 67 of military order 1827 regarding security provisions in the OPT. The order came into effect last May three months after its signing by GOC of the Central Command Major General Nadav Padan. The order gives a soldier, or an authorized party, the power to confiscate "anything suspected of being given as payment or reward for carrying out a crime," specifically the stipends given by the Palestinian Authority to the families of prisoners, released prisoners, and martyrs.

Participating in transactions defined as facilitating or contributing to terrorism is punishable by imprisonment and heavy fines. The order does not only target funds received by individuals but also by "prohibited organizations," a broad and vague definition that includes political parties, labor unions, student movements and even the Palestinian Liberation Organization (PLO), and might target Civil Society, private sector and charities.

Just before the order came into effect, Palestinian banks were pressured into closing accounts of Palestinian prisoners and released prisoners, a step that will have dire consequences for the livelihood of tens of thousands of Palestinians. The military order comes on the heel of a decree by then-Defense Minister Naftali Bennet to confiscate money transferred from the Palestinian Authority to Palestinian political prisoners with Israeli citizenship. The extraterritorial application of Israeli law through military orders is yet another step towards de jure annexation that should be viewed in the context of marauding annexation and the intensification of collective punishment measures.

Closing Remarks

One of the main reasons Israel has been able to implement and escalate its measures of collective punishment against the Palestinian people is the sweeping impunity it continues to enjoy. To put an end to impunity, accountability mechanisms must be activated. These include:

Recognizing the International Criminal Court's territorial jurisdiction in the Occupied Territory and thus authorizing the Prosecutor to open a thorough and comprehensive investigation into the situation in the State of Palestine, including the war crime of collective punishment.

Based on the principle of universal jurisdiction and third State responsibility to prosecute and investigate war crimes not limited to their territories, third States are encouraged to open criminal investigations into potential war crimes and crimes against humanity committed by Israeli occupying authorities.

International accountability is all the more pressing in a political climate where racial domination is entrenched, illegal occupation perpetuated, and formal annexation expanded. It is also critical in light of the complicity of the Israeli justice system with the entrenchment of illegal occupation and annexation and its failure to insure respect for IHL and fundamental human rights of Palestinians.

- i *Customary International Humanitarian Law: Rule 103, Collective Punishments, Int'l Comm. Red Cross, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule103*
- ii *OCHA report "Breakdown of data and displacement in the West Bank (between 01/01/2016 and 31/05/2020): <https://bit.ly/2U9bggh>*
- iii *Israeli High Court of Justice verdict: <https://bit.ly/2Mur7lq>*
- iv *Figures are compiled by the National Campaign for the Retrieval of War Victims' Bodies and the Disclosure of the Fate of the Missing.*

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